constitutional system. Let me propose that the two are not coextensive."

Now yesterday, when Chairman Biden was asking you questions, you adopted the principles of the second Justice Harlan, and if I had time I would go through Cardozo and *Palco* and fundamental values and Frankfurter. We may have time later to come to that. But when we talk about doing justice and we talk about people rising above their own inequities and above their own injustice, why should it not be that the essential rights in our constitutional system should not be coextensive with the essential rights in a just system? Or stated differently, should not essential constitutional rights be implemented to see to it that essential rights in a just system are recognized, that the two are coextensive?

Judge KENNEDY. Well, I think the American people would be very surprised if a judge announced that the Constitution enabled a judge to issue any decree necessary to achieve a just society. The Constitution simply is not written that way. And I think it is an exercise in fair disclosure to the American people, and to the political representatives of the Government, to make it very clear that the duty to provide a just society is not one that can be undertaken solely by the judiciary.

I indicated yesterday there is no truly just or truly effective constitutional system in the very broad sense of that term—constitutional with a small "c"—if there is hunger, if there are inadequate educational opportunities, if there is poor housing. It is not clear to me that the Constitution addresses those matters.

Senator SPECTER. My time is up. I will return later. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman. Thank you, Senator Metzenbaum.

The CHAIRMAN. Now, we will turn to Senator Metzenbaum.

Senator METZENBAUM. Judge Kennedy, in the *Aranda* v. *Van Sickle* case, you joined a decision which held that the constitutional voting rights of Mexican-Americans were not violated by the election system of the city of San Fernando, California. That was a case where Mexican-Americans claimed that they had been denied their voting rights by the city, and that they had been denied equal access to the political process.

Some Hispanic groups, it is only fair to say, find that decision very troubling. They say that you ignored a lot of evidence which showed that the political process was not equally open to participation by Mexican-Americans, and that Mexican-Americans had less opportunities than other residents to participate in the political process and elect legislators of their choice.

For example, the evidence showed that up until 1972, two-thirds of the polling places had been located in the homes of whites, and "that the private homes which were used were invariably not Spanish-surnamed households, and they were not located in an area of the city where Mexican-Americans lived."

In your opinion, you said, "There is no substantial evidence in the record indicating that location of polling places has made it systematically more difficult for the Mexican-Americans to vote, causing Mexican-Americans who otherwise would have voted to forego voting."

I guess in this connection I might quote a Supreme Court Justice, when referring to obscenity, who said, "I know it when I see it." And I sort of feel the same thing about this kind of situation. Is it not sort of common sense, or does it not sort of speak for itself, that when you locate polling places in white homes and in a Mexican-American area that you are going to bring about the results—I think the results were that only 28 percent of the Mexican-Americans were voting, although they made up about 48 percent of the population.

I just was wondering how you came to the conclusion you did in that case.

Judge KENNEDY. Well, I am pleased to talk with you about that case, Senator. I found it a very troubling case and still do.

You began by saying that in that case I found that the constitutional rights of the Hispanic community to vote were not violated.

Senator METZENBAUM. Would you mind pulling the mike a little bit around? Thank you.

Judge KENNEDY. You began by saying that in that case I found the constitutional right to vote of Hispanics in the community were not violated. That was precisely what I was concerned about. It was precisely what I did not find. It is precisely why I wrote a separate opinion.

In this case, the plaintiffs, who were residents of the city of San Fernando in Southern California, brought a challenge to the at-large system of voting, and they asked for the remedy of a federal court decree to require district voting—the purpose being so that Hispanics could have representation in the city government. Although I forget the facts of the case, I will assume that there were neighborhoods which were largely Hispanic. I think that is probably implicit in the facts of the case. So they would have achieved that had that remedy been granted.

The lower court found the evidence insufficient to state a cause of action and granted summary judgment. My two colleagues on the court agreed. I felt that there was something wrong in that case. So I undertook to write a separate opinion to express my concerns.

I went through the evidence and brought out the fact that voting booths were located in non-Hispanic neighborhoods, that there had been no representation on city commissions and boards, et cetera. I indicated that these facts might very well support an action for relief in the federal courts.

