

# LECTURE

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## The Constitution and Its Promise

*The Honorable Anthony M. Kennedy*

### Abstract

*In a democracy, each generation is the trustee for the next. Each generation has a duty to conserve and to preserve and then to transmit the assets of a democracy. All Americans have the duty to preserve, protect, and defend the Constitution. The Constitution gives Americans an identity. We come from many ethnicities, nationalities, and religions, and yet we are bound together as one people because of our allegiance and our respect and our reverence for the Constitution. This is a link, a tie, a bond to our history and to our heritage that is unique, or almost unique, in the world.*

This paper, in its entirety, can be found at <http://report.heritage.org/hl1221>

The Joseph Story Lectures

Produced by the Edwin Meese III Center for Legal & Judicial Studies

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**EDWIN MEESE III:** The Heritage Foundation's Preserve the Constitution series promotes the protection of individual liberty, property rights, free enterprise, and the constitutional limits on government, and we've been able to feature some of the nation's most respected judges, legal scholars, lawyers, and policy analysts.

The marquee event in this series is tonight's program, the Joseph Story Distinguished Lecture. The namesake of tonight's lecture, Joseph Story, became the youngest associate justice ever to serve on the United States Supreme Court when he was appointed by President Madison in 1812.

Justice Story made a significant mark on American law in his 33 years on the bench, but his greatest contribution to jurisprudence is his renowned *Commentaries on the Constitution of the United States*. Eminently quotable, Justice Story famously and correctly declared, "A Constitution of government is addressed to the common sense of the people and never was designed for trials of logical skill or visionary speculation." This lecture series celebrates Justice Story's legacy in the law.

Prior Justice Story lecturers have been Judge Robert Bork, Professor

### KEY POINTS

- The heritage of liberty is bound up with the Constitution, which defines who we are as a people.
- Because of separation of powers, each branch of the government has a certain autonomy to act on its own. Because of checks and balances, government cannot operate unless the branches interact with each other.
- Federalism is a unique contribution of the Framers to political theory. The Framers had the idea that you have more freedom if you have two governments instead of one.
- It is not just public servants that have the duty to preserve and protect and defend the Constitution. All citizens have that duty. But you cannot preserve what you do not comprehend, protect what you cannot transmit, and defend what you do not know.

John Harrison from the University of Virginia School of Law, Judge Raymond Randolph of the United States Court of Appeals for the D.C. Circuit, and, last year, Chief Justice Alice Batchelder of the United States Court of Appeals for the Sixth Circuit.

Tonight, we are honored to add a fifth name to that prestigious list as we welcome Justice Anthony Kennedy, who will deliver this evening's Joseph Story Distinguished Lecture on the topic "The Constitution and Its Promise." Justice Kennedy received his bachelor of arts degree from Stanford University and the London School of Economics, and then his law degree from Harvard Law School. Prior to his public service, the justice served in private practice in both San Francisco and Sacramento. I can attest to his prowess as an attorney, because on one very interesting occasion, he represented me on a speeding ticket and got me off with the minimum fine.

From 1965 to 1988, Justice Kennedy was a professor of constitutional law at the McGeorge School of Law at the University of the Pacific located in Sacramento. A point of particular pride of mine is the fact that he provided valuable support to then-Governor Ronald Reagan on a number of legal issues as a volunteer lawyer.

Justice Kennedy was appointed to the United States Court of Appeals for the Ninth Circuit in 1975, where he served for more than 12 years until President Reagan nominated him as an associate justice of the U.S. Supreme Court. He took his current seat in 1988. In nominating Justice Kennedy to the Supreme Court in 1987, President Reagan remarked that his career as a judge in the U.S. Court of Appeals for the Ninth Circuit, as a constitutional law professor, and in private practice was marked by a devotion to the simple, straightforward, and enduring principle that we are a government of laws and not of men.

