

LECTURE

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Joseph Story Distinguished Lecture: A Conversation with Clarence Thomas *The Honorable Clarence Thomas and John G. Malcolm*

Abstract: *In a wide-ranging discussion, Supreme Court Associate Justice Clarence Thomas discusses his 25-year anniversary at the Court, multiple landmark decisions, stare decisis, touring the U.S. in a recreational vehicle, and why an autograph seeker at Gettysburg reminds him of the importance of making constitutional law accessible for everyone. He addresses the lack of public confidence in the governmental branches—and which amicus briefs he finds most compelling. Finally, Justice Thomas reminisces about his decades-long friendship with the late Justice Antonin Scalia and the rise of administrative law as a counterpoint to legal review.*

MR. EDWIN MEESE: Thank you, John, and thank you, ladies and gentlemen. It's a pleasure for me to join John Malcolm and The Heritage Foundation to welcome you to this, the Joseph Story Distinguished Lecture. This is one of Heritage's most prestigious events of the year, and we are very happy to sponsor it this evening, particularly because of the guest that I'll introduce in a moment.

The Joseph Story Lecture has traditionally been held in conjunction with two other important events of our Center for Legal and Judicial Studies. One is the Legal Strategy Forum—and so in the audience tonight we have nearly 50 CEOs and chief legal officers from the freedom-based public interest law firms of this nation. And we're happy to have them with us, particularly on this occasion.

The other event is a series that we started some years ago called the "Preserve the Constitution" series. This is one of several of these types of events in which various aspects and issues of the Constitution and the rule of law are discussed by various experts. This

KEY POINTS

- The Affordable Care Act was one of the last recent pieces of major legislation to cross the Court's docket. The real action today occurs in the administrative agencies.
- As constitutional matter, courts are obligated to be more exacting in their review of administrative law cases. Complete deference to the Chevron precedent in all cases is insufficient.
- Judicial review of agency decisions is an integral part of checks and balances, and using Chevron to shield agency decisions from review gives the agencies constitutional advantages even Article III judges do not possess.
- *[On why he takes clerks to Gettysburg]* "I always thought it was a great idea to go and to have them see it wasn't about winning an argument. It wasn't about a subject. It wasn't about just this little thing. It was about us; it's about our country. And to encourage them to remain hopeful."

This paper, in its entirety, can be found at <http://report.heritage.org/hl1282>

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Joseph Story Lecture really fits right into that pattern in which we discuss the importance of constitutional fidelity and the rule of law.

Of course, this lecture has been named in honor of one of our country's foremost judicial and legal scholars, a man who distinguished himself in so many different ways. Joseph Story was involved in politics and civic activities in his native state of Massachusetts. He was a scholar. He taught even while a justice of the Supreme Court at the Harvard Law School and was a member of that faculty, starting what I suspect was a pattern that has been imitated by many justices since that time, including our guest this evening.

He held various offices in his home town and that area and also served in the House of Representatives, representing his district in Massachusetts. He was appointed to the United States Supreme Court by James Madison in 1812, and he served until 1845, when he passed away at the age of 65.

What makes him particularly noted, as far as we are concerned, was his commitment to the Constitution of the United States as it was written. He was a true defender of that document—our foremost charter—and believed that being faithful to the text of the Constitution and how it was understood by those who wrote it and ratified it (as well as the amendments in subsequent years) was the only way in which a judge or justice could legitimately interpret that document, as they would any other legal document. It was that commitment to the Constitution that led him to write one of the foremost commentaries on the Constitution of any author in the history of the country, and it was indeed Story's *Commentaries* that are still used to understand the way in which the Constitution should be interpreted by the legal profession, by the judges, and, of course, by the members of the Supreme Court.

It's appropriate, then, that the Story Lecture tonight feature our particular guest. Clarence Thomas is a unique individual—like Justice Story. He served in all three branches of our federal government. He worked in the Senate office of Senator Jack Danforth from Missouri. He worked in the Reagan Administration in two capacities: He was first Assistant Secretary of Education for Civil Rights, and then he was Chairman of the Equal Employment Opportunity Commission [EEOC]. And then, of course, he was appointed initially by George H.W. Bush as a judge on the United States Court of

Appeals for the District of Columbia Circuit, and then ultimately as an Associate Justice of the United States Supreme Court in 1991. We mentioned, as we were discussing this before we came in tonight, that last Sunday was his 25th anniversary as a member of the Court. [Applause and cheers]

I could not introduce Clarence without also mentioning his lovely wife, Ginny, who is with us tonight. She has been a great helpmeet of his. I'm sure he would be the first to tell you. She herself has a distinguished career in this city and in our country, both in civic activities, in think tanks, as well as in TV. We're pleased to have you with us also, Ginny. [Applause]

When I say that it's very appropriate that Clarence Thomas be our Joseph Story Lecturer tonight, it's because of his lifelong (particularly in his judicial period) dedication to the Constitution of the United States. He is, in my mind, one of the clearest writers that we've ever had on the U.S. Supreme Court, and his clear writing has made it clear, if you will, that the Constitution as written should be interpreted according to those who, as I mentioned, wrote it and ratified it. And that has been an important part of preserving the thoughts and ideas that Ronald Reagan had when he first appointed him to a position in the executive branch, and what President Bush had in mind when he appointed him to two judicial positions. That is the fact that we need judges who will be faithful to the rule of law and to the Constitution itself if we're going to preserve self-government and liberty for the people of this country. At no time in our history, in my opinion, has this been more important as a concept—and more important as something to be defended—than it is at the present time. And so that is why we are so honored to have him as our guest tonight.

Randy Barnett, who I see here tonight, a constitutional law professor at Georgetown University Law Center, called then-judge and now Justice Thomas a "fearless originalist." He honors the Constitution as it was written. He went on to say, "He elevates the original meaning of the text above precedent. In other words, he puts the Founders above dead justices." [Laughter and applause]

I might add he puts them above living Justices as well. [Laughter and applause]

I think the best test of anyone appointed to any court is how the person who appointed him feels about it. That's why I think we should all be interested to know that President Bush, in talking about

him, said this about him and how proud he was of this selection. He said, “While Justice Thomas is known both for his consistently sober demeanor on the bench and his thoughtful and respected jurisprudence, he is also widely admired for his warmth among his colleagues, law clerks, and the court staff.” He wound up by saying, “He is a very good man.”

