Of necessity, such an approach embodies deep respect for democratic institutions and the will of the community.

Third, though, one might say, well, with all this respect for law and history and tradition and precedent and the will of the community, will a pragmatist judge like Judge Breyer sacrifice constitutional rights? Absolutely not. Again, the answer is clear. Absolutely not. Judge Breyer's record is quite clear that when rights are clearly embodied in the Constitution or in statute, he has not hesitated boldly and squarely to uphold them, whether rights of free speech, free conscience, rights to equal protection of the law.

In sum, Judge Breyer's thoughtful commitment to pragmatism places him squarely in the mainstream of this century's most important judicial philosophy and allies him with the Court's most powerful and influential Justices from Harlan to Holmes.

I will be brief on the second two points. I would like to say in addition——

The CHAIRMAN. Kathleen, it is only our friendship that is allowing you to go beyond your 5 minutes, but go ahead.

Ms. SULLIVAN. Two sentences, Mr. Chairman. First, should not confuse—there has been talk of lack of passion. Is this man so pragmatic he has no passion? We should not confuse passion with commitment to justice and fairness, and I think Justice Breyer's opinions, like Judge Breyer's opinions, will be marked by a kind of superior craftsmanship and legal excellence that enables him to bring about justice and fairness in a way that might be more enduring than the efforts of mere passion alone.

And, last, he is, as you have seen and as others have testified—and I wholly concur—a man of great evenhandedness and openmindedness. He has the qualities of spirit as well as mind to be one of the great Justices on the Supreme Court in this century.

Thank you very much.

[The prepared statement of Ms. Sullivan follows:]

BIOGRAPHICAL SKETCH OF KATHLEEN M. SULLIVAN

Kathleen M. Sullivan is Professor of Law at Stanford Law School. She was previously Professor of Law at Harvard Law School, where she taught from 1984 to 1993. Her specialty is constitutional law. She has published articles on a wide range of constitutional issues, including affirmative action, abortion, unconstitutional conditions, freedom of religion and freedom of speech. She wrote the 1992 *Forward* to the Supreme Court issue of the *Harvard Law Review.*

Professor Sullivan has served as co-counsel in a number of Supreme Court cases, including *Turner Broadcasting* v. *FCC, Freytag* v. *Commissioner, Rust* v. *Sullivan, Bowers* v. *Hardwick, Puerto Rico* v. *Branstad, Fisher* v. *City of Berkley,* and *Hawaii Housing Authority* v. *Midkiff.* She has commented on various constitutional issues on *The New York Times* op-ed page and the MacNeil/Lehrer News Hours.

Professor Sullivan holds degrees from Cornell University (B.A. 1976), Oxford University (B.A. 1978), and Harvard Law School (J.D. 1981). At Oxford, she was a Marshall Scholar. In 1981–82, she served as law clerk to Judge James L. Oakes of the United States Court of Appeals for the Secord Circuit.

PREPARED STATEMENT OF KATHLEEN M. SULLIVAN

Mr. Chairman and Members of the Committee: Thank you for inviting me to appear before this distinguished Committee. It is both a great honor and a great pleasure to testify in enthusiastic support of the nomination of Judge Stephen G. Breyer to serve as a Justice on the United States Supreme Court. I have known Judge Breyer for over a decade, as we were colleagues on the Harvard Law School faculty before I moved west to Stanford Law School. I have closely followed his opinions

and his academic writings over the years. I believe that he will be an exemplary Supreme Court Justice, and will bring great credit to the Court.

Three features of Judge Breyer's approach to law and judging lead me to that conclusion. First is his thoroughly pragmatic philosophy, which is in keeping with the best of the Supreme Court's traditions over the last century. Second is the excellence of his legal craftsmanship. Third is his judicious temperament. Allow me to address each feature in turn.

1. Pragmatic philosophy. Throughout his opinions and other writings, Judge Breyer has expressed a view of law as a practical enterprise, to be applied in a practical way for practical ends. Just the other day, in his opening statement to the Committee, he summarized this view as follows: "I believe that law must work for people. That vast array of Constitution, statutes, rules, regulations, practices, procedures—that huge, vast web—has a single basic purpose. That purpose is to help the many different individuals who make up America from so many different backgrounds and circumstances, with so many different needs and hopes * * * live together productively, harmoniously, and in freedom." The New York Times, July 13, 1994 (national edition), at A8.

That statement echoes Judge Breyer's previous statements in other contexts. For example, in a 1991 lecture he delivered at USC on statutory interpretation, he said, "I assume that law itself is a human institution, serving basic human or societal needs. It is therefore properly subject to praise, or to criticism, in terms of certain pragmatic values, including both formal values, such as coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the 'reasonable expectations' of those to whom it applies." On the Uses of Legislative History in Interpreting Statutes, 65 So. Cal. L. Rev. 845, 847 (1992).