During his more than three decades on the bench, Justice Kennedy has played an integral role in the consideration and decision of some of the most significant cases and some of the most serious constitutional challenges in our nation's history. He has been a staunch defender of First Amendment rights, individual liberty against government intrusion, and federalism. These are core themes of our Preserve the Constitution series, and we are honored to have the Justice here at Heritage to provide this evening's lecture. Please join me in welcoming the Honorable Anthony Kennedy.

—*Edwin Meese III is Ronald Reagan Distinguished Fellow in Public Policy and Chairman of the Center for Legal & Judicial Studies at The Heritage Foundation.*

### **THE HONORABLE ANTHONY M. KENNEDY:**

Thank you very much. Good afternoon, ladies and gentlemen and my fellow citizens in a nation that must seek always to come ever closer to the idea and the reality of the rule of law.

It is a special privilege and pleasure to be introduced by my longtime and valued friend, Ed Meese. Ed came to Sacramento in the late '60s. At that time, there was still in the state government a continuing extant tradition that public service was a high calling; that public service was an honor and a trust and a duty. I, in my early years in Sacramento, even in elementary and high school, had the good fortune to meet leaders of the state of California, the heads of executive departments. Any number of them were brilliant attorneys, and they appreciated the fact that civil service is a public trust.

The whole idea of democracy is that each generation is the trustee for the next. Each generation has the obligation to ensure that democracy is stronger for the next generation than it is for our own. Each generation has a duty to conserve and to preserve and then to transmit the assets of a democracy. And trustees do not grab all the assets for themselves.

Ed Meese was squarely within that tradition. He considered public service to be a great honor. It is again my pleasure, Ed, to be with you this afternoon, because you were the very ideal of a dedicated public servant, and your work continues here at Heritage, for which I congratulate you.

The heritage of freedom is fragile and must be transmitted from one generation to the next. That is the purpose of The Heritage Foundation, a remarkable institution which exemplifies one of the strong voices that a pluralistic and independent and principled society can produce. The heritage of our freedom is, of course, closely tied to the Constitution of the United States. The heritage of liberty is bound up with the Constitution of the United States.

### **"The Single Most Wonderful Work"**

Americans talk always about the Constitution, and there is a reason for that. The Constitution gives us our identity. The Constitution gives us our self-identity, our self-authentication, our self-esteem, defines our purpose, defines our mission, defines who we are as a people. We come from many ethnicities, nationalities, religions, and yet we are bound together as one people because of our allegiance to and our respect and reverence for the Constitution.

This is a link, a tie, a bond to our history and to our heritage that is unique, or almost unique, in the world. This

tie that we have to our Constitution that defines us, that gives a stability and a purpose and a mission to our people, is the envy of the rest of the world.

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**THE CONSTITUTION GIVES US OUR IDENTITY, DEFINES OUR PURPOSE, DEFINES WHO WE ARE AS A PEOPLE. WE COME FROM MANY ETHNICITIES, NATIONALITIES, RELIGIONS, AND YET WE ARE BOUND TOGETHER AS ONE PEOPLE BECAUSE OF OUR ALLEGIANCE TO AND OUR RESPECT AND REVERENCE FOR THE CONSTITUTION.**

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The British revere their constitution as well. It is not quite the same. William Gladstone, prime minister of England, one time compared the American and the English constitutions. He began by saying that the English constitution was grown, the American Constitution was something that was made.

If he had ended there, you might have thought it was rather patronizing. The English constitution was “grown”; the American Constitution was “made.” But Gladstone went on to refer to the American Constitution in the most laudatory and complimentary of terms. He said in that same statement that “just as the British constitution is the most subtle organism ever to proceed from the womb and the gestation of a progressive history, so is the American Constitution the single most wonderful work ever struck off at a given time from the brain and purpose of man.” This was a highly laudatory, complimentary statement about the American Constitution, and it is true.

It’s hard to find superlatives for the work that the Framers did in Philadelphia in 1787. There is a book by Catherine Drinker Bowen which I have mixed ideas about because it is filled with conversations that never could have happened, but the title is *Miracle at Philadelphia*. And that is not far wrong.

