Constitutional Advocacy Explains Constitutional Outcomes

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CONSTITUTIONAL ADVOCACY EXPLAINS CONSTITUTIONAL OUTCOMES*

Stephen A. Higginson**

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I. INTRODUCTION

In oral argument in Baker v. Carr, Attorney Z.T. Osborn, Jr., on behalf of Tennessee voters arguing that the U.S. Supreme Court should hold legislative apportionment a justiciable issue, exclaimed that "the motto of the Supreme Court of Tennessee is Fiat justicia ruat caelum; Let justice be done if the skies should fall." With that exhortation, Osborn remarked to the Court, "We have no other place to go. We are at the capital of the world."

* Editor's Note: With this Essay by Professor Stephen A. Higginson of Loyola University College of Law, the Florida Law Review presents the first multimedia article in our sixty-year history. We invite you not only to read Professor Higginson's piece about oral advocacy before the United States Supreme Court, but also to listen to the moments of Supreme Court advocacy that Professor Higginson writes about in his Article. Supreme Court audio recordings of litigant arguments began in 1955, and today are available from The Oyez Project, at http://www.oyez.org. In this Article, each oral advocacy moment may be heard by clicking into the footnote containing the oral argument after the signal hear. If you are reading this Article in print form, you may listen to links to the audio clips from our website at http://www.floridalawreview.org/higgin/mp3list.htm. We are grateful for permission for this shared usage given by Professor Jerry Goldman, director of the Oyez Project.

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HeinOnline -- 60 Fla. L. Rev. 857 2008
This Article seeks to show that scholars, especially constitutional scholars, must pay more attention to the ways advocates frame their controversies at the "capital of the world." If the Anti-federalists' prophecy was that an overly complex constitution would accrete power around its ambiguities, then the perpetual refinement of the Constitution by lawyers in controversy—from article to section to sentence to clause to phrase to word—has given the best protection against inflexibility. This thesis is timely because lawyering is more accessible with the Court's recent decision to post oral arguments "on the same day an argument is heard by the Court." The topic is pragmatic because scholarly attention to judges' courtroom conversations with lawyers may help close the divide between the academy and the legal profession.

Moreover, understanding persuasive advocacy is vital to understanding constitutional law. Walking into the Court on December 6, 1965, and listening to the controversy preceding the Court's decision in Brown v. Louisiana foretells the Court's eventual ruling by displaying the collapse of this "separate but equal" argument by Louisiana attorney Richard Kilbourne:

JUSTICE FORTAS: The question occurs to me, is the State of Louisiana telling us that in this Parish library facilities are not segregated, that is to say, that a Negro can get service from any library facility, any public library facility in this Parish?

RICHARD KILBOURNE: Yes sir, I would say that they can.

Although the Court accepted Osborn's argument that legislative apportionment was justiciable, Baker v. Carr, 369 U.S. 186 (1962), this advocacy connects significantly also to Justice Frankfurter, in dissent, who caustically replied that "[w]e were soothingly told at the bar of this Court... a euphoric hope... to enthrone the judiciary... whereas [in this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate... [and] an aroused popular conscience that sears the conscience of the people's representatives." Id. at 269–270 (Frankfurter, J., dissenting).

2. This Article does not develop its most obvious proof when the Court explicitly ties its reasoning to concessions and points made in arguments submitted to it. Cf. Mark R. Killenbeck, M'Culloch v. Maryland: Securing a Nation 5, 95–109 (Peter Charles Hoffer & N.E.H. Hull eds., 2006) (detailing indebtedness to nine days of oral arguments propounded by counsel just three days before the Court issued its ruling). Those cross-reference imperatives to what lawyers have done are unavoidable, but because they endorse or chide out of the decisions themselves they permit the focus on end-product that most doctrinal scholarship (case comments and casebooks) perpetuates.


QUESTION: Is that the representation of the State of Louisiana?

ANSWER: That’s the representation of the State of Louisiana which I make and which I certainly stand by—

QUESTION: Now these cards, these library cards, as I remember the record, there is testimony to the effect that a library card issued to a Negro is stamped Negro. Any dispute about that?

ANSWER: No sir. There is no dispute about that.

QUESTION: Does that practice continue?

ANSWER: I really, I just couldn’t answer that—

QUESTION: Well, there is a blue bookmobile for the Negroes and a red one for the whites, isn’t there? How can you say it’s not segregated?

ANSWER: Well, I say it’s not segregated because if a white person wants to use that blue bookmobile, they would let him use it; if a colored person want to use a red bookmobile—I may have my colors wrong, but I believe that’s right—they would certainly wouldn’t be able to refuse him service.

QUESTION: The record says quite the contrary, doesn’t it? Is there any testimony in the record to support what you have just said?

ANSWER: I believe it is. Now you see, this, something like this has never come up, actually, before. I mean—

QUESTION: Well, it sure is up now.

ANSWER: Sir?

QUESTION: I said, it’s up now, and I want to ask you about the last statement you made. Is there anything in the record to the effect that a Negro who wants to get a book from the red bookmobile, can do so? There is testimony from some woman who used to work for the library—I’ve forgotten her name—to the precise opposite . . . [S]he said, “The only person who used the blue bookmobile is Negroes and the blue bookmobile services three parishes for all Negroes, and occasionally if a white person would come to the blue
bookmobile, I’d give him a schedule telling him when the red bookmobile would come.”

ANSWER: I believe that would be the only testimony that’s in the record.

QUESTION: That looks like a segregated library system.

ANSWER: Well, I often get confused when you say segregated system or integrated system because in Clinton, Louisiana, well, I’ve always felt like we had more integration than probably any place in the United States, I mean, just from the way people live. But I don’t—segregation and integration seems to mean different things in different parts of the country.

QUESTION: Prior to this incident, had Negroes ever gone into that library?

ANSWER: You mean to get a book? They often went in there—

QUESTION: Gone in there for a service to the library as a white person would?

ANSWER: I don’t believe they had. No, sir.

QUESTION: Would you explain to us why that would be if you didn’t have segregation?

ANSWER: No, I, I really can’t, I can’t explain why that could be, except, as I say, no doubt it was a custom that they did not go in that library at that time.6

Trying to reconcile blue bookmobiles for blacks with the demands of the Constitution, Attorney Kilbourne first contends that segregation and integration are indistinct terms; then his constitutional grip slips down from avoidance to evasion; then down further to slanted truth; finally, he retreats into semantics, asserting that blacks have a “custom” of not using libraries.6 Only with this vivid collapse in mind are we unsurprised that the Court, in an opinion by Justice Fortas, not only held Petitioner Brown’s library breach-of-peace conviction invalid, but also elaborated as follows:


6. _Hear id._
We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. . . .

It is an unhappy circumstance that the locus of these events was a public library—a place dedicated to quiet, to knowledge, and to beauty. It is a sad commentary that this hallowed place in the Parish of East Feliciana bore the ugly stamp of racism. It is sad, too, that it was a public library which, reasonably enough in the circumstances, was the stage for a confrontation between those discriminated against and the representatives of the offending parishes.7

First, this Article uses advocacy moments like this—rarely incorporated into casebooks on constitutional law—to demonstrate how advocacy foretells much of constitutional decision-making. Second, by referring to several dozen leading constitutional decisions and focusing on how lawyers in dialogue with Justices shaped decisions, this Article explains how three features of advocacy often determine a case’s outcome. Finally, this Article shows that scholarship must realign constitutional doctrine with persuasive or unpersuasive lawyering, both to tie in the lawyer’s professional role and, more importantly, to better recognize the Court’s opinions as a group-assembled product begun when the Justices speak with attorneys.8

II. CONSTITUTIONAL DOCTRINE AS THE OUTCOME OF PERSUASIVE LAWYERING

Great and small cases that stand in decisional edifice—as well as buttressed by scholarly scaffolding—are heard aloud and at inception by the Court as controversies compressed in courtroom clashes over constitutional syntax, origin and purpose. Consider the Commerce Clause. Although leading casebooks contain excerpts from *Heart of Atlanta Motel, Inc. v. United States,*9 none includes this argument by Attorney Moreton Rolleston, who sought to invalidate the Civil Rights Act of 1964:

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8. See Transcript of Oral Argument on May 13, 1952, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 592 (1952) (Nos. 744, 745), *reprinted in* 48 LANDMARK BRIEFS AND ARGUMENTS, supra note 1, at 976–77 (“This is something that cannot be decided, it is not a case that can be decided, in one day. After your discussions here come the arguments; as a matter of fact, the arguments have just then begun.”).
I didn’t come here to talk about commerce. I didn’t come here to argue the question of whether or not this Motel has an effect on commerce, certainly everything that happens in this country has an effect on commerce. But I did perceive, I hope, that in the writings of members of this Court there is still the great facet of personal liberty that this Court stands for. This Court under the Constitution is the last bulwark of personal liberty. Where else can a man go to defend personal liberty? So if you get to your questions that you asked, the answer is that commerce has got to stop somewhere with commerce, in the sense that a business function is commerce. And that the power of the Commerce Clause under the Constitution does not go to people. If you don’t accept that fundamental, I’m lost.

Attorney Rolleston did lose. In fact, his declamation that people are not as protected as commerce also flowed directly into Justice Douglas’ concurrence, which reiterated that people discriminated against because of race should occupy “‘a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.’”

