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HARVARD LAW REVIEW

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## IN TRIBUTE: JUSTICE ANTHONY M. KENNEDY

The editors of the *Harvard Law Review* respectfully dedicate this issue to Justice Anthony M. Kennedy.

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*Chief Justice John G. Roberts, Jr.\**

This past summer, after three decades on the Supreme Court, and more than four as a federal judge, Anthony M. Kennedy decided to take a well-earned retirement. I will deeply miss his contributions to the Supreme Court's daily work. He brought to the Court a special combination of legal acumen, collegiality, and kindness. He leaves behind an imposing body of judicial opinions to guide our future deliberations. Judges, lawyers, and scholars who study those writings will discern behind the words an individual of integrity, insight, and decency.

Justice Kennedy also left some clues about the influences that shaped his perspective on life and law. It is no secret that he is devoted to his beloved wife, Mary; his three children, Justin, Gregory, and Kristin; and his entire extended family. Some years ago, he created a very personal list of suggested readings on liberty for his grandchildren. The Library of the United States Court of Appeals for the Ninth Circuit convinced the Justice to make a version of the list available in connection with his civics education initiatives. I have appended the catalogue, which is captioned "Understanding Freedom's Heritage: How to Keep and Defend Liberty."<sup>1</sup> The list includes books, speeches, documents, judicial opinions, plays, poetry, movies, and songs. Thought provoking for readers of any age, Justice Kennedy's curated collection adds an additional dimension to the portrait of an extraordinary judge.

The list begins with a journey back to the Greeks to probe the relationship between the individual and the state. The readings — drawn from Sophocles's *Antigone*, Pericles's *Funeral Oration*, and Plato's

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\* Chief Justice of the United States.

<sup>1</sup> See Appendix, *infra* pp. 24–27.

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*Republic* — share the common theme that liberty is not merely freedom from restraint, but requires the exercise of both individual conscience and public responsibility. That theme is reflected in Justice Kennedy's own tireless devotion to public service throughout his professional life and his abiding commitment to civics education.

The basic charters of our liberty are on the list, from Magna Carta's promise of due process, to the bold assertion in the Declaration of Independence that governments are instituted to preserve liberty, to the Constitution's plan to do just that. Alexander Hamilton's *Federalist No. 1* is included, with its discussion of the Constitution's effort to create a government strong enough to protect freedom, but not so strong as to threaten it.

The collection contains courageous demands for freedom that changed the world: Patrick Henry's *Give Me Liberty or Give Me Death*; Emmeline Pankhurst's *Freedom or Death*; Sojourner Truth's *Ain't I a Woman?*; and Martin Luther King, Jr.'s *I Have a Dream*. There are many entries recounting the sacrifices throughout history that were necessary to secure liberty: President Lincoln's *Gettysburg Address*, as well as his *Second Inaugural*; John McCrae's "In Flanders Fields"; Winston Churchill's vow to fight from the beaches to the hills; and President Franklin D. Roosevelt's marking of the day that indeed lives in infamy.

But Justice Kennedy's list is not just a catalogue of the price paid — it includes meditations on the prize won. John Magee's "High Flight" captures the beauty of freedom in its soaring description of flight — freedom that allows the "silent, lifting mind" to "touch[] the face of God."<sup>2</sup> Robert Frost's "Road Not Taken" speaks of the liberty to chart your own path. So too does Reese Witherspoon's commencement address as Elle Woods in *Legally Blonde* (really). But the list also contains warnings about what awaits the loss of liberty, from the horrors of Orwell's *1984*, to the relentless oppression of Solzhenitsyn's *One Day in the Life of Ivan Denisovich*, to the poignant sorrow of Chief Joseph's *Surrender Speech*.

There's much more: Cicero; Shakespeare; Daniel Webster; Mark Twain; Lou Gehrig; Charlie Chaplin; William Faulkner; and Whittaker Chambers. In addition to Lincoln and FDR, Presidents Washington, Theodore Roosevelt, Eisenhower, Kennedy, and Reagan. And this does not even include the eight Supreme Court opinions, beginning with the first Justice Harlan's dissents in *The Civil Rights Cases*<sup>3</sup> and *Plessy v. Ferguson*.<sup>4</sup> The seventy-nine brief items can easily be read (or watched) over a couple of months. We should do it. They will stick with us over a lifetime.

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<sup>2</sup> John Magee, *High Flight*, in THE COMPLETE WORKS OF JOHN MAGEE, THE PILOT POET 56, 56 (Stephen Garnett ed., 1989).

<sup>3</sup> 109 U.S. 3, 26–62 (1883) (Harlan, J., dissenting).

<sup>4</sup> 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

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Perhaps the most inscrutable entry on Justice Kennedy's list is Don McLean's hit song "American Pie." When asked what "American Pie" means, the singer replied, "It means I don't ever have to work again."<sup>5</sup> I'm fairly certain that is not the kind of freedom Justice Kennedy had in mind when he included the song on his list. And it is not the kind of freedom he will enjoy in retirement. He will continue to work on behalf of the Court, strengthening our bonds of friendship with the judiciaries of other countries. He will also pursue his commitment to freedom by promoting greater appreciation of what it means and of the obligation of each citizen to help preserve it. And he will, I am sure, always be open to a request from a colleague for some reading recommendations.

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*Justice Neil M. Gorsuch\**

With Justice Kennedy's retirement, the Supreme Court has lost one of the most consequential justices in its history. His formidable legal legacy is the focus of many of the other tributes in this issue of the *Harvard Law Review*. Yet the editors have asked me to focus not so much on Justice Kennedy as on Anthony Kennedy. That assignment is a particular honor and a very happy one. For as much as the Justice has touched the life of the law, the man has touched the lives of those around him and in ways that hold rich lessons of their own.

There is his deep civility and respect for all persons. I first came to know Justice Kennedy as his "step clerk." Justice White had hired me to serve him in his first year in retirement when he sat by designation on the Tenth Circuit. But when I arrived, Justice Kennedy also "adopted" me and treated me every bit a member of his law clerk family. The year began when the Justice asked all of us to come to his home on the weekend to discuss the first set of merits cases. His only instruction: bring the whiteboard. So we trucked out to Virginia in a clunker with the whiteboard in the trunk. We spent the day debating cases, covering

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<sup>5</sup> Nick Clark, *Don McLean's American Pie Manuscript Set to Go up for Auction*, THE INDEPENDENT (Feb. 13, 2015, 7:37 PM), <https://www.independent.co.uk/arts-entertainment/music/news/don-mcleans-american-pie-manuscript-set-to-go-up-for-auction-10045702.html> [https://perma.cc/8SHX-S7LV].

\* Associate Justice, Supreme Court of the United States. Justice Gorsuch clerked for Justice Kennedy from 1993–1994.

the whiteboard with arguments and diagrams. From that moment to the end of the year, I witnessed a gentle man who never raised his voice, who treated every lawyer he saw in the courtroom and person he encountered in the hall as he would wish to be treated, and who afforded the most routine case the same care as the most important. In his already long and distinguished judicial career, the Justice had encountered many of the issues we clerks now faced for the first time. But he would follow the judicial process scrupulously from start to finish in every case all the same — carefully reading the briefs, listening to the parties, talking over the issues with clerks and colleagues, and only then deciding. His enthusiasm, his attention to detail, and his interest in hearing different views was infectious. When at last he reached his final judgment and found himself at odds with a colleague or clerk, he would not hesitate to disagree, but he would never do it disagreeably.

