TESTIMONY OF LAURENCE H. TRIBE
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ANTHONY M. KENNEDY
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

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My name is Laurence Tribe. I am the Tyler Professor of Constitutional Law at Harvard Law School. I have taught there since completing a clerkship with Justice Potter Stewart in 1968. I have served as an expert witness on numerous constitutional matters in Congress and have frequently argued in the United States Supreme Court. Among the books and articles I have written is a 1978 treatise entitled American Constitutional Law, the second edition of which has just been published. In 1980, I was elected a Fellow of the American Academy of Arts and Sciences, and my treatise received the Order of the Coif Award for distinguished legal scholarship.

On September 22, 1987, I testified before this Committee on another Supreme Court nomination. It was with regret that I found myself unable, on that occasion, to support the nominee. It is a great honor -- and, on this occasion, a distinct pleasure -- to appear at the Committee's invitation to testify on the nomination of Anthony M. Kennedy as an Associate Justice of the Supreme Court. This time, I am glad to say, I am here to testify in favor of President Reagan's nominee.

I. INTRODUCTION: THE SENATE'S ROLE

In a speech delivered at Columbia Law School in New York City last month, Chief Justice William H. Rehnquist called attention to the role of "the Senate as well as . . . the President" in conducting "inquiry . . . into what may be called the 'judicial philosophy' of a nominee to [the] Court." The Chief Justice expressed the view that such inquiry by the Senate is "entirely consistent with our constitution and serves as a way of reconciling judicial independence with majority rule." I share the Chief Justice's view. Nonetheless I am convinced, for reasons I developed at some length in a 1985 book (God Save This Honorable Court), that the Senate's proper function under the Advice and Consent Clause of Article II, Section 2, does not include enforcing the Senate's own political preferences as between liberalism and conservatism, or as among any other set of "isms". It is one thing for the Senate to reject a nominee whom it perceives, rightly or wrongly, as a threat to the Supreme Court's basic role in our constitutional scheme. It would be another thing entirely if the Senate were to reject a nominee simply because a majority of the Senators would have preferred someone with different views, either more liberal or more conservative, either in general or on some set of specific issues.

Assuming a nominee is otherwise superbly qualified, therefore, the issue for the Senate, as I see it, is not whether

it agrees or disagrees with where the President's Supreme Court nominee stands, or is likely to stand in the future, on such matters as the exclusionary rule, comparable worth, or affirmative action. Today's burning agenda may not be tomorrow's. The issue, rather, is how Senators assess the nominee's commitment to fundamental constitutional principles at the most general level, and how Senators evaluate the nominee's capacity to contribute to the ongoing development and refinement of those principles as a member of our nation's highest court.

My purpose today is to be of whatever help I can to the Senate as it makes that assessment and undertakes that evaluation.

II. EVALUATION OF JUDGE KENNEDY

With this purpose in mind, I have studied all of the speeches Judge Kennedy has made available to this Committee and have read a large number of his judicial opinions. Although I obviously do not agree with everything Judge Kennedy has said or written, and although I fully expect to disagree with some of the opinions he would be likely to write and votes he would be likely to cast as a Supreme Court Justice, it seems to me indisputable that Judge Kennedy's very considerable intellectual strengths are coupled with a deep and abiding commitment to basic constitutional values and principles. There is every reason to expect that, if confirmed as a Justice, Judge Kennedy would make

a significant and enduring contribution to the Supreme Court's crucial work of elaborating, explaining and enforcing the Constitution of the United States.

It is true that Judge Kennedy does not espouse any single, simple theory of constitutional interpretation. This makes his writings harder to characterize than is sometimes the case. But the nominee should not be faulted for having views of a more complex character -- views not susceptible to simplistic labeling. Indeed, in the second edition of my treatise, American Constitutional Law, I address this very matter. On page one of that book, I suggest that little "can be gained by seeking any single, unitary theory for construing the Constitution . . . . For the Constitution is an historically discontinuous composition; it is the product, over time, of a series of not altogether coherent compromises; it mirrors no single vision or philosophy but reflects instead a set of sometimes reinforcing and sometimes conflicting ideals and notions."

A. The Speeches

Judge Kennedy's speeches consistently reflect the highest level of sensitivity to precisely this complexity. In speech after speech -- and in his many years as a professor of constitutional law -- Judge Kennedy has resisted the temptation to offer dogmatic, definitive answers to the most perplexing puzzles of our constitutional order. Speaking of presidential

authority and the separation of powers in Salzburg, Austria, in November 1980, for example, Judge Kennedy explained why answers to some of the most pressing constitutional questions "must await an evolutionary process" and observed that, "as to some fundamental constitutional questions it is best not to insist on definitive answers." In his view -- a view I share -- "[t]he constitutional system works best if there remain twilight zones of uncertainty and tension between the component parts of the government. The surest protection of constitutional rule lies not in definitive announcements of power boundaries but in a mutual respect and deference among all the component parts." (Pg. 11.)