Alternatively, consider our Constitution’s impeachment machinery. The Court’s landmark holding in Nixon v. United States announced that the method the Senate chooses to “try” impeachment cases lies in large part in its “sole” discretion, and thus may include delegation by the full Senate to a Senate committee. Not one casebook on constitutional law, however, refers to the following compressed exchange during oral argument on October 14, 1992, between Justice White and Solicitor General Kenneth Starr about syntactical emphasis, etymological pedigree, and the Court’s own practice of delegating authority to special masters:

KENNETH STARR: I think the word “try” meant something different to the Framers. We’ve cited—


13. Id. at 226, 237–38 (interpreting U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”)).
JUSTICE WHITE: Well, whatever it meant, they have to be able to—they have to fit it within the word “try.”

ANSWER: They have to fit it within the word “try.” Now, what did the Framers mean by try, and we have given to the Court the 1755 Samuel Johnson dictionary—to examine or to examine as a judge—and just as this Court examines as a judge in original cases by having a special master do, by the way, considerably more . . . .

The Court’s unanimous decision issued on January 13, 1993, includes both the late Chief Justice Rehnquist’s holding citing to Samuel Johnson’s dictionary and Justice White’s concurrence noting the practice of courts to delegate to special masters.

Relating to executive power, examine the final moments of argument framing the Court’s landmark decision in Youngstown Sheet & Tube Co. v. Sawyer. Amicus counsel Harold Heiss, representing the railroad labor unions, had this extra-legal retort to whether America’s hostilities in Korea warranted seizure of domestic steel production facilities: “Whatever there may be in Korea, I can say this: My boy is there and my boy told me that he is far more interested in the preservation of the fundamental freedom of this country than he is in anything in Korea.”

Or, consider United States v. Nixon—popularly referred to in the casebooks as the Court’s constitutional stop on executive power. But to perceive the immensity of that stop, every student of this terse, qualified, executive privilege holding must go back to Attorney St. Clair’s sweeping originalist and political-process argument that turning “Richard Nixon [into], let’s say, an eighty-five percent president, not a hundred percent president . . . can’t be constitutional[.]”

Shifting to equal-protection doctrine, it is during attorney argument that we hear the Court famously stiffen in 1985 against peremptory strikes based on race. Similarly, almost ten years later, it is in dialogue with

16. Id. at 250 (White, J., concurring).
17. 343 U.S. 579 (1952).
attorneys that the invalidity of strikes based on gender becomes self-evident.\textsuperscript{22}

The same value in hearing the Supreme Court's disbelief is explosively proven in landmark controversy after landmark controversy. Listen in on April 21, 1969, to understand why the Court would later rule that Congress may not exclude elected members as it deems appropriate;\textsuperscript{23} or on March 31, 1976, to consider with the Court whether the death penalty is excessive in severity, but "not in a constitutional sense";\textsuperscript{24} or on April 3, 1962, to hear school prayer positioned into a constitutional formula;\textsuperscript{25} or on March 31, 1976, to hear why there is a First Amendment imperative protecting flag burners.\textsuperscript{26}

\textsuperscript{22} Hear Recording of Oral Argument on Nov. 2, 1993, at clip 6, J.E.B. v. Alabama \textit{ex rel.} T.B., 511 U.S. 127 (1994) (No. 92-1239), http://www.floridalawreview.org/higginson/mp3list.htm (This exchange occurs: Q: "But you're arguing that there's nothing wrong with a counsel that's continuing to exclude them solely on the basis of their gender." A: "I'm not saying that that's right, or wrong. I'm saying—" Q: "No, yes you are, you're saying it's perfectly constitutional." A: "I'm saying, well, that's what I mean." And minutes thereafter, counsel is asked and answers as follows: Q: "[I]sn't it true that there is no other group in the history of this country that was excluded from jury service as long as women, not even racial classifications .... A: "Justice Ginsburg, it is true that only blacks and women have been under the law denied the right and that actually black men were allowed to sit on juries prior to women in Alabama.").

\textsuperscript{23} Hear Recording of Oral Argument on Apr. 21, 1969, at clip 7, Powell v. McCormack, 395 U.S. 486 (1969) (No. 138), http://www.floridalawreview.org/higginson/mp3list.htm (Q: "In my opinion it would not, Sir, although clearly unconstitutional, clearly improper." A: "Well, what could be more perverse than that?").

\textsuperscript{24} Hear Recording of Oral Argument on Mar. 31, 1976, at clip 8, Jurek v. Texas, 428 U.S. 262 (No. 75-5394), \textit{vacated}, 429 U.S. 875 (1976), http://www.floridalawreview.org/higginson/mp3list.htm ("Of course it's excessive in its severity. But not in a constitutional sense. And that's where we differ. I'll take the back seat to no one in revering human life.").

\textsuperscript{25} Hear Recording of Oral Argument on Apr. 3, 1962, at clip 9, Engel v. Vitale, 370 U.S. 421 (1962) (No. 468), http://www.floridalawreview.org/higginson/mp3list.htm ("I want to make it absolutely clear, before this Court, that I come here not as antagonist to religion, that my clients are deeply religious people, that we come here in the firm belief that the best safety of religion in the United States ... is to keep religion out of our public life ... I don't take issue with the goodness or the badness of this prayer. I say prayer is good. My clients say prayer is good. But what we say here is that this is the beginning of the end of religious freedom when religious activity such as this is incorporated in the public school system of the United States.").

\textsuperscript{26} Hear Recording of Oral Argument on Mar. 31, 1976, at clip 10, Texas v. Johnson, 491 U.S. 397 (1989) (No. 88-155), http://www.floridalawreview.org/higginson/mp3list.htm (Q: "Why ... did the defendant's actions here destroy the symbol? His actions would have been useless unless the flag was a very good symbol for what he intended to show contempt for? His action does not make it any less a symbol." A: "Your Honor, we believe that if a symbol, over a period of time, is ignored or abused, that it can in fact lose its symbolic effect." Q: "I think not at all. I think ... when somebody does that to the flag, the flag becomes even more a symbol of the country.").
Beyond elucidating why the Court draws constitutional rules as it does, advocacy also has value because it reveals the messiness of legal work around human controversy.\textsuperscript{27} One case is tinctured with untimeliness,\textsuperscript{28} another, inconstancy of position,\textsuperscript{29} many, lack of standing.\textsuperscript{30} These concepts are dry, yet whole sets of litigation rules are built on them, and many outcomes end with them. Lawyering these boundaries into courts is indispensable terrain advocates must cover. Today, students study these issues in casebooks largely as announced “political question” doctrine set forth in \textit{Baker v. Carr},\textsuperscript{31} \textit{Powell v. McCormack},\textsuperscript{32} and \textit{Elk Grove Unified School District v. Newdow}.\textsuperscript{33} But each of these case and controversy clause decisions gains clearest exposition by going to the lawyers who were at the Court’s door.\textsuperscript{34}

\textsuperscript{27} The first few minutes of Attorney St. Clair’s argument on behalf of President Nixon begin with his grave indication that the Court must resist entry into a political dispute. But then the mood slips abruptly into confusion and laughter about what relief would fit his request—dismissal, vacatur, or another disposition. \textit{Hear, e.g.}, Recording of Oral Argument on July 8, 1974, at clip 11, United States v. Nixon, 418 U.S. 683 (1974), http://www.floridalawreview.org/higginson/mp3list.htm.

\textsuperscript{28} \textit{Hear, e.g.}, Recording of Oral Argument on Feb. 26, 2001, at clip 12, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047), http://www.floridalawreview.org/higginson/mp3list.htm (addressing whether a property owner who acquired title to the property after it was subject to wetlands regulations may still bring a takings claim under the Fifth Amendment).

\textsuperscript{29} Recording of Oral Argument on Jan. 18, 1984, at clip 13, New York v. Quarles, 467 U.S. 649 (1984) (No. 82-1213) http://www.floridalawreview.org/higginson/mp3list.htm (questioning whether other issues were raised in the lower courts).

\textsuperscript{30} A casebook favorite on the standing doctrine illustrates the imperative of studying what lawyers throw into the constitutional mix. In \textit{City of Los Angeles v. Lyons}, 461 U.S. 95 (1983), the Court held that Lyons’s injunction against the use of police chokeholds did not meet threshold requirements imposed by Article III of the Constitution. \textit{E.g.}, \textit{JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW} 1558–59 (10th ed. 2006). Students are told that the Court dismissed the case because Lyons’s fear of twice being choked by police was speculative and remote, thus only a threatened injury. \textit{Id.} Listening to Attorney Michael Mitchell, counsel for Lyons, one first hears a disagreeing position, \textit{hear, e.g.}, Recording of Oral Argument on Nov. 2, 1982, at clips 14, 15, \textit{Lyons}, 461 U.S. 95 (No. 81-1064), http://www.floridalawreview.org/higginson/mp3list.htm, but, startlingly even for the Justices, mid-argument, Mitchell announces that Lyons no longer feels himself injured at all, and would himself ask that the Court dismiss the matter. \textit{Id.} at clips 16–18.

\textsuperscript{31} 369 U.S. 186, 198–99 (1962).
\textsuperscript{32} 395 U.S. 486, 495 (1969).
\textsuperscript{33} 542 U.S. 1, 4–5 (2004).
\textsuperscript{34} \textit{Hear, e.g.}, Recording of Oral Reargument on Oct. 9, 1961, at clip 19, \textit{Baker}, 369 U.S. 186 (No. 6), http://www.floridalawreview.org/higginson/mp3list.htm (“We fully recognize that there are wrongs which can be righted only by the people or by the legislature. This Court doesn’t carry the whole burden of government . . . . But I suggest to you that judicial inaction, through excessive caution, or through a fancied impotence, in the face of crying necessity and very serious wrongs, may also do damage to our constitutional system . . . . I suggest that this is the occasion for such a blow.”); Recording of Oral Argument on Mar. 24, 2004, at clips 20–21, \textit{Newdow}, 542 U.S. 1 (No. 02-1624), http://www.floridalawreview.org/higginson/mp3list.htm (after questions about
Listening to lawyers argue to the Court helps predict future outcomes, as well as reconcile past decisions. Vexing issues of how constitutionalism will work in the future become clearer if one hears Justices discuss these issues aloud in the crucible of an actual case. For example, the current debate over whether international views are considered in constitutional discourse helps answer itself when one overhears that conversation. These and other constitutional decisions can be fully understood only after listening to the arguments of persuasive and unpersuasive lawyers.