There is his humility and his profound love of country and our courts. Years later, when I became a judge on the Tenth Circuit, I asked Justice Kennedy to come to Colorado to swear me in. Of course he came. And of course I took the chance to seek his advice. His reply? Listen. Listen to your colleagues, to the parties, to scholars in the field. There's a reason federal courts of appeals sit in collegial panels, he reminded me, and a reason we engage in such a painstaking process before announcing our judgments. Appreciate always, he said, that to those involved the case before you may be the most important thing in their lives. The job of judge is a difficult one. You must decide; someone must win and someone must lose. Each time you will be criticized by some and honored by others. Pay no attention to either. These are false sirens. Know, too, that you are part of something much greater than yourself, the promise of the rule of law in our time. This nation's independent courts may not be perfect, but their promise of equal justice under law for all persons represents one of the noblest of human aspirations in any place or age. Justice Kennedy could say these things because he lived all these things.

Then there is his kindness. After Justice Kennedy swore me in for a second time, now as his colleague on the Supreme Court, my family moved to Washington. It was the first time in history that a Justice and his former clerk served together. No surprise by now, the Justice and his wife, Mary, offered us a welcome that could not have been more gracious. For as everyone who knows them knows, Mary Kennedy is every bit as special as her husband. The Kennedys were among the first to invite us to dinner and to introduce us to friends. They even helped with our house hunt. When I circulated a draft of my first opinion for the Court, Justice Kennedy raced to join before anyone else could. Not even the fickleness of less-than-modern technology could keep him from that goal. I circulated a draft late in the day, after Justice Kennedy had gone home. When his clerk tried to fax the opinion to him, the machine wouldn't cooperate. But Justice Kennedy wouldn't risk waiting to get

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a copy until the next morning, so he asked to have someone drive a hard copy out to his house that night. Before the open of business the next morning I received a handwritten “join memo” — one I keep in the top drawer of my desk and will always treasure.

As great as Justice Kennedy’s legal legacy may be, I cannot help but wonder if today the person may have as much to teach us as the judge. I’ve offered only a few (among so many) examples of the man I’ve known, but the truth is everyone who knows Tony and Mary Kennedy is blessed with an overabundance of memories like mine. And what we’ve all witnessed perhaps boils down to this. The rules Tony Kennedy has chosen to follow in his life he’s chosen carefully and worked hard to abide. They are timeless, tested, and true. They represent what is best, if too often missing, in our profession and our culture. Treat others as you would have them treat you, remembering that those with whom you disagree love this country every bit as much as you do. Strive for humility in argument and in decisionmaking, knowing that everyone has something to offer and teach. Accept praise and criticism with equal equanimity, realizing that life’s real joy lies not in self but in serving something greater than yourself. Don’t dwell on this nation’s imperfections so much that you forget that its aspirations to the rule of law and to the equal protection of all persons are among the noblest ambitions in human history. Along the way try to be kind, for whatever regrets you may have in life, you’ll never regret being kind. Of course, no one is perfect, we all stumble and struggle, so learn to get back up, dust yourself off, and aim again at getting it right. These are the simple but enduring truths Tony Kennedy has sought to honor in his life. It is a life that is a grace to our profession and our nation and a model for those who follow.

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*Judge Cheryl Ann Krause\**

We have all had moments when some experience lifts us above the frenzy of our daily lives and gives us, if only for a brief time, a panoramic perspective on the possibilities of life, what has brought us to this point, and the ways decisions we make can change the future for ourselves and those around us. Those moments are precious and profound. And for most of us, they are also rare. But there are some people, an exceptional few, who simply perceive the world through that lens. And it is a blessing indeed when our paths cross with theirs because they raise us up and enable us to see in new dimensions.

Justice Kennedy's law clerks had that good fortune, for we had the chance not only to cross paths but also to share an intensive year and a lifelong bond with a man who has that gift and has shared it with many. My year clerking for the Justice was an opportunity to serve an institution I revere and to do so under the mentorship and tutelage of an extraordinary mentor and role model. Justice Kennedy is a jurist whose vision of the law and the Constitution is grounded in history yet reaches to the present and future, a member of the Court who has contributed in powerful ways to its work and culture, and a human being who has exemplified decency and integrity in both his life and his jurisprudence. I will discuss briefly each of these aspects of the Justice.

First, the long-term vision the Justice brings to the law. I had the experience in my clerkship year of submitting to the Justice drafts over which I long labored, thinking them sometimes quite good, although no doubt with room for improvement. What ensued was a process that I now recognize, as I have come to share my children's fascination with our live butterfly kit, was a true metamorphosis. For invariably, what emerged, while bearing some resemblance to that draft, was something transcendent, rooted in law and reason but beautiful, sometimes quite colorful, and capable of soaring into the future. The concept of federalism was brought to life as "[t]he Framers split[ting] the atom of sovereignty,"<sup>6</sup> for example, or free speech as "the beginning of thought" and "[t]he right to think [as] the beginning of freedom."<sup>7</sup>

But this is not merely skillful prose; it reflects a vision of the Constitution, the rule of law, and the role of the Court for the ages. For as the Justice has often reminded us, the freedoms we enjoy and the

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\* Judge, United States Court of Appeals for the Third Circuit. Judge Krause clerked for Justice Kennedy from 1994–1995. This Tribute is adapted from remarks delivered at a reunion of Justice Kennedy's law clerks on June 24, 2017.

<sup>6</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>7</sup> Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

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democracy we cherish, while resting on a firm foundation, are threatened from many sides. They require vigilant protection and constant tending — freedom can be lost; balance of powers, tipped; and lines of separation, overridden. As the Justice has shown us with the power of his pen, the judiciary has an essential role to play in making our Constitution and our system of government relevant, accessible, and respected. For it is the public's respect for the rule of law and its faith and trust in the integrity of our institutions and those who serve them that will preserve the cherished liberties we know.

Second, the Justice has enhanced that public respect with the vision he has brought to his role on the Court, both as a colleague and as an emissary of the rule of law.

To his fellow Justices, he has been a warm and respectful colleague, even in disagreement. In an era when civility is too often wanting in the practice of law, when the rhetoric of partisan politics has driven deep divides in other branches of government, and when our citizenry and even our institutions of higher learning struggle to foster honest and open debate, the Justice has been a champion of free speech and a paradigm of collegial dialogue. And the results speak for themselves. It is precisely because he is humble, solicitous of divergent views, and committed to a thorough airing of the issues before rendering a decision that the Justice is so esteemed by his colleagues and so effective in building consensus.

And as a representative of the Court, he has reached out across communities and even oceans to teach about the Constitution, the genius of checks and balances, and the importance of an independent judiciary. I recall during my clerkship year when the Justice accepted an invitation to travel as the first sitting Justice to visit China and to speak with judges there about the rule of law. Even on rough terrain, he was committed to planting the seeds of freedom and respect for individual rights. Again, his efforts have been exemplary and inspiring when we consider what we can do as lawyers, judges, and academics — and also as parents — to carry on that civic education and to ensure that the independence of our courts and the rights and responsibilities enshrined in our Constitution are understood, honored, and protected by the next generation.

Finally, I want to touch on the decency and humanity the Justice has brought to his relationships and his jurisprudence. As a boss, I cannot imagine a better role model. To a person — whether his law clerk offering up an idea or court staff dropping off a delivery — the Justice has been respectful, considerate, and attentive. And, with thanks also to his beloved wife, Mary, and the entire Kennedy family, the Kennedy household has been a warm and welcoming place for his clerks for decades, especially when we were far from our own families over the holidays.