Washington, of course, was the presiding officer of the convention, and this was providential. The American Constitution was by accident and by design and I think by providence. For the first month, the delegates did not know: Would there be a president? Would it be a council? Would the president have an absolute veto? At the end of the month, none of these things was resolved. At some points, the delegates would say the 18th century equivalent of “We’re out of here,” and Washington would say, “Gentlemen, please stay.” You didn’t walk out on the general, and they stayed for three months and finished this document.

## **Holding Fast for a Bill of Rights**

One of the great ifs in history is what if Jefferson had been at Philadelphia? It’s interesting that two of America’s greatest thinkers, greatest writers, John Adams and Thomas Jefferson, were not at Philadelphia. Adams was the American minister to the Court of St. James, Jefferson the American minister to Paris, and neither of them was there.

Jefferson made a tremendous contribution. He, from Paris, sent to his friend Madison over 200 books on political theory, political thought, history. I was not able to verify it, but my surmise is that some of those books must have been about the Dutch federation, which was very instructive for Madison and the delegates when they were thinking about federalism, and, of course, Montesquieu, which was very instructive for separation of powers.

But Jefferson was not there. He did very quickly get his hands on a copy of the Constitution, and he looked at it and said, “Well, I get the concept, but where’s the bill of rights?” The answer was that there was no bill of rights, and he said, “How can you have a constitution without a bill of rights?” He said, “Every people on Earth is entitled by nature to a bill of rights that protects them against their government.”

This foreshadowed a problem: no bill of rights. George Mason was one of the members of the Virginia delegation. He had written the Declaration of Rights for the state of Virginia in 1776, a few months before Jefferson wrote the Declaration of Independence, and Jefferson relied for inspiration and for substance on Mason’s Declaration of Rights for the state of Virginia. When the convention was over, Mason would not sign the Constitution. Washington was infuriated, but this indicated a real problem, because the Constitution went into force when nine states ratified, but if you didn’t have Virginia or New York, it wouldn’t work.

And so came about one of the great informal agreements in American legal history. There was an informal agreement that if the Constitution were ratified as written by the 1787 Convention, there would be a bill of rights. Statesmen in those days kept their word, and so we had a bill of rights in 1791. The result is we have a Hamiltonian structure and a Jeffersonian Bill of Rights.

## **Separation of Powers and Checks and Balances**

There are different structures, but one of the principal ones is separation of powers and checks and balances. We use those terms often interchangeably, but they actually

have different thrusts. Separation of powers teaches that each branch of the government has a certain autonomy to act on its own. Checks and balances works the other way around: Checks and balances indicates that the government cannot operate unless the branches interact with each other.

There is a certain Newtonian metaphor to checks and balances. The Framers of the Constitutional Convention and their fellow countrymen were sons of the Enlightenment, children of the Enlightenment. Many of the Framers and many of the people over time were fascinated by all sorts of gears and balance wheels and clocks and pendulums and machines, and they could see this Newtonian metaphor with checks and balances. Two components of the Congress must act in concert, and then the Congress enacts, the President vetoes, the Congress overrides, the Court reviews, like a pendulum or a clock. This metaphor captivated the American mind.

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**THE FRAMERS KNEW THAT NO MATTER HOW BRILLIANT THE WRITTEN DOCUMENT WAS, IT REQUIRED A VIRTUOUS AND ENLIGHTENED CITIZENRY, IN THE WORDS OF THAT TIME, TO ENSURE THAT THE CONSTITUTION WOULD SURVIVE.**

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The Framers were not only good inventors; they were astute learners of human behavior. They knew that no matter how brilliant the written document was, it required a virtuous and enlightened citizenry, in the words of that time, to ensure that the Constitution would survive.

