

THURGOOD MARSHALL: CASES IN CONTROVERSY

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INTRODUCTION

During oral argument in *Brown v. Board of Education*,¹ Justice Frankfurter took a break from his constitutional probing to say: “My only purpose is to try to see these things clearly without a simplifying darkness”² Frankfurter was speaking to NAACP attorney Thurgood Marshall, who, as an attorney and later as a Justice himself, utilized the compressed dialogue of courtroom controversy to propound simple *and* illuminating truths that drove constitutional outcomes. This compression which occurs during case controversy—attorney argument tested by judges—involves a process that may be termed constitutional reductionism. Constitutional reductionism is the reduction of a constitutional argument to a case-determinative point without slipping into “simplifying darkness.” This Article explores how cases, during controversy, reveal this constitutional compression; whereas, these same cases, in announced doctrine, do not fully articulate the reductionist logic that was pivotal to each outcome. Consider, for example, two adjacent advocacy moments during oral argument in *Brown v. Board of Education*, keeping in mind that neither of these moments is discussed in traditional casebook materials covering constitutional law and the *Brown* case.³

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¹ 347 U.S. 483 (1954).

² Transcript of Oral Reargument at 30, *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951) (No. 101), *reprinted in* 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 478 (Philip Kurland & Gerhard Casper eds. 1975). For other sources of Supreme Court oral arguments, see Supreme Court of the United States, www.supremecourtus.gov and Oyez: U.S. Supreme Court Media, <http://www.oyez.org>.

³ Prominent constitutional law casebooks do not cite to, much less link to or excerpt from, any actual lawyer advocacy, written or oral, submitted in this landmark case. *See, e.g.*, DANIEL A. FARBER, WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, *CONSTITUTIONAL LAW* 59-86 (3d ed. 2003) (an entire chapter, including nearly thirty pages of specific case discussion, urges that students “try drafting a few paragraphs of your own for use in a brief,” FARBER, *supra*, at 74, yet presents no analysis of the actual

First, Thurgood Marshall, responding to Justice Reed, reduced his advocacy argument against a century of precedent supporting segregation into a five-word non-legal, non-factual imperative, which is italicized below:

MR. JUSTICE REED: Is it fair to assume that the legislation involving South Carolina, as these cases do, was passed for the purpose of avoiding racial friction?

MR. MARSHALL: I think that the people who wrote on it would say that. You bear in mind in South Carolina—I hate to mention it—but that was right in the middle of the Klan period and I cannot ignore that point. . .

MR. JUSTICE REED: In the legislatures, I suppose there is a group of people, at least in the South, who would say that segregation in the schools was to avoid racial friction.

MR. MARSHALL: Yes, sir. Until today, there is a good-sized body of public opinion that would say that, and I would say respectable public opinion.

MR. JUSTICE REED: Even in that situation, assuming, then, that there is a disadvantage of the segregated group, the Negro group, does the legislature have to weigh as between the disadvantage of the segregated people and the advantage of the maintenance of law and order?

MR. MARSHALL: I think that the legislature should, sir. But I think, considering the legislatures, . . . I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not. It is just a fact. But I assume that there are people who will say that it was and is necessary, and my answer to that is, even if the concession is made that it was necessary in 1895, it is not necessary now *because people have grown up* and understand each other.

They are fighting together and living together. For example, today, they are working together in other places. As a result of the rulings of this Court, they are going to school together on the higher level. . . . I think when we predict what might happen, I know in the South, where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be trouble if they went to school together.⁴

This courtroom exchange provides invaluable insight into the unarticulated judicial reasoning behind the ultimate decision. The insight provided is especially apparent when comparing Thurgood Marshall's distilled, non-doctrinal point against the application of *stare decisis*—"because people have grown up"—to the second advocacy moment, the response his opponent, attorney John Davis, found to be unsayable:

lbrieffs submitted, nor any excerpts of oral argument exchange in the Court); *see also, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 556-80 (3d. ed. 2001); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1207-15 (9th ed. 2001); WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM DAVID AMAR, CONSTITUTIONAL LAW 730-32 (12th ed. 2005); DONALD E. LIVELY ET AL., CONSTITUTIONAL LAW 664-99 (2d ed. 2000); NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, CONSTITUTIONAL LAW 662-64 (4th ed. 2002); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 643-51 (7th ed. 2004); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 469-88 (5th ed. 2005); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 671-79 (15th ed. 2004).

⁴ Transcript of Oral Argument at 16-17, *Briggs, supra* note 2, at 345-46 (emphasis added).

MR. JUSTICE FRANKFURTER: Mr. Davis, do you think that “equal” is a less fluid term than “commerce between the states”?

MR. DAVIS: Less fluid?

MR. JUSTICE FRANKFURTER: Yes.

MR. DAVIS: I have not compared the two on the point of fluidity.

MR. JUSTICE FRANKFURTER: Suppose you do it now.

This pinprick moment, appreciated by lawyers and judges alike, came to a conclusion as follows:

MR. DAVIS: That what is unequal today may be equal tomorrow, or vice versa?

MR. JUSTICE FRANKFURTER: That is it.

MR. DAVIS: That might be. I should not philosophize about it.⁵

This glimpse of oral argument before the Court, which memorializes the successes and failures of the lawyers’ advocacy, allows us to understand how Marshall won the stare decisis argument—which casebooks imply is so confounding.⁶ Marshall’s ability to compress effectively a complex legal argument into a common-sense distilled answer about Americans having “grown up” demonstrates the determinative impact of effective advocacy. In contrast, Davis failed to articulate why the equal protection doctrine is less fluid than the interstate commerce doctrine.

My propositions in this Article are several. First, at a general level, it is imperative that scholars re-align their analysis with the controversies judges resolve;⁷ and, as a specific proposition, it is imperative that scholars recognize that constitutional change occurs more in the formative moment of controversy than in the resolving decision. These propositions are tested with approximately one dozen moments of *controversy*, when Justice Thurgood Marshall punctuates the equilibrium of an oral advocate’s constitutional argument with dispositive reductionist challenges, as he did in *Brown* as a lawyer. Paying less attention to constitutional result, and closer attention to constitutional controversy, shows that even in decisions Justice Marshall does not author, the Court grounds its decisions on the constitutional bedrock he unearthed and the Court resolves doctrinal disharmony he ex-

⁵ *Id.* at 3-4, *Briggs*, *supra* note 2, at 332-33.

⁶ *See, e.g.*, STONE, *supra* note 2, at 475-81.

⁷ This purpose to reconnect scholarship with the controversies lawyers submit to the judicial department is not novel. *See generally* K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930). But it is pressing. *See* Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8.

posed.⁸ Second, this Article demonstrates that compressed dialogue can be used effectively not just, as in *Brown*,⁹ when an inspecting Justice (Frankfurter) aligns with a provoking attorney (Marshall), but also when an inspecting Justice (Marshall) disagrees with a provoking attorney, as occurred in *United States v. Nixon*.¹⁰ Third, this Article argues that compressed constitutional arguments have been determinative of outcomes, but are not openly acknowledged in written opinions, and accordingly, these arguments largely have eluded scholarly consideration. To support this argument three examples are offered, which focus on the constitutional reductionism Justice Marshall articulated in controversies before the Court. Fourth, this Article explores how the Case and Controversy Clause compels focus on the constitutional conversation judges elicit from lawyers. Celebrated constitutional decisions, like *Gideon v. Wainwright*,¹¹ *Miranda v. Arizona*,¹² and *Hamdi v. Rumsfeld*,¹³ were informed by the realization that lawyers, through controversy, are a necessary part of constitutional decision-making. Finally, this Article concludes by contending that this same dynamic—priorities salient in controversy but hidden in outcome—applied to the framing of our Constitution and continues to control significant decisions announced by the Supreme Court.¹⁴

I. USING CONSTITUTIONAL REDUCTIONISM TO REJECT EXPANSION OF CONSTITUTIONAL DOCTRINE

Consider the following formative constitutional moments, won or lost by clashing lawyers in conversation with Justice Marshall using constitutional reductionism to press reduced Fourth Amendment precepts.

A. *Arizona v. Hicks*: “I’m not talking about the guilty person”

On December 8, 1986, attorney Linda Akers, Special Assistant Attorney-General of Arizona, stood before the Supreme Court and proposed that the Fourth Amendment should be interpreted to allow subclasses of searches,¹⁵ just as the Court had decided in *Terry v. Ohio* that there are sub-

⁸ See, e.g., *infra* Part I.A. (discussing *Arizona v. Hicks*, 480 U.S. 321 (1987)).

⁹ See *supra* pp. 741-43.

¹⁰ 418 U.S. 683 (1974).

¹¹ 372 U.S. 335 (1963).

¹² 384 U.S. 436 (1966).

¹³ 542 U.S. 507 (2004).

¹⁴ See *infra* Part V.

¹⁵ See Transcript of Oral Argument at 9-14, *Arizona v. Hicks*, 480 U.S. 321 (1987) (No. 85-1027), 1986 U.S. TRANS LEXIS 150, at *9-14.

classes of seizures.¹⁶ She argued: Why not permit police to examine your television to read its serial number, or check its brand, and say that is reasonable for purposes of the Fourth Amendment?¹⁷ In other words, she suggested that police should be allowed to do small searches based on less suspicion than probable cause, or even based on no suspicion at all.¹⁸ If *Terry* approved this for lesser interferences with people, like frisks, why not for property?¹⁹

Scholars of the Fourth Amendment largely defend the Court's rejection of Akers' constitutional argument in *Arizona v. Hicks*.²⁰ They give comparative acclaim to the majority opinion authored by Justice Scalia and to Justice O'Connor's dissent favoring " cursory inspection " authority.²¹ The scholars focus on the result (i.e., the opinion setting forth the decision on the issue), which reveals only the outer layer of the Court's reasoning. The written opinion fails to address the importance of constitutional reductionism—the decisiveness of driven principle—that Justice Marshall applied to the controversy during oral argument, when the constitutional question was still open.

