Beyond Black Ink: From Langdell to the Oyez Project--the Voice of the Past

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BEYOND BLACK INK: FROM LANGDELL TO THE OYEZ PROJECT—THE VOICE OF THE PAST

Paul R. Baier*

[The law is a science; ... all the available materials of that science are contained in printed books.]—Christopher Columbus Langdell, ca. 1886¹

I am the Edison Phonograph created by the Great Wizard of the new world to delight those who would have melody or be amused. I can sing you tender songs of love. I can give you merry tales and joyous laughter. I can transform you to the realms of music. I can call you to join in the rhythmic dance...—Sound recording, ca. 1906²

Beyond Langdell’s black ink, lies the Oyez Project. It adds the human voice to our pedagogy:

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¹ George M. Armstrong, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Judicial Fellow, Supreme Court of the United States, 1975-76. This was the year of my discovery of “The Supreme Court Tapes: Lively Conversations for the Classroom,” as I captioned my archeological diggings in the Sound Recordings Division of the National Archives for a joint program of the Sections on Constitutional Law and Teaching Methods at the 1980 Annual Meeting of the Association of American Law Schools, Phoenix, Arizona—a pretty good place to launch a contemporary nova methodus, following Leipnitz (1667) and echoing Coke (1600): “Reading without hearing is dark and irksome.” I owe thanks to Yale Kamisar, whose booming voice I first heard as a lowly Instructor in Law at Michigan Law School and whose loud objection at Phoenix to using the sound effects of Supreme Court tapes in teaching (“Why tapes, why not transcripts?”) inspired me to keep at it for another quarter of a century, culminating of late in a reprise of sorts: “The Palm Beach Sound Machine,” for the Southeastern Association of Law Schools Annual Meeting, Palm Beach, Fla., July 2008, with thanks to Russell Weaver for inviting me to join his coterie of SEALS friends.

² To listen to this early 78 RPM sound recording, Google “I am the Edison Phonograph.” You will hear Thomas Alva Edison’s technological miracle for yourself, exactly as the Great Wizard advertised it at the turn of the Twentieth Century, a recording made at Menlo Park, http://www.archive.org/details/iamed1906 (follow “stream” hyperlink). This, a precursor to a marvel of our own generation, “The Oyez Project,” from the inventive brain of Jerry Goldman, Great Wizard of Northwestern University, “The Oyez Man” as he calls himself (Google Jerry Goldman).
CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-949, George W. Bush and Richard Cheney versus Albert Gore, et al. Before we begin the argument, the Court wishes to commend all of the parties to this case on their exemplary briefing under very trying circumstances. We greatly appreciate it. Mr. Olson.

THEODORE B. OLSON, Esq.: Mr. Chief Justice, thank you, and may it please the Court. Just one week ago this Court vacated the Florida Supreme Court's November 21 revision of Florida's Election Code, which had changed statutory deadlines, severely limited the discretion of the State's chief election officer, changed the meaning of words such as "shall" and "may" into "shall not" and "may not," and authorized extensive, standardless, and unequal manual ballot recounts in selected Florida counties. Just four days later, without a single reference to this Court's December 4 ruling, the Florida Supreme Court issued a new, wholesale post-election revision of Florida's election law. That decision not only changed Florida election law yet again, it also explicitly referred to, relied upon, and expanded its November 21 judgment that this Court had made into a nullity.

JUSTICE KENNEDY: Can you begin by telling us about our federal jurisdiction. Where's the federal question here?

I. FROM LANDGELL TO THE OYEZ PROJECT

I first sounded the use of the Supreme Court tapes in teaching some twenty-five years ago in the Journal of Legal Education. I asked, "What Is the Use of a Law Book Without Pictures or Conversations?" I proposed a "tapes method" of enriching the processes of learning in the law schools. The Supreme Court tapes, I said at first trumpeting, "capture the law in action; they preserve the life of the judicial mind; they engage the listener in the stream of thought that is the business of the Supreme Court." The sounds of the Supreme Court "are new intellectual capital, unmasking the persons behind the law and extending the boundaries of knowledge and


4. Paul R. Baier, What Is the Use of a Law Book Without Pictures or Conversations?, 34 J. LEGAL EDUC. 619, 632 (1984), with a facing frontispiece of Justice Oliver Wendell Holmes, Jr., sitting in his favorite horschair armchair, holding a book open in his lap but looking straight at the photographer, gazing immortally at untold future generations. This is the first photograph of a human being, Holmes no less, that appears in the Journal of Legal Education—Prometheus unbound from the chains of black ink. In sounding the tapes method anew for Loyola Law Review's Tug of War Symposium, I draw freely on my plea of twenty-five years ago, lost on law library shelves.
After a quarter of a century, the sound recordings of Supreme Court arguments are now at our fingertips, at the click of the mouse, on the internet. All we have to do is Google “Oyez Project,” select, by Term of Court, a favorite case for classroom instruction, and, presto, the life of the mind, the dialectic of the Court, the voice of the past becomes a vital tool to educate lawyers and bring up professionals “in the grand manner,” to borrow from my Master’s Voice. I mean Oliver Wendell Holmes, Jr. (Have you heard his ninetieth birthday radio address, March 8, 1931?)

A. HOLMES AT HARVARD

Here is what Holmes said on the 250th anniversary of Harvard University, his oration “The Use of Law Schools,” delivered at Cambridge, November, 1886. “So I say the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers.” Christopher Columbus Langdell, first Dean of the Harvard Law School, was in Holmes’s audience. Langdell’s new-fangled “case method” was all the rave—“those books of cases which were received at first by many with a somewhat contemptuous smile” but which now, said Holmes, Jr., “bid fair to revolutionize the teaching both of this country and of England.”

B. GOLDMAN AT NORTHWESTERN

Thanks to the Oyez Project, we are beyond Langdell’s black ink. Thanks to Jerry Goldman—wizard of the new world of legal education—we are able to model professional performance in our law schools by the example of actual argument in the Supreme Court of the United States.

The Justices and members of the Supreme Court Bar come to class as academic support, a high-tech, front-end variation on the Socratic and case method of learning law. We approach our subject, in my case Constitutional Law—“from in front.” Our students join in the rhythmic

5. Baier, supra note 4, at 633.
6. Oliver Wendell Holmes, Jr., The Use of Law Schools, Oration Before the Harvard Law School Association at Cambridge (Nov. 5, 1886), on the 250th Anniversary of Harvard University, in OLIVER WENDELL HOLMES, JR., SPEECHES 28, 30 (Little, Brown 1891).
7. Id. at 35. Cf. MARSHALL McLuhan, UNDERSTANDING MEDIA 5 (MIT Press 1999) (1964) (“Every culture and every age has its favorite model of perception and knowledge that it is inclined to prescribe for everybody and everything”).
8. Karl N. Llewellyn, On the Problem of Teaching “Private” Law, 54 HARV. L. REV. 775, 793 (1941). And muddling through gets boring for them, and we wonder why the edge is off the boys in the second year. It is off because we—as we made our instruction-books—have taken it off. We have been known, even, to edit down or edit out the facts. We make slight effort to get
dance. To paraphrase Judith Wegner only slightly, the Oyez Project makes “the thinking process audible to all.” To quote her exactly, the Supreme Court tapes “stretch [our] students’ horizons by causing them to imagine themselves in significant professional roles.” The Oyez Project nurtures what a recent Carnegie report calls “[a]n apprenticeship of professional identity.”

II. I AM THE OYEZ PROJECT

I propose to bring the tapes method down to date, to give you merry tales of law, to call you to the Oyez Project. I offer a few examples of the tapes in action. They enable us to escape the Old World of the casebook and enter the New World of the Oyez Project. Students and teachers alike experience a Supreme Court seminar of extraordinary vitality. We hear law in the making—“from in front.” At the back-end, we hear judicial voices announcing the Opinion of the Court. I can bring you Lewis Powell’s soft, Virginia voice announcing the judgment of the Court in Allen Bakke’s case. I can give you William J. Brennan, Harry Blackmun, and Thurgood

hold of counsel’s argument, and so to present the case as an exercise in how a lawyer goes about his job, an exercise in dealing with cases from in front. How should the edge not be off the boys?

Id.


10. Wegner, supra note 9, at 38, quoted in Stuckey, supra note 9, at 166.


12. Justice Lewis F. Powell, Jr., died a decade ago, in his Richmond, Virginia home early Tuesday morning, August 25, 1998. That same day I played a tape recording of his swearing-in at the Supreme Court, a treasured piece of audio tape unearthed years earlier on a field-trip with my students to the Court and to the National Archives. The day he died, Lewis Powell’s soft, Southern voice was heard in my constitutional law seminar at LSU Law Center. This seemed to us a good way to pay our respects. He botched his oath of office, an innocent slip, my students know. The Court’s official report, Appointment of Mr. Justice Powell, 404 U.S. xi-xiii (Fri., Jan. 7, 1972), recites the oath in its entirety without the slip. For details, see Paul R. Baier, Lewis F. Powell, Jr., 1907-1998: Remembrances from LSU Law, 59 L.A. L. Rev. 409 (1999). It seems only yesterday when I first saw Justice Powell’s tall, lean, handsome figure walking the marble halls of the Court, very quietly, very peacefully, late in the afternoon as was his custom, a respite from the workload of chambers. He was wearing hush puppies.

13. Oyez, Oyez, Oyez—As the Chief Justice has stated, I am authorized to announce only the judgment of the Court. The facts in this case are too well known to be restated this morning. Perhaps no case in modern memory has received as much media coverage and scholarly commentary. More than sixty briefs were filed with the Court. We also have received the advice through the media and commentaries of countless extrajudicial advocates. The case was argued some eight months ago and as we speak today with a notable lack of unanimity, it may be fair to say that we needed all of this advice. In any event it will be evident from the several opinions that the case, intrinsically difficult, has received our most thoughtful attention over many months. So much for an introduction. As there are six separate opinions, I will state first the Court’s judgment...
Marshall’s oral dissents in the same cause, *leurs cris du cœur*, over the meaning of Equal Protection of the Laws.14 I am the Oyez Project.

**A. SIR EDWARD COKE**

“[R]ead ing without hearing is dark and irksome,”15 said my Lord Coke, his instructions to law students, when Elizabeth I was on the throne. Doubtless Sir Edward Coke would marvel at the Oyez Project. Perhaps even Christopher Columbus Langdell would supplement his *Contracts* casebook. Have you heard of another Marshall, not Thurgood Marshall, not John Marshall, but Marshall McLuhan? He would say the Oyez Project is the pre-eminent “hot medium” of constitutional law.16 I know from personal experience that Harvard Law School Dean Erwin N. Griswold, sixth in Langdell’s line, marveled at the Supreme Court tapes and the active voice of the Court. I played the *Pentagon Papers* argument to him in his law office. This was my first pedagogical demonstration, so to speak—quite a classroom—at Jones, Day, Reavis & Pogue, Metropolitan Square, Washington, D.C. As Solicitor General of the United States Erwin

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15. Sir Edward Coke so exclaimed more than four hundred years ago. 1 COKE REP. XXVIII (1600), quoted in WALTER CECIL RICHARDSON, A HISTORY OF THE INNS OF COURT 193 (Claitor’s 1975).

16. See generally McLuhan, supra note 7, at 22 (“Media Hot and Cold”).
Griswold argued the *Pentagon Papers Case* for the Government. During the argument he confronted Justice Hugo Black from the rostrum of the Supreme Court. They were face to face, voice to voice, over the meaning of the First Amendment. We will listen to their tug of war a little later in this *Loyola Law Review* technology reprise.\(^{17}\)

What I want to say at this point is that Dean Griswold confronted me with a grave look. He usually looked grave, but this was very grave. He asked me, incredulously, “Where did you get these tapes?” The reader may recall the *Pentagon Papers* were stamped, “Top Secret.” What about these Supreme Court tapes? Well, I calmed the Dean down when I told him the sound recordings of oral argument were available, with the High Court’s permission, from the National Archives for use by scholars and teachers. “Oh, all right.”

I learned that this quintessential Harvard Law School Dean, sometime Solicitor General of the United States, Erwin N. Griswold, had never heard of the tapes, much less heard his own argument. I explained to him that I had the Court’s permission. I told him I use his exchange with Justice Black in teaching constitutional law.

After our class at Jones, Day, Reavis & Pogue, Dean Griswold walked me to the elevator far from his corner office. This was his old-school custom. The offices are a labyrinth. It’s easy to get lost. As the elevator door closed, he exhorted me, “How are you going to get these tapes into the hands of law teachers?” I have been at it ever since.

**B. HOLMES ONCE MORE**

To recur to Holmes once more: “Why look at it simply in the light of human nature. Does not a man remember a concrete instance more vividly than a general principle? . . . than when you merely see it lying dead before you on the printed page.”\(^{18}\) We join the Justices in their working laboratory, “Open to the Public.” I mean the crucible of oral argument. Our learning is in depth.\(^{19}\) This is livelier than Professor Agassiz’s Natural

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17. In his memoirs, Dean Griswold reports, “Undoubtedly the most spectacular case in which I appeared was the one involving the ‘Pentagon Papers.’” ERWIN N. GRISWOLD, OLD FIELDS, NEW CORNER 296 (West Publ’g Co. 1992). “A friend of mine, Professor Paul R. Baier of the Law School of Louisiana State University, obtained a copy of this recording, and made it available to me. Every four or five years or so, I get this tape out and play it. It brings back interesting memories.” Id. at 307.

18. Holmes, Jr., supra note 6, at 36.

19. “Because ‘depth’ means ‘in inter-relation,’ not in isolation. Depth means insight, not point of view; and insight is a kind of mental involvement in process that makes the content of the item seen quite secondary. Consciousness itself is an inclusive process not at all dependent on content.” MCLuhan, supra note 7, at 282-83.
History Museum at Harvard University, Cambridge, Massachusetts. Fossil fish don't talk back. Justice Scalia does.

Recent scholarship, including the brilliant panegyric of the Oyez Project by your own Professor Stephen Higginson, suggests that oral argument is a pretty good indication of what is to come, both at the Court's private conference and, in due course, in the United States Reports. Of course, Professor Higginson is right to say that our understanding of constitutional law is deepened by reference to constitutional advocacy. Our scholarship should attend to the front-end of constitutional law, not just to the back-end. What I am here to broadcast, however, is not the underpinnings of doctrine, but the pedagogical, front-end, truth of the Oyez Project. It is audible, free, and available at our fingertips in our wired classrooms. Let the word go forth: “OYEZ, OYEZ, OYEZ.”

