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MADISON LECTURE

JAMES MEREDITH, MUHAMMAD ALI, AND LIEUTENANT WILLIAM CALLEY: CASES AND CONTROVERSIES BEFORE THE FIFTH CIRCUIT

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INTRODUCTION

Madison said he wasn't the "writer of the Constitution," because it was the "work of many heads & many hands."¹ This truth continues today as lawyers help write our Constitution indivisibly with judges.

What indisputably was just the work of Madison's hand is the most complete record we have of what was said in Philadelphia. He didn't publish his notes till the other Framers had died, at which point he remarked that he "outlived" them and "may be thought to have outlived myself."²

Madison was thirty-seven in Philadelphia. I was thirty-seven almost twenty years ago. Already then, I was an "inferior" officer according to his Article II.³ Now, I sit on one of his Article III "inferior courts."⁴ I argued for years before the court I now sit on. When I appeared before judges whose friendship I now enjoy and heard "all rise," what came to mind was the opening stage direction from *Macbeth*: "Lightning and thunder. Enter three witches."⁵ What is on their minds? Does my argument have the right ingredients? Is it all witchery?

That uncertainty intrigued me enough to write several articles.⁶ Having served a few years on the bench, I will elaborate an answer informed now by my perspective as a lawyer-turned-judge.

Judging is witchery only if we "kill all the lawyers."⁷ The truth is we've had a killing field. We over-focus on judicial end product in part because only in the last few years—really, since I've been on the bench—have full case records, with pleadings and appellate argument audio, been easily accessible to the academy and public. My iPad hyperlinks every record and case citation for instant verification. Every brief and everything in the trial record is electronically filed and accessible, and oral arguments are streamed online.

¹ Letter from James Madison to William Cogswell (Mar. 10, 1834), <https://founders.archives.gov/documents/Madison/99-02-02-2952>.

² Letter from James Madison to Jared Sparks (June 1, 1831), <https://founders.archives.gov/documents/Madison/99-02-02-2358>.

³ See U.S. CONST. art. II, § 2. From 1989–2011, I served as an Assistant U.S. Attorney for the District of Massachusetts and then for the Eastern District of Louisiana.

⁴ See *id.* § 1.

⁵ WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 1.

⁶ See generally Stephen A. Higginson, *Constitutional Advocacy Explains Constitutional Outcomes*, 60 FLA. L. REV. 857 (2008) (discussing the close relationship between advocacy in constitutional cases and the ultimate decision made); Stephen A. Higginson, *Thurgood Marshall: Cases in Controversy*, 15 GEO. MASON L. REV. 741 (2008) (discussing Thurgood Marshall's use of reductionist reasoning, as both attorney and Justice, to shape the outcome of constitutional cases).

⁷ WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2, l.71.

When we examine the case records, pleadings, and arguments, we can see that nothing judges write can be disconnected from the lawyering that makes it. Without that connection, judging would seem a “hell-broth” of ingredients we label and guess about: pragmatism, originalism, and so on—each an “adder’s fork” or a “blindworm’s sting.”⁸ We may yearn for the predictability, teachability, and provocation that interpretative labels give. And they give lawyers—and lower courts, whose views aren’t embraced—a palliative. Perhaps most of all, they don’t obligate what one colleague and mentor calls the “deep dive” into facts and law every case requires. My experience on an intermediate appellate court, presently with fourteen active judges who work in panels of three and handle approximately 8000 appeals a year, is that what is authoritative is whatever authority lawyers give compellingly. The “boil and bubble” of judging is theirs.⁹

Lawyer Thurgood Marshall in *Brown v. Board of Education*¹⁰—more than Chief Justice Warren and his unanimous court—and lawyer Abe Fortas in *Gideon v. Wainwright*¹¹—more than Justice Hugo Black and that unanimous court—rewrote our Constitution. Lawyer Marshall rewrote the Equal Protection Clause in *Brown* when he disproved the *Plessy v. Ferguson*¹² equation that separately equal equals equal. No, he said, separate is not equal.¹³ When he was asked why, for his authority, he said, “[P]eople have grown up.”¹⁴ Blacks and whites have fought two world wars together; they can go to school together.

And it was lawyer Abe Fortas who rewrote the Fourteenth Amendment to give us the right to counsel in *Gideon*.¹⁵ In the Supreme Court, when he was asked whether his client had “special circumstances” requiring counsel, Fortas excoriated the Court, telling them if you are “still struggling with this impossible question of do special circumstances exist,”¹⁶ you’re forgetting “the realities of what happens downstairs, of what happens to these poor, miserable, indigent people when they are arrested and they are brought . . . in these

⁸ SHAKESPEARE, *supra* note 5, at act 4, sc. 1, l.16.

⁹ *Id.* at act 4, sc. 1, l.19.

¹⁰ 347 U.S. 483, 484 (1954) (noting Thurgood Marshall as having argued for appellants).

¹¹ 372 U.S. 335, 335 (1963) (noting Abe Fortas as having argued for petitioner).

¹² 347 U.S. at 494–95 (“[T]his finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”).

¹³ *Id.* at 495 (striking down the separate but equal doctrine in the field of public education).

¹⁴ 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 345 (Philip B. Kurland & Gerhard Casper eds., 1975).

¹⁵ See *Gideon*, 372 U.S. at 335 (noting Abe Fortas as the attorney for the petitioner).

¹⁶ Oral Argument at 32:51, *Gideon*, 372 U.S. 335 (No. 155) [hereinafter *Gideon* Oral Argument], https://apps.oyez.org/player/#/warren11/oral_argument_audio/14085.

strange and awesome circumstances . . . before a court. And there, Clarence Earl Gideon, defend yourself. Apply the doctrine of *Mapp* against Ohio.”¹⁷

“Grow up,” or “Clarence Earl Gideon, apply the doctrine of *Mapp v. Ohio*”¹⁸—eclectic authorities lawyers pressed to overturn precedent and rewrite the Constitution.

Both these lawyers became Justices. If they were alive, they’d agree, I think, that good judging comes from good lawyering.

A few years ago, I was on a panel with Chief Justice Margaret Marshall, who immigrated to the United States from apartheid South Africa and became the first woman Chief Justice of the Massachusetts Supreme Judicial Court.¹⁹ She described receiving an award for *Goodridge v. Department of Public Health*, the 2003 Massachusetts same-sex marriage decision.²⁰ Seeing Mary Bonato in the audience, the attorney who compellingly presented that case (and later, *Obergefell v. Hodges*),²¹ Chief Justice Marshall asked lawyer Bonato to stand and receive credit. To me there is importance to this modesty, to Madison’s observation that our Constitution has been written by many heads and many hands. Scholars increasingly perceive this, integrating attorney work product that today is accessible. In the more salient cases I’ve participated in, law professor blogs dive into the minutiae of each oral argument question and answer, now able to assign credit and blame—attribution and authorship—connecting the dots back from judges to lawyers. And that corrective is overdue, and hopefully will move us away, even if fractionally, from facile cynicism about judicial ego.

Realigning focus to granular lawyering reinforces that what is needed in judges is the talent and open-mindedness to comprehend and decide lawyer arguments. Whether we get that brings to mind two noteworthy questions on the Senate Questionnaire every judicial nominee fills out.²²

¹⁷ *Id.* at 18:35.

¹⁸ 367 U.S. 643 (1961) (holding evidence found in violation of Fourth Amendment inadmissible in state court).

¹⁹ See Nina Totenberg, *Former Mass. Chief Justice on Life, Liberty, and Gay Marriage*, NPR (June 7, 2013, 3:25 AM), <http://www.npr.org/2013/06/07/189288605/former-mass-chief-justice-on-life-liberty-and-gay-marriage>.

²⁰ 440 Mass. 309 (2003).

²¹ 135 S. Ct. 2584 (2015).

²² See, e.g., S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES (Merrick Garland, 2016), <https://www.judiciary.senate.gov/imo/media/doc/Senate%20Judiciary%20Committee%20Questionnaire%205%209%202016.pdf>.

Question 17 asks for the phone numbers of all counsel in the “ten most significant litigated matters which you personally handled.”²³ Lawyers, especially opposing counsel, have excellent insight into talent and temperament. The Framers perceived that. On June 5, 1787, in the Committee of the Whole, Madison recorded that the delegates were at loggerheads about who should select members of the “National Judiciary.”²⁴ Wilson had just spoken against Congress picking, because big bodies are prone to “[i]ntrigue, partiality, and concealment.”²⁵ We need “a single, responsible person,” he said.²⁶ Rutledge replied: No, don’t “grant so great a power to any single person. The people will think we are leaning too much towards Monarchy.”²⁷ At that impasse, Madison wrote that Benjamin Franklin raised an approach practiced in Scotland, where “the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order *to get rid of him*, and share his practice among themselves.”²⁸

Then there is Question 11, which asks nominees about memberships since law school.²⁹ To avoid recent controversy, let me offer comment again through the Framers—this time George Washington. We haven’t heeded his Farewell Address warning against factionalism and party affiliation, the “spirit of revenge,” rather than the common good.³⁰ But he lived that animating principle.

In March 1783, before the Treaty of Paris, Washington gave the Newburg Address, often remembered because his officers wept when he stumbled reaching for his spectacles,³¹ telling them, “[P]ardon me. I have grown gray in your service and now find myself growing blind.”³² Washington had heard talk of a military coup against Congress for back pay.³³ He sympathized with their grievance—these were officers who had fought with him for eight years—but he denounced as madness a mutiny and military elite.³⁴ That ended an

²³ See *id.* at 126.

²⁴ THE AVALON PROJECT, YALE LAW SCHOOL, *Madison Debates: Tuesday June 5, 1787*, http://avalon.law.yale.edu/18th_century/debates_605.asp.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (emphasis added).

²⁹ See, e.g., S. COMM. ON THE JUDICIARY, *supra* note 22, at 7.

³⁰ THE AVALON PROJECT, YALE LAW SCHOOL, *Washington's Farewell Address: 1796*, http://avalon.law.yale.edu/18th_century/washing.asp.

³¹ See MINOR MYERS, JR., *LIBERTY WITHOUT ANARCHY: A HISTORY OF THE SOCIETY OF THE CINCINNATI* 14 (2004).

³² *Id.*

³³ See *id.* at 1–3.

³⁴ See *id.*

immediate crisis, but the discontent re-emerged that spring in the form of a national military society called the Society of the Cincinnati.³⁵ Washington again sympathized with its benevolent purpose, but after consulting Jefferson, they spotted the danger of a hereditary clause and the risk of creating a society with leverage over, and blurred lines between, it and government.³⁶ In thinking about judicial selection, especially the importance of open-mindedness, how positive would it be if we remind ourselves of the note Washington wrote to himself on the eve of the Society's first national assembly over which he was to preside: "Strike out every word, sentence, and clause which has a political tendency."³⁷

After all, what is our judicial oath? Title 28, Section 453 instructs that we do justice without respect to persons.³⁸ The Section 453 statutory oath is a bigger mouthful than the constitutional one Madison and his contemporaries penned for us.³⁹ And Article VI's federal officer oath doesn't map exactly onto Article II's presidential oath, its more celebrated neighbor.⁴⁰ The President pledges to "preserve, protect and defend" the Constitution.⁴¹ Judges swear to less, to one verb, to "support this Constitution."⁴²

To support the Constitution. A contronym, "support" means both to bear the weight of and to give assistance to.⁴³

Support the Constitution, as in bear its weight? The late Professor Robert Cover, a teacher of mine, describes in his classic, *Justice Accused: Antislavery and the Judicial Process*, how heavy that weight was on antebellum judges struggling between conscience and law.⁴⁴

Support the Constitution, as in assisting it? These stories we all learn. How Chief Justice Marshall assisted Article I, giving Congress

³⁵ See *id.* at 15.