Justice Marshall's unanswerable reductionist point that empowers the eventual majority opinion came in this exchange, where he exposed that the government request for "inspection" authority relied on a guilty person premise as well as that it portended an expansive list of Fourth Amendment rummaging:

[MR. JUSTICE MARSHALL]: Mrs. Akers, the case that says, you can search for cocaine, and it's okay, that sets a precedent that anybody with cocaine in his possession has no privacy. If we in this case say that he can search a TV set, then that means that he can search anybody's TV set under any circumstances. And I'm sure you don't want to go that far.

MRS. AKERS: Well, Your Honor, I believe that the same interest in stolen property, it's the same illegitimate interest in contraband or in stolen property.

[MR. JUSTICE MARSHALL]: I'm not talking about the guilty person. I'm talking about the innocent person.

MRS. AKERS: If, Your Honor—

[MR. JUSTICE MARSHALL]: Under that case, any innocent person with powder in his room has a chance of being searched, as of right now. So if we rule fully with you, then anybody with a TV set has a possibility that somebody's going to search it for a serial number. And you don't want to go that far, do you?

¹⁶ See *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

¹⁷ See Transcript of Oral Argument at 3, *Hicks*, *supra* note 15, at *3.

¹⁸ *Id.* at 22, *Hicks*, *supra* note 15, at *22.

¹⁹ *Id.* at 19, *Hicks*, *supra* note 15, at *19.

²⁰ 480 U.S. 321 (1987).

²¹ See, e.g., JOSHUA DRESSLER & ALAN C. MICHAELS, 1 UNDERSTANDING CRIMINAL PROCEDURE 244-46 (2006) (discussing Scalia's majority opinion and O'Connor's dissent).

MRS. AKERS: Your Honor, I don't have any problem with going that far, because I don't think the interest in—

[MR. JUSTICE MARSHALL]: Well, I do. I have trouble—I have trouble with you searching my TV set.

MRS. AKERS: Your Honor, I believe that the information that could be conveyed from the [search of the] exterior, and calling it a search—I'm not conceding that it is a search—but the inspection of the television set I don't believe reveals any information other than whether or not the item is stolen; and that you have, and anyone else has, no legitimate expectation of privacy in that area.

[MR. JUSTICE MARSHALL]: Well, that validates every search. If you find what you're looking for, it's a legal search.

MRS. AKERS: No, Your Honor—

[MR. JUSTICE MARSHALL]: (Inaudible) going on for years.

MRS. AKERS: I disagree with your conclusion in the respect—and petitioner would submit to this Court that the examination of the exterior of an item in plain view that reveals only the serial [number] or the brand name, which assists the officer in determining whether or not it is stolen, is not an intrusion that. . .

[MR. JUSTICE MARSHALL]: You want us to say that?

MRS. AKERS: Yes; a brand name or a serial number.

[MR. JUSTICE MARSHALL]: Yes. That they can search for a brand name?

MRS. AKERS: Or a serial number, that is correct, Your Honor.

[MR. JUSTICE MARSHALL]: I'm not talking about [a] serial number. I'm talking about [a] brand name. You want us to go that far?

MRS. AKERS: You [sic] Honor, I think—

[MR. JUSTICE MARSHALL]: You don't want to limit it to [a] serial number, which is what you have in this case. You don't want to limit it to that. You want it to also [to] go to brand name.

MRS. AKERS: In this case, the Court doesn't have to go that far. However, brand name is the same kind of information that is encompassed within the serial number.²²

In *Arizona v. Hicks*, Marshall compressed the Fourth Amendment argument to the irrefutable reductionist point that search authority is unrestrained if the government can presume guilt. Around that core, Marshall composed his admonishing refrain as a negative principle: “you don't want to go that far,” and from this negative principle, attorney Akers finally re-

²² Transcript of Oral Argument at 21-23, *Hicks*, *supra* note 15, at *21-23. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN22arizona_v_hicks.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

treated, saying “[i]n this case, the Court doesn’t have to go that far.”²³ In the ensuing decision, announced three months later, even dissenting Justice O’Connor was obliged, therefore, to emphasize that reading serial numbers is a “miniscule” inspection,²⁴ whereas, correspondingly, Justice Scalia, writing for the majority, insisted that “there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”²⁵

B. *Chimel v. California*: “[I]f we let him go home and then arrest him, we can search the attic, the garage and everything else”

In *Chimel v. California*,²⁶ the Court issued an opinion divided seven to two, with the majority upholding grab-area searches incident to lawful arrests, but disallowing full home searches without a warrant.²⁷ Justice Stewart authored the majority opinion; Justice White, the dissent.

But it was Justice Marshall, during oral argument, who exposed that the pretextual arrest-in-order-to-search-the-home practice would effectively nullify the Fourth Amendment Warrant Clause. That reality emerged during this colloquy with Ronald M. George, Deputy Attorney-General of the State of California:

[MR. JUSTICE MARSHALL]: May I break in just one moment on the other point? Assuming that they know, they are confident that this man committed this robbery, and they see him on this side of town, going toward his home. Is it possible that some detective would say, “Well, if we arrest him here, we can only search his person but if we let him go home, and then arrest him, we can search the attic, the garage, and anything else”? Is that possible?

MR. GEORGE: It is possible that officers would do that.

[MR. JUSTICE MARSHALL]: Well, what is different about that case and this case?

MR. GEORGE: I think it is improper when the officers do that. We concede that, and there are cases so holding, but it is improper.

[MR. JUSTICE MARSHALL]: Well, didn’t they deliberately wait at home for him? They knew where he was.²⁸

Sharper questions from the Court returned to this exposed concern:

²³ Transcript of Oral Argument at 23, *Hicks*, *supra* note 15, at *23.

²⁴ *Hicks*, 480 U.S. at 338 (O’Connor, J., dissenting).

²⁵ *Id.* at 329.

²⁶ 395 U.S. 752 (1969).

²⁷ *Id.* at 762-63.

²⁸ Transcript of Oral Argument at 26, *Chimel v. California*, 395 U.S. 752 (1969) (No. 770). This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN26-chimel_v_california-mr.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

QUESTION: Mr. George, may I ask you this: Is your desire to broaden out the right of search? Does that indicate a desire on the part of law enforcement in California to wipe out the necessity of warrants, search warrants, warrants of every kind, in order to go in and search whenever they want to do so?

MR. GEORGE: No.

QUESTION: I will tell you the reason I ask that. It is because in one case we had here a while back, it was stated to us that in the great City of Los Angeles, the Police Department got out, I think it was, fewer than 20 search warrants in an entire year.²⁹

And, by rebuttal argument, Justice Marshall's concern was illustrated by conclusive empirical evidence hurriedly proffered by attorney Keith Monroe:

[MR. MONROE]: To pursue this same point a little bit on the matter of warrants, I had shortly before coming here contacted the clerk of the Municipal Court in the Los Angeles Judicial District, who is one of the few agencies in California, or anywhere, so far as I can find out, who has some statistical information available on search warrants.

To give you an idea of what Los Angeles Judicial District comprises, the entire County is authorized 125 Municipal Court Judges. The Los Angeles Judicial District, which is within that county, comprises 58 of those 125 Judges. So we have something here which is approaching half of the entire county.

In 1931, according to the letters I have, the Clerk of this court commenced keeping separate records of search warrants issued and papers received for search warrants. They were numbered serially, commencing with the Number 1. As of March 12, 1969, these numbers had reached 1938 or, in other words, during this period of time, there had been approximately some 50 warrants per year, or something like that, although this is not a fair representation, since 1968, according to advice I have personally received from the Clerk, there were papers processed in this Judicial District for 179 search warrants.

So the figure has gone up, but it was to me amazingly low for a 38-year period.

[THE COURT]: Will you submit that to us, too, please, Mr. Monroe?

[MR. MONROE]: Yes, I will. The 1968 figures I obtained myself. The letter covers the rest.³⁰

Three months later, on June 23, 1969, the Court announced its decision. Writing for the majority, Justice Stewart's discussion traces the turns of Fourth Amendment precedent to overturn the warrantless home search at issue as well as other wayward Court authorities.³¹ The negative core Justice Marshall exposed is visible twice in the decision, beginning with the observation that "[u]nder . . . an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point,"³² and then warning against "giv[ing] law enforcement officials the opportunity to en-

²⁹ *Id.* at 32.

³⁰ *Id.* at 54-55.

³¹ *Chimel*, 395 U.S. at 755-68.

³² *Id.* at 765.

gage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.”³³

C. Terry v. Ohio: “[C]ouldn’t you say that when he laid hands on him and swung him around that the petitioner’s freedom of movement was arrested?”

On Tuesday afternoon, December 12, 1967, attorney Reuben M. Payne, for respondent, the State of Ohio, stood before the Supreme Court.³⁴ The Court asked him to explain, in “plain ordinary language,” what “quantum of evidence” police must have to stop persons and ask them questions, to interfere with and even frisk them, to lay hands on them and detain them, all being distinct from a Fourth Amendment seizure and arrest which requires probable cause.³⁵

During oral arguments, Justices Marshall and Black engaged in a triangular conversation through attorney Payne. Justice Black’s line of questioning led Payne to focus on heightening public protection concerns and to minimize the scope of the seizure and show of public force allowed.³⁶ In response, Marshall interjected inimitable reductionist logic. First, lessening the suspicion required from probable cause to collective police apprehension, Marshall warned, means “we’re getting intuition by osmosis.”³⁷ Then, in a fierce set of compressed and negative questions, Justice Marshall presages the Court’s threshold ruling that a police touching is a seizure:

MR. JUSTICE MARSHALL: Well, Mr. Payne, couldn’t you say that when he laid hands on him and swung him around that the petitioner’s freedom of movement was arrested?

MR. PAYNE: I would agree that his freedom of movement was arrested.

MR. JUSTICE MARSHALL: But that’s not an arrest.

MR. PAYNE: I do not agree that his freedom of movement was arrested “in a significant way.”

MR. JUSTICE MARSHALL: You mean because he only turned him around? It didn’t take long to turn him around.