C. BEYOND BLACK INK

Going beyond black ink adds life to our learning. The tapes are living law. Our classroom comes alive. Voices of the past teach the great lesson that law is human. To know constitutional law, we must listen to the voices that make it. The Supreme Court tapes are a pirate’s treasure chest of judicial personalities. They record competing judicial philosophies ready


21. My colleague, former Dean of Vanderbilt Law School and Chancellor Emeritus of LSU Law Center, John Costonis’s scholarship of late on the Fifth Amendment’s Takings Clause and Louisiana’s constitutional knee-jerk reaction to Kelo v. City of New London, 545 U.S. 469 (2005), was heightened by his first encounter with the Oyez Project’s audio recording of the oral argument in Kelo, which I had recommended to him. Coming at Kelo from “in front” deepened his understanding beneath and beyond the published opinion, adding nuance to his scholarship. “Although I had previously read the Kelo opinion many, many times, I simply would not have picked up on this nuance (with its fundamental reshaping influence on my thinking), but for Oyez.” E-mail from John Costonis, former Dean of Vanderbilt Law School and Chancellor Emeritus of LSU Law Center, to author (Jan. 08, 2009, 16:41 CST) (on file with author) (printed with permission of John Costonis). For the resulting black ink, see John J. Costonis, Katrina, Kelo and New Orleans: American Cities in the Post-Kelo Era, 83 TUL. L. REV. 395 (2008). Oyez, Oyez, Oyez, ye Scholars.

for instant playback.\(^{23}\) Constitutional advocacy determines constitutional outcomes, usually. But sometimes, we must go deeper still. *Mapp v. Ohio*\(^ {24}\) is a good example. You will hear Justice Tom Clark—Texas Voice of Common Sense—later on our Pine Street Juke Box. I trust you remember what he said in his opinion on behalf of Dolree Mapp: “There is no war between the Constitution and common sense.”\(^ {25}\)

My purpose here is to report my experience using the Oyez Project as a teaching tool, to give you a few examples of classroom use, and to suggest ways in which other teachers of the law, regardless of their subject matter, may do likewise. I hope to contribute my own insight to all the table talk of late of educating lawyers and best practices. There is a vital place, I submit, for the Supreme Court tapes—for the legal clinic of the Court—in the professional development of our law students.

Like the Edison Phonograph, I invite you to join the rhythmic dance. “Can you begin by telling us about our federal jurisdiction?” Here is a method that adds life to Professor Henry Hart’s federal courts class at Harvard Law School as I remember it. God bless Henry Hart. He is gone. So is William Rehnquist, Hugo Black, Felix Frankfurter, William Brennan, Potter Stewart, Harry Blackmun, William O. Douglas, Thurgood Marshall, Lewis Powell. Take your pick. Do you have any judicial heroes? Our students live by example, do they not? Let me avouch Archibald Cox, my teacher at Harvard Law School, as witness:

In the end, young men and women do not set their compasses solely—or even chiefly—by courses of formal instruction. . . . Much used to be done by portraying great figures in Anglo-American Law: Coke, Erskine, Marshall, Story, Evarts, Rufus Choate, Clarence Darrow, Holmes, and Brandeis. The list goes on and on. Today one would add Robert Jackson, Hugo Black, Earl Warren, Felix Frankfurter, Thurgood Marshall, and many others. I cannot speak for my colleagues, but I have failed to present the examples that my classmates and I admired as Austin Scott, Felix Frankfurter, and

\(^{23}\) Following Steve Allen’s precedent, his “Meeting of Minds” television program, I produced a television program featuring judicial table talk between Justices Hugo L. Black and Justice John Marshall Harlan. They voice their competing judicial philosophies for playback in class. Two of my students portray Justices Black and Harlan, after extensive study of their opinions and extra-judicial writings. After we view the video, the entire class participates in a round-table question and answer session, featuring Justices Black and Harlan, who join us “live and in person” in class as guest teachers. Pedagogues extol this as role playing. *Vide* Paul R. Baier, *Hugo Lafayette Black and John Marshall Harlan: Two Faces of Constitutional Law, With Some Notes on the Teaching of Thayer’s Subject*, 9 S.U. L. REV. 1 (1982).


\(^{25}\) *Id.* at 657.
Edmund Morgan presented them to us. The mood has seemed against it. History and heroes seem to command little attention from the “now” generation. I would like to have the opportunity back.26

And what of Erwin Griswold, Alexander Bickel, Archibald Cox, Frederick Bernays Wiener, and a host of exemplary counsel whose voices bring master advocates to our classes. Their clashing faiths live on, on tape. I like to have the voice of the past as part of our learning. So do my students.

Beyond Langdell’s black ink, let me trumpet anew, lies the Oyez Project.

III. PINE STREET PHONOGRAPH

Each Spring, when Audubon Park blossoms, I play my Pine Street Phonograph for Loyola Law School’s Skills Curriculum under the watchful eye of its Director and my friend for fifteen seasons, Pat Phipps. Justice Harry T. Lemmon, a favorite son of Loyola University, Associate Justice of the Louisiana Supreme Court, retired, joins me in class. We call our skills course, “Lawyers in the Great Tradition: The Argument of an Appeal.” Here is an obvious use of the Supreme Court tapes and the Oyez Project, both in and out of class—the training of vital skills of oral advocacy by the example of masters at the Bar. You have already heard the hammer blows of Theodore Olson’s opening argument in *Bush v. Gore*. After his opening, what is left to decide? That’s the way to do it.

As for our featured Loyola skills exemplars, let me say I was mesmerized when I first heard Frederick Bernays Wiener’s argument in *Reid v. Covert*,27 which he won on rehearing in the Supreme Court of the United States, the only instance in over two hundred years of the Supreme Court reversing itself, without a controlling change in membership, in the same case following a published adverse opinion.28

27. 354 U.S. 1 (1957) (on rehearing).

In the 198 years that the Supreme Court of the United States has sat since it first convened in New York on February 1, 1790, it has only once reached a different result in the same litigation following a published opinion and without a controlling change in membership. That was in *Reid v. Covert*, 354 U.S. 1 (1957), which held unconstitutional the trial by court-martial of servicemen’s dependents in time of peace, and which, accordingly, withdrew the earlier opinion sustaining such trials, rendered just 364 days earlier in *Kinsella v. Krueger*, 351 U.S. 470 (1956), and *Reid v. Covert*, 351 U.S. 487 (1956).

Id.
(VICTORY),” as Fritz Wiener’s leather-bound brief recites in gold leaf on its spine, held unconstitutional an act of Congress subjecting Mrs. Clarice B. Covert, a civilian wife, to trial by court martial for murdering her soldier husband on a military base overseas in time of peace.29 She was entitled to trial by jury, not trial by soldier. The advocate’s “dream case,”30 is how Colonel Wiener, U.S. Army retired, describes it. His peroration in Reid v. Covert II31 blossoms out each Spring on Pine Street. It continues to inspire, just as the bronze “Advocate’s Prayer” to St. Thomas More32 in the foyer of your Pine Street building continues to inspire me: “Pray that, for the greater glory of God and in the pursuit of His justice, I be able in argument . . . .”

But beyond the obvious use of the tapes to sharpen advocacy skills, the Oyez Project is a doctrinal tool of extraordinary vitality in class. Let me demonstrate this by playing a half dozen or so of my favorite excerpts from a variety of constitutional angles: the scope of judicial power, judicial supremacy, separation of powers, substantive due process, procedural due process, equal protection, freedom of the press. I could go on, but I won’t.

Leipnitz published his essay Nova Methodus discendae docendaeque Jurisprudentiae33 in 1667. I like to tell my friends that in using the Oyez Project in class I am following Leipnitz. I have my own twenty-first century nova methodus, a veritable post-Langdellian Sound Machine. True, I teach constitutional law. It is in this field, pre-eminently, that the Oyez Project is a miracle. It enables all Americans to hear their Supreme Court in action (“Your Supreme Court,” Harry Blackmun used to say). But the tapes method can be used to enliven other classrooms regardless of subject matter, provided the assigned casebook includes Supreme Court opinions. If there is a dissent, let us say from Justice Breyer in a labor law case, as

29. “[T]he miracle had come to pass.” Wiener, supra note 28, at 10.


32. Erected by the Saint Thomas More Law Society, Loyola University New Orleans School of Law, with thanks to Pat Phipps for reciting the prayer over the telephone so that I could use the opening part herein.

33. John Henry Wigmore, Nova Methodus Discendae Docendaeque Jurisprudentiae, 30 HARV. L. REV. 812, 813 (1917). Leipnitz was but twenty-one years old at the time he published his essay; “the vast science of law was thus (in Hallam’s phrase) ‘invaded by a boy.’” Id. His Nova Methodus anticipated the polemic moots at Harvard Law School, projected a “Theatrum Legale,” which sounds good to me [cf. Paul R. Baier, “Father Chief Justice”: E. D. White and the Constitution, 58 LA. L. REV. 423 (1998)], and, “curiously enough, the Socratic method, as applied in the Harvard Law School under Ames and Keener, is foreshadowed in his preface.” Wigmore, supra at 813.
against a majority opinion by Chief Justice Rehnquist, select excerpts of oral argument are likely to add brain fire to whatever colloquy passes between teacher and student in class.\textsuperscript{34} What, after all, is a classroom, I might ask Yale Kamisar, of booming voice himself,\textsuperscript{35} if not a sound stage?

Now for a few cuts from our Pine Street Phonograph, courtesy of the Oyez Project and its Great Wizard Jerry Goldman.

\begin{itemize}
  \item 34. I have in mind \textit{Hoffman Plastic Compounds, Inc. v. NLRB}, 535 U.S. 137 (2002), with thanks to my labor law colleague Bill Corbett for suggesting the case. The argument, on the Oyez Project, October Term, 2001, is a spectacular specimen of legal analysis that brings Court and counsel to class. Justice Scalia, Mt. Etna, erupts in opposition to the Government’s argument regarding the Labor Board’s award of back pay to illegal aliens for an employer’s violation of the labor act. I have listened to the entire argument. It proves the potency of the tapes beyond constitutional law. The sound effects are reminiscent of \textit{Hart & Sachs} legal process materials. My colleague Ed Richards, who teaches administrative and public health law, became an instant convert to the tapes method, at my cajoling, after listening to the dialectic of Court and counsel in a favorite case of his teaching, \textit{FDA v. Brown & Williamson Tobacco Corp.}, 529 U.S. 120 (2000). Whether the Food and Drug Administration has jurisdiction to regulate tobacco products on the theory that nicotine is a “drug” within the meaning of the Food, Drug, and Cosmetic Act, is the question presented, hotly contested by Solicitor General Seth Waxman, in support of regulatory authority, to the utter disbelief of Chief Justice Rehnquist, Justice Scalia, and Justice O’Connor during oral argument. The Court splits itself open at the seam, 5 to 4, against FDA jurisdiction (“Congress has directly spoken to the issue here and precluded the FDA’s jurisdiction to regulate tobacco products”), Justice Breyer, hearing different “music” in the statutory framework, 529 U.S. at 189, joined by Justices Stevens, Souter, and Ginsburg, dissents (“this particular drug [nicotine] and device [a cigarette] risks the life-threatening harms that administrative regulation seeks to rectify. The majority’s conclusion is counterintuitive”). Ed Richards adds, “[t]he argument is interesting because Scalia and the conservative judges who prevail are pushing for the use of history of tobacco regulation to change the plain meaning of the statute, while Breyer is arguing to read the words and ignore the history.” Professor Richards has downloaded the Oyez Project audio in \textit{FDA v. Brown & Williamson} and posted it on his Medical and Public Health Law Site at LSU Law Center, which is permissible with attribution to the Oyez Project. Take note, ye Bloggers.
  
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A. SCOPE OF JUDICIAL POWER

1. **Baker v. Carr, October Term, 1960.**

   “Arguing a case before the Supreme Court of the United States isn’t making mud pies,” said Justice Frankfurter, who comes to class in *Baker v. Carr* to excoriate Archibald Cox for seeking a judicial dismantling under the Equal Protection Clause of Tennessee’s malapportioned legislature. Frankfurter wonders out loud about the reach of judicial power. His is the Voice of Judicial Restraint. On the flip side, Solicitor General Cox holds up pretty well against Frankfurter, urging a competing philosophy of judicial action in the face of irrational discrimination affecting voting rights. Talk about fireworks that enliven our learning! Things get started with Justice Potter Stewart reminding Solicitor General Cox that the Court had sustained a complete denial of voting rights for women. Why worry about geographical vote dilution? More bluntly, Justice Frankfurter—galvanic voice of the past—insists that the Court stay entirely out of this “political thicket.” Listen for yourself:

   **Solicitor General Archibald Cox:** It seems to me that a geographical—

   **Justice Stewart:** Of course, it could be done with respect to all women, couldn’t it?

   **Mr. Cox:** So far as the Fourteenth—

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37. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 268 (Reynal & Co. 1960).

38. "Next to the Supreme Court itself perhaps the most important factor in the sequence of reapportionment litigation, viewed as a 'reform caucus in action,' was the Solicitor General of the United States, Archibald Cox . . .” ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 201 (Oxford Univ. Press 1968).

His cleverness in shaping litigation tactics to match apparent judicial predilections (an aspect of constitutional law development on which too little research has been done) suggests that the creative aspects of the decision making process in the Supreme Court are only half revealed when attention is confined to judicial votes and written opinions.

*Id.*
JUSTICE STEWART: So far as the Fourteenth Amendment went, it required an additional amendment to the Constitution to give females the vote, did it not?

MR. COX: I suppose the question would be raised whether that was an arbitrary discrimination.

[Laughter.]

JUSTICE STEWART: It was raised. It was raised.

MR. COX: I had forgotten the case.

JUSTICE STEWART: And it was decided in this Court.

MR. COX: That it was not an arbitrary discrimination.

JUSTICE STEWART: That all women could be denied the vote under the Fourteenth Amendment, and under the Constitution generally, until we got the suffrage Amendment.