1. On Structural Principles.

In dealing with the structural principles underlying the Constitution, Judge Kennedy's discussions of federalism and states' rights reflect an unusually subtle appreciation for constitutional history and for the perennial tensions and paradoxes of our constitutional system. In a speech on October 15, 1987, in Sacramento, Judge Kennedy called federalism's division of power into two distinct levels of government "[w]ithout question . . . [the] most daring contribution made by the framers to the science of government" -- the "conception that this dual allocation of authority would be protective of freedom." (Pg. 7.) In an address emphasizing the historical background of the concept, delivered on October 26, 1987, before

the Historical Society for the United States District Court for the Northern District of California, he emphasized the "moral and ethical content inherent in federalism" -- the framers' conclusion that it is wrong "for an individual to surrender essential power over his or her own personality to a remote government that he or she cannot control in a direct and practical way." He concluded that "[t]he states, and their subdivisions, with more visible and approachable legislators, and often with an initiative and referendum process, are likely to be more responsive to the citizen than the federal government." (Pg. 13.)

Yet Judge Kennedy does not let his strong belief in federalism blind him to the difficulties of direct judicial protection of states' rights under our Constitution. In the Historical Society speech, he recognized that "[o]ne of the most intriguing aspects of the Constitution is that it says very little about the power of the states or their place in the federal system," and that "it is difficult to find effective structural mechanisms designed to protect the states." (Pgs. 7-8.) He noted that, when selection of United States Senators by state legislatures was replaced by direct election by the people, the states lost their sole institutional check on the national government, leaving them little ability to fight the national government for turf in the way the three branches of the national government can fight among themselves. (Pg. 8.) As to other guarantees in the Constitution shielding the states from the

national government, Judge Kennedy noted that "[t]he guarantee of a republican form of government and the prohibition against depriving states of equal suffrage in the Senate are there, but nothing more." (Pg. 9.)

Indeed, Judge Kennedy recognized in this speech that "[t]he principal protection for the states is that the national government is one of limited powers." (Pg. 9.) But even this protection has in recent decades exhibited little promise, given developments in how broad those powers are viewed as being. In his 1987 Sacramento speech, Judge Kennedy recognized that, "of all of the structural elements of the Constitution, . . . federalism remains today the most in doubt," given the nationalization of the economy and the growth of national governmental power in both domestic and foreign realms. (Pg. 7.) As a result, Judge Kennedy explained in a February, 1982, speech in Los Angeles, protection of the states is "remitted primarily to the exercise of self-restraint by the political branches." (Pg. 6.) To Judge Kennedy, despite the vital importance of federalism, "[t]here is no easy answer" to the question of how its vitality can be retained. (1987 Historical Society speech, pg. 13.)

Judge Kennedy has also stressed the importance of other structural principles implicit in our system of government -- namely, the separation of powers between the three national branches of government; the checks and balances among the

branches; and, in particular, the power and duty of the judiciary to invalidate unconstitutional actions of the political branches. In his 1987 Sacramento speech, Judge Kennedy defended his emphasis on structural principles by demonstrating that the Constitution's specific protections of individual rights, while obviously crucial, are not by themselves sufficient to preserve liberty. He noted that "there are over 160 constitutions in the world today, many of which contain ringing affirmations of individual liberties, affirmations as eloquent as our own. But absent a structure to guarantee their enforcement, these are shams, what Madision scorned as parchment barriers. Eloquence is easily achieved; freedom and real equality are rare and elusive." (Pg. 9.)

2. On Individual Rights.

As to the Constitution's protections of individual rights as such, Judge Kennedy has made clear his belief in the need for vigorous and open-minded defense of those rights by the federal judiciary. At his induction as a member of the Court of Appeals on June 1, 1975, Judge Kennedy recognized that the Framers of the Constitution drafted "strong words that after all the arguments and interpretations subside, still remain as powerful and forceful shields for individual liberty." (Pg. 5.) His commitment to a strong federal judiciary was highlighted in an August, 1978, speech in Phoenix to his fellow Circuit Judges, in which he attacked a then-pending legislative proposal to

establish a federal judicial commission to police the behavior of federal judges. Regarding such a device as a threat to judicial independence, Judge Kennedy warned that, "once the independence of the judiciary is undermined, it can never be restored." Rather than taking a more measured approach, Judge Kennedy declared that "[t]here is a time to compromise and a time to stand on principle; and I submit we must stand on the principle of judicial independence in this case and refuse to support or endorse or amend this bill." (Pg. 25.)