MR. PAYNE: No. I mean in the sense of the circumstances involved at that particular time.

MR. JUSTICE MARSHALL: Well, in this particular case he laid hands on him, and swung him around. How many days later was he free to go, from that moment on, in this case?

³³ *Id.* at 767.

³⁴ Transcript of Oral Argument at 11, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), *reprinted in* 66 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 704.

³⁵ *Id.* at 12, *Terry*, *supra* note 34, at 705.

³⁶ *Id.* at 18-22, *Terry*, *supra* note 34, at 711-15.

³⁷ *Id.* at 13, *Terry*, *supra* note 34, at 706.

MR. PAYNE: If there had been no more—

MR. JUSTICE MARSHALL: No. In this particular case, when did he next get out? When did Terry get his freedom?

MR. PAYNE: Some time after he was convicted of the crime of carrying a concealed weapon.

MR. JUSTICE MARSHALL: So his freedom was arrested for quite a while.³⁸

The influence that this constitutional reductionism has is undeniable and most evident when other Justices recast their lines of questioning to address the proposed constitutionally compressed point. After Justice Marshall introduced the constitutional reductionist point here (i.e., swinging a citizen around effectuates a seizure), two other justices recast the controversy in Marshall's terms: First, Chief Justice Warren asked attorney Payne, "When did the arrest take place? Just speaking in ordinary terms, now, not 'little arrest,' or 'big arrest,' but speaking in ordinary terms, when was he arrested?"³⁹ Second, Marshall's reductionist point propelled Justice Brennan to press attorney Payne with this set of questions:

MR. JUSTICE BRENNAN: Let's use the Fourth Amendment language, then. When was the first "seizure" of the person?

MR. PAYNE: The first seizure of the person was at the time that he ordered them in to the store.

MR. JUSTICE BRENNAN: You mean when he took Terry and swung him around there was no seizure of the person?

MR. PAYNE: I think there was a "temporary detaining," or "interference" with his person.

MR. JUSTICE BRENNAN: Well, he had his hands on him and he switched him around. Surely—there was no seizure of the person?

MR. PAYNE: But here again we're dealing with simple semantic words.

MR. JUSTICE BRENNAN: That word is in the Fourth Amendment, isn't it?⁴⁰

Six months later, the Court announced its decision.⁴¹ Even as the Court elaborates its approval of police safety frisks, Justice Marshall's negative

³⁸ *Id.* at 19-20, *Terry*, *supra* note 34, at 712-13.

³⁹ *Id.* at 20, *Terry*, *supra* note 34, at 713 (questioning whether swinging a person around would constitute a "little arrest" or "big arrest").

⁴⁰ *Id.* at 20-21, *Terry v. Ohio*, *supra* note 34, at 713-14. The entire sequence of the exchange provoked by Justice Marshall may be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN42-terry_v_ohio.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁴¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

reductionist concern about abusive police practices underlies the Court's refusal to unhinge law enforcement altogether from judicial review; specifically, Chief Justice Warren makes clear that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'"⁴²

The above examples of constitutional reductionism resulted in restraint: a refusal to expand the reading of the Constitution to allow greater intrusions under the Fourth Amendment. This was accomplished by reducing plain view "inspections" to presuppositions of guilt; home searches to warrantless intrusions; and bodily stops to seizures.

II. USING CONSTITUTIONAL REDUCTIONISM TO EXPAND CONSTITUTIONAL DOCTRINE

The same analysis of constitutional controversy—how Justices probe and interact with lawyers—applies even more dramatically to cases in which the Court's decision expanded previous constitutional principles. What follow are two Supreme Court cases, whose majority opinions were not authored by Justice Marshall, yet whose leaps in constitutional perspective can be seen to have been influenced by Justice Marshall's reductionist points articulated during the oral argument stages of the cases.

A. *Batson v. Kentucky*: "[Is there] any case that says that a constitutional right has to be denied a number of times?"

On December 12, 1985, during oral argument framing what would become the historic case *Batson v. Kentucky*,⁴³ attorney Rickie L. Pearson, the Assistant Attorney-General of Kentucky, along with Deputy Solicitor-General Lawrence G. Wallace, as amicus curiae, urged continuation of the constitutional norm announced twenty-one years earlier in *Swain v. Alabama*,⁴⁴ that prosecutors can keep African Americans off juries unless a pattern of discrimination across cases is shown.

The Supreme Court famously disagreed.⁴⁵ Scholars include in the leading casebooks excerpts from Justice Powell's landmark majority decision,

⁴² *Id.* at 16.

⁴³ 476 U.S. 79 (1986).

⁴⁴ 380 U.S. 202 (1965).

⁴⁵ *Batson*, 476 U.S. at 95-96 ("'[A] consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" (quoting *Arlington Heights v. Metropolitan Housing Dept. Corp.*, 429 U.S. 252, 266 & n.14 (1977))).

and also quote from Justice Marshall's concurrence disfavoring peremptory challenges altogether.⁴⁶ These treatises and commentary, however, overlook the decisive doctrinal block imposed by Justice Marshall's reductionist point which was set up mid-controversy. Justice Marshall urged a reductionist point to demonstrate that the proposition that several constitutional violations are required to equal one actionable one is untenable:

[MR. JUSTICE MARSHALL]: Let's examine that. What I think you are building on is that you can take a peremptory challenge without giving any reason.

MR. PEARSON: Yes.

[MR. JUSTICE MARSHALL]: And you are building that that [sic] you can give it for a violation of the Constitution, and those are two different animals.

MR. PEARSON: No, sir, I—

[MR. JUSTICE MARSHALL]: If a state officer says I am using race in my enforcement of my law, doesn't that violate the Fourteenth Amendment?

MR. PEARSON: If the state does it over a period of time, yes, it does, but in a particular case—

[MR. JUSTICE MARSHALL]: I didn't say over a period of time.

MR. PEARSON: But in a particular case—

[MR. JUSTICE MARSHALL]: He does it once. Doesn't he violate the Constitution?

MR. PEARSON: We don't believe so.

[MR. JUSTICE MARSHALL]: Well, how many times?

MR. PEARSON: Well, I think there[,] based upon how many times it has been done, it has to raise a reasonable inference that he is practicing invidious discrimination. I can't quantify a particular number.

[MR. JUSTICE MARSHALL]: Can you give me any case that says that a constitutional right has to be denied a number of times?

MR. PEARSON: As I understand your question, I don't know of a case to that point, but I do know that *Swain* says that—

[MR. JUSTICE MARSHALL]: Including *Swain*.

MR. PEARSON: Pardon?

[MR. JUSTICE MARSHALL]: Including *Swain*. Did *Swain* say that?

⁴⁶ See, e.g., YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1403-09 (11th ed. 2005); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1199-1205 (8th ed. 2007).

MR. PEARSON: No, sir, not as you put it. I will say—⁴⁷

Tellingly, six months later Justice Marshall would author a concurrence to “Justice Powell’s eloquent opinion for the Court,” adding a very reductionist accusation against jury selection practices that have “flouted [justice] in case after case before a remedy is available.”⁴⁸ Justice Powell’s decision for the Court, by contrast, begins,⁴⁹ has at its middle,⁵⁰ and ends with positive reaffirmations of *Swain*’s equal protection purpose.⁵¹

B. *United States v. Nixon*: “*How are you going to impeach him if you don’t know about it?*”

Chief Justice Burger’s opinion for a unanimous Court in *United States v. Nixon*,⁵² ended a presidency with its announcement that giving Nixon an absolute executive privilege would impede the mission of the judicial department.⁵³ But as one leading constitutional scholar notes, “*Nixon*, too, had its critics. . . . [T]he Court erred in granting expedited review and that the better course would have been to allow the impeachment process to run its course.”⁵⁴

Tellingly, Justice Marshall perceived and gave a reductionist answer to this tension between an absolute executive privilege and our Constitution’s impeachment machinery. Here is his fulcrum moment, engaging attorney James D. St. Clair, counsel for President Nixon:

[MR. JUSTICE MARSHALL]: How are you going to impeach him if you don’t know about it?

MR. ST. CLAIR: Well, if you know about it, then you can state the case. If you don’t know about it, you don’t have it.

⁴⁷ Transcript of Oral Argument, *Batson v. Kentucky*, 476 U.S. 79 (1986) (No. 84-6263), 1985 U.S. TRANS. LEXIS 17, at *30-31. The exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN50-batson_v_kentucky.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁴⁸ *Batson*, 476 U.S. at 102 (Marshall, J., concurring).

⁴⁹ *Id.* at 84 (“We reaffirm the [Swain antidiscrimination] principle today.”).

⁵⁰ *Id.* at 92-93 (contending that “lower courts” misinterpreted “the teaching of Swain” to require a “crippling burden of proof” across “a number of cases . . . to establish a violation of the Equal Protection Clause”).

⁵¹ *Id.* at 100 n.25 (the constitutional misdirection exposed during argument by Justice Marshall’s compressed negative attack gains just oblique acknowledgement only, in a final majority footnote: “To the extent that anything in *Swain v. Alabama* is contrary to the principles we articulate today, that decision is overruled.” (citations omitted)).

⁵² 418 U.S. 683 (1974).

⁵³ *Id.* at 707.

⁵⁴ CHEMERINSKY, *supra* note 3, at 358 (citing Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 31 (1974)).

[MR. JUSTICE MARSHALL]: So there you are. You're on the prongs of a dilemma, hunh?

MR. ST. CLAIR: No, I don't think so.

