

that you will be faced with a myriad of cases in your long tenure on the Court where you are going to have to come up with, if you will, various rules of construction to make a judgment about where it is appropriate and inappropriate. You are going to have liberal Senators who are extremely well respected, like Senator Simon and others, considering whether or not we condition the ability to get a license for broadcasting on whether or not they show violence on television. I doubt whether he will do that, but others will raise that question.

You will find that conservatives suggest that in order to get money for the arts, there must be a certain standard that is met. This has been raised. I put *Rust* in that context.

I think the problem we have—and I will end with this—is we become—we, on this side of the bench—are somewhat myopic. We look at the subject matter that is being debated rather than the substance of what is being debated. *Rust* does not concern me because it relates to the ability of a doctor to talk about the availability of something other than birth. It concerns me because it seems to set a precedent that suggests that a condition can be placed on a fundamental constitutional right—freedom of expression, freedom of movement—it can be anything.

So I, like all of us, am going to end up having to take a chance on what we think your instincts and methodology are. I am prepared to take that chance, and I am confident you will think a lot about this, and I am also confident—not because I said it, but because it is a'coming, Judge, in a big way in this Congress and succeeding Congresses, and it is something no one is writing very much about now, but I predict to you it will be written about; it will fill volumes before this decade is over.

Senator MOSELEY-BRAUN. Will the chairman yield just for a moment, just for a hot moment, because I know everyone is anxious to go, and Judge Breyer has been more than patient.

The CHAIRMAN. I yield the floor.

Senator MOSELEY-BRAUN. My question in that regard is would you see the possibility of unconstitutional conditions coming in areas other than first amendment—because the first amendment is such a slippery slope, and that gets us into all of these kinds of questions the chairman has just raised on arts and violence on television—but other than the first amendment, would you see the possibility of an unconstitutional condition arising in other areas?

Judge BREYER. My guess is—and it is a guess—that there could arise conditions that people would argue violate a host of different amendments—fair trial—I do not know—there are lots of different parts. I think the answer is yes, but it is a guess.

Senator MOSELEY-BRAUN. Yes.

The CHAIRMAN. I cannot think of a single amendment that would not qualify except the ninth, and that is only because the folks who are applying these unconstitutional conditions do not believe there is a ninth amendment. But that is another question.

Senator MOSELEY-BRAUN. But Mr. Chairman, again, the reason I raise the question—I think it came up—I do not know who it was—Senator Cohen may have raised it earlier today—the issue of the leases in public housing in my own State comes immediately to mind. Again, I think this is an area where, right, there has not

been a lot done in this area, but it certainly is one that will no doubt in Judge Breyer's long tenure on the court come up before the Court.

Again, I apologize for interrupting, and I thank the chairman.

The CHAIRMAN. Thank you, and I thank Senator Hatch for letting me go over. I will have no more questions for the remainder of this hearing. I will yield to Senator Hatch, and we will close with Senator Hatch's questioning.

Would you like a break?

Judge BREYER. No; I am fine.

The CHAIRMAN. Then we will finish with Senator Hatch.

Senator HATCH. Judge, after hearing Senator Biden's predictions of how tough it is going to be on the Court, maybe you want to withdraw.

Judge BREYER. No, thanks.

Senator HATCH. Actually, when you are talking about the *Rust* case, you are talking about a funded speech case instead of a free speech case. Basically, it should be pointed out that the case—

The CHAIRMAN. That is the whole point.

Senator HATCH [continuing]. You made the point; I thought you did make it rather well—that the case involved regulations governing Federal funding of title X family planning programs. And those regulations did not bar any speech; they simply prevented the use of Federal Government dollars to fund pro-abortion counseling and referrals.

Now, it was a perfect illustration of how the Court ruled one way and the Congress of the United States overruled the Court in an appropriate way, according to the majority. I happen to disagree with that, but it was the way the democratic system should work. So I would submit it is a funded speech case instead of a free speech case. Nothing would have prevented the doctor from speaking as freely as the doctor wanted to. He just could not use Federal dollars to do it under the Court's ruling.

I would feel very badly if I did not say a few words about Justice Scalia, because I think there are some misinterpretations here that conservative jurists like Justice Scalia are inconsistent in their approaches to statutory and constitutional interpretations. Some are arguing that. But let me quote from a Law Review article that is critical of Justice Scalia's method of statutory interpretation, but an article which is also critical of many of his critics as well. It says:

Many of Justice Scalia's critics point to an apparent inconsistency in his approach to constitutional provisions as opposed to statutes. While he takes a "textualist" approach to statutes and criticizes the use of legislative history to establish legislative intent, they argue, he takes a sharply originalist turn in constitutional adjudication, basing his arguments on the intentions of the Framers. Justice Scalia does indeed consider himself an originalist in constitutional adjudication, but his brand of originalism does not rest on the intent of the Framers as revealed in the proceedings of the Philadelphia Convention. Instead, he relies upon the original understanding of constitutional terms, based on arguments similar to those he uses in interpreting statutes. These include arguments from text, context, purpose, contemporaneous usage of language, and the structure of the constitutional scheme, including separation of powers and federalism.

I think that is a more accurate description of Justice Scalia. In other words, Justice Scalia's statutory interpretation and constitu-