³⁶ 27 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 394, 1745–1799 (John C. Fitzpatrick, ed., 1931).

³⁷ *Id.* at 393.

³⁸ 28 U.S.C. § 453 (1990).

³⁹ Compare *id.* § 453, with U.S. CONST. art. VI.

⁴⁰ See U.S. CONST. art. VI (proclaiming executive and judicial officers shall be bound by an oath "to support" the Constitution); *id.* art. II, § 1, cl. 8 ("I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.").

⁴¹ *Id.* art. II, § 1, cl. 8.

⁴² *Id.* art. VI.

⁴³ *Support*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/support> (last visited Feb. 7, 2018).

⁴⁴ See generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) (examining the challenges judges faced when ruling on unjust laws regarding slavery in the nineteenth century).

implied powers in *McCulloch v. Maryland*.⁴⁵ How he assisted Article III, confirming that the Judiciary has the power of judicial review.⁴⁶ But here tonight, who can name the lawyer who prevailed and argued for the Bank of Maryland? Keep in mind, the decision was issued three days after nine days of lawyer argument. Yes, the Court gave Congress the power to create a bank, but surely it did so indivisibly with Daniel Webster (and his co-counsel William Pinkney, who later would be Madison's Attorney General).⁴⁷ Court and lawyer—indivisible decisionmaking and constitution writing.

And who can name the adversary lawyers who, on February 11, 1803, gave us *Marbury v. Madison*?⁴⁸ If we can't, that should cause concern.

I

LAWYERS, LIKE MADISON, WRITE LAW INDIVISIBLY WITH JUDGES

Eleven years ago, I ended an article I wrote by quoting Emily Dickinson: "To fill a Gap, Insert the Thing that caused it."⁴⁹ That "Thing" is the lawyer. NYU has such Things.

Have you listened to Professor Tony Amsterdam's argument in *Furman v. Georgia*, which led to the Court's landmark 1972 decision holding that imposition of death penalty amounted to cruel and unusual punishment?⁵⁰ Let me describe three points of argument I would elevate to constitution writing.

First, just before he sat down, Amsterdam brought up the distant past. Lord Ellenborough, in the House of Lords in 1813, wondered whether without the death penalty for commercial thefts all trade would stop.⁵¹ Amsterdam told the Justices that Parliament did repeal the law, yet "England did not fall."⁵²

Second, on rebuttal, Amsterdam pivoted to make a point about the present facts of his case: "a regular garden variety, burglary, murder. Unintended . . . , somebody shot through the door . . . , there

⁴⁵ 17 U.S. (4 Wheat.) 316, 408 (1819).

⁴⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

⁴⁷ See *McCulloch*, 17 U.S. at 322, 377 (noting Webster and Pinkney as having argued the case).

⁴⁸ *Marbury*, 5 U.S. at 137, 143 (Charles Lee and Levi Lincoln were the lawyers in the case).

⁴⁹ EMILY DICKINSON, TO FILL A GAP, <https://www.poemhunter.com/poem/to-fill-a-gap/>.

⁵⁰ 408 U.S. 238, 239–40 (1972).

⁵¹ *Id.* at 246 n.9 (Douglas, J., concurring).

⁵² Oral Argument at 25:07, *Furman*, 408 U.S. 238 (No. 69-5003), https://apps.oyez.org/player/#/burger4/oral_argument_audio/17579.

are thousands of these. The jury comes back with death, the defendant is black, the victim is white, it is all the aggravation in the case.”⁵³

Third, having used past and present, before he sat down, Amsterdam warned against a future of “rare arbitrary, usually discriminatory but provably discriminatory infliction of a punishment [that] escapes all other kinds of constitutional control . . . and escapes the public pressure that keep legislatures acting decently.”⁵⁴

The Court’s per curiam opinion in *Furman* is one page—actually, it’s one paragraph, just two sentences.⁵⁵ So who rewrote the Eighth Amendment? At minimum, there is indivisibility between the Court and the prevailing lawyer Amsterdam. Many heads, many hands. Not surprisingly, in the concurrences, we meet Amsterdam’s past—Lord Ellenborough;⁵⁶ we meet Amsterdam’s present—the fatal shot was through a closed door;⁵⁷ and we meet Amsterdam’s predicted future—a prohibition on arbitrary executions, capricious in every sense except for racial bias.⁵⁸

Professor Burt Neuborne, who recently wrote the magnificent First Amendment book *Madison’s Music*,⁵⁹ made an argument that compelled the 2000 decision in *Legal Services Corp. v. Velazquez*, which invalidated funding restrictions to Legal Services Corporation as violative of the First Amendment.⁶⁰ During argument, though eventual dissenters took most of his time, Neuborne managed to engage with Justice Kennedy, the 5-4 author, at least twice, decisively.

First, using the past, Neuborne emphasized the pertinent past wasn’t *Rust v. Sullivan*,⁶¹ but instead “the most relevant precedent” was Kennedy’s own *Arkansas Educational Television Commission v. Forbes*.⁶² Because Chief Justice Rehnquist had written *Rust*,⁶³ he steadily challenged Neuborne’s interpretation of *Rust*, till finally Neuborne capitulated: “That’ll teach me to do that.”⁶⁴ Self-deprecation and gentle humor—enhancing his credibility before the Court.

⁵³ *Id.* at 47:13.

⁵⁴ *Id.* at 49:00.

⁵⁵ *Furman*, 408 U.S. at 239–40.

⁵⁶ *Id.* at 246 n.9 (Douglas, J., concurring).

⁵⁷ *Id.* at 252.

⁵⁸ *Id.* at 295 (Brennan, J., concurring).

⁵⁹ BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* (2015).

⁶⁰ 531 U.S. 533, 533 (2001).

⁶¹ 500 U.S. 173 (1991).

⁶² Oral Argument at 38:09, *Velazquez*, 531 U.S. 533 (No. 99-603) [hereinafter *Velazquez* Oral Argument] (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998)), https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/21737.

⁶³ 500 U.S. at 176.

⁶⁴ *Velazquez* Oral Argument, *supra* note 62, at 32:55.

Second, if I remember, looking to the future, Neuborne offered a vital limiting principle.⁶⁵ But instead of explicating at length how Neuborne rewrote the First Amendment here, we all can read his briefs and argument, juxtapose the Court's opinion, and decide for ourselves about lawyer primacy and indivisibility of authorship. Still, I can't resist a fun, quick, and last example of Neuborne's talent and indivisibility. Justices Souter and Stevens had asked questions simultaneously, prompting Neuborne to admit to a fantasy of taking a call from one Justice while putting another on hold.⁶⁶

There are many other Madisons right here at NYU—lawyers who have given us our rewritten Constitution: Arthur Miller, Bob Bauer, and of course, the late Norman Dorsen.⁶⁷ And though I am no legal historian, I say with certainty that there is much more “authorship” of our Constitution to exhume.

Consider what has been called “the most famous footnote in constitutional law.”⁶⁸ I haven't been able to get the 1938 briefs, and I am unaware of any transcript of the April 6, 1938 argument.⁶⁹ Instead, Professor Lusky, who clerked for Justice Stone, described at length his involvement.⁷⁰ For now, Justice Stone keeps credit for the footnote in *United States v. Carolene Products Co.*, which tells judges to give “more searching judicial scrutiny” to protect “discrete and insular minorities” when prejudice “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”⁷¹ But with that accelerant, it is undeniable that lawyers ignited a firestorm of court decisions expounding our Constitution today, compelling judges to “assist and bear the weight of” rights enshrined in the Constitution.

⁶⁵ *See id.* at 50:10.

⁶⁶ *Id.* at 35:47.

⁶⁷ Arthur R. Miller is a professor at New York University School of Law. *Arthur R. Miller*, NYU, <http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20130> (last visited Feb. 4, 2018). Bob Bauer is a Professor of Practice and Distinguished Scholar in Residence at New York University School of Law. *Bob Bauer*, NYU, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=36322> (last visited Feb. 4, 2018). Norman Dorsen was the Frederick I. and Grace A. Stokes Professor of Law at New York University School of Law until his recent passing. *Norman Dorsen*, NYU, <http://www.law.nyu.edu/academics/fellowships/haysprogram/norman-dorsen-memorial> (last visited Feb. 4, 2018).

⁶⁸ WILLIAM M. WIECEK, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 116 (2006).

⁶⁹ *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 146 (1938) (referring to the case history and oral arguments in this case).

⁷⁰ *See generally* Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982) (describing his experience as Justice Stone's law clerk when *Carolene Products* was decided).

⁷¹ *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

Consider *Baker v. Carr*, 6-2,⁷² and *Reynolds v. Sims*, 8-1,⁷³—celebrated cases we say came from the Warren Court. *Baker* was argued and then reargued in October 1961 by Solicitor General Archibald Cox.⁷⁴ At one point, Justice Frankfurter asks incredulously, “You couldn’t mandamus a legislature, could you? . . . Do you think that’s a fair argument to address to this Court that you might push them into doing things although legally, you couldn’t make them?”⁷⁵ What ensues is a remarkable exchange over the statement attributed to President Jackson: “John Marshall has made his decree; now let him enforce it!”⁷⁶

I think Solicitor General Cox’s answer—made with his stature, calm, and confidence—decides *Baker*. He said:

I . . . think that by and large the people in this country recognize that a representative democracy depends upon voluntary compliance with law and that once this Court or another court focuses its attention on what the law is, then the chances that the legislature or other public officials will comply with it are very great and much greater than they are while the issue remains undecided.⁷⁷

If Daniel Webster indivisibly with the Court gave Congress its implied powers; if Thurgood Marshall indivisibly with the Court revised equal protection for us all; if Tony Amsterdam indivisibly with the Court stopped executions for years; if Archibald Cox indivisibly with the Court gave us one person, one vote—let me mention two other Constitution writers. The first was born here in New York but, I’m happy to say, left to be a civil rights lawyer in Louisiana: Richard Barry Sobol. If you listen to his oral history on the Internet, it will inspire you to consider how much difference you can make.⁷⁸ What part of our unwritten Constitution did he write? My hint: His client’s name was Gary Duncan—of *Duncan v. Louisiana*—who was convicted of simple battery for slapping the elbow of a white teenager in

⁷² 369 U.S. 186 (1962); *see also* *Baker v. Carr*, OYEZ, <https://www.oyez.org/cases/1960/6> (last visited Feb. 2, 2018).

⁷³ 377 U.S. 533 (1964); *see also* *Reynolds v. Sims*, OYEZ, <https://www.oyez.org/cases/1963/23> (last visited Feb. 2, 2018).

⁷⁴ *Baker*, 369 U.S. at 186, 187 (noting the case was reargued on October 9, 1961 and that Solicitor General Archibald Cox was the attorney arguing for the United States as *amicus curiae*).

⁷⁵ Oral Reargument at 1:18:14, *Baker*, 369 U.S. 186 (No. 6), https://apps.oyez.org/player/#/warren7/oral_argument_audio/14553.

⁷⁶ *Id.* at 1:20:12 (quoting Andrew Jackson).

⁷⁷ *Id.* at 1:21:20.