Defending the record of the independent judiciary in American history, Judge Kennedy observed:

> "I simply must remind you, although it should be clear enough, that it was not the political branches of the government that decided Brown v. Board of Education; and it was not the political branches of the government that wrought the revolution of Baker v. Carr (the reapportionment decision), or that decided the right of counsel case (Gideon v. Wainright). It was the courts. And I submit that if the courts were not independent, those decisions might not have been made, or if made, might not properly have been enforced." (Pg. 31.)

Whether Judge Kennedy was right or wrong in perceiving the proposed judicial commission as a grave threat to the independence of the federal judiciary, it is noteworthy how deeply he cared about the progress that the judiciary had wrought.

Most crucially, Judge Kennedy has recognized that the great protections afforded individual liberty by the Constitution cannot be defined by any scientific process or conception of the

Framers' specific intentions, but are bound up in a continuing examination of the principles of human freedom. In a 1981 commencement speech at the McGeorge School of Law, Judge Kennedy reviewed the concept of "fundamental law," and said that

> "[i]n our own time, the idea is most fully, although not entirely, expressed in the Constitution. The plain fact is that the scholarship of the American legal profession on questions of fundamental law is one of the great contributions to Western civilization in modern times. Our work on this subject is the major source of reliance by every other court in the world that cares about justice." (Pg. 7.)

As understood by Judge Kennedy, the Constitution's fundamental law is plainly an evolving concept. In a speech in Sacramento delivered in February, 1984, Judge Kennedy stated that

> "[c]hange within the mainstream of our constitutional tradition is necessary. . . . The framers of the Constitution would not have used such spacious phrases as due process, cruel and unusual punishment, [or] equal protection of the laws, if they had thought otherwise. The great Chief Justice, John Marshall, said that 'The Constitution was intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs.'" (Pg. 6.)

Judge Kennedy's careful analysis of the broadly phrased constitutional guarantees is best illustrated by his speech at Stanford in July, 1986, on "Unenumerated Rights and the Dictates of Judicial Restraint." Some academics, jurists and others have read the Constitution so narrowly that they are unable to find in it a basis for protecting so-called "unenumerated" rights -- those fundamental personal freedoms which, although not surrendered to any level of government when the people of the United States adopted the Constitution, did not happen to be

specifically mentioned in the Bill of Rights or elsewhere. Such commentators ignore the broad protection of "liberty" under the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the command of the Ninth Amendment that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Other legal thinkers urge that the expansive phrases of the Constitution be read extraordinarily broadly -- as a means of guaranteeing all the prerequisites of a just society, forgetting the Constitution's character as a sometimes uneasy and unsatisfying product of conflict and compromise.

In his 1986 Stanford speech, Judge Kennedy steered a middle course, arguing that it flouts "constitutional dynamics, and it defies the [precedential] method to announce in a categorical way that there can be no unenumerated rights," but that "it is imprudent as well to say that there are broadly defined categories of unenumerated rights, and to say so apart from the factual premises of decided cases. This follows from the dictates of judicial restraint." (Pg. 5.)

In this spirit, Judge Kennedy, through a discussion of the rights to travel and to vote, and the right of privacy, explored in some detail and with considerable subtlety "the boundaries of judicial power and the difficulties encountered in defining fundamental protection[s] that do not have a readily discernible basis in the constitutional text," (pg. 1) demonstrating his

preference for detailed attention to the factual nuances of particular situations, with close heed to the Constitution's text, structure, and history, and to the traditions surrounding its evolving interpretation. In Judge Kennedy's view, this process is most in line with the judicial role of deciding "specific cases, from which general propositions later evolve, and this approach is the surest safeguard of liberty." (Pgs. 4-5.)

Judge Kennedy's analysis of the "right of privacy" decisions protecting fundamental matters of family life and individual autonomy and intimacy is particularly perceptive. That these specific words do not appear in the Constitution, he suggests, is a distraction. Some of the most difficult constitutional controversies involved in this area, he points out, would persist even if the Constitution's text were explicitly to grant a "right to respect for private and family life," as is afforded under European law. (Pg. 9.) Judges would still have to struggle with intractable problems of defining and delimiting this right's outer boundaries. And some of the confusion in this area, he suggests, stems from use of "the word 'privacy,' rather than . . . a constitutional term, such as 'liberty'" -- shifting attention to "[t]he mystic attraction of [an] untested and undefined word . . . ." (Pg. 10.)

