person who wishes to change that doctrine and change that approach.

Senator METZENBAUM. I think it is fair to say that this is not a field in which you have been that much involved. I would like to leave you with the concerns of this Senator that the antitrust laws are not liberal laws, they are not conservative laws. They came into being with Republican sponsorship, a Senator from my own State, John Sherman. And that when you have those cases before you I would hope that you would think seriously not just about the impact upon the consumer, not just about the impact upon the businessperson, not just about the impact of those employees who may or may not be forced out of work by reason of corporate mergers, but that you think about the overall impact upon the economic system, the free enterprise system, and recognize that our antitrust laws have served us well over a period of many years in protecting free competition in this country with many of the attendant benefits that have resulted in the system.

Judge KENNEDY. That is an eminently persuasive statement of the antitrust laws, which commends itself to me, Senator.

Senator METZENBAUM. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Senator.

Judge, I want to compliment you for the candid way you have answered these questions, and I think you have enlightened us in many ways.

Judge KENNEDY. Thank you, Senator.

Senator HATCH. I just have a few questions I would like to go over with you that I think need to be brought out and may be helpful to everybody concerned, and certainly in this bicentennial time of the Constitution.

I would like to point out there is much value in a unanimous Court. When the Court is unanimous, it tends to put an end to further debate about the merits of any particular decision or issue. Supreme Court historians have recounted how Justice Burger labored diligently to get a unanimous Court in the *U.S.* v. *Nixon* case concerning executive privilege during the Watergate era.

Similarly, historians report that Chief Justice Warren worked prodigiously to get a unanimous decision in *Brown* v. *Board of Education.* You are sworn to uphold the Constitution and we would want you to do nothing else. But there might be times when unanimity on a ruling is more important than your own dissenting view.

Now, how would you weigh the merits of such a case, and what factors would cause you to submerge your own views in deference to the need for a unanimous opinion?

Judge KENNEDY. We have confronted that on our own court, Senator, and it is a difficult problem. But I think, as you have indicated, that it is also a very important one. In some cases on the court in the ninth circuit you can not always tell really how long an author of an opinion has had a case because sometimes when a panel is in disagreement, one of us will say, well, why don't you let me try writing the opinion and I will see if I can solidify our view.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

And the two polar tensions here are, on the one hand, the duty of the judge to speak his or her conscience and not to compromise his or her views. Judicial decisions are not a log-rolling or a trading exercise. That is inappropriate. And, on the other hand, there is the institutional need to provide guidance, to provide uniformity, to have a statement of rules that all of the court agrees on. And I think that the Supreme Court functions much better if it has fewer fragmented opinions. Fragmented opinions are terribly difficult for all of us to work with.

I recognize that these are the toughest issues there are, and so views will differ. On the other hand, I think it is the duty of the judge to submerge his or her own ego, to accept the fact that his or her colleagues, too, have much wisdom and have great dedication to the law. Sometimes I have concurred in opinions simply because I did not think the majority had it right, but I can not say that those have added a great deal to the volume of the law. I think there is much in what you suggest, to commend judges to try to concur in other judges' opinions.

Senator HATCH. There is much to that. There is the other side of the coin, too, and, you know, I want to give some thought to that as well. I am speaking about the need to stand courageously alone on matters of principle. *Plessy* v. *Ferguson* was a perfect illustration of that where Justice Harlan, you know, a single Justice, decided that this separate but equal doctrine established by that case was wrong. And, frankly, he issued a remarkable dissent reminding the Nation that the Constitution ought to be "colorblind."

Now, what factors are going to enter into your decision to stand alone as a sole dissenter?

Judge KENNEDY. Holmes and Brandeis were also known for their great dissents. You must stand alone. You may be *vox clamatis in deserto,* a voice crying in the wilderness, even though it is a lonely and difficult position. Judging is a lonely and difficult position. This is a very lonely job, Senator.

