

# American Enterprise Institute for Public Policy Research

## *Text of United States Supreme Court Justice Clarence Thomas' Lecture*

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It is very tempting to confine my talk tonight to the subject that I am most familiar with: the law and my years at the Court. But, even though straying from that narrow ground may be hazardous, I am going to speak more broadly tonight—as a citizen who believes in a civil society, and who is concerned because too many show timidity today precisely when courage is demanded.

Judges do not cease to be human beings when they go on the bench. In important cases, it is my humble opinion that finding the right answer is often the least difficult problem. Having the courage to assert that answer and stand firm in the face of the constant winds of protest and criticism is often much more difficult.

As Alexander Hamilton wrote in *The Federalist* No. 78, "It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community." This point is rarely stressed enough.

The trait that Hamilton singles out—fortitude—is fundamental to my philosophy of life, both as a judge and, more fundamentally, as a citizen of this great nation.

I've heard that the great UCLA basketball coach John Wooden taught his players how to play the game by first teaching them how to lace up and tie their shoes. Making the right decisions as a judge requires a similar focus on fundamentals. Long before walking onto the Court, one must be clear about how to conduct oneself as a human being and as a citizen. One must be clear and confident about one's judicial philosophy, and have the courage to stand by the decisions that an honest adherence to the law requires.

On July 1, 1991, when I arrived at President Bush's home in Kennebunkport, he invited me to join him in the sitting area of his bedroom. During that very brief meeting, he asked me only two questions. First, could my family and I endure the confirmation process? Not knowing what was in store for us, I answered yes.

The second question was simply whether I could "call it as I saw it" when I became a member of the Court—whether I could rule on the law, and not my personal opinions. To that, I also answered yes.

In a perfect world, the second question would be the only one members of the Court should ever have to answer, either to a president or to the legislators who confirm their appointments. Judges could then focus their energies on the substance of their decisions,

which is more than enough to occupy anyone's spirit or intellect. I wish it were that simple. But judges can be buffeted by strong winds that tear them away from the basic principles they have sworn to safeguard. Fulfillment of our oath requires us to have both a clear understanding of the principles that allow us to "call it as we see it," and the fortitude to stand by those principles and the decisions that rest upon them.

I'd like to reflect tonight upon those two questions: judicial principles and the question of courage in American political life.

If we are to be a nation of laws and not of men, judges must be impartial referees who defend constitutional principles from attempts by particular interests (or even the people as a whole) to overwhelm them. By insulating judges from external retaliation and from internal temptations of ambition, the framers hoped that the judiciary would be free of pressure not only from the government, but also from the people.

Life tenure and an irreducible salary exist only to help judges maintain their independence and, hence, their impartiality. Impartiality is central to judging and to being a judge. When deciding cases, a judge's race, sex, and religion are not relevant. A judge must push these factors to one side, in order to render a fair, reasoned judgment on the meaning of the law. A judge must attempt to keep at bay those passions, interests, and emotions that beset every frail human being. A judge is not a legislator, for whom it is entirely appropriate to consider personal and group interests. The ideal of justice is to be blind to such things.

In addition to these personal challenges, judging is difficult, because the Constitution itself is written in broad, sometimes ambiguous terms. And, unfortunately the Constitution does not come with Cliffs Notes or a glossary. When it comes time to interpret the Constitution's provisions, such as, for instance, the Speech or Press Clauses, reasonable minds often differ on their exact meaning. But that does not mean that there is no correct answer, that there are no clear, eternal principles recognized and put into motion by our founding documents. These principles do exist. The law is not a matter of purely personal opinion. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.

When struggling to find the right answer to a case, judges should adopt principles of interpretation and methods of analysis that reduce judicial discretion. Reducing discretion is the key to fostering judicial impartiality.

The greater the room for judicial discretion, the greater the temptation to write one's personal opinions into the law. This is especially important at the Supreme Court, where many of the usual limitations on judicial discretion, such as authority from a superior court or state decision, either do not exist, or do not exist with the same strength as with other courts. Hence, other doctrines and principles designed to narrow discretion and to bolster impartiality assume greater significance for the Court.

When interpreting the Constitution and statutes, judges should seek the original understanding of the provision's text, if the meaning of that text is not readily apparent. This approach works in several ways to reduce judicial discretion and to maintain judicial impartiality. First, by tethering their analysis to the understanding of those who drafted and ratified the text, modern judges are prevented from substituting their own preferences for the Constitution.

Second, it places the authority for creating the legal rules in the hands of the people and their representatives, rather than in the hands of the judiciary. The Constitution means what the delegates of the Philadelphia Convention and of the state ratifying conventions understood it to mean; not what we judges think it should mean.