[MR. JUSTICE MARSHALL]: If you know the President is doing something wrong, you can impeach him; but the only way you can find out is this way, you can't impeach him, so you don't impeach him. You lose me some place along there.⁵⁵

The Court's unanimous decision, decided in the same month, avoids mention of this decisive reduction of constitutional argument (Article II executive privilege) to negative constitutional paradox (invalidation of Article I impeachment machinery) altogether. The Court's outcome solves Justice Marshall's "dilemma" about a constitutional black box for presidential wrongdoing, but in its announced opinion, the Court makes no mention of a derelict executive using the Constitution against itself and instead speaks positively of the powers and duties of all three branches of government.⁵⁶

III. USING CONSTITUTIONAL REDUCTIONISM TO ACKNOWLEDGE CONSIDERATIONS OUTSIDE CONSTITUTIONAL DOCTRINE

Examining oral arguments in cases involving a constitutional argument before the Supreme Court has shown us how judges, like Justice Thurgood Marshall, engage with lawyers to reduce complex constitutional doctrine to core answers that compel case outcomes. As a significant variant, this Article also contends that examining controversies reveals that judges compellingly use constitutional reductionism to acknowledge considerations that are decisive to outcomes, yet are unsuitable for acknowledgement in decisions. These considerations go largely unnoticed by scholarly treatment that assembles doctrine in the traditional manner, excerpting from decisions but not the controversies that framed those decisions. Consider the following reductionist points used by Justice Marshall during oral argument about a woman's right to abortion, the First Amendment and the Eighth Amendment.

⁵⁵ Transcript of Oral Argument at 108, *United States v. Nixon*, 418 U.S. 683 (No. 73-1766) (1974), reprinted in 79 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 898. This exchange may be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN59-us_v_nixon-how_are_you_going_to.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁵⁶ See *Nixon*, 418 U.S. at 691-93 (declining to require the President to place himself in contempt of court; applying executive branch delegation regulations; enforcing specific criminal rule provisions only, as well as due process rights of defendants and Article III powers of judicial review and subpoena authority; plus, finally, reaffirming a qualified presidential privilege).

A. Roe v. Wade: “I’ll withdraw the question.”

The Court’s ruling protecting a right to abortion in *Roe v. Wade*⁵⁷ still confounds, inspires and enrages today. Justice Blackmun, even as the most junior Justice, wrote the opinion for the Court and he bears the weight of critical attention for his conclusion that fetuses are not persons.⁵⁸ However, a return to the controversy in the Court on December 13, 1971, reveals this reductionist exchange between attorney Jay Floyd, Assistant Attorney-General of Texas, and Justice Marshall:

MR. FLOYD: Well, as I say, Your Honor, the . . . I don’t think the courts have come to the conclusion that the unborn has full juristic rights—not . . . not . . . yet. Maybe they will. I don’t know. I just don’t feel like they have, at the present time.

[MR. JUSTICE MARSHALL]: In the first few weeks of pregnancy?

MR. FLOYD: Sir?

[MR. JUSTICE MARSHALL]: In the first few weeks of pregnancy?

MR. FLOYD: At any time, Mr. Justice. We make no distinctions in our statute.

[MR. JUSTICE MARSHALL]: You make no distinctions whether there’s life there or not?

MR. FLOYD: We say there is life from the moment of impregnation.

[MR. JUSTICE MARSHALL]: And do you have any scientific data to support that?

MR. FLOYD: Well we begin, Mr. Justice, in our brief, with the—the development of the human embryo, carrying it through the development of the fetus from about seven to nine days after conception.

[MR. JUSTICE MARSHALL]: Well, what about six days?

MR. FLOYD: We don’t know.

[MR. JUSTICE MARSHALL]: But the statute goes all the way back to one hour?

⁵⁷ 410 U.S. 113 (1973).

⁵⁸ See, e.g., *The Origins and Scope of Roe v. Wade: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 101 (1996) (statement of Douglas W. Kmiec, Professor of Constitutional Law, University of Notre Dame) (“So, there you have it. A confession by the principal author of the most infamous decision in this century, and perhaps after Dred Scott, ever, revealing that arbitrary choice—not discernment of the law of the land—accounts for the result in Roe.”); Bob Woodward, *The Abortion Papers*, WASH. POST, Jan. 22, 1989, at D1 (reviewing internal Court papers to discuss “legal scholars and millions of other critics” of Justice Blackmun’s opinion for the Court).

MR. FLOYD: I don't...Mr. Justice, there are unanswerable questions in this field. I . . .⁵⁹

Upon being told that he was asking “unanswerable questions,” Justice Marshall offered to withdraw his question.⁶⁰ Attorney Floyd nonetheless added this agreeing codicil: “When does the soul come into the unborn—if a person believes in a soul—I don’t know.”⁶¹ The fact that constitutional reductionism gets to frank agreement that there are questions that are constitutionally unanswerable itself is crucially important; in controversy, reductionist points identify clear darkness, rather than impose a simplified darkness.

B. *First Amendment: Words will never hurt me*

When hearing Justice Marshall’s constitutional reductionism during the frank exchange of ideas that occurs in courtroom controversy, one hears a blunt and powerful explanation of First Amendment protection built on impatience. The academic world has generated “voluminous literature” assessing “why freedom of speech should be regarded as a fundamental right,” including “[t]hat freedom of speech is protected to further self-governance, to aid the discovery of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance[.]”⁶² In contrast, Justice Marshall reduces his challenge to government censorship to the “sticks and stones” truism that words do not hurt. Needless to say, the fact that we should not be bothered by most speech is not an interpretative mode that takes easy voice in announced First Amendment decisions, and it gains even less elaboration in scholarship. But listening to Justice Marshall, its vital force is undeniable, as is evident in the following two landmark cases.

1. *Wooley v. Maynard*: “I didn’t live or die by it.”

Justice Marshall was blunt with his First Amendment reaction to New Hampshire’s “live free or die” state motto license requirement:

[MR. JUSTICE MARSHALL]: You mean that if we rule in favor of the Appellees that everybody will tape it over?

MR. JOHNSON: This is another matter, Mr. Justice Marshall, that—

⁵⁹ Transcript of Oral Argument, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), reprinted in 75 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 803-04. This exchange may be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN63-roe_v_wade.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁶⁰ Transcript of Oral Argument, *Roe*, *supra* note 59, at 804.

⁶¹ *Id.*

⁶² CHEMERINSKY, *supra* note 3, at 926, 926-30.

[MR. JUSTICE MARSHALL]: If everybody is in favor of getting rid of it, you ought to get rid of it.

MR. JOHNSON: This is not a burning issue within the State of New Hampshire . . . Prior to this particular case, there were two combined cases before the New Hampshire Supreme Court cited in the State's brief, *State v. Hoskin and Ely*, in which the defendants therein had taped over the State motto.

[MR. JUSTICE MARSHALL]: Then, I understand the Attorney General's office doesn't have anything else to do, that's why they brought it up here.

MR. JOHNSON: We have sufficient work in New Hampshire.

[MR. JUSTICE MARSHALL]: Is it important in the State of New Hampshire or not?

MR. JOHNSON: It is very important, Mr. Justice Marshall.

[JUSTICE MARSHALL]: But it is not a burning issue.

MR. JOHNSON: It is not a burning issue from the standpoint that when one goes to New Hampshire one sees the motto taped over. If I may introduce a piece of evidence not before the Court. In my travels around the State of New Hampshire since this case first was instituted, I personally have yet to see within the State of New Hampshire a license with the State motto either cut out or taped over.

[MR. JUSTICE MARSHALL]: Since you are speaking as an individual, the first time I noticed the motto was after this case was filed. I hadn't ever paid any attention to it. I noticed New Hampshire license and I'd say, "Well, there's somebody from New Hampshire," but I didn't live or die about it.⁶³

2. *Rankin v. McPherson*: "[T]hat wrecks the world?"

More starkly, in the controversy framing *Rankin v. McPherson*,⁶⁴ Justice Marshall again connected First Amendment logic to the fact that speech is merely expressive—its effect innocuous. *Rankin* involved whether firing a public employee for a hostile comment towards the president—"if they go for him again, I hope they get him"—violates the First Amendment.⁶⁵ Insisting that the government give its reason to censor hostile speech, Marshall articulated his perspective on the First Amendment in the following exchange:

[MR. JUSTICE MARSHALL]: Well, just what harm was done to anybody by her statement? I have limited this to anybody.

⁶³ Transcript of Oral Argument at 10-12, *Wooley v. Maynard*, 430 U.S. 705 (1977) (No. 75-1453). Justice Brennan, similarly, adverts during oral argument to the irony that New Hampshire's licenses containing the mottos are made in state prison. *Id.* at 10. The exchange in the text may be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN67wooley_v_maynard.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁶⁴ 483 U.S. 378 (1987).

⁶⁵ *Id.* at 379-80.

MR. NAGER: The harm in this case is to the Government's interest in promoting the public understanding and respect for the laws of the constables.

[MR. JUSTICE MARSHALL]: For uniformity of thought?

MR. NAGER: No, Justice Marshall, not for uniformity of thought, but for understanding about the requirements of the law. A law enforcement agency doesn't just engage in day-to-day enforcement activity. It doesn't just go out on the street and arrest people and put them in jail. A law enforcement agency is responsible—

[MR. JUSTICE MARSHALL]: You tell me; I don't know.

MR. NAGER: A law enforcement agency is responsible for teaching the public about the requirements of the law, for emphasizing their importance.

[MR. JUSTICE MARSHALL]: This statement was made in an office where nobody was there but employees of that office, and it doesn't even show how many were there. It only shows there were three there. Now, that wrecks the world?⁶⁶

Justice Marshall's comments expressed impatience over the government's intolerance of the employee's words, and hinted at the insignificance of their effect. However, such reactions are ill-suited as the basis for announced First Amendment doctrine or for scholarly conception. Certainly, the position Justice Marshall articulated during the oral argument is in tension with grand First Amendment theories, some of which are "concerned with nothing less than helping to shape 'the intellectual character of society.'"⁶⁷ The latent layer of reasoning underlying the Court's decision is highlighted when Justice Marshall's impatient points during the oral arguments are juxtaposed with the muted language contained in the opinion he authored in the case.⁶⁸ In fact, Justice Marshall's decision devotes extensive inquiry into possible harm, including the footnoted contemplation that even clerical employees could be discharged if "their speech . . . truly injures the public interest in the effective functioning of the public employer."⁶⁹

⁶⁶ Transcript of Oral Argument, *Rankin v. McPherson*, 483 U.S. 378 (1987) (No. 85-2068), 1987 U.S. TRANS LEXIS 182, at *14-15. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN70-rankin_v_mcpherson.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁶⁷ See CHEMERINSKY, *supra* note 3, at 930 & n.40 (citing LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 120 (1986)).