The difficult questions in addressing such divisive constitutional issues are, therefore, ones that at times not even

the most explicit text can answer. Yet Judge Kennedy recognizes the federal judiciary's obligation to examine these issues:

> "The fact that we are not sure how ultimate legal principles are weighed in reconciling conflicting claims between society and individual freedom, or that we may disagree on the subject, does not mean that our duty to address such questions can be abandoned or treated with indifference. . . . [I]t is the nature of the judicial process that ultimate principles unfold gradually and over time." (1981 McGeorge speech, pg. 7.)

Judge Kennedy has made it equally clear, however, that the Constitution is not an instrument for the enshrinement of judges' own political or moral values. In his 1986 Stanford speech, Judge Kennedy admitted that "[o]ne can conclude that certain essential, or fundamental, rights should exist in any just society," but that "[i]t does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution." (Pg. 13.) At a speech delivered in Sacramento during February, 1984, he noted that "[t]o recognize the necessity of continued interpretation does not give us a license to interpret the document for utilitarian ends," and that "[t]he Constitution cannot be thrown about as a panacea for every social ill" -- "cannot be divorced from its logic and its language, the intention of its framers, the precedents of the law, and the shared traditions and historic values of our people." (Pg. 7.) In this way, Judge Kennedy properly stressed the very considerable differences between identifying the rights implicit in our Constitution and deciding what rights ought to exist in an ideally just society.

Given the limits of judicial interpretation, Judge Kennedy quite rightly has pointed out that many claims "that courts must enforce certain minimum entitlements" requiring positive action by government, such as "education, nutrition, and housing . . . if the constitutional system is to work," appear implausible under our Constitution as written. One may argue, he noted, "that the political branch has a responsibility to furnish an entitlement that is necessary to make the constitutional system work, but this simply underscores the proposition that the legislature has the authority to initiate actions that the judiciary does not." (1986 Stanford speech, pgs. 17-18.) The alternative of federal courts instructing government "what minimum level of entitlements each citizen must receive . . . would be a fundamental change of our constitutional tradition," and "a further erosion of the sovereignty of separate states." (1984 Sacramento speech, pgs. 5-6.) Judge Kennedy therefore recognizes that the legislative branches may have constitutional responsibilities to furnish the entitlements needed to make the system work even when those responsibilities are not fully and perfectly enforceable by courts of law. This view -- one that a number of scholars have defended -- stands in sharp contrast with a doctrinaire commitment to judicial enforcement of every right that our Constitution might be said to support.

It would be wrong to suggest, said Judge Kennedy in a 1982 Los Angeles speech, that "the judiciary is the sole force for the preservation of constitutional values . . . ." Indeed, he

recognizes that "the Constitution in some of its most critical aspects is what the political branches of the government have made it, whether the judiciary approves or not," and that "Congress must acknowledge its constitutional responsibility and begin to articulate its legislative judgments in constitutional terms." (Pg. 9.) In his 1986 Stanford speech, Judge Kennedy elaborated on this theme: "If there are claims of basic rights . . . not cognizable by the courts, claims that must be honored if the Constitution is to have its fullest meaning, the political parts of the government ought to address them" so those branches are held accountable; a degree of judicial restraint in addressing such matters ensures that the political branches will not "deem themselves excused from addressing constitutional imperatives . . . ." (Pg. 21.) Judge Kennedy is not concerned "that there is a zone of ambiguity, even one of tension, between the courts and the political branches over the appropriate bounds of governmental power," believing that "[u]ncertainty is itself a restraint on the political branch, causing it to act with deliberation and with conscious reference to constitutional principles." (Pg. 22.)

These views do not derive from Judge Kennedy's personal views about the nature of good judging. Rather, Judge Kennedy believes that "[t]he imperatives of judicial restraint spring from the Constitution itself," a document "written with care and deliberation, not by accident," and that restraint by judges is part of our structural system of checks and balances. (Pg. 20.)

Principled limits on judicial power are necessary, Judge Kennedy argued in his 1987 Sacramento speech, because "judges are in the fortunate, or unfortunate, position of making up the rules in [their] own game"; they must therefore avoid both the fact and the perception that they hold "uncontrolled authority lead[ing] to the raw exercise of will, the . . . insolence of office." (Pg. 6.)