And that’s why I’m so pleased to introduce to you tonight that good man, Clarence Thomas. [Applause]

Joining him tonight in this discussion is the Director for the Center for Legal and Judicial Studies, John Malcolm, who has a distinguished career himself in law, in government, and now as the Director of this Center here at the Heritage Foundation. John, I’ll turn it over to you. Please welcome John Malcolm. [Applause]

MR. JOHN MALCOLM: Thank you. Justice Thomas, it’s a real pleasure and a privilege to be here on the stage with you. Congratulations on being on the Court for 25 years. I’d like to begin our conversation with perhaps some reflections on those 25 years. What surprised you the most about your time on the Court?

JUSTICE CLARENCE THOMAS: Well, first of all let me, John, thank... can you all hear me?

AUDIENCE: Yes.

THOMAS: Because I’m having trouble hearing myself. [Laughter] I’d like to thank General Meese for the introduction. I met General Meese in December 1980, and I consider it a distinct honor to have served with you in the Reagan Administration and to have known you now for over 35 years.

And that holds true also for Ursula [Meese]. I remember when you were being criticized heavily, and that’s an understatement, in the city. Your demeanor—your pleasant demeanor—never changed. Your positive attitude, your willingness to talk to young people and to persuade them to your ideas, but not returning fire with fire. That is much to commend and much to admire, so thank you, Ed, not only for the years together, but for your example. [Applause]

I’d also like to thank Heritage, Ed Feulner, Senator [Jim] DeMint, and all who were involved with this evening. Of course, my wife and I have made lots of trips here when she was working here, and I just love being around her, so I would come over here and see her.

But, you know, I don’t spend a lot of time thinking back over the time. We’re too busy doing our work.

I’m not a navel gazer. [Laughter] We’ve got enough navel gazers in this society. You know, I think over the last few years some things have happened at the Court—certainly last year—that changed the way that we work. And we have to be focused on that.

Now there were things you were thinking of talking about, but if I reflect back on the years, the thing that I enjoyed most are my law clerks. Love my law clerks. They make it fun. It’s the energy. And the first year was really tough. I don’t know how we survived that. But I see those clerks today, and the affection I have for them is just tremendous, because they were there at the beginning when we didn’t have systems, we didn’t have computers—when we had four cases a day.

But through the years I think I have to say the consistency, the effort to have a consistent judicial philosophy, and when you can’t, to try to explain why you’ve changed. I think you owe that to people. Try to make the work understandable, to make it make sense. And when it doesn’t make sense, to try to point out why you think it doesn’t make sense. Something like the Dormant Commerce Clause. It’s sort of like a hibernating bear or something. [Laughter] And if you can’t explain it, you know, you should at least tell people why you can’t. [Laughter] And if it doesn’t make sense, I think, as my granddaddy used to say, “Boy, it don’t make sense because it don’t make sense.” [Laughter]

But you know we try to make it accessible. We were on one of our road trips with my law clerks, and this gentleman comes up to me and boy, he’s excited. He runs up. We were at Gettysburg. And he runs up Little Round Top, you know, and he’s really perspiring. It’s like June, you know.

MALCOLM: A Civil War reenactor?

THOMAS: Oh, no. He’s just a guy. And he’s running. And he runs me down, you know. He has this fake parchment paper with an opinion on it. “I need you to sign this. I’m glad I caught up with you.” I said, “Whoa, what is this?” He said, “It’s your *Federal Maritime Commission* opinion.” [Laughter] I said, “Well, why are you here with that?” He said, “That’s what this is all about.” [Laughter] But he said, “I want to thank you because I can understand what you were saying.” And he said, “I read all your opinions because I can understand them.”

I think we are obligated to make the Constitution, and what we write about the Constitution, accessible to our fellow citizens.

MALCOLM: I assume that that empowers people by giving them a sense that the Constitution is really theirs and ought to be accessible?

THOMAS: Well, it *is* theirs. I think we hide it from them when we write in language that's inaccessible. I had a buddy of mine who was a wonderful, wonderful friend who was quadriplegic. And I remember before you had curb cuts, a curb that high—two or three inches high—was like the Great Wall of China.

MALCOLM: Right.

THOMAS: That part of the city or building was inaccessible to him. Today, of course, we have made the curbs flush with the street. So it's accessible. Well, we can kind of do that with language, too. One of the things I tell my law clerks is that genius is not putting a \$2 idea in a \$20 sentence. It's putting a \$20 idea in a \$2 sentence—without any loss of meaning. But that takes work. And it takes organization and editing, etc. But I think we owe it to people to present to them their Constitution in a way they can understand, to enfranchise them constitutionally.

MALCOLM: You mentioned that you take your clerks to Gettysburg, and I was curious about that. Why do you do that? What are some of the experiences, the reactions, you've gotten from them when you've done that?

THOMAS: They're polite. [Laughter] Actually, I was going to stop doing it, and there was some resistance to discontinuing the trip. I really enjoy it. And I read *Battle Cry*. I think to understand the 14th Amendment, in particular, in the post-Civil War era, you have to understand the Civil War first. And you have to understand our history.

That started, actually, when I was at EEOC. I wanted to understand the Founding better, and I hired a couple of guys, young men from Claremont [Institute], John Marini and Ken Masugi. I wasn't planning on being a judge: I just wanted to understand our Founding. And as a part of that you read Civil War history, you read the Lincoln–Douglas debates—all sorts of things. And I thought it would be important for my clerks to go, not just talk about the 14th Amendment, not just talk about the Equal Protection Clause, not just talk about substantive due process, but to go and feel it, to see the place, to see why. What was this about? Why did people die? To go where Lincoln delivered the Gettysburg Address, where he implores us—"the living"—to make it worthwhile, this experiment that these people who had given their last full measure.