That same decency will be part of the Justice's legacy in the law. As the Justice said at his confirmation hearing thirty-one years ago, "the decisions of the Supreme Court of the United States have such great

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acceptance by the American people . . . because of the perception by the people that the Court is being faithful to a compact that was made 200 years ago.”<sup>8</sup> And he has guarded that faith. At the same time, he has observed: “The nature of injustice is that we may not always see it in our own times,” so part of that compact, in the Justice’s words, was to “entrust[] to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”<sup>9</sup> That trust has been well-placed in Justice Kennedy, for while “[d]ignitary wounds cannot always be healed with the stroke of a pen,”<sup>10</sup> the Justice’s mark in recognizing equal dignity in the eyes of the law and in dispelling bigotry and prejudice is indelible.

As a former law clerk, a current judge, and a proud American, I am deeply grateful for what the Justice has taught all of us about life and the law. He has made a lasting impression on his clerks and the Court and, just as he has inspired us, he will inspire many future generations to serve justice, to honor the rule of law, and to support and defend the Constitution of this great nation.

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*Judge Diarmuid F. O’Scannlain\**

Others in this Tribute will speak to Justice Kennedy’s jurisprudence; my task is to share some impressions of the off-bench personality of a distinguished jurist and friend, passionate in his commitment to Rule of Law efforts around the world, dedicated to legal education, and, perhaps surprisingly, a master of judicial administration.

I.

It all began during the 1960–1961 academic year at the Harvard Law School when he, a Californian and a 3L, was a member of the Board of Student Advisers and I, a New Yorker and a 1L, was one of his assigned mentees for the first-year moot court program. When “Tony” Kennedy and I said good-bye in the spring of 1961, neither of us expected to see the other again, let alone to have a fifty-seven-year acquaintance and renewed friendship.

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<sup>8</sup> *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 86 (1987) (testimony of Judge Anthony M. Kennedy).

<sup>9</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

<sup>10</sup> *Id.* at 2606.

\* Senior Judge, United States Court of Appeals for the Ninth Circuit.

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About seventeen years later, having moved with my wife and family to join an Oregon law firm, I was arguing *Port of Astoria v. Hodel*<sup>11</sup> before the United States Court of Appeals for the Ninth Circuit in Portland's Pioneer Courthouse. Who should be on the panel but "Tony," who turns out to be United States Circuit Judge Anthony M. Kennedy, my old mentor. I certainly recognized him and I believe he recognized me, but while the panel was most cordial, it returned a mixed result, with my clients prevailing on the merits but losing on the crucial remedy. We did not meet socially during that panel's visit to my hometown.

And then, lo and behold, President Ronald Reagan nominates me to the very same court in 1986 and I become Tony's colleague, overlapping for two years and concurring with each other, including in one of the famously labeled "dissentals," in which we disagreed with our court's refusal to rehear a high-profile case en banc<sup>12</sup> — but subsequently prevailed when the Supreme Court reversed our court's decision on the merits a year later.<sup>13</sup> I found him to be the same earnest, capable, affable companion that I knew from our law school days but more. He was still my mentor and a brilliant one, and I savored those two years of his inspiration and guidance. But he was destined for higher things. When a seat on the Supreme Court became vacant, we lost Tony and he became United States Supreme Court Justice Anthony M. Kennedy in 1988. While I missed him as a colleague, for the next thirty years we stayed in touch, notwithstanding the distance between Portland, Oregon, and Washington, D.C.

## II.

Justice Kennedy's commitment to defending the Rule of Law in speaking engagements both here and abroad is probably his dominant image for me. I was with him on one of the many summer seminars that he taught in Salzburg, Austria, during his enviable summer recess. I was privileged during one of his sojourns to serve on a panel with law school professors, where I witnessed his mesmerizing lectures, entirely without notes, extolling various features of the Rule of Law. He was always available to assist the International Judicial Relations Committee of the United States Judicial Conference when I was its chair, as indeed he reminded me in a note that said, "It is, after all, our duty to defend the Rule of Law and this is best done by teaching its methods to other Nations." He is very proud of a bookmark that he designed defining the Rule of Law, which later was adopted by the U.N. Committee on the Empowerment of the Poor and, as he reminded me, has been translated into about eight or nine languages.

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<sup>11</sup> 595 F.2d 467 (9th Cir. 1979).

<sup>12</sup> *Pangilinan v. INS*, 809 F.2d 1449, 1450 (9th Cir. 1987) (Kozinski, J., dissenting from denial of rehearing en banc), *rev'd*, 486 U.S. 875 (1988).

<sup>13</sup> *INS v. Pangilinan*, 486 U.S. at 887.

## III.

Legal education has long been Justice Kennedy's passion, having served as an adjunct professor at McGeorge Law School in Sacramento, California, for many years until his elevation. But in my view, his most significant contribution was his willingness to establish the Kennedy Lectureship at Lewis and Clark Law School, where I had been serving as an adjunct.

Tony came to Portland in 2008 to headline the Fortieth Anniversary of the Federal Judicial Center, along with Justice Sandra Day O'Connor. He enjoyed the visit and when I approached him on behalf of Dean Robert Klonoff about authorizing a permanent lectureship in his honor, it was an easy sell. The Kennedys must have enjoyed the dinner that we hosted at our home during that visit; we received not only one but two lovely thank you notes, one each from Tony and his dear wife, Mary.

Today, the Kennedy Lecture is an annual endowed presentation featuring distinguished jurists and intellectual leaders, beginning with the auspicious initial lecture by then-Stanford Law School Dean Kathleen Sullivan in 2009. Future Kennedy lecturers included appellate lawyer Paul Clement, then-Judge Brett Kavanaugh, Professor Bill Eskridge, and Professor Charles Fried, a spectrum of speakers with whom Tony seemed pleased.

Later, when I was co-chairing a panel at the Aspen Institute in 2014 with Professor Charles Ogletree, Justice Kennedy readily agreed to participate, giving a profound depth and perspective to our smaller group, in addition to serving on his regular speaking spot on the full Aspen program to which he was regularly invited. He is a teacher, but a listener, too.

## IV.

Judicial administration, perhaps surprisingly, also dominates the Justice's off-bench interests, I can attest. The structure of the Ninth Circuit has fascinated observers for many years, and Justice Kennedy and I learned early on that we both supported some sort of realignment of this nine-state and twenty-nine-judgeship Court of Appeals into two or perhaps even three smaller circuits. While I have become rather visible and frequently testify before congressional committees on various bills to split the Circuit, Justice Kennedy remains quietly, yet energetically, sympathetic and occasionally has publicly expressed his deep concern for the outsized design of our court, which I expect he will continue in senior status. We worked together as early as 1997, when serious congressional action was underway, only to flounder in the end. I expect that he will stay active in the discussion of this effort.

He willingly agreed to lead the selection committee for the Devitt Award, which honors an outstanding member of the federal judiciary, and asked me to serve with him on a three-judge panel. Tony displayed

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a keen interest in identifying the strongest of the many nominations that we reviewed at meetings in New York in 2009. Talent for judicial administration ranked high in choosing the winner.

The role of Circuit Justice is a crucial link between our court and the Supreme Court, a role that Justice Kennedy performed for the last twelve years. But he did more than serve as a funnel for emergency motions. He not only attended the annual judicial conferences, some of which were in delightful locales, but he also made special trips to San Francisco to inspire our law clerk orientation program, perhaps reliving his fourteen years as a former Court of Appeals member himself. I marveled at his rapport with the many law clerks with whom he made time to interact.