Third, this approach recognizes the basic principle of a written Constitution. "We the people" adopted a written Constitution precisely because it has a fixed meaning, a meaning that does not change. Otherwise we would have adopted the British approach of an unwritten, evolving constitution. Aside from amendment according to Article V, the Constitution's meaning cannot be updated, or changed, or altered by the Supreme Court, the Congress, or the President.

Of course, even when strictly interpreted as I believe it should be, the Constitution remains a modern, "breathing" document as some like to call it, in the strict sense that the Court is constantly required to interpret how its provisions apply to the Constitutional questions of modern life. Nevertheless, strict interpretation must never surrender to the understandably attractive impulse towards creative but unwarranted alterations of first principles.

Another principle of self-restraint derives from the nature of the legal analysis we employ. It is always tempting to adopt balancing tests, or to rest one's decision on the presence of several factors. Judges can then say that they decided the case on its facts, thereby preserving some degree of flexibility for the next case. While this may be appropriate for trial courts, or for state courts, it is seldom the best approach for the Supreme Court or a federal appellate court. Whenever possible, the Court and judges generally should adopt clear, bright-line rules that, as I like to say to my law clerks, you can explain to the gas station attendant as easily as to a law professor.

Rules not only provide private parties with notice, but also limit judicial discretion by narrowing the ability of judges in the future to alter the law to fit their policy preferences. Broader rules are more likely to be impartial as to how they affect specific parties. Thus, clear rules—along with life tenure and an irreducible salary—encourage judges to maintain their impartiality.

A judge who strictly adheres to the rules of impartiality and judicial restraint is likely to reach sound conclusions. But as I've said, reaching the correct decision itself is only half the battle. Having the courage of your convictions can be the harder part.

My beliefs about personal fortitude and the importance of defending timeless principles of justice grew out of the wonderful years I spent with my grandparents; the years I have spent here in Washington; and my interest in world history, especially the history of countries in which the rule of law was surrendered to the rule of fear, such as during the rise of Nazism in what was one of the most educated and cultured countries in Europe at the time.

I have now been in Washington D.C. for more than two decades. When I first arrived here in 1979, I thought that there would be great debates about principles and policies in this city. I worked as a legislative assistant for Senator John C. Danforth. I expected these great debates to occur in the Senate. Like so many of you, I was surprised to see soliloquies spoken in almost empty chambers, and unspoken statements included in the Congressional Record as though spoken.

For some reason that now eludes me, I expected citizens to feel passionately about what was happening in our country, to candidly and passionately debate the policies that had been implemented, and suggest new ones. I was disabused of this heretical notion in December of 1980, when I was unwittingly candid with a young Washington Post reporter. He fairly and thoroughly displayed my naive openness in his op-ed about our discussion, in which I had raised what I thought were legitimate objections to a number of sacred policies, such as affirmative action, welfare, school busing—policies that I felt were not well serving their intended beneficiaries. In my innocence, I was shocked at the public reaction. I had never been called such names in my entire life.

Why were these policies beyond question? What or who placed them off limits? Would it not be useful for those who felt strongly about these matters, and who wanted to solve the same problems, to have a point of view and to be heard? Sadly, in most forums of public dialogue in this country, the answer is no.

It became clear in rather short order that on the very difficult issues such as race there was no real debate or honest discussion. Those who raised questions that suggested doubt about popular policies were subjected to intimidation. Debate was not permitted. Orthodoxy was enforced. When whites questioned the conventional wisdom on these issues, it was considered bad form; when blacks did so, it was treason.

These "rules of orthodoxy" still apply. You had better not engage in serious debate or discussion unless you are willing to endure attacks that range from mere hostile bluster to libel. Often the temptation is to retreat to complaining about the unfairness of it all. But this is a plaintive admission of defeat. It is a unilateral withdrawal from the field of combat.

Today, no one can honestly claim surprise at the venomous attacks against those who take positions that are contrary to the canon laid down by those who claim to shape opinions. Such attacks have been standard fare for some time. Complaining about this obvious state of affairs does not elevate one's moral standing. And, it is hardly a substitute for the courage that we badly need.

If you trim your sails, you appease those who lack the honesty and decency to disagree on the merits, but prefer to engage in personal attacks. A good argument diluted to avoid criticism is not nearly as good as the undiluted argument, because we best arrive at truth through a process of honest and vigorous debate. Arguments should not sneak around in disguise, as if dissent were somehow sinister. One should not be cowed by criticism. In my humble opinion, those who come to engage in debates of consequence, and who challenge accepted wisdom, should expect to be treated badly. Nonetheless, they must stand undaunted. That is required. And, that should be expected. For, it is bravery that is required to secure freedom.