3. Assessment.

In remarks to the Ninth Circuit Judicial Conference in August, 1987, Judge Kennedy referred to the notion of an unwritten Constitution, stressing its embodiment of cultural and ethical constraints that limit government in general, including the federal judiciary. He believes that this notion "counsels the morality of restraint," and "teaches that any branch of the government which attempts to exercise its powers to the full, literal extent of the language of the Constitution is both indecorous and destabilizing to the constitutional order." (Pgs. 5-6.)

Some critics of these observations -- and of the measured tone of Judge Kennedy's speeches generally -- have read in them a distressing signal of reluctance to invoke judicial power boldly to vindicate unconventional or unpopular claims against the will of a determined majority. A candid assessment requires one to concede that there is a risk that the thoughtful generalities

contained in Judge Kennedy's speeches could serve as excuses for an insufficiently vigilant judicial role. But it seems fundamentally improper to read Judge Kennedy's speeches in their entirety as presenting any such threat. There is no ground for drawing sinister inferences from language which seems entirely responsible and which does not suggest an agenda to diminish the established role of the federal judiciary in protecting individual rights.

It is perhaps ironic that a principal criticism of Judge Kennedy, from both ends of the ideological spectrum, has focused on his supposed tendency to accept legal doctrine as pronounced by the Supreme Court -- a tendency that some criticize as insensitive to claims of freedom and equality, and that others criticize as insufficiently protective of the majority's prerogatives. Thus, I have heard him attacked both from the right for his failure to criticize the Supreme Court's controversial 1973 abortion decision, and from the left for his failure to criticize the Court's 1986 decision limiting the rights of sexual privacy.

I find neither attack fair or persuasive. As a sitting federal judge, Anthony Kennedy might have felt less free to criticize than others would. Or perhaps it is simply not his style to tilt too hard against prevailing legal winds. But what I have read of Judge Kennedy's work belies any notion that he lacks the independence of mind or the critical edge that would

enable him to bring his powerful intellect and his evident sense of fairness to bear upon the novel challenges that would confront him as a Supreme Court Justice.

Nor should the intellectual quality of Judge Kennedy's work be underestimated. It might be easier to perceive brilliance in constitutional arguments that stake out bold, extreme positions -- in speeches and essays (or, for that matter, opinions) that simplify for the sake of emphasis or clarity. But it would be a great mistake in Judge Kennedy's case to attribute the cautious and measured character of his analyses to any lack of intellectual force, lucidity of mind, or conviction. The caution that characterizes Judge Kennedy's speeches reflects not a mind lacking in boldness but a temperment resistant to oversimplification. In sum, Judge Kennedy's speeches reward close attention precisely because they reveal an admirably complex and balanced understanding of constitutional problems.

B. The Judicial Opinions

In light of these qualities of mind, it should not be too surprising that Judge Kennedy's views, as reflected in his Court of Appeals opinions, resist easy categorization.

Judge Kennedy's opinions on the Court of Appeals -- consistent with the views he has expressed in his unpublished speeches -- demonstrate a sensitive approach to the problems of constitutional interpretation. Ultimately, Judge Kennedy's

opinions reveal a belief in the fundamental constitutional principles that have been of concern to this Committee. In particular, they demonstrate the absence of any categorical opposition to a view of the Constitution as an organic, evolving document; dedication to the fundamental role of the courts in our constitutional system as protectors of individuals and minorities from oppressive government; and a commitment to the special place of courts in elaborating and enforcing principles implicit in the Constitution's structure, even when those principles may not be explicitly stated within the four corners of the document.

Judge Kennedy has limited his holdings quite closely to the facts of the case before him, avoiding the broad, inevitably oversimplified pronouncements of the dogmatist. In this he reminds me of the late Justice Stewart, for whom I clerked in 1967 and of whom I wrote in a tribute: "He was less interested in pursuing a unified philosophical vision than in determining what the law, as he understood it, required in the case at hand." Tribe, Justice Stewart: A Tale of Two Portraits, 95 Yale L.J. 1328, 1328 (1986). Judge Kennedy espouses no all-inclusive constitutional theory, and his opinions reflect a cautious, thoughtful, case-by-case approach to judicial decisionmaking. The "judicial restraint" revealed in his opinions is the restraint that avoids categorical answers to complex issues whose resolution requires subtlety and flexibility.

1. A Belief in Implicit and Evolving Constitutional Principles.

Judge Kennedy's opinions are illustrative of his willingness to draw inferences from the broader principles underlying the Constitution's text. His decisions concerning the right to privacy, for example, reveal a cautious acceptance of certain constitutionally protected unenumerated rights.

In Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied sub nom. Beller v. Lehman, 452 U.S. 905 (1981), for example, Judge Kennedy ruled that the constitutional right to privacy did not protect naval personnel from discharge for homosexual conduct. While I am inclined to disagree with Judge Kennedy's conclusion, there can be little doubt that the Supreme Court as then composed would have reached the same result he did. Indeed, the Court subsequently upheld the power of state governments to go so far as to impose criminal penalties on private, consensual homosexual conduct in Bowers v. Hardwick, 106 S. Ct. 2841 (1986) -- a case that I argued in support of the privacy claim.

In Middendorf, Judge Kennedy did not conclude that the consensual conduct at issue was constitutionally unprotected, but that the needs of the military outweighed whatever solicitude such conduct was due. Judge Kennedy's ultimate conclusion -- that the right to privacy must yield in some circumstances -- is surely defensible. Indeed, even the brief I submitted in Hardwick invited a distinction between crimininalizing consensual

intimacies and subjecting them to less intrusive forms of regulation. The language of Judge Kennedy's opinion evidences recognition of the courts' role in the protection of certain unenumerated rights grounded in historical understandings or inferrable from the structure of the Constitution.

The Middendorf opinion also demonstrates the type of cautious restraint characteristic of Judge Kennedy's judicial philosophy. In Middendorf Judge Kennedy decided only the question before him -- the permissibility of military discharge for homosexual conduct -- leaving open the question of privacy in other contexts until a case concretely presenting the issue might come before the court. At a time when other judges -- in the name of judicial "restraint" -- were shutting the door to future litigation of related issues of individual liberty, Judge Kennedy properly went out of his way to avoid such judicial activism.

United States v. Penn, 647 F.2d 876 (9th Cir.), cert. denied, 449 U.S. 903 (1980), reveals the extent of Judge Kennedy's commitment to constitutional protection for fundamental rights involving privacy and the family. In Penn, Judge Kennedy dissented when the Court of Appeals upheld the legality of a five-dollar police bribe to a five-year-old child -- offered to the child in his parents' absence -- to obtain evidence to be used against his mother. Judge Kennedy would have excluded the evidence that the bribed child had shown to the police. Most significantly, he based his ruling on more than the ad hoc

conclusion, relied on by the district court, that the police behavior was so "shocking to the conscience" as to violate due process. See id. at 879 (citing Rochin v. California, 342 U.S. 165 (1952) (per Frankfurter, J.)). Rather, Judge Kennedy viewed the governmental intrusion into the parent-child relationship as violative of the broad principles animating such Supreme Court privacy decisions as Moore v. City of East Cleveland, 431 U.S. 494 (1977), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). While others have attacked the Supreme Court's privacy decisions as "unprincipled," Judge Kennedy's ability to apply those decisions in a principled way to a new situation demonstrates a genuine commitment to the idea of a living Constitution.

Nor is Judge Kennedy's commitment to the Constitution as a set of principles going beyond the explicit textual provisions limited to the elaboration of unenumerated personal rights. It extends as well to discerning structural limits in the constitutional system of checks and balances which is, in the end, one of the fundamental guarantors of individual liberty. In Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), aff'd sub nom. INS v. Chadha, 462 U.S. 919 (1983), Judge Kennedy foreshadowed the Supreme Court's landmark invalidation of the legislative veto, see INS v. Chadha, 462 U.S. 919 (1983), reasoning that to place the disapproval power in the hands of one house of the legislature threatens the tyranny of concentrated power that the separation of powers was designed to prevent. In so holding,

Judge Kennedy relied not only on the intentions of the Framers, but also on principles inherent in the system of government they created. Judge Kennedy's Chadha opinion confronted the complexities of the legislative veto even more forthrightly than did the Supreme Court; indeed, many commentators, I among them, have found Judge Kennedy's opinion in Chadha to be more subtle and insightful than the opinion for the Court written by Chief Justice Burger, demonstrating a thoughtful -- even scholarly -- approach to the Constitution's most fundamental architectural principles.

The Chadha opinion, too, reveals again what might be called Judge Kennedy's most consistent philosophy. He himself has described the aspect of the case to which I refer, in the Hoover Lecture delivered at Stanford in May, 1984: "In our court we left open the possibility of further analysis or doctrinal elaboration by confining the opinion to the case before us. This was implied acknowledgement that some forms of legislative veto might survive." (Pg. 1.)

2. A Positive Commitment to the Judicial Role.

Rather than uniformly evidencing only a grudging acceptance of the judicial role in elaborating and enforcing fundamental constitutional principles, Judge Kennedy's opinions often display a powerful affirmative commitment to judicial protection of liberty and equality. He has at times sought positively to

extend protections of these fundamental rights beyond the point undeniably compelled by Supreme Court precedent.