On his visit to Portland in 2008, Justice Kennedy toured our newly refurbished and seismically upgraded National Landmark Pioneer Courthouse, confirming his consistent interest in historic courthouses going back to the days when he was instrumental in securing our now-magnificent courthouse (but former destination resort hotel) in Pasadena, California, which has ever since served as the southern headquarters of our Circuit.

Upon his receiving the John Marshall Award, which I, as then-Chairman of the Judicial Division of the American Bar Association, presented to him in a formal ceremony in the Chamber of the Supreme Court of the United States, he insisted on paying for the memento, which was an elegant colored-glass sculpture by the famous glass artist Dale Chihuly.

Most observers have little knowledge of the court-related but off-bench talents and interests of Supreme Court Justices; Justice Kennedy was not content merely to decide cases.

## V.

My most recent image of the Justice is his glowing presence surrounded by children who came to meet him and to be photographed with him at our annual judicial conference in his last appearance as Circuit Justice just a few months ago. Reminiscent of his determination to participate in the hanging of my portrait in the Pioneer Courthouse, when he appeared by video and said some very nice words, I could only rejoice in the elegance and genuine grace of this kind and good man.

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*Jack L. Goldsmith\**

Anthony M. Kennedy authored an unusual number of landmark constitutional law decisions during his thirty-one Terms of service.<sup>14</sup> In the Court's 5–4 decisions, he led or tied for most votes in the majority in twenty Terms (including all but his last one on the Roberts Court), and was close to the top in his other eleven Terms.<sup>15</sup> It is little exaggeration to say that, in important cases, as Justice Kennedy went, so went the Court.<sup>16</sup>

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<sup>14</sup> On abortion, see *Gonzales v. Carhart*, 550 U.S. 124 (2007); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion). On gay rights, see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Romer v. Evans*, 517 U.S. 620 (1996). On freedom of speech, see *Citizens United v. FEC*, 558 U.S. 310 (2010). On freedom of religion, see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); and *Lee v. Weisman*, 505 U.S. 577 (1992). On federalism, see *Alden v. Maine*, 527 U.S. 706 (1999); and *City of Boerne v. Flores*, 521 U.S. 507 (1997). On separation of powers, see *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076 (2015); and *Boumediene v. Bush*, 553 U.S. 723 (2008). On antidiscrimination law, see *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016); and *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). On the death penalty, see *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); and *Roper v. Simmons*, 543 U.S. 551 (2005). See also *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (internet sales tax); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (regulatory takings); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (race and jury selection).

<sup>15</sup> For October Terms 1995–2017, these numbers are drawn from SCOTUSblog. See *Stat Pack Archive*, SCOTUSBLOG (last updated June 29, 2018), <http://www.scotusblog.com/reference/stat-pack/> [<https://perma.cc/C9L8-6DXP>]. For October Terms 1987–1994, these numbers are based on statistics in the *Harvard Law Review's* annual issue on the previous year's Supreme Court Term, published each November. See *The Supreme Court, 1987 Term — The Statistics*, 102 HARV. L. REV. 350, 353 (1988); *The Supreme Court, 1988 Term — The Statistics*, 103 HARV. L. REV. 394, 397 (1989); *The Supreme Court, 1989 Term — The Statistics*, 104 HARV. L. REV. 359, 362 (1990); *The Supreme Court, 1990 Term — The Statistics*, 105 HARV. L. REV. 419, 422 (1991); *The Supreme Court, 1991 Term — The Statistics*, 106 HARV. L. REV. 378, 381 (1992); *The Supreme Court, 1992 Term — The Statistics*, 107 HARV. L. REV. 372, 375 (1993); *The Supreme Court, 1993 Term — The Statistics*, 108 HARV. L. REV. 372, 375 (1994); *The Supreme Court, 1994 Term — The Statistics*, 109 HARV. L. REV. 340, 343 (1995).

<sup>16</sup> Some notable exceptions include *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Justice Kennedy was not the man in the middle because of a proclivity to moderation or compromise. He had no compunction about maximalist judicial decisions.<sup>17</sup> He found himself in the middle because his jurisprudential commitments led him to vote in ways that did not cluster neatly in one area on a conventional ideological spectrum, thus making him a deciding vote on an array of issues.

This pattern led critics to complain that he was unprincipled. Justice Kennedy sometimes did change his mind.<sup>18</sup> And one can find tensions in his voting patterns, just as one could with the voting patterns of any Justice who served three decades.

But the basic principles that guided him were clear. He possessed a generally conservative judicial disposition that was tempered by a strong commitment to constitutional liberty and dignity. He had a libertarian's suspicion of government regulation that led him to take state governmental prerogatives against the federal government seriously, and individual rights against both even more seriously. And he believed that a robust judicial power was vital to the effectiveness of the constitutional scheme.

Justice Kennedy did not come to these views late in life. They are recognizable in his Ninth Circuit opinions and his Supreme Court confirmation hearings.<sup>19</sup> He followed these principles in the unusual — and, for the nation, momentous — directions they led him. I don't think he was too bothered by the resulting, sometimes-heated reactions from critics of all stripes, which I suspect he interpreted as evidence that he was doing something right.

Despite the certainty with which he often wrote opinions, Justice Kennedy sometimes struggled with how to vote. In one case he voted in favor of the government, but could not bring himself to join the circulated majority draft opinion. He decided to write a less sweeping concurring opinion, and gave me instructions about how to craft it. He rewrote the draft I gave him and seemed satisfied. But the next morning he said he slept on it uncomfortably and was considering switching his vote. I tried to address his concerns, and by the end of the day he again seemed comfortable with the approach he had adopted. The following morning he had more concerns, which led to another day of research

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<sup>17</sup> See, e.g., *Obergefell*, 135 S. Ct. 2584; *Zivotofsky II*, 135 S. Ct. 2076; *Citizens United*, 558 U.S. 310.

<sup>18</sup> And he was unembarrassed by it. As he once said, “[t]o re-examine your premise is not a sign of weakness of your judicial philosophy. It’s a sign of fidelity to your judicial oath.” Mark Sherman, *Justice: Changing Course on the Bench Is Not Weakness*, SEATTLE TIMES (Sept. 23, 2016, 12:07 PM), <https://www.seattletimes.com/nation-world/nation-politics/justice-changing-course-on-the-bench-is-not-weakness/> [https://perma.cc/MNQ7-GA5M].

<sup>19</sup> See JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 35–63 (2007); TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 16–19 (2000); Jeffrey Rosen, *The Agonizer*, THE NEW YORKER, Nov. 1, 1996, at 82, 82, <https://www.newyorker.com/magazine/1996/11/11/the-agonizer> [https://perma.cc/9SH7-HVTX].

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and discussion. The Justice continued in this vein for over a week until finally he decided to go with his concurrence, which he circulated.

In my youth, I thought the legal question was pretty easy, that judging should aspire to be algorithmic, and that the Justice's seeming indecision reflected an underdeveloped jurisprudence or insufficient will. I was wrong on every count, as I learned over time. The legal question was actually quite hard. And it demanded a significant element of judgment to resolve several competing principles. The Justice's opinion improved quite a lot as a result of his characteristically painstaking, deliberative efforts.