⁷⁸ *Richard Barry Sobol Oral History Interview Conducted by Joseph Mosnier in New Orleans, Louisiana*, LIBRARY OF CONG. (May 26, 2011), https://www.loc.gov/item/afc2010039_crhp0015/ (last visited Mar. 22, 2018) (video interview of Richard Barry Sobal conducted in May 2011).

Plaquemines Parish.⁷⁹ Listening to Sobol’s argument, I would say he, indivisibly with Justice White for the Court, gave defendants across the country the right to trial by jury.

Of course, my thesis recognizes that opposing counsel can also help us to write our Constitution. Louisiana’s Assistant Attorney General who argued *Duncan v. Louisiana*, audibly laughed, saying “Magna Carta did not guarantee jury trial to anybody.”⁸⁰ That went over with a thud. “I think I have a very[,] pretty good idea what Magna Carta says,” one Justice remarked.⁸¹ Is it a coincidence that Justice White, with his wry sense of humor, delivered the opinion of the Court saying that jury trial has existed for centuries with “impressive credentials traced by many to Magna Carta”?⁸²

So too in *Heart of Atlanta Motel v. United States*.⁸³ I heard the case lost—and written—by Atlanta Attorney Moreton Rolleston, a staunch segregationist. He ignored Justice Hugo Black to say, bombastically, “There are 43 million White people in the South, and I’ll say it for all of them so loud that Congress can hear, ‘Please don’t do us any more favors.’”⁸⁴

Remember Michael Newdow—the doctor, father, pro se litigant, and atheist—who sought to remove “God” from the Pledge of Allegiance?⁸⁵ In the Supreme Court, he was asked to explain how “under God” could be divisive when it passed Congress unanimously. Here is his *Carolene Products* footnote four answer⁸⁶:

Mr. Newdow: Again, the Pledge of Allegiance did absolutely fine and . . . got us through two world wars, got us through the Depression, got us through everything without God, and Congress stuck God in there for that particular reason, and the idea that it’s not divisive I think is somewhat, you know, shown to be questionable at least by what happened in the result of the Ninth Circuit’s opinion. The country went berserk because people were so upset that God was going to be taken out of the Pledge of Allegiance.

⁷⁹ 391 U.S. 145, 146–47 (1968).

⁸⁰ Oral Argument at 1:00:27, *Duncan*, 391 U.S. 145 (No. 410), https://apps.oyez.org/player/#/warren15/oral_argument_audio/15320.

⁸¹ *Id.* at 1:00:36.

⁸² *Duncan*, 391 U.S. at 151 (emphasis added).

⁸³ 379 U.S. 241 (1964).

⁸⁴ Oral Argument at 2:17:42, *Heart of Atlanta Motel*, 379 U.S. 241 (No. 515), https://apps.oyez.org/player/#/warren11/oral_argument_audio/14753.

⁸⁵ *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 3 (2004) (noting Michael Newdow as pro se respondent).

⁸⁶ Oral Argument at 47:37, *Elk Grove United Sch. Dist.*, 542 U.S. 1 (No. 02-1624), https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/22355.

Chief Justice Rehnquist: Do we know . . . do we know what the vote was in Congress apropos of divisiveness to adopt the under God phrase?

Mr. Newdow: In 1954?

Chief Justice Rehnquist: Yes.

Mr. Newdow: It was apparently unanimous. There was no objection. There's no count of the vote.

Chief Justice Rehnquist: Well, that doesn't sound divisive.

[Laughter]

Mr. Newdow: It doesn't sound divisive if . . . that's only because no atheist can get elected to public office. The studies show that forty-eight percent of the population cannot get elected.

[Applause]

Chief Justice Rehnquist: The courtroom will be cleared if there's any more clapping. Proceed, Mr. Newdow.

Mr. Newdow: The . . . there are right now in eight states in their constitutions provisions that say things like South Carolina's Constitution, no person who denies the existence of a supreme being shall hold any office under this Constitution. Among those eight states there's 1328, I believe the number of legislators, not one of which has tried to get that . . . those phrases out of their state constitutions, because they know, should they do that, they'll never get re-elected, because nobody likes somebody to stand up for atheists, and that's one of the key problems, and we perpetuate that every day when we say, okay class, including Newdow's daughter, stand up, put your hand on your heart and pledge, affirm that we are a nation under God.

Justice Ginsburg: You have a clear free exercise right to get at those laws, wouldn't you, that you recited that said atheists can't run for office, atheists can't do this or that? That . . . that would be plainly unconstitutional, would it not?

Mr. Newdow: That would be, yes. Those clauses are clearly nullities at this time in view of *Torcaso v. Watkins*.

Justice Ginsburg: And is—

Mr. Newdow: However, they still exist. And the fact that those clauses, I mean, we saw what happened to the . . . to . . . when the Confederate flag was over the statehouse in South Carolina, they had a big, you know, everyone got, you know, very upset and said, let's get that out. That was a flag that can mean anything to anyone. Could we imagine a clause in the South Carolina Constitution that said no African American shall hold any office under this Constitution, no Jew shall hold any office under this Constitution?

That would be there for two seconds maybe. But no atheists? Hey, let it stick around, it's been there, in eight states right now today in 2004.

My point in sharing that with you is the jolt. The jolt comes from the lawyer. The advocate, like Cox in *Baker* and *Sims*, tells the Supreme Court to assist and bear. Audibly, we hear it transfixingly. I have heard decisional moments when I know a lawyer is right; she knows she's right; the law clerks know it—the decision is fixed and written even if the court doesn't issue it for months.

New York civil rights lawyer William Kunstler twice explicated the Constitution so that governments can't make flag burning a crime.⁸⁷ And his partner—also a New Yorker—Arthur Kinoy gave us *Powell v. McCormack*,⁸⁸ fortifying the Qualifications Clause to make sure Congress can't exclude representatives who are lawfully elected, and *Dombrowski v. Pfister*.⁸⁹

Consider *District of Columbia v. Heller*⁹⁰—what a jolt to the Second Amendment. *United States v. Lopez*⁹¹—what a jolt for states' rights. Justice Scalia and Chief Justice Rehnquist? Well, yes, each did author for a 5-4 court.⁹² But in *Heller*, the Court had, indivisibly, Walter Dellinger and Paul Clement and Alan Gura.⁹³ The last two would later also argue *McDonald v. City of Chicago*.⁹⁴ And in *Lopez*, striking down the Gun-Free School Zones Act as exceeding Congress's Commerce Clause power,⁹⁵ yes, it was the Rehnquist Court, but affirming whom? The Fifth Circuit.⁹⁶ And whose decision? Circuit Judge Will Garwood, citing Madison's Federalist 45 to limit federal government authority.⁹⁷ Interestingly, on the subject of attribution, Judge Garwood wrote the blueprint for *Heller* seven years before *Heller* was decided, in a case captioned *United States v.*

⁸⁷ See *United States v. Eichman*, 496 U.S. 310, 310–11 (1990) (noting William Kunstler as counsel for appellees and finding prosecution “for burning a flag . . . inconsistent with the First Amendment”); *Texas v. Johnson*, 491 U.S. 397, 397–98 (1989) (noting William Kunstler as counsel for defendant and finding conviction “for flag desecration . . . inconsistent with the First Amendment”).

⁸⁸ 395 U.S. 486, 488, 491–94 (1969).

⁸⁹ 380 U.S. 479, 481 (1965) (noting Arthur Kinoy among counsel for appellants).

⁹⁰ 554 U.S. 570 (2008).

⁹¹ 514 U.S. 549 (1995).

⁹² *Heller*, 554 U.S. at 572; *Lopez*, 514 U.S. at 550.

⁹³ *Heller*, 554 U.S. at 572.

⁹⁴ 561 U.S. 742, 747 (2010).

⁹⁵ *Lopez*, 514 U.S. at 549–50 (finding that that the Gun-Free School Zones Act of 1990 “exceeds Congress’ Commerce Clause authority”).

⁹⁶ *Id.* at 552 (“The Court of Appeals for the Fifth Circuit agreed and reversed respondent’s conviction. It held [the Act] . . . invalid as beyond the power of Congress under the Commerce Clause. . . . [W]e now affirm.”).

⁹⁷ *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff’d*, 514 U.S. 549 (1995).

Emerson.⁹⁸ So traceability must sweep in lawyers' work back in time and at each level. (Not surprising to this audience, one of many amicus counsel in *Emerson* was Professor Norman Dorsen.⁹⁹)

Lawyer work has as its animating core sentiment attributed to Justice Benjamin Cardozo, that "competing values each have merit yet still oppose each other, and must somehow be brought together so that as much as possible of the good in each can be protected and preserved."¹⁰⁰ It is the essence of our adversary system. The lawyer's creed is that each, devoted to his or her party and position, argues more or less compellingly. And judges, in turn, decide those arguments—overwhelmingly, I observe—based on how the prevailing lawyer presents it. There is nothing else "to support." There is no person to support. No philosophy. No membership. No party. No president. And certainly, no celebrity.

Before, I said that if I'm correct and lawyers write constitutional law more than judges, or at least indivisibly with them, then judges need just several qualities—open-mindedness to lawyers' arguments, talent to comprehend lawyers' arguments, plus of course the work ethic to read often voluminous lawyers' arguments. If I compress to one quality—think umpire or empathy—sure to be mischaracterized, I would pick what a respected judge from my court, Alvin Rubin, praised: "A judge should be self-consciously eclectic[;] where the text is not itself decisive he should consider its historical background and the future implications of all possible decisions. . . . [E]nrich one's reasoning as much as possible by all information relevant to a just result."¹⁰¹ "Self-consciously eclectic." Imagine that in a confirmation hearing today.

II

LAWYERS, LIKE JUDGES, WRITE USING THE PAST, PRESENT, AND FUTURE

If I have made my case about lawyer primacy, now I want to be reductionist about how I see lawyers prevail, how they turn me into their pen. Then I will finish with examples of cases from my court—

⁹⁸ See 270 F.3d 203, 217 (5th Cir. 2001) (deciding when limited explicitly to interstate transported weapons, such restriction did not violate the Commerce Clause).

⁹⁹ Brief for an Ad Hoc Group of Law Professors and Historians as Amici Curiae in Support of Appellant, *Emerson*, 270 F.3d 203 (No. 99-10331). Since this lecture was originally given at NYU School of Law, the "audience" referenced above was largely members of the NYU School of Law community.

¹⁰⁰ ROBERT A. LEFLAR, *APPELLATE JUDICIAL OPINIONS* 235 (1974).

¹⁰¹ Alvin B. Rubin, *Judicial Review in the United States*, 40 LA. L. REV. 67, 81 (1979).

each famous enough to be familiar, but old enough to critique without causing offense.