III. A SHIFT IN ANALYSIS TO BETTER UNDERSTAND CONSTITUTIONAL DOCTRINE

To shift the analysis to how law is made, scholarship must change its focus, from the announced decision, to the one question that brings advocacy, decision-making, and doctrine into the comprehensible sequence lawyers live: Which lawyer put the Court where it came out, and how? The Supreme Court answers this question, giving the necessary clarity to constitutional law. Scholars should examine the advocacy material submitted in connection with each case. In particular, scholars must read the Court's own "in the year of our Lord," phraseology, and points of deistic generality—to which counsel responds, "I don't think that I can include "under God," to mean 'no God,' which is exactly what I think"—the interruptive threshold standing clarification comes abruptly, "I just want to point out that, once again, you're arguing based on the child and I think there is a serious standing problem."); Recording of Oral Argument on Apr. 21, 1969, at clip 22, Powell, 395 U.S. 486 (No. 138), http://www.floridalawreview.org/higginson/mp3list.htm ("Now I submit that there are at least five separate reasons why his demands for relief cannot be granted . . . .").


36. For example, if scholars read the items that correspond to subparagraphs 1(a) and 1(h) of Supreme Court Rule 24 (the "question presented" and each side's "summary of the argument," i.e. their "clear and concise condensation of the argument made in the body of the brief"), an instant result is comparison of each litigant's framing of the "question presented" as it evolves from briefs into oral argument, and then emerges in final characterization answered by the Court in its decision. Sup. Ct. R. 24(a); Sup. Ct. R. 24(h). This carving by judges and litigants over the question presented, though chambered from public assessment during the opinion-writing stage, is also instructive when controversies are heard. Thus, framing the Eighth Amendment decision in Furman, striking down capital punishment, Professor Amsterdam contours the question of death
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(or listen to) how attorneys “emphasize and clarify the written arguments in the briefs” during oral argument, when their propositions are being tested by the Court. In turn, this shift in focus to advocacy illuminates three points no lawyer can overlook (elaborated below, in corresponding sections of this Article):

(1) whether positive facts are forcefully presented and negative ones effectively dealt with;

(2) whether pertinent points of law are forcefully presented; and

(3) whether policy concerns are forcefully presented.

When robust scholarship considers the materials that the Supreme Court itself deems necessary to render its decision, inquiry will shift from the casebook holding to the adversarial making of that holding and to whether and how the Court’s holding drew on specific argument submitted by lawyers.

A. Constitutional Controversy Highlights Facts

Attention to advocacy restores case facts to a place of importance, especially in constitutional litigation and even at the Supreme Court level. The consolidated cases that revived the death penalty in 1976, for example, were won by attorney arguments that drew out the inexorable sadness of victimhood. Indeed, refocusing on the controversies as they


play out in the Supreme Court accentuates the human work of the judiciary. The heartstrings of controversies have shaped our Constitution. We are forgetful, and we mislead when we dissociate judicial outcomes from the people who clashed over them and from the judges who considered that clash. If you listen to the Supreme Court in the winter of 1989, you will hear the first question asked to help resolve whether the Due Process Clause would permit Nancy Cruzan’s parents to refuse life-sustaining treatment on their daughter’s behalf in *Cruzan v. Director, Missouri Department of Health.*39 This narrative of harm has resulted in our constitutional betterment, and its proof is moving.

Similarly, through facts, attorneys can give anger its time and place. More than five minutes of vitriol against unregulated domestic espionage wiretapping successfully framed the Court’s decision in *United States v. United States District Court.*40 Attorney Arthur Kinoy’s constitutional anger is timely today, yet untaught.

The outcome of the landmark decision in *Griswold v. Connecticut*41 seems ineluctable when we hear that Connecticut’s Joseph Clark could give no reason why Connecticut should ban contraceptives to married couples.42 Recently, the Supreme Court’s non-decision in the “under God” Pledge of Allegiance case43 may be comprehensibly reduced to one factual rejoinder heard during argument, when Justice Ginsburg interrupted pro se litigant Newdow to remind him that his ex-wife possessed the custodial position that trumped any assertion of injury to him.44 Another famous constitutional case, *Clinton v. Jones,*45 which rejected President Clinton’s claim of temporal immunity from civil litigation relating to acts that


41. 381 U.S. 479 (1965) (holding that the Constitution protects marital privacy against state restrictions on the use of contraceptives).

42. *Hear Recording of Oral Argument on Mar. 29, 1965, at clip 35, Griswold, 381 U.S. 479 (No. 496),http://www.floridalawreview.org/higginson/mp3list.htm (Justice insists repeatedly that Connecticut articulate a coherent “purpose” behind its statutory ban on contraceptives, whereupon, eventually, counsel concedes that Connecticut’s “population argument” is one he “personally [is] not too happy with” and that the “only argument we can honestly say is that this is a question of pure power”).


occurred before his presidential term,\textsuperscript{46} may have been propelled by the factual concession that apparently no governor had the shield from lawsuits Clinton asked the Court to give him.\textsuperscript{47}

An overarching, but casebook-quiet lesson from fact advocacy is not simply that judges are intolerant of inaccuracy,\textsuperscript{48} but that they make rulings after assessing that inaccuracy. Advocacy material demonstrates that when a lawyer trips on an overstatement of fact or law, he loses persuasiveness. Consider Louisiana's argument framing the Court's decision in \textit{Duncan v. Louisiana}.\textsuperscript{49} Louisiana Assistant Attorney General Wolbrette's presentation, which culminated in dismissive and nervous laughter about the Magna Carta, collapses as she tries to deny the constitutional imperative of jury trials.\textsuperscript{50} We hear the Court's mind set like concrete not once,\textsuperscript{51} but several times.\textsuperscript{52} Having heard that dialogue, we are unsurprised to read Justice White writing for the Court that the jury trial right carries "impressive credentials traced by many to Magna Carta."\textsuperscript{53} Indeed, a refocus that spotlights the lawyer's circumstance has special value because, in decisions, the Court infrequently criticizes the litigants themselves.\textsuperscript{54} Justices are less restrained with criticism, however, during oral argument.\textsuperscript{55} No lawyer reprimanded in open court ever forgets the

\begin{footnotesize}
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\item \textit{Id.} at 684.
\item \textit{Hear}, e.g., Recording of Oral Argument on Nov. 3, 1997, at clip 38, United States v. Scheffer, 523 U.S. 303 (1998) (No. 96-1133), http://www.floridalawreview.org/higginson/mp3list.htm (criticizing an attorney for failing to attribute a quote to a dissenting opinion).
\item 391 U.S. 145, 149–50 (1968) (finding that Louisiana violated the Sixth and Fourteenth Amendment's jury trial provision by denying Duncan a jury trial).
\item \textit{Hear id.} at clip 40 (questioning the circumstances under which the Constitution would require a jury trial).
\item \textit{Hear id.} at clips 41–42 (questioning again the principle upon which Attorney Wolbrette wished the Court to base its decision).
\item \textit{Duncan}, 391 U.S. at 151. Justice White was the Justice whose questions about the Magna Carta Attorney Wolbrette dismissed with a laugh. Footnote 16 tersely further develops this controversy, pitting Blackstone against "[h]istorians [who] no longer accept this pedigree." \textit{Id.} at 151 n.16.
\item \textit{But cf.} United States v. Chadwick, 433 U.S. 1, 16 (1977) (Brennan, J., concurring) ("[I]t is deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the people of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments.").
\item Judicial admonitions heard aloud vividly impress how trust in a lawyer can gust away. \textit{Hear}, e.g., Recording of Oral Argument on Feb. 20, 1990, at clip 43, Illinois v. Perkins, 496 U.S. 292 (1990) (No. 88-172), http://www.floridalawreview.org/higginson/mp3list.htm (attorney's mischaracterization of case law provokes questioning Justice to insist on a "promise" not to refer to the precedent again during argument). For example, the Court's 5–4 ruling in \textit{Arizona v.}
\end{enumerate}
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reprimand, yet without attention to controversies in the Court, as well as the way they are decided by the Court, we rarely hear how judges hoe, trench, and weed professionalism in the ranks of lawyers on a day-to-day basis.\textsuperscript{56}

A last lesson worth highlighting from how lawyers use facts in controversy before the Court—and how this use can be decisive—is that the factual universe never entirely closes. Whereas scholars unaccustomed to litigation often assume that records become fixed, a look into the courtroom reveals that lawyers continue to enlarge the record up to, and past, submission to the Supreme Court. Litigants expand the record to focus the Court's doubt on the other side's proof, and have done so determinatively in significant constitutional cases.\textsuperscript{57}


\textsuperscript{56} In \textit{Branzburg}, in spite of the aforementioned criticism of the poor government argument, \textit{supra} note 55, the Court's decision demonstrates how the Court will often necessarily announce a constitutional rule that favors a party whose advocacy was deficient. \textit{Branzburg}, 408 U.S. at 708. Likewise, access to advocacy confirms that Justices whose questions imply one outcome may later author an opinion concluding the opposite. \textit{Compare Recording of Oral Argument on Oct. 8, 1986, at clip 47, \textit{Colorado v. Connelly}, 479 U.S. 157 (1986) (No. 85-660), http://www.floridalawreview.org/higginson/mp3list.htm (Justice Marshall asking incredulously, "You mean a man can't confess!")}, \textit{with Connelly}, 479 U.S. at 174 (Brennan, J., joined by Marshall, J., dissenting) (arguing that the Court should affirm the Colorado Supreme Court's decision since Connelly could not make an "intelligent" decision). These truths are reassurances that the constitutional discussion carried out with lawyers during oral argument, highlighted in this Article, indeed do begin the next-in-time discussion among Justices, \textit{cf. supra} note 8, which scholars can and do explore when access to Justices' internal materials is possible. \textit{See, e.g.,} \textit{Mark V. Tushnet, Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991} (Oxford Univ. Press, 1997) (comprehensively reviewing the development of constitutional law with reference, especially, to Justice Marshall's papers, as well as other Court materials and sources).