⁶⁸ Compare *Rankin*, 483 U.S. at 388-91, with Transcript of Oral Argument, *Rankin v. McPherson*, *supra* note 66, at *14-15.

⁶⁹ *Rankin*, 483 U.S. at 391 n.18.

C. *Eighth Amendment: “Why didn’t you pick him up the first time and kill him?”*

Eighth Amendment jurisprudence has evolved into a solemn, angry and renunciatory formula, telling us that we are bettering ourselves away from cruelty.⁷⁰ Justice Marshall reduces this conceit to a different impatient reductionist point: stop executing first-time serious offenders and serial petty offenders. It is this reduced principle which he uses as a refrain during oral arguments, but which finds no acknowledgement in any written opinion.

In the momentous Capital Cases of 1976, for example, in retort to the government’s argument that specific deterrence can only be assured by execution, Justice Marshall reduced his Eighth Amendment response to this sarcasm:

[MR. JUSTICE MARSHALL]: Mr. Attorney General, if you could give him life imprisonment, you wouldn’t have to worry about recidivism, would you?

MR. HILL: Well, interestingly enough—

[MR. JUSTICE MARSHALL]: I don’t mean—mean real life. I mean life.

MR. HILL: I know what you mean, Mr. Justice.

[MR. JUSTICE MARSHALL]: You wouldn’t have to worry about recidivism then, would you?

[MR. JUSTICE MARSHALL]: Except perhaps as to guards and other inmates and employees of the prison. I suppose that is always a possibility, isn’t it?

MR. HILL: Well, of course, we had a lifer who escaped. You might have read about it. We just lost three women as hostages in the course of it. I guess life to them was rather important and to their families. And he was a lifer; what did he have to lose under the —

[MR. JUSTICE MARSHALL]: Oh, I imagine that you get all kinds of cases, but I say if it is actual life imprisonment, you wouldn’t have to worry about recidivism, unless you want to get some way-out case some place.

MR. HILL: Well, but to the—

[MR. JUSTICE MARSHALL]: Do you think that the mere fact that a man is subject to commit another crime entitles him to be killed; is to prevent him from preventing another crime?

MR. HILL: I think—

[MR. JUSTICE MARSHALL]: Why didn’t you pick him up the first time and kill him?

⁷⁰ See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (“evolving standards of decency” test) (plurality opinion).

MR. HILL: I think the public is entitled—

[MR. JUSTICE MARSHALL]: You didn't, did you? The first time you didn't pick him up.

MR. HILL: I think, Mr. Justice Marshall, that the legislatures of the states on behalf of the people that they represent are entitled to make that judgment.⁷¹

And again, several years later, responding to the government's argument that even petty recidivism may warrant life imprisonment, Justice Marshall's constitutionally reduced retort is the same:

[MR. JUSTICE MARSHALL]: What is so bad about Mr. Rummel?

MR. BECKER: What is bad about him is that he is a habitual offender, none of his offenses singly have been so serious, but a look at his criminal record, as the prosecutor saw it, saw virtually that he is a career criminal, that he committed one crime after the other, that there was a succession of—

[MR. JUSTICE MARSHALL]: There is a total of four.

MR. BECKER: No, Your Honor, it is not a total of four. It is a significantly higher number than four.

[MR. JUSTICE MARSHALL]: Well, are you going to give him time for the crimes he wasn't convicted of?

MR. BECKER: Your Honor, we are giving him time because of what he has shown himself to be. He has shown himself to be unable to exist outside of prison for any significant period of time without violating the law.

[MR. JUSTICE MARSHALL]: Why not sentence him to death while you are at it?

MR. BECKER: Well, Your Honor—

[MR. JUSTICE MARSHALL]: That would remove him.

MR. BECKER: Your Honor, it must be said that the State of Texas is faced with a very difficult problem here. I wish we knew what to do with Mr. Rummel. I wish the State of Texas—I wish that a Justice of this Court or a penologist or sociologist or someone knew what to do with someone like Mr. Rummel who is a petty criminal—we admit it—

[MR. JUSTICE MARSHALL]: But one way would be to give him some training in jail. That would be one way, which Texas does?

MR. BECKER: Which Texas does, yes, sir.

[MR. JUSTICE MARSHALL]: To a great extent?

MR. BECKER: To an extent which Texas does.

⁷¹ Transcript of Oral Argument, *Jurek v. Texas*, 428 U.S. 262 (1976) (No. 75-5394), reprinted in 90 LANDMARK BRIEFS & ARGUMENTS, *supra* note 2, at 644-45. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN74-Jurek_v._Texas.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

[MR. JUSTICE MARSHALL]: Do you want to use the word “great”?

MR. BECKER: As far as the rehabilitation and the programs of the Texas Department of Corrections—

[MR. JUSTICE MARSHALL]: Yes, sir.

MR. BECKER: —from my own knowledge, they are at least as good as those elsewhere, we think they are.

[MR. JUSTICE MARSHALL]: Can you get anybody else to join you in that?⁷²

Humor and sarcasm are persuasive. Justice Marshall uses each to demonstrate that the First Amendment has value because we do not “lie or die” by most speech and that the Eighth Amendment must check a government predisposed to execute petty serial and serious first-time offenders, respectively. These compressed imperatives defy expression in announced doctrine, which is one step short of the reductionism in *Roe v. Wade*,⁷³ when Justice Marshall declares his own question constitutionally unanswerable.

IV. CONSTITUTIONAL REDUCTIONISM OCCURS IN ORAL ARGUMENT CONTROVERSY WHEN LAWYERS ENGAGE WITH JUDGES

Controversy highlights constitutional reasoning in its formative, reduced and tested stage. The practice of judging is shown most clearly during a judge’s interaction with lawyers. It is a significant reality that adversarial propositions, rejected or adopted by judges, enliven constitutional interpretation.

There is an indivisibility of lawyer and judge during oral arguments. This mixing of lawyering and judging is an unexamined, but radical implication of *Marbury v. Madison*,⁷⁴ namely, that the Case and Controversy Clause sweeps lawyers with their facts—humans in controversy—into officialdom through the judicial department.

When still making constitutional arguments as an attorney, Abe Fortas argued in the landmark case *Gideon v. Wainwright*⁷⁵ that courts are not properly constituted without representation by lawyers who “clash” in courtroom disputes:

⁷² Transcript of Oral Argument, *Rummel v. Estelle*, 445 U.S. 263 (1980) (No. 78-6386), 1980 U.S. TRANS LEXIS 32, at *26-28. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN75-rummel_v_estelle.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁷³ See *supra* Part III.A.

⁷⁴ 5 U.S. (1 Cranch) 137 (1803).

⁷⁵ 372 U.S. 335 (1963).

There is error in this transcript; there's error in most criminal trials, I think we all know it, even when lawyers are present. There's error in this transcript. But I suggested in my brief, and I hope it's not a gross overstatement, that to say that this transcript distinguishes this case from the run of criminal trials is like trying to distinguish between Tweedle Dum and Tweedle Dee. And I believe that. I believe that this case dramatically illustrates the point that you cannot have a fair trial without counsel. Indeed, I believe that the right way to look at this, if I may put it that way, is that a court, a criminal court is not properly constituted—and this has been said in some of your own opinions—under our adversary system of law, unless there is a judge and unless there is a counsel for the prosecution and unless there is a counsel for the defense. Without that, how can a civilized nation pretend that it is having a fair trial, under our adversary system, which means that counsel for the State will do his best within the limits of fairness and honor and decency to present the case for the State, and counsel for the defense will do his best, similarly, to present the best case possible for the defendant, and from that clash there will emerge the truth. That is our concept, and how can we say, how can it be suggested that a court is properly constituted, that a trial is fair, unless those conditions exist.⁷⁶

This constitutional conjoining of the judicial department with party-advocates in courtroom disputes at all levels infuses legitimacy into the interpretative supremacy arrogated to the Court by Chief Justice John Marshall. Indeed, the yoke is hinted at in *Marbury v. Madison* by Chief Justice John Marshall as a reason why constitutional approval or disapproval of all governmental actions is vested in courts, the only branch that entertains “conflicting rules” which must be inspected and reconciled.⁷⁷ Marshall’s culminating argument is that the judicial department is distinguished by its inability *not* to “look[] into,” “examin[e],” “inspect[,],” and read issues wholly; instead the issues are examined as framed by clashing litigants.⁷⁸

The same point is explosively articulated in the argument that helped frame the Court’s decisional retort to presidential prerogative in *United States v. Nixon*.⁷⁹ With decision-making precision, Justice Thurgood Marshall orally thrust attorney St. Clair into the concession that President Nixon’s employment of him as a lawyer appearing in argument before the Court was an acknowledgement by the President that the dispute was being submitted into the Article III judicial system:

[MR. JUSTICE MARSHALL]: The tapes that they ask for in this subpoena duces tecum, which is the only thing before us—has any effort been made to say what if any part of that can be released?

MR. ST. CLAIR: Other than the twenty that are already published, no effort has been made as yet, sir.

[MR. JUSTICE MARSHALL]: Why not?

⁷⁶ Transcript of Oral Argument, *Gideon v. Cochran*, 370 U.S. 932 (1963) (No. 155), reprinted in 57 LANDMARK BRIEFS & ARGUMENTS, *supra* note 2, at 615. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN79-gideon_v_wainwright.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁷⁷ *Marbury*, 5 U.S. (1 Cranch) at 178.

⁷⁸ *Id.* at 179-180.

⁷⁹ 418 U.S. 683 (1974).

MR. ST. CLAIR: Because, if Your Honor please, we have not felt that it has been necessary to do so, because we firmly feel that the President has every right to refuse to produce them.