When I was thirty-seven—flush with executive inferiority—I could indict. True, Madison and his contemporaries checked that by requiring presentment to a grand jury. But prosecutors, lawyers, have the power of initiative—an accusation, a complaint—whereas the judiciary receives. True, many cases stop because we say “not you” or “not yet.” Last spring, for example, the claim was that the City of New Orleans could not take down four Confederate monuments;¹⁰² and in my next sitting, that the Mississippi state flag could not depict the Confederate battle flag in its upper, left-hand corner.¹⁰³ Both cases were fascinating, but both times we said no, because the Monumental Task Committee had not shown a legally cognizable injury and interest,¹⁰⁴ and because Carlos Moore, a black Mississippi lawyer, lacked standing.¹⁰⁵ The point is an obvious one I won’t spend time on: Judicial power is latent and comes alive only when lawyers present an actual, concrete, and cognizable injury. Recall *Newdow*;¹⁰⁶ the merits issue was not resolved because *Newdow* was not the custodial parent of his daughter reciting the Pledge.¹⁰⁷

Next, even assuming a case and controversy, lawyers issue-select, sculpting how a case comes to us. My still vivid memory of that lawyer primacy was when the best lawyers in their day—Paul Bator, Alan Morrison, and Charles Fried—came before the Court on October 5, 1998, as I began my clerkship, to argue *Mistretta v. United States*.¹⁰⁸ The issue was the constitutionality of the federal sentencing guidelines. During argument, a Justice asked how from so much lower court ferment; Morrison had selected delegation as his line of attack.¹⁰⁹ He lost,¹¹⁰ and it took fifteen years before different lawyers expounded the Sixth Amendment to invalidate mandatory guidelines in *United States v. Booker*.¹¹¹

But assume a lawyer presents an actionable case, and assume the talent to pick the best argument. Then how does that case and argu-

¹⁰² See Monumental Task Comm., Inc. v. Chao, 678 F. App’x 250 (5th Cir. 2017) (mem.), *aff’g sub nom.* Monumental Task Comm., Inc. v. Foxx, 157 F. Supp. 3d 573, 581 (E.D. La. 2016).

¹⁰³ See Moore v. Bryant, 853 F.3d 245, 248 (2017).

¹⁰⁴ *Monumental Task Comm., Inc.*, 678 F. App’x at 252.

¹⁰⁵ *Moore*, 853 F.3d at 248.

¹⁰⁶ Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

¹⁰⁷ *Id.* at 1–2.

¹⁰⁸ *Mistretta v. United States*, 488 U.S. 361, 362 (1989).

¹⁰⁹ See Oral Argument at 23:55, *Mistretta*, 488 U.S. 361 (No. 87-7028), <https://www.oyez.org/cases/1988/87-7028>.

¹¹⁰ *Mistretta*, 488 U.S. at 412.

¹¹¹ 543 U.S. 220, 226–27 (2005).

ment become law? What is it that lawyers say that writes law, especially constitutional law? My answer, and what I observe, is that lawyers write my opinions when they give compelling authority from the past, the present, and the future.

In oral argument questioning, I have a concern, an inclination, an uncertainty, a probe for a concession. What's vital, and requires skill—what kept me up at night as a lawyer—is that you have only an instant to comprehend a judge's question. And often the question comes, as Karl Lwellelyn wrote almost a century ago, from “lopsided men,” which means you have to go lopsided with them.¹¹² To do that, and this is my insight: Listen for *tense*.

Is your judge focused on the past—how the past says the question presented must be answered? By past, I mean any of the colored pencils out of Phillip Bobbitt's *Constitutional Fate*, which we call text—the Constitution, a statute, a contract, a decision—or intent behind that text, or precedent interpreting the text.¹¹³ Textualism, historicism, doctrinalism: These are questions and answers about the past.

But at other times, your judge will ask about facts in the case, the present controversy—how the present wants to answer. Again, listen to tense. Is the judge asking about what's in the record? What is waived or forfeited? Whether the error is harmless? Whether you need to show plain error? These are ineffable right-the-wrong fairness imperatives Judge Posner emphasized.¹¹⁴

Finally, judges—some more than others—look to clarify the future, to announce a rule going forward that is not over-inclusive, not under-inclusive, not a slippery slope, and not a parade of horrors. This probing will come in the future tense because, as Judge Rubin observed, judges should try to avoid issuing “[t]he ad hoc, ‘railway ticket’ decision—good only for this day and station.”¹¹⁵

In my experience, it is the lawyer who assembles compelling authority to answer each tense—or even two of three—who prevails. This effort favors the nimble, and lawyers who enjoy suspense and spontaneity. Car Talk is instructive. The Tappett brothers, Click and Clack, blended with their callers—joking, teasing, being stumped, questioning—so together, indivisibly, they could diagnose car mal-

¹¹² KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 105 (2015).

¹¹³ PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93–94 (1982) (comparing types of constitutional arguments to shades of colored pencils).

¹¹⁴ See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 131–40 (2016).

¹¹⁵ Alvin B. Rubin, *Views from the Lower Court*, 23 *UCLA L. REV.* 448, 451 (1976).

functions.¹¹⁶ Judging at its most lively, at least for me on an intermediate appellate court which reviews thousands of rulings each year, is error correction done similarly with lawyers.

Years ago, I was fortunate to befriend Jerry Goldman, the creator of Oyez. I had been asked to teach constitutional law for the first time, which was unsettling because at law school my constitutional law seminar started with, finished with, and never left the Ninth Amendment. I bought a leading casebook and treatise. I reread the cases, but already by law school, decisions seemed end points to me, with an aura of inevitability. I understand complexity and nuance better when I am informed by a clash of answers and alternatives. Today, when briefs seem impenetrable or a decision on review seems impregnable, returning to district court hearings and considering the clash of viewpoints given by lawyers helps me assess the issue.

Needing that crutch to teach, I called Jerry Goldman, who kindly gave me superuser access, so I could spend the summer in my town library listening to each landmark case argument. And by the end of that summer, I gained the insight I am offering to you. I had not heard a single question—nor have I asked one myself—that can't be classified into the time dimensions I am describing, which is why I say the lawyer who gives answers from the past, the present, and the future will prevail. Judge Rubin puts the goal more eloquently: "The best brief is like a good song. It plays a melody the judge will remember and hum when he writes the opinion."¹¹⁷ I will be specific with examples.

By present, I mean the lawyer's use of facts, victimhood, and injustice—who was wronged? Thanks to Oyez, we can hear how lawyers, even at the Supreme Court, win and lose because of facts. Read the following excerpt of the argument from *Brown v. Louisiana* and tell me if you don't think Louisiana's denials of segregation were slain by one ugly fact.¹¹⁸

Justice Fortas: [A] question occurs to me is the State of Louisiana telling us that in this parish library facilities are not segregated. That is to say that a Negro can get service from any library facility, any public library facility in this Parish.

Mr. Kilbourne: I would—yes, I would say that they can.

¹¹⁶ See generally *Car Talk*, NPR, <https://www.cartalk.com/our-show/browse> (last visited Jan. 25, 2018) (providing access to archives of a call-in radio show where brothers Tom and Ray Magliozzi attempt to assist listeners with car malfunctions over the phone).

¹¹⁷ Alvin B. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 874 (1983).

¹¹⁸ Oral Argument at 46:02, *Brown v. Louisiana*, 383 U.S. 131 (1966) (No. 41), https://apps.oyez.org/player/#/warren13/oral_argument_audio/15533.

Justice Fortas: Is that the representation of the State of Louisiana?

Mr. Kilbourne: Well that's a representation of the State of Louisiana which I make and which I certainly stand by it. Of course they only have the [*Voice Overlap*].

Justice Fortas: Now these cards—these library cards. As I remember the record, there is testimony to the effect that the library card issued to a Negro is stamped “Negro.”

Mr. Kilbourne: That's in the record.

Justice Fortas: Is there any dispute about that?

Mr. Kilbourne: No sir, there's no dispute about that.

Justice Fortas: Does that practice continue?

Mr. Kilbourne: I really—I just couldn't answer that—

Justice Douglas: Well if there is a blue bookmobile for the Negroes and the red ones for the Whites, isn't it?

Mr. Kilbourne: In other words, it works—

Justice Douglas: How can you say it's not segregated?

Mr. Kilbourne: Well it's in the—well I say it's not segregated because if a White person wants to use that blue bookmobile, they would let him use it. If a colored person wants to use the red bookmobile, I may have my colors wrong there but I believe that's right, they would . . . they certainly wouldn't be able to refuse them service.

Justice Fortas: Well the record says quite the contrary, doesn't it? Is there any testimony in the record to support what you have just said?

Mr. Kilbourne: I believe—it is. . . . I believe it is. [*Voice Overlap*] Now you have to—you see something like this has never come up actually before.

Justice Fortas: Well it sure is up now.

Mr. Kilbourne: Sir?

Justice Fortas: I said it's up now and I want to ask you about the last statement that you made. Is there anything in the record to the effect that a Negro who wants to get a book from the red bookmobile can't do something? There is a testimony of some woman that used to work with the library I've forgotten her name, to the precise officer.

Mr. Kilbourne: Well I—I do not believe that that would be—

Justice Douglas: I think that—I think Justice Fortas is referring to the testimony of Mrs. Laura Spears on page 136, 137 of the record.

Mr. Kilbourne: Yes. I believe—

Justice Douglas: To 138.

Mr. Kilbourne: I think she—I believe she did testify that—

Justice Douglas: Well she said, the only person who will use the blue bookmobile is Negroes and the blue bookmobile serves the three parishes for all Negroes and occasionally if a White person would come to the blue bookmobile, I'd give him the schedule telling him when the red bookmobile would come.

Mr. Kilbourne: Well, that—I believe that would be the only testimony that's in the record.

Justice Douglas: That looks like a segregated library system.

Mr. Kilbourne: Well I—I often get confused when you—when you say segregated system or integrated system because in Clinton, Louisiana—well I always felt like we had more . . . more integration than probably any place in the United States, I mean, just with the way people live. I don't—segregation and integration seems to mean different things and different policy on contrary.

Justice Warren: Prior to this—prior to this incident, had Negroes ever gone into that library?

Mr. Kilbourne: You mean to get a book?

By future, remember *Texas v. Johnson*, which considered whether government can criminalize flag burning.¹¹⁹ The decision is one the late Justice Scalia cited to show originalism has authoritative force and isn't an interpretative method applied to get his preference.¹²⁰ We can't get a sure answer, but as legal empiricists point out, the one time we hear and see judges at work is during oral argument.

Here are two exchanges. The first concerns the future tense, probing with hypothetical questions whether the proposed interpretation works.¹²¹

Justice Kennedy: And I assume if we upheld the statute in every other state it would have the same right?

Ms. Drew: Yes, your Honor.

Justice Kennedy: So, your category for one flag is now expanded to fifty-one.

¹¹⁹ 491 U.S. 397, 399 (1989) (determining if a statute banning flag burning is unconstitutional).

¹²⁰ See, e.g., Mitch Kokai, *Scalia: Originalism Not a "Weird Affliction,"* CAROLINA J. (Nov. 1, 2007, 12:00 AM), <https://www.carolinajournal.com/news-article/scalia-originalism-not-a-weird-affliction/> (referencing *Texas v. Johnson* as a case in which Justice Scalia personally preferred a different outcome but originalist interpretation compelled him to vote with the majority).

¹²¹ Oral Argument at 8:53, *Johnson*, 491 U.S. 397 (No. 88-155), https://apps.oyez.org/player/#/rehnquist3/oral_argument_audio/18080.

Ms. Drew: The statute does say a state or national flag. That is correct. And we do believe Texas certainly has a right to protect its own flag. And I think that a similar interest would be for sister states. But it does say a state or national flag.

Justice O'Connor: Could Texas prohibit the burning of copies of the Constitution, state or federal?

Ms. Drew: Not to my knowledge, Your Honor.

Justice O'Connor: That wouldn't be the same interest in the symbolism of that?

Ms. Drew: No, Your Honor, it would not be the same interest I don't believe.

Justice Scalia: Why not? Why is that? I was going to ask about the state flower.

[Laughter]

You're not going to—the state flower?

Ms. Drew: There is legislation, Your Honor, which does establish the blue bonnet as the state flower.

Justice Scalia: I thought so.

Ms. Drew: It does not seek to protect it.

Justice Scalia: Well, how do you pick out what to protect? I mean, you know, if I had to pick between the Constitution and the flag, I might well go with the Constitution.