In that case, however—and you are never sure why lawyers and litigants frame the cases the way they do—the insistence by the plaintiffs was that they wanted only the one remedy of a district election scheme rather than an at-large election scheme. That is the only remedy they sought.

This is one of the most powerful, one of the most sweeping, one of the most far-reaching kinds of remedies that the federal court can impose on a local system. And in our view, or in my view as expressed in the concurrence, that remedy far exceeded the specific wrongs that had been alleged. I concluded that the remedy sought did not match the violation established. But I made it very clear—and that was the point of my opinion in what I still consider trou-

bling and a very close case—I had a serious concern that individual rights violations had been established in the record.

What was the outcome of that case, whether a subsequent suit was brought based on my concurring opinion, I do not know. My concurring opinion is a textbook for an amended complaint, or a textbook for a new action. I tried to indicate my concerns and my sensitivities in that case rather than simply joining in the majority opinion, which I thought did not adequately address some very real violations.

Senator METZENBAUM. Did you make it clear, in your opinion, that if the remedy sought had been a different one, that based upon the same facts, and I think the facts also were that all of the election process was in English and it made it that much more difficult for people to vote, but had the remedy sought been a different one, that you very well might have arrived at a different conclusion?

Or is that your comment here today?

Judge KENNEDY. Well, I thought that that was implicit if not explicit in my opinion. I was writing a concurring opinion. I did not have the second vote, so I could not order—I could not frame the judgment in the case.

Senator METZENBAUM. Just on this point, why did you not let it go to the jury? You affirmed a summary judgment.

Judge KENNEDY. Or to the finder of fact.

Senator METZENBAUM. Or to the finder of fact. Since you were troubled by it, and there were the egregious circumstances of polling booths being in white homes, that decision is made by the local ordinance, by the local election officials, if you were troubled by it, why not then let it go to the next stage and let a finding of fact be permitted?

Judge KENNEDY. Well, remember, number one, I just don't have the judgment. But so far as my own separate concurring opinion, why didn't I recommend that, I guess would be your question.

Senator METZENBAUM. Yes. And you might at the same time answer this: why could you not have indicated in your decision what the proper remedy should be? Even though the plaintiffs sought a certain kind of remedy, couldn't you have come to the conclusion in your opinion that another kind of remedy was appropriate? Perhaps the court is not required to deny all relief merely because the petitioner comes in asking for one kind of remedy. Shouldn't the court be able to come up with another remedy in this case?

Judge KENNEDY. That is a fair question, and I am not sure I have an adequate answer in my own memory—now.

As I recall the case, we explored the case with counsel extensively at oral argument. And counsel said, "This is a case in which all we are seeking is an abolition of at-large elections. That is all this case is about." And that was my concern.

Why clients and attorneys present cases in this way is beyond me. It was very clear to me, based on my understanding of the record, that any Hispanic resident could bring an action to change the places of the polling booths and to rectify the other injustices that were there in the system.

Now, under the—well, I'm not an expert in the amendments to the Voting Rights Act of 1980, I haven't had cases on those. At this time, we were operating under the assumption that the remedy had to fit the wrong, and that was the argument that I had with the attorneys in the case.

But I wanted to make it very clear in the concurring opinion that I was concerned with the treatment that the court was giving to these litigants, and I wanted to put on the record that I thought there was some evidence of discrimination.

And I guess, Senator Kennedy, the answer to your question of why didn't it go to the finder of fact, is because the attorneys insisted that this was all the suit was about, at-large versus district elections.

I just did not see that as a plausible remedy, as a permissible remedy, given the violations they had established.

Senator METZENBAUM. I don't think we need to debate it further. But suffice it to say, if I were a Mexican-American, I think there would be a keen sense of disappointment that you did not take that extra step so that the summary judgment would not have precluded a different kind of remedy.

And as you have already said, maybe you could have or should have indicated something to that effect.

Judge KENNEDY. Well, it brings up the troubling point that I have not resolved, Senator: To what extent can courts try lawsuits for the litigants. In this case, as I recall, these were extremely experienced, capable attorneys.

