INTRODUCTION  (Fr. Alexander Pocetto, OSFS)

When a man studies, he has the opportunity to see his fellow beings in historical perspective. When a man practices law he can see his fellow beings in all their guises, both base and noble. When a man teaches he sees his fellow beings at their best. That man then can mount a Supreme Court seat and see his fellow beings as an integral part of a society that often needs to be saved from itself.

Our guest this evening has moved brilliantly through all of those chairs. First in his class at Xavier High School; first in his class at Georgetown. Tops at Harvard where he earned a place on the Harvard Law Review and first with his colleagues when the American Bar Association gave him their highest rating as a nominee for the Supreme Court.

His finely reasoned and forcefully expressed opinions are on the side of judicial restraint.

He has commented that the judiciary had derailed Democrat processes by setting major issues outside the arena of public debate.
At one time he charged the Supreme Court with making decisions that were “tied together by threads of social preference and predisposition.”

His positions on increasing accountability of the press and the unconstitutionality of the Graham Rudman Act are excellent examples of his philosophy and skill.

His formidable intellect has, on occasion, terrified his foes. His elegance in writing impresses friend and foe alike.

I take great personal pleasure, however, in noting the incontrovertible proof that this intellectual giant has all the humanity and warmth that nature can bestow. He’s Italian. And I can’t say more than that.

Ladies and Gentleman, it is a great and rare pleasure to present to you Associate Justice of the Supreme Court of the United States, Antonin Scalia.

Thank you Father Pocetto, Father Gambet, Reverend Clergy, Faculty and Students of Allentown College, Ladies and Gentleman.

I am Italian. I have to admit that, but I didn’t want to talk to you about that this evening. I thought I would share a few thoughts about the Constitution of the United States, a matter which I’ve given some attention over the past seven years—four years on the Court of Appeals and three years on the Supreme Court.

If you’ve ever been to a formal dinner in England, you will recall that after dessert and coffee and before it’s permitted to light a cigarette, it’s customary that a toast be presented which goes—Ladies and Gentleman, the Queen. If you’ve ever been to a diplomatic function at which there are representatives both of Great Britain and the United States present, you will know that that toast is generally replied to by the American delegation with a toast that goes—Ladies and Gentleman, the President of the United States. In my many years in Washington by now, because I went to college there and served in the Executive Branch for about seven years before being on the Courts, I’ve heard the progression of toasts many times. It always strikes me as wrong. The President is, of course, both our Chief Executive and our Head of State, sort of the Queen and the Prime Minister rolled into one. But, in fact, if one wishes to evoke for Americans what the Queen is for the British, the symbol of our nationhood and of our unity as a people, it has always seemed to me that the toast ought to go—Ladies and Gentleman, the Constitution of the
United States. Because that is really the equivalent of the royal armies that brought forth one nation out of a diversity of people and it is not only the token but, remarkably enough, the very substance of what binds us together as people.

The Constitutional scholar and political philosopher Walter Burns wrote as book a couple of years ago called Taking the Constitution Seriously in which he quoted another political philosopher, Martin Diamond, to the effect that there is no other nation in the world that has an equivalent to our word un-American. It means nothing in French political debate or German political debate to refer to something as unFrench or unGerman. It would be utterly meaningless. It is only this country which considers itself bound together, not by genealogy or by place of residence, but by ideas. And the most important of those ideas are set forth in the Constitution.

It may not have occurred to you but it is remarkable, is it not, that we have so much veneration for the document that even when we amend it we don’t amend it the way we amend anything else. When you amend a statute you strike out the old words, chuck them away and put in the new ones. But we amend the Constitution so gingerly and with such veneration that we leave the original text in tact and add the amendment at the end. The Twenty-First Amendment, Twenty-Second, or whatever. So you read the original text and you this we still have a Senate elected by the State Legislature. It's only when you get to the Seventeenth Amendment that you realize, oh, that’s been changed.

One difficulty with a symbol like the Constitution, any symbol, is the eventually it comes to be taken for granted. So by the time you’ve graduated from high school, and I’m sure that students here by the time you’re in college, you have heard praise of the Constitution sung so frequently that you being to suspect its just a lot of nationalistic exaggeration that other countries Constitution’s are, in fact, quite as good as ours and the only thing special about ours is that it happens to be ours.