On matters of consequence, reasons and arguments must be of consequence. Therefore, those who choose to engage in such debates must themselves be of consequence.

Much emphasis these days is placed on who has the quickest tongue, and who looks best on television. There seems to be an obsession with how one looks to others; hence, a proliferation of public relations professionals and spin doctors. As I was counseled some years ago, perceptions are more important than reality. But this is madness. No car has ever crashed into a mirage. No imaginary army has ever invaded a country.

It is sometimes thought that we must all have some great insight into life and the intellect of the great philosophers. Obviously, it is quite important that we have people of ideas and intellect. It is awe inspiring to read the works of Gertrude Himmelfarb, Michael Novak, Michael Ledeen, Judge Bork, and others in this audience. But as much as great works of genius are necessary, they are insufficient. This is particularly so when the responses are not of the intellect. It does no good to argue ideas with those who will respond as brutes. Works of genius have often been smashed and burned, and geniuses have sometimes been treated no better.

But, there is much wisdom that requires no genius. It takes no education and no great intellect to know that it is best for children to be raised in two parent families. Yet, those who dare say this are often accused of trying to impose their values on others. This condemnation does not rest on some great body of counterevidence; it is purely and simply an in-your-face response. It is, in short, intimidation. For brutes, the most effective tactic is to intimidate an opponent into the silence of self-censorship.

In September of 1975, the Wall Street Journal published a book review by Michael Novak of Thomas Sowell's book, *Race and Economics*. The opening paragraph changed my life. It reads:

Honesty on questions of race is rare in the United States. So many and unrecognized have been the injustices committed against blacks that no one wishes to be unkind, or subject himself to intimidating charges. Hence, even simple truths are commonly evaded. This insight applies with equal force to very many conversations of consequence today. Who wants to be denounced as a heartless monster? On important matters, crucial matters, silence is enforced.

Some years ago, I wrote a dissenting opinion which argued that a prisoner who had been beaten but only received minor injuries could not, in this case, base a claim on the "cruel and unusual punishment" clause of the 8th Amendment. Now, there are obviously different, legitimate points of view on this case. If not, I would not have been in dissent.

But what is striking is that I was widely denounced for advocating the beating of prisoners, which is ridiculous. When a wrong is done, justice requires that it be weighed impartially. The critics weren't content to argue that I was analytically wrong—that I had misinterpreted the law in making my decision—rather, they sought my conformity, or, in the alternative, my silence.

Even if one has a valid position, and is intellectually honest, he has to anticipate nasty responses aimed at the messenger rather than the argument. The objective is to limit the range of the debate, the number of messengers, and the size of the audience. The aim is to pressure dissenters to sanitize their message, so as to avoid being subjected to hurtful ad hominem criticism. Who wants to be calumniated? It's not worth the trouble.

But is it worth it? Just what is worth it, and what is not? If one wants to be popular, it is counterproductive to disagree with the majority. If one just wants to tread water until the next vacation, it isn't worth the agony. If one just wants to muddle through, it is not worth it. In my office, a little sign reads: "To avoid criticism, say nothing, do nothing, be nothing."

None of us really believes that the things we fear discussing honestly these days are really trivial—and the reaction of our critics shows that we are right. If our dissents are so trivial, why are their reactions so intense? If our ideas are trivial why the headhunting? Like you, I do not want to waste my time on the trivial. I certainly have no desire to be browbeaten and intimidated for the trivial.

What makes it all worthwhile? What makes it worthwhile is something greater than all of us. There are those things that at one time we all accepted as more important than our comfort or discomfort—if not our very lives: Duty, honor, country! There was a time when all was to be set aside for these. The plow was left idle, the hearth without fire, the homestead, abandoned.

We all share a reasonable and, in many ways, admirable, reluctance to leave the safety and peacefulness of private life to take up the larger burdens and challenges of active citizenship. The price is high, and it is easier and more enjoyable to remain within the shelter of our personal lives and our local communities, rather than the larger state. To enter public life is to step outside our more confined, comfortable sphere of life, and to face the broader, national sphere of citizenship. What makes it all worthwhile is to devote ourselves to the common good.

When one observes the pitched battles that rage around persons of strong convictions, who do not accept the prevailing beliefs of others, it is no wonder that those who might

otherwise wish to participate find more hospitable outlets for their civic interests. When one of my friends began feeling the urge to get involved, his spouse glared at him and said, "Don't even think about it. We love our life the way it is." And that is not an unreasonable perspective, not at all. But is reasonableness always our standard of review on this question? I hope not.