The Federal system has its own isolation that it imposes on the judges. Within your own chambers, within your own thought processes, you wrestle to come to the right result. If you think there is a matter of legal principle that has been ignored, if you think there is a matter of principle that affects constitutional rule, if you think there is a principle that affects the judgment in the case, you must state that principle, regardless of how embarrassing or awkward it may be.

Senator HATCH. One final point concerning the changing style of the Supreme Court, more than the substance of its rulings, and that is this. In recent years the Court's opinions have become far more complex. Plurality opinions have multiplied. I think you have noticed it, I have noticed it. Hardly any opinion is issued without an accompanying flurry of concurring and dissenting viewpoints.

On the one hand, as we have discussed, this is an important part of the process because arguments are preserved for the future and develop more deliberately as the legal and political communities respond to an unresolved mosaic of opinions on any particular single issue.

Yet again, when the Court issues an opinion which nods to both sides of an issue, or which includes a five-pronged analysis of com-

plex factors, what the Court has actually done, in my opinion, is abdicate, instead of giving clear guidance as it could do. And by abdicating it thus leaves up to the lower courts to give various kinds of emphasis to various parts of the mosaic which is wrong.

Now what can be done to get shorter, more succinct and clear guidance in some of the Court's opinions?

Judge KENNEDY. Well, I think, Senator, that Justices simply must be conscious of the duties that they have to the public, the duties they have to the lower courts, the duties they have to the bar—to give opinions that are clear, workable, pragmatic, understandable, and well-founded in the Constitution. More than that I cannot say, other than that judges also must be careful about distinguishing between a matter of principle and a matter that really is dear to their own ego.

Senator HATCH. I see you as a person, with your experience both as an eminent lawyer, as a person who has worked as a lobbyist, as a person who might have a great deal of ability on that Court to bring about consensus, and to help bring unanimity in those cases where it should be, and I also see you as a person who is willing to stand up for principle, even if you are the sole dissenter, which is an enviable position as well. So I just wanted to point this out, because a lot of people do not give enough thought to those various aspects of Supreme Court practice.

Judge KENNEDY. I agree that that is a very valuable characteristic in a Justice.

Senator HATCH. Thank you. Let me shift ground just for a minute. I do not want to keep you too long, so I will only take a few more minutes.

But earlier, you were engaged by one of my colleagues in a discussion about original intent. Now because there has been a great deal of concern and confusion about what is meant by original intent, I thought that maybe we could just return for a moment to that particular issue.

In the first place, I prefer the term original meaning to original intent, because original intent sounds like it refers to the subjective intent of the legislators who wrote the Constitution, or its amendments, or in the case of other legislation, the Congress and State legislatures who wrote the legislation or amendments that were passed.

When you use the term "original intent," I presume that you are in reality discussing the objective intent of the framers as expressed in the words of the Constitution.

Would that be a fair characterization?

Judge KENNEDY. Yes, and I am glad that you brought the subject up. I think there is a progression, in at least three stages. There is original intent in the sense of what they actually thought.

Senator HATCH. Right.

Judge KENNEDY. There is original intent in the sense of what they might have thought if they had thought about the problem. I do not think either of those are helpful.

There is the final term of original intent in the sense of what were the legal consequences of their acts, and you call that the original meaning.

Senator HATCH. Right.

Judge KENNEDY. I accept that as a good description. We often say intent because we think of legislative intent, and in this respect, we mean legislative meaning as well.

Your actions have an institutional meaning. One of you may vote for a statute for one reason, and another for another reason, but the courts find an institutional meaning there and give it effect.

Senator HATCH. Well, I appreciate that. Our fundamental law is the text of the Constitution as written, not the subjective intent of individuals long since dead.

Specifically, you were asked if statements by the Members of the 39th Congress acknowledging segregated schools meant that the 14th amendment permitted a separate but equal reading, and I think you were absolutely correct in saying that the text of the 14th amendment outlaws separate but equal, regardless of the statements or subjective intents of some of its authors, and I appreciated that.