[MR. JUSTICE MARSHALL]: You don't think that a subpoena duces tecum is sufficient reason for you to try? You just ignored it, didn't you?

MR. ST. CLAIR: No, sir, we did not. We filed a motion to quash it.

[MR. JUSTICE MARSHALL]: The difference between ignoring and filing a motion to quash is what?

MR. ST. CLAIR: Well, If Your Honor please, we are submitting the matter—

[MR. JUSTICE MARSHALL]: You are submitting the matter to this Court—

MR. ST. CLAIR: To this Court under a special showing on behalf of the President—

[MR. JUSTICE MARSHALL]: And you are still leaving it up to this Court to decide it.

MR. ST. CLAIR: Yes, in a sense.

[MR. JUSTICE MARSHALL]: In what sense?

MR. ST. CLAIR: In the sense that this Court has the obligation to determine the law. The President also has an obligation to carry out his constitutional duties.

[MR. JUSTICE MARSHALL]: You are submitting it for us to decide whether or not executive privilege is available in this case.

MR. ST. CLAIR: The problem is the question is even more limited than that. Is the executive privilege, which my brother concedes, absolute or it is only conditional?

[MR. JUSTICE MARSHALL]: I said, "in this case." Can you make it any narrower than that?

MR. ST. CLAIR: No, sir.

[MR. JUSTICE MARSHALL]: Well, do you agree that that is what is before this Court, and you are submitting it to this Court for decision?

MR. ST. CLAIR: This is being submitted to this Court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution.

[MR. JUSTICE MARSHALL]: Are you submitting it to this Court for this Court's decision?

MR. ST. CLAIR: As to what the law is, yes.

[MR. JUSTICE MARSHALL]: If that were not so, you would not be here.⁸⁰

⁸⁰ Transcript of Oral Argument at 59-62, *United States v. Nixon*, *supra* note 55, at 871-72. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN83-us_v_nixon-the_tapes_that_they_ask_for.mp3. Throughout this argument, there are indispensable

Our Constitution's twining of lawyers into the judicial process is a tight bind, not only in this line of seminal decisions—which Chief Justice Marshall perceptively termed cases of “peculiar delicacy”⁸¹—but also in current cases. Now and then, the tight bind constricts enough to squeak out a menacing response from worried executive branch officials who would untie the constitutional knot that ties lawyers to the judicial department. Thus, probing behind the two landmark cases which defend judicial power *Miranda v. Arizona*⁸² and *Hamdi v. Rumsfeld*,⁸³ reveals the executive branch shuddering about assignment of the case to the “Article III system,” not because of distrust of judges, but because of the executive branch's fears that its prerogatives may be subverted by the lawyers who enter and compose cases defending clients against the government.

lawyer undertakings—indispensable both to any full understanding of the Court's ultimate decision, and also to the process of constitutionalism itself. For example, attorney Philip Lacovara, for the United States, puts forth this analysis of who won *Marbury*, 5 U.S. (1 Cranch) 137, and the advocacy thrill to appreciate is that attorney Lacovara is exploring that answer with a Court that was about to take aim, again two centuries later, at assumed presidential prerogative:

MR. LACOVARA: Now, to say that there will be public consequences even political consequences, to the Court's action does not mean that this is a political question, so that the Court must regard it as nonjusticiable. The same argument would have prevented this Court from deciding *Marbury v. Madison*. It's common knowledge that Chief Justice Marshall, himself, was threatened with impeachment if he decided the case against President Jefferson. He went ahead and did his duty on behalf of this Court. Later, in connection with the Burr trial,—

[MR. CHIEF JUSTICE BURGER]: But he really decided it in favor of President Jefferson, didn't he?

MR. LACOVARA: No, sir.

[MR. CHIEF JUSTICE BURGER]: He didn't?

MR. LACOVARA: No, sir. He said it expressly—

[MR. CHIEF JUSTICE BURGER]: He surely decided it. Jefferson won the case—the battle—but lost the war.

MR. LACOVARA: Well, if you—

[MR. CHIEF JUSTICE BURGER]: Of judicial supremacy.

MR. LACOVARA: Well, the case is normally thought of as being solely concerned with original jurisdiction, but if—

[MR. CHIEF JUSTICE BURGER]: But in that sense—

MR. LACOVARA: If one reads the case again, sir, I submit, Chief Justice Marshall got to the original jurisdiction point only after he had been very decisive in saying that a lower court could issue and should issue and would be obliged to issue the mandamus to Secretary Madison, because the President had no legal power to order Secretary of State Madison not to issue that commission. He held that—it might be called dictum, but it certainly at the time was a courageous act.

[MR. CHIEF JUSTICE BURGER]: But the basic ruling in the case related to the original jurisdiction of the Court under Article III did it not?

MR. LACOVARA: I concede that, sir.

Transcript of Oral Argument at 131-32, *Nixon*, *supra* note 55, at 910-11. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN83-b-us_v_nixon-now_to_say_that.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁸¹ *Marbury*, 5 U.S. (1 Cranch) at 154.

⁸² 384 U.S. 436 (1966) (ruling that resulted in the requirement that suspects be apprised of their constitutional rights prior to police interrogations).

⁸³ 542 U.S. 507 (2004) (holding that detainees had a right to a hearing in which they could present evidence challenging their classifications as enemy combatants).

During oral argument in *Hamdi v. Rumsfeld*, for example, the executive branch representative openly ties its aversion to judicial review to defense attorneys, who are an essential part of the Article III system.⁸⁴ Deputy Solicitor-General Paul Clement, in his first answer to the Court, emphasized that “there are plenty of individuals who either have a paramount intelligence value that putting them into the Article III system immediately and providing them with counsel whose first advice would certainly be to not talk to the Government is a counterproductive way to proceed in these cases.”⁸⁵

Deputy Solicitor-General Clement’s failed attempt to explain the danger of providing defense attorneys is nearly a verbatim echo of peril urged decades earlier, also unsuccessfully, against giving an arrestee named Miranda access to a lawyer. Attorney Gary Nelson, Assistant Attorney-General for Arizona made this same dire constitutional warning:

MR. NELSON: Now, I think if the extreme position is adopted that says he has to either have counsel at this stage or intelligently waive counsel, that a serious problem in the enforcement of our criminal law will occur. First of all, let us make one thing certain. We need no empirical data as to one factor, what counsel will do if he is actually introduced. I am talking now about counsel for defendant. At least among lawyers there can be no doubt as to what counsel for the defendant is supposed to be doing. He is to represent him 100 percent, win, lose or draw, guilty or innocent. That is our system. When counsel is introduced at an interrogation, interrogation ceases immediately.⁸⁶

Supporting amicus curiae counsel, attorney Duane Nedrud, for the National District Attorneys Association, chimed in worriedly:

MR. NEDRUD: I would remind this Court that we are not talking about the police versus the defendant. We are talking about the people versus the defendant. In the same way that we would not talk about the Army or the Marine Corps versus the Viet Cong, but we would talk about the United States versus the Viet Cong⁸⁷

The question comes, I think, Mr. Justice Douglas, to whether or not we are going to allow the trial court to determine the guilt or the innocence, or the defense counsel. If the defense counsel comes in at the arrest stage, he will, as he should, prevent the defendant from confessing to his crime, and you will have fewer convictions. If this is what is wanted, this is what will occur.⁸⁸

⁸⁴ See *infra* note 85 and accompanying text.

⁸⁵ Transcript of Oral Argument at 28, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 1066082, at *23. This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN88-hamdi_v_rumsfeld.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁸⁶ Transcript of Oral Argument at 35-36, *Miranda*, 384 U.S. 436 (No. 759), reprinted in 63 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 862. This exchange may be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN89-miranda_v_arizona.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁸⁷ *Id.* at 60-61, *Miranda*, *supra* note 86, at 875.

⁸⁸ *Id.* at 67, *Miranda*, *supra* note 86, at 879.

Significantly, Justice Black gave this reduced response: “I guess there is no doubt, is there, that the provision that provides for protection against compelling him to give testimony has a consequence of fewer convictions.”⁸⁹ Consequently—and not surprisingly having insight into the reductionist negative put forth during the oral arguments that framed the *Miranda* and *Hamdi* decisions—the government’s constitutional position each time was rejected by the Court.

V. SEEING THINGS CLEARLY, WITHOUT A SIMPLIFYING DARKNESS

Thurgood Marshall participated in the Article III system first as an attorney, then as a judge. His constitutional reductionism persuaded the Court as an advocate,⁹⁰ and even more so as a Justice.⁹¹ In the famous reverse discrimination case, *Regents of University of California v. Bakke*,⁹² Justice Marshall reduced equal protection to yet another imperative:

MR. COLVIN: It is the principle of keeping a man out because of his race that is important.

⁸⁹ *Id.*

⁹⁰ As in *Brown*, see *supra* notes 4-6 and accompanying text, Attorney Marshall achieved another decisive equal protection leap when he convinced the Court to announce its landmark voting rights decision in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). Attorney Marshall’s attack on Virginia’s poll tax included this compressed common sense:

MR. MARSHALL: While considering the argument in this case I happened to be in New York during the strike, and I think my analogy is correct. Where a city can, without question, charge for riding on the municipal subway and put up a turnstile where you have to put in the fifteen cent token, I don’t think anybody would try to support a plan where you had to put in a dime in a turnstile when you went in to vote. It just is completely opposed to any form of democratic government I can think of. And this is even worse, because in Virginia it would be bad enough if you had to pay a dollar and a half to buy a ticket before you went in to vote. But this, you have to pay it six months in advance. And whereas some people normally get it on their tax bill, there are others that don’t have tax bills, and they don’t know about it. And I think the Court is aware of the fact that there’s not too much interest in an election six months in advance. So I say my turnstile example is a position that even Virginia can’t rely upon.

Transcript of Oral Argument, *Harper*, 383 U.S. 663 (No. 48), reprinted in 62 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 1034.