Justice Kennedy has been a teacher for decades at McGeorge School of Law, in his summer stints in Salzburg, Austria, and in many other places and capacities. He liked teaching, and he was very good at it. Three years ago he awed my students when he gave a brilliant ninety-minute account of his majority opinion in the Jerusalem passport case, *Zivotofsky II*<sup>20</sup> — an account that included, through extended back-and-forth exchanges with the students, a candid critique of the weaknesses in his argument. It was a performance that taught the students lessons about constitutional doctrine and judicial decisionmaking, but also about modesty, self-reflection, and self-criticism.

Justice Kennedy was a terrific teacher in chambers too. At unexpected times he would call his clerks into his grandly decorated office at the front of the Supreme Court building, pull out his whiteboard, and, with the Capitol Building in the background through his huge office window, start charting out the case as he saw it — the core issues, how they fit together, the crucial decision points, and the like. And then he would argue with us, one side, then the other, point and counterpoint. Justice Kennedy had a knack for drawing out disagreements and, it seemed, learning from them.

One thing that emerged from these discussions, and which is not widely known, is what a broad practical sense of the law Justice Kennedy possessed. He took over his father's law firm in Pasadena only two years out of law school. Then, for over two decades, he conducted a wide-ranging generalist practice that included domestic and international transaction work, tax advice, estate planning and probate, real estate, lobbying, and scores of criminal and civil trials.

Justice Kennedy's professional background was thus different from the other Justices with whom he sat. He understood intimately the ins and outs of many different types of legal processes. And he had special concern for, and insight into, the human stakes in judicial decisionmaking. "[B]ehind all these cases, there's a real person," Justice Kennedy recently said, explaining the impact of his early practice on his judicial

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<sup>20</sup> 135 S. Ct. 2076.

decisionmaking.<sup>21</sup> He knew what it meant to represent a client who might go to jail or who might be ruined by a tax ruling or new regulation. He appreciated the tangible difficulties that individuals face navigating interactions with government agencies, and the manifold ways in which unfairness, injustice, and disputes might arise. And he understood concretely how legal rulings affected people's lives.

I think these real-world experiences informed Justice Kennedy's self-conscious defiance of "hornbook categories" in some of his most important opinions.<sup>22</sup> And I know that he often drew on these experiences in assessing arguments and their implications. I was once stuck figuring out a corner of an argument in an opinion I was drafting for him. Justice Kennedy told me that he had seen a similar issue in practice, and advised me that if I looked at a nonobvious place in the record, I might find the answer to my puzzlement. He was right, and the opinion was much better for it.

Justice Kennedy treated his clerks, and indeed everyone he worked with and encountered in life, with intense and genuine courtesy, kindness, and solicitude — in short, with civility. "Civility stands for the proposition that we owe respect to our fellow citizen because of the humanity we share in common," he said in a speech two decades ago.<sup>23</sup> He believed that "civility and mutual respect . . . are the essential preconditions for the orderly resolution of social conflict in a free society."<sup>24</sup> The principle of civility pervaded Justice Kennedy's jurisprudence, and was reflected in all his interactions, including in the respect he always showed his colleagues when disagreeing with them. It is a principle that stands out sharply in the uncivil times in which we live.

Another old-fashioned value that Justice Kennedy embraced was an unembarrassed admiration for the American legal tradition, including the inherited common law, the American judicial process, and, more than anything else, the U.S. Constitution. Justice Kennedy spent his entire professional career in unceasing study of the constitutional Framers, their influences, and their accomplishments. This learning is reflected not only in his opinions, but also in the hundreds of speeches and lectures before professional and lay audiences in which he explained the richness and deep wisdom that inhered in the U.S. Constitution's separation of powers, federalism, individual rights, and judicial review. He believed that the Constitution was constitutive of the national identity and a generative guarantor of justice, equality, and liberty.

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<sup>21</sup> Harvard Law School, *HLS in the World: A Conversation with Six Justices of the U.S. Supreme Court* at 51:37, YOUTUBE (Oct. 27, 2017), [https://youtu.be/\\_EeU6Lo\\_i7I](https://youtu.be/_EeU6Lo_i7I) [<https://perma.cc/9PFS-P64X>].

<sup>22</sup> Michael Dorf, *Tribute: Justice Kennedy's Genius*, SCOTUSBLOG (June 28, 2018, 8:32 AM), <http://www.scotusblog.com/2018/06/tribute-justice-kennedys-genius/> [<https://perma.cc/R83L-QU5E>].

<sup>23</sup> Anthony M. Kennedy, *Law and Belief*, TRIAL, July 1998, at 23, <http://go.galegroup.com/ps/i.do?p=LT&u=camb55135&id=GALEIA20993794&v=2.1&it=r> [<https://perma.cc/6W8K-DUZV>].

<sup>24</sup> *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993) (Kennedy, J., concurring).

He also saw it as a vital task, to which he devoted enormous time and energy, to bring the gift of American constitutionalism, and the rule of law for which it stands, to all corners of the globe. Early in his tenure on the Ninth Circuit, he sat as a judge of the High Court of American Samoa, and later Chief Justice Warren Burger appointed him to supervise the territorial courts in the South Pacific. Justice Kennedy often talked about how this experience helped him understand how American Samoa had benefited, through its trust territory status, from its access to the American justice system.

Thus began a lifelong commitment to “explain[ing] to the rest of the world the meaning, the essentiality, and the purpose of the rule of law as it’s understood by the American people and by other democracies throughout the world,” as he said in 2006.<sup>25</sup> Justice Kennedy thought it important to define the “rule of law.” He was self-conscious about the pitfalls of doing so — because the phrase has “a resonance, an allure, that you’re reluctant to destroy” through definition; because “we’re often reluctant to talk about universal truths, lest our efforts at formulating their specifics seem too bland, too insufficient for the great purpose behind the phrase”; because there’s a risk of saying too little and of saying too much.<sup>26</sup>

And so he offered a “suggestion,” a “working definition,” a starting point for discussion, that he reproduced on bookmarks translated into many languages and would pass out before audiences at home and especially abroad. It stated as follows:

1. The Law is superior to the government, and it binds the government and all officials to its precepts.
2. The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and guard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.
3. The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfill just expectations and seek redress of grievances without fear or penalty of retaliation.

This very simple account of the rule of law sums up well the Justice’s insights and idealism. As elaborated by him in hundreds of lecture halls and classrooms, it is an account that has inspired many, many thousands

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<sup>25</sup> *Justice Kennedy Address* at 11:00, C-SPAN (Aug. 5, 2006), <https://www.c-span.org/video/?193757-1/justice-kennedy-address> [<https://perma.cc/47JT-CQSL>].

<sup>26</sup> *Id.* at 12:30.

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of people around the globe to better appreciate the aims and aspirations of the rule of law, and strive to achieve it.

The Court and the country will miss Justice Kennedy's heart, his learning, his kindness, his integrity, his judgment, and his commitment to American legal traditions and the rule of law.

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*Leah M. Litman\**

“So how are we doing?” Justice Kennedy asked at the start of my interview.<sup>27</sup> At the time, the question seemed difficult to answer because, while the question was about the Court, the Court rarely differed from Justice Kennedy, at least in high visibility cases in recent years.

With several years' hindsight, however, the question strikes me as altogether perfect. The question provided the Justice the opportunity to introduce his law clerks to some of the attributes I came to associate with him most — an unparalleled ability to maintain civility, even while immersed in disagreement, as well as a belief in free speech and the exchange of ideas. And my answering the question now, on the heels of the Justice's retirement, is fitting if only because it may test the limits of those principles.