In the second exchange, the Court probes the past—the intention of the Framers in this case.¹²²

Justice O'Connor: Do you suppose Patrick Henry and any of the founding fathers ever showed disrespect to the Union Jack?

Ms. Drew: Quite possibly, Your Honor.

Justice O'Connor: You think they had in mind then in drafting the First Amendment that it should be a prosecutable offense?

Ms. Drew: Of course, Your Honor, one has no way of knowing whether it would be or not.

Justice Scalia: I think your response is that they were willing to go to jail, just as they were when they signed the declaration. They were hoping they wouldn't get caught.

What I draw from comparing them is this: At best, the originalist claim, like most interpretative gloss, cuts both ways. Yes, the Framers would have delighted in burning the Union Jack, but Justice Scalia is also right that they'd have expected to go to jail. The other exchange

¹²² *Id.* at 17:47.

tells me more. It predicts, even writes, Justice Brennan's 5-4 decision.¹²³ *Texas v. Johnson* wasn't written because of the past, or any driving judicial philosophy. It was written because one lawyer's constitutional future collapsed. Bluebonnets don't get more constitutional protection than the Constitution gives itself.¹²⁴ States can't criminalize flag burning, not because we know the Framers would have said they can't, but because the Texas District Attorney couldn't articulate a coherent constitutional future for a host of symbols we cherish.

As a second example, consider the Fourth Amendment as expounded in *Kyllo v. United States*.¹²⁵ Here is *Kyllo's* lawyer, Ken Lerner, proposing a Fourth Amendment that reaches a bit too far: "I think anytime that the Government is seeking to capture information from a private place like the home, and they cannot do it with their own unaided human senses, then they may not use technology to do the same thing."¹²⁶ Now see Justice after Justice testing Lerner's proposed constitutional future¹²⁷:

Justice Scalia: Is it unconstitutional to use binoculars to look into a window that's left unclosed without a curtain? . . . But eyeglasses are okay?

Kenneth Lerner: Eyeglasses are fine.

Justice Scalia: Okay. But not binoculars? . . .

Justice O'Connor: What about a dog sniff, how about a dog sniff?

Finally, using the past, lawyers are finely trained. If the present is fact-advocacy, investigated and fiercely proven—finding blue bookmobiles—and if advocating from the future is nimble, eclectic, and interdisciplinary—considering binoculars, eyeglasses, and dog sniffs—the past is differently daunting. Last year, Bryan Garner published his impressive compendium *The Law of Judicial Precedent*.¹²⁸ Skipping to his last page, his last sentence reads: "Good judges, like good lawyers [or, if I could revise, "Good judges *because of* good lawyers"] must mine relevant sources for guidance—and ought to be grateful whenever they find it."¹²⁹

¹²³ 491 U.S. at 398.

¹²⁴ See *id.* (discussing the distinction between flags and certain other state symbols, including the state flower and state constitution).

¹²⁵ 533 U.S. 27 (2001) (deciding the scope of Fourth Amendment protection and technology).

¹²⁶ Oral Argument at 12:36, *Kyllo*, 533 U.S. 27 (No. 99-8508), https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/22003.

¹²⁷ *Id.* at 14:54.

¹²⁸ BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016).

¹²⁹ *Id.* at 783.

Mine, and be mindful of, precedent. The compendium gives 782 pages of instruction you should read. Tonight, I will highlight only two observations of my own about how talented lawyers compel judges either to turn the past upside down to their advantage; or, when that can't happen, to compel courts to do what we say we can't, and reject the past altogether.

I'll start with the second, because ignoring stare decisis is judicial heresy, if not for the Framers who were informed by the past but ruptured with it. Stare decisis is near cement for judges who owe unflinching obedience to vertical precedent, but not for lawyers, whose craft is like Touchstone, the court jester in *As You Like It*,¹³⁰ adept with distinctions and circumvention.

But fully rejecting the past? Yes, lawyers can get us to do it. And I have my same outstanding authority. Judge Rubin wrote over fifty articles. Many still cite his *Causerie on Lawyers' Ethics*¹³¹ and his *A Judge's Response to the Critical Legal Studies Movement*.¹³² My own favorite is a reprimand he wrote to appellate judges called *Views from the Lower Court*.¹³³ But now I am quoting from him as a judge: "When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, . . . courts need not follow the outgrown dogma."¹³⁴ With that flourish, Judge Rubin overturned Louisiana's exclusion of women from juries despite a Supreme Court decision upholding a similar system twelve years earlier.¹³⁵ Of course, given my thesis, my interest is the identity of the lawyer who compelled that insubordination. One hint: Her initials are RBG.¹³⁶

Or lawyer Fortas again. During argument in *Gideon*, he was asked, "But *Betts*?"¹³⁷ No, Fortas said, *Powell v. Alabama*¹³⁸ is the better past; *Betts* was a dead end.¹³⁹ You wrote *Betts* because you thought you were being sensitive to the pull of federalism; you said

¹³⁰ See generally WILLIAM SHAKESPEARE, *AS YOU LIKE IT* (referring to the character Touchstone, the court jester).

¹³¹ Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

¹³² Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

¹³³ Rubin, *supra* note 115.

¹³⁴ *Healy v. Edwards*, 363 F. Supp. 1110, 1117 (E.D. La. 1973).

¹³⁵ *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (finding constitutional an exemption based on sex for women on jury duty).

¹³⁶ *Healy*, 363 F. Supp. at 1111 (noting Ruth Bader Ginsburg among counsel for the plaintiffs).

¹³⁷ *Betts v. Brady*, 316 U.S. 455 (1942).

¹³⁸ 287 U.S. 45 (1932).

¹³⁹ See generally *Gideon* Oral Argument Part 1, *supra* note 16, at 28:35 (discussing the failings of the *Betts* ruling).

that except for capital cases, and cases with “special circumstances,” states wouldn’t be made to pay.¹⁴⁰ But having reviewed every case after *Betts*, Fortas told the Court, the Court’s *Betts* ruling was corrosive of federalism, as it over and over again reversed state high court rulings that hadn’t seen a special circumstance which required a lawyer.¹⁴¹ Thus Florida’s past, *Betts*, didn’t vindicate states; it corroded them and was itself the federalism injury. By turning *Betts*’s bad past to his advantage, Fortas turned the constitutional clock back to 1932. He took controlling past—albeit his opponent’s past—flipped it on itself as a wrong, and resuscitated the Constitution to its earlier luster, giving Gideon what the Scottsboro boys had been given—a lawyer—thirty years earlier.¹⁴²

III

THREE CASES AND CONTROVERSIES BEFORE THE FIFTH CIRCUIT

To show Madison’s modesty at work—that law is what the many heads and hands of lawyers give us as compelling from the past, the present, and the future—now I turn to my court, which cheers me. I have selected three rulings to show lawyers winning or losing with fact advocacy, how they muster the present; winning or losing advocating from the past, convincing courts to apply or misapply law; and winning or losing because of the future, urging a rule that’s workable, even aspirational, not one that is collapsing.

A. *Lieutenant William Calley*

First, in 1975, my court wrote about a massacre that took place across the world seven years earlier, on March 16, 1968, when American soldiers shot hundreds of unarmed civilians in the village of My Lai, Vietnam.¹⁴³ A two-year cover-up followed, but was exposed

¹⁴⁰ See generally *id.* at 25:16–29:11 (discussing the circumstances where counsel must be appointed under the then-existing doctrine).

¹⁴¹ See generally *id.* at 29:35–32:52 (discussing finding special circumstances in almost all cases).

¹⁴² *Powell*, 287 U.S. at 71–72 (deciding counsel is constitutionally required and must be appointed by the court if not requested in this capital case). The Court may have been emboldened by a second lawyer. When Florida tried to secure support among state attorneys general, Florida’s request came to Minnesota’s young Attorney General, who felt oppositely and submitted an amicus brief with many more attorneys general in support of Gideon. That lawyer’s name was Walter Mondale. See Letter from Walter F. Mondale, Att’y Gen., State of Minn., to Hon. Richard W. Ervin, Att’y Gen., State of Fla. (Aug. 15, 1962), <http://www2.mnhs.org/library/findaids/gr00601/pdfa/gr00601-00001.pdf>.

¹⁴³ See *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) (reviewing the writ of habeas corpus and court-martial).

because a soldier named Ron Ridenhour wrote letters about the massacre to the President, the Pentagon, and Congress, and not getting a response, he gave an interview to a journalist named Seymour Hersh, who broke the story.¹⁴⁴ Public outcry forced a special inquiry, and in March 1970, Lieutenant General William Peers recommended charges against twenty-eight officers.¹⁴⁵ Fourteen would be charged, including Second Lieutenant William Calley.¹⁴⁶

Calley's case was exceptional in its day. Professor Belknap has written extensively about it, citing polls showing deep sympathy for Calley, both from hawks and doves, the latter who felt Calley was scapegoated to protect persons more responsible.¹⁴⁷ To hear the fury, our library staff retrieved from the National Archives telegrams and letters sent to my court. One reads: "I am quite disgusted, angry, frustrated . . . because that fighter, that black loud mouth Cassius Clay . . . could pay a few hundreds of thousands to courts to stay home Nixon and Kissinger get honored and you treat Calley like a dog. Grinning, black Cassius Clay did not even go."¹⁴⁸

Calley's prosecution reverberated up to the White House. Nixon wanted damage control to protect his war effort. He approved the use of "dirty tricks," his Chief of Staff Bob Haldeman wrote.¹⁴⁹ "Discredit one witness," Nixon said, most likely referring to Hugh Thompson, an Army pilot who was a star witness who had landed his helicopter between unarmed Vietnamese and advancing U.S. soldiers.¹⁵⁰

Calley's court-martial came down to whether the jury would believe him or his company commander, Captain Medina.¹⁵¹ In that regard, Calley's attorney George Latimer was outmatched and pursued incoherent defenses—at times disputing the massacre, at times

¹⁴⁴ See Seymour M. Hersh, *Coverup—I*, NEW YORKER (Jan. 22, 1972), <https://www.newyorker.com/magazine/1972/01/22/i-coverup>.

¹⁴⁵ See U.S. DEP'T OF THE ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT: VOLUME I – THE REPORT OF THE INVESTIGATION, 12-5 to 12-6 (1970), https://www.loc.gov/frd/Military_Law/pdf/RDAR-Vol-I.pdf.

¹⁴⁶ See Seymour M. Hersh, *The Scene of the Crime*, NEW YORKER (Mar. 30, 2015), <https://www.newyorker.com/magazine/2015/03/30/the-scene-of-the-crime> (noting fourteen officers were charged for a range of crimes including murder).

¹⁴⁷ See generally MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2013).

¹⁴⁸ Letter to the Honorable Judges of the 5th Circuit Court (June 18, 1974) (on file with author) (criticizing the Vietnam War and the treatment of soldiers in the war and in the court).

¹⁴⁹ Evie Salomon, *Document Points to Nixon in My Lai Cover-Up Attempt*, CBS NEWS (Mar. 23, 2014), <https://www.cbsnews.com/news/document-points-to-nixon-in-my-lai-cover-up-attempt/>.

