Senator METZENBAUM. No question about it, but I am going to attribute my flunking appropriately.

Senator SIMPSON. Thank you, Mr. Chairman.

Senator KENNEDY. Professor Tribe, I want to join in welcoming you back, again, to this hearing, and to our committee, and also to commend you for the work that you have done with our committee over a long period of time on a variety of issues; and we are always well-served by your appearance, and your responses to questions.

Just, again, quickly. In your formal presentation, at page 20, and continuing on for several pages, you express some concern about the Judge's decisions in the areas of civil rights.

I am wondering what you might tell us, given what he had written, and also, what his responses have been in the course of these hearings, whether it is the *Aranda* case, the *Circle Realty* case, some of the others that are related to the problems—I will come to the gender issue, the women's issues after. But one of the concerns that at least I was addressing is his sensitivity to those who have been left out, and really left behind, whether it is minorities, or the handicapped, or the poor, or women in our society.

You comment on that in a general way in your formal presentation. You have heard him speak. I want to hear you, briefly, on that, and then, if that bell goes off, I hope you will take a moment or two to talk about what assurances women should be able to reach, both in terms of the cases that he has decided—the *AFSCME* case—and also, his responses to the questions on discrimination, invidious discrimination, and his general comments in that area.

Those are really the things I would be most interested in, in the time that I have available.

Professor TRIBE. Senator, I think the primary assurance is an assurance that here is someone who listens, who has evidenced at least the sensitivity to grow.

He talked about the fact that he was not really proud of some of what he had done with respect to those private clubs. He talked about how much he has come to realize that, even if discrimination is not intended, that it can hurt, that it can retard the development of a fully integrated society, and the ending of discrimination.

A number of his quite narrow interpretations of some of the statutes, civil-rights statutes protecting minorities, protecting women, protecting the handicapped—interpretations in which the United States Supreme Court ended up going the other way, some times nine to nothing—these are cases in which he said he now fully accepts the correctness of what the Supreme Court did.

He said, in response to, I think a question that you asked, Senator Kennedy—"I do not think that those statutes"—referring to the civil-rights statutes—"should be interpreted grudgingly."

"There is," he said, "a certain amount of finger-pointing that goes on here, where the courts say the Congress didn't write the statute clearly enough." But he says: "I have come to recognize that the workload of the Congress is such that we have to interpret the statutes as they are given to us."

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Now I read no promise, no promise in that statement, but I hear the voice of someone who is saying, "perhaps I have been, at times, a bit narrow in my reading of these statutes."

This is not someone with a fixed commitment to a particular grudging view of the law. This is someone who is 51 years old, who I think is capable of development, and, in the particular cases that are most troubling, this is someone who does reach out.

I do not agree with his decision in the Mexican-American at-large voting case. I think he should have gone further. I think he should have made his separate opinion a dissent. Maybe he would have had more persuasive force with his colleagues if he had.

But it is to his credit that, rather than saying, "I'm slamming the courthouse door on you, go away, I'm giving you no help," he went out of his way—as he put it correctly in his testimony—virtually to outline an alternative, and a more creative complaint that would have provided possible relief to those people.

So it seems to me that, though one might hope for something more, or different, there is here a very real basis for believing that there is an openminded commitment to justice.

Senator KENNEDY. Just—and I think you have referred to it—what do you think that you could tell women in our society, based upon his writings, and in terms of the statements that he has made—about his understanding of the real problems of discrimination that may not be so explicit—where the tracks may not be so evident as to be found in a clear statement of bylaws or statutes—but which would be in existence in a world like today.

What do you gather from his statements, or his comments, or any of his writings—what would you say by way of assurances to women in our society that their interests and rights will be protected?

Professor TRIBE. Well, I think, Senator, it would be presumptuous of me to offer assurances to anybody. I mean, people who are concerned, based on this record, I think have a legitimate reason to speak. But I, at least for myself, took some assurance from his testimony here, that he recognized that when injuries to various groups, including women, are—I think these were his words—"enduring, visible, hurtful, and condoned," then that is bad enough to call it intentional.

And I think his views of original intent, strangely enough, have a relevance here. He realizes that what is really important is the institutional meaning of an act, not just the subjective intent of those who did it. That is why he reads the Constitution in a sense that does not require trying to get inside James Madison's head.

And it seems to me that he has made progress toward understanding that when clubs and institutions and government bodies do things, even thoughtlessly, not necessarily with hostile animus, that do hurt those who have been left out, that there is a real problem, and I think he has made progress towards understanding that.

I think it is interesting that he volunteered here—he was not pressed—he volunteered that he thought we do not have a "free society" as long as people are left out because of their race, or because of their sex.

He had no trouble with Senator DeConcini's questions about whether the Court has moved in the right direction when it comes

to extending the guarantees of equality to deal with problems of gender.

In fact the only issue he raised about equal protection and gender was whether the Court had gone far enough. He said maybe we should have strict scrutiny and not just heightened scrutiny in gender cases.

He was unwilling, as others have been—and I take Senator Simpson's suggestion that perhaps we put this in more anonymous terms—he was unwilling, as others have been, to say that mere rationality and reasonableness are enough for gender.

So there is a real basis for promise here.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Pennsylvania. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Tribe, I note in your prepared statement, your observation that, "Little can be gained from seeking any single unitary theory for construing the Constitution."

I believe that Judge Kennedy's testimony approximates that generalization, but in some of his writings he had commented about the requirement that there be some connection between original intent and the holding of the Court.

I had explored with him, at some length, the *Brown* v. *Board* case, on the proposition that in seeking framers' intent, it was pretty clear-cut that the prevailing practice, in many parts of the United States, called for segregated schools, including the District of Columbia. That the Senate Gallery was in fact segregated.

So that if one seeks original intent as the lodestone for interpretation of the Equal Protection Clause, *Brown* v. *Board of Education* went contrary to original intent.

I would start by asking you your judgement, as to whether there is any way to construe *Brown* v. *Board* to comply with the intent of the framers of the 14th amendment, Equal Protection Clause, where they lived in a segregated society with segregated schools?

Professor TRIBE. Senator Specter, on that one I think my answer is almost exactly the same as Judge Kennedy's. That is, he draws a distinction, and I would draw it as well, between the intent at an institutional and general level, that is expressed in the public acts of those who promulgated and those who ratified the 14th amendment, and the subjective, specific assumptions of the particular individuals involved.

I think we all recognize that they lived, at that time, in a segregated society, and if someone had asked them, "are the practices of your society consistent with what you have projected into the future, in the Constitution, as a compact with the future," I think most of them would have had to concede, "no, they are not necessarily consistent, we do not yet practice what—through the Constitution—we have decided to preach."

But I think Judge Kennedy was right when he said that they promulgated the Constitution anyway, and were willing to be bound by its consequences.

They wanted to rise above its injustices. So that it is, I think, entirely right to say that if by original intent we mean the specific