⁹¹ As another example, ten years later, on December 7, 1976, now as a Justice and in oral argument framing *Trimble v. Gordon*, 430 U.S. 762 (1977), which contested whether Illinois law that disallowed illegitimate children from inheritance by intestate succession violated the Equal Protection Clause, Justice Marshall interrupted a complex argument blaming a decedent for not legally eluding the Illinois law which disallowed illegitimate children from inheritance by intestate succession, bluntly asking, “You’re talking about all this great legal advice he had that he could get . . . I mean, why not be realistic. A man with that much income whose [sic] about to get his head blown off is not the type of person who gets into all these legal niceties.” Transcript of Oral Argument at 27, *Trimble*, 430 U.S. 762 (No. 75-592). This exchange may also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN94-trimble_v_gordon.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁹² 438 U.S. 265 (1978).

[MR. JUSTICE MARSHALL]: You are arguing about keeping somebody out, and the other side is arguing about getting somebody in.

MR. COLVIN: That's right.

[MR. JUSTICE MARSHALL]: So it depends on which way you look at it, doesn't it?

MR. COLVIN: It depends on which way you look at the problem.

[MR. JUSTICE MARSHALL]: It does?

...

[MR. JUSTICE MARSHALL]: You are talking about your client's rights. Don't these underprivileged people have some rights?

MR. COLVIN: They certainly have the right to compete—

[MR. JUSTICE MARSHALL]: To eat cake.⁹³

In one sense, constitutional reductionism is Thurgood Marshall's aggregate of talent, skepticism and provocation. But in a larger sense, it is the functional reality of decision-making in an adversarial legal system; an inheritance from the Framers' direction in Article III that the judicial department involve itself in controversies.

The Framers gave no interpretative guide to the development of constitutional doctrine.⁹⁴ However, their own practice in moving from their negative assessment of American government in 1787 to constitutional prescription is instructive.⁹⁵ Distrust of those in positions of power animates almost every page of the Philadelphia Convention,⁹⁶ yet the delegates agreed that these apprehensions, along with all of their formative discus-

⁹³ Transcript of Oral Argument at 65-66, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (No. 76-811), reprinted in 100 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 656-657. This exchange can also be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN96-regents_of_uc_v_bakke.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

⁹⁴ See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); LEONARD WILLIAMS LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 10-11 (1988).

⁹⁵ MAX FARRAND, 3 *RECORDS OF THE CONVENTION* 31 (letter from George Washington to Thomas Jefferson, May 30, 1787) ("[T]he situation of the general government, if it can be called a government, is shaken to its foundation . . . [i]n a word, it is at an end; and unless remedy is soon applied, anarchy and confusion will inevitably ensue."); JAMES MADISON, *Vices of the Political System of the United States*, in 9 *THE PAPERS OF JAMES MADISON* 348-57 (Robert A. Rutland & William M. E. Rachal eds., 1975); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 5-23 (1937).

⁹⁶ I-II 1787: *DRAFTING THE U.S. CONSTITUTION* (Wilbourn Benton ed., 1986); see also Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 *WM. & MARY Q.* Vol. 401 (1982). See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 393-564 (1969); CHRISTOPHER COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787*, at 244 (1986).

sions, would remain secret.⁹⁷ Indeed, focusing on the judicial department, the end product proposed and ratified in our Constitution scarcely intimates fear of authority. The only check on judges is that their tenure shall be dependent upon their “good behavior.”⁹⁸

In constitutional controversy, the Supreme Court continues to approach the Constitution in this way. Justices test constitutional propositions during oral arguments with negative reductionist points, but having done so, the Court issues opinions articulating positive protective principles⁹⁹—just as the Framers did not record their fears of despots and tyranny, but instead provided protective devices to prevent such abuses.

To illustrate, during oral arguments in *Rankin v. McPherson*, when Justice Marshall was told by Assistant Solicitor General Glen Nager that “[a] law enforcement agency doesn’t just . . . go out on the street and arrest people and put them in jail. A law enforcement agency is responsible—,” Marshall retorted: “You tell me; I don’t know.”¹⁰⁰ Clearly, this cynicism is not suitable as a holding or rule, but as a constitutional interrogative, it echoes the Framers’ concern about abuse of power and was trenchant to the First Amendment doctrinal “No” that the Court announced in its written opinion.¹⁰¹

In the controversy preceding the landmark decision *Branzburg v. Hayes*,¹⁰² we hear the compressed challenge as a proposition about media dereliction: “Let me ask you a hypothetical question . . . [s]uppose in a particular community . . . the press was apathetic, and some public-spirited citizens . . . went around and did just what your investigative reporter did . . . [are they] protected?”¹⁰³

⁹⁷ BOBBITT, *supra* note 94, at 11; *see also* DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 51-52 (2007).

⁹⁸ U.S. CONST. art. III, § 1.

⁹⁹ *See supra* Parts I.A-I.C, II.A-II.B (elucidating negative constitutional reductionism in argument framing the Court’s positivist decisions in *Arizona v. Hicks*, *Chimel v. California*, *Terry v. Ohio*, *Batson v. Kentucky* and *United States v. Nixon*).

¹⁰⁰ Transcript of Oral Argument, *Rankin v. McPherson*, *supra* note 66, at *14-15.

¹⁰¹ Similarly, upon being told that the Constitution should be read to contain a “majoritarian standard” against political gerrymandering, Chief Justice Rehnquist uttered this compressed principle in *Vieth v. Jubelirer*: “[Y]ou know, the—the Constitution doesn’t ever use the word democracy.” Transcript of Oral Argument at 9, *Vieth v. Jubelirer*, 540 U.S. 1015 (2003) (No. 02-1580), 2003 WL 22990415, at *9.

¹⁰² 408 U.S. 665 (1972).

¹⁰³ Transcript of Oral Argument, *Branzburg v. Hayes*, 408 U.S. 665 (1972) (No. 70-85), *reprinted in* 74 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 680. *Compare Branzburg*, 408 U.S. at 686-708 (in outcome, and so as doctrine, positively endorsing the “constitutionally mandated” criminal investigative duty of grand juries) *with Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring) (in outcome, and so as doctrine, positively highlighting “solicitude repeatedly shown by this Court for First Amendment freedoms”).

States are not exempt from negative constitutional reductionism, either. During oral argument preceding the Court's ruling in *Baker v. Carr*,¹⁰⁴ one hears the sharpest doubt expressed towards them—:

THE COURT: May we presume that [Tennessee's state government] will sail as close to the line of selfishness as it thinks is justified, and therefore make [bare changes in apportionment] and you would then be here again, wouldn't you?

MR. OSBORN: Well—

THE COURT: Wouldn't you?

MR. OSBORN: —if employed to come.¹⁰⁵

In fact, if we look at constitutional controversies in total, comparing these reduced negative questions to the positivist holdings in the written opinions, the judicial department's inheritance of distrust is incontrovertible. The Court is even suspicious of itself, but again, the Court rarely acknowledges that distrust of its own power drives outcomes.

Consider this argument urged by amicus curiae attorney Paul Bator, reducing to a constitutional chide against judicial distinction and self-empowerment, in order successfully to persuade the Court to uphold the constitutionality of federal judicial sentencing guidelines, as it would hold in *Mistretta v. United States*¹⁰⁶:

MR. BATOR: Overall, globally viewed, the Sentencing Reform Act significantly reduces, rather than expands, the overall power of the judicial branch to make law with respect to sentencing. Before the Act, the judicial branch exercised a plenary discretion to make sentencing law. This Act significantly narrows and makes accountable that power. The doctrine of separation of powers is supposed to have something to do with liberty, and it would be a huge irony if this Court invalidated a statute whose global effect is not to increase but sharply to curtail the prerogatives of one of the branches of Government.¹⁰⁷

Gideon v. Wainwright,¹⁰⁸ discussed earlier, vindicated the constitutional role of attorneys. This outcome, however, was achieved through controversy focused on restraining judicial power. Attorney Fortas reduced his federalism retort to the admonition that the Court get “downstairs” and acknowledge the imperative of giving counsel to the accused when they appear in court before judges:

¹⁰⁴ 369 U.S. 186 (1962).

¹⁰⁵ Transcript of Oral Argument at 72, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), reprinted in 56 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 687.

¹⁰⁶ 488 U.S. 361 (1989).

¹⁰⁷ Transcript of Oral Argument, *Mistretta v. United States*, 488 U.S. 361 (1989) (No. 87-7028), 1988 U.S. TRANS LEXIS 26, *58-59. Recently, the Court has ruled in a sequence of cases to restore judicial sentencing discretion, but in the supervening name of juries. See *United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁰⁸ 372 U.S. 335 (1963).

MR. FORTAS: . . . I think—I may be wrong about this, but I do believe that in some of this Court’s decisions there has been a tendency from time to time, because of the pull of federalism, to forget, to forget the realities of what happens downstairs, of what happens to these poor, miserable, indigent people when they are arrested and they are brought into the jail and they are questioned and later on they are brought in these strange and awesome circumstances before a magistrate, and then later on they are brought before a court; and there, Clarence Earl Gideon, defend yourself. Apply the doctrine of *Mapp* against *Ohio*; construe this statute of the State of Florida which says that breaking and entering with intent to commit a misdemeanor is a felony. You should know, Clarence Earl Gideon, that the State of Florida, the Supreme Court of the State of Florida, has construed this statute and it has made available to you various defenses. Well, then, how can Clarence Earl Gideon do it?

I was reminded the other day as I was pondering this case about Clarence Darrow’s trial. The Court will remember that Clarence Darrow was accused and subsequently acquitted of attempting to bribe jurors and subordination of perjury. And I looked at Irving Stone’s book; Irving Stone’s book says that the first thing that Clarence Darrow realized was that he had to have a lawyer. Here was a man who by our folklore, anyway, and I think perhaps really was our greatest criminal lawyer, he needed a lawyer. He got a lawyer. He was eventually acquitted.

But I think that in some of the Court’s opinions, if I may say so, Mr. Justice Harlan, this element, this failure to remember what happens downstairs, has crept in. Not because of an insensitivity of the judges but because of the understandable pull of the sensitivity about the States’ old jurisdiction. And that’s why I want to analyze that. I don’t think that it stands the test of logic, and I don’t think that the argument of federalism here is either correct or soundly founded or stands the test of experience, and that’s what I want to come to.