¹⁵⁰ See *id.*

¹⁵¹ BELKNAP, *supra* note 147, at 183.

disputing Calley's responsibility, either psychologically or based on a defense of superior orders from Medina.¹⁵²

Medina, however, testified he gave no order to kill or "waste" unarmed persons.¹⁵³ He would later be acquitted after one hour of jury deliberations.¹⁵⁴ Represented by famed Boston attorney F. Lee Bailey, Medina was shown to have been truthful when he answered "no" during a polygraph test to the question: "Did you intentionally infer to your men that they were to kill unarmed, unresisting noncombatants?"¹⁵⁵

Contrast the cross-examination of Paul Meadlo who, next to Calley, had shot many women and children¹⁵⁶:

Mr. Latimer: What did you do?

Mr. Meadlo: I held my M-16 on them. . .

Mr. Latimer: They were children and babies? . . .

Mr. Meadlo: They might've had a fully loaded grenade on them. The mothers might have throwed [sic] them at us.

Mr. Latimer: Babies?

Mr. Meadlo: Yes. . . .

Mr. Latimer: Were the babies in their mothers' arms?

Mr. Meadlo: I guess so.

Mr. Latimer: And the babies moved to attack?

Mr. Meadlo: I expected at any moment they were about to make a counterbalance.

Though Calley's conviction was affirmed in military court review, on September 25, 1974, United States District Judge J. Robert Elliott granted his habeas petition.¹⁵⁷

I will quote from just the final portion of Judge Elliott's sixty-eight-page decision, which he labeled "Obiter," citing authorities like Plutarch, the Bible, and Carl Sandburg, to express his view that "war is war . . . and has been so throughout recorded history . . . when Joshua took Jericho . . . in 1565 [when] Ivan the Terrible ordered [an]

¹⁵² *Id.* at 168–69.

¹⁵³ *Id.* at 182.

¹⁵⁴ Homer Bigart, *Medina Found Not Guilty of All Charges on Mylai*, N.Y. TIMES (Sept. 23, 1971), <https://www.nytimes.com/1971/09/23/archives/medina-found-not-guilty-of-all-charges-on-mylai-medina-cleared-of.html> (reporting the results of the trial).

¹⁵⁵ See WILLIAM THOMAS ALLISON, *MY LAI: AN AMERICAN ATROCITY IN THE VIETNAM WAR* 117 (2012) (recounting Medina's responses to a lie-detector test before trial).

¹⁵⁶ TIM O'BRIEN, *THE VIETNAM IN ME* (1994), <https://archive.nytimes.com/www.nytimes.com/books/98/09/20/specials/obrien-vietnam.html>.

¹⁵⁷ *Calley v. Callaway*, 382 F. Supp. 650, 691 (M.D. Ga. 1975).

entire Jewish civilian population drowned . . . [when] Truman bombed Hiroshima, leaving 80,000 dead, most of whom were women and children, but he was later elected President.”¹⁵⁸

Elliott went on to compare General Sherman, “gloried, idolized, beatified and sanctified,”¹⁵⁹ with Calley, “pummeled and pilloried by the press . . . taunted and tainted by television . . . reproached and ridiculed by radio,”¹⁶⁰ before he ruled that Calley was denied even “a fair chance for a fair trial.”¹⁶¹

Hindsight is 20/20, but my point tonight is that consequential error often occurs when judges assert themselves and their personal views. Fortunately, in this first case, my court, sitting en banc, applied the corrective.

Judge Ainsworth reinstated the judgment of the court-martial in a workmanlike opinion proving that when judges lawyer a case, it decides itself. Point by point, footnote-to-record after footnote-to-record, Ainsworth painstakingly goes through what the lawyers did in trial to show that, contrary to Elliott’s assessment, Calley “received a fair trial from the military court-martial . . . for the premeditated murder of . . . Vietnamese civilians at My Lai.”¹⁶²

There is no more subtle lesson. Lawyers of divergent skills did or did not establish facts as to the massacre, the contours of Medina’s orders, and, assuming any such orders, overwhelming proof that Calley led a massacre of unarmed civilians, including infants and women.

Yet there is a bigger point. Beyond my thesis about lawyer primacy and effective present-tense fact advocacy dictating my court’s corrective decision, there is a bigger point. The court-martial and house arrest of Calley pales to his massacre, yet this one conviction and house arrest influenced America and our withdrawal from Vietnam. It also preserves the memory of the victims. Doing the same, though tragedy and horror become incomparable, Harvard’s Nuremberg Trials Project similarly shows how, with tenacity of effort, lawyers bring some justice to unimaginable injustice,¹⁶³ and thereby counteract what Elie Wiesel warned against in his White House talk “The Perils of Indifference.”¹⁶⁴

¹⁵⁸ *Id.* at 711.

¹⁵⁹ *Id.* at 712.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Calley v. Callaway*, 519 F.2d 184, 227–28 (5th Cir. 1975).

¹⁶³ See *Nuremberg Trials Project*, HARV. L. SCH. LIBR., <http://nuremberg.law.harvard.edu> (last visited Feb. 7, 2018).

¹⁶⁴ Elie Wiesel, Remarks at Millennium Evening: The Perils of Indifference (Apr. 12, 1999), <http://www.pbs.org/eliewiesel/resources/millennium.html>.

My focus tonight is on lawyers—specifically the indivisibility of lawyering and judging—but this case, like so many, began with victims. Then the case required a soldier to write letters about those victims. Then, unfortunately, there was a cover-up of the victims. Fortunately, there was a stubborn journalist. Unfortunately, a corrupt President impugned the star witness who tried to shield the victims with his helicopter. Fortunately, JAG lawyers still obtained a court-martial against the killer. Unfortunately, one judge’s “obiter” helped give Calley freedom. Fortunately, in the end—or at least the end of the story I am telling—government lawyers established facts sufficient for my court to contradict not only Calley’s claim of superior orders, but also Elliott’s findings of pretrial publicity and discovery error.

So, the bigger lesson is that every case outcome is indivisible with many heads and many hands, not just lawyers but also, especially, victims and witnesses, whose tenacity together we should make less invisible.

B. *Muhammad Ali*

My second case came from the same Vietnam era and maelstrom, and involved the world’s most visible athlete-celebrity. On June 20, 1967, Muhammad Ali, the heavyweight boxing champion of the world, was convicted for refusing induction into the United States military.¹⁶⁵

His prosecution was headlined across the world (and watched closely by Nixon). It is remembered often by Ali’s remark, “I ain’t got no quarrel with them Vietcong.”¹⁶⁶

Ali was sentenced to five years in prison,¹⁶⁷ the maximum for draft evasion. Few know his conviction came through my court. In fact, Jonathan Eig’s superb new 600-page biography makes no mention of the Fifth Circuit.¹⁶⁸ That’s understandable because my court affirmed Ali’s conviction in a decision that is forgettable except for one footnote, which contains a judicial flaw similar to the one I say Judge Elliott committed.

Just as Elliott personalized his habeas decision with his view that war is war, my court did the same by discrediting the sincerity of Ali and the religious beliefs of Black Muslims, generally. Seizing on a Department of Justice advice letter, my court in footnote sixteen dis-

¹⁶⁵ See *Clay v. United States*, 397 F.2d 901, 901 (5th Cir. 1968), *rev’d*, 403 U.S. 698 (1971).

¹⁶⁶ See Bob Orkand, ‘*I Ain’t Got No Quarrel with Them Vietcong*,’ N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/opinion/muhammad-ali-vietnam-war.html?_r=0.

¹⁶⁷ See *Clay*, 397 F.2d at 906–07.

¹⁶⁸ See JONATHAN EIG, *ALI: A LIFE* (2017).

credited “the beliefs of Black Muslims,” as racial and political, fueled by hatred of “the white race,” and quoted as authority a statement attributed to Malcolm X that he prays for airplane crashes full of white victims.¹⁶⁹

Chauncey Eskridge, Ali’s lawyer, would later tell the Supreme Court: “I sense a prejudice against the so called Black Muslims . . . against this defendant who was the heavy weight champion of the world, and . . . who had announced that he was a Muslim.”¹⁷⁰

The Supreme Court reversed unanimously. Apparently, the Court originally voted to affirm, but a law clerk for Justice Harlan, who had been assigned to write the opinion, convinced him Ali’s religious beliefs were sincere.¹⁷¹ Harlan changed his vote, making it a 4-4 deadlock, whereupon Justice Stewart offered a compromise, reversing Ali’s conviction not on the merits but on the narrow ground that Department of Justice protocol was flawed and the Draft Appeal Board’s reasons were vague; hence the Court could not discern whether Ali’s conviction was based on a valid ground or an invalid one, like disbelief of Ali’s Muslim faith.¹⁷²

Certainly Eskridge pushed what is known as the *Stromberg* doctrine, that a conviction must be reversed if it could have rested on a legally invalid theory.¹⁷³ What was distinctive for me, and I think decisive, was that Solicitor General Erwin Griswold, who first served under Johnson and continued under Nixon, acted truly as a Tenth Justice.¹⁷⁴ Griswold starkly defended the conviction yet did everything he could to disavow the personalization my court had given it. He repeatedly conceded Ali’s sincerity in his Muslim faith, which had been, after all, the finding of the hearing examiner who heard first-hand from Ali.¹⁷⁵

My court was mistaken in its present-tense fact disbelief. So Griswold had to pivot to the past and doctrine, claiming that even sincere adherents to Islam contemplate some wars; hence his attempt to argue that the Court could affirm Ali’s conviction on the legal basis that Ali’s aversion to war was selective—that even as a sincere and

¹⁶⁹ *Clay*, 397 F.2d at 919 n.16.

¹⁷⁰ Oral Argument at 58:35, *Clay*, 403 U.S. 698 (No. 783) [hereinafter *Clay* Oral Argument], https://apps.oyez.org/player/#/burger2/oral_argument_audio/16975.

¹⁷¹ See EIG, *supra* note 168, at 323–25.

¹⁷² See *Clay*, 403 U.S. at 703–04; EIG, *supra* note 168, at 325.

¹⁷³ See *Stromberg v. California*, 283 U.S. 359, 367–68 (1931).

¹⁷⁴ See generally LINCOLN CAPLAN, *THE TENTH JUSTICE* 3 (1987) (explaining that the term “Tenth Justice” derives from the Solicitor General’s responsibilities to both the Judicial and Executive branches).

¹⁷⁵ *Clay* Oral Argument, *supra* note 170, at 32:32.

committed Muslim, he was not opposed to war in any form.¹⁷⁶ But *Stromberg* was settled law that the Court agreed unanimously to apply; the Court refused to guess about the basis for the denial of Ali's exemption.

To sum up, my court's error against Ali was like Judge Elliott's error for Calley. Both courts injected their own belief or disbelief. Each time, correction came from unremarkable, workmanlike opinions, compelled by the lawyers' fact advocacy in Calley's case and the lawyers' use of settled doctrine in Ali's. Indeed, Justice Harlan would call the Ali decision a "pee wee" ruling—one whose precedential effect was minimal.¹⁷⁷ But it had the advantage of avoiding the nationwide fury against Ali's facts—our country's greatest fighter avoiding military service—as well as avoiding the government's fear that all Black Muslims would be exempt from military service. Present-tense fact lawyering reinstated Calley's conviction and past-tense law advocacy overturned Ali's, each time despite judicial overreach.

C. James Meredith

My final case—an example of lawyers using the future to write law, especially constitutional law—had as its protagonist James Meredith, an Air Force veteran, who fought a long battle to enter the University of Mississippi. Meredith's saga culminated in a constitutional crisis familiar in outline to most of us, told beautifully by Jack Bass in his book about my court, *Unlikely Heroes*¹⁷⁸ as well as in first-hand accounts like the autobiography of another NYU graduate and Meredith's lawyer, the legendary Constance Baker Motley.¹⁷⁹

As for lawyer primacy, this case had Thurgood Marshall giving the Equal Protection Clause a new day by prevailing in *Brown*, and in so doing giving himself the key, years later, to get his Legal Defense Fund client James Meredith into Ole Miss. Motley remembered Marshall coming into her office, throwing Meredith's letter seeking counsel on her desk, and saying, "'This man has got to be crazy'—which meant it would be my case if I wanted it."¹⁸⁰

And the rest is history.