Perhaps the most prominent example is Judge Kennedy's opinion in James v. Ball, 613 F.2d 180 (9th Cir. 1979), rev'd sub nom. Ball v. James, 451 U.S. 355 (1981). Six years before James, the Supreme Court, by a divided vote, had qualified its basic commitment to the "one person-one vote" principle with a dubious notion that a "one acre-one vote" allocation of electoral power is permissible for a governmental body that has a "special limited purpose," if its activities have a "disproportionate effect . . . on landowners as a group . . . ." Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 728 (1973).

Sensing the tension between this decision and the promise of equal participation explicit in Baker v. Carr, 369 U.S. 186 (1962), and its earlier progeny, Judge Kennedy refused to extend the approach of Salyer to the Arizona Agricultural Improvement and Power District -- a governmental entity that provided utilities and water services to many of the citizens of Arizona, landowners and non-landowners alike -- and held unconstitutional an electoral system in which the franchise was restricted to landowners, with voting power essentially apportioned on the basis of the amount of land owned.

Unfortunately, only four Supreme Court Justices were persuaded by Judge Kennedy's reasoning. A 5-4 Court reversed

James v. Ball, and retreated further from the principle of one person-one vote. See Ball v. James, 451 U.S. 355 (1981). In dissent, Justice White, joined by Justices Brennan, Marshall and Blackmun, quoted at some length from Judge Kennedy's opinion, sharing his conclusion that "'it would elevate form over substance to characterize the District as functioning solely for the benefit of the landowners.'" 451 U.S. at 383-84 (quoting 613 F.2d at 184).

Similarly, in CBS, Inc. v. United States District Court, 765 F.2d 823 (9th Cir. 1985), Judge Kennedy extended the First Amendment right of access to criminal proceedings -- a right first recognized in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) -- to the post-conviction context, and to a right of documentary access. CBS sought access in this case to a sealed motion for a reduced sentence submitted by a defendant as part of a plea bargain in which he agreed to testify against automobile executive John DeLorean, then on trial for narcotics offenses. Judge Kennedy held that "[t]he primary justifications for access to criminal proceedings . . . apply with as much force to post-conviction proceedings as to the trial itself," 765 F.2d at 825, and ordered the district court to unseal both the defendant's motion and the government's response. His decision thus expanded the scope of the government's affirmative duty to provide access to information in order to make meaningful the liberty implicitly guaranteed by the First Amendment.

Even in cases where Judge Kennedy might be faulted for having afforded insufficient judicial protection to minorities, his opinions display a willingness to suggest other possible avenues for judicial relief. In Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), for example, Judge Kennedy was faced with a challenge to San Fernando, California's at-large voting system. A group of Mexican-Americans alleged that the electoral scheme was intended to discriminate against them. In a separate concurring opinion, after reluctantly finding the evidence insufficient to create an inference of intentional discrmination in the creation or maintenance of the entire at-large voting system -- a decision with which I disagree -- Judge Kennedy went on to suggest that some of the evidence presented might justify other types of judicial relief, including "a remedial requirement of increased consideration and/or appointment of Mexican-Americans" to San Fernando's city commissions, on which Mexican-Americans had been historically underrepresented. 600 F.2d at 1279. Thus Judge Kennedy went out of his way to suggest alternative possibilities to the litigants against whom he ruled.

3. Willingness to Absolve Government of Responsibility.

None of this is to say that Judge Kennedy could plausibly be described as a judicial "liberal." He has, for example, been quick at times to absolve government of responsibility for its complicity in inequality arising from the marketplace in

employment and housing. In his famous opinion in AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy wrote the nation's leading opinion rejecting the comparable worth theory of gender-based wage discrimination. He held that the employees of the State of Washington, in job categories at least seventy percent female, could make out neither a disparate impact nor a disparate treatment claim under Title VII based upon inequality of pay for comparable work. Writing that "[n]either law nor logic deems the free market system a suspect enterprise," Judge Kennedy concluded that "the State did not create the market disparity and has not been shown to have been motivated by impermissible sex-based considerations in setting salaries." 770 F.2d at 406-07. While it seems likely that the Supreme Court would have reached the same conclusion, Judge Kennedy was perhaps too quick to conclude that the state bore no responsibility for deciding in its own practices to mirror the "private" wrong of a structural, gender-based wage disparity.