Senator METZENBAUM. Judge, I want to make a distinction on that point.

Judge KENNEDY. And for me to say, well, now, you have done this the wrong way, you go back, when they insisted they did not want to do that, it seems to me is perhaps overstepping.

Senator METZENBAUM. You are saying that the court cannot try the case for the litigants' attorney.

But I do not think it was a matter of trying the case in a different manner. I think it was a matter of providing a different solution, a different conclusion, than the summary judgment.

The evidentiary material was already in the record. It was sufficient. There were Mexican-Americans, 48 percent; 28 percent only voting. Voting booths were in the white homes. All of the election process was in English.

So the facts were there. And so I do not think it is a matter of saying that the court had to tell the lawyers how to try the case differently. I think what you're really saying is whether the court should come up with a different kind of result or different kind of remedy than that which is being sought by the litigants.

Judge KENNEDY. Well, but it is not clear to me that the court should, if the litigants insist that this is all they are asking for.

Senator METZENBAUM. Well, I understand your point.

Judge KENNEDY. And the whole point of the decision was that I did not want Hispanics to think that I did not think there were some serious problems down there in San Fernando.

Senator METZENBAUM. Let me go on to another issue.

Let us look at your 1985 opinion in *AFSCME* v. *State of Washington* where you reversed a lower court finding that the State had

violated the civil rights law by paying women substantially less than men for comparable work.

Until the early 1970s, the State of Washington ran segregated male-only and female-only help wanted ads. In 1974, following a comprehensive job pay study, the State concluded that women overall were paid about 20 percent less than men in jobs of comparable value, and in certain jobs, were paid as much as 135 percent less.

These differences were not related to education or skills. They were related only to sex. After the State study, then Governor, now Senator, Evans, conceded there was an inequity, and said the State had an obligation to remove it.

Despite its knowledge of the inequity, the State did not correct it. The district court held that the State's knowing, quote, "deliberate perpetuation," end of quote, of a discriminatory pay system, combined with the State's admission of the discrimination, and its past segregated job ads, supported a finding of unlawful discrimination under title VII of the civil rights law.

Now, in reaching that conclusion, the court was guided by the Supreme Court's 1981 *Gunther* decision, which said that Congress wanted title VII's prohibition of discriminatory job practices to be, quote, "broadly inclusive, to strike at the entire spectrum of disparate treatment of men and women resulting from their sex stereotypes," end of quote.

The district court's findings obviously raise very serious questions as to the state's discriminatory practices toward women.

I have difficult in understanding your complete rejection of the court's conclusion on these facts. And I wonder if you would care to address yourself to it because it is a decision that frankly has many in this country very worried.

Judge KENNEDY. I would be glad to address it, Senator.

We must at the outset distinguish between equal pay and comparable pay. The Congress of the United States has a statute which says that women and men in the same positions are to be given the same pay.

That is not what this case was about. That law is clear; that policy is clear; that obligation is clear; and the courts enforce that.

That is not what this case was. What this case was about was a theory that women should be paid the same as men for different jobs.

The theory of the case was that the State of Washington was under an obligation to adopt this differential pay scale or a compensatory pay scale, because it had notice of the fact that there were pay disparities based on long classifications and stereotypes of women in particular jobs.

I understand that. You do not have to be married to a school teacher for very long to figure out that the reasons educators are not paid enough in this country is because for hundreds of years the education system has been borne on the backs of women.

They have borne the brunt of it. And I think you can make a pretty clear inference that the reason for those low pay scales is because women have dominated that profession. I think that is very unfortunate.

On the other hand, it is something of a leap to say that every school district in the country is in violation of title VII because it does not adopt a system whereby you find comparable worth and lower the salaries of drivers of equipment which, say, are male dominated jobs—let's assume they are—and raise the salaries of women.

That may be a commendable result but, number one, we did not see in title VII that Congress had mandated that result, or in the Equal Pay Act. We looked very carefully at the legislative history.

Second, we did not see, in the evidence presented to us, that the State of Washington had intentionally discriminated by continuing to use the market system in effect.