¹⁷⁶ *Id.* at 33:32.

¹⁷⁷ See EIG, *supra* note 168, at 325.

¹⁷⁸ JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY (1981).

¹⁷⁹ CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW (1999). Constance Baker Motley graduated from NYU with a bachelor's degree in economics. *Id.* at 56.

¹⁸⁰ *Id.* at 162.

United States District Judge Mize, in Mississippi, accepted, over and over again, Mississippi's arguments to reject Meredith, a decorated soldier, as a troublemaker, and Mississippi's denials of any policy of segregation, even with post-*Brown* admission requirements like six letters from alumni in a state where there were no black alumni.¹⁸¹

Judge Brown on my court would later describe that “[w]e would set aside [Mize’s] order and Judge Cameron [a segregationist on the Fifth Circuit] would set aside our order, setting aside Judge Mize’s order, and we would set aside Judge Cameron’s order, which set aside our order, which set aside Judge Mize’s order.”¹⁸²

Charles Eagles in *The Price of Defiance* gives vivid ear to how acute the crisis was.¹⁸³ For example, when Mississippi Attorney General Patterson heard the Justice Department had entered as amicus to help resolve the contradictory Fifth Circuit injunctions, Patterson announced, “Robert Kennedy criticizing a judge of Judge Cameron’s stature is like a jackass looking up into the sky and braying at a great American Eagle as it soars above.”¹⁸⁴ And when Governor Barnett heard that Justice Hugo Black, as Circuit Justice, had interceded to vacate Judge Cameron’s stays, thus making my court’s mandate for Meredith’s admission effective, Barnett announced that Justice Black’s ruling was “just as illegal as if the Supreme Court of Kansas had issued it.”¹⁸⁵

What is less known is the issue that came to the Supreme Court after the riot and violence and after Meredith’s entry—namely, whether Governor Barnett, who stayed defiant to the end, eventually aggregating University registrar’s powers to himself and physically blocking Meredith, would get a jury trial for that contempt. That case has the caption *United States v. Barnett*.¹⁸⁶

I think the outcomes of both this case and the companion case involving the desegregation of New Orleans schools, which had drawn an oppositely principled United States District Judge in Judge Skelly Wright, were written when a similar advocacy event occurred.

It happened first in the New Orleans case. Bass describes how Louisiana Attorney General Gremillion stormed out of Wright’s court, saying “I’m not going to stay in this den of iniquity,” spitting on

¹⁸¹ See CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 252–55 (2009); BASS, *supra* note 178, at 174–79.

¹⁸² Interview with Judge John R. Brown, in New Orleans, La. (Mar. 12, 1992), at 95.

¹⁸³ EAGLES, *supra* note 181, at 261–76.

¹⁸⁴ *Id.* at 275.

¹⁸⁵ *Id.* at 276.

¹⁸⁶ 376 U.S. 681 (1964).

two black women, and bellowing about being in a “kangaroo court.”¹⁸⁷ Thurgood Marshall, representing the plaintiffs, instantly perceived his opportunity to align past, present, and future, saying “This is no longer a case of Negro children seeking their constitutional right. This is now a challenge by the officials of the State of Louisiana to the sovereignty of the United States. The duty of this Court is clear.”¹⁸⁸ Judge Skelly Wright phoned Burke Marshall with the Department of Justice who, in turn, went to Attorney General Robert Kennedy, to be certain the government would intervene.¹⁸⁹ It would, and sure enough the threat of contempt brought Louisiana into compliance.¹⁹⁰

Of course, Judge Skelly Wright was a special man, in the right place and time, who at great personal peril and expense saw and felt his judicial duty to assist and bear the Constitution clearly:

I did [what I did] because the Supreme Court had said it, and there wasn't any way out except subterfuge. Other judges were using subterfuge to get around the Supreme Court, delays and so on, but I grew up around federal courts and had respect for them, and I tried to carry on tradition.¹⁹¹

The present, at that time, had bogged down in abject segregation, violent resistance and what judges on my court called “Alice in Wonderland” delays. And the past, of course, included *Brown II*'s opaque timing for implementation.¹⁹² So lawyer Marshall recharacterized the controversy as a threat to the future, an affront to the Judiciary, telling federal courts, and especially my court, that their authority, their existence, was in peril.

Like Judge Wright, the judges on my court needed lawyer assurances that the United States would stand behind and enforce my court's far-reaching injunctive orders ordering Meredith into Ole Miss. Judge Brown later described this lawyer imperative:

I remember Judge Tuttle . . . sitting up there very firm and erect as he always is, and he addressed either Burke Marshall, who was an Assistant Attorney General . . . or Katzenbach . . . and said if we issue orders does the executive department of the United States mean to enforce them. We have no police power. We have nothing but our orders. And they gave us assurance that they would carry it out. And about this time, President Kennedy went on the national

¹⁸⁷ BASS, *supra* note 178, at 128.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 131.

¹⁹⁰ *Id.* at 135.

¹⁹¹ *Id.* at 115.

¹⁹² See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (mandating desegregation with “all deliberate speed”).

television. And they brought in a great number of United States Marshalls [sic] . . . [which led to] the only real bloodshed that ever occurred in the Fifth Circuit in this revolutionary effort to try to assure blacks equal protection of the laws.¹⁹³

To me, a related lawyer decisional moment culminated during tense en banc hearings in late September 1962. The two Mississippi lawyers were Charles Clark and James Coleman. What I am about to describe, I would like to believe, is why each of them, like their Question 17 adversaries, Motley and Marshall, would all become federal judges. Motley became the first black woman on the federal bench.¹⁹⁴ Marshall went from the Second Circuit to the Supreme Court.¹⁹⁵ And Coleman and Clark both joined the Fifth Circuit they had argued before.¹⁹⁶ In fact, when Clark was nominated, this was Judge Wisdom's endorsement:

Charles Clark emerged as a shining star. He represented a lost cause—and with flair. He argued vigorously, made the best of a bad case, was deferential to the court, acted with dignity and grace, and conducted himself in every way according to the highest tradition of Anglo-American advocacy. He won my respect then and the respect of all the judges of our court.¹⁹⁷

Judges Wisdom and Brown's oral histories confirm that Clark and Coleman were decisive, along with Motley, in resolving Meredith's case. After hours of argument, all afternoon and into the dark, on September 24, Coleman and Clark requested a recess to explain to their clients, the University of Mississippi's board of trustees, many appointed by Barnett, why they must avoid contempt and accept the court's order that Meredith be admitted.¹⁹⁸ Once they did, Barnett was isolated, though he stayed defiant enough to provoke the violence that caused two deaths and injured many U.S. Marshals, leading, in turn, to the contempt proceedings against him.¹⁹⁹

¹⁹³ Interview with Judge John R. Brown, *supra* note 182, at 101–02.

¹⁹⁴ See Douglas Martin, *Constance Baker Motley, Civil Rights Trailblazer, Dies at 84*, N.Y. TIMES (Sept. 29, 2005), http://www.nytimes.com/2005/09/29/nyregion/constance-baker-motley-civil-rights-trailblazer-dies-at-84.html?_r=0.

¹⁹⁵ See *Thurgood Marshall*, NAACP LEGAL DEF. FUND, <http://www.naacpldf.org/thurgood-marshall> (last visited Nov. 8, 2017).

¹⁹⁶ See *U.S. Court of Appeals for the Fifth Circuit – Brief History*, U.S. CT. OF APPEALS FOR FIFTH CIR., <http://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history> (last visited Nov. 11, 2017); *J.P. Coleman, 77, Ex-Governor in Mississippi and U.S. Judge, Dies*, N.Y. TIMES (Sept. 29, 1991), <http://www.nytimes.com/1991/09/29/us/j-p-coleman-77-ex-governor-in-mississippi-and-us-judge-dies.html>.

¹⁹⁷ Judge John Minor Wisdom, *Dedication: Chief Judge Charles Clark*, 52 LA. L. REV. 765, 765 (1992).

¹⁹⁸ See BASS, *supra* note 178, at 185; EAGLES, *supra* note 181, at 310–12.

¹⁹⁹ See BASS, *supra* note 178, at 185–200; EAGLES, *supra* note 181, at 360, 364–65.

My court divided evenly as to whether Barnett was entitled to a jury, so it certified the question to the Supreme Court.²⁰⁰ Argument occurred in October 1963.²⁰¹ Solicitor General Archibald Cox, with Leon Jaworski, represented the government; Charles Clark represented Barnett.²⁰² Cox would prevail, using all tenses a lawyer can use.

He began with the present—the facts of the controversy, Barnett’s demagoguery, and intransigence against federal court orders. Barnett “arrayed against them everything he could in the State of Mississippi,” Cox argued, and “the entire process of the constitutional adjudication was assaulted”²⁰³

From the past, Cox traced courts’ discretionary power to punish contempt without a jury back to Madison and the Judiciary Act of 1789, uninterrupted through recent Supreme Court caselaw.²⁰⁴

But most of all, Cox used the future, warning that Barnett’s “nullification challenged the power of the Court to act as a Court.”²⁰⁵ And Jaworski reinforced in rebuttal this threat from the future, boldly asking the questioning Justices two rhetorical questions.

The first: “[I]f court decrees are not to be evade[d], what is the right of trial by jury worth?”²⁰⁶

And the second: “[I]f court decrees are not to be evade[d], may it please the Court, what is the Constitution worth?”²⁰⁷

In my opinion, Solicitor General Cox at that point, along with Jaworski, is writing what Justice Clark would write for the Court: “A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders . . . against the recusant parties before it, would be a . . . stigma upon the age”²⁰⁸

Lawyers Cox and Jaworski prevailed.²⁰⁹ But, as courts will do, the Supreme Court took back in a footnote a little of what it gave in text. In footnote twelve, the Court wrote what Clark would claim as his victory, inserting this caveat:

In view of the impending contempt hearing, effective administration of justice requires that this dictum be added: Some members of the

²⁰⁰ See *United States v. Barnett*, 330 F.2d 369, 369 (5th Cir. 1963) (certifying the question to the Supreme Court).

²⁰¹ *United States v. Barnett*, 376 U.S. 681, 681 (1964).

²⁰² *Id.*

²⁰³ Oral Argument at 42:46, *Barnett*, 376 U.S. 681 (No. 107), https://apps.oyez.org/player/#/warren11/oral_argument_audio/14430 (Day 1 of oral argument).

²⁰⁴ *Id.* at 50:56.

²⁰⁵ *Id.* at 1:02:05.

²⁰⁶ Oral Argument at 1:18:35, *Barnett*, 376 U.S. 681 (No. 107), https://apps.oyez.org/player/#/warren11/oral_argument_audio/14500 (Day 2 of oral argument).

²⁰⁷ *Id.* at 1:18:42.

²⁰⁸ *Barnett*, 376 U.S. at 700.

