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BOOK REVIEW

ENHANCING THE LEARNING EXPERIENCE WITH CONSTITUTIONAL *CLIFFS NOTES*

MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS BEFORE THE SUPREME COURT SINCE 1955, Peter Irons and Stephanie Guitton Eds., The New Press (1993). 375 pp.

David Frey[*]

The initial study of constitutional law can be either one of the more vibrant intellectual pursuits upon entering law school, or one of the most tediously boring exercises imaginable. At times, it involves immersing one's self in philosophical debates which impact on most aspects of modern life. At other times, it seems to involve merely reading judicial opinions that are the literary equivalent of a mouth full of sand. Which of these two extremes describes one's opinion often depends on how a professor presented the cases, or how the cases were presented in a textbook.

A significant step towards making constitutional jurisprudence come alive for all is *May It Please the Court*, a set of six audio tapes and an accompanying book and transcript which present some of the most famous arguments before the United

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States Supreme Court in the last thirty-five years. The narrations and oral arguments were edited by Professor Peter Irons, a professor of political science at the University of California at San Diego. The Court opinions and case bibliographies were edited and compiled by Stephanie Guitton, who holds a law degree from the University of Poitiers in France and, at time of publication, was a doctoral candidate at the University of California at Berkeley.

Much has already been written about the controversial genesis of this book.[1] After reading the book and listening to the tapes, one has to wonder, "Why?" Nathaniel Hawthorne, in the preface to *Twice-Told Tales*, stated that "[t]he book, if you would see anything in it, requires to be read in the clear, brown, twilight atmosphere in which it was written; if opened in the sunshine, it is apt to look exceedingly like a volume of blank pages." But one hopes that this is not true of the Supreme Court's decisions. And, after reading the book and listening to the tapes, the Court's desire to limit access to the tapes is baffling. The tapes lend a touch of humanity to the Court and reveal a different dimension of constitutional jurisprudence. Moreover, as a matter of pure legal scholarship, *May It Please the Court* cannot be categorized as *The Brethren, Part II*. Instead, the work is intended to enhance the study of constitutional law by law students, legal scholars and members of the bar who may argue before the Court. In this context, the book easily accomplishes its goal.

May It Please the Court begins with an excellent overview of Supreme Court jurisdiction and process, which in many respects mirrors the introduction to a first-year law student's constitutional law course. The work touches on major cases in five areas of constitutional law: governmental powers, the First Amendment, criminal procedure, equal protection under the

[1] The tapes are kept in the National Archives and the Supreme Court allows use of these tapes only for private research and teaching purposes. Moreover, before gaining access to them, one must sign a "use restriction" contract indicating that no commercial use will be made of the tapes. Peter Irons, one of the editors of this book, signed this contract, but has since insisted that the contract is an invalid prior restraint on public materials. *See* James H. Andrews, *Tapes of Oral Argument May Cause Supreme Suit*, CHRISTIAN SCI. MON., Oct. 7, 1993, at 2; Maro Robbins, *"May It Please the Court" Doesn't Please the Court*, NAT'L L.J., Oct. 11, 1993, at 47.

Fourteenth Amendment and privacy rights. Each of these five sections is introduced by a short summary of the historical and legal framework in which the cases arose. More specifically each case is preceded by a brief summary, including a short historical perspective, the facts of the case, the decision and the legal and historical aftermath. Following this introduction is a transcript of the oral argument, accompanied by a narrator's commentary. The narrator introduces the various players, including their argument style and strategy. After the edited oral argument, the narrator summarizes the decision(s) and the legal and historical aftermath of the Court's opinion. Finally, edited versions of the opinions are reproduced.