During my youth there were many wonderful sayings, now considered trite, that provided cryptic, yet prescient guidance for my life. Among them was one based on Luke 12:48: "To whom much is given of him much is required." Perhaps such sentiments are embarrassing in sophisticated company today, but I continue to believe this with all my heart.

I do believe that we are required to wade into those things that matter to our country and our culture, no matter what the disincentives are, and no matter the personal cost. There is not one among us who wants to be set upon, or obligated to do and say difficult things.

Yet, there is not one of us who could in good conscience stand by and watch a loved one or a defenseless person—or a vital national principle—perish alone, undefended, when our intervention could make all the difference. This may well be too dramatic an example. But nevertheless, put most simply: if we think that something is dreadfully wrong, then someone has to do something.

In the spring of 1980, I received a call asking if I had any interest in going to the Office for Civil Rights in the Department of Education. Until then, for the good of my career, I had assiduously avoided any work that was related to civil rights and frankly I had no interest in such a position. Then a dear friend of mine, Jay Parker, spoke to me about it, insisting that these issues were of great importance to me, and that I had a point of view that should be a part of the policy process and the continuing debate.

I had to admit that what happened in this area did mean a lot to me. But I didn't want to be the one arguing publicly for policies that would raise the ire of the civil rights establishment. I had just gotten a taste of the penalties for candor and honesty as a result of the Washington Post op-ed, and I had no interest in a repeat performance. There is, of course, such a thing as self-preservation. Also, I was insulted that I was being offered the job for no reason other than my race.

I hesitated, unsure of how to proceed. But Jay Parker's final words of advice to me were compelling: "Put up or shut up." What a choice!

But he was right. Even with all the complications, in the end the choice is just that stark. One might shut up when it doesn't matter, but when it really counts, we are required to put up.

It goes without saying that we must participate in the affairs of our country if we think they are important and have an impact on our lives. But how are we to do that? In what manner should we participate?

Today, there is much talk about moderation. It reminds me of a former colleague at the Equal Employment Opportunity Commission who often joked that he was a "gun-toting moderate" — a curiously oxymoronic perspective. Just think of that, dying over half a loaf. I do not believe that one should fight over things that don't really matter. But what about those things that do matter? It is not comforting to think that the natural tendency inside us is to settle for the bottom, or even the middle of the stream.

This tendency, in large part, results from an overemphasis on civility. None of us should be uncivil in our manner as we debate issues of consequence. No matter how difficult it is, good manners should be routine. However, in the effort to be civil in conduct, many who know better actually dilute firmly held views to avoid appearing "judgmental." They curb their tongues not only in form but also in substance. The insistence on civility in the form of our debates has the perverse effect of cannibalizing our principles, the very essence of a civil society.

That is why civility cannot be the governing principle of citizenship or leadership. As Gertrude Himmelfarb observed in her book, *One Nation, Two Cultures*, "[t]o reduce citizenship to the modern idea of civility, the good-neighbor idea, is to belittle not only the political role of the citizen but also the virtues expected of the citizen—the 'civic virtues,' as they were known in antiquity and in early republican thought."

These are the virtues that Aristotle thought were necessary to govern oneself like a "freeman"; that Montesquieu referred to as the "spring which sets the republican government in motion"; and that the Founding Fathers thought provided the dynamic combination of conviction and self-discipline necessary for self-government.

Gertrude Himmelfarb refers to two kinds of virtues. The first are the "caring" virtues. They include "respect, trustworthiness, compassion, fairness, decency." These are the virtues that make daily life pleasant with our families and those with whom we come in contact.

The second are the vigorous virtues. They include courage, ambition, and creativity. These heroic virtues "transcend family and community and may even, on occasion, violate the conventions of civility. These are the virtues that characterize great leaders, although not necessarily good friends."

She notes that the vigorous virtues have been supplanted by the caring ones. Though they are not mutually exclusive or necessarily incompatible, active citizens and leaders must be governed by the vigorous rather than the caring virtues. We must not allow our desire to be decent and well-mannered people to overwhelm the substance of our principles or our determination to fight for their success. Ultimately, we should seek both caring and vigorous virtues—but above all, we must not allow the former to dominate the latter.

Again, by yielding to a false form of "civility," we sometimes allow our critics to intimidate us. As I have said, active citizens are often subjected to truly vile attacks; they

are branded as mean-spirited, racist, Uncle Tom, homophobic, sexist, etc. To this we often respond (if not succumb), so as not to be constantly fighting, by trying to be tolerant and nonjudgmental—i.e., we censor ourselves. This is not civility. It is cowardice, or well-intentioned self-deception at best.