The Enlightenment was so powerful that toward the end of his life and for over 100 years after, Newton was the most famous person in the world. He was not the only Enlightenment thinker, but he was the poster boy for the Enlightenment. The average person did not read *Principia Mathematica*, his great treatise, but this idea that if the apple fell out of a tree, there was a law of nature, a universal principle that the human mind of its own force could discover, was liberating. This idea swept the world.

Who became the successor to the mantle of Newton? This was not a celebrity-crazed era, but Washington then became the most admired person in the world, and there is a connection. Washington was not the only great Founder, the only great thinker, but he was the poster boy for the American Revolution. There is a relation between the two because the Framers demonstrated that the human mind, of its own power, can discover and write the laws of the decent government, and this is the force that

separation of powers and checks and balances had in the original Constitution.

### **The Genius of Federalism**

I should mention federalism as one of the other great structures. It was a brilliant implementation. In fact, if you look at Article I—the legislative branch, the legislative power—and then look at Article II, the style is completely different. Article I sets out with great precision in Section 8 the particular powers of the Congress and what are the powers of the President. The sentences are longer; the style is different. You have to go through and in the middle of the sentence pick out “the executive power,” and then he receives foreign ministers and has the appointment power as commander in chief.

There is a reason for that. The Framers were not sure what this executive should look like, but they were confident that it would be Washington, and they trusted him to establish the tradition.

So checks and balances were not exactly a breakthrough in the prior state of the art, because Montesquieu had written about it, and you could actually see the reflection of it in England: military and permanent power in the monarch, property in the lords, numbers in the commons, an emerging independent judiciary. As I said, it is a brilliant implementation.

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**THE GENIUS OF FEDERALISM IS THAT IT IS WRONG AS AN ETHICAL MATTER, WRONG AS A MORAL MATTER, TO DELEGATE SO MUCH POWER OVER YOUR OWN LIFE TO A REMOTE CENTRAL AUTHORITY THAT YOU CAN NO LONGER PLAN YOUR OWN DESTINY AND THE DESTINY OF YOUR CHILDREN.**

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But federalism is a unique contribution of the Framers to political theory. The Framers had the idea that you have more freedom if you have two governments instead of one. You almost get intellectual whiplash: Why more freedom if you have two governments?

Many students think of federalism as being a brilliant administrative device. This was the biggest land mass since the Roman Empire to attempt a unified government. It took six weeks to get from New England to South Carolina, so if you are a business person or an astute manager, you have territorial divisions.

In the 1960s and '70s, when European statespersons and scholars were looking at American federalism to see if they could find some lessons for the European Union,

many of them thought of the American federal system as being a device of administrative convenience, and in a sense it was; but that's not the whole theory of federalism. That is not the reason for two governments. The theory of federalism, the genius of federalism, is that it is wrong as an ethical matter, wrong as a moral matter, for you to delegate so much power over your own life to a remote central authority that you can no longer plan your own destiny and the destiny of your children. That is the moral and the ethical underpinning of federalism.

### **Structure and Rights: A Stunning Synergy**

Those are the components of a Hamiltonian structure. Then, as I've indicated, there is a Jeffersonian Bill of Rights. You think there might be tension between the two, but actually there is a stunning synergy. The structural components of the federal Constitution work quite well with the Bill of Rights. The First Amendment, for example, in a way is structural. You cannot have the government work unless you have free speech, so it is structural in that sense. But it is also a substantive right. It is a right inherent in human personality, in human dignity, that you have the right of free expression and free worship.

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### **THE GOVERNMENT DOES NOT TAKE A POSITION ON WHICH PHILOSOPHY IS CORRECT, WHICH PHILOSOPHY IS INCORRECT. THIS IS FOR THE PEOPLE.**

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In thinking about the First Amendment Speech Clause, there are at least three different realms for speech protection, and I do not think any one type of speech in the Constitution is entitled to priority over any others. The first is, of course, political speech. This is essential to the human personality. It is essential to the American democracy.