Also, it's the end of the term. And at the end of the term you can be a little bit upset. [Laughter] These kids can see how the sausage is made and become a little bit cynical or a little bit jaded. I always thought it was a great idea to go and to have them see it wasn't about winning an argument. It wasn't about a subject. It wasn't about just this little thing. It was about us; it's about our country. And to encourage them to remain hopeful despite what they have seen, to remain idealists despite what they have seen and what has happened.

Because in these jobs a lot of negativity comes in. I mean, that's a lesson, again as I mentioned, I learned from General Meese, that you keep it together and you say, "Look, I'm experienced, I've seen how the sausage is made, but this ideal, that's all we have left is this wonderful ideal of the perfectibility of this great republic." And so that's basically the reason. Plus, it's kind of fun. [Laughter]

MALCOLM: You can contemplate, I suppose, how our country would have gone in a completely different direction if that battle had ended differently.

THOMAS: Well, yeah. If we'd lost. I mean, if [General Robert E.] Lee had won, that'd have been a problem.

MALCOLM: That's right. [Laughter]

THOMAS: More of a problem for me than you. [Laughter and applause]

MALCOLM: That's probably so. So let's stick with reflections on the last 25 years. So perhaps you'll mention your *Maritime* opinion. So opinions that you've written over the years—I remember the first time I read an opinion of yours: It just captured me. It was a 1999 opinion. It was *City of Chicago v. Morales*, in which the Court struck down an anti-loitering—really an anti-gang ordinance—and you wrote this passionate dissent saying for the supposed right to loiter of the two percent, you were condemning 98 percent of the residents—and, you know, that just hit me and has stuck with me.

I'm curious. What opinions over the course of your career have stuck with you as having been ones you're most proud of or [were] most profound?

THOMAS: I don't know. There are different types of opinions. I don't really see them as trophies. I don't think about them when I'm done. You know, the opinions that I think about are usually ones that are really hard. The *Bennis* opinion. Really, I agonized over—and then agonized throughout the summer. She lost her car. The government took her

car and her husband's car, because he was visiting a prostitute. That really bothered me a lot.

The cases like the Haitian refugees, cases where your heart goes one way, but you've got to stick with the law. Those are really hard opinions, and I think those are the ones that you think a lot about. And those are the ones where your hair begins to fall out.

But, you know, the one you mentioned, *Morales*, the thing that concerned me was I think sometimes we write these opinions or the Court decides cases, and that case, that was about keeping gangs off the street so that poor inner-city people could walk down the street, little kids could go to school. I lived in the inner city. And you imprison people if they're not capable of using public transportation or public streets.

I think sometimes, because we don't have a sense of that neighborhood, we don't really point out that side of the equation. So that was just a paragraph or so of the opinion. But I was just making that point at the end, after you went through the vagueness analysis, etc. But I don't really go back and look at specific opinions. I look at things that I need to do more work on.

I look at opinions that—for example, I taught a course on *stare decisis* and spent about a month or so preparing for that simply because people talk about it a lot, and you don't have time during the term to read thousands of pages on that. But the ones where I'm not sure is where I probably agonize over and spend more time, particularly during the summers.

MALCOLM: So we'll get to *stare decisis* a little later. Do you spend more time agonizing over the opinions in which you're trying to command a majority or about the ones in which, say, you're a lone dissenter? And how do you work that in terms of moderating your position—if you do—in order to try to bring more of your fellow Justices along to join an opinion of yours?

THOMAS: You know, I don't really have a problem writing majority opinions. I mean, I rarely have problems with that. You're an agent for the majority when you're writing for the majority. One of the things you learn at the Court over time is that everybody knows everybody. If you're honest, an honest broker, when you're writing for the majority, you really don't have a problem. So I really have never had a problem with that.

I mean, you know, any number of opinions that start out fractured, five-four, or four-four-one,

or something like that, that wind up eight-one or seven-two. So that's not a problem.

But you agonize over it if it's a technical opinion. You take something like whether or not you can patent the breast cancer gene. That's technical, so that's difficult. But it's difficult in a different way from, say, the Haitian refugee case. So, of course, you have to spend a lot of time on it. But I don't agonize over it and say, "Oh, my gosh, how'd I get this one?" But there are tax opinions that might be complicated, but you don't lose a lot of emotional energy over a tax case. [Laughter]

MALCOLM: But I was really curious, say in constitutional cases when you're trying to get some of your fellow Justices to join your opinion and see things your way, how much will you moderate your view?

THOMAS: I really don't spend a lot of time on that. [Laughter]

MALCOLM: Okay. So you're going to express your view, and whether others join you or not is...

THOMAS: If we agreed, and I'm writing for the majority, yes. I'll write a little more narrowly, a little more crisply, because someone doesn't want to go quite as far. But you don't change the principle. You might compromise and not go as far to hold the Court. You do that sometimes. But you don't change your underlying view or your underlying principle. I never do that. I haven't done that in 25 years. That doesn't mean that I don't make a mistake, but I don't believe in doing that.

So when I write separately, I try to be thoughtful. I mean, even if you go back and take a look when I wrote separately in the *McDonald* case. I would love to have been in the majority there, but I still believe we should not ignore the Privileges or Immunities Clause. And so we spent an enormous amount of time explaining the history of the Privileges or Immunities Clause and what it included. I'm not saying that I had it perfectly or anything like that, but we did a ton of work on it. You don't just throw it out.

A few years ago we did three opinions in the administrative law area, which I think is very important, and that was quite a haul because you were trying to show the implications of what we had been doing. It took a lot of extra work. Simply because I think you owe it to people, when you're breaking new ground, to explain things more thoroughly and more in-depth.

MALCOLM: But certainly with respect to *McDonald* (we can talk a little bit more about Privileges or Immunities in a bit), and certainly with respect to the administrative law decisions, which you've been talking about, your bold positions with respect to the Vesting Clauses. You've been quite out front and quite bold on that. I applaud you for that.

Well, one thing I know that's on the mind of everybody in here is you're still absorbing the impact of the passing of your good friend, Justice Antonin Scalia, last February. I'm just curious whether you could perhaps share some, you know, fond reminiscences of your time with him, either on or off the Court.