Let me tell you of a little incident that occurred to me a number of years ago that I hope may disabuse you of that notion. A number of years before I went on the bench I served in the Executive Branch and my last position there was in the Justice Department. I was the head of the division called The Office of Legal Counsel, which is the advice-giving division of the department. It provides legal advice to the President, to the Attorney General and to the General Counsel of the Agencies.
One year while I was there, the equivalent office in the Italian Government was celebrating its anniversary and they invited their correlative offices from all the major countries of the world to come to Rome to help them celebrate, which I was happy to do.

I left the Justice Department on Constitution Avenue in Washington. Those of you that are familiar with the building know that it’s an art deco building constructed in the ‘20’s or early ‘30’s and typical for the period. I go over to Rome to meet my colleagues in the equivalent offices which is called the Avocato dello Stato. The Avocato dello Stato is located in a building that was formerly the headquarters of the Augustinian Order where Martin Luther stayed when he was in Rome.

You know the mind reels backward. You’re so new and they are so old. We are so fresh and young and they are so venerable. I think every American tourist has that feeling the first time he or she goes to Europe. In fact, maybe every time he or she goes to Europe.

But then it occurred to me, this office, the Avocato dello Stato was celebrating its hundredth anniversary. Big Deal! I am coming from a country that was about, at that time, to celebrate its two hundredth. The fact is that we have been a nation living under this one Constitution for more than a century longer then Italy was anything more than a geographic description. For more than a century longer the Germany was anything more than a geographic description rather than a nation.

During this time we have been living under this one constitution, France has had five separate Constitutions and at least eleven different forms of government. So although in many respects we are indeed nouveau, and young and untried and untested and all of that, in the field of government, we are the oldest. We are the most venerable. We are the most successful. And that is all attributable to the Constitution.

The wondrous durability of the document is attributable to a whole series of irreplicable circumstances. Incredibly lucky if you wish to regard it that way, or, as many of the founding fathers thought, providential.

When else has a government been established not by the conquerors dividing up the territory of by politicians parceling out the power, but quite literally by a four month seminar consisting of the wisest and most experienced leaders of the nation. The historian, Clinton Rossiter, has described the prominence of the 55 delegates to
the Grand Convention, the Philadelphia Convention of 1787 as follows: “The Republic has two men of world-wide fame and both were there (he was referring, of course, to George Washington and Benjamin Franklin). It had perhaps ten who were well-known within the bounds of the old British Empire and at least five of that description were there: Johnson, Livingston, Robert Morris, Dickinson, and Rutledge. Gorham, Gerry, Sherman, Elsworth, Hamilton, Mifflin, Wilson, Madison, Wyth, Williamson, Charles Pickney and the untraveled Mason had won themselves, as best one could in those days of poor communications, continental reputations. Langdon, Reed, Randolph, Alexander Martin, Jennifer and C.C. Pickney were major figures in their states and almost every other delegate was someone whose standing was unchallenged in his part of the country.”

As for governmental experience, all but two or three of the framers had served as public officials of a colony or of a state.

A remarkable forty-two of fifty-five had served in the Congress of the United States under the Articles of Confederation.

As for education, in an age when few even from the richest families went to college, the fifty-five members of the convention included nine graduates of the College of New Jersey, now Princeton; four graduates of Yale, four from William and Mary; three from Harvard; two from King’s College, now Columbia; two from the College of Philadelphia, now the University of Pennsylvania and one each from Oxford and St. Andrews. Several others had studied law at the Inns of Court in London. The academics here will be pleased to note a number of them had done graduate work and six held professorships or tutorships.

These extraordinary individuals, quite literally much of the cream of society at that time, did not meet a couple of times to draw up grand outlines and leave the detail work to their staff, which is the way it would be done today, of course. They met personally five or six hours a day, six days a week, from mid-May to mid-September—almost an entire baseball season, to put it in perspective. After the planner sessions they often filled their evenings with committee work or information discussion about the same problems they had been talking about during the day. Imagine getting individuals of the prominence to commit that kind of time to such an enterprise today. It would never happen again.

Yale University Press, a few years ago, came out with a paperback edition of Foran’s notes of the Convention consisting principally, of course, of the notes that
Madison kept. He used to scribble a few shorthand notations during the day and then he’d go back to his rooms and write out, at great length, the proceeding as he recalled it.