Likewise, in a 1989 tribute to his late Harvard colleague Paul Bator, Judge Breyer praised the legal tradition that "sees law, including constitutional law, as an untidy body of understandings among groups and institutions, inherited from the past, open to change mostly at the edges. It is a tradition that communicates its important vision, not through the explication of any single theory, but through detailed study of cases, institutions, history, and the human needs that underlie them." 102 Harv. L. Rev. 1737, 1744 (1989).

In expressing these views, Judge Breyer has situated himself squarely within the great and distinctively American tradition that has dominated the Supreme Court throughout this century: namely, legal pragmatism. The pragmatic tradition links the opinions of the great Justice Oliver Wendell Holmes at the beginning of the century with those of Justice John Marshall Harlan and his admirers in our own era. And this tradition continues overwhelmingly to predominate among the Justices who sit on the Supreme Court today.

Pragmatism sees law not as an intellectual exercise in abstract theory, but rather as a practical enterprise rooted in the complexity of actual social life. As Justice Holmes put this point in his most famous aphorism, "The life of the law has not been logic: it has been experience." O.W. Holmes, The Common Law 5 (1881). *See generally* Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787 (1989).

Pragmatism rejects the notion that legal or constitutional interpretation can be reduced to any one grand unified theory or single, simple, overarching approach. Thus, Judge Breyer, as a pragmatic judge, takes a flexible, undogmatic view of the tools relevant to legal interpretation. Whether interpreting a statute or a constitutional provision, he would look to text *and* structure *and* history *and* tradition as his guides to meaning, rather than rigidly limiting himself to any one of these tools alone.

Pragmatism likewise stresses the need for legal flexibility and adaptability over time, so that the law, including constitutional law, may continue to serve its underlying purposes amid changed circumstances. As Judge Breyer stressed to the Committee in his testimony on Tuesday, citing the pragmatist Justice Holmes himself, the Constitution cannot be read to enact any particular economic theory that would hamstring government "if the world changes so that it becomes crucially important to all of us that we protect the environment, that we protect health, that we protect safety. * * *" New York Times, *supra*. Such reasoning is in the mainstream of the Court's pragmatic tradition, once captured by Justice Harlan in his famous saying that "due process has not been reduced to any formula; its content cannot be determined by reference to any code." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Does pragmatism mean that a judge seeks to impose his own preferences on the law? Absolutely not. As Judge Breyer's mentor, the late pragmatist Justice Arthur Goldberg, once wrote, "In determining which rights are fundamental, judges are not

left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and conscience of our people' * * * [and to] 'experience with the requirements of a free society.'" *Griswold* v. *Connecticut,* 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). And as Judge Breyer himself assured the Committee in his testimony on Tuesday, a Justice's job is certainly *not* to "legislate from the bench," but rather to follow the law—although determining just what an open-ended law really means may demand all the resources of his judicial craft. Pragmatism is a philosophy of judicial humility, not judicial arrogance: it holds that general propositions cannot decide concrete cases, and that adjudication between two competing legal claims is necessarily a matter of degree.

Does pragmatism mean that a judge resolves legal disputes in an ad hoc way? Again, the answer is clearly no. As Judge Breyer himself has emphasized, a pragmatist judge looks not only backward to our traditions, but also forward to how his ruling will achieve present peace and future stability by resolving disputes in an authoritative manner that enables people to predict what the next case will hold. Of necessity, such an approach embodies deep respect for democratic institutions and the will of the community.

On the other hand, does pragmatism sacrifice constitutional rights to the social welfare of the community? Once again, in Judge Breyer's hands it most assuredly does not. As he has stressed, our most basic laws are designed to protect not only harmony but also freedom. And when rights are clearly embodied in the text of the Constitution or a statute, Judge Breyer has not hesitated strongly to uphold them, whatever the will of the community might be.

For example, as he told the Committee on Tuesday, the Constitution "foresees over the course of history that a person's right to speak freely and to practice his religion is something that is of value [and thus] is not going to change." New York Times, *supra.* Accordingly, he has ruled for his Court that the First Amendment plainly bars government from targeting either one's political or one's religious views. *See, e.g., Ozonoff* v. *Berzak,* 744 F.2d 224 (1st Cir. 1984); *Aman* v. *Handler,* 653 F.2d 41 (1st Cir. 1981). Likewise, he held for his Court in *Stathos* v. *Bowden,* 728 F. 2d 15 (1st Cir. 1984), that no matter what conventional attitudes about sex roles might be, an employer violates the most basic notions of equality if he pays women less than men "just because they were women."

In sum, Judge Breyer's thoughtful commitment to a pragmatic judicial philosophy places him squarely in the mainstream of the century's most important and enduring jurisprudential tradition, and allies him with the Court's most powerful and influential Justices. And this legal pragmatism is thoroughly consistent both with the rule of law and the role of individual rights.