Some of the most memorable moments from the clerkship involve the lunch hour. Lunch in the Kennedy chambers involved a certain ritual — the Justice would be tempted to order takeout with his law clerks (he'd be particularly interested if it was ribs or Chinese food), instead of sticking with the boiled chicken and vegetables, or the salad and cottage cheese, as he had promised Mrs. Kennedy he would. The Justice would struggle between the two options for a little while before ultimately sticking with his promise to Mrs. Kennedy.<sup>28</sup> (He gave in and got Chinese a few times, though.<sup>29</sup>)

Once at the table, the conversation would be wide-ranging and cover topics including politics, history, art, and music, to name a few. For a

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<sup>27</sup> Apparently, he used some variant of this question in other interviews as well. *See We the People with Jeffrey Rosen: The Legacy of Justice Anthony Kennedy*, NAT'L CONST. CTR. (July 5, 2018), <https://constitutioncenter.org/debate/podcasts/the-legacy-of-justice-anthony-kennedy> [https://perma.cc/ZT42-JNRK].

<sup>28</sup> That pre-lunch hour ritual was one of the rare occasions the Justice lived up to his nickname as the “swing” Justice.

<sup>29</sup> On his birthday, however, the Justice tried only one of the desserts we law clerks had made, because if he tried more, he told us, he would have to tell Mrs. Kennedy.

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recent law school graduate, talking with a Supreme Court Justice about any of those topics was surreal; having a Supreme Court Justice act like he cared what you had to say about them was mindboggling. Yet that's what Justice Kennedy did, even twenty-plus years into his time on the Court. Not only would he ask for our views on the topic du jour, but he would also tell stories about how much he had enjoyed having similar conversations with former clerks who had sat around the same lunch table before we did. He recounted story after story about those clerks. He had one anecdote about a former law clerk who had the Justice and his co-clerks in stitches over a story about a prior work experience, and another about a different clerk who did well bringing together clerks from other chambers. He also liked to share praise about former clerks who went off to great success in academia, in practice, and elsewhere.

Perhaps most importantly, the Justice told stories about law clerks who had made mistakes or disagreed with him, and how he still was fond of them anyway. Hearing those reassurances made chambers especially welcoming, since we law clerks inevitably slipped up at some point, and because we'd all disagree with the Justice on occasion, too. Although the Justice often found himself at the center of disagreement, he never really learned to sit with it, at least comfortably. He would never say when he didn't like a particular memo or draft; we just surmised as much when he failed to offer his usual forthcoming praise. And when one of us would say something a bit off (to him), he would just smile and wave it aside before quickly moving on.<sup>30</sup> Then we'd never talk about it again.

In these and other ways, the Justice was maybe just a little too nice for the world around him. His tendency to avoid conflict was even somewhat at odds with his public persona, at least the part of it that was evident from his writings. The Justice was fiercely protective of the First Amendment, including as it applied to contentious speech and speech that many (including him) found uncomfortable. That much was evident from the very beginning of his tenure on the Court. In *Texas v. Johnson*,<sup>31</sup> decided in the Justice's first full Term on the Court, the Justice provided the fifth vote to invalidate a law that made it a crime to burn the American flag.<sup>32</sup> The Justice wrote separately to explain how "difficult" it was for him to invalidate the law and what a "personal toll" it took.<sup>33</sup> The Justice did not suggest he found the case a particularly close one; his concurrence described the First Amendment as a

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<sup>30</sup> For example, it turns out I didn't share the Justice's taste in musicals.

<sup>31</sup> 491 U.S. 397 (1989).

<sup>32</sup> See *id.* at 398.

<sup>33</sup> *Id.* at 420 (Kennedy, J., concurring).

“pure command.”<sup>34</sup> He just felt it “poignant . . . that the flag protects those who hold it in contempt.”<sup>35</sup>

That kind of nostalgia often appeared in the Justice’s opinions,<sup>36</sup> but it appeared with extra flourish when the Justice wrote about the role of free speech in America. It found its way into the Justice’s opinion for the Court in *Citizens United v. FEC*,<sup>37</sup> which invalidated the federal ban on corporate in-kind political contributions.<sup>38</sup> “At the founding,” the Justice wrote, “speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge.”<sup>39</sup> The Justice then used classic American iconography, rather than the *Hillary* movie actually at issue in the case, to illustrate why that should be the case,<sup>40</sup> even if it has not always been.<sup>41</sup> His opinion described how government officials once flirted with the idea of suppressing production of the movie *Mr. Smith Goes to Washington*, which depicts an idealistic Jimmy Stewart happening into a Senate seat and then exposing massive corruption in Washington.<sup>42</sup>

To the Justice, that narrative illustrated the power of ideas, as well as his firm belief that words could change the world (for the better). That belief often led him to curtail the government’s ability to censor speech. In *United States v. Alvarez*,<sup>43</sup> for example, the Justice rejected the idea that the First Amendment did not protect false speech, or lies.<sup>44</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 421. For a similar sentiment later in his career, see *United States v. Alvarez*, 567 U.S. 709, 715 (2012), stating: “[L]aws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.”

<sup>36</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

<sup>37</sup> 558 U.S. 310 (2010).

<sup>38</sup> *Id.* at 365.

<sup>39</sup> *Id.* at 353.

<sup>40</sup> *Id.* at 371–72.

<sup>41</sup> See, e.g., Justin Miller, *Criminal Law — An Agency for Social Control*, 43 YALE L.J. 691, 704 (1934) (describing a North Carolina law that criminalized teaching slaves to read or write). On criminal prohibitions on black literacy more generally, see JANET DUTSMAN CORNELIUS, “WHEN I CAN READ MY TITLE CLEAR”: LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH (1991).

<sup>42</sup> See *Citizens United*, 558 U.S. at 371.

<sup>43</sup> 567 U.S. 709 (2012).

<sup>44</sup> *Id.* at 727–28.

“The remedy for speech that is false,” the Justice wrote, “is speech that is true.”<sup>45</sup> “[I]n a free society[,] . . . [t]he response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”<sup>46</sup>

One of the Justice’s final writings on the Court pressed a similar theme, warning of the dangers “when government seeks to impose its own message in the place of individual speech, thought, and expression.”<sup>47</sup> The Justice entreated his audience (whom he probably envisioned to be the American people) to “carry . . . onward” the lessons about “how relentless authoritarian regimes are in their attempts to stifle free speech” (the case involved a law from California) “as we seek to preserve and teach the necessity of freedom of speech for the generations to come.”<sup>48</sup> It’s a work in progress, to be sure.<sup>49</sup>

Recently, I’ve found myself wondering: what if (some) words are part of the problem? And what if (some) words are not enough to fix them? One of the occasions for those thoughts was the Justice’s concurrence in *Trump v. Hawaii*,<sup>50</sup> which offered a gentle reminder that it is “imperative” and an “urgent necessity” that officials “adhere to the Constitution.”<sup>51</sup> The Justice voted to reverse the lower courts’ injunction against President Trump’s ban on entry into the United States by nationals of several Muslim-majority countries.<sup>52</sup> The ban came after the President’s campaign promise of a “total and complete shutdown of Muslims entering the United States.”<sup>53</sup>

The Justice’s concurrence in *Trump v. Hawaii* contained his last words on the Court, and in some ways, it is fitting that he went out on

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<sup>45</sup> *Id.* at 727.

