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

subjective assumptions of those who wrote it, then you cannot justify decisions like *Brown* v. *Board.*

Such a decision is right, it is moral, it is lawful, precisely because the relevant intent is not what was going on inside the private thoughts and assumptions of a particular set of draftsmen.

We are bound by the objective intent, and as Senator Hatch I think likes to express it—the "original meaning" of the Constitution. And when the Constitution is promulgated with words as general as "equal protection of the laws", then we are bound—we are trying to interpret those words to seek not the subjective specific intent of those who wrote them, but the objective intent that was expressed through the words they chose.

Senator SPECTER. Professor Tribe, where the 14th amendment contains the language, "equal protection of the law," which is a generalization, and then you have the issue as to whether there ought to be segregated schools, which is a specification—if you elevate constitutional doctrine to require the application of the intent of the framers, and you deal with the specific of desegregating the schools, how can you say that looking to what was in the minds of the framers, as it applies to the specific issue—segregated schools—that there is anything but an intent that equal protection does not include integration?

Professor TRIBE. Senator, your premise, if you look into the "minds of the framers" as to their specific intent—given that premise, your conclusion surely follows, and what I would argue, what Judge Kennedy seems to believe, is that the premise is wrong.

We should not have a jurisprudence of original specific subjective intent, but that does not mean that the purpose of the Constitution somehow becomes irrelevant.

The mistake is to ignore that you can seek the meaning of the Constitution and resist imposing your own will, without suddenly falling into the trap of enforcing the specific subjective intentions of the framers.

Those specific subjective intentions never became part of the Constitution. So that I think we agree, though the labelling may be different.

Senator SPECTER. Well, we all agree with the conclusion of *Brown* v. *Board of Education*, but what I am looking toward is whether there is an ideological straitjacket to be applied on framers' intent?

Professor TRIBE. And I agree with you, Senator, that there is not, and oughtn't to be. That if there were, if there were a narrow, specific subjective straitjacket, not only would particular decisions like *Brown* be wrong, but the Constitution would be frozen. It would be stillborn.

It would preserve the status quo that they assumed was perhaps lawful, and then why bother—as Judge Kennedy asked—why bother promulgating a Constitution? So that straitjacket seems to me to be wrong, and I agree with you.

Senator SPECTER. Well, do you believe that it is ever appropriate for the Supreme Court to decide a case at variance with framers' intent?

Professor TRIBE. With the specific subjective intent, yes. At variance with the general purpose that the framers had, as expressed in the general language they chose, no.

I think that judges are bound to enforce the Constitution, and that doing that requires—and here is where I think Judge Kennedy's subtlety is really very powerful—it requires recognizing that we can learn from the history and the tradition of interpreting the Constitution.

It is not as though, by getting further from the moment at which they wrote, we somehow lose our understanding of what they did. By getting further from it, by looking at it in the light of what has transpired since, we can develop a clearer understanding of the meaning of the grand promises that they wrote into the Constitution.

I think it was really very insightful for Judge Kennedy to formulate it that way. I have not read it formulated that way.

Senator SPECTER. That is news to you?

Professor TRIBE. Well, the idea is not entirely new, but for those who often say of Judge Kennedy, he is not as brilliant, not as articulate as some others, they are wrong.

This man is capable of articulating a powerful, coherent vision, and of making it understandable and appealing.

Senator SPECTER. I agree——

Senator KENNEDY. The Senator's time is up. The Senator from Ohio has indicated he is ready for questioning, so I will recognize him, and then return. The Senator from Ohio.

Senator METZENBAUM. I just have a few questions, Mr. Tribe. I am happy to see you before our committee again.

You did testify, quite eloquently, in connection with the earlier nominee. What would you say is the most important difference between Judge Kennedy and Judge Bork?

Professor TRIBE. If I had to reduce it to a single, most important difference, I suppose it would be that Judge Kennedy is not an ideologue with a clear agenda of revisionism.

He is an openminded person with a commitment to an evolving Constitution. He is more cautious, more respectful of tradition, more flexible in his understanding of the Constitution, and I think he means it when he says, in response to—I think it was a question from Senator Humphrey—he has no list of major constitutional advances that he would like to see undone.

Then there are a lot of specific differences, about liberty, about free speech, where he says that the free-speech clause protects all ways in which we express ourselves as persons. With respect to equal protection, with respect to Congress' power to enforce the Constitution. With respect to the role of the Court as an umpire of disputes between the legislative and the executive branches.

There are enormous, specific differences, but the fundamental, the most general difference is that, in the nominee that the President has sent to this committee now, I see a fundamental, principled commitment to an evolving constitutional understanding and not a clear agenda of going back to some narrow concept of specific original intent, and wiping away a number of very fundamental, important gains in our understanding of constitutional justice.