But there are many people who think—and in my view, rightly so—that there are other things in the world that are more important than politics: arts, culture, religion, science, philosophy, sports; whether the umpire got it right last week; whether or not the nature of dark matter is going to be first discovered by microphysicists rather than astrophysicists. This is all part of the speech and thought and belief protected by the First Amendment. We ought not think of it just in political terms.

Then there's a third dimension. Speech is what allows you to define your persona, your personality. Your speech and your thought, your beliefs, are who you are, and this is an essential human right.

The Supreme Court in its First Amendment cases has protected speech that is hideous. We only get those cases.

We had a case recently protecting speech videos where it was described to me—I never look at these things—as women in spiked heels killing little animals. We protected that. It was protected speech. We protected speech on the day of a funeral of a serviceman killed in the Middle East. There were protesters using derogatory words about gays, saying that the military is all going to be doomed to perdition because it protects gays. This was said on the day of the funeral. The Supreme Court said it was protected speech.

At first glance, you then might think that the Court in its First Amendment jurisprudence has embraced the philosophy of moral relativism: All ideas are equal. Who are we to say that one idea is better than the other? If we were going to have a philosophical argument, you could make a very strong case that the philosophy of moral relativism—that all ideas, all art, all speech are equally good—leads to skepticism, and skepticism leads to cynicism, and cynicism is corrosive of basic human values. So it is a philosophic decision of the first order to embrace the philosophy of relativism.

So how do you explain these Supreme Court cases? It's very simple: It is not for the government to decide this. The government does not take a position on which philosophy is correct, which philosophy is incorrect. This is for the people. But that does not mean that people cannot and should not and must not debate ideas to determine what is good, what is bad, what is right, what is wrong, what is virtuous, what is evil.

Those of us who have taught in law school know that, number one, law professors use skepticism: Whatever the student says, the professor disagrees with. But that is just a method, not an end philosophy. It is just in order for you to think and to understand and to identify first principles. Again, those who have taught know that any number of our young people are reluctant to embrace some ideas as good and some ideas as bad, but please do not think that this is endorsed by the Supreme Court. It is a choice that society makes.

### **Custom, Tradition, and Technology**

Let me put it this way. I've been talking about the Constitution with a big *C*. If you talk about the Constitution of the United States, you have a capital *C*. That is the document that the Framers hammered out with Washington in 1787. It was ratified in 1789, and the Bill of Rights was added in 1791. It establishes separation of powers, checks and balances, federalism. It is a formal document that lawyers argue about, that judges interpret. That is the big-*C* Constitution.

But constitution with a small *c* is a word that had been used by historians and political theorists for centuries. Constitution with a small *c* means the sum total of customs and traditions and mores and beliefs and historical heritage that define a people.

Constitution with a small *c* in this sense was used to some extent by Plato and certainly by Aristotle, Pericles, Locke, Rousseau, Harrington, Jacques Maritain, and Michael Oakeshott. The whole point of official free speech is that the people can define their small-*c* constitution so that their country has a meaning and a purpose and a history and a destiny, and it's the small-*c* constitution that other people look to, that other countries look to, to see what the United States is, what it stands for.

If you have moral relativism as the public philosophy, you have a problem with teaching the importance of our heritage. You have a problem because teachers are reluctant to say that an American hero was good and virtuous, that one event has an ethical and a spiritual quality. Everything is the same, and the result is that young people are discouraged from finding magnificent examples in our history. In a relativist world, if you say something is important, that is an ethical judgment, and you should not make it.

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**THE WHOLE POINT OF OFFICIAL FREE SPEECH IS THAT THE PEOPLE CAN DEFINE THEIR SMALL-C CONSTITUTION SO THAT THEIR COUNTRY HAS A MEANING AND A PURPOSE AND A HISTORY AND A DESTINY.**

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This puts us, in my view, at risk. It is not just public servants who have the duty to preserve and protect and defend the Constitution of the United States. All citizens have that duty. But this requires conscientious, conscious effort. You do not believe in freedom because you pass a DNA test. Freedom is taught, and teaching is a conscientious act. All of us have the duty to preserve, protect, and defend the Constitution, but you cannot preserve what you do not comprehend. You cannot protect what you cannot transmit. You cannot defend what you do not know. This small-*c* constitution that The Heritage Foundation and so many other distinguished groups in American society contribute to must understand this.