At this point in class, I pause the recording with my mouse and rehearse Minor v. Happersett for the benefit of my students, dehors the recording. The tapes, say it softly, teach the importance of knowing your case law.

MR. COX: But it seems to me that the fact that a rational line can be drawn between men and women does not go to indicate that a rational line can be drawn in terms of race or in terms of geography. Surely—

JUSTICE STEWART: A rational line can certainly be drawn between the sexes in many areas, but—

MR. COX: And in voting.

JUSTICE STEWART: It was.

MR. COX: Well, in terms of the whole legal background it seems to me that I would not quarrel with the decision of the Court. Surely, nothing in the decision—and I think this is the only important point—surely nothing in the decision indicates that the Fourteenth Amendment does not prohibit irrational differentiation with respect of the exercise of the right to vote. And a geographical discrimination, I think it must be

39. 88 U.S. (21 Wall.) 162 (1874) (on writ of error to the Supreme Court of Missouri). Mrs. Minor was a Missouri lady and a citizen of the United States. The Supreme Court rejected her claim that the Fourteenth Amendment conferred the right of suffrage upon her. Said Chief Justice Morrison R. Waite: “Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitution and laws of the several States which commit that important trust to men alone are not necessarily void, we AFFIRM THE JUDGMENT.” Id. at 178.
agreed, can be as arbitrary and discriminatory as many others. Nobody would debate the case if a State were to say that the voters in the eastern half shall have ten votes, and the voters in the western half shall each have one, or one vote and one-tenth of a vote. If by the process of apportioning representatives the State gives ten representatives to each of the sparsely settled counties in the eastern half and only one to each of the well settled counties in the western half, that seems to me just as arbitrary and just as capricious as labeling the fraction of the vote that those under-represented are entitled to get. Certainly there is no merit in the argument that the appellees make, that the Constitution guarantees only the right to cast a ballot and to have it physically counted, but it doesn’t guarantee you anything with respect to the value of the count that it gets, and it may be neglected from then on.

And now Mr. Justice Frankfurter pipes in:

JUSTICE FRANKFURTER: Mr. Solicitor, may I put this to you: You belong to an administration which has had signal experience with the inability of two houses of the legislature to agree on highly desirable legislation. And it may well be that Tennessee may have had difficulties from year to year in getting the two houses to agree to a proper apportionment. Now, I take it mandamus couldn’t lie, so that the constitutional right derives from the fact that two houses of the Legislature can’t agree on what is proper legislation. I didn’t mean to say anything except to call attention to a well-known legislative fact, of which the last session of Congress was a signal demonstration, the difficulty of getting concord between two houses of a legislature on legislation deemed highly desirable.

Frankfurter prided himself on his political, as well as his legal, acumen. We join him in the cloakroom. Solicitor General Cox, on the other hand, has a competing view of the situation. He tells our classroom apprentices:

MR. COX: I cannot speak with any great knowledge about the political history of Tennessee. My reading of the allegations in the complaint would indicate that the difficulty wasn’t in getting the two houses to agree. It was simply that the minority who have this unjustified, as we say, power, won’t give it up.

JUSTICE FRANKFURTER: But we know that legislation doesn’t merely mean—the process of legislation—isn’t merely what gets on the floor of legislatures. We know that the legislative process is agreement in what has, in reference to the Hill, been called the “cloakroom.” We know that the process involves agreement or disagreement between
those who wield political power. And it may well—looking ahead, as I for one have to look ahead—it may well be that this is one of these situations. And, therefore, it isn’t really—we’re not really engaged in an abstract question: Is there jurisdiction, abstractly considered, but what can you do about it? Not “you”; meaning, what can a court do about it? Or what is involved? I take it you agree you couldn’t mandamus them to apportion, could you?

MR. COX: Well, I had hoped to postpone until later the suggestion of what the decree might be. I was going to suggest that there were a number of possibilities.

JUSTICE FRANKFURTER: You couldn’t mandamus the legislature, could you?

MR. COX: No, you could not.

Why not? What about Chief Justice Marshall’s admonition in Marbury v. Madison: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” Chief Justice Marshall reminds us, “In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.” Why not mandamus the Tennessee Legislature to do its constitutional duty?

You can see how the tapes method stirs up thought in the classroom. Teacher and student become a part of the Socratic dialogue of Court and counsel. Thereafter, it’s back to Oyez Project:

JUSTICE WHITTAKER: Well, even if you couldn’t tell them what to do, does that mean that there isn’t power to tell them that what they are doing is unlawful?

MR. COX: It does not; and frequently telling them what they are doing is unlawful supplies the necessary impetus to achieve a solution of the matter.

JUSTICE FRANKFURTER: And you think, if you can’t go beyond that, that that is a fair legal argument to make, that you might push them into doing something which legally you couldn’t compel them to do? You think that’s a fair argument?

MR. COX: I think that is a factor to be taken into—

41. Id.
JUSTICE FRANKFURTER: You think that’s a fair argument to address to this Court, that you might push them into doing things, although legally you couldn’t make them?

"Why tapes, why not transcripts?", Yale Kamisar boomed when he heard me playing select Supreme Court tapes at a joint program of the Sections on Constitutional Law and Teaching Methods at the 1980 annual meeting of the Association of American Law Schools, Phoenix, Arizona. This was my first formal tapes demonstration, trumpeting “The Supreme Court Tapes: Lively Conversations for the Classroom.” My goal was to attract a large crowd and let the tapes do the talking. I expected opposition from the Old Guard. There is nothing about playing tapes in Edward H. (“Bull”) Warren’s Spartan Education, a book that aims “to give some helpful suggestions to younger men who earnestly seek to justify their existence by becoming effective teachers of the law.”

The answer, Yale, to your question, “Why tapes, why not transcripts?”, is heard when you listen to Frankfurter’s high pitch at this precise point in the oral argument, almost a scream, at Cox as the judicial curtain closed in on Mr. Justice Frankfurter in Baker v. Carr. “[W]ords, especially the written words, of another cannot convey the reality of Felix Frankfurter. There is no substitute for the apprehension of the senses. One needs to see, to hear . . . .” His dissent, which refers back to Cox’s argument, was his last judicial breath:

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court’s admonition. This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary.

For Frankfurter, the Warren Court’s opinion in Baker v. Carr, authored by Frankfurter’s student at Harvard Law School, William J.

42. Ass’n of Am. Law Sch. 1980 Annual Meeting Program, Sections on Constitutional Law and Teaching Methods, supra note *, at 19.
43. Id.
44. EDWARD H. WARREN, SPARTAN EDUCATION ix (Houghton, Mifflin 1942).
Brennan, Jr., is anathema—"sounding a word of promise to the ear, sure to be disappointing to the hope." The Warren Court, history teaches us, left Frankfurter behind, its word of promise fulfilled. What is important here is that the sounds of these competing faiths endure "for untold generations." This is how Justice Frankfurter inscribed a photograph I have hanging on the wall of my office, next to an inscribed photograph of Justice Brennan. Frankfurter's inscription reads: "Every good wish to Louisiana State University Law School for untold generations from Felix Frankfurter, December 16, 1952." This was "The Year of the Steel Case," Youngstown Sheet & Tube Co. v. Sawyer. I found this photograph in a box stored in the basement of the LSU law library gathering dust. It has been on my office wall ever since. Frankfurter's faith is a part of my teaching. Indeed, the Oyez Project sounds his voice of judicial restraint, along side Justice Brennan's voice of judicial action. We sense the tug of war between these competing voices of the past, Term after Term, Court after Court, Chief Justice after Chief Justice. Christopher Columbus Langdell's casebook has come alive. OYEZ, OYEZ, OYEZ:

MR. COX: I think in determining—first, I have not suggested that there is no other relief that the Court could frame. I think that in

49. 343 U.S. 579 (1952).
50. Compare Frankfurter's own teaching: "One of my hobbies in those enviable Cambridge days was to have the picture of the Supreme Court justices around when we talked about the opinions written by those judges." Felix Frankfurter to Edward H. Warren, May 6, 1941 (on file in Frankfurter Papers, Library of Congress, Box 110); see also Baier, supra note 4, at 620 n.7 (quoting same). Contemporary Harvard Law School Professor Lani Guinier laments that when she mentions Supreme Court Justices by name in class, "my students give me blank stares. They do not have in their mind's eye an image of the Justices. They don't know what each Justice looks or sounds like . . . ." Guinier, supra note 14, at 25 n.104. It might help, she suggests, if her students "could hear the Justices speak. This would help them to recognize the style of each Justice and would humanize authority that is so often virtually anonymous." Id. The Oyez Project fills Professor Guinier's void, if I may speak for our friend Jerry Goldman, Mr. Oyez Man himself. In my own teaching I follow Harvard Law School Professor Felix Frankfurter's precedent of having the picture of the Supreme Court justices around when we talk about the opinions written by those judges. And my students hear the voices of the Justices off the Oyez Project. Requiescat in pace Mr. Justice Frankfurter.
51. When Justice Frankfurter died after his final judicial utterance, his dissent in Baker v. Carr, a former law clerk and Chancellor Kent Professor of Law and Legal History at the Yale Law School, Alexander Bickel said of him: "His voice will be heard, and he will influence political thought so long as there is a Supreme Court and so long as men are concerned to make their actions fit the American constitutional tradition." Alexander Bickel, Felix Frankfurter, 1882-1965, NEW REPUBLIC, Mar. 6, 1965, at 7.
determining how to exercise its discretion, one of the factors that this Court may take into account—and I think it frequently has taken into account—is the very great likelihood that public officials and others in this country will comply with the law where it is clearly declared.

**Justice Frankfurter:** I know of only one such case, Mr. Solicitor, just one such case—and it’s a case that ought to give a court pause—and that is a suit brought by Virginia against West Virginia, which this Court dawdled over nearly twenty years because of the difficulties of seeing the end of the road in case West Virginia thumbed its nose at the Court and you couldn’t seize the statehouse. There’s just one such case in the whole history. I venture to believe you couldn’t contradict that statement.

**Mr. Cox:** Mr. Justice, there’ve been other cases, I think, where, if the Court had really had to resort to its physical power, it’s very doubtful whether the decree would ever have been made effective. There was the decree, of course, of which John Marshall said—of which Andrew Jackson said, “John Marshall has made his decree; now let him enforce it.” There have been cases—there is a case, if my memory is right, where the Court—

**Justice Frankfurter:** All you’re suggesting is a case where the President of the United States was disobedient, apart from the fact that it’s very dubious whether Jackson ever said that. Nobody has been able to trace the accuracy of that statement.

[Laughter.]

Laughter breaks tension, and so we take our leave of Frankfurter, Cox, and the Oyez Project in class. I tell my Louisiana students, proudly, that it fell to Louisiana’s Great Chief Justice Edward Douglass White to close the book on the long drawn out fight between Virginia and West Virginia that Mr. Justice Frankfurter had in mind, in which one of two sister states sought to disregard without judicial sanction its obligation under the United States Constitution. Chief Justice Edward Douglass White would have none of it. He withheld mandamus, for the moment, believing that “we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution.”

Professor Thomas Reed Powell, of the Harvard Law School, praised White’s handling of *Virginia v. West Virginia* by paying tribute “to the statesmanship that accords to the defendant the respect which refuses to believe that this action will continue, now that the

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question of duty is authoritatively and finally determined." White's temperate view prevailed. A year later an acknowledgment of the satisfaction of the Court's decree was filed by counsel for the contending States. All of which adds a level of learning a step above Frankfurter and Cox, which is our goal.

Archibald Cox was my teacher at Harvard Law School. The tapes bring back fond memories of his craggy Maine voice, his granite integrity, his bow tie. More importantly, he joins me in class as a model of what it means to think like a lawyer. Archibald Cox, aside Felix Frankfurter, lives on for untold generations by virtue of the Oyez Project, a veritable Edison Phonograph of the Supreme Court of the United States. It is an amazing oral history of the Court and its voices. "The use of oral evidence," Paul Thompson tells us, "breaks through the barriers between the chroniclers and their audience; between the educational institution and the outside world." The Supreme Court tapes add to constitutional law what oral evidence adds to history:

Finally, oral evidence can achieve something more pervasive, and more fundamental to history. While historians study the actors of history from a distance, their characterizations of their lives, views, and actions will always risk being misdescriptions, projections of the historian's own experience and imagination: a scholarly form of fiction. Oral evidence, by transforming the 'objects' of the study into 'subjects,' makes for a history which is not just richer, more vivid and heartrending, but truer.

54. Thomas Reed Powell, Coercing a State to Pay a Judgment: Virginia v. West Virginia, 17 MICH. L. REV. 1, 32 (1918).
56. After thirty years of teaching constitutional law at LSU Law Center, I sent a note of thanks to Professor Cox, who was retired and living in Maine. He was in his nineties. He was of the Old School. His teaching meant much to me. His hand-written reply, all the way from Condon Point Road in Brooksville, Maine, is a treasure: "I greatly appreciated your kind words for my teaching. You have probably been teaching long enough now to know that the greatest satisfaction comes to a professor from a former student's saying that one's teaching contributed." Letter from Archibald Cox to author (Oct. 26, 2000), in Paul R. Baier, On Being Knighted by the Louisiana Bar Foundation: Distinguished Professor 2004, 65 L.A. L. REV. 1159, 1164 (2005).
58. Id. at 90. John Henry Wigmore quotes Benedetto Croce to the same effect: "All histories separated from their living documents are empty narratives. And, since they are empty, they fail short of truth . . . ." JOHN HENRY WIGMORE, PANORAMA OF THE WORLD'S LEGAL HISTORIES 12
B. JUDICIAL SUPREMACY, SEPARATION OF POWERS

2. UNITED STATES v. NIXON, OCTOBER TERM, 1973.\textsuperscript{59}

Constitutional law has matured considerably since President Jackson supposedly thumbed his nose at Chief Justice Marshall. After more than two centuries, the doctrine of judicial supremacy is pretty well established, from \textit{Marbury v. Madison}, through \textit{United States v. Nixon}, right up to \textit{Boumediene v. Bush},\textsuperscript{60} October Term, 2007. Charles Lee, Esq., late Attorney General of the United States, argued the cause for William Marbury, but this was at the February Term, 1803. There was no Edison Phonograph at the time. Thanks to William Cranch’s report, however, you get a pretty good idea of what it was like. Lee told Chief Justice John Marshall & Co., “I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution.”\textsuperscript{61} Mandamus to Secretary of State James Madison was another matter altogether, according to Lee.\textsuperscript{62} It’s too bad the Oyez Project does not go back that far.