<sup>46</sup> *Id.*

<sup>47</sup> Nat’l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

<sup>48</sup> *Id.*

<sup>49</sup> See Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 10, 2017, 3:42 AM), <https://twitter.com/realDonaldTrump/status/917701841466593280> [<https://perma.cc/22YT-CXK3>] (“With Jemele Hill at the mike, it is no wonder ESPN ratings have ‘tanked,’ in fact, tanked so badly it is the talk of the industry!”); P.R. Lockhart, *Jemele Hill, Known for Anti-Trump Tweets, Is Leaving ESPN’s SportsCenter*, VOX (Jan. 26, 2018, 5:08 PM), <https://www.vox.com/2018/1/26/16936812/jemele-hill-espn-sportscenter-departure-trump-tweets> [<https://perma.cc/L846-A6NB>]; Daniel Trotta, *Bowing to Trump, NFL Will Require Players to Stand for Anthem*, REUTERS (May 23, 2018, 12:47 PM), <https://reut.rs/2uPnkXH> [<https://perma.cc/VP34-NZD8>].

<sup>50</sup> 138 S. Ct. 2392 (2018).

<sup>51</sup> *Id.* at 2424 (Kennedy, J., concurring).

<sup>52</sup> *Id.* at 2423.

<sup>53</sup> See *Trump’s Deleted “Preventing Muslim Immigration” Statement*, THE MEMORY HOLE (May 10, 2017), <http://thememoryhole2.org/blog/trump-muslim-immigration> [<https://perma.cc/4CJK-JYER>]; Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST (Dec. 7, 2015, 7:43 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states> [<https://perma.cc/78UL-5TEA>].

his unshakeable faith in the power of words — in this case, his words — to redeem us. It’s a belief that he’s held for a long time, and it very much represents who he is. In a speech fifteen years ago to the American Bar Association, for example, the Justice implored the legal profession that “[n]o public official should echo the sentiments of the Arizona sheriff who once said with great pride that he ‘runs a very bad jail.’”<sup>54</sup>

That sheriff, of course, was Joe Arpaio,<sup>55</sup> the man who was convicted of violating a federal court order that directed him to stop systematically violating the Fourth Amendment.<sup>56</sup> In August 2017, President Trump pardoned Mr. Arpaio.<sup>57</sup> Other members of the Trump Administration have similarly championed the former sheriff, a man who used state power in brutal and coercive ways that often fell on the Latinx community, as a defender of the rule of law.<sup>58</sup>

Perhaps there is something of a sad irony to how this all played out. A man who valued decorum so much he practically apologized for every one of his dissents<sup>59</sup> retired during the administration of, and thus solidified the power of,<sup>60</sup> a man who began his presidential campaign by

<sup>54</sup> Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_08-09-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html) [<https://perma.cc/P9HN-JG2W>].

<sup>55</sup> See Seth Mydans, *Taking No Prisoners, In Manner of Speaking* N.Y. TIMES (Mar. 4, 1995), <https://nyti.ms/2JTjRvT> [<https://perma.cc/U36D-ZC5J>]; Richard Pérez-Peña, *Former Arizona Sheriff Joe Arpaio Is Convicted of Criminal Contempt*, N.Y. TIMES (July 31, 2017), <https://nyti.ms/2vZQimn> [<https://perma.cc/SA26-KW5U>].

<sup>56</sup> See *United States v. Arpaio*, No. CR-16-01012, 2017 WL 3268180, at \*7 (D. Ariz. July 31, 2017).

<sup>57</sup> Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://nyti.ms/2vwEQx7> [<https://perma.cc/B725-Z6X3>].

<sup>58</sup> See Matthew Yglesias, *Mike Pence Hails Joe Arpaio as a “Tireless Champion . . . of the Rule of Law”*, VOX (May 2, 2018, 10:00 AM), <https://www.vox.com/policy-and-politics/2018/5/2/17309064/mike-pence-joe-arpaio-rule-of-law> [<https://perma.cc/6JJC-QZCV>].

<sup>59</sup> See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (Kennedy, J., dissenting) (“This case involves new technology, but the Court’s stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.”); *Luis v. United States*, 136 S. Ct. 1083, 1103 (2016) (Kennedy, J., dissenting) (“The reasoning in these separate opinions is incorrect, and requires this respectful dissent.”); *Zadvydas v. Davis*, 533 U.S. 678, 706 (2001) (Kennedy, J., dissenting) (“The Court having reached the wrong result for the wrong reason, this respectful dissent is required.”).

<sup>60</sup> Justice Kennedy’s name is already being used to justify the President’s misdeeds, as Republicans point to the Justice’s decision to step down as a reason not to challenge any of Trump’s misconduct. See AG Patrick Morrisey (@MorriseyWV), TWITTER (June 27, 2018, 2:56 PM), <https://twitter.com/MorriseyWV/status/1012092215970197505> [<https://perma.cc/KHL9-M5ZC>] (“Today’s Supreme Court news underscores why it was so important to support @realDonaldTrump in 2016.”); cf. W. James Antle III, *The Donald Delivers*, THE WEEK (July 5, 2018), <http://theweek.com/articles/782606/donald-delivers> [<https://perma.cc/RR4H-33MP>] (“Since Justice Anthony Kennedy announced his retirement, I have repeatedly heard some version of the following from conservatives who declined to back the Republican presidential nominee in 2016: If I had known that Donald Trump would keep his promises on judges, I would have voted for him.”); Josh Blackman, *Conservative and Libertarian Lawyers in the Era of Trump*, LAWFARE (May 29, 2018, 3:00 PM),

referring to Mexicans as criminals and rapists,<sup>61</sup> and who bragged, on tape, about grabbing women by the pussy.<sup>62</sup>

But perhaps there are some lessons here as well as some ironies. If the real threat to civil society is having the audacity to call a racist a racist or a fascist a fascist,<sup>63</sup> perhaps the “civil” thing to do is to hand that person the keys to the kingdom and ask them to play nice. It’s a relatable decision, if nothing else; I’ve come to appreciate the difficulty of calling out someone you know and perhaps like, or someone you worked with (or perhaps someone you worked for), for doing something that may enable evil, even if unintentionally, and even though they may have had (otherwise) legitimate reasons for doing so.

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In Justice Kennedy’s eyes, more speech was always a good thing — even if it was not good speech, and even if it was not speech that people wanted to hear. Perhaps it is the influence of those ideas, or just the Kennedy clerk in me, that made it impossible for me to write the piece of schmaltz that these tributes tend to be. Perhaps more fitting for the unwavering champion of free speech is a piece that speaks (some) truth to (some) power, or at least some truth with whatever power the pages of the *Harvard Law Review* afford.

Justice Kennedy’s belief in the power of words led him to do great things, and his belief in the power of civility led him to be a good person, even when others would not do the same for him.<sup>64</sup> He fiercely pro-

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<https://www.lawfareblog.com/conservative-and-libertarian-lawyers-era-trump> [<https://perma.cc/B7F7-K6HQ>] (“[T]here is nothing wrong with keeping silent because of ‘but Gorsuch.’”); Hugh Hewitt, *Turns out ‘But Gorsuch’ Was a Good Argument After All*, WASH. POST (June 27, 2018), <https://wapo.st/2AaofE6> [<https://perma.cc/UJU7-Y88T>]. Others have made a similar argument for White House officials who are involved in various administration fiascos in addition to the selection of judges. See Jack Goldsmith (@jackgoldsmith), TWITTER (Aug. 18, 2018, 1:11 PM), <https://twitter.com/jackgoldsmith/status/1030910169453080577> [<https://perma.cc/24ZY-V5W7>] (“McGahn will forever be a (deserved) hero to the conservative establishment for his role in helping select and confirm great conservative judges and justices. Everything else, it increasingly appears, is a cost of doing business.”).