Two examples of outcome-determinative facts raised to the Court—yet not acknowledged in casebook excerpts—occurred in the arguments that framed the landmark decisions in Chimel v. California and Sheppard v. Maxwell. In Chimel, the Court invalidated under the Fourth Amendment the warrantless search of a home as incident to an arrest. During oral argument, Attorney Monroe goes outside the record and successfully attacks warrantless home searches—conducted by the Los Angeles police as "incident to arrest" authority—with an argument that the Los Angeles police sought only 225 home search warrants in 1 year in a city with more than 7 million residents. In Sheppard, the Court found that media publicity denied the defendant a fair trial. Ohio Attorney General William Saxbe unsuccessfully attempted to block the Court’s consideration of evidence of media publicity prejudice that denied Sheppard his Fifth Amendment right to a fair trial.

B. Constitutional Controversy Reconciles Law

As to legal argument, an advocacy shift highlights different lessons significant to constitutional doctrine. Studying the adversarial process of arriving at a decision shows that doctrine emerges before it is written. Yet because casebooks devote overriding attention to decisions, students study these last things first, an order that obscures how issues are shaped or misshaped as they advance or are back-pulled through litigation.

Lawyers who master antecedent rulings and work done in their case before the Supreme Court, and integrate a breadth of pertinent caselaw,
speak fluidly about the present-mindedness of law, which is what judges seek. This occurs, for example, with startling immediacy in the following exchange in Youngstown Sheet & Tube Co. v. Sawyer when Solicitor General Perlman reminded Justice Jackson of seizure activity he authorized as Attorney General during World War II:

JUSTICE JACKSON: I looked it [his case as Attorney General] up because I wondered how much of this was laid at my door.

SOLICITOR GENERAL PERLMAN: Your Honor, we lay a lot of it at your door.

JUSTICE JACKSON: Perhaps rightly.

. . . .

I claimed everything, of course, like every other Attorney General does. It was a custom that did not leave the Department of Justice when I did.67


67. Transcript of Oral Argument on May 12, 1953, Youngstown, 343 U.S. 579 (Nos. 744, 745), reprinted in 48 LANDMARK BRIEFS AND ARGUMENTS, supra note 1, at 920.
"cryptic" text, and "indecisive" precedent.68 And this exchange elucidates these concurring sentences by Justice Jackson:

The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.69

The stretching of precedent—not just endorsing70 or distinguishing71—proves that borrowing is not "clinging to."72 In fact, advocacy shows that borrowing powerfully can be "refusing." Talented lawyers attempt to tell the Court what will remain undisturbed,73

68. Youngstown, 343 U.S. at 634, 635, 637, 641 (Jackson, J., concurring).
69. Id. at 647.
70. In the following exchange, endorsement veers towards pandering. Hear Recording of Oral Reargument on Oct. 9, 1961, at clip 60, Baker v. Carr, 369 U.S. 186 (1962) (No. 6), http://www.floridalawreview.org/higginson/mplist.htm (Q: "Mr. Attorney General, does the fact that I am still alive add strength to the opinion?" A: "May it please the Court, I think that that opinion must live for centuries yet to come."). Or, in this second exchange, counsel offers precedent without firsthand recollection and fails to produce the case cited to the Court upon further questioning. Hear Recording of Oral Argument on Jan. 11, 2000, at clip 61, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), http://www.floridalawreview.org/higginson/mplist.htm (Q: "Where does it say that . . . ." A: "I don’t have the opinion with me right here." Q: "Well, if it’s the only opinion you’re relying on . . . I’d like to know what language suggests that.").
71. Consider two more illuminating moments that display advocacy beyond distinguishing difficult precedent—both taken from Baker: "[W]e recognize that in Colegrove versus Green[328 U.S. 549 (1946)], we have a major problem of distinguishing what we consider to be a misunderstood decision . . . . I’m not agreeing with your opinion [in Colgrove]. I’m merely distinguishing it from this case, Mr. Justice Frankfurter." Transcript of Oral Reargument on Oct. 9, 1961, Baker, 369 U.S. 186 (No. 6), reprinted in 56 LANDMARK BRIEFS AND ARGUMENTS, supra note 1, at 560–61. Separately during oral argument, counsel was rebuked for the citation of a decision based on its subsequent treatment, instead of the holding itself. Hear Recording of Oral Reargument on Oct. 9, 1961, at clip 62, Baker, 369 U.S. 186 (No. 6), http://www.floridalawreview.org/higginson/mplist.htm ("That isn’t the way I read a case. I read the case for an opinion to find out what the opinion said, although later on it may have had a different history.").
reassuring that large steps asked of the Court will have quiet footfalls. Indeed, listening to successful argument, one hears caution. Harsh constitutional talk is soothingly spoken and ambition is kept small, even when attorneys do not sufficiently reassure and a step is not taken.

http://www.floridalawreview.org/higginson/mp3list.htm (distinguishing the instant case from cited decision after cited decision of First Amendment rulings protecting “the world of ideas”—“this is not that”).

74. Hear, e.g., Recording of Oral Argument on June 26, 1971, at clip 65, N.Y. Times v. United States, 403 U.S. 713 (1971)(Nos. 1873, 1885), http://www.floridalawreview.org/higginson/mp3list.htm (responding to a hypothetical proposed that media right of publication would cause the death of U.S. draftees, Attorney Bickel first cautions that the hypothetical will not occur, then argues that it would make bad separation-of-powers law, but then concedes “it’s almost impossible to resist the inclination not to let that information be published, of course”); Recording of Oral Reargument on Oct. 9, 1961, at clip 66, Baker, 369 U.S. 186 (No. 6), http://www.floridalawreview.org/higginson/mp3list.htm (frank exchange relating to court-ordered reapportionment about whether and when, through history, the Court has considered that elected officials will not comply with Court orders or suggestions); Recording of Oral Argument on Mar. 18, 1980, at clip 67, Rummel v. Estelle, 445 U.S. 263 (1980) (No. 78-6386), http://www.floridalawreview.org/higginson/mp3list.htm (disclaiming suggested “floodgate problem” because in the past 200 years arguably only one prior similar case was presented). There are counterpoint lessons too, when attorneys do not sufficiently reassure and a step is not taken. Cf. Recording of Oral Argument on Apr. 19, 2000, at clip 68, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), http://www.floridalawreview.org/higginson/mp3list.htm (Solicitor General Seth Waxman, as respondent, rejecting as too radical for “four reasons” petitioner’s request to overturn Miranda).

An advocacy shift also shows that almost any case teeters on a fine point between failure and success; and that adversarial testing dislodges most certainties in favor of reconciled opposites. Advocacy teaches this encouraging lesson by demonstrating the vitality of lawyering, as well as the moral that lawyers must recognize and judges enforce: “that competing values each have merit yet still oppose each other, and must somehow be brought together so that as much as possible of the good in each can be protected and preserved.”

A professional shift bolsters this lesson by forcing awareness of both sides to every question. The full orbit of pros and cons—and the insightful, failed, or outwitted advocacy that conjures them—lies just beneath the surface of every decision propounded by the Court. Indeed, it is the promise of *Marbury v. Madison*, essential to the rule of law, that the judicial department receive and examine “conflicting rules.”


78. The Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973), for example, which remains as pivotal as it is controversial, is best understood by constitutional participants of any opinion if they hear the many viewpoints submitted to the Court. *Compare* Recording of Oral Argument on Dec. 13, 1971, at clip 78, *Roe*, 410 U.S. 113 (No. 70-18), http://www.floridalawreview.org/higginson/mp3list.htm (arguing about when life begins, Texas Assistant Attorney General Jay Floyd is asked whether the proposition before the Court is “a legal question, a constitutional question, a medical question, a philosophical question, a religious questions . . . what is it?”), with *id.*, at clip 79 (answering the Court, Attorney Sarah Weddington, in quick order, has her argument tested against medical ethics, against constitutional safeguards “at the other end of life’s span,” and against personhood in the Fourteenth Amendment).

79. 5 U.S. (1 Cranch) 137 (1803).

80. *Id.* at 178; *hear* Recording of Oral Argument on Jan. 17, 18, 1966, at clip 80, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22), http://www.floridalawreview.org/higginson/mp3list.htm (before adjournment to decide the constitutionality of the Voting Rights Act of 1965, the Court commends “more than half the states of the Union” for submitting views on “on
assessment extends not merely to outcome, but to whether the Court engaged a full plethora of viewpoints, decisions of “peculiar delicacy”\textsuperscript{81}—where judicial supremacy is asserted—gain legitimacy. Indeed, some issues are complex enough that we do well to remind ourselves—when an outcome necessarily is chosen—that the Court wrestled with polarizing and multifaceted angles that each of us may embrace differently.