Now, first—

QUESTION: “Understandable sensitivity” to describe a basic principle of our Government doesn’t seem to me to be a very happy expression.

MR. FORTAS: Well, I’m sorry sir. I meant that a regard, which I myself share, for the principles of federalism. But I believe that those principles are misapplied here.¹⁰⁹

A more common, and tactically prudent, echo of the negative inference against judicial power is its opposite. A claimant asks for what the Court already confers on itself. This approach attains near certain success, but, consistent with the thesis here, the Court rarely will elaborate in doctrine that distrust of its own power and distinctiveness is what has made a hard constitutional question compelling to answer.

Consider four landmark constitutional cases, in which the constitutional explanation for the Court’s decision is expounded in hundreds of pages of judicial opinion, and further explicated in thousands of pages of scholarly articles. An analysis of the oral argument which framed each decision reveals one core compressed challenge, similar each time in direction, which likely compelled the doctrinally distinct outcomes:¹¹⁰

¹⁰⁹ Transcript of Oral Argument, *Gideon v. Cochran*, *supra* note 76, at 617.

¹¹⁰ The four oral arguments are: Transcript of Oral Argument, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279), 1988 U.S. TRANS LEXIS 70, at *56; Transcript of Oral Argument, *Walter Nixon v. United States* at 18, 506 U.S. 224 (1993) (No. 91-740), 1992 WL 687900, at *18, *54; Tran-

In the argument before the Court as to whether judges may appoint independent prosecutors, here is the compressed inquiry:

QUESTION: May I interrupt . . . [j]udges have been appointing defense counsel for years to represent indigents. Why is there any greater appearance of impropriety in this situation? Don't judges know that they are separate from the lawyers that appear before them?¹¹¹

Yet two months later, the Court's near unanimous decision affirmed assignment of appointment power over a prosecutor to the judiciary based on constitutional analysis of the Appointments Clause, Article III and separation of powers doctrine.¹¹² To the extent that the Court returned to the reduced imperative that its result might also be dictated by judicial prerogative, the Court attempted in its decision— hence, for doctrine— the opposite, disclaiming direct power over litigants in the judiciary.¹¹³ These disclaimers, in part, prompted Justice Scalia's cynical and dissenting retort decrying that “[t]hat is what this suit is about. Power.”¹¹⁴

Similarly, in the argument before the Court as to whether the Senate may try impeachments by delegation to committee, two questions are similarly determinative:

QUESTION: [Y]et we do exactly what you say can't be done in the Senate trial. That is, [we] have a master take the evidence.¹¹⁵

QUESTION: But you're saying they [the Senate] can't draw straws or flip a coin, but we can.¹¹⁶

Yet three months later, the Court's decision that Senate impeachment procedures are nonjusticiable was built around textual and historical evidence,¹¹⁷ whereas the compressed truth that the Court's own practices might compel its outcome makes an appearance only in a concurring opinion, in one sentence, and that sentence is phrased as an insight into the intentions of the Framers.¹¹⁸

script of Oral Argument at 53, *United States v. Nixon*, *supra* note 55, at 867; and Transcript of Oral Argument, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), 1997 WL 9248, at *20.

¹¹¹ Transcript of Oral Argument, *Morrison v. Olson*, *supra* note 110.

¹¹² *Morrison v. Olson*, 487 U.S. 654, 670-696 (1988).

¹¹³ *See id.* at 681 n.20 (claiming that “federal courts and judges have long performed a variety of functions that, like the functions involved here, do *not* necessarily or directly involve adversarial proceedings within a trial or appellate court.” (emphasis added)); *see also id.* at 684 (appointing judges statutorily are “sufficiently isolated . . . from the review of the activities of the independent counsel”).

¹¹⁴ *Id.* at 699 (Scalia, J., dissenting).

¹¹⁵ Transcript of Oral Argument at 18, *Walter Nixon*, *supra* note 110, 1992 WL 687900, at *18.

¹¹⁶ *Id.* at 54, *Walter Nixon*, *supra* note 110, at *54.

¹¹⁷ *See* *Walter Nixon v. United States*, 506 U.S. 224, 233-38 (1993).

¹¹⁸ *Id.* at 250 (“Federal courts likewise had appointed special masters and other factfinders ‘[f]rom the commencement of our Government.’” (citation omitted)) (White, J., concurring).

Or, in the landmark argument in *United States v. Nixon*, discussed earlier, deciding whether the president must comply with a trial subpoena, the reductionist point comes suddenly:

QUESTION: The testimony of Justices of this Court has been given in past times by deposition.¹¹⁹

Yet the Court's decision, several weeks later, though built on its defense of judicial functioning, never returns to or acknowledges the compressed oral argument point that if Justices must testify so too will Presidents.¹²⁰

As a final example of the conclusiveness of this unacknowledged modality, consider this moment in controversy in *Clinton v. Jones*, deciding whether the president has temporary immunity from civil lawsuits:

QUESTION: Your brief . . . make[s] a lot about the fact that the President is—you know, it's a full-time job and he—he's very—and any intrusion upon his time is intruding. I must say, I don't find that terribly persuasive. The fact is that—that that's a better reason why the Chief Justice or any of the Justices of this Court should have the kind of immunity you're talking about . . . none of whom can delegate any of their responsibilities. The President is the one Federal officer at the highest level who is able to delegate.¹²¹

Yet the Court's decision four months later refusing to stay litigation against a President for his unofficial acts gives bare intimation that the Court would not confer temporal immunity on a member of a co-equal branch that it does not enjoy itself.¹²²

In these controversies, the constitutional yes or no is foretold in oral argument—the Court would not proclaim its own distinctiveness¹²³—even if that simplicity stays dark in case pronouncement.

CONCLUSION

To come full circle and return to Thurgood Marshall's "grown up" Equal Protection doctrine, recall that Justice Reed had questioned him if the Court should let change come legislatively. Attorney Marshall's answer was terse and respectful:

I think that the legislature should, sir. But I think, considering the legislatures, . . . I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not. It is just a fact.¹²⁴

¹¹⁹ Transcript of Oral Argument at 53, *United States v. Nixon*, *supra* note 55, at 867.

¹²⁰ See *United States v. Nixon*, 418 U.S. 683, 707-12 (1974).

¹²¹ Transcript of Oral Argument, *Clinton v. Jones*, *supra* note 110.

¹²² See *Clinton v. Jones*, 520 U.S. 681, 706 n.40 (grouping Presidents and "other officials" as persons who must meet "demands on their time" such as litigation).

¹²³ The Court did once, in *Marbury*, distinctively; but that was the other Justice Marshall.

These two sentences against majoritarianism are vivid constitutional reductionist use of what constitutional law casebooks say is the foundation of judicial constitutionalism.¹²⁵

A small sampling of oral arguments in the Supreme Court highlights how even pro se advocates perceive this answer to political process arguments. Here, for example, is the recent exchange between pro se litigant Newdow and the late Chief Justice Rehnquist over what meaning can be drawn from the fact that the “under God” amendment to the Pledge of Allegiance passed Congress unanimously in 1954:

MR. NEWDOW: [T]he 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 . . . 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.

QUESTION: 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?

QUESTION: Yes.

MR. NEWDOW: It was apparently unanimous. There was no objection. There’s no count of the vote.

QUESTION: 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 48 percent of the population cannot get elected. (Applause.)

QUESTION: 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.¹²⁶

¹²⁴ Transcript of Oral Argument at 17, *Briggs v. Elliott*, *supra* note 4, at 346.

¹²⁵ *See, e.g.*, SULLIVAN & GUNTHER, *supra* note 3, at 508 (introducing footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

¹²⁶ Transcript of Oral Argument at 44-45, *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624), 2004 WL 736416, at *44-45. This exchange may also be heard at <http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN121->

Comparative lessons across landmark arguments yield up tense, similar efforts by lawyers who assert minority rights against political process majoritarianism. Consider, for example, this argument by attorney Robert Flowers, on behalf of Texas in *Roe v. Wade*:

This Court has been diligent in protecting the rights of the minority. And, gentlemen, we say that this is a minority—a silent minority—the true silent minority. Who is speaking for these children? Where is the counsel for these unborn children whose life is being taken? Where is the safeguard of the right to trial by jury? Are we to place this power in the hands of a mother, and a doctor—all of the constitutional rights—if this person has the person concept? What would keep a legislature, under this ground, from deciding who else might or might not be a human being, or might not be a “person”?¹²⁷

Similarly, during oral arguments in *Loving v. Virginia*, attorney Bernard Cohen, on behalf of Richard Loving, thrust the same compressed argument against Virginia’s anti-miscegenation statute:

THE COURT: Have there been any efforts to repeal this law in Virginia?

MR. COHEN: Your Honor, there have not been any efforts. And I can tell you, from personal experience, that candidates who run for office for the State Legislature have told me that they would, under no circumstances, sacrifice their political lives by attempting to introduce such a bill. There is one candidate who has indicated that he would probably do so, at some time in the future, but most of them have indicated that it would be political suicide in Virginia.¹²⁸

Cases should be studied as they are structured during oral argument controversy because constitutional reductionism, especially negative constitutional reductionism, which compels outcomes, often is obscured by the elaboration of positive constitutional reasons given by the Court in its announced decisions.

elk_grove_v_newdow.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

¹²⁷ Transcript of Oral Argument, *Roe v. Wade*, *supra* note 59, at 824. This exchange may be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN122-roev_wade2-this_court_has_been_diligent.mp3. To hear the complete version of this oral argument please visit www.oyez.org.

¹²⁸ Transcript of Oral Argument at 10, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 2, at 969. This exchange may be heard at http://www.law.gmu.edu/assets/subsites/gmulawreview/files/Sounds/FN123-loving_v_virginia.mp3. To hear the complete version of this oral argument please visit www.oyez.org.