THOMAS: You know, I did not know Justice Scalia before I got to the Court. I had not met him. I had one law clerk, my first law clerk, Chris Landau, who'd clerked for him. And so he snuck me in his chambers when he wasn't in one time, and that was really the most extensive time I'd ever been at the Court before I became a member of the Court.

But when I got to the Court, Justice Scalia made it a point—you know, he has this reputation of being sort of tough, and I think unfairly treated as being aggressive in some ways. I never found that side. We might disagree on something, but it was always very, very warm and very cordial. He was also enormously respectful from the first days I was there to the last days.

Our relationship was not one—I mean, I didn't go to the Kennedy Center to see operas with him. [Laughter] I used to kid him about that. I said, "Nino, I like opera; I just don't want to be around the people who like opera." [Laughter] He always thought that was really funny. And he always thought it was really odd that I was from the South but wouldn't go hunting. And I thought it was really odd that he was from New York and New Jersey and he went hunting. [Laughter] But he would try to talk me into that, and I told him there was no good that comes from being in the woods. [Laughter]

It was absolutely delightful. I would go in his office, and we, literally, most of the time were just laughing. Sometimes he'd be a little down, and I'd try to boost him up a little bit and get him going. And one of the funny things toward the end was we were on opposite sides—he was really pretty aggressive with that 4th Amendment. So we were on the opposite sides again in a 4th Amendment case. I think it was an anonymous tip about a drunk driver. I forget which one. It might have been the DNA case: I can't remember which. But

in his opinion, it was a dissent, he said that "This is a liberty-destroying cocktail." Yeah, I said. That's a good line. [Laughter] So I said, "Nino, you think my opinion is a liberty-destroying cocktail?" "Yeah."

So at the end of the term we went to lunch, and it was the last lunch we went to as the two chambers. It's really a tradition we started early on. And he's ordering, and he's trying to figure out, "What kind of a cocktail do I have before lunch?"

I said, "Nino, how about a liberty-destroying cocktail?" [Laughter] Oh, he thought that was hilarious.

But one of my favorites is—Nino, of course, was a constitutional law expert and loved—I mean, he loved talking—and I think he must have thought I was just a wrecking ball or something, but he loved constitutional—I mean, *administrative* law, I'm sorry.

MALCOLM: Right.

THOMAS: And so we were sitting on the bench one day, and he leans over to me. He said, "Clarence. *Auer*—A-U-E-R. *Auer* is one of the worst opinions in the history of this country." "Yeah, Nino. Nino?" "Yeah." "You wrote it." [Laughter] Oh, my goodness. He couldn't remember what he had done.

MALCOLM: Thirty years is 30 years.

THOMAS: I trusted him. And we trusted each other. Even when we disagreed. If I told him I didn't agree with him, he trusted that I didn't agree with him. If he was on the other side and he had an edit, he'd call me up. And if he had a concern, I trusted him. I didn't have to look for where he was. I didn't have to talk to him. We almost never talked about cases before we voted. It was very rare. But we would almost invariably—for slightly different reasons—wind up on the same side.

He always thought it was really hilarious. He said, "How did you wind up in the same position? You're from down here, you know, you come from a barely literate family." His father was like a romance literature professor. He was from the north. I was from the south. But we wound up at the same place. I can honestly tell you I miss him.

MALCOLM: That was one of the points I remember he made in his dissent, I guess, in—perhaps it was *Obergefell*—in which he said, if we're going to make policy decisions in the Court, then that regional variation, all that stuff really matters. But, of course, if you're going about the task of actually being a judge and interpreting the law in a consistent way, then that sort of regional variation shouldn't really matter.

THOMAS: You know, he tried—very, very hard, in my opinion—to always be open to disagreements, concerns. He always cared about the big things, the principles, small things like syntax and vocabulary and punctuation. I would go by to see him, and he’s got this rack of books there, and he is booking his opinions, you know, he’s going through them. He did the small. He did the big. And he cared about it all. And that teaches you a lesson—that it all matters.

You know, after he passed away... First of all, it’s horrible. It was just horrible in every way. I normally left the bench right after him, and his office, his chambers, were next to mine, so I would be a few steps behind him because I left later. And I would catch up to him and we’d talk a bit, usually just sort of about nothing, yukking it up. The first day he was gone, I caught myself coming off the bench, taking a quick step to try to catch him. That was the poignant example of someone who’s missing. That he’s not there. I mean, there’s nobody to catch up to.

But he was—for me—a fun guy. I mean, I would often just go in, and it was not about cases. It was just to talk. And sometimes, if one of his clerks told me he was down a little bit, I’d go in and we’d laugh, and then I’d leave, and hopefully he felt a little better.

MALCOLM: And obviously the respect and admiration for each other was quite mutual.

Well, in light of this current vacancy, you know, one of these days we’re going to have another confirmation hearing, and there are a lot of people who of course believe that the confirmation process is broken. Your confirmation being one example of that. I’m curious [about] your thoughts on whether there is any hope to improve the confirmation process.

THOMAS: You know, there’s always hope. But this city is broken in some ways. I’ve been here most of my life now, and I think that we have become very comfortable with not thinking things through and debating things. That’s one of the things I love about the Court. You can actually talk to people about things. And I think that we have decided that rather than confront the disagreement and the differences of opinion, we’ll just simply annihilate the person who disagrees with us. I don’t think that’s going to work. I don’t think that’s going to work in a republic or in a civil society.

At some point, we have got to recognize that we’re destroying our institutions and we’re undermining our institutions. And we’re going to destroy them. The day is going to come, if it’s not already

here, when we need the institutions and the integrity of the institutions. So even when you disagree with people—if you notice in my opinions, I don’t attack personally my colleagues. I disagree with them, strongly, because I think it’s important for me to leave them standing and to leave the institution standing. And to sharply have the contrast and the points of view.

But I don’t think that’s going to change in this city until we get back to sort of the notion that we argue, that we debate, that we decide things based on logic and facts and reason—as opposed to who yells the loudest or who has the best narrative or best meme or some other nonsense.