Consider capital punishment, where the Court’s end-product decisions are as divisive as they are decisive. Precisely for that reason, scholars should report on the variability of arguments that advocates asked the Court to reconcile. There is a reassuring discomfort to the divergent reasons the Court entertains before announcing its constitutional holding. For example, when the Court, unsurprisingly, was told death is different as an argument \textit{against} the constitutionality of executions, we also hear Solicitor General Robert Bork point out that if death is different, it is so in a punishment-favoring sense.\textsuperscript{82} We hear that executions deter crime; then, that they contribute to crime.\textsuperscript{83} We are asked—if the academy will listen alongside the Justices—to consider whether the Constitution can condemn itself,\textsuperscript{84} whether we trust our founding Fathers,\textsuperscript{85} trust the Court,\textsuperscript{86} and even, ourselves.\textsuperscript{87} From any perspective, we rehear the range of concerns both sides of the question”).


\textsuperscript{83.} Compare \textit{id.}, at clip 83 (arguing that academic evidence and common sense support the deterrence effect of executions), \textit{with Recording of Oral Argument on Mar. 31, 1976, at clip 84, \textit{Woodson v. North Carolina}, 428 U.S. 280 (1976) (No. 75-5491), http://www.floridalawreview.org/higginson/mp3list.htm (“The death penalty may be the greatest obstacle to adequate enforcement of crime in this country today . . . .”)).

\textsuperscript{84.} \textit{Hear Recording of Oral Argument on Mar. 30, 1976, at clip 85, \textit{Jurek}, 428 U.S. 262 (No. 75-5394), http://www.floridalawreview.org/higginson/mp3list.htm (stating that it would be an “anomaly” to now condemn procedures that the Constitution created); hear also \textit{id.} at clip 86 (noting that competing values in the Constitution must be resolved, rather than obliterating one at the expense of the other).

\textsuperscript{85.} \textit{Hear \textit{id.} at clip 87 (noting the Framers’ “understanding” that the Eighth Amendment was “not to alter existing practices, but was to prevent intolerable innovations or reversions”).}

\textsuperscript{86.} \textit{Hear \textit{id.} at clip 88 (emphasizing confidence in the Court as one whose role is “not a super-legislature” and “not the keeper . . . of the social values and the conscience and moral values of the people of this country”).}

\textsuperscript{87.} \textit{Hear \textit{id.} at clip 89 (“[U]ltimately these five cases are cases about democratic government” to choose or reject the death penalty).
the Constitution must accommodate, such as whether we would prohibit execution of a Buchenwald commandant or a fanatic who detonates a hydrogen bomb in New York City, or whether life imprisonment may be more “cruel” than capital punishment. 88

Advocacy materials clarify the Court’s pursuit of reconciled opposites, telling lawyers that if their proposed rule means that their side always wins, the rule will lose. 89 This fundamental concept cannot be overtaught, both for the development of constitutional law and also for individual lawyering advantage. Yet casebooks contain virtually no analysis of how lawyering produces judicial outcomes.

The study of advocacy illuminates other aspects of lawyering and the development of the law. First, not infrequently, rulings can be heard being decided during moments when lawyering mixes audibly into judging. For example, Congress’s contention that its exclusion of Congressman Powell was immune from judicial review—based on Speech or Debate Clause impermeability—audibly crested into impossibility in this sequence of questions and answers during argument in Powell v. McCormack:

QUESTION: Suppose he had been excluded because of his race in the form of a resolution, would you say that he would have any judicial remedies?

ANSWER: I should say, Sir, in answer to that question that the action of the House would be clearly unconstitutional.

QUESTION: But would he have judicial remedy?

ANSWER: But as I read the Speech or Debate Clause, he would not, Sir [long silence]. 90

Petitioner Francis Connelly’s argument that a confession to police that is induced by mental infirmity violates due process broke down precisely when Attorney Nathan Coats could not describe when confessions to guilt ever would be “voluntary.” 91 Federal Public Defender Frank Dunham, Jr., successful on other grounds in Hamdi v. Rumsfeld, 92 stumbled similarly,

89. Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 47–48 (1998) (“Because there is no stopping point to the logic of petitioner’s argument, we find it unpersuasive.”).
and irrecoverably, with his overarchingly argument against executive detentions of citizen-combatants. There are many further significant illustrations of this point.

The Court’s refusal in Apodaca v. Oregon to find a constitutional imperative for juror unanimity in criminal trials emerged from a decidedly structural and originalist clarification during oral argument when it was noted that the Framers of the Constitution thought a non-unanimous vote of two thirds would suffice for as serious an outcome as presidential impeachment.

Similarly, during argument in the landmark United States v. Salerno case, this brusque criminal justice exchange foreshadows the Court’s subsequent outcome upholding the congressional statutory apparatus that permits pretrial detention of dangerous persons:

QUESTION: [What if you] have solid evidence ... that he’s maybe going to leave the jurisdiction?

ANSWER: Put him in jail.

QUESTION: Put him in jail. You have solid evidence that he’s associating with people that he shouldn’t?

ANSWER: Put him in jail.

QUESTION: Third, you have very good evidence that he’s about to kill somebody.

ANSWER: Nope.

And, as a final example, casebooks excerpt United States Term Limits, Inc. v. Thornton as a recent, significant decision that states cannot alter qualifications for Congress that are enumerated in the Constitution. But students will better appreciate both the lawyer’s task and constitutional

93. Hear Recording of Oral Argument on Apr. 28, 2004, at clip 93, Hamdi, 542 U.S. 507 (No. 03-6696), http://www.floridalawreview.org/higginson/mp3list.htm (admitting that inherent Presidential power to kill enemy combatants exists, but simultaneously arguing against executive power to detain them).


growth if they juxtapose Arkansas Attorney General J. Winston Bryant’s firm anti-incumbency beginning with his argument’s textualist collapse twenty minutes later under a barrage of perplexed questions by the Court.99

More generally, academic alchemy should test its own worth by measurement against the line along which the case-and-controversy scalpel cuts. We hear originalism as a decision-making priority alive and loud but often elusive, as lawyers struggle to overcome the variability that comes with discerning centuries-old motives.101 Structural constitutional implications are urged trenchantly, and textualism, even as an afterthought, commands attention.103

It is an oversight that constitutional scholarship endorses these modalities of constitutional decision-making, yet casebooks do not link to the advocacy that pushed these concepts—advocacy that this Article shows is readily available. In the arguments that framed the Court’s impeachment method decision in Nixon v. United States,104 for example, the rapier-like interplay of textualism, structuralism, and originalism stands out as the opposing lawyers urge the Court to amplify meaning from constitutional syntax.105 Early in the argument, in fact, the late Chief

99. Compare Recording of Oral Argument on Nov. 29, 1994, at clip 96, U.S. Term Limits, Inc., 514 U.S. 779 (Nos. 93-1456, 93-1828), http://www.floridalawreview.org/higginson/mp3list.htm (defending Arkansas’s constitutional authority to encourage rotation of delegates and its authority to add additional qualifications), with id. at clip 97 (“General Bryant, this is a very remarkable proposition . . . does your argument depend in any way on this most unusual interpretation?”).

100. Hear, e.g., Recording of Oral Argument on Apr. 10, 1967, at clip 98, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), http://www.floridalawreview.org/higginson/mp3list.htm (arguing that there is no reason to read into the original Constitution a power to veto state legislation that the Framers explicitly excluded).

101. Hear, e.g., Recording of Oral Argument on Mar. 21, 1989, at clip 99, Texas v. Johnson, 491 U.S. 397 (1989) (No. 88-155), http://www.floridalawreview.org/higginson/mp3list.htm (“Do you suppose Patrick Henry and any of the Founding Fathers ever showed disrespect to the Union Jack . . . do you think they had in mind then, in drafting the First Amendment, that it should be a prosecutable offense [to burn the American Flag]?”).


Justice Rehnquist quipped ironically about textualist tags.\footnote{224 (No. 91-740), http://www.floridalawreview.org/higginson/mp3list.htm (discussing what the Framers meant by the word "try"); id. at clip 104 (disagreeing that the text of the Constitution provides one answer about what "to try" means); id. at clip 105 (acknowledging that text, structure, and "the end result" are all considerations relevant to the Court's decision).}

Additionally, advocacy demonstrates not only that decisions are made by, and responsive to, lawyers' arguments, but also that ignoring the exchange between lawyers and judges strips decisions of vital formative information.\footnote{106. \textit{Hear id.} at clip 106 ("Well, Mr. Stewart, you refer to it as the Impeachment Trial Clause. It says the Senate shall have the sole power to try all impeachment—you might just as well refer to it as the Sole Power Clause.")

107. \textit{Compare} Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) ("If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life."); \textit{compare} Recording of Oral Argument on Apr. 28, 2004, at 50, \textit{Hamdi}, 542 U.S. 507 (No. 03-6696), \textit{available at} 2004 WL 1066082, at *42 (Q: "But doesn't the Court have some business intervening at some point, if it's the Hundred Years War or something?"