\textsuperscript{60} 128 S. Ct. 2229 (2008).

\textsuperscript{61} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149 (1803) (argument of Charles Lee, Esq.). In the early days of the Supreme Court, and continuing up to the late 1940s, Reporters such as William Cranch, John Marshall’s reporter, included in their reports the oral arguments of counsel as they took them down in open court.

All is changed, and not for the better. We no longer see the reporter sitting in court, noting the oral argument and colloquies between judge and counsel, which in the older reports, and in those of England sometimes even now, are so instructive and enable the reader to understand much that he might otherwise overlook. Henry Budd, \textit{Reports and Some Reporters}, 47 \textit{AM. L. REV.} 481, 514 (1913), quoted in Paul R. Baier, \textit{Court Reports and Reporters of Decisions: From Edmundus Plowden to Henry Putzel, Jr., with Headnotes Biographical & Legal and a Syllabus} 201 n.1 (New Orleans, Ass’n of Reporters of Jud. Decisions 1990). My friend Frank Wagner, Esq., incumbent Reporter of Decisions of the Supreme Court of the United States, informs me that the papers of the Reporter’s Office do not indicate exactly when the arguments of counsel were dropped from the United States Reports, but they were gone by the late 1940s. Ex rel. Frank Wagner, Dec. 23, 2008. \textit{See also} Frank Wagner, \textit{The Role of the Supreme Court Reporter in History}, 26 J. OF SUP. CT. HISTORY 9 (2001).

\textsuperscript{62} Mr. Lee observed that the Secretary of State’s duties are of two kinds, and he exercises his functions in two different capacities. As a public ministerial officer of the United States, his duty is to the United States or its citizens. As agent of the President, his duty is to the President. “In
“[N]o teaching is good,” said James Bradley Thayer, “which does not rouse and ‘dephlegmatize’ the students . . . which does not engage as its allies, their awakened, sympathetic, and cooperating faculties.” Nothing rouses students more than hearing first-rate lawyers arguing real cases, especially those of enduring significance. The tapes method puts our students in the shoes of real lawyers and real judges in actual cases.

This brings us to our second cut: Leon Jaworski and James St. Clair squaring off in the *Nixon Tapes Case.* During class discussion, I play select excerpts of the oral arguments of Leon Jaworski, James St. Clair, and Philip Lacovara. Our classroom is “interactive,” to borrow the jargon of learning theorists. I have read my share in this field, just as Holmes read *Yearbooks* in his day. “What, Fessenden, do you think Jaworski will say to Justice Stewart’s question?” After Fessenden responds in class, we immediately test his answer against Jaworski’s. Sometimes a student is quite pleased with herself, which is a good thing. Reinforcement is important to learning. Sometimes a supplemental lecture is in order, or I will ask a few questions myself: “What, Myers, does Mr. St. Clair mean when he tells Justice Marshall, ‘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.’” Then we listen to more argument and this, in turn, prompts more questions. Every student is the former capacity he is compellable by mandamus to do his duty; in the latter he is not.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 139 (1803) (argument of Charles Lee, Esq.).

Reporter William Cranch’s marginal note says: “A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.” *Id.*

63. *JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW, WITH NOTES* vii (Riverside Press 1895). Thayer’s casebook was the first in its field, in two volumes, published in 1895. He was a contemporary of Christopher Columbus Langdell, progenitor of the “case method” of studying law at the Harvard Law School, which was all the marvel, and mystery, in its day. In his teaching, Thayer “aimed to bring out the precise legal significance of each case he dealt with. The exact question of law decided by the court was the fundamental thing to be considered . . . . He never found more in a case than actually was there, and nothing that was there escaped him.” *JAMES PARKER HALL, James Bradley Thayer, in THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917, 276, 281* (Harv. Law Sch. Ass’n 1918).

64. In my teaching, I use excerpts from a reel-to-reel copy of the National Archives Sound Recording Division’s audio recording of the *Nixon Tapes Case.* I discovered this sound recording at the Archives on a junket of my own while working inside the Supreme Court as a Judicial Fellow, 1975-76. This was long before the Oyez Project put the Supreme Court tapes at our fingertips. Strangely, when I searched for *United States v. Nixon*, October Term, 1973, on the Oyez Project’s website, it was not listed. A quick wire to our friend Jerry Goldman brought an almost instantaneous reply: “But it is classified in the 1974 Term. It should be 1973 Term. I will make this change in the new Oyez (soon to be released to the world). We have stopped development on the current (old) Oyez site. Yours obediently, ig.” E-mail from Jerry Goldman to author (Dec. 18, 2008, 14:38 CST) (on file with author) (reprinted with permission). “Permission granted, sire. Let him who is perfect cast the first bit or byte. Whatever.” E-mail from Jerry Goldman to author (Dec. 18, 2008, 15:53 CST) (on file with author).
listening. Everyone is involved. How could it be otherwise? This is the real thing. Hear it for yourself:

MR. JAWORSKI: Now may I, before I get to the jurisdictional points, briefly state what we consider to be a bird’s eye view of this case. Now enmeshed in almost 500 pages of briefs, when boiled down, this case really presents one fundamental issue: Who it to be the arbiter of what the Constitution says? Basically, this is not a novel question—although the factual situation involved is, of course, unprecedented.

I should hope Marbury v. Madison comes to my student’s mind at this point.

MR. JAWORSKI: Now, the President may be right in how he reads the Constitution. But he may also be wrong. And if he is wrong, who is there to tell him so? And if there is no one, then the President, of course, is free to pursue his course of erroneous interpretations. What then becomes of our constitutional form of government? So when counsel for the President in his brief states that this case goes to the heart of our basic constitutional system, we agree. Because in our view, this nation’s constitutional form of government is in serious jeopardy if the President, any President, is to say that the Constitution means what he says it means, and that there is no one, not even the Supreme Court, to tell him otherwise.

Fortunately, Mr. Justice Stewart, from my home town of Cincinnati, Ohio, now joins us in class—from the Supreme Bench in Washington, D.C., to Room 106, Paul M. Hebert Law Center, Baton Rouge, Louisiana. This is another feature of the Oyez Project: instantaneous time and space travel:

JUSTICE STEWART: Mr. Jaworski, the President went to a court. He went to the district court with his motion to quash, and then filed a cross-petition here. He’s asking the Court to say that his position is correct as a matter of law, is he not?

MR. JAWORSKI: He is saying his position is correct because he interprets the Constitution that way.

JUSTICE STEWART: Correct. He is submitting his position to the Court and asking us to agree with it. He went to the district court, and he has petitioned in this Court. He has himself invoked the judicial process, and he has submitted to it.

MR. JAWORSKSKI: Well, that is not entirely correct, Mr. Justice.

JUSTICE STEWART: Didn’t he file a motion to quash the subpoenas in the District Court of the United States?
MR. JAWORSKI: Sir, he has also taken the position that we have no standing in this Court to have this issue heard.

Sure enough, President Nixon's brief, available in the *Landmark Briefs and Arguments* collection, 65 plainly says in its argumentative headings:

II. The court lacks jurisdiction over an internal dispute of a co-equal branch;

III. A presidential assertion of privilege is not reviewable by the Court;
   A. The separation of powers doctrine precludes judicial review of the use of executive privilege by a President.

Back to Court:

**JUSTICE STEWART:** As a matter of law—he is making that argument to a court; that as a matter of constitutional law he is correct.

**MR. JAWORSKI:** So that of course this Court could then not pass upon the constitutional question of how interprets the Constitution, if his position were correct. But I—

**JUSTICE STEWART:** As a matter of law, his position is that he is the sole judge, and he is asking this court to agree with that proposition, as a matter of constitutional law.

**MR. JAWORSKI:** But what I am saying is that if he is the sole judge, and if he is to be considered the sole judge, and he is in error in his interpretation, then he goes on being in error in his interpretation.

**JUSTICE STEWART:** Then this Court will tell him so. That is what this case is about, isn't it?

**MR. JAWORSKI:** Well, that is what I think the case is about, yes, sir.

Enter the Chief Justice of the United States:

**CHIEF JUSTICE BURGER:** He is submitting himself to the judicial

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65. 79 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 463 (Philip B. Kurland & Gerhard Casper eds., Univ. Publ'ns of Am. 1975). The *Landmark Briefs and Arguments* series is another vital tool of constitutional law pedagogy. I do not mean to suggest that I eschew black ink entirely. As I said a quarter of a century ago: "Now, plainly, only a fool would urge burning casebooks and ravaging law review articles." Baier, *supra* note 4, at 634. My students inspect real briefs and come at the cases "from in front," to use Karl Llewellyn's telling figure. "We make slight effort to get hold of counsel's argument, and so to present the case as an exercise in how a lawyer goes about his job, an exercise in dealing with cases from in front." Llewellyn, *supra* note 8, at 793.
process in the same sense that you are, is that not so, Mr. Jaworski?

**MR. JAWORSKI:** Well, I can't see that—

**CHIEF JUSTICE BURGER:** You take one position and he takes another.

**MR. JAWORSKI:** Well, Mr. Chief Justice, in my view, frankly, it is a position where he says the Constitution says this, “and nobody is going to tell me what the Constitution says.” Because up to this point, up to this point, he says that he and he alone is the proper one to interpret the Constitution. Now, there is no way to escape that, because the briefs definitely point that out, time after time.

**CHIEF JUSTICE BURGER:** I think this matter may be one of semantics. Each of you is taking a different position on the basic question, and each of you is submitting for a decision to this Court.

**MR. JAWORSKI:** That may be, sir.

**JUSTICE DOUGLAS:** Well, we start with a Constitution that does not contain the words “executive privilege” is that right?

**MR. JAWORSKI:** That is right, sir.

**JUSTICE DOUGLAS:** So why don’t we go on from there?

As President Nixon’s brief shows, the matter goes beyond semantics. Chief Justice Burger is wrong. The President is claiming that separation of powers precludes judicial review of his invocation of executive privilege. The Executive Branch is the sole judge of its own prerogatives, just as the Court and the Congress are independent of the Executive. Surely, this is more than semantics. It is separation of powers writ large with President Nixon holding the writ. The Court’s Socratic questioning prompts our own in class: “Is Chief Justice Burger right to say the matter is one of semantics?”

The Oyez Project is thus a good source of exam questions. This is a practical consideration not to be overlooked. Justice Douglas’s observation that the Constitution does not contain the words “executive privilege” surely challenges us to go beyond text. The Supreme Court tapes are a treasure trove of interpretative techniques, of application of precedent, of stare decisis, of words and meaning—constitutional hermeneutics caught on magnetic tape. John Chipman Gray’s *The Nature and Sources of Law*, Hart & Sachs’s *The Legal Process* are at your fingertips on the Oyez Project. It teaches by example. The Constitution does not contain the words “judicial supremacy.” Nor are the words “judicial review” found therein. So we go on from there in class.

As for “the right of privacy,” it too nowhere appears in the
Constitution. So what? Justice Douglas himself goes beyond text—to “penumbras” and “emanations”—and gives voice to the right of privacy in the Court’s opinion in *Griswold v. Connecticut*. 66 This, over vocal objections from Justice Hugo L. Black, whom you will hear later in our tapes demonstration.

But first, let us hear Justice Thurgood Marshall questioning President Nixon’s lawyer James St. Clair, Esq., on the subject of judicial supremacy. Whether President Nixon would abide the Supreme Court’s judgment and turn over the tapes if ordered to do so was clearly on the Court’s mind, as well as the Nation’s, when the *Nixon Tapes Case* was argued in the summer of 1974. The courtroom was packed. Everyone wanted “tickets to watch history being made.”67

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

**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—

**JUSTICE MARSHALL:** And you are still leaving it up to this Court to decide it.

**MR. ST. CLAIR:** Well, yes, in a sense.

**JUSTICE MARSHALL:** Well, in what sense?

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

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

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

**JUSTICE MARSHALL:** I said, “in this case.” Can you make it any narrower than that?

**MR. ST. CLAIR:** No, sir.

**JUSTICE MARSHALL:** Well, do you agree that that is what is before

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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.

**JUSTICE MARSHALL:** Are you submitting it to this Court for this Court’s decision?

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

**CHIEF JUSTICE BURGER:** If that were not so, you would not be here.

**MR. ST. CLAIR:** I would not be here.

Justice Marshall’s vivisection of Mr. St. Clair is a classroom exemplar of what my new friend and Loyola, New Orleans, College of Law Professor Stephen Higginson calls “constitutional reductionism.” Justice Marshall cuts to the heart of the matter in oral argument without worrying about the niceties of the law. There is no beating around the bush. The bird is flushed out immediately. To really appreciate Thurgood Marshall’s talent, you have to hear his voice in oral argument, or hear him announcing his dissent from the bench in Allen Bakke’s case, October Term 1977, also available on the Oyez Project. Adding italics to his right cross to St. Clair’s jaw—“I said in this case. Can you make it any narrower than that?”—is a poor substitute for Thurgood Marshall’s vocal chords in action. Emotion, conviction, force, all are missing from the lifeless transcript—*Nota bene* Yale Kamisar.

Webster, “The Great Daniel,” in argument before the Marshall Court always cut to the jugular. It is a talent to be emulated. Would that we could hear him arguing the *Dartmouth College Case*. “It is, Sir, as I have said, a small College. And yet, *there are those who love it*—” *Eulogy on Daniel Webster, in Samuel Gilman Brown, 1 The Works of Rufus Choate 516* (Little, Brown 1862). “If a painter could give us the scene on canvas,—those forms and countenances, and Daniel Webster as he then stood in the midst, it would be one of the most touching pictures in the history of eloquence.” *Id.* at 517.

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68. Higginson, *Thurgood Marshall, supra* note 20, at 741 (“Constitutional reductionism is the reduction of a constitutional argument to a case-determinative point without slipping into ‘simplifying darkness’”) (quoting Justice Frankfurter).