²⁰⁹ See *id.*

Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.²¹⁰

Back in my court, over Wisdom's bitter dissent that Barnett would go unpunished for defying the rule of law, the matter was dismissed.²¹¹ Judges Brown and Tuttle joined Wisdom in dissent, but their fourth, Judge Rives, broke from them,²¹² seeing Meredith already in Ole Miss, and reportedly concerned not to make a martyr out of Barnett, especially because few to none believed a Mississippi jury would have convicted him.²¹³

My last point about this advocacy that explicated more than fifty years ago the constitutional crisis and circumstance about whether a contempt trial must be to a jury, which recently was back in the headlines, is about an advocacy reach that didn't compel its way into court opinion. Solicitor General Cox did not just intimate a bear-and-assist *Carolene Products* footnote four argument. He put it front and center:

This decree was entered to sustain the constitutional rights of an unpopular minority. And I say that if the authority of a court to make such a decree is subject to attack and the decree cannot be vindicated except by referring the issue to a body [a jury] run from the very populace that is attacking it then the protection of the unpopular minority is likely to prove very slim indeed. . . .

If I may perhaps put it this way . . . [s]o long as one thinks, it appears to me, of the Court, the Government as oppressing . . . people then the power of the jury to intervene becomes an important safeguard.

But as soon as one begins to think of the law as an instrument for protecting the weak and the oppressed, as an instrument for securing constitutional rights of [a] minority, of protecting us, if you will, our better selves against our worst self, then, there is a different and more complicated problem.²¹⁴

Here we have a lawyer, the Solicitor General of the United States, contending that when the government is protecting the few from an oppressive majority, then the jury trial right designed to shield against an oppressive government, should be exempted. That's an eclectic proposition. It's a lawyer's creative attempt to rewrite the Constitution differently and, right or wrong, sometimes these offshoots become the trunk.

²¹⁰ *Id.* at 694 n.12.

²¹¹ *United States v. Barnett*, 346 F.2d 99, 101 (5th Cir. 1965).

²¹² *Id.* at 100, 101.

²¹³ See BASS, *supra* note 178, at 254–58.

²¹⁴ Oral Argument, *supra* note 203, at 1:03:45.

CONCLUSION

Tonight, I hope I have encouraged more heads and more hands to continue compelling courts to bear the weight of and to assist, in short, to expound, our Constitution.

To lawyer-scholars, when you aren't appearing before us, or writing articles that make us reconsider our law, I look forward to critiques that trace decisions back to the lawyers that compel them.

To soon-to-be lawyers, have expectancy. Throw deep and be eclectic. Law is written indivisibly by you, even if to date mostly also invisibly.

To lawyers, stay vigilant against judicial overreach and correct—using the past, the present, and the future—errors, which will occur when judges disconnect from you out of hubris, impatience, or ignorance. Judge Elliott, in his obiter, decided counterfactually that Lieutenant Calley was doing what soldiers in war do when he massacred unarmed women, children, and infants. My court decided counterfactually that Ali was not a true conscientious objector. And Judge Mize decided counterfactually that Meredith was a troublemaker. Each time, lawyers compelled correctives using past, present, and future advocacy.

Fourth, to pro se litigants in the spotlight recently, you are at a disadvantage, as are persons represented by overworked or ineffective counsel. Pro bono projects, such as Chief Judge Katzmann's initiatives for noncitizens,²¹⁵ or Arthur Liman's legacy and example of public service,²¹⁶ are vital.

Fifth, to judges, cherish the public engagement lawyer dialogue brings. Order oral argument. How regrettable the American Academy of Appellate Lawyers reported this summer that oral argument in circuit courts is at a historic low, hovering around twenty percent even in cases decided on the merits,²¹⁷ a trend confirmed by another NYU

²¹⁵ Chief Judge Robert Katzmann of the Second Circuit Court of Appeals has spearheaded many initiatives to improve access to counsel for undocumented immigrants, including the Immigrant Justice Corps, the country's first fellowship program that recruits and trains new immigration lawyers. See, e.g., *Immigrant Justice Corps Announces 2017 Justice Fellows*, IMMIGRANT JUST. CORPS, <http://justicecorps.org/immigrant-justice-corps-announces-2017-justice-fellows/> (last visited Feb. 2, 2018).

²¹⁶ See, e.g., *The Arthur Liman Center for Public Interest Law*, YALE L. SCH., <https://law.yale.edu/centers-workshops/arthur-liman-center-public-interest-law> (last visited Feb. 7, 2018).

²¹⁷ See AM. ACAD. OF APPELLATE LAWYERS, WITHER ORAL ARGUMENT? THE AMERICAN ACADEMY OF APPELLATE LAWYERS SAY LET'S RESURRECT IT! app. at 13 tbl. 1 (2017).

luminary, Professor Resnik, because we privatize disputes so much,²¹⁸ and because in criminal cases, plea bargaining with appeal waivers is prevalent.

I've made the point that decisions I write are written indivisibly with lawyers. But the majority of my decisions are quiet ones, so I will finish with loud exchanges that affected our constitutional circumstance and truly show how indispensable the lawyer-judge dialogue has been.

During argument in *Roe v. Wade*, Justice Marshall questioned lawyer Jay Floyd, the lawyer for Texas prosecuting Norma McCorvey. Marshall asked Floyd to define the line between life and no life.²¹⁹ Floyd answered "impregnation."²²⁰

Marshall asked whether there is "scientific data to support that?"²²¹ Floyd said, "[T]here are unanswerable questions in this field."²²² Marshall said, "I appreciate it."²²³

Floyd apologized if he'd made an "artless statement."²²⁴ But Marshall dignified him and said, "I withdraw the question."²²⁵ Floyd then said, "Thank you," and added, "When does the soul come into the unborn—if a person believes in the soul, I don't know."²²⁶ To me there is startling honesty in this exchange about an issue, which stays divisive today, that so benefits from lawyer-judge humility.

Better known, this time forcing humility, there is the exchange on June 9, 1954, between a lawyer and a former judge which took place in the first senate committee hearing ever nationally televised.²²⁷ Senator McCarthy had just falsely accused Fred Fisher, a young attorney from Army lawyer Joseph Welch's law firm Hale and Dorr.²²⁸

Welch interrupted, "May I have your attention!"²²⁹

²¹⁸ See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (discussing the Supreme Court's trend of allocating greater adjudicatory authority to private arbitrators).

²¹⁹ See Oral Argument at 55:46, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), https://apps.oyez.org/player/#/burger3/oral_argument_audio/16147.

²²⁰ *Id.* at 55:52.

²²¹ *Id.* at 55:54.

²²² *Id.* at 56:25.

²²³ *Id.* at 56:27.

²²⁴ *Id.* at 56:30.

²²⁵ *Id.* at 56:32.

²²⁶ *Id.* at 56:35.

²²⁷ See *Army-McCarthy Hearings*, in *ENCYCLOPEDIA OF TELEVISION* 135, 135–36 (2d ed. 2013).

²²⁸ See *Hearing Before the Special Subcomm. on Investigations of the S. Comm. on Gov't Operations*, 83rd Cong. 2426–27 (1954) (statement of Joseph R. McCarthy, Chairman, Senate Committee on Government Operations).

²²⁹ *Id.* at 2427 (statement of Joseph N. Welch, Special Council for the Army).

McCarthy, talking to Roy Cohn, his chief counsel, parried insultingly, “I can listen with one ear—”²³⁰

Welch interrupted again, “This time I want you to listen with both.”²³¹

Trying to evade, McCarthy accused Welch of baiting Cohn, whereupon Welch turned to Cohn:

Mr. Welch: I did you, I think, no personal injury, Mr. Cohn?

Mr. Cohn: No, sir.

Mr. Welch: I meant to do you no personal injury, and if I did, I beg your pardon.²³²

That’s when Welch, a lawyer we thank for rescuing us from a constitutional crisis, exclaimed: “Senator. You have done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?”²³³

Going back much further, in 1776, consider the question “Do we sever from England?” which our forebears answered yes. This gave present-tense advocacy we can all recite: “[L]et Facts be submitted to a candid world,” listing “injuries and usurpations”²³⁴ which had compounded into tyranny as vivid as Shelley’s sonnet against the same hapless King George III:

An old, mad, blind, despise’d, and dying King;

Princes, the dregs of their dull race, who flow

Through public scorn,—mud from a muddy spring²³⁵

And twelve years later, in 1787, the Framers’ threshold question was “May we rewrite, or just revise?”²³⁶ After all, their Continental Congress commission was explicit they were gathering “for the sole and express purpose of revising . . . and reporting.”²³⁷ Yet the Framers, adept advocates with the past, turned that controlling text into a license to rewrite by seizing on an antecedent past, the legal axiom that they were free to “propose anything, but to conclude nothing,”²³⁸

²³⁰ *Id.* at 2248 (statement of Joseph R. McCarthy, Chairman, Senate Committee on Government Operations).

²³¹ *Id.* (statement of Joseph N. Welch, Special Council for the Army).

²³² *Id.* at 2429 (statements of Roy M. Cohn, Chief Counsel, Senate Committee on Government Operations, and Joseph N. Welch, Special Council for the Army).

²³³ *Id.* (statement of Joseph N. Welch, Special Council for the Army).

²³⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²³⁵ Percy Bysshe Shelley, *England in 1819*, POETRY FOUND., <https://www.poetryfoundation.org/poems/45118/england-in-1819> (last visited Feb. 7, 2018).

²³⁶ See 1 1787: DRAFTING THE U.S. CONSTITUTION 47 (Wilbourn E. Benton ed. 1986).

²³⁷ *Id.*

²³⁸ *Id.* at 60, 69, 82.

and with that pivot, they composed and transmitted back to their Congress our new national government.

Last, on November 19, 1863, our country's greatest lawyer, giving homage at Gettysburg, asked us, "How can a nation dedicated to the proposition that all created equal, long endure?"²³⁹ What pathos he must have felt, speaking where 50,000 soldiers had perished in what remains the largest battle ever fought on this continent.

The future requires it, Lincoln answered, so that government of, by, and for the people "shall not perish from the earth."²⁴⁰

Actually, look at each of Lincoln's three paragraphs.

He begins with the past: "[O]ur fathers brought forth . . . a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."²⁴¹

Then he gives the anguished present: "Now we are engaged in a great civil war," "met" on a "great battlefield" where soldiers "gave their lives, that that nation might live."²⁴²

And finally, the future: Our "unfinished work," the "great task remaining before us," is to give "increased devotion to that cause for which they here gave the last full measure of devotion," so that "these dead shall not have died in vain," so that our government stays one of, by, and for the people.²⁴³

When I am invited to talk at law schools, I try to express gratitude to my teachers. After all, Audrey Hepburn said in *Breakfast at Tiffany's*, "Anyone who ever gave you confidence, you owe them a lot."²⁴⁴ I've mentioned several mentors tonight, like Justice White and Professor Cover. But most of all, I am indebted to the late Professor Judith Shklar. I especially recommend her essay, *Putting Cruelty First*.²⁴⁵ She asks, "Why don't we?"²⁴⁶ Her answer is nuanced, personal, and not easily paraphrased, so tonight I have given my answer, which is that we do put cruelty first when we train lawyers to have the intellect and courage—the instantaneity and eclecticism—to compel constitutional growth; and we do put cruelty first when we train lawyers to have the talent to demand decency, make an honest statement of the past, consider the future, and, in the present, force antagonists to stop and listen with both ears.

²³⁹ President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *BREAKFAST AT TIFFANY'S* (Paramount Pictures 1961).

²⁴⁵ Judith N. Shklar, *Putting Cruelty First*, 11 *DAEDALUS* 17 (1982) (describing the implications of according conceptual priority to cruelty).

²⁴⁶ *Id.*