A: "Well, Justice Breyer, I mean, there may be a point where, depending on the nature of the war—I mean, I'm not quite sure what you have in mind that they would intervene on."); \textit{compare} Recording of Oral Argument on Feb. 22, 1982, at clip 107, INS v. Chadha, 462 U.S. 919 (1983) (No. 80-1832), http://www.floridalawreview.org/higginson/mp3list.htm (arguing that the Framers' constitutional text is clear and determinative, and exceptions are explicit, provoking the question: "Well, what makes you think that you're going to find explicit provisions for everything that Congress can do in the Constitution?")}, \textit{with Chadha}, 462 U.S. at 959 ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."); \textit{compare} Nixon, 506 U.S. at 253–54 (Souter, J., concurring) (signaling that political-question insularity might not excuse an impeachment "[i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy'" (quoting \textit{id.} at 239 (White, J., concurring))), \textit{with Recording of Oral Argument on Oct. 14, 1992, at clip 108, Nixon, 506 U.S. 224 (No. 91-740), http://www.floridalawreview.org/higginson/mp3list.htm (questioning whether the Court could review impeachment by coin toss)), id. at clip 109 (questioning the constitutionality of impeachment for being "a bad guy"), and \textit{id.} at clip 110 (questioning the constitutionality of impeachment for "poisoning a neighbor's cat"); \textit{compare} Faretta v. California, 422 U.S. 806, 833–34 & n.45 (1975) ("[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." (citing U.S. CONST. amend. I)), and \textit{id.} at 852 (Blackmun, J., dissenting) (concluding that "the Court by its opinion today now bestows a constitutional right on one to make a fool of himself"), \textit{with Transcript of Oral Argument at 19–20, Faretta, 422 U.S. 806 (No. 73-5772), microformed on The Complete Oral Arguments of the Supreme Court of the United States 1974 Term (Univ. Publ'ns. of Am.) (arguing for Petitioner Faretta's right to represent himself at trial, Attorney Jerome Falk states: "At the philosophical level, I think we have to conclude that constitutional rights are not dependent for their existence on the ability of the person who owns them, has them, and to exercise them intelligently or well. The right of free speech can be exercised by an utter fool . . . ")

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Published by UF Law Scholarship Repository, 2008

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For example, in the landmark decision in *Youngstown Sheet & Tube Co. v. Sawyer,* Chief Justice Vinson in dissent wrote: "Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action." During oral argument, however, Solicitor General Perlman’s attempt to make this argument was convincingly challenged:

MR. JUSTICE FRANKFURTER: You say that Congress did not do anything, although the President invited them to. I want to know what the legal significance of that non-action is in this case.

MR. PERLMAN: I think it can be inferred from their failure to act that they were content to let the Presidential action stand.

MR. JUSTICE FRANKFURTER: We have a very wide range of opinions of the Court to the effect that non-action is not to be so regarded.

MR. PERLMAN: Under these circumstances, in the teeth of the two messages asking Congress to accept responsibility, telling Congress that he would abide by anything that Congress passed, then I think if Congress did not suggest anything different from what the President had done, it can be inferred that Congress was quite satisfied with the situation.

MR. JUSTICE FRANKFURTER: What does that mean legally? All you can say is that they were satisfied to let this stand. That is all, isn’t it?

MR. PERLMAN: Yes, that is all. But I will come to an argument here that usage and custom has a bearing on the solution of this problem.

However, Solicitor General Perlman never did “come” to the promised argument.

109. Id. at 701.
111. This indebtedness to litigants can be true even when the Court writes that credit for a doctrinal shift was its own. Compare *Katz v. United States*, 389 U.S. 347, 351 (1967) (“Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The
In short, not equipping our constitutional audience, and law students especially, with the lawyering behind the cases we study asks them to leap the chasm from the academy into practice in two jumps. The corrective is not an occasional frolic into the advocate's world, but wholesale casebook reconfiguration. Instead of disembodied leaps from landmark decisions to scholarly exegesis, casebooks should link comprehensively to the lower court evolution of the case, certiorari filings, briefs, and argument in a case. Grafting this sequence is available, free, time-effective, and needed.

C. Constitutional Controversy Illuminates Where We Are Going, or Will Not Go

A third significant lesson is that lawyers never stop trying to move courts their way, but must also demonstrate the mistake of going any other way. During the final moments of argument in Baker v. Carr, there is this consequential exchange:

THE COURT: [M]y question was—accept that you succeed in having this statute declared unconstitutional. My question was to foresee the next step. Couldn't your legislature, with entire conscientiousness, then . . . pass a reapportionment statute which from your point of view would raise the same questions which are now brought here?

MR. OSBORN: No, they could not.

THE COURT: They could not?

MR. OSBORN: With good conscience, and on a rational basis—

THE COURT: Not with your conscience, but with their conscience.

MR. OSBORN: No. Both of us are supposed to have the conscience provided for in the Fourteenth Amendment of the United States Constitution.

petitioner has strenuously argued that the booth was a 'constitutionally protected area' . . . . But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places." (footnotes omitted)), with Recording of Oral Argument on Oct. 17, 1967, at clip 111, Katz, 389 U.S. 347 (No. 35), http://www.floridalawreview.org/higginson/mp3list.htm ("[W]e feel that the emphasis on whether or not you have a constitutionally protected area may be placing the emphasis on the wrong place . . . we feel that the right to privacy follows the individual and that whether or not he is in a space enclosed by four walls and a ceiling and a roof . . . is not determinative of the issue . . . .").
THE COURT: And there never would be difference of opinion on this point?

THE COURT: Can you imagine any case where we hold a law unconstitutional, where there's a decided sentiment against what we hold in the community, where the legislature wouldn't try to pass another to try to trim it as much as possible?

MR. OSBORN: Always they have done that.

THE COURT: Has that heretofore been held a reason why we shouldn't hold them unconstitutional if they are?

MR. OSBORN: Never has this Court failed to have the courage to do what it thought was right. 112

Persuasive constitutional advocacy "foresee[s] the next step" and makes an opponent's solution the problem.113 But we often do not study this endeavor because casebook decisions subordinate attorney argument, and especially attorney policy argument.114

Even the angriest dissents often do not match the predictive harm lawyers muster to arouse the dissent,115 not to mention those warnings


114. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35–36 (Little, Brown & Co. 1948) (1881) ("The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned . . . . [based on] more or less definitely understood views of public policy . . . .").

115. Consider two decisions, Mistretta v. United States, 488 U.S. 361 (1989), and Morrison v. Olson, 487 U.S. 654 (1988), in which Justice Scalia argued in dissent that Congress and the Executive were surrendering, or having stripped from them, constitutionally assigned duties, respectively. Compare Mistretta, 488 U.S. at 422 (Scalia, J., dissenting) ("By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. . . . I foresee all manner of 'expert' bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert [commission] . . . to dispose of . . . .thorny, 'no-win' political issues . . . . This is an undemocratic precedent that we set . . . ."), with Transcript of Oral Argument, Mistretta, 488 U.S. 361 (Nos. 87-7028, 87-1904), available at 1988 U.S. Trans. LEXIS 26, at *39 ("[I]t certainly is handy . . . [t]o just simply say, why go through all the trouble of hammering [out] a new securities law? Let's just create an agency and say, hey, promulgate a securities law."); compare Morrison, 487 U.S. at 714–15 (Scalia, J., dissenting) ("[T]his statute does deprive the President of substantial control over the prosecutorial functions performed by the independent
credible enough to sway a majority.116 For example, students who study constitutional doctrine should listen to Federal Public Defender Frank Dunham's command for judicial intervention in *Hamdi v. Rumsfeld*,117 in which he argues that enemy combatants can be detained only under law. By contrast, in arguments that framed the Court's decision in *Gregg v. Georgia*,119 the government successfully contends that justice, though due to the accused, is due to the accuser too.120

The centrality of lawyer warnings in all litigation, including constitutional controversy, is evident from any sampling of advocacy, whether or not it loses visibility in decisional outcomes. Even when a lawyer loses footing, he can compensate for an inability to say what the Court's position should be if he knows what it cannot be.121 Moreover,
teaching that lawyer’s doomsay allows effective lawyers to anticipate Court inquiries about consequences; and, perceiving this skill, to apprehend the array of answers to policy scoldings. Students apprehend the chilly answer that fidelity to our framing text leaves the judiciary no room to problem solve. Or warnings can be pierced as counter-factual fearmongering. For example, in framing arguments leading to \textit{J.E.B. v. Alabama ex rel. T.B.}, Attorney Lois Brasfield warned about the harms of extending \textit{Batson v. Kentucky} to gender, yet these predictions were diminished when Justice Ginsburg elicited the concession that jurisdictions were already applying the ban.

\begin{itemize}
\item of Oral Argument on Jan. 21, 1987, at clip 120, \textit{Salerno}, 481 U.S. 739 (No. 86-87), http://www.floridalawreview.org/higginson/mp3list.htm, yet contended persuasively that invalidating pretrial detention would be going from bad to worse. \textit{Hear id.} at clip 121 (“The case that haunts me is this: A person is released . . . [and] he then does indeed commit such a [violent] crime. What is to be done about such a person? I take it on the logic of the argument, he must again be released pending conviction. And if he commits yet another crime, he must again be released until such time as there is a conviction. That, I think, is a situation . . . which I don’t think we are constitutionally required to admit in the face of a reasonable statute which seeks to do the opposite.”). Thus instructive for future lawyers, students can hear how attorneys sometimes must argue for what may be bad—compared to what persuasively is shown to be worse. \textit{Hear, e.g.}, Recording of Oral Argument on Oct. 14, 1992, at clip 122, Nixon v. United States, 506 U.S. 224 (1993) (No. 91-740), http://www.floridalawreview.org/higginson/mp3list.htm (arguing that an unconstitutional impeachment would pose worse problems than concerns about judicial review of impeachments).
\item \textit{Hear, e.g.}, Recording of Oral Argument on Feb. 28, Mar. 1, 2, 1966, at clip 126, Miranda v. Arizona, 384 U.S. 436 (1966) (Nos. 759-761, 584), http://www.floridalawreview.org/higginson/mp3list.htm (answering a litigant’s threat that “fewer convictions” are the inevitable result of a prohibition on arrest-stage confessions by indicating that there is “no doubt” that a prohibition on self-incrimination has that consequence); Recording of Oral Argument on Dec. 3, 1996, at clip 127, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503), http://www.floridalawreview.org/higginson/mp3list.htm (contending that while some solutions to problems cannot be reconciled with constitutional requirements, this issue in fact, albeit “rough and ready,” can and will save thousands of lives). The Court decided in \textit{Printz} that the Brady Handgun Violence Prevention Act’s requirements on state law enforcement officers imposed unconstitutional obligations on state officers to execute federal laws. \textit{Printz}, 521 U.S. at 902, 905.
\item 511 U.S. 127 (1994).
\item 476 U.S. 79 (1986).
\item \textit{Hear id.} at clip 129 (Justice Ginsburg interrupts attorney warning that judiciary will be
In arguments in *United States v. Nixon*, Attorney James St. Clair was undone by the inconsistencies in his threat that the Court was being used as an adjunct of House impeachment proceedings. In *National League of Cities v. Usery*, Solicitor General Robert Bork forcefully responded to his opponent’s bleak forecast of the consequences of extending congressional authority to city employees.