In fact this example clarifies my thinking for using the term original meaning instead of original intent. Often, the framers write into the Constitution a rule which they themselves cannot live by. I think the 39th Congress was a perfect illustration of that. They never did completely live up to the aspirations that they included in the Constitution in the 14th amendment, but we should live by the words of the Constitution, not by the subjective intent or the practices of its authors.

In a similar vein, the framers could not anticipate the age of electronics, but they stated in the fourth amendment, that Americans should not be subject to unreasonable searches and seizures.

And so the words and the principles of the fourth amendment govern situations beyond the subjective imaginings of the actual authors back in 1789.

Now do you agree that there are real dangers in relying too heavily on the subjective intent of the framers of legislation, or, in this case, the Constitution?

Judge KENNEDY. Yes. We always have to keep in mind the object for which we are making the inquiry, and the object for which we are making inquiry is to determine the objective, the institutional intent, or the original meaning, as you say, of the document. That is our ultimate objective.

Senator HATCH. Well, we hear criticism sometimes of original intent, or original meaning analysis, and these critics say that intent governs, or, they really ask the question, whose intent is the important intent? In this case, the authors', the ratifiers', the statements made contemporaneously with, the statements that were not fully recorded?

That again, it seems to me, to confuse subjective intent with original meaning. And so I would ask you, in your opinion, whose intent does govern, or whose meaning does govern?

Judge KENNEDY. It is the public acts of the framers—what they said, the legal consequences of what they did, as you point out and suggest by your phrase, not their subjective motivations.

Senator HATCH. That is good. Well, let me just say this: that we could go on and on on this principle, and I think it is a pretty important principle, and one that we really do not discuss enough, and one that I think is very much mixed up.

I think many members of this panel misconstrued Judge Bork's approach towards original intent, as though it was some sort of a Neanderthal approach to just a literal interpretation of the Constitution, when in fact it was far more complex and far more difficult than that.

Let me just say the cases may evolve, circumstances may change, doctrines may change, applications of the Constitution may evolve, but the Constitution itself does not evolve unless the people actually amend it. Do you agree with that?

Judge KENNEDY. Yes.

Senator HATCH. That is all I have, Mr. Chairman. Thank you for the time. Thank you.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

We reviewed, Judge Kennedy, yesterday, some of your decisions on the handicapped, and on fair housing; and we exchanged views about whether the decisions you had made were particularly narrow.

We talked a little bit about the question of sensitivity on cases affecting minorities' rights, women's rights in the clubs issue, where you had been involved and participated in club activities, and then eventually resigned.

I do not want to get back into the facts on those, but I want to get back into related subjects in terms of you, if you are confirmed and because a Supreme Court Justice, whether those who are either left out, or left behind in the system, can really look to you as a person that is going to be applying equal justice under law.

And there are some concerns that have been expressed through the course of these hearings, and I want to have an opportunity to hear you out further on some of these issues.

I come back to one of the cases that was brought up earlier today, and that is the *Aranda* case.

Judge KENNEDY. Yes, sir.

Senator KENNEDY. We discussed that earlier in the day, and I just want to review, briefly, the evidence in that particular case. You are familiar with it.

—Ten of the fifteen polling places in the city were in the homes of whites living in a predominantly white section of town.

—Although Mexican-Americans constituted 49 percent of the city's population, and 28 percent of the registered voters, only three Hispanics had been elected to the city council in 61 years.

—During a voter-registration drive conducted by the Mexican-American community, the city clerk issued statements alleging irregularities, and the mayor issued a press release charging that unnamed activists were trying to take control of the city government.

—In the preceding election there was evidence of harassment of Mexican-American poll-watchers by the city police.

—And Mexican-Americans were significantly under-represented in the ranks of election inspectors and judges, the membership of city commissions, and the ranks of city employees.

Now, the lower court indicated that they did not find that there was any violation of the law. It was appealed to you. You wrote a separate opinion, and I believe in the exchange earlier today, you had indicated that even if there had been a finding that all of these