<sup>61</sup> See Amber Phillips, “*They’re Rapists.*” *President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://wapo.st/2LEKBoC> [<https://perma.cc/NX3K-KFZC>].

<sup>62</sup> See *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://nyti.ms/2jaECZT> [<https://perma.cc/X7LN-PWVT>].

<sup>63</sup> See, e.g., Editorial Board, Opinion, *Let the Trump Team Eat in Peace*, WASH. POST (June 24, 2018), <https://wapo.st/2JRInxb> [<https://perma.cc/Z4L7-DV78>]; Nicole Hemmer, *In MLK’s Day, Conservatives Didn’t Think He Was So “Civil,”* VOX (June 26, 2018, 7:00 AM), <https://www.vox.com/the-big-idea/2018/6/26/17503088/sanders-civility-red-hen-restaurant-trump-mlk-martin-luther-king-protests> [<https://perma.cc/64QH-ZNEK>].

<sup>64</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting) (describing the majority’s reasoning as “the mystical aphorisms of the fortune cookie”); *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting) (claiming that “the real rationale of today’s opinion” was a “disappearing trail of its legalistic argle-bargle”).

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tected the First Amendment's guarantee of free speech, and he was justifiably skeptical of efforts to suppress disfavored ideas. He recognized that constitutional protections should extend even to words that upset people, including him, and he (nicely) asked people to join him in tolerating words or ideas they could not stand.

But sometimes the best things about a person get the best of them too. Justice Kennedy believed in the power of words and of civility, perhaps sometimes to a fault. Still, the Justice's faith in those principles and their ability to redeem us even in trying times will be missed, particularly as the principles come under siege by regimes more authoritarian than his beloved California.

## APPENDIX

UNDERSTANDING FREEDOM'S HERITAGE:  
HOW TO KEEP AND DEFEND LIBERTY<sup>65</sup>

SOPHOCLES, *ANTIGONE* (442 B.C.) (Antigone's Plea to Creon)

Pericles, Funeral Oration (431 B.C.)

PLATO, *The Allegory of the Cave*, in *THE REPUBLIC*,  
Book VII (c. 380 B.C.)

Cicero, First Oration Against Catiline (63 B.C.)

MAGNA CARTA, Articles 39 and 40 (1215)

WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*,  
act IV, sc. 1, beginning at line 2125 (1596–1598) (Portia's Speech)

WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act III, sc. 2, beginning  
at line 1617 (1599) (Marc Antony's Funeral Oration for Caesar)

Edmund Burke, Speech to the Electors at Bristol (1774)

Patrick Henry, Speech to Second Virginia Conference (1775)

THOMAS JEFFERSON, *THE DECLARATION OF  
INDEPENDENCE* (1776)

George Washington, Resignation Speech (1783)

THE CONSTITUTION OF THE UNITED STATES pmbl. (1787)

THE FEDERALIST NO. 1 (1787) (Alexander Hamilton)

William Wilberforce, Abolition Speech (1789)

Friedrich Schiller, *The Maid of Orleans* (1801) (Plea by Joan)

Daniel Webster, *Second Reply to Hayne* (1830)

Sojourner Truth, *Ain't I a Woman?* (1851)

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<sup>65</sup> This Appendix is adapted from *Understanding Freedom's Heritage: How to Keep and Defend Liberty*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (June 25, 2013), [http://cdn.ca9.uscourts.gov/datastore/library/2013/06/27/AMK\\_ReadingList\\_20130625.pdf](http://cdn.ca9.uscourts.gov/datastore/library/2013/06/27/AMK_ReadingList_20130625.pdf) [<https://perma.cc/7T2Z-W8ND>].

- Henry Wadsworth Longfellow,  
*The Midnight Ride of Paul Revere* (1861)
- Abraham Lincoln, The Gettysburg Address (1863)
- Abraham Lincoln, Letter to Mrs. Bixby (1864)
- John Greenleaf Whittier, “Barbara Frietchie” (1864)
- Abraham Lincoln, Second Inaugural Address (1865)
- William Ernest Henley, “Invictus” (1875)
- Susan B. Anthony, Women’s Right to the Suffrage (1873)
- Chief Joseph, Surrender Speech (1877)
- The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting)
- Theodore Roosevelt, Duties of American Citizenship (1883)
- MARK TWAIN, HUCKLEBERRY FINN, ch. XXXI (1885)  
(Huck’s Moral Dilemma)
- Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting)
- Emile Zola, *J’Accuse . . . !* (1898)
- Theodore Roosevelt, Man in the Arena (1910)
- Emmeline Pankhurst, Freedom or Death (1913)
- John McCrae, “In Flanders Fields” (1915)
- Abrams v. United States*, 250 U.S. 616, 624 (1919)  
(Holmes, J., dissenting)
- Robert Frost, “The Road Not Taken” (1920)
- Clarence Darrow, Closing Argument in *Illinois v. Leopold & Loeb*,  
Nos. 33,623 & 33,624 (Ill. Cir. Ct. Sept. 1, 1924)
- Whitney v. California*, 274 U.S. 357, 372 (1927)  
(Brandeis, J., concurring)
- Lou Gehrig, Farewell to Baseball (1939)

THE GREAT DICTATOR (1940)  
(Film: Chaplin's Speech Declining the Dictatorship)

Winston Churchill, We Shall Fight on the Beaches (1940)

Winston Churchill, Their Finest Hour (1940)

Franklin Delano Roosevelt, The Four Freedoms (1941)

John Gillespie Magee, "High Flight" (1941)

Franklin Delano Roosevelt, Pearl Harbor Address (1941)

Mahatma Gandhi, Quit India (1942)

*Korematsu v. United States*, 323 U.S. 214, 233 (1944)  
(Murphy, J., dissenting)

Martin Niemöller, "First They Came" (1946)

Jawaharlal Nehru, Tryst with Destiny (1947)

GEORGE ORWELL, 1984 (1948)

William Faulkner, Acceptance of Nobel Prize (1950)

WHITTAKER CHAMBERS, WITNESS (1952) (Preface)

*Brown v. Board of Education*, 347 U.S. 483 (1954)

FRIEDRICH DÜRRENMATT, THE VISIT (1956)

12 ANGRY MEN (1957) (Film)

Dwight D. Eisenhower, Farewell Address (1961)

John F. Kennedy, Inaugural Address (1961)

TO KILL A MOCKINGBIRD (1962)  
(Film: Gregory Peck's Closing Argument to the Jury)

ALEKSANDR SOLZHENTSYN, ONE DAY IN THE  
LIFE OF IVAN DENISOVICH (1962)

Martin Luther King, Jr., I Have a Dream (1963)

Martin Luther King, Jr., Letter from a Birmingham Jail (1963)

Don McLean, "American Pie" (1971) (Song)

MICHAEL CRICHTON, THE GREAT TRAIN ROBBERY (1975) (Preface)

Ronald Reagan, The Boys of Pointe Du Hoc (1984)

Ronald Reagan, Speech at Berlin Wall (1987)

*Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring)

A FEW GOOD MEN (1992)

(Film: Tom Cruise's Direct Examination of Jack Nicholson)

SHAWSHANK REDEMPTION (1994)

(Film: Mozart Duet Inspires Prisoners)

LEGALLY BLONDE (2001)

(Film: Reese Witherspoon's Commencement Address)

*Lawrence v. Texas*, 539 U.S. 558 (2003)