MALCOLM: Well, let me build on that a little bit. Obviously there are a lot of people in this country who believe that the presidency and Congress is irretrievably broken. They’ve just lost confidence in those institutions. There are a lot of people that have lost confidence in the courts, including your Court, and really sort of view it as just being just another political branch. What do you say to people who believe that?

THOMAS: Well, I’d probably say more to us: What have we done to gain their confidence? And I don’t think people owe us, reflexively, confidence. I think it’s something we earn. And that you try to do your job in a way that they can have confidence in what you do. You try to do the hard things that they shouldn’t be doing in a way that they can have confidence in, that you can trust. And perhaps we should ask ourselves what we have done to not earn it or to earn it.

And I’m not so sure I have all of the answers to that, but one of the things I tell my clerks is you simply try to live up to the oath you took. You took an oath to show fidelity to the Constitution. You live up to it. You took an oath to judge people impartially. You live up to it. In this city that doesn’t go for much. You take heat for it or whatever. But that’s part of the job. You’re supposed to be beaten for it. You’re supposed to do your job, and so hopefully someone will run up to you one day with your *Federal Maritime Commission* opinion [Laughter]—and have a lot of confidence. He’s shaking it and saying, “This is what this is all about.”

And that doesn’t sound like a whole lot. Nobody cares. I mean, probably most people don’t even care about it. But it does mean something to you when an average citizen has confidence that you did your

job fairly. You did it right, as best you could. And he didn't say he agreed with me.

MALCOLM: Right.

THOMAS: He said he could understand it, and he accepted it because of that.

MALCOLM: Well, certainly you, and Justice Scalia, and some of your colleagues, when the Court has issued a political opinion, will call them out for that. Do you think that there's a hope of sort of reining that in? Do you hope that perhaps your colleagues, over time, will be persuaded, or what do you hope to gain by putting that out?

THOMAS: Oh, I don't know. I think that, you know, if you're going to do substantive due process you run the risk of broad policy decisions. You tend to stray far afield from law. And what Justice Scalia was saying is that you've got to have rules. It's got to do some work, you know. Nobody's really that interested in it, but that's part of the reason I dissented in the commercial speech cases, in the *Central Hudson* test. You know, it's a multifactor, four-factor test, that always takes you where you want to go.

MALCOLM: Right.

THOMAS: Well, that's not much of a test.

MALCOLM: Right.

THOMAS: I think that Justice Scalia understood, whether it was the *Lemon* test, or even the *Central Hudson* test, that we have got to have something with more teeth to it, with more grip to it, than that sort of a test. And that's the problem with substantive due process. These leave room for you to come out where you want to go as a policy preference. So I don't know whether it's people are political in the sense of the politics of the city, but the jurisprudence allows for it. It allows for that criticism.

We took criticism in, let's say in *Bush v. Gore*, or something like that. People can easily throw out and cast aspersions about a particular opinion here or there, but I think what you try to do is you do your job in a way where you know that you have applied the law in a fair way.

Some years ago, a composition of the Court that I really enjoyed was the one that was together for over 11 years, with Justices Souter, O'Connor, and Stevens. We were together a long time. And one of the things that one of my colleagues, with whom I rarely agreed, said, "Clarence, you are consistent." And I think that that is whether you're a baseball umpire or a referee in basketball, you want to call it the same way. Just call it the same way for both sides, and you can live with that.

MALCOLM: Like the *Maritime* guy. He wasn't necessarily paying you a compliment, but he said...

THOMAS: Yeah, but he could understand...

MALCOLM:... may not agree with you, but he appreciated...

THOMAS: But he never said he agreed.

MALCOLM: Right. No. I get it. Well, so I want to talk a little bit about certain provisions. You've just made reference to substantive due process. But before I do that, I want to take a slightly broader view. You said that the Constitution is not a stand-alone document, and that it can really only be properly understood in combination with the Declaration of Independence. And I wonder whether you could elaborate on that a little bit?

THOMAS: You know, my point was that we have to understand why. This was a question I was trying to answer in the mid-1980s. Why this government? Why this republic? Why isn't it something else? Why didn't we do what the French did? And so I have to start with the Declaration. Government by consent, inalienable rights, etc. And what were we protecting with this structure in our Constitution?

And I think when you look at the Constitution, which is the positive document, with the Declaration as a backdrop, you understand why this republic. Why is separation of powers so important? Why is federalism so important? Why are enumerated powers so important? Why a written Constitution? Why is it so important? Because you give up some of your rights in order to be governed. Not all of them. And it's that limitation—the protection of that liberty.

You know, I went back. I read a lot of Justice Scalia's separation-of-powers opinions this summer. And they all seem to come back to one theme: protecting individual liberty. It wasn't just to have separation of powers. It wasn't just to have federalism. It wasn't just to have enumerated powers. You had these in order to protect liberty. But where does that start? It starts in the Declaration.

MALCOLM: I always find it frustrating that people will talk about the Bill of Rights as if that's the cake, as opposed to, you know, these were 10 amendments to the actual document that was our charter of freedom that we the people were going to consent to be governed by. They ignore that those structural protections are what really gave us liberty.

THOMAS: You know, it's really interesting. I did not fully understand that until, again, sitting [at the] EEOC in the 1980s with Ken Masugi and John

Marini. And I certainly didn't get it from law school. [Laughter] Because the amendments were a big deal in law school. And we didn't even read the Constitution. But I think the structure is so important. And on the constitutional issues, perhaps that's where Justice Scalia and I saw eye to eye from the very beginning—the critical importance of the structure.

The other thing was the text. This is a written constitution. This isn't common law. This isn't like we will make it up as we go along, or common law where *stare decisis* has to lock it down. You have a written document. You have written amendments, which are really important because it's a positive document.

So I think that the structure is important—the most important part of it. The limitations built into that structure are critically important. That's why you see, for example, that I would write extensively on the Commerce Clause. You know, look what you're doing. You're eviscerating the relationship about what the national government can do. This is an enumerated power. And if you expand that, you go from regulating commerce to economic effects or effects on commerce or whatever. That's a quite different task from regulating commerce.