The State of Washington was subject to a judgment for $800 million, which I take it is a large amount of money, perhaps even in Washington, DC, on the theory that their failing to depart from the market system and from market forces was an actionable violation.

Now, the Governor recognized—I forget if it was the Governor or the legislature or both—that in their view, the State as an affirmative matter should undertake this correction.

We did not think, however, that there was a shred of evidence to show that the State had deliberately maintained that pay scale difference in order to discriminate against women.

It is true that the State had in the past advertised for some job categories as male only. And the State had corrected that.

Once again, I guess we are talking about the difference between the wrong and the remedy.

Senator METZENBAUM. I am not sure we are in this case, because the Supreme Court in the *Gunther* case laid down the rule that title VII's ban on discriminatory job practices should be liberally interpreted and strictly enforced.

Now, what concerns me is whether you applied title VII too narrowly. You seem to hold that to prove discriminatory treatment, it would be necessary to show that the employer harbored a—this is your word—"discriminatory animus," end of quote, or a discriminatory motive.

But the district court had already found that the State of Washington knew for several years that it was perpetuating a discriminatory pay system.

Didn't you go too far in immunizing an employer from title VII liability? Should not an employer who has knowingly and deliberately perpetuated a discriminatory wage system be legally liable for engaging in unlawful employment discrimination?

Judge KENNEDY. We held not. We held that under that formula—it appeared to me, it appears to me, that under that formula, every employer in the United States is charged with an intentional discrimination because it follows the market system even though it did not create that market system.

Senator METZENBAUM. But it seems to me the case is very similar to *Gunther*. *Gunther* went beyond equal pay for equal work. *Gunther* said that a case could be brought where the court was not required to make subjective assessments of job worth.

The State did its own study in this case, and therefore there was no requirement in the *AFSCME* case that the court make a subject judgment.

There was the finding by the State. The State had done the work. The facts were there. *Gunther* had recognized that it appeared to be enough. The appellate court, with you writing the opinion, reversed that and undermined the rights of the women established in the *Gunther* case.

And frankly, it is a kind of a case that causes great concern, and my guess is, we will hear some testimony, some witnesses, on the subject. Women are saying they are concerned about whether you went too far to reverse the lower court in this case, and went beyond the requirements of the Supreme Court as enunciated in *Gunther.*

Judge KENNEDY. I am absolutely committed to enforcing congressional policy to eliminate barriers that discriminate against women, particularly in employment or in the market place or in any other area where it is presented to me.

We do not have a free society when those barriers exist. We do not have a free society if women cannot command pay that is calculated without reference to the fact that they are of a particular sex.

But it is simply not clear to me at all that the State of Washington, because it undertakes a survey and discovers what is intuitive for many people, that some job classifications are dominated by women and that they are paid less, can be held to be a violator for not correcting that.

I think the State should be commended for undertaking the study. If the holding were that any employer who undertakes a study of comparable worth is liable for failing to correct the inequity—I simply don't think that the Congress has let the courts go that far.

If the Congress wants to enact that, I will enforce it. If the Congress has not enacted it, I cannot as a judge invent it.

Senator METZENBAUM. But the lower court found the law and the evidence adequate. *Gunther* seemed to say that much evidence was sufficient.

And what is of concern to this Senator, as well as to many women, is that you then saw fit to reverse.

But let us not belabor that point.

Judge KENNEDY. Well, it is an important case, Senator, and I do not mind talking about it. A couple of final points. First, my understanding is that every other court in the country that has looked at the issue has reached the same result. Second, we indicated that in a case where you can establish that the wage scales were set because women were dominant in the pay group, there could be an actionable violation, of course.

We made that very clear. We did not find it on this evidence.

Senator HATCH. Howard, would you yield to me for a comment on my time? It will take less than a minute.

Senator METZENBAUM. If the Chair permits it.

The CHAIRMAN. If there is no objection from anyone else.

Senator HATCH. I just want to point out that in the *Gunther* case the court specifically noted that it was not deciding the case on the basis of comparable worth. It was simply ruling on a discriminatory method of evaluation.