Let me just make two more points about young people. We were in Poland, I think eight years ago in September. We went to visit the Supreme Court in Poland, and when you go to European countries you often have to go to three supreme courts: There is the constitutional court, the administrative court, and the general supreme court,

the court of general jurisdiction. They have fine judges and a fine court system.

I was teaching in Krakow for a few days, and then we went to Warsaw. We had arranged to meet with the faculty at the University of Warsaw. They explained to me that the students would not be there, because this was the third week in September, but the faculty was going to be there, so we arranged to meet with the faculty. Midway through the meeting, though, there were some notes being passed, and they said, "Oh, Justice Kennedy, we didn't realize our entering law students are here for an orientation day, and they'd like you to talk with them."

Law school in Europe is undergraduate. Very few countries in the world have a graduate law school system. So these orientation students were basically high school seniors ready to enter their freshman year of college.

I said, "I'm Justice Kennedy, here to tell you about the Supreme Court," and we started talking, and a student raised her hand and said, "checks and balances are very important in your Constitution. The President checks the Congress, and the Congress checks the President. Who checks the courts?" Very good question. We talked about that.

Then another student raised his hand, and he said, "Federalism is very important in America, but money goes to Washington, and then it goes to the states with conditions, with grants. Doesn't this undermine federalism?" So we talked about that.

Then a student raised her hand and said, "Chief Justice John Marshall is very much admired in the United States. Were all his decisions popular when he wrote them?" I said, "Wait, stop. You knew I was coming. This is pre-planned." They said, "No, you don't understand. It took you until 1787 to get your Constitution. We have been working on our constitution since the fall of the Soviet Union, and we've been studying your constitutional history since the fourth grade."

I told my wife that if I'd had that class in an American university, I would have said, "That was a great class." I told the same story that night at the dinner that the president of the university gave. He said, "That's true, but there's another thing. Under the Soviets, if you wanted to be a doctor, a scientist, an architect, a lawyer, you couldn't do it. You went into the schools, and for 50 years we had the best teachers in the world, and you saw the product of that."

In the United States, I get visits often from high school groups, and sometimes friends of our family will bring their young teenagers in. I often am quite impressed by their grasp of American history, but there are some real problems generally. We were in a place this summer

where some civic-minded people had gotten together grants for distinguished and exceptional high school students to go to Europe for two or three weeks, and they would come back and give a report. This one student had gone to Auschwitz. A mentor said, “Well, Auschwitz is very important. Question: Why is it important?” The answer: “Because that’s where *Schindler’s List* was filmed.”

You see, there must be more substance to our discourse. Yet the challenge that we have is complicated by the fact that we have new media. We have blogs and the Internet, and it is this conversation that we have in our small-*c* constitution that must strive to become more decent, more rational, more thoughtful. There was never a golden age of political debate. It was always somewhat raucous, and we cannot expect the political world or public discourse generally to be in the confines of a court case or a legal argument; but we must pay more attention to making our civic discourse more principled, thoughtful, decent.

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**MAKE NO MISTAKE: THE VERDICT IS OUT ON DEMOCRACY, AND THEY ARE LOOKING TO AMERICA, TO OUR SMALL-C CONSTITUTION, TO SEE HOW DEMOCRACY WORKS.**

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There are tremendous changes. We had a case in which the question was whether or not requiring that cable TV must carry rules for broadcasters raised a constitutional problem, and we said the technology is going so fast that we are reluctant to freeze in to the Constitution First Amendment principles based on technical mechanisms. The emergence of the Internet and Twitter and other innovations, I think, shows the validity of that. We’re going very, very fast.