69. “My style,” Daniel Webster said, “was not formed without great care and earnest study of the best orators. I have labored hard upon it, for I early felt the importance of expression to thought.” *1 Legal Masterpieces 467* (Van Vechten Veeder, ed., Callaghan 1912).


71. *Eulogy on Daniel Webster, in Samuel Gilman Brown, 1 The Works of Rufus Choate 516* (Little, Brown 1862). “If a painter could give us the scene on canvas,—those forms and countenances, and Daniel Webster as he then stood in the midst, it would be one of the most touching pictures in the history of eloquence.” *Id.* at 517.
James St. Clair taught yours truly Trial Practice at the Harvard Law School. As to Appellate Practice, you can judge St. Clair's performance off the Oyez Project for yourself. "I would not be here," he tells my students, as well as Chief Justice Burger, each Spring in Constitutional Law I at the LSU Law Center. We cover United States v. Nixon using the Nixon tapes in class—not the White House recordings, mind you, or the missing cut of eighteen and a half minutes. I mean the dulcet sounds of the Supreme Court, the Voice of the Past, off the Oyez Project. To my ear this is listening to Stravinsky's "Lullaby and Final Hymn" from his "Firebird Ballet Suite," a favorite recording of my law school days. I would listen to it on Edison's Phonograph, a record player, 33 1/3 rpm, at the Radcliffe College library. This required a brisk walk away from Langdell Hall, gladly taken, up Massachusetts Avenue. Stravinsky's "Lullaby and Final Hymn," the Supreme Court tapes bring to class. Let me repeat my own envious exclamation on hearing Jerry Goldman's Oyez Project: "MIRACLE!"

Chief Justice Burger has the last word in the Nixon Tapes Case,

72. Google "Stravinsky, Firebird," and hear "Lullaby and Final Hymn" for yourself, conducted by Igor Stravinsky (1882-1971), New Philharmonia Orchestra, Royal Festival Hall, London, "The Firebird & Les Noces—Stravinsky" (BBC/Opus Arte 1965). This, on another media marvel, the ubiquitous "You-Tube." I clicked on to this audio-visual recording while writing this essay on the Supreme Court tapes. I had never experienced "You-Tube" before. Langdell would have marveled at it. I saw Stravinsky conducting music I heard for the first time as a student at Harvard Law School. It was not in Professor Lon Fuller's Contracts casebook. The sound of the French Horn, when Stravinsky signals it in, is haunting to my memory. "MUSIC!" It overwhelms you. And Stravinsky leaves the podium, up through the orchestra, and out the back way, just as Professor Fuller ended his first-year Contracts class, via the back door of our Langdell Hall classroom. MEMORY!

73. I owe thanks to my teacher at Harvard Law School, Professor David Shapiro, for refreshing my geographical grasp of Cambridge, Massachusetts's streets after forty years. I couldn't remember how I got from Langdell Hall to Radcliffe College. Professor Shapiro, via the miracle of Alexander Graham Bell's telephone, straightened me out and put me on the right path: "North on Mass. Ave., left on Shepard." Google Earth's virtual tour of the route took me back in time and space. Amazing. And it was good to hear David Shapiro's voice after a generation. I owe to his labor law seminar my first academic publication following graduation. See Paul R. Baier, Rights Under a Collective Bargaining Non-Agreement: The Question of Monetary Compensation for a Refusal to Bargain, 47 J. URB. L. 253 (1970). I owe to Professors Benjamin Kaplan, Lon Fuller, Robert Keeton, John Dawson, Archibald Cox, Stephen Breyer, and David Shapiro the desire to become an effective teacher of the law. I have tried hard because of their crimson example.
October Term, 1973, his announcement of the Opinion of the Court, on July 24, 1974, another gift of the Oyez Project. We hear the fifteenth Chief Justice of the United States utter the words of the fourth, the Great Chief Justice, John Marshall: "Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury against Madison . . . in 1803, that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"lifting these words off the printed page and giving them life emphasizes their importance and helps students appreciate the principle of judicial review and judicial supremacy as they have come down to us through the ages. Thereafter, Boumediene v. Bush, October Term 2007, is assigned listening in Constitutional Law I at the LSU Law Center (Section 2, Mr. Baier).

C. SUBSTANTIVE DUE PROCESS—THE RIGHT OF PRIVACY


Yale Law School Professor Thomas Emerson confronts both Justice William J. Brennan, Jr., and Justice Hugo L. Black during the oral argument in the Connecticut Contraceptive Case, otherwise known as Griswold v. Connecticut. I am sure you have heard of it, but I am equally confident that most of my listeners here, or readers of Loyola Law Review’s Tug of War Symposium hereafter, have not heard Professor Emerson and Justice Black waging war with one another over the meaning of liberty and privacy. This is a favorite sound track of my teaching repertoire.

First, Justice Brennan asks Mr. Emerson about the meaning of the Connecticut statute at issue. Does it prohibit use of a contraceptive device for the prevention of disease? The ensuing colloquy is an object lesson in how to read statutes—not a matter to be taken lightly. Of equal importance, the Supreme Court tapes teach the necessity of anticipating argument from a variety of doctrinal angles. The tapes, as I said, invite our students into the Supreme Court’s litigation clinic, a pretty good place to exercise the legal mind and nurture professional skills, the latter of which is all the rave of late. Justice Byron White, as I knew him from life, took his exercise

75. 128 S. Ct. 2229 (2008).
playing basketball in the gymnasium on the top floor of the Supreme Court ("highest court in the land"). He too joins us in class in Baton Rouge, just as you will hear him *viva voce* at Loyola College of Law, New Orleans, via the Pine Street Sound Machine, O. W. Wollensak, Producer.77

There is nothing in Justice Douglas’s opinion for the Court in *Griswold v. Connecticut* about equal protection, but Justice Brennan raises that angle in our classroom. The Oyez Project, *nota bene*, takes us beneath the black ink of the Court’s opinions, exposing the tap roots of constitutional understanding.

**MR. EMERSON:** The major interpretation of the Connecticut statute is not in dispute, either.

**JUSTICE BRENNAN:** Professor, I’m sorry, I gather, looking at your brief at page nine, that this exclusion of sales for the prevention of disease is read into the fact that the statute deals only with use for the prevention of conception; is that it?

**MR. EMERSON:** Yes. In addition—

**JUSTICE BRENNAN:** I mean, has there been any court decision on—

**MR. EMERSON:** Not in Connecticut, your Honor. The Massachusetts courts, which have a somewhat similar statute, have interpreted their statute as not applying to the sale of contraceptives for the prevention of disease; and the Connecticut courts have cited with approval those Massachusetts decisions, so that we say that, in effect, the Connecticut courts have taken that position. But there is no direct ruling by a Connecticut Court on that point; that’s correct.

**JUSTICE BRENNAN:** Well, on the strength of that, wouldn’t you have had a rather compelling equal protection argument, if the Connecticut courts have gone that far?

**MR. EMERSON:** Well, you mean that—

**JUSTICE BRENNAN:** I’m just trying to find out why you haven’t made an equal protection argument which on the face of it, it seems to me might have considerable merit.

**MR. EMERSON:** Well, I didn’t, I wasn’t participating in the case at an

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77. “O. W. Wollensak” is my *nom de plume*, after O. W. Holmes, Jr., a favorite intellectual prop, and “Wollensak,” the machine on which I played the Supreme Court tapes at the 1980 Phoenix, Arizona, AALS demonstration. *See supra note* *. In speaking of the equipment I use in playing the tapes in class, I picked up my trusty Wollensak 2520 (it has since died) and introduced it to the crowd, saying: “This is my associate, Professor Wollensak, whose circle of constitutional acquaintances is wide indeed.” *Id.*
earlier stage, your Honor. But the equal protection—there are differences between married and unmarried persons, and between the use of devices for preventing conception and the use for preventing disease, and it’s conceivable that the State legislature could validly make distinction between them in some situations.

Let me pause the machine, as I do in class, to interject that Professor Emerson’s “conception” of “equal protection”—literally and legally, is quite different from Mr. Justice Brennan’s. It’s important to their teacher that my students know the life of Justice Brennan’s mind. Yale Law School Professor Thomas Emerson, *sotto voce*, is not in tune with Justice Brennan.

**JUSTICE BRENNAN:** It just struck me that, if it has merit, it’s a narrower constitutional ground, it would dispose of the statute, which is what you want to do.

**MR. EMERSON:** It would dispose of the statute, your Honor, that’s correct.

**JUSTICE WHITE:** Professor, Mr. Emerson, are these devices on sale in drugstores?

**MR. EMERSON:** There’s nothing in the record about that, your Honor. The question was asked about that at the trial and the evidence was excluded. I can say, however, from my own information that they are on sale in the drugstores for the prevention of disease. They are, at least technically, not on sale for any other purpose.

Query, was the trial court in error in excluding evidence of the availability of condoms in the drugstores? What about it, class? I like to think I am training my student lawyers to try constitutional cases, as well as to argue them in the Supreme Court when it’s their turn. Although they doubt it, some do try such cases in court and a few have reached Mt. Olympus. When they do they call me with the good news. This is the joy

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78. I have in mind my former student E. Wade Shows’s telephone call years ago. He had reached Mt. Olympus, briefing an equal protection challenge to a Louisiana statute for his chief Hershel Adcock, Esq., who argued the cause in the Supreme Court of the United States, on certiorari to the Louisiana First Circuit Court of Appeal. Wade tagged along and sat at petitioner’s counsel table. Adcock & Shows won a reversal of one sentence, and one citation. [Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977).] Wade’s success gives me joy, as well as a neat precedent to teach Churchill’s lesson (October 29, 1941, Harrow School) to my law students: “[N]ever give in, never give in, never, never, never, never—in nothing.” Wade’s precedent proves there is such a thing as law. You must fight for it, tirelessly. And then there is my former student Jelpi Picou’s success this past October Term, 2007, [Kennedy v. Louisiana, 128 S. Ct. 2641 (2008),] a long hard Eighth Amendment struggle, ultimately holding, 5 to 4, that a sentence of death for rape of a child under twelve years of age is cruel and unusual punishment. [Rehearing denied, 129 S. Ct. 1 (2008).] I appeared as counsel of record for *amicus curiae* Louisiana
of teaching. "A teacher affects eternity; he can never tell where his influence stops." But let's get back on Mount Olympus ourselves:

**CHIEF JUSTICE WARREN:** Openly and avowedly, they're on sale, not secretly.

Earl Warren's gravelly voice, his mispronunciation of "secretively," causes our class to smile. We see condoms oozing out of drugstore counters.

**MR. EMERSON:** They're not normally on display, your Honor. They're under the counter. But there's no problem of obtaining them if you ask for them. Certain devices must be sold on physician's prescription, of course, and can be obtained only on prescription from a physician. But others which do not require such a prescription can be obtained without at the drugstore.

The Supreme Court tapes also teach the vital force of judicial philosophy in giving shape to our law, especially constitutional law, where the interplay of black ink and intellectual personality—the human element of our law—is starkly visible to the eye, and sweetly audible to the ear. "[T]here is no guaranty of justice," Cardozo teaches us, "except the personality of the judge." I know of no better example than Justice Hugo L. Black's tug of war with Yale Law School Professor Thomas I. Emerson, counsel for Estelle T. Griswold, in the **Connecticut Contraceptive Case.** All professors of constitutional law are obliged to teach the case, one way or the other. As I said, this piece of tape is a favorite composition in the concert hall I conduct at LSU law school. Teachers of the Constitution are little Stravinskys, are we not? We compose our classes, do we not? Of course, Justice Scalia's *Firebird* is a favorite of many students. Others favor the contrapunto of Justice Brennan's *Contemporary Ratification;* Justice

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80. **BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS** 16-17 (Yale Univ. Press 1921) (quoting EUGEN ERLICH, FREIE RECHTSCINDUNG UND FREIE RECHTSWISSENSCHAFT (Ernest Bruncken trans., 1903), reprinted in part in IX SCIENCE OF LEGAL METHOD 47, 65 (Boston Book Co., 1917; Rothman Reprints, 1969)).

81. No doubt about it. Justice Scalia is *Guidice Sapiente* as I have dubbed him. This, after teaching with him at Siena, Italy, Summer Term July, 1991, and in a retrospective of twenty years. See Paul R. Baier, *The Supreme Court, Justinian, and Antonin Scalia: Twenty Years in Retrospect,* 67 LA. L. REV. 469, 502 (2007). And yes, my Scalia musings are assigned reading in my teaching. In this, I am following Holmes, who told his law clerks that his favorite author was, guess who?—Holmes, J.


You can read these pieces of black ink or hear the magnetic tapes for yourself. HeinOnline and the Oyez Project are at your fingertips at any Community Coffee House. Or, if you prefer, at the Napoleon House, 500 Chartres Street, cattycorner from the Louisiana Supreme Court, 400 Royal Street, the heart of the *Vieux Carré*.

You hear Hugo Black himself decrying the doctrine of substantive due process. This is better than listening to your professor talk about it. I speak only for myself. During the oral argument, Justice Black presses Professor Emerson, counsel for Estelle Griswold, to the limit on his due process claim. Emerson’s argument reminds Justice Black of *Burns Baking Company v. Bryan* 86 and kindred errors of the *Lochner* era. Hugo Black would have none of it:

**JUSTICE BLACK:** It seems to me what someone has done here deliberately is to try to force a decision on the broadest possible meaning of due process, speaking as a matter of substance, and to have us weigh facts and circumstances as to the advisability of a law like this rather than leaving it up to the legislature. . . . You pitch it wholly on due process, with the broad idea that we can look to see how reasonable or unreasonable the decision of the people of Connecticut has been in connection with this statute.

**MR. EMERSON:** We pitch it on due process in the basic sense, yes, that it arbitrary and unreasonable, and in the special sense that it constitutes a deprivation of right against invasion of privacy. The privacy argument is a substantially narrower one than the general argument.

**JUSTICE BLACK:** That’s a due process argument?

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86. 264 U.S. 504 (1924) (citing *Lochner v. New York*, 198 U.S. 45 (1905)) (Nebraska statute regulating the size of loaves of bread held unconstitutional as an arbitrary restriction of liberty).
MR. EMERSON: That's correct. They're both due process; they're both due process.