MALCOLM: You just touched on sort of revisiting a past precedent, *stare decisis*. I'll get to that in a moment. So you've talked a little bit about privileges or immunities, you've made some statements about substantive due process. So when you look at different clauses in terms of protecting personal liberties, economic liberties, which clauses do you sort of gravitate to? Due process clause? Equal protection clause? The Privileges or Immunities Clause? What other provisions?

THOMAS: Whatever's in the Constitution. I mean, it's all there. The Bill of Attainder is there. The 3rd Amendment's there—that we skip over. The 2nd Amendment we want to pretend doesn't exist. The 1st Amendment has, "Congress shall make no law respecting the establishment of religion." What is the establishment of religion? You know, it doesn't have a wall of separation. It has "establishment of religion." So you go back to the language. What does it mean?

And we're obligated to do that. Absolutely obligated. Or people's theories. I think Judge [Janice Rogers] Brown gave a lecture on that about these theories. These theories can spin off in a totally different direction from the limitations built into the Constitution itself. And I think that's quite important.

MALCOLM: Alright. So — that's great. You talked about limited enumerated powers for government, the structural protections. You've mentioned how the Privileges or Immunities Clause has been perhaps ignored even though it's right there. So let's talk about your view of *stare decisis*.

You have been both praised and criticized, depending on which side of the aisle you happen to be on, for being perhaps more willing than some of your colleagues to revisit past precedent. This isn't unique. I mean, sometimes the Court has, whenever it's deemed it appropriate over the course of its history, revisited precedent in some way.

But I'm curious to hear your views on *stare decisis*, on these constitutional questions, and how would you respond to your critics about this?

THOMAS: I don't. I don't really care.

MALCOLM: Okay. Let's set aside the last part of that.

THOMAS: I mean, *stare decisis* I care about. Criticism I don't.

That's why I taught this summer. I read everything I could get my hands on—on *stare decisis*. And the theory is all over the place. Justice [Arthur] Goldberg's theory was basically "It's a ratchet." As you improve civil liberties, those strict rules of *stare decisis* apply when you win those cases. But when they need to overrule cases in order to do what he thinks is the right thing, then a loose set of rules of *stare decisis* apply.

Then you get [the late Justice Louis] Brandeis. He has his rules on *stare decisis*. But he overruled *Swift v. Tyson*, which was a 96-year-old precedent. You know? Then what do you do with *Plessy*? You know? When you get *Brown*. So you've got lots of precedents out there that have been changed. You have Justice [William] Brennan redoing the Political Question Doctrine in *Baker v. Carr*. I'm not saying he overruled anything but, boy, it didn't look like it used to look. [Laughter]

But the point is that they change a lot of things, and when people get what they want, then they start yelling *stare decisis*, as though that is supposed to stop you. That's like the "bogeyman" or something. I think that the Constitution itself, the written document, is the ultimate *stare decisis*. That it is written. [Applause]

Caleb Nelson has, I think, a nice piece. I'm not saying it's totally right, but Caleb is very thoughtful on *stare decisis*. And he makes a point. If you have

a choice between two—if the statute allows you to choose between A and B, and you would, on a clean slate, choose B, but the Court’s already chosen A, you give that *stare decisis*. Because the choices were there: The Court has chosen. You don’t change it. But if the Court has chosen C when the statute gave you A and B, then that is clearly erroneous. Everybody thinks that that does not deserve *stare decisis*.

But now let’s just apply it to something else. Let’s say the *Slaughter-House* case on Privilege or Immunities Clause. “*Slaughter-House* case is wrongly decided.” Well, my point in *McDonald* wasn’t I had the answer. I didn’t say that. I said, If everybody agrees it’s wrongly decided, then why are we applying it? [Laughter] That’s it. As simple as that.

And I think we have to do more than like just zip up. We have to just say we’re not applying it for these reasons. It leaves you wanting an explanation.

MALCOLM: Right.

THOMAS: So I wasn’t trying to grandstand or anything. And that goes back to my FMC [*Federal Maritime Commission*] guy—that we owe him an explanation. Even if you come out the other way, you owe him an explanation. We all agree *Slaughter-House* is wrongly decided. It has had a profound effect on this country. You know it, and I know it, that when you guarantee citizenship to people, the privileges or immunities of citizenship that cannot be impinged upon, and then you read it out of the Constitution or you trivialize it or you minimize it.

If I said to you, “John, you’re a member of my club. You have all the privileges or immunities of membership in this club,” then I rewrite the privileges or immunities to mean you get to ride the elevator once a week—and that’s it. You’d say, “Boy, that’s a heck of a membership.” [Laughter] “Everybody else is swimming and they’re in the gym or they’re in the sauna, and I just get to ride the elevator once”—that’s the way I feel about the Privileges or Immunities Clause.

And as I said to you about the battle at Gettysburg, I have a personal interest in this. I lived under segregation. And we talked all around these things. This is at the very heart of it. Go back to *Dred Scott*. Here you have [late Justice Roger] Taney— what did he say? That no black could be a citizen for the purpose of diversity jurisdiction, and he goes on and on and on about the other stuff—the Kansas–Nebraska Act, etc.

Now, the 13th, 14th—particularly the 14th Amendment—answer his question. It guaranteed

that citizenship and all the privileges and immunities of citizenship. And then we sit here and we read it out of the Constitution.

Anyway, you said, “Why do you get passionate about it?” It is the heart and soul; it’s not just a subject. It’s not just a theory. It is what makes it all work. It was a way to perfect a blemish on this country’s history. That is the blemish of slavery. It was the big contradiction, and we fought a war over it.

MALCOLM: It’s interesting how you approach *stare decisis*. It really is sort of once you get what you want—it’s a one-way ratchet. You get what you want and then, all of a sudden, it becomes settled law, which ought not to be revisited.

THOMAS: If I were on the court of appeals or the district court, then I have to apply the precedent. And I did that for the two minutes I was on the D.C. Circuit. [Laughter] And I would do that. I would faithfully do that. But we are at a different place, and I believe we are obligated to think things through constantly, to reexamine ourselves, to go back over turf we’ve already plowed, to think it through, to torment yourself to make sure you’re right.