I urge you some rainy weekend to read Foran’s records. They are full of the spirit of the age of reason. The belief that seems almost naïve to many of us cynical moderns that the application of logic and experience to any problem will produce, if not perfection, at least improvement. These men were engaged and knew themselves to be engaged, in the enterprise of applying what James Madison called “the new science of government.”

The records are also full of the spirit of honest, open discussion and persuasion. One of the things that impress you, if you read the records, is how often the views that are expressed by one of the participants in the fall, are quite the opposite of the views expressed by the same participant in the spring. Because in the interim he had been persuaded by the discussion with his colleagues. I might interject that that openness to persuasion is as essential to the continuation of this Republic as it was to its formation. So also is the spirit of humility and of generous acceptance of the majority’s judgment expressed in the famous concluding speech of Benjamin Franklin when on the last day of the Convention he urged all of the member present to step forward and sign the document and was successful in persuading all except two of them. We have that speech in its original form since Franklin was 81 at the time and in poor health and too weak to stand up to deliver it, so he gave the text to James Wilson to read, and Wilson gave it to Madison to copy. It went in part as follows:

“Mr. President. I confess that there are several parts of this Constitution which I do not approve, but I am not sure I shall never approve them for having living long I have experienced many instances of being obliged by better information or fuller consideration to change opinions, even on important subjects which I once thought right but found to be otherwise. It is therefore that the older I grow the more apt I am to doubt my own judgment and to pay more respect to the judgment of others.”

I mean this old fellow was doing a real number on the other members of the convention. A very wise man, Franklin.
“In these sentiment, sir, I agree to this Constitution with all of its faults, if they are such, because I think a general government necessary for us and there is no form of government but what may be a blessing to the people if well administered and believe farther that this likely to be well administered for a course of years.”

Of course, when he says that, “this is likely to be well administered,” he’s looking back over his shoulder to the President of the Convention, George Washington, whom everybody knows has a lock on the Presidency.

“I doubt, too, whether any other Convention we can obtain may be able to make a better Constitution, for when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interest, and their selfish views from such an assembly can a perfect production be expected. It, therefore, astonishes me, sir, to find this system approaching so near to perfection as it does and I think it will astonish or enemies. Thus I consent, sir, to this constitution because I expect no better and because I am not sure that it is not the best. The opinions I have had of its errors I sacrifice to the public good. I have never whispered a syllable of them abroad. Within these walls they were born and here they shall die.”

Franklin made good on that promise as did almost all of the members of the Convention. They did not, in the period which followed in which the debate concerning the ratification of the Constitution was being avidly conducted throughout the country. They did not raise the objections to particular provisions that they had at the end during the Convention.

Well having said a lot about the process of the Grand Convention, let me say just a little bit about its product.

That product did not include the portion of the Constitution that lawyers have most occasion to invoke, namely the Bill of Rights. That was added, as you know, on the proposal of the First Congress as the first ten Amendments to the Constitution. Although the understanding that such a Bill of Rights would be proposed was almost a condition of the ratification of several of the states, nonetheless it is paradoxical, is it not, that what was an afterthought, what was not what was
debated during those four months, should have become the most celebrated feature of our Constitution.

In the commemorations of the Bicentennial that are now going on that have been going on since 1987 and will continue until 1994 by which time I will be glad they’re over—’87 was when the convention sat. ’91 will be the bicentennial of the Bill of Rights.

In all those celebrations of the provisions of the Constitution that are singled out for praise are not the bicameralism of the legislature or the separate election of the president, of the presidential veto power, or life tenure for judges or the brief two year terms for members of the House, or the six year terms for the members of the Senate, or any of the other expertly crafted provisions that pertain to the structure, that is to say the Constitution, of the government, but rather freedom of speech, freedom of religion, freedom of press, and so forth, provisions of the subsequently adopted Bill of Rights? So completely does that portion of the document capture the imagination and attract the affection and devotion of the people.

But if the virtue of the Constitution is to be judged primarily on the basis of the popular feature, the Bill of Rights, one must admit that the Constitution of the United States fares rather poorly by comparison.

Take for example protection against governmental intrusion upon privacy. The United States Bill of Rights contains nothing more explicit than the following: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. And no warrants shall be issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Compare that to the much more explicit and extensive guarantees of a prominent modern Constitution which reads: Citizens are guaranteed the inviolability of the person. No one may be arrested except by a court decision of on the warrant of a procurator. Citizens are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of those residing in it. The privacy of the citizen and of their correspondence, telephone conversations and telegraphic communications are protected by law.