Trying to escape Hugo Black's clutches, Mr. Emerson hurriedly distinguishes *Lochner v. New York*\(^{87}\) and reminds the Court of *Meyer v. Nebraska*:\(^{88}\)

MR. EMERSON: But it is not broad due process in the sense in which the issue was raised in the 1930s. In the first place, this is not a regulation that deals with economic or commercial matters. It is a regulation that touches upon individual rights: the right to protect life and health, the right of advancing scientific knowledge, the right to have children voluntarily. And therefore, we say we are not asking this Court to revive *Lochner* against *New York*, or to overrule *Nebbia*\(^{89}\) or *West Coast Hotel*.\(^{90}\)

JUSTICE BLACK: It sounds to me like you're asking us to follow the constitutional philosophy of that case.

MR. EMERSON: No, your Honor, we are not. We are asking you to follow the philosophy of *Meyer* against *Nebraska* and *Pierce* against the *Society of Sisters*,\(^{91}\) which dealt with—*Meyer* against *Nebraska*—

JUSTICE BLACK: That's the one that held it was unconstitutional, as I recall it, for a state to try to regulate the size of loaves of bread—

MR. EMERSON: No, no—

JUSTICE BLACK: —to keep people from being defrauded; was that it?

MR. EMERSON: That was the *Lochner* case, your Honor. . . .

The Nebraska case Justice Black has in mind is not *Lochner v. New York*, not at all. Both the Justice and the Professor, not to put too fine a point on it, are all mixed up. The case is an old favorite of my teaching, *Burns Baking Company v. Bryan*—"The loaf is the usual form in which bread is sold," per Butler, J.\(^{92}\) Be that as it may, Elizabeth Black was in the wives' box when her husband, chastising the Court for its errant ways, announced his dissent in *Griswold v. Connecticut* orally from the bench. Mrs. Black recorded in her diaries, "Hugo was eloquent. Wish everybody

\(^{87}\) 198 U.S. 45 (1905).
\(^{88}\) 262 U.S. 390 (1923).
\(^{90}\) W. Coast Hotel, Co. v. Parrish, 300 U.S. 379 (1937).
\(^{91}\) 268 U.S. 510 (1925).
could have heard him. I think it will be one of his great dissents!"\(^{93}\) She was right. Judge for yourself:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but privacy. To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given.\(^{94}\)

And more:

I get nowhere in this case by talk about a constitutional "right to privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional provision.\(^{95}\)

Having dispatched the Court's reliance on the First, Third, Fourth, Fifth, and Ninth Amendments—all the hodgepodge of Justice Douglas's majority opinion—Justice Black puts his dagger into Justice Harlan's due process nonsense:

I do not believe we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not the power to interpret them.\(^{96}\)

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95. Id. at 509-10 (footnote omitted).
96. Id. at 513 (footnote omitted).
D. PROCEDURAL DUE PROCESS, PROOF BEYOND A REASONABLE DOUBT

4. In re Winship, October Term, 1969.97

The Due Process Clause of the Fourteenth Amendment really puts the Court on the brink. Whether “fundamental fairness” is the measure of “due process” is an old tug of war rehearsed on the Oyez Project. In re Winship, October Term, 1969, holds that in all criminal proceedings proof of must be “beyond a reasonable doubt,” and not a mere preponderance of the evidence. At oral argument, Justice Black decries any reliance on “fundamental fairness.” His due process philosophy abhors such a vagary. Listen to his mellifluous voice yourself—“sweet home Alabama”:

JUSTICE BLACK: I understood that the only question you brought up, the only question you raised, the only question the court decided was whether or not an infant could be found guilty of an offense on proof of a mere preponderance of evidence, or whether you had to prove it beyond a reasonable doubt.

RENA K. UVILLER, ESQ.: Yes, Mr. Justice Black. I’m only trying to, uh,—

JUSTICE BLACK: I say though, isn’t that the only question before us?

RENA K. UVILLER, ESQ.: Yes, yes it is—

JUSTICE BLACK: And whether the Constitution requires it be beyond a reasonable doubt?

RENA K. UVILLER, ESQ.: Yes, that’s right.

CHIEF JUSTICE BURGER: You know of any constitutional prohibition against this Court deciding that the preponderance of the evidence should be the rule in all full-scale criminal cases, in all the states? And in the federal courts? What in the Constitution would prohibit that?

RENA K. UVILLER, ESQ.: Nothing would prohibit it. I would think we’re determining what is the concept of a fair trial.

CHIEF JUSTICE BURGER: I’m not in favor of it you understand, I’m just asking whether we have the power to do it?

RENA K. UVILLER, ESQ.: Yes, you do I would think.

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Well, class, what provision of the Constitution requires “proof beyond a reasonable doubt” in all criminal cases? What about the Sixth Amendment? No, it’s not there. “Mr. Fessenden, where do you find the ‘Proof Beyond a Reasonable Doubt Clause’ in the Constitution?” Fessenden can’t find it. “Snodgrass, what do you say?” Snodgrass, no dullard, exclaims dutifully: “It’s in the Due Process Clause, Professor.”

The tapes, you will hear, provide instant professional reinforcement. This is a good thing because educational theorists tell us that reinforcement is important to learning. “Snodgrass, you are in good company.” Enter Mr. Justice Byron White:

JUSTICE WHITE: You’re relying on the Due Process Clause?

RENA K. UVILLER, ESQ.: Yes, I am.

JUSTICE WHITE: As compared to the idea of a fair trial, “fundamental fairness”?

RENA K. UVILLER, ESQ.: Yes.

Snodgrass got it right.

On the other hand, Stanley Buchsbaum, Esq., who argued the cause on behalf of the City of New York, stumbles over Justice Hugo Black’s mellifluous hypothetical:

JUSTICE BLACK: May I ask you one or two questions to clarify in my mind on what you are saying. Suppose this child had not been a child but had been twenty-five years old and charged with a crime. Do you think the Constitution requires the proof to convict—constitutionally. I’m not talking about anything but the Constitution—requires proof to be shown beyond a reasonable doubt of his guilt?

STANLEY BUCHSBAUM, ESQ.: To put it, Your Honor put it, “Charged with a crime—

JUSTICE BLACK: “Charged with a crime—

STANLEY BUCHSBAUM, ESQ.: “Charged with a crime—

JUSTICE BLACK: The measure of proof. Do you think that the Constitution requires that his proof of guilt be shown beyond a reasonable doubt, or that it could be satisfied by showing he’s guilty by a preponderance of the evidence?

STANLEY BUCHSBAUM, ESQ.: I have found no case that decides that issue. I would be inclined to think that this Court, probably, if faced with that issue, would reach the conclusion that it must be proof beyond a reasonable. I think it would say that—
JUSTICE BLACK: Well, they'd have to do that on the basis of a criteria that I don’t agree to, of course, which is a question of fairness. That we have a right to decide what's “fair,” and if we decide it's not fair, to say it's unconstitutional.

JUSTICE DOUGLAS: Not necessarily, because if you took the reasoning of Judge Fuld in New York, in his dissent in this case, you would say—or could argue at least—that the requirement of a finding “beyond a reasonable doubt” is necessary to maintain the integrity of the Fifth Amendment, unless a juvenile is not a “person” within the meaning of the Fifth Amendment.

“What, Fessenden, does Justice Douglas have in mind?” “How, Myers, does the standard of proof beyond a reasonable doubt maintain the integrity of the Fifth Amendment?” We are back in class.

E. EQUAL PROTECTION, VOTING RIGHTS

5. GRAY V. SANDERS, OCTOBER TERM, 1962.98

The Warren Court, we know, condemned the Georgia “county unit” system of voting for statewide officials as a denial of equal protection of the laws. It skews elections of, let's say, Georgia's Governor in favor of rural counties and peanut farmers. The voters in Fulton County and its great metropolis Atlanta are denied equal voting strength, as they far outnumber the sparsely populated rural counties, yet each is given equal voting strength in statewide elections regardless of population. Gray v. Sanders comes midway between Baker v. Carr, which sustained jurisdiction, and Reynolds v. Sims,99 which condemns on the merits. The equal protection principle of Gray v. Sanders as Justice Douglas voices it in the United States Reports is “one person, one vote.”100 All of which I expect my students to know, just as I expect them to know the multiplication tables.

But beyond doctrine, the sounds of Attorney General Robert Kennedy arguing Gray v. Sanders, his only appearance at the Bar of the Supreme Court,101 give us more—Inspiration, Youth, Hope, Conviction. Robert

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100. “The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.” Gray v. Sanders, 372 U.S. 368, 381 (1963).
101. “It had become a custom for Attorneys General to argue one case in person at the summit. Even had there been no such custom, Kennedy would have wished to appear before the Court.” ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 396 (Houghton Mifflin 1978).
Kennedy’s plea for equality in voting rights was his only appearance as a law in any court. There were more Kennedys in the Supreme Court than Justices when Bobby Kennedy argued the Georgia county-unit case. Archibald Cox, who was then Solicitor General, guided Attorney General Kennedy’s preparation, modeling at the highest level.

Our Master’s Voice—Holmes, remember—tells us that the only thing that matters when you finish law school is whether you have any “fire in your belly.” Inspiration counts for much in this fire department. Robert Kennedy’s peroration in *Gray v. Sanders* inspires. You hear youth, conviction, passion, hope. You hear Robert Kennedy’s soft knock, knock, knocking of the rostrum as he finishes his argument. You hear the great miracle of the Oyez Project sounding the “great miracle of the Constitution”:

**ATTORNEY GENERAL ROBERT KENNEDY:** When the Constitution was written we didn’t have decisions on due process or commerce between the states or freedom of speech. But we made important progress in all of these fields under the general umbrella of the Constitution and under the guidance of the Supreme Court. When George Washington was President, you didn’t have railroads, you didn’t have automobiles, let alone jet aircraft. But the great miracle of the Constitution is that we’ve been able to deal with the problems of the Twentieth Century, as well as the problems of the Eighteenth Century. These are the great problems that are facing the United States [knocking] at the present time. And this kind of invidious practice that exists now [knocking] and has existed before in the Georgia county-unit system, strikes [knocking] at the very heart of the United States. If we can give equal protection to those who feel they have been denied their economic rights, certainly we can give equal protection to those who have been deprived of the most basic right of all [knocking], which is the right to vote [knocking]. If we cannot

“The obvious field was civil rights. But ‘I had done so much in civil rights,’ Kennedy recalled. ‘I was up to my ears in civil rights . . . so I selected an apportionment case.” *Id.*

102. “The Kennedys, it was observed, outnumbered the justices.” SCHLESINGER, *supra* note 101, at 399.

103. “The best argument for you to make will be whatever you, yourself, find most persuasive . . . The burden of convincing the Court that is just wrong-wrong-WRONG will come at oral argument, for the point is just as much emotional as rational.” *Id.* at 398. Archibald Cox said of Robert Kennedy’s legal intuition:

He did not know a great deal about case law. But he had the quality Hugo Black had so strongly. I would present a technical problem to him in technical terms—very often a problem remote from his training or experience—and he could put his finger at once on the gut issue.

*Id.* at 401.
Beyond Black Ink: The Oyez Project

protect them, then the whole fabric of the American system, of our way of life [knocking], is irreparably damaged. Thank you.

An assassin's bullet muted Robert Kennedy’s voice, sadly. The Oyez Project saves it for us, gladly. 104

F. FREEDOM OF THE PRESS, PENTAGON PAPERS CASE

6. NEW YORK TIMES CO. v. UNITED STATES, OCTOBER TERM, 1970. 105

Now for our promised Pine Street reprise—legal fireworks—of Dean Griswold and Justice Hugo Black’s confrontation, forehead to forehead, 106 voice to voice, during oral argument in the Pentagon Papers Case. You will recall that Solicitor General Griswold sought a federal court injunction on grounds of national security prohibiting the New York Times and the Washington Post from publishing the Pentagon Papers, which were stamped “Top Secret” by the military. Well, what about the First Amendment? What about freedom of the press? Justice Thurgood Marshall fires the first rocket, loudly audible to the ear. This time his minimalism is aimed at Solicitor General Griswold. Let’s listen in:

JUSTICE MARSHALL: Well, wouldn’t we, then, be—the federal courts, be the censorship board?

104. I did not find Gray v. Sanders, October Term, 1962, on the Oyez Project when composing my Pine Street Phonograph. I used a recording I had mined myself out of the National Archives. Thereafter, I wired Goldman: “What, Gray v. Sanders is missing from the Oyez Juke Box? I mean Robert Kennedy’s only argument in any court as a lawyer under the guidance of Archibald Cox, Solicitor General, who got Bobby ready.” I begged, “Oh Great Wizard, call the tune up please.” The Oyez Man responded instantaneously. Said my new friend Jerry Goldman:

My dear Wollensak:

Plucking old chestnuts from the fire again! We just received our copy of the entire 1962 Term (220 reels of content!) And I shall cherry-pick this one for your pleasure. At our age, we take pleasure where we can. I will also advance it in the queue for transcription and alignment, using our new tools to enable you and your students to improve the record.

Email from Jerry Goldman, founder and creator of The Oyez Project, to author (Dec. 05, 2008 9:42 CST) (on file with author) (reprinted with permission).


106. Cf. Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (holding that Sixth Amendment right of confrontation "existed under Roman law... simply as a matter of Latin as well, since the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)").
MR. SOLICITOR GENERAL ERWIN N. GRISWOLD: That's a pejorative way to put it, Mr. Justice. I don't know what the alternative is.

JUSTICE BLACK: The First Amendment might be.

[General laughter.]

MR. GRISWOLD: Yes, Mr. Justice, and we are, of course, fully supporting the First Amendment.

[Laughter.]

Dean Griswold knows how to stand up to laughter, another essential professional skill:

MR. GRISWOLD: We do not claim, or suggest, any exception to the First Amendment, and we do not agree with Mr. Glendon, when he says that we set aside the First Amendment, or that Judge Gesell or the two courts of appeals in this case, have set aside the First Amendment by issuing the injunction which they have.

Well, Myers, how can it be that our friend the Solicitor General is not suggesting any exception to the First Amendment? We test Myers against Erwin N. Griswold, sixth in C. C. Langdell’s line:

MR. GRISWOLD: The problem in this case is the construction of the First Amendment. Now, Mr. Justice Black, your construction of the First Amendment is well known, and I certainly respect it. You say that “no law” means “no law,” and that should be obvious.