MALCOLM: You made reference before to the fact that you used to have four cases that you would hear a day, so I mean the Court used to hear 140, 150 cases. Now you hear about 70. How did this come to be? And is this a positive development or a negative development? What are your thoughts about that?

THOMAS: Well, if you think they’re rightly decided, it’s a positive development. Or actually, if you think that we have been wrongly deciding cases, it’s a positive development.

You know, I don’t know. Everyone comes to the Court thinking that there are more cases to grant cert [a writ of certiorari] in. And then we wind up doing exactly what we were doing before. When I got to the Court it was close to 120 cases or so. And that was a lot. And the Court had been doing 150 or so at some point. I think around 110 or so would be good—100 to 110. But I don’t see any prospects with our discretionary jurisdiction that that’s going to happen any time soon.

Also, take this into consideration. Other than the health care, the Affordable Care Act, which seems like a kind of a misnomer considering all the things that are going on. [Laughter] The Affordable Care Act was one of the last pieces of major legislation, one of the few pieces of major legislation. So it’s not like you have a lot of that.

Where the real action occurs is actually in the agencies—in the administrative agencies. So I don't know if there's that much legislation that's actually going on that requires review.

When I first got to the Court, we still had a new bankruptcy code, and we had quite a few of those cases. At one point we got into AEDPA [the Antiterrorism and Death Penalty Act of 1996] in the criminal area, so we had a ton of litigation there. And what we're doing in the area of criminal law and the collateral review—which is God only knows what. I think you're going to get a lot of review in the lower courts on that. But there's not been major legislation. So I don't know what the source of the litigation would be.

The other thing is—I don't know the total impact of this—but a lot of the cases are being siphoned off or being diverted to mediation or arbitration, and we have a very light review of that under the Federal Arbitration Act. So they're not coming up like just the normal commercial litigation through the federal court system. They're off to the side. And I think that may be a cost consideration for the companies that are engaged in this.

MALCOLM: You were mentioning, before, that there's very little legislation, and regardless of whether you happen to like the Affordable Care Act or don't like the Affordable Care Act...

THOMAS: Well, I understand that...

MALCOLM: No, no, I understand that. It's certainly bad for the country that that was done on, you know, such a one-sided basis.

THOMAS: Remember John said that. I didn't say it.

MALCOLM: No, I totally get that. [Laughter]

But one interesting point is that obviously that legislation and many other bills that pass when they pass, do exactly what you just said, which is they say, "I'm going to empower some agency to go out and do good"—basically, some nebulous direction. And the agencies are off, then, effectively performing the legislative function. Then they're executing them so they are performing an executive function. They then often have these tribunals, so they're performing a judicial function.

How do you approach those sorts of cases when you're trying to interpret law and think about, where the line is? You made reference to Justice Scalia's statement about *Auer*. How do you approach those cases sort of differently when you're thinking about taking them up and deciding them?

THOMAS: You know, I do my job. To be honest with you, I think if a case is cert-worthy, you take it. Then if there's a split, there's a big issue, it's preserved. You take the case. I don't get into, "We may not win this." That's not my job. My job is to decide cases—cases and controversies.

The administrative law area is obviously complicated. But it's our job. And it's complicated by things like *Chevron*. It's complicated by our willingness to say, "Oh, let the expert agency decide," and then give them all this running room. More running room, by the way, than we would give an Article III judge.

MALCOLM: Oh, right.

THOMAS: I've written extensively in these areas, and it isn't because I had any ax to grind. I did not have an ax to grind. But I do think that when we don't review things, we abdicate our responsibilities.

There are checks and balances in our system. A part of the check from the judicial standpoint is to review the cases. You don't review cases when you say, "Oh, we defer" to virtually anything the agency does. That's not a review. We don't do that to a district judge, and district judges are Article III judges. They have the same status, and courts of appeals have the exact same status we have. But we do that to the agencies.

I think that as just a constitutional matter, we are obligated to be more exacting in our review. That doesn't mean you don't show them some deference. But I think we're obligated to do more than just wave our hands at it and say, "Well, *Chevron*," and be done with it. That's no review at all.

MALCOLM: How helpful do you find *amicus* briefs?

THOMAS: Which ones? [Laughter]

MALCOLM: Well, I'll leave it to you. Do you read all the *amicus* briefs in all the cases?

THOMAS: No.

MALCOLM: How do you go about picking which ones to read?

THOMAS: I mean, if you have 30 *amicus*...

MALCOLM: Yeah, I know. It's huge.

THOMAS: Yeah. There are people who are credible. The ACLU [American Civil Liberties Union], for example, is credible. You find people that you may not agree with what they say, but they're good. So that's a good brief you should read. The U.S. government—you read that. You read the briefs of states, if it's something that, say, 10 states are writing. But some people, like Law Professors for a Better World

[Laughter]—that’s sort of a one-off kind of group. I mean, you might go through it.

MALCOLM: Right.

THOMAS: You know, they start out with some polemic or something like that. There was an excellent *amicus* brief we had by electrical engineers supporting neither party. [Laughter] And it had to do with a grid. They were explaining an electrical grid. And I just thought it was just excellent. Because I didn’t know what the heck a grid was, and neither party was explaining it. So these engineers actually helped the Court. They were friends of the court. You run across these in technical cases, too. Somebody, it might be sort of an intellectual property group that might explain, say, a technical patent area. Then that is a good brief.

MALCOLM: So you’re going, “Whew, thank you.”

THOMAS: Yeah. For me a brief, if it is thorough, if it is honest, if you can look at that and say, “This is an honest broker. This person, you don’t agree with that position, but this is an honest brief,” then you read it. For the repeat people, you read it again. Or if they make a point, a good point, you will read their next brief. But if it’s just sort of a one-off, you don’t spend a lot of time with those. Unless it’s a party.

MALCOLM: I assume you read those briefs. [Laughter] So, you and Ginny, I gather, go during the summers, and you head off on a bus and you travel the country.

THOMAS: Two days I spent on my bus.