In Spangler v. Pasadena City Board of Education, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring), following the Supreme Court's lead, Judge Kennedy concluded that a court should not retain jurisdiction over a school desegregation action where the school board had substantially complied with a court order designed to remove the vestiges of past discrimination even where the result -- because of such "private" wrongs as segregated neighborhoods -- will almost certainly be schools as segregated as they were prior to the court-ordered desegregation

plan. While Judge Kennedy's opinion was consistent with Supreme Court precedent, see Spangler v. Pasadena City Board of Education, 427 U.S. 424 (1976), a more sensitive approach might have recognized that even such "natural" and "private" factors as residential choices that cause discriminatory racial consequences may themselves be products of prior official policies and public programs. A deeper commitment to the elimination, "root and branch," Green v. County School Board, 391 U.S. 430, 438 (1968), of racial separation in our public schools requires complex -- and continuing -- judicial remedies, even reaching at times into the field of racially segregated housing. Indeed, the rigid compartmentalization of state action that underlies the Court's desegregation remedy decisions is reflected daily in the continuing racial segregation in our schools, exposing the sadly unkept promise of Brown.

In the latter regard, Judge Kennedy's reading of § 3612 of the Fair Housing Act, 42 U.S.C. § 3612, in TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976), was strikingly restrictive of the class of people to whom the Act granted standing to sue. TOPIC, an integrated organization dedicated to eliminating racial discrimination in housing, had discovered -- through use of black and white couples posing as home seekers -- realtors engaging in racially based "steering," that is, directing of black customers to homes in predominantly black residential areas. Judge Kennedy ruled that this section of the Act did not permit suits to vindicate the rights of third parties, and that only a narrow

class of "direct victims" of housing discrimination -- persons directly faced with discriminatory practices -- were "granted rights" under the Act. Judge Kennedy's decision would effectively have limited the right to sue under § 3612 to this small group of "direct victims."

This conclusion seems particularly hard to defend in light of the Supreme Court's prior holding that "[a]ny person who claims to have been injured by a discriminatory housing practice" -- language contained in another section of the Fair Housing Act -- includes a renter or homeowner denied by discriminatory practices against others "the important benefits from interracial associations." Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972). Judge Kennedy sought to distinguish the harms of residential segregation suffered by TOPIC members as "caused by no specific single act of the defendants, but by a prolonged practice spanning many years" -- and thus somehow as less worthy of immediate judicial redress. That distinction is unpersuasive. I think it fortunate that the Supreme Court -- by a vote of 7-2 in an opinion written for the Court by Justice Powell -- disapproved of TOPIC in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

It must be conceded that more than a few individuals and groups have found something to criticize in decisions such as these; some of the criticism seems to me well founded. But no nominee may be required to be free from error. And nothing in

Judge Kennedy's judicial performance suggests that he should not be confirmed, for nothing in it overcomes the overall picture, presented by his speeches and opinions taken as a whole, of Judge Kennedy as a sensitive and powerful proponent of judicial vindication of basic rights -- and as an intelligent and fair judge. None of his judicial work evidences the antipathy to fundamental constitutional principles that might bring into question his suitability as a nominee to the Supreme Court.

On the contrary, Anthony Kennedy's public service as a Circuit Judge, like his scholarly work, evidences qualities of mind and spirit that well suit him to distinguished service on any court. His is not a nomination that challenges the role that the post-World War II Supreme Court has come to play in defending constitutional principles of liberty and equality, within a system of separated and divided powers. On the the contrary, his nomination is entirely consistent with that evolving role.

III. CONCLUSIONS

When all is said and done, Judge Kennedy is, in most senses of the word, a "conservative." But it is not a play on words to say that there is much worth conserving in our constitutional tradition. And, in any event, the role our Constitution assigns to federal judges is in some respects inescapably a "conservative" one. Such judges are, after all, bound by a legal tradition that leaves them free to make significant choices --

but only within a fairly significant set of constraints. Within these constraints, some would prefer a jurist with more "liberal" leanings than Judge Kennedy is likely to display. But liberals are not entitled to demand that of the President. The Senate should not withhold its consent from a nomination that honors and seems likely to advance, rather than jeopardize, our core constitutional traditions even if some Senators would have favored a differently inclined Justice.

There is good reason to believe that Anthony Kennedy would serve with distinction, and would work to preserve and protect basic constitutional values, if confirmed as a Justice of the Supreme Court. And, assuming these hearings contain no surprises, there is no good reason to believe that his approach to the Constitution, or to the Court's role in enforcing it, would threaten either our fundamental law or the judicial function. Thus I urge the Senate Judiciary Committee to report favorably the nomination of Judge Kennedy to the full Senate, which I hope will promptly confirm his appointment as an Associate Justice of the Supreme Court.