The importance of thinking through consequences, in short, proves itself when we scratch beneath final decisions to investigate how the Court bored down to perceive where opposing constitutional interpretations might take us. Not surprisingly, that excavation, in turn, unearths other bedrock concerns, above all showing that when lawyers propose a constitutional rule for the future, they will be challenged to avoid both the Scylla of an over-inclusive rule and the Charybdis of an under-inclusive one.

“loaded up” with difficulties applying *Batson* to gender and elicits acknowledgment that there is no evidence of such “intractable problems” in jurisdictions already applying this prohibition."


129. *Hear* Recording of Oral Argument on July 8, 1974, at clip 130, *Nixon*, 418 U.S. 683 (No. 73-1766), http://www.floridalawreview.org/higginson/mp3list.htm (Attorney St. Clair concedes that in spite of his contention of injury to Presidential communications from disclosure of tapes he in fact claimed no knowledge of what was on those tapes.).


133. *Hear, e.g.,* Recording of Oral Argument on Oct. 15, 1991, at clip 136, Simon & Schuster, 502 U.S. 105 (No. 90-1059), http://www.floridalawreview.org/higginson/mp3list.htm (arguing that the over-inclusive criminal disgorge ment statute is also under-inclusive because it does not recoup profits from other categories of felons); Recording of Oral Argument on Feb. 22, 23, 1972, at
IV. CONCLUSION

Why make an advocacy shift, then, if not because attorney materials are free and casebooks are not, or because the Court itself asks for these as blueprints to help it construe our Constitution? Looking more closely at lawyering corrects, at least fractionally, several ways we understand our Constitution.

The shift reveals more fully the process of lawyering and judging. It is the adage that “if a man would be a soldier, he’d expect of course to fight.” Future lawyers learn best by listening to other lawyers win and lose. An advocacy focus also counteracts tendencies to reduce law to stereotypes of judges, to overcomplex doctrine, or to understand it as immutable principle—three generalizations that misdirect towards cynicism, “sportiveness of wit,” and incivility, respectively. Advocacy materials juxtaposed with outcomes reinforce a contrary law-sustaining truth: that cases, at all levels, are won by attorneys who show utmost frankness and assert positions of fact, law, and policy that judges come to trust.

There may be no more exalted example of this axiom for interpretative success than these minutes of upending federalist argument, submitted by Attorney Abe Fortas, successfully seeking to overturn the perceived states-rights logic behind *Betts v. Brady* which deprived accused persons of appointed counsel except in special circumstances.

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clip 137, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-85), http://www.floridalawreview.org/higginson/mp31ist.htm (defending unsuccessfully against questions that proposed press “privilege” would be inapplicable to professors, authors, and even the Framers of the Constitution); Recording of Oral Argument on Mar. 24, 1997, at clip 138, Richards v. Wisconsin, 520 U.S. 385 (1997) (No. 96-5955), http://www.floridalawreview.org/higginson/mp31ist.htm (caught arguing about whether the Government’s no-knock rule applies to petty drug offenses, yet not murder); Recording of Oral Argument on Mar. 21, 1989, at clip 139, Texas v. Johnson, 491 U.S. 397 (1989) (No. 88-155), http://www.floridalawreview.org/higginson/mp31ist.htm (conceding to questions that burning the Constitution would not be protected, although burning the state flag is protected); id. at clip 140 (conceding to questions that the cross is not protected); *hear also* Recording of Oral Argument on Apr. 21, 1969, at clip 141, Powell v. McCormack, 395 U.S. 486 (1969) (No. 138), http://www.floridalawreview.org/higginson/mp31ist.htm/ (arguing that exclusion of an elected congressman because of race, though unconstitutional, would not be sufficiently “perverse” to warrant judicial relief as would “seizing the President and dragging him into the well of the House under a resolution that he be beheaded”).

134. See generally EDWARD H. WARREN, SPARTAN EDUCATION (Houghton Mifflin Co. 1942) (discussing effective teaching methods for young lawyers).


137. 316 U.S. 455 (1942).

Lessons in proficiency do not stop, of course, with this Article's map of how adversaries try persuasively to assemble propositions of fact, law, and policy to impose a favored constitutional interpretation on us all. Smaller lessons abound. Arguments must be clear. Persuasion exists just in telling the Court that the actions under review ought to conform to earlier judicial decree. A first question is frequently a cocked pistol,

372 U.S. 335 (1963) (No. 155), http://www.floridalawreview.org/higginson/mp3list.htm ("I believe that those [federalism] principles are misapplied here . . . because a true regard, in my judgment, Mr. Justice Harlan, for federalism here, means that this Court will lay down a principle, will establish a principle, and that this Court will not exercise the kind of minute, detailed, ex post facto supervision over state court trials that you have been exercising for these past years and which in my opinion is the most corrosive possible way to administer our federal-state system . . . . I should like to restate that very simply and very plainly, your Honor. I believe that Betts against Brady does not incorporate a proper regard for federalism. I believe that Betts against Brady, laying down as it does, the principle of case by case supervision by the federal courts of state criminal proceedings is antithetical to federalism. Federalism requires, in my judgment, if your Honors please, that the federal courts should refrain, so far as possible, from intervention in state criminal proceedings. And certainly that where intervention is necessary because of a constitutional principle that that intervention should be exercised in the least corrosive, the least aggressive fashion possible.").

139. See, e.g., Transcript of Oral Argument on May 13, 1952, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Nos. 744, 745), reprinted in 48 LANDMARK BRIEFS AND ARGUMENTS, supra note 1, at 958-59:

MR. JUSTICE FRANKFURTER: You say that I can go any time to pick all the apples and cherries I want, and I do not need permission to do that at any special time.

MR. PERLMAN: That is not the Government's position.

MR. JUSTICE FRANKFURTER: Then I do not understand it.

MR. PERLMAN: I am sorry.

MR. JUSTICE FRANKFURTER: I am sorry, too.

Id. As valuable, lawyers must listen to lawyers who deftly recover from uncertainty, who do not over-promise, and who convey a true desire to clarify a point of inquiry. Hear, e.g., Recording of Oral Argument on Jan. 17, 1996, at clip 144, United States v. Virginia, 518 U.S. 515 (1996) (No. 94-1941), http://www.floridalawreview.org/higginson/mp3list.htm (understanding and agreeing with a question from the Court, the attorney asks to restate the question for clarification); id. at clip 145 ("I think that I am saying that, and if I'm not answering the question, I'm not understanding the question.").

140. Hear, e.g., Recording of Oral Argument on Mar. 30, 1976, at clip 146, Jurek v. Texas, 428 U.S. 262 (No. 75-5394), vacated, 429 U.S. 875 (1976), http://www.floridalawreview.org/higginson/mp3list.htm (describing actions taken by the state to comply with the Court's earlier decision); id. at clip 147 ("So I went over and worked. We tried to pour over Furman. We tried to understand it. What did Justice Berger say when he said he might not like a mandatory sentence. What was the right thing to do?").
prefiguring a constitutional outcome. Answers often must be given to questions that are hard to understand. One must anticipate opponents who will evade complexity with parables. A rebuttal rejoinder should be a final nail hammered in. Law professors indeed speak obscurely. And, as one more lesson among many, law allows laughter.

141. Hear Recording of Oral Argument on Nov. 8, 1994, at clip 148, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), http://www.floridalawreview.org/higginson/mp3list.htm (assessing whether in 1990 Congress had exceeded Commerce Clause powers for the first time in more than half a century, the Court’s purpose to recalibrate came in the first question); hear also Recording of Oral Argument on Apr. 19, 2000, at clip 149, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), http://www.floridalawreview.org/higginson/mp3list.htm (in assessing whether Congress could overrule Miranda, the Court’s decisional answer was forecast by this opening observation that Miranda had been applied as a constitutional imperative against states).

142. Hear, e.g., Recording of Oral Argument on Apr. 3, 1962, at clip 150, Engel v. Vitale, 370 U.S. 421 (1962) (No. 468), http://www.floridalawreview.org/higginson/mp3list.htm (admitting to the Court that the attorney lost the question in the exchange); Recording of Oral Argument on Feb. 26, 1974, at clip 151, DeFusis v. Odegard, 416 U.S. 312 (1974) (No. 73-235), http://www.floridalawreview.org/higginson/mp3list.htm (acknowledging that the attorney forgot the question, leading to “You have my permission to forget it.”). Cf. Transcript of Oral Reargument on Oct. 9, 1961, Baker v. Carr, 369 U.S. 186 (1962) (No. 6), reprinted in 56 LANDMARK BRIEFS AND ARGUMENTS, supra note 1, at 691 (responding to an attorney comment that a question was difficult, the attorney is asked, “[d]o you want me to put you easy ones?”).