MALCOLM: That was a shame.

THOMAS: *Stare decisis*.

MALCOLM: — You’ve got to work it better this summer. [Laughter] But tell us a little bit about some of the great experiences you’ve had, why you do that, and how does that help revive you?

THOMAS: This, first of all, is a wonderful country, and we fly over most of it. We fly from destination to destination. I had never been to east Tennessee. I grew up in Georgia. And the thing about segregation, and we have it going on with things like political correctness and all sorts of things in our society now, it created fear. You couldn’t talk to each other. You couldn’t go anywhere.

So the fear in Georgia was I couldn’t go to small towns. I do that with my mother now. I wanted to see small towns, to see our country. And now that I can do that without fear. We thought we would do it. My poor wife—she let me do it, and she came along, and now we both love it now. We’ve got the same bus we’ve had for 17 years.

This is east Tennessee. Have you ever been Cades Cove, for example? Or have you ever been to Sevierville and Dolly’s—what was it?

MALCOLM: Dollywood?

THOMAS: Dollywood, yeah. What did we go see with the horses? Yeah. Anyway, we’ve been to a lot of different things. We’ve been out to the West. We like the mountains. We get down to Florida.

But most of all, you see the citizens of this country. An RV park is very, very democratic with a small “d.” It is some of everybody there. The people are camping out of the back of a motorcycle, which is really interesting to see. [Laughter] The first time we went, we had a 40-foot coach, and we were next to this little teardrop thing that was about the size of this table, and this is really embarrassing—the truck stops, Flying J. Pilot. I run into people.

So it was right after *Bush v. Gore*. You asked me this —

MALCOLM: Yeah.

THOMAS: I love this stuff. I love the bus. I love the diesel stuff. I love the people—the truckers, everybody. I love it all.

I’ll give you just two stories. So, *Bush v. Gore*, which—whether you know it or not—was a bit controversial, right? [Laughter]

MALCOLM: So I am told.

THOMAS: Oh boy, you talk about feeling the heat around here. So I had to take my bus down to Florida the week after *Bush v. Gore*. So I certainly took security with me that time. I stopped south of Brunswick, Georgia, to refuel at the Flying J. And it’s not like a car, you know. It’s a real professional thing when you do a bus. You got to put your fueling gloves on and look around like you know what the heck you’re doing. And all these eighteen-wheelers around, you know, and I’m like pretending.

And this trucker comes up to me and says, “Anybody ever tell you you look like Clarence Thomas?” [Laughter] And so I said to him, “Yeah.” And he said, “I bet it happens all the time, doesn’t it?” [Laughter] And then he went on about his business. [Laughter]

So all these things happen to you on the road. Oh God, it’s great. Even the breakdowns are great. So we were in Pennsylvania. You’re going up these mountains—Endless Mountains, that was it. So you get up the top; the bus was dying. So finally we pulled into a truck stop, into a Flying J in Pennsylvania, after we got out of New York, and we look around. There’s these two guys, and it’s a little mobile van

repairing shop, with a half a set of teeth between them. [Laughter]

But they knew how to fix diesel motors. And we were back on the road. That's the kind of thing. And these guys were great. They were great to talk to. I mean, you have to try to figure out some things. [Laughter] But it was absolutely wonderful. Everything about it—I love it. This is a great country. We've done about 40 states, and met a lot of people, been a lot of places, and it's freedom for me.

MALCOLM: And I assume most people don't know who you are, so that...

THOMAS: Most people don't care. [Laughter]

MALCOLM: But it's refreshing, I would think.

THOMAS: For me it is.

MALCOLM: Yeah.

THOMAS: It shows you the constituency for the Constitution. It shows you it's not this city. It's not the people who are doing all the talking and all the prevaricating. It's just a person camping out of the back of his motorcycle, who wants to be left alone.

MALCOLM: Right.

THOMAS: Who wants to enjoy his country, wants to raise his family or her family, and they're just friendly. If you go to an RV park, people wave, they come by. Sometimes they're too friendly. You just want to sit there, and they want to come and chitchat. And they don't know you from a hill of beans, but they're just friendly. So I think that it has shown me a part of the country that you wouldn't normally see. I would not have seen it in Georgia, and I would not see it from Washington, D.C., which are two very different perches, but both in their own way [are] limited perches.

MALCOLM: Right. Well, in a moment I'm going to bring Ed Meese back up here for a special presentation. Then I would ask, afterwards, if the people here in the audience would remain seated for a few moments while Justice Thomas leaves.

But I do have to ask you one more question, which is any chance for a national title for the Nebraska Cornhuskers this year?

THOMAS: Hey.

MALCOLM: They're seventh in the country.

THOMAS: We will be undefeated until we're robbed. [Laughter and applause]

MALCOLM: Perfect answer.

MEESE: Well, I think we all would agree that we've been treated to a great evening here with Justice Thomas. [Applause]

Justice Thomas, if you would join me here. We have something to present to you. This is our Defender of the Constitution Award. We only give one a year. And we don't do it every year unless we have a real defender. [Laughter] It says, "The Honorable Clarence Thomas, Defender of the Constitution Award, The Heritage Foundation, 2016." Congratulations. [Applause and cheers]

What I'm about to do ought to be called the "Coals to Newcastle Award," because I'm giving you a set of the *Commentaries on the Constitution*, written by Joseph Story, which you can probably add to the set you already have in your office. This is for your home. Or even better, for the bus. [Laughter]

THOMAS: Do you mind if I share it with colleagues?

MEESE: Ha ha, yeah. [Laughter and applause]

MEESE: Well, I think this might be a better one for the colleagues, because it's the short version. [Laughter] But it's called *The Familiar Exposition of the Constitution of the United States* by Joseph Story, and I have a particular interest in this because I was privileged to write the foreword. [Applause and cheers]

—*The Honorable Clarence Thomas is Associate Justice of the United States Supreme Court. John G. Malcolm is Vice President of the Institute for Constitutional Government at The Heritage Foundation. This lecture was given on October 26, 2016, at The Heritage Foundation in Washington, D.C., as part of the Joseph Story Distinguished Lecture series.*