JUSTICE BLACK: I rather thought that.

MR. GRISWOLD: And I can only say, Mr. Justice, that to me it is equally obvious that “no law” does not mean “no law,” and I would seek to persuade the Court that that is true. As Chief Justice Marshall said so long ago, it is a Constitution that we are interpreting. And all we ask for here is the construction of the Constitution, in the light of the fact that there are other parts of the Constitution which grant powers and responsibilities to the Executive, and that the First Amendment was not intended to make it impossible for the Executive to function, or to protect the security of the United States.

Through Erwin Griswold, viva voce, we hear an echo of the past, the voice of the Great Chief Justice John Marshall: “[W]e must never forget that it is a constitution we are expounding.”

But is McCulloch v. Maryland an apt precedent? What is the place of John Marshall and James

McCulloch in the context of the New York Times and the Pentagon Papers? What is the role of the Necessary and Proper Clause, if any, in this Executive Branch/First Amendment clash of interests? Later on in my class at LSU Law School, Dean Griswold, “live and in person,” supplements his Pentagon Papers argument by telling us of the wisdom of Justice Jackson’s dissent in *Terminiello v. City of Chicago*, from Justice Douglas’s opinion of the Court in a free speech case that borders on a riot. The majority opinion, said Justice Jackson,

> [F]ixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society’s need for public order. . . . The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.  

A vital lesson, to be sure.

Next, the voice of Alexander Mordecai Bickel, Chancellor Kent Professor of Law and Legal History, the Yale Law School, counsel of record for the New York Times. Yale’s Professor Bickel is a sharp foil to Harvard’s Erwin N. Griswold. I want my students to hear the sounds of Harvard and Yale clashing at the Supreme Court—“the joust” of First Amendment principles. This is modeling at our lower level. At this point in class, I let the tapes do the talking. Things get started when one of my favorite, no-nonsense judicial personalities joins us in class. This is Justice Potter Stewart, who is pure Yale. I first laid eyes on him and heard his voice when I worked at the Court during the Bicentennial of the American Revolution a generation ago. I listened to many arguments during my year as a Judicial Fellow. They improved my mind. Justice Stewart, I submit, is a pretty good C. C. Langdell, albeit from Yale. He asks good questions of the lawyers at Court. All law professors use hypotheticals in class. Why not have Justice Stewart in class asking one of his own:

> **JUSTICE STEWART:** Let me give you a hypothetical case. Let us assume that when the members of the Court go back and open up this sealed record, we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of a 100 young men whose only offense had been that they were 19 years old,

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110. *Id.* at 14, 37 (Jackson, J., dissenting).
111. *Texas v. Johnson*, 491 U.S. 397, 418 (1989) ("We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment") (Brennan, J.).
and had low draft numbers. What should we do?

**MR. BICKEL:** Mr. Justice, I wish there were a statute that covered it.

**JUSTICE STEWART:** Well, there isn’t, we agree—or you submit—so I’m asking in this case, what should we do?

Over the years my students, in answering Justice Stewart’s question before they hear Professor Bickel’s response, sometimes insist that “freedom of the press” requires publication, with no ifs, ands, or buts. This is Hugo Black’s absolutism and it is a false teaching to my lights. I prefer Holmes’s, or Justice Jackson’s voice. Or listen to the New York Times’ counsel of record:

**MR. BICKEL:** I’m addressing a case which I am as confident as I can be of anything, your Honor will not find that when you get back to your chambers. It’s a hard case. I think it would make bad separation of powers law, but it’s almost impossible to resist the inclination not to let that information be published, of course.

**JUSTICE STEWART:** As you know—as I’m sure you do know—the concern that this Court has, term after term, with people who’ve been convicted and sentenced to death—convicted of extremely serious crimes—you know that the—in capital cases—and I’m posing you a case where the disclosure of something in these files would result in the death of people who were guilty of nothing.

**MR. BICKEL:** You’re posing me a case, of course, Mr. Justice, in which that element of my attempted definition which refers to the chain of causation—

**JUSTICE STEWART:** I suppose in the great big global picture this is no—this is not a national threat.

**MR. BICKEL:** No, sir.

**JUSTICE STEWART:** There are at least 25 Americans killed in Vietnam every week, these days.

**MR. BICKEL:** No, sir, but I meant it’s a case in which the chain of causation between the act of publication and the feared event—the death of these 100 young men—is obvious, direct, immediate—

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112. To quote:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

JUSTICE STEWART: That's what I'm assuming in my hypothetical case.

MR. BICKEL: I could only say, as to that, that it is a case in which, in the absence of a statute, I suppose most of us would say—

JUSTICE STEWART: You would say the Constitution requires that it be published, and that these men die? Is that it?

MR. BICKEL: No. No, I'm afraid I'd have—I'm afraid that, my inclinations to humanity overcome the somewhat more abstract devotion to the First Amendment in a case of that sort.

Another vital lesson—the interplay of black ink and humanity—from the voice of the past. Alexander Bickel, sadly, died much too young, at the height of his powers. But his mind lives on, on tape—Oyez, Oyez, Oyez!

Chief Justice Burger tunes in at this point. He alters the hypothetical a little bit:

CHIEF JUSTICE BURGER: Professor Bickel, let me alter the illustration a little bit, the hypothetical. Suppose the information was sufficient that judges could be satisfied that the disclosure of a link—the identity of a person engaged in delicate negotiations having to do with the possible release of prisoners of war—that the disclosure of this, would delay the release of those prisoners for a substantial period of time? Now I am posing that so that it is not "immediate." Is that, or is that not, in your view, a matter that should stop the publication, and therefore avoid the delay in the release of the prisoners?

MR. BICKEL: Mr. Chief Justice, on that question—which is, of course, a good deal nearer to what's bruited about anyway in the record of this case—I can only say that . . . I think Mr. Chief Justice, that, that is a risk that the First Amendment signifies that this society is willing to take. That is part of the risk of freedom that I would certainly take.

CHIEF JUSTICE BURGER: I get a feeling from what you have said—although you haven't addressed yourself directly to it—that you do not weigh heavily, or think the courts should weigh heavily, the impairment of sources of information, either diplomatic or military intelligence sources?

MR. BICKEL: Mr. Chief—

CHIEF JUSTICE BURGER: Now—

MR. BICKEL: I am sorry.

CHIEF JUSTICE BURGER: I get the impression that you wouldn't
consider that enough to warrant an injunction.

**MR. BICKEL:** In the circumstances of this case, Mr. Chief Justice, I think it—I'm perfectly clear in my mind that the President, without statutory authority—no statutory basis—goes into court and asks for an injunction, on that basis, that if *Youngstown Sheet and Tube Company v. Sawyer*[^13] means anything, he does not get it.

Remember, as I said earlier, it's important to know the Court's precedents. Or, as Colonel Wiener says, "Nothing shuts up a judge like an apt citation."[^14] Chief Justice Burger is unperturbed by Bickel's precedent. He plows ahead:

**CHIEF JUSTICE BURGER:** Well then, now let me—

**MR. BICKEL:** Now, whether under a statute, we don't face it in this case and I really don't know. I'd have to face that if I saw it—if I saw the statute—if I saw how definite it was.

**JUSTICE DOUGLAS:** Why would the statute make a difference? Because the First Amendment provides that "Congress shall make no law abridging freedom of the press"?

**MR. BICKEL:** Well—

**JUSTICE DOUGLAS:** You can read that to mean Congress may make "some laws" abridging freedom of the press?

**MR. BICKEL:** No, sir—only in that I have conceded, for purposes of this argument, that some limitation, some impairment of the absoluteness of that prohibition, is possible. And I argue that whatever that may be—whatever that may be—it is surely at its very least when the President acts without statutory authority, because that inserts into it, as well as separation of powers—

**JUSTICE DOUGLAS:** That's a very strange argument for *The Times* to be making, that Congress can make all this illegal by passing laws.

**MR. BICKEL:** Well, I really didn't argue that Mr. Justice. At least I hope not.

**JUSTICE DOUGLAS:** Well, that was the strong impression you left in my mind.

You can judge for yourself whether this Harvard/Yale tug of war over

the meaning of the First Amendment in the Pentagon Papers Case leaves a strong impression in your mind. Surely it adds life to our learning.

G. THE EXCLUSIONARY RULE

7. MAPP V. OHIO, OCTOBER TERM, 1960.115

The roots of Mapp v. Ohio lie deep beneath the surface of Justice Tom Clark’s opinion for the Court. Constitutional advocacy determines constitutional outcomes, usually. But sometimes the Oyez Project yields a blank tape, or almost a blank tape, or at best a cacophony of Court and counsel. We must look elsewhere to expose the roots of Mapp. Counsel for Dolree Mapp, A. L. Kearns, Esq., is none too clear as to whether he wants the Court to overrule Wolf v. Colorado.116 He doesn’t say so. Sharp questioning from Justice Frankfurter leaves Mr. Kearns scratching his head. He recurs to the facts. Only the American Civil Liberties Union, as amicus curiae, is heard on the Oyez Project urging that Wolf v. Colorado be reconsidered. Most of the Oyez audio concerns the scope of Ohio’s criminal obscenity statute as it reaches private possession in the home. On the other side, Gertrude Bauer Mahon, Esq., Criminal Courts Building, Cleveland, Ohio, tells the Court, “Now, we are relying on the Wolf case . . . the State of Ohio, . . . we have a right to rely on your decision in Wolf case and on your decision in the Roth117 case, if there is anything to the doctrine of stare decisis . . . .” The Court sits in utter silence. No justice challenges her reliance on Wolf v. Colorado in any way. The Exclusionary Rule of Mapp v. Ohio, respectfully, is an echo of the past not heard on the Oyez Project. To understand its origin, we must listen to the Texas voice of Tom Clark. He recurs to what Chief Justice Charles Evans Hughes used to say. The voice of the past thus echoes down to us for good or ill, as we have heard.

I have elsewhere reported a field trip to the Court and a conversation with Justice Clark in the East Conference Room.118 We were a small seminar: the Justice, a busload of law students, and their teacher. We asked Justice Clark what was the most difficult thing about being on the Supreme


Court. “Well, I suppose all the hullabaloo they make over you.” I brought a tape recorder along and asked Justice Clark whether I could record his remarks. He didn’t mind at all. At the time, I knew nothing of Paul Thompson’s The Voice of the Past: Oral History. “[H]istory can help people see how they stand, and where they should go.” Shortly after our taped conversation, Justice Clark died. He had given us the gift of his voice’s teaching. He talked about Mapp v. Ohio, the exclusionary rule, and the role of judicial heroes in giving shape to our law. Was Mapp the one opinion he was most proud of?

JUSTICE CLARK: I don’t know about Mapp being my most, the one I’m most proud of. I am proud of it, because the idea of Mapp just shocked me. When I was a kid I came out of the University of Texas. I went back to Dallas and tried to practice a little law and I picked up a few cases, and one of them was our cook’s. We had a cook—believe it or not—for seven dollars a week. We paid her a dollar a day. That was the going wage, for cooks. And her son was a nice little fellow, but got into trouble. They found a half-a-pint of corn whiskey, during prohibition, in his house he had on Elm Street. And they cut open the mattress; they didn’t have a search warrant or anything; they just took a knife and cut the mattresses open, took crow bars and pulled the baseboards away from the wall—just a terrible thing for these police officers to do. Then they carried the half-a-pint on a “silver platter,” as they called it, over to the federal court, not to the state court, or the city court, but to the federal court. And so I filed a motion to quash. And I think I was about like that fellow who was arguing Mapp. And Atwell said, Judge Atwell was the judge, and he said, “Aren’t you familiar with such-and-such case?” And I said, “No.” He said, “Well, that’s one of my cases. Mr. Clerk, take Mr. Clark back there in my chambers and show him Atwell No. 7.” I found out he had bound his opinions in Atwell 1, Atwell 2, Atwell 3 [laughing]—just like the U. S. Supreme Court does. And there was an opinion that said they would receive the proceeds of an illegal search which was committed by state officers or city officers, because the federals had no control over those officers, and it would be an untoward thing for a person to go free just because of some technicality. So the Silver Platter Doctrine—the idea being that the waiter carries things on a silver platter from the kitchen to the

119. Baier, supra note 118.
120. THOMPSON, supra note 57, at 7-8.
121. Id. at 225.

[T]he real justification of history is not in giving an immortality to a few of the old. It is part of the way in which the living understand their place and part in the world... And in giving a past, it also helps them towards a future of their own making.

Id. at 225-26.
dining room, and so you carried this whiskey on a “silver platter” over from the police department over to the federal court. Potter Stewart knocked that down in that case just before Mapp.¹²²

Let me interject that the Silver Platter Doctrine met its demise upon the convincing advocacy of Frederick Bernays Wiener, Esq., as well as the sturdy judicial personality of Potter Stewart.¹²³ Often constitutional advocacy and judicial personality work in tandem, voice to voice, in sounding constitutional outcomes. Sometimes, however, advocacy and judicial philosophy are at loggerheads, as we hear on the Oyez Project. United States v. Leon,¹²⁴ carves a “good faith” exception out of Mapp v. Ohio. Justice Brennan, dissenting, speaks of “the teaching of those Justices who first formulated the exclusionary rule . . .”¹²⁵ My mind drifts back to what Tom Clark told my students. I treasure the voice of that humble Texan’s teaching:

JUSTICE CLARK: I couldn’t understand why Wolf v. Colorado said that the Fourth Amendment applied to the states, but it just didn’t seem to go all the way—in fact it was just an empty gesture, sort of like what Chief Justice Hughes used to say: No use to have a Constitution—it’s pretty, got all sorts of nice fringes around it, but it doesn’t mean anything, just a piece of paper—unless you really live by it and enforce it. And so that’s true with Mapp and the Fourth Amendment.

IV. PERORATION

The Supreme Court tapes—the sounds of the Court in action, viva voce—proffer a deeper understanding of the Court’s published opinions and, beneath them, of the Court’s judicial process in constitutional adjudication. The Oyez Project, we have heard, takes us beyond, and beneath, Langdell’s black ink. In doing so it enlivens the human enterprise of law via the human voice.