But it is of immense importance that we use this new power, this new potency we have to have a civic discourse in the small-*c* constitution that is respected by the rest of the world. And make no mistake: The verdict is out on democracy, and they are looking to America, to our small-*c* constitution—that’s what other people see, not the big-*C* Constitution—to see how democracy works.

### **The Importance (and Limits) of Tolerance**

I will close by suggesting just one concept that is of some help. The Supreme Court is invited to go to the State of the Union, and we go as a matter of etiquette. As you know, there is a great rostrum for the President and the Vice President and the Speaker of the House. Then below it there is another beautiful credenza, which is the desk for the clerk of the House of Representatives. It is a

five-sided credenza with five different planes and a single plane across the front. On the sides, it says “equality, justice, liberty, freedom,” and what’s the word in the middle? I stare at this word. It is “tolerance.”

I do not know who made up these words. The “equal justice under law” on the Supreme Court pediment, high above the steps, was made up by the architect because the words seemed to balance: “equal justice under law.” I’m not sure about the provenance of “tolerance,” but it is an important word. The Framers did not use it very often, but I think in part that was because the Toleration Acts, which were a step forward in political freedom, had still a lot of baggage, and they did not want to bring in that baggage.

Second, it was just not a word used very often. It was basically a word which found its force and its legitimacy and its power and its necessity in what Voltaire wrote. Voltaire wrote in the 1760s an essay and then his dictionary of philosophy. He said, “Tolerance is the essence of humanity, because all men are activated by folly and vice.”

Again, be careful of the relativist calculus here. Tolerance does not mean that I accept your views as right; it means that I can be so strong and so certain in my views that I can defend them against yours, but in a decent and respectful way. Our European friends seem to be going in a different direction. They want the government to enforce so-called hate speech laws, laws that are not tolerant, and we have not so far chosen that direction because we think the power of speech and the power of a small-*c* constitution which is decent and respectful can shame people who are intolerant of other religions.

Of course, it does not mean that you tolerate evil. Hitler was evil, maniacal, murderous; Stalin, the same. We do not tolerate those acts. Those are evil acts. But when we think of speech, the calculus is different, and it’s the strong society that must emerge and remain strong in order to make our speech the envy of the rest of the world so that freedom can advance.

That, again, is the purpose of Heritage. And for the work of Heritage and for inviting me here, please accept my thanks.

### **Questions & Answers**

**MR. MEESE:** This is rather practical question, but you’ve spent thousands of hours reading briefs, articles, and transcripts and an equal amount of time writing and rewriting opinions. What has contributed most to your decision-making during your time on the Supreme Court? Is it the quality of the briefs, discussions with your colleagues, or the oral arguments?

**JUSTICE KENNEDY:** I've been reading briefs for over 35 years, and I have yet to find one I cannot put down in the middle. When I was circuit justice for the Eleventh Circuit, I went to meet with the attorneys and the judges in the Eleventh Circuit. I said, "Do you have any questions?" and somebody said, "How do you read all of those briefs, all that written material?" I said, "Well, I assign the cases to my clerks. They each have to read a fourth of the cases. I have to read them all, and if it's a difficult case, I bring it home over the weekend. I like opera, so I'll read it a second time with the opera, and I have one-opera and two-opera briefs."

A fellow raised his hand and said, "Well, I have a rule like that when I write those briefs. I have a one-six-pack brief and a two-six-pack brief." I said, "I remember your last one; I think it was a three-six-pack brief."

No, the briefs are very well-written. *Amicus* briefs are of tremendous importance. A high school student once said, "Are *amicus* briefs like lobbying?" and I thought that was a fascinating question. Of course, *amicus* briefs are tremendously important to help us understand the consequences of our decision.

When I first came on the Court, I thought *stare decisis* was an antiquarian exercise. I put on the green eyeshade and say, well, the trial judge got this wrong and that wrong, kind of a backwards look. But *stare decisis* is really forward-looking because you are bound by what you do, and *amicus* briefs help.