144. Hear Recording of Oral Argument on Apr. 26, 2000, at clip 153, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699), http://www.floridalawreview.org/higginson/mp3list.htm (“If you have to dissect each butterfly in order to classify it, there are not going to be many butterflies left.”), hear also Recording of Oral Argument on Feb. 22, 2005, at clip 154, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), http://www.floridalawreview.org/higginson/mp3list.htm (“[T]he four words I think that this Court should consider—and I’m not going to tell you the four since my red light is on.”).


146. Acknowledging advocacy enlivens because lawyers balance the solemnity of judges. There are more than ten thousand “laughter” moments in the last decade of argument in the Supreme Court (easily searched on Westlaw’s SCT-ORALARG* database or Lexis/Nexis’ “U.S. Trans” databases), but scholarship discusses almost none. Beyond mere lightness, these moments are significant, often bearing out the maxim that “a joke’s a very serious thing,” hear, e.g., Recording of Oral Argument on Oct. 5, 1998, at clip 157, Mistretta v. United States, 488 U.S. 361 (1989) (No. 87-7028), http://www.floridalawreview.org/higginson/mp3list.htm (recovering from courtroom laughter about judges who “suffered an increase” in salary, the attorney discusses whether presidential appointment of federal judges to the U.S. Sentencing Commission might
Finally, incorporating advocacy corrects against constitutional immodesty for the timeless reason that spoken argument makes truth more disturbing. Poets like Toni Morrison remind us that words either crumble in the mouth like ashes or, like birds, they sing, they fly. This Article echoes the same reminder that our Supreme Court must hear each side’s contradicting constitutional story before issuing its own pragmatic and usually reconciled outcome. The value of this constitutional process is easy to hear, and it is further proven by its negative, because it is undeniably a loss that we cannot hear the government’s clenched-teeth constitutional arguments against Plessy and Korematsu, whose Supreme Court oral arguments are missing.

In this regard, future generations will likely study as much how we sought to persuade the Court into injustice as they will the decisional injustice itself. Students obtain a more nuanced perspective when they hear viewpoints embedded in situational difficulty, or pierced by the

infringe independence), or, in other cases, that one step from the sublime indeed may be the ridiculous. Hear, e.g., Recording of Oral Argument on Nov. 29, 1976, at clip 158, Wooley v. Maynard, 430 U.S. 705 (1977) (No. 75-1453), http://www.floridalawreview.org/higginson/mp3list.htm (noting amidst courtroom laughter the irony that New Hampshire license plates “Live Free or Die” are made in state prisons).


149. See Transcript of Oral Argument on May 12, 1952, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Nos. 744, 745), reprinted in 48 LANDMARK BRIEFS AND ARGUMENTS, supra note 1, at 915:

MR. PERLMAN: [W]e submit that the source of the President’s power must be considered in the light of the circumstances of this case . . . .

MR. JUSTICE FRANKFURTER: ‘The source of the President’s power must be considered in the light of the circumstances’? It is one thing to say circumstances, but you do not derive the existence of a power from circumstances.

MR. PERLMAN: That is right. We say that the source must be there, and that from the source comes the power. I did not say that you create power by the circumstances.

MR. JUSTICE FRANKFURTER: I thought you did.

multifaceted angles litigants and amici offer. Responsibility properly extends back to an idea's proponent, or settles between extreme positions that were rejected. By contrast, responsibility lying with the Court alone is sharpened, and should be, if one learns that refutations of its announced constitutional rule went unanswered by a Court more inclined to guard its law than to question it.

This observation circles back to my beginning, reiterating that constitutional ideas must be spoken to before they explain themselves. The Constitution was authored long ago, and questions today confront us with when, whether, and how to expound on it. We, the People, are skeptical and discuss these questions with disagreement. That debate is societal constitutional controversy—unhinged, except to personal conscience or political purpose. Decisional constitutional controversy is what judges do, and purports to be more constrained.

What is in-between—and today mostly missing from analysis—is the controversy between the lawyers, whose constitutional discourse is more hinged than the first, but less than the other. We should watch here more than we do because it is in this middle that one first sees whether and how our government grows tyrannical fighting tyranny—a raw viewpoint often smoothed over in decision. Here, crucially, one can assess the full public record of vigilance by the Court, wondering, cajoling, and


151. Perhaps with purposive ambiguity, Justice Frankfurter had this exchange with Solicitor General Perlman in Youngstown:

MR. JUSTICE FRANKFURTER: Doctor Johnson said, you know, you can give a person knowledge, but not understanding.

MR. PERLMAN: If that is meant for me, it is a dirty dig.

MR. JUSTICE FRANKFURTER: It is meant for me.

Transcript of Oral Argument on May 12, 1952, Youngstown, 343 U.S. 579 (Nos. 744, 745), reprinted in 48 LANDMARK BRIEFS AND ARGUMENTS, supra note 1, at 916.

152. Hear, e.g., Recording of Oral Argument on Feb. 24, 1972, at clip 161, United States v. U.S. Dist. Court, 407 U.S. 297 (1972) (No. 70-153), http://www.floridalawreview.org/higginson/mp3list.htm (uninterrupted challenge to arguments for executive wiretap authority as 'the precise arguments... the Fourth Amendment was designed to eliminate'); Recording of Oral Argument on Apr. 10, 1967, at clip 162, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), http://www.floridalawreview.org/higginson/mp3list.htm (repeatedly interrupting Virginia's vague answers and "labels" to compel acknowledgment and answer to the question, "Is there any doubt in your mind that the object of these statutes, the basic premise on which they rest, is that the white people are superior to the colored people and should not be permitted to marry... because it might pollute the white race?").
encouraging, or chiding, blaming, and checking. And here one hears the grey zones of cases spoken about, whisperingly or daringly, because lawyers and Justices in discourse are not bound by any academic modality to eschew ideas that may sound too unruly for a printed page.

In this uncensored state, we hear what distinguishes the profession and rule of law in our Supreme Court from those of so many other countries and courtrooms—namely that lawyers expect that the Court will acknowledge their facts, perceive their future, and adopt their interpretative constitutional rule. By contrast—and by design—decisions

153. Hear, e.g., Recording of Oral Argument on Apr. 29, 1964, at clip 163, Escobedo v. Illinois, 378 U.S. 478 (1964) (No. 615), http://www.floridalawreview.org/higginson/mp3list.htm ("[w]hen you make constitutional doctrine you try to look ahead a little bit and see where you are going ... that's the core of a very difficult problem; these cases are easy to decide if you just decide them as a case and don’t care where you are going, where you are looking, what the consequences are").

154. Hear, e.g., Recording of Oral Argument on Mar. 30, 1992, at clip 164, New York v. United States, 505 U.S. 144 (1992) (Nos. 91-543, 91-558, 90-563), http://www.floridalawreview.org/higginson/mp3list.htm (sharply questioning whether state advocate would urge the same position applied to other circumstances, reprimanding that “it’s a principle we have to deal with, not some individual scheme").

155. Hear, e.g., Recording of Oral Argument on Jan. 10, 1989, at clip 165, United States v. Sokolow, 490 U.S. 1 (1989) (No. 87-1295), http://www.floridalawreview.org/higginson/mp3list.htm (attorney finishes his challenge to the constitutionality of DEA drug profiling by asking softly whether any empirical data exist to justify losing “[t]he very basis of being an American. . . . the right to be left alone, to be free to go where we want to go without worrying about intrusions . . . . I would only beg the Court to consider that we are giving up a very basic, basic right for returns we have no knowledge").


157. Hear Recording of Oral Argument on Oct. 5, 1988, at clip 167, Mistretta v. United States, 488 U.S. 361 (1989) (Nos. 87-7028, 87-1904), http://www.floridalawreview.org/higginson/mp3list.htm (defending the constitutionality of restrictions on judicial powers to sentence, Solicitor General Fried boldly observes that because “the doctrine of separation of powers is supposed to have something to do with liberty . . . it would be huge irony if this Court invalidated a statute whose global effect is not to increase but sharply to curtail the prerogatives” of its own judicial branch); Recording of Oral Argument on Dec. 10, 2003, at clip 168, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580), http://www.floridalawreview.org/higginson/mp3list.htm (interrupting claim for Court intervention into state redistricting plan, Chief Justice Rehnquist interjects, “the Constitution doesn’t ever use the word democracy").

158. Hear, e.g., Recording of Oral Argument on Apr. 17, 2002, at clip 169, Hope v. Pelzer, 536 U.S. 730 (2002) (No. 01-309), http://www.floridalawreview.org/higginson/mp3list.htm (“What should be the rule that you say was violated here. If we write out the opinion . . . . we say the rule . . . is and we have to fill in the blank, what is that rule?”); Recording of Oral Argument on Jan. 11, 2000, at clip 170, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), http://www.floridalawreview.org/higginson/mp3list.htm (“[T]his Court has had what I think is an unfortunate 150 or 200 year history in trying to draw some kind of line as you are between local and interstate effects. Most of those have failed. What’s your line?"); Recording of Oral
have finality. Sometimes, even, decisions let hard arguments go unanswered,\textsuperscript{159} trying to stay tidy, but playing high stakes that what has been overlooked may be the better future—advocacy materials should be re-examined for this reason also.\textsuperscript{160}

There is a better way to learn law and lawyering. The way is more instructive and less expensive; more firsthand, less formal; more complete with circumstance, less constricted as to possibility. Practically, it helps one avoid being outwitted; or, if outwitted, to relax and manage the crisis.\textsuperscript{161} As Emily Dickinson tells us, “To fill a Gap Insert the Thing that
caused it." There is a gap in how we understand the Constitution, and we should insert the thing that caused it.

guess that's the best way to worm out of this. If I had to worm out, that's the way I'm going. It's not this case. It's a hypothetical, and it's not this case.").