2. Legal craftsmanship. Judge Breyer's judicial opinions during his tenure on the Court of Appeals for the First Circuit are marked by clear thought, careful analysis, close reasoning, and precision of language. Eschewing footnotes and legal jargon, Judge Breyer has a gift for boiling down highly complicated matters to their basic core, and expressing legal opinions with compelling simplicity. In keeping with his view of law as a practical enterprise, he cares deeply that his decisions can be readily understood. He writes his opinions to be watertight, so that even people of differing views might find they can agree upon them.

The absence of fiery rhetoric or sweeping slogans from Judge Breyer's opinions should not be confused with a lack of commitment to justice and fairness. To the contrary, his calm reasoning and superior craftsmanship often achieve more effective victories for justice and fairness than might have been won by a display of passion alone.

For example, through his judicious methods, Judge Breyer has often been able to dissolve technical obstacles and give force to holdings that increase access to courts or protect the rights of minorities—holdings that might not have been as persuasive if set forth with less precision or care, *See, e.g., Munoz-Mendoza* v. *Pierce,* 711 F. 2d 421 (1st Cir 1984) (holding, contrary to the district court, that minority residents of an integrated Boston neighborhood had standing to argue that a federal building project would cause the racial segregation of their neighborhood); *Mayburg* v. *Secretary of Health and Human Services,* 740 F.2d 100 (1st Cir 1984) (holding, contrary to an HHS interpretation, that an 88-year-old woman who lived in a nursing home was eligible to keep receiving benefits without having to move from the home); *Stuart* v. *Roche,* 951 F.2d 446 (1st Cir 1991) (upholding a decree designed to cure past racial discrimination in the Boston Police Department, finding it narrowly tailored under the Supreme Court's decision in *City of Richmond* v. *Croson Co.*).

Finally, his opinions also exhibit considerable restraint. He declines to reach out to embrace principles that are broader than necessary to decide the case before him. *See, e.g., Alexander* v. *Trustees of Boston University,* 766 F.2d 630, 650 (1st Cir 1985) (Breyer, J., dissenting) ("I would not allow the parties, through their choice

of arguments, to force this court unnecessarily to decide a broader constitutional question than the facts require."). And if a record is inadequate, he does not hesitate to send a case back for further facts.

Taken together, these features of Judge Breyer's skilled judicial craftsmanship enable him to serve as a potential catalyst for consensus on the Court, even among Justices of differing views.

3. Judicious temperament. On this point, I can be brief: Judge Breyer is not only an intellectually distinguished judge, but a fair and judicious one. He is open-minded and even-handed. He genuinely listens to others. He is willing to revise his views when one persuades him that he was wrong. He is highly focused, and is undaunted by factiousness or conflict. Thus, he has in abundance the qualities of spirit, as well as the qualities of mind, to serve with the greatest distinction as an Associate Justice on the United States Supreme Court.

The CHAIRMAN. Thank you very much, Professor.

I read with some interest the treatise of Professor Farber of the University of Minnesota on pragmatism and the criticisms of the new pragmatism—as nonlawyers have a clear sense, we lawyers sometimes try to give phrases that have generic meanings very specific meanings that sometimes are difficult to understand. There are some very cogent criticisms of pragmatism.

I have one question for you, Professor. You make it clear that you think that Judge Breyer is a legal pragmatist in the tradition of Holmes and Harlan. Apart from the work of these two Justices, what makes you conclude that the Court's dominant tradition in this century has been legal pragmatism?

Ms. SULLIVAN. It is not just Justice Holmes, but also Justice Cardozo, to a great extent Justice Brandeis, who launched us in the modern constitutional tradition who were pragmatists, who were influenced by that distinctively American philosophy that says that the value of something is to be measured by its practical effect. It is a distinctively American tradition rooted in the writings of Dewey and Perse and James. But to connect it up with our own time, I believe it is also the dominant judicial philosophy on our Supreme Court today. It is a philosophy that enables——

The CHAIRMAN. That was my next question. I would like to know why you conclude that.

Ms. SULLIVAN. Because I think if we look at the decisions of the Court, the great decisions of the Court in the last few terms, we see the Justices who come from very different places in life and very different views of the world, very different political sides of the aisle, can come together around basic propositions such as that people should be unfettered in their right of access to basic constitutional rights, such as the view that there is a balance to be held between the interests of people in exercising their religion and the interests of keeping the public order free from the establishment of religion.

In issues like privacy and speech and religion, the most contested issues in our time, where it is so easy to be divided, where it is so easy to be passionate, we have seen that pragmatism is what enables Justices, as distinctive across a spectrum from Chief Justice Rehnquist to Justice Ginsburg to agree, to agree on what is the best outcome in a particular case.

The CHAIRMAN. You think that is the spectrum? I kind of think it goes Rehnquist, Ginsburg, to some other place. But——

Ms. SULLIVAN. There are some on the Court, of course, Mr. Chairman, who do not share this philosophy. There are some who