As for the oral arguments, sometimes we don't behave well; sometimes we do. A good oral argument is like a discussion of a doctoral thesis. It's very, very helpful.

So it's really all of the above. Discussions with our colleagues are mostly in writing. We do not discuss a case before it is heard, and if we do discuss, just two of us, we immediately send a memo to the others that we have talked about this case, and we think there may be a jurisdiction problem, just so we're all in the loop. It's a good process.

**MR. MEESE:** I think you've already answered this question: What do you find makes for a persuasive friend of the court brief? You've answered it in part. Would you like to add to that?

**JUSTICE KENNEDY:** Well, again, it shows the consequences of the decision, and they're of tremendous importance.

**MR. MEESE:** What's been the most difficult case you've decided?

**JUSTICE KENNEDY:** The one I'm working on now.

**MR. MEESE:** Here's an interesting historical question. When Warren Burger was chief justice, the Court decided far more cases—sometimes in the neighborhood

of 150 cases per term. The Court now decides about half that number, while there are nearly 10,000 cases every year that the parties ask the Supreme Court to hear. Is there a particular reason for a reduced caseload in recent years?

**JUSTICE KENNEDY:** We're not sure, and we talk about it. When I came to the Court, I think actually the first year we had over 150, and by April it was just a nightmare. You could barely read the things that were coming through, and with some of the justices that refused to change stuff, you had to write a concurring opinion, and then they'd change it after they saw your concurring opinion.

So 150 was far too many. Seventy-plus, 80-plus is not really the optimal capacity, I think, but we wait until we find cases where, as you know, a federal statute is declared unconstitutional or the circuits are in disagreement or there is a disagreement that involves state supreme courts.

Many of our cases come from enactments of Congress. The Bankruptcy Reform Act of more than a decade ago produced a number of cases that come up slowly. There have not been many recent major congressional enactments that produce the cases. We wonder about this, but we don't take cases because we think they're wrong. We take cases because we think our guidance is necessary.

**MR. MEESE:** Some prior justices, including on a number of occasions a particular chief justice in the past, have commented on the quality of advocacy before the Court. Do you have any observations on this subject?

**JUSTICE KENNEDY:** When I went back to our hometown of Sacramento, I had to go into the courthouse to get a document, and as I was going up the steps of the county courthouse for Sacramento County for the superior court, my heart started to beat. When I was arguing a case, I'd get really nervous.

Somebody asked me once, "Do you get nervous before you go on the bench?" I said, "No, I don't get nervous when I go on the bench." But I get very nervous when I go into the conference room with my colleagues, because I then have to argue up to four cases that we've heard that week, and I want to make sure that I don't miss anything. So I appreciate what the advocates have to go through, and they can be tremendously helpful.

Since we don't talk with each other before arguments, this is the first time that we may have an inkling of what the other justice is thinking. So at the oral argument, some of the questions of the justice are designed for another justice. I will, through a question to counsel, say, "Don't worry, Justice Scalia, I think there is standing here,"



and then he will say, again in a question to counsel, “Well, don’t be too fast, Justice Kennedy. There’s a minimum to Article III.” And if we behave well and give the counsel a chance, the counsel can enter the conversation that the Court is having with itself, and this can be a wonderful dynamic.

We’re very, very fortunate that we have a dedicated, experienced bar because that is necessary for us to understand the consequences of our work and to write an opinion that not only is understood by the parties, but gains the allegiance of the American people.

**MR. MEESE:** Justice Kennedy, we appreciate very much you being our Joseph Story Distinguished Lecturer, and we would like to present two small mementos of the occasion, as we have to each of our lecturers. First is *A Familiar Exposition of the Constitution of the United States* by Joseph Story, and second is a two-volume set of his *Commentaries on the Constitution of the United States*. We hope that this will remind you of your service to The Heritage Foundation, to the audience here, and your participation in this evening’s event.