I should it make clear, as I did twenty-five years ago—a rising Phoenix—that I am not advocating burning law reviews and contemporary successors to James Bradley Thayer’s monumental Cases on Constitutional Law, with Notes (1895), first in its field after Langdell trumpeted his

¹²². Interview with Tom C. Clark, Retired Associate Justice of the Supreme Court of the United States, East Conference Room, Supreme Court of the United States, Washington, D.C., May 3, 1977) (recorded with the permission of Justice Clark) (transcript and recording on file with author).
¹²⁵. Id. at 935 (Brennan, J., dissenting).
Let me add that I use the tapes sparingly. But like Stravinsky’s Firebird, every once in a while they add fire to my teaching. Justice Potter Stewart’s hypothetical case put to Alexander Bickel in the Pentagon Papers Case is a good example. I had a chance once in the Great Hall at the Court

126. SUTHERLAND, supra note 1, at 175 (quoting THAYER, supra note 63).
128. I’m no Oliver Wendell Holmes, Jr., by any measure, but my Collected Legal Papers would include, to name a rare few: The True Story of the Ohio Syllabus Rule, 1980 YEARBOOK SUP. CT. HIST. SOC’Y 21 (1980); Time and the Court, 38 LA. B.J. 9 (1990); Mr. Justice Blackmun: Reflections from the Court Mirabeau, 43 A.M. U. L. REV. 707 (1994); The Blue and Gray as One: Holmes and White on the Supreme Court, 24 LITIG. 76 (1998); Holmes and Honors Law at LSU—From the Great Hall to La Maison Française, 63 LA. L. REV. 53 (2003); Act IV, “Father Chief Justice”. E.D. White and the Constitution, 6 LOY. J. PUB. INT. L. 1 (2005); Of Bakke’s Balance, Gratz and Grutter: The Voice of Justice Powell, 78 TUL. L. REV. 1955 (2004); The Supreme Court, Justinian, and Antonin Scalia—Twenty Years in Retrospect, 67 LA. L. REV. 489 (2007). For Holmes’s legal papers, see OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (Harcourt, Brace & Howe 1920). Holmes has twenty-six legal papers and speeches in all.
129. HOLMES, supra note 128, at Preface (“these little fragments of my fleece that I have left upon the hedges of life”).
132. Martin Agronsky, CBS News, asked Justice Black during the first television interview ever made with a sitting Supreme Court Justice, what he meant when he said, “It is my belief that there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be ‘absolutes.’” Elizabeth Black in her memorial portrait records that, “Hearing Martin’s question prompted a smile from Hugo, and he reached for the Constitution he always carried in his pocket, opened it, and began to instruct his listeners on how to read the Constitution.” Eliza beth Black, Hugo Black: A Memorial Portrait, YEARBOOK 1982, SUP. CT. HIST. SOC’Y 72, 77 (1982).
to tell Justice Stewart about my tapes method. This was at some reception, I forget which. I told him that each Spring Term at LSU Law he joins us in class to reprise his hypothetical to Bickel, testing the limits, if any, of the First Amendment: “You would say that the Constitution requires that it be published, and that these men die? Is that it.” I explained to him that before we hear the answer, I put a student in Bickel’s shoes at the podium of the Court—pedagogically speaking. We hear my student’s answer first.

What was Justice Stewart’s reaction? I had better quote him exactly as he put it to me in the Great Hall at the Supreme Court: “That’s a damn good idea.”

I have always admired Justice Stewart’s succinct and sound judgment. He was a good judge, just as he wanted to be remembered. As a teacher of the Constitution, I’m glad to have Justice Stewart in class, at Baton Rouge, challenging Professor Bickel and my students, just as Socrates challenged the young of his day, at Athens, circa 425 B.C.

A quarter of a century ago, at Phoenix, it was said I was hopelessly corrupting the young by virtue of the drama and emotion of the Supreme Court’s tapes. It was urged in all apparent seriousness that “we ought to strip it all off and pour [cynical] acid on constitutional law in order to stay with the scholar’s task as against that of the dramatic presenter.”

After another quarter of a century using choice fragments of Supreme Court Socratic tapes (SCST) in class, and assigning a few landmark oral arguments in full for listening after hours, I remain convinced that the sounds of the Supreme Court—the Voice of the Past—should be heard as a best practice in our classrooms, from Harvard Law School to Pepperdine on the Pacific—“from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific,” to conjure Chief Justice Marshall’s voice of the past. With great respect to the Old Guard, I say again that my students and their teacher prefer the life of the tapes to cynical acid poured on constitutional law.

Let me repeat myself after twenty-five years using the tapes method in class: “[A] great gap separates classroom constitutional law from courtroom constitutional law. A pure theorist might ask, ‘So what?’ I have no fancy explanation, except that the real world is more interesting to me,

133. Baier, supra note 4, at 635. I had better leave my nemesis unnamed, so as to avoid self-incrimination. “It was in this spirit of bulldog opacity that the scholastic philosophers failed to meet the challenge of the printed book in the sixteenth century. The vested interests of acquired knowledge and conventional wisdom have always been by-passed and engulfed by new media.” McLuhan, supra note 7, at 195.


135. “Perhaps the Old Guard is right; perhaps the old pedagogy is the best pedagogy. Each of us, however, is obliged to forge our own way.” Baier, supra note 4, at 635.
and I want to share it with my students.”

The Oyez Project is not only a magnetic attraction, it is a magical toolbox. “What one feature of my teaching do you find of greatest benefit?” I ask my students.

The first day I heard oral arguments before the Supreme Court on the tapes. This was my first real taste of the lawyer’s problems. It seems as though the first-year of law school is an endurance test, rather than a place to learn and perfect the skills and knowledge required to be the best lawyer you are capable of becoming.

Christopher Columbus Langdell, surely a discoverer, was criticized bitterly by colleagues and students alike for his new-fangled “case method.” He remained silent. Or, as was his best practice, he would ask a question himself of his interlocutor. This irritated people. For myself, I proffer the proofs of the Pine Street Phonograph. As Wigmore says, “Res ipsa locquitur”—the tapes speak for themselves.

Above all else, by way of peroration, may I say as a teacher of constitutional law that the merry tales of the Court, the melody, the laughter, the rhythmic dance, the music—the voices of the Supreme Court, past, present, and future, enable us to teach law, in Holmes’s phrase, “in the grand manner, and to make great lawyers.” “OYEZ, OYEZ, OYEZ.” I hear Holmes’s voice whispering in my ear: “I think it a noble and pious thing to do whatever we may by written word and molded bronze and sculptured stone to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget.”

136. Baier, supra note 4, at 625.
137. I am quoting a student’s response to my course questionnaire. One question asks, “What one class do you remember most and why?” A recent report of the Carnegie Foundation for the Advancement of Teaching urges “pedagogies of practice and professionalism that enable students to shift from the role of students to that of apprentice professionals.” SULLIVAN ET AL., supra note 11, at 77. The tapes method, inter alia, does just that.
138. “His lectures were followed by impromptu indignation meetings—’What do we care whether Myers agrees with the case, or what Fessenden thinks of the dissenting opinion? What we want to know is: What’s the Law?’” Samuel F. Batchelder, Christopher C. Langdell, 18 GREEN BAG 437, 440 (1906).
139. Langdell, wisely, may I say, ignored the opposition, although on many occasions he was hard pressed to explain his new method: “On these occasions he became absorbed in thought and seemed to falter. Usually he asked questions in reply.” Franklin G. Fessenden, The Rebirth of the Harvard Law School, 33 HARV. L. REV. 493, 501 (1920).
140. JOHN HENRY WIGMORE, IV A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2509, 3556 (Little, Brown, & Co. 1905). Of course, Wigmore was talking tort liability, while I am talking tapes.
8. **REID v. COVERT, OCTOBER TERM 1956, ON REHEARING, OCTOBER TERM 1957.**

I will leave the last selection of my RCA Victrola to a nestor of the Supreme Court Bar, Frederick Bernays Wiener, Esq., whom I was lucky in life to meet, first by ear in the Sound Recordings Division of the National Archives, later in person, with Doris Merchant Wiener at his side. They were living in sunny retirement in Phoenix, Arizona. Fritz Wiener was Note Editor of the *Harvard Law Review* at the height of the Coolidge Bull Market, shortly before the stock market crash of 1929. He was Reporter to the Supreme Court Rules Committee under Chief Justice Earl Warren in 1955. He was William Hubbs Rehnquist’s sponsor at the Bar of the Supreme Court when Assistant Attorney General Rehnquist, later Chief Justice of the United States, headed the Justice Department’s Office of Legal Counsel.

I had no letter of introduction, there was no advance telephone call when I knocked on Colonel Wiener’s door at 2822 East Osborn Road, Apt. 103, Phoenix, Arizona 85016. This was mid-way across America from Washington, D.C., where Fritz Wiener was a legend: “There Was a Giant in the Land.”

All I had were copies of Colonel Wiener’s oral arguments in *Reid v. Covert*—the first, defeat; the second, on rehearing, victory. Otherwise Frederick Bernays Wiener did not know me from Adam. The tapes got me across the threshold. Such is their magic. “All I want to hear

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143. Jacob A. Stein, a seasoned Washington, D.C., lawyer and a friend of Fritz Wiener, so captions his foreword to the revised edition of F. B. W.’s masterpiece, FREDERICK BERNAYS WIENER, EFFECTIVE APPELLATE ADVOCACY xvii (Christopher T. Lutz & William Pannill eds., Am. Bar Ass’n 2003). Says Stein’s opening:

1. I first recall seeing Fritz Wiener at Connecticut Avenue and L Street in Washington, D.C., in front of the Stoneleigh Court Building (no longer there), an attractive, old-fashioned apartment house converted, with few changes, into an old-fashioned office building. Although I did not know who Fritz was, I knew he must be somebody. His posture was militarily correct. He wore a cowboy hat that conflicted with his otherwise conservative 1930s double-breasted suit. He sported mustachios in an Oliver Wendell Holmes, Jr., style.

Id. A little later, Stein says of a passage from Colonel Wiener’s slashing review of McNaughton’s revision of *Wigmore on Evidence* “This passage brings to mind Fritz’s own definition of a perfectionist: A person (Fritz) who takes infinite pains himself and gives infinite pain to others.” Id. at xix (discussing Frederick Bernays Wiener, Book Review, Evidence in Trials at Common Law, 75 HARV. L. REV. 441 (1961)). Jake Stein’s foreword, like Fritz Wiener’s swallowtail coat, is extraordinary.
is the peroration in Covert II.”

Fritz Wiener welcomed me into his cozy study, lined with Selden Society volumes, of which he was Vice-President for the Americas, both North and South. “Uncle Fritz,” as he later signed off on his many letters to me, and precious Doris Merchant Wiener, as I came to know her—“best friend and most perceptive critic”—settled in. The tapes fused a friendship that lasted for over twenty years and saw many trips between Phoenix and Baton Rouge and vice-versa. I owe Fritz and Doris Wiener much. He is buried at the foot of Thunder Mountain, Sierra Vista, Arizona, at Fort Huachuca, a U.S. Army military intelligence base. I commend his sturdy advocacy, his old-school courtesy, his erudition, his inestimable wit to you. For legal scholarship, I recommend his Selden Society lecture, The Uses and Abuses of Legal History. Or for real power, try his Civilians Under Military Justice. Both are masterpieces of black ink. Frederick Wiener’s Effective Appellate Advocacy, originally published in 1950, is the locus classicus in its field, republished after fifty years by the American Bar Association. The original edition was literally stolen off library shelves. I paraded Colonel Wiener recently in an op-ed piece published in the Washington Times, the very day of the Hamdan argument in the Supreme Court. He was a ghost at the rostrum. I heard an echo of his voice as I sat in silence and listened to Neal Katyal’s oral argument at the Court.

But my time is fleeting and I must conclude our Pine Street Production. I give heartfelt thanks to the Loyola Law Review and its Tug of War Symposium Editor Samantha Siegel for inviting me and my RCA Victrola to join your table. I salute my new friend Jerry Goldman, wizard of the Oyez Project. I hope my listeners agree that the Oyez Project’s sound effects—carefully composed for class—are a veritable Socratic symphony. So too its dramatis personae—a living portrait gallery of the voice of the past.

144. This is how Fritz Wiener dedicated his BRIEFING AND ARGUING FEDERAL APPEALS (The Bureau of Nat’l Affairs 2001) (1967)—“For DORIS Best friend and most perceptive critic.” She was.


146. FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE (Univ. of Chicago Press 1967).


Let me conclude by playing Colonel Frederick Bernays Wiener’s peroration in *Reid v. Covert II*—the advocate’s dream come true. For me, this is Stravinsky’s “Final Hymn” from his *Firebird*. I proffer it as a final Advocate’s Prayer, off Pine Street, Loyola University New Orleans College of Law, Spring Term, 2009.

I hope you hear it the same way, and will keep the faith.

**FREDERICK BERNAYS WIENER, ESQ.** If your Honors please, [arranges papers] I have tried to argue this case with some degree of objectivity. I have tried to put out of mind as nearly as I can the callous and somewhat obtuse cruelty with which these two women were treated, because I felt that I could best discharge my duty to this Court, [sips water] as well as my duty to them, by dealing with this as a question of constitutional law, which calls for research, and reflection, and cogitation.

But I cannot conceal my concern over the seriousness of what’s involved, because this, this is about as fundamental an issue as has ever come before this Court, and certainly more vital and fundamental in the constitutional sense than any that’s been here for some years.

And it is fundamental and vital because it poses in stark immediacy the question of how far we may properly brace ourselves to withstand assault from without, and yet perhaps sow the seeds of our own disintegration from within. Because we have here, I think for the first time, a question involving the impact on the one hand of the supposed needs of the garrison state upon, on the other, “the immutable principles of a free nation.”

That’s a quotation, “The immutable principles of a free nation,” not from the writings of some cloistered libertarian philosopher, but from the institution of the Order of the Cincinnati, which was founded in 1783 by the Revolutionary officers who had pledged their lives and shed their blood that this country might be born.

And I think [drinks water] we will be aided in the resolution of that problem by considering two sentences from the late Mr. Justice Cardozo’s immortal classic, *The Nature of the Judicial Process*:
The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

If your Honors please, I have been enrolled among the body of defenders. I hope this Court will keep the faith.

If reading this you are not moved, you should hear it. If hearing it you are not moved, you are not a lawyer.