Or consider freedom of religion. Our First Amendment says nothing more than: Congress shall make no law respecting an establishment of religion or prohibiting
the free exercise thereof. Compare that with the prominent modern Constitution which says: Citizens are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion and to conduct religious worship or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited.

Or consider freedom of speech and assembly as to which the United States Bill of Rights says only: Congress shall make no law abridging the freedom of speech or of the press or the right of the people to peaceably assemble and to petition the government for a redress of grievances. Compare that paltry guarantee with the modern Constitution I’ve been describing which says: Citizens are guaranteed freedom of speech, of the press and of assembly, meetings, street processions, and demonstrations. Citizens have the right to associate with in public organizations that promote their political activity and initiative. Persecution for criticism of state bodies and public organizations is prohibited. Persons guilty of such persecution will be called to account.

I’m just letting it sink in. You will see the point I have been driving toward, indeed you probably already guessed it, when I tell you that the modern Constitution I have been describing is that of the Union of Soviet Socialist Republics. Needless to say, I would not trade our old Bill of Rights for that in a million years. If I had to pick a country other than my own, in which I thought my individual rights were most secure, I would very likely choose England or Australia, both of which are among the significant hold-outs in the universal movement towards Bills of Rights. The reason, of course, is that a Bill of Rights only has value if the other part of the Constitution, the part that really constitutes the organs of government, establishes a structure that is likely to preserve against the ineradicable human lust for power—the liberties that the Bill of Rights expresses.

If the people value those liberties, the proper Constitutional structure will likely result in their preservation even in the absence of a Bill of Rights. And where that structure does not exist, the mere recitation of the liberties will certainly not preserve them.

Do not mistake me, it is entirely appropriate for us Americans in this bicentennial of our founding as a nation to celebrate and decorate our wonderful Bill of Rights, but we should realize that it represents the fruit, and not the roots, of our constitutional tree. The rights it expresses are the reasons that the other provisions exist. But it is those other humdrum provisions—the structural mechanistic portions of the Constitution which, in James Madison’s words ‘pit ambition against
ambition’ and make it impossible for any element of government to obtain unchecked power. It is those humdrum provisions that convert the Bill of Rights from a paper assurance to a living guarantee.

It’s a lot easier to get a crowd do form behind a banner that reads “Freedom of Speech or Death,” then behind on that says “Bicameralism or Fight.” But the fact is that the latter goes much more to the heart of the matter. That either signifies agreement of disagreement.

One final thought—All the provisions of the Constitution, the Bill of Rights and the structural portions as well will endure in practice only so long as they endure in the minds and hearts of the people.

We have seen, for example, a significant dimming if not the utter disappearance of the concept of enumerated and hence limited federal power contained in the original document. (Inaudible) changed, it has the same old commerce clause but it’s just that the peoples (inaudible) in the first quarter of this century. But the Supreme Court ultimately yielded as it inevitably will yield to the persistent long term view of the society at large.

The Court can stand against the distortion of the original constitution produced by the temporary excess of one brief era—the era of McCarthyism, if you need an example. But in the nature of things, the Supreme Court cannot hold out against a departure from our Constitutional traditions that is deep and sustained and believed to be the society over a lengthy period of time, as the new view of the commerce power was. The judges of the Supreme Court are not dispatched here from Mars, but are drawn from the very same society that possesses the altered understanding. So if the understanding persists long enough, if its taught in the law school, learned by lawyers, believed in by the newly appointed lower court judges, it will eventually be the system of beliefs that the appointees to the Supreme Court bring to the branch themselves. And that’s for better or worse because the new understandings are not always for the better. They do not always, for example, expand rather than constrict individual freedom.

Over the long haul, in other words, the court cannot save the society from itself, because over the long haul, the court is no more than the society itself. The compromises of principal, the misperceptions of the meaning of liberty that is believed in the homes, learned in the schools, taught in the universities will
ultimately be the body of knowledge and belief that new justices bring with them to the bench.

The Constitution will endure, in other words, only to the extent that it endures in the understanding and affection of the people. In your understanding and affection.

That is why I used to find it so upsetting in the days when I taught Constitutional Law, to learn how many law students in major universities, the best and the brightest and presumably the most interested in the law, had never read cover to cover such a basic part of our Constitutional heritage as the Federalist Papers. And it is why I thought it worth the time to speak to you about the Constitution tonight.

Thank you.