Immanuel Kant pointed out that to escape shame and self-contempt we must learn to lie to ourselves. These lies create a formidable obstacle to action on behalf of truth, and one of the greatest human accomplishments is to find a way to shatter those lies.

We've learned how easy it is to deceive ourselves, even when the truth is luminously clear. The little-known story of Dimitar Pe\_ev shows both the power of self-deception and the explosive effect of telling the truth, and the dangers inherent in allowing the rule of law and the truth to succumb to political movements of the moment.

Pesev was the vice president of the Bulgarian Parliament during World War II. He was a man like many, simple and straightforward, not a great intellectual, not a military hero. Just a civil servant, doing his job as best he could, raising his family, struggling through a terrible moment in European history.

Bulgaria was pretty lucky, because she managed to stay out of the fighting, even though the Nazis had placed the Bulgarian government, and the king, under enormous pressure to enter the war on the side of the Axis, or at a minimum to permit the destruction of the Bulgarian Jews. Bulgaria had no tradition of widespread antisemitism, and the leaders of the country were generally unwilling to turn over their own citizens to certain death. But, like all the other European countries, Bulgaria moved toward the Holocaust in small steps.

Pesev was one of many Bulgarian officials who heard rumors of the new policy, and constantly queried his ministers. They lied to him, and for a time he believed their lies. Perhaps the ministers somehow believed the lies themselves. But, in the final hours, a handful of citizens from Pesev's hometown raced to Sofia to tell him the truth: that Jews were being rounded up, that the trains were waiting.

According to the law such actions were illegal. So Pesev forced his way into the office of the interior minister, demanding to know the truth. The minister repeated the official line, but Pesev didn't believe him. He demanded that the minister place a telephone call to the local authorities, and remind them of their legal obligations. This brave act saved the lives of the Bulgarian Jews. Pesev then circulated a letter to members of Parliament, condemning the violation of the law, and demanding that the government ensure that no such thing take place.

According to his biographer, Pesev's words moved all those "who until that moment had not imagined what could happen but who now could not accept what they had discovered." He had broken through the wall of self-deception, and forced his colleagues to face the truth.

There is no monument to this brave man, quite the contrary. The ministers were embarrassed, and made him pay the price of their wickedness. He was removed from the position of vice president, publicly chastised for breaking ranks, and politically isolated. But, he had won nonetheless: The king henceforth found ways to stall the Nazis; the leader of the Bulgarian Orthodox Church publicly defended the country's Jews; and even the most convinced antisemites in the Bulgarian government dared not advocate active cooperation with the Third Reich.

After the war, when the Communists took over Bulgaria, they rewrote the wartime history to give the Communist Party credit for saving the Jews. Pe\_ev was sent to the Gulag, and his story was only rediscovered after the collapse of the Soviet Union. Though this is a dramatic case, examples of this sort are not as rare as one might imagine, nor should they be. Pope John Paul II has traveled the entire world challenging tyrants and murderers of all sorts, speaking to millions of people, bringing them a single, simple message: "Be Not Afraid."

He preached this message to people living under Communist tyranny in Poland, in Czechoslovakia, in Nicaragua and in China—"Be not afraid." He preached it to Africans facing death from marauding tribes and murderous disease—"Be not afraid." And he preached it to us, warning us how easy it is to be trapped in a "culture of death" even in our comfortable and luxurious country—"Be not afraid."

Listen to the truths that lie within your hearts, and be not afraid to follow them wherever they may lead you.

Those three little words hold the power to transform individuals and change the world.

They can supply the quiet resolve and unvoiced courage necessary to endure the inevitable intimidation.

Today we are not called upon to risk our lives against some monstrous tyranny. America is not a barbarous country. Our people are not oppressed, and we face no pressing international threat to our way of life, such as the Soviet Union once posed. Though the war in which we are engaged is cultural, not civil, it tests whether this "nation: conceived in liberty . . . can long endure." President Lincoln's words do endure:

It is . . . for us [the living] to be here dedicated to the great task remaining before us . . . that from these honored dead we take increased devotion to the cause for which they gave the last full measure of devotion . . . that we here highly resolve that these dead shall not have died in vain . . . that this nation, under God, shall have a new birth of freedom . . . and that government of the people . . . by the people . . . for the people . . . shall not perish from the earth.

The Founders warned us that freedom requires constant vigilance, and repeated action. It is said that, when asked what sort of government the Founders had created, Benjamin

Franklin replied that they had given us "A Republic, if you can keep it." Today, as in the past, we will need a brave "civic virtue," not a timid civility, to keep our republic.

So, this evening, I leave you with the simple exhortation: "Be not afraid."