The audio tapes are timed and indexed so that finding specific arguments is easy. The quality of these tapes varies depending on the year the case was argued. It is somewhat unfortunate that the publisher did not employ modern technology to clear up the fuzzy quality of many of the tapes. And, parenthetically, the editors might well have dispensed with the amateurish synthesizer music at the beginning of each tape.[2]

Some introductions to particular sections are more successful than others, which might have to do with the cases chosen by the editors. The first three cases, *Baker v. Carr*,[3] *United States v. Nixon*,[4] and *DeShaney v. Winnebago County Department of Social Services*[5] are grouped under the somewhat amorphous heading "Secure the Blessings of Liberty."[6] The explanation of how these particular cases are connected seems a bit strained. The authors posit that they put the Constitution to its "hardest test" by forcing the Court to balance governmental power against the rights of the people. This explanation is a bit overstated, especially when such cases as *Griswold v. Connecticut*[7]

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[2] Indeed, every time I started listening to the new side of a tape I half expected acrobats, clowns and circus dogs to start scampering through the room.

[3] 369 U.S. 186 (1962) (equal protection/voter apportionment); MAY IT PLEASE THE COURT 7 (Peter Irons & Stephanie Guitton, eds., 1993).

[4] 418 U.S. 683 (1974) (presidential immunity); MAY IT PLEASE THE COURT, *supra* note 3, at 23.

[5] 489 U.S. 189 (1989) (Fourteenth Amendment deprivation of liberty/due process); MAY IT PLEASE THE COURT, *supra* note 3, at 39.

[6] *See* MAY IT PLEASE THE COURT, *supra* note 3, at 3.

[7] 381 U.S. 479 (1965).

and *Brown v. Board of Education*[8] are missing, and when *Roe v. Wade*[9] appears in another section.[10]

Similarly, the grouping of the cases within the sections are not always perfect. For instance, there is an interesting comment by the editors[11] that Chief Justice Warren's opinion in *Terry v. Ohio*,[12] a case that explored the Fourth Amendment limitations on the police practice of the "stop-and-frisk," perhaps was influenced by criticism that he was soft on crime in light of his opinion in *Miranda v. Arizona*.[13] The insight of that comment, however, is weakened by the fact that the *Miranda* case, which was decided before *Terry*, is reproduced after the *Terry* opinion. Another example of questionable case grouping is *Loving v. Virginia*,[14] which is contained in the equal protection section.[15] The arguments which prevailed for the Lovings would provide an interesting contrast to *Bowers v. Hardwick*,[16] where similar arguments also could have been made for Michael Hardwick, whose case appears in the Privacy Rights section eighty-four pages later.[17] Of course, these are minor structural criticisms; indeed, the complexity of the constitutional issues in Equal Protection and privacy seem to make discerning bright-line distinctions difficult not only for editors of textbooks, but often for America's nine highest jurists as well.

What *May It Please the Court* does especially well is show the reader how oral arguments are presented to the Court, and what the Court does with those arguments. Before each argument, the editors' summary of the case includes which side prevailed. In close cases, I found myself reading the transcript and listening to the tapes to spot the flaw, if any, that may have led to victory or defeat. The first case presented, *Baker v.*

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[8] 347 U.S. 483 (1954); MAY IT PLEASE THE COURT, *supra* note 3, at 247.

[9] 410 U.S. 113 (1973); MAY IT PLEASE THE COURT, *supra* note 3, at 343.

[10] *See* MAY IT PLEASE THE COURT, *supra* note 3, at 5.

[11] *Id.* at 207.

[12] 392 U.S. 1 (1968); MAY IT PLEASE THE COURT, *supra* note 3, at 199.

[13] 384 U.S. 436 (1966); MAY IT PLEASE THE COURT, *supra* note 3, at 213.

[14] 388 U.S. 1 (1967); MAY IT PLEASE THE COURT, *supra* note 3, at 277.

[15] MAY IT PLEASE THE COURT, *supra* note 3, at 245.

[16] 478 U.S. 186 (1986); MAY IT PLEASE THE COURT, *supra* note 3, at 361.

[17] MAY IT PLEASE THE COURT, *supra* note 3, at 339.

Carr,[18] is a perfect example of how "20/20 hindsight" affects the reader. The transcript of the oral argument of Jack Wilson, who represented the State of Tennessee, serves as an example of how one should not present their case to the court. One wonders if, perhaps, Mr. Wilson was being paid like a modern-day Dickens—not necessarily for the content of his argument, but for the number of times he could repeat the phrase "may it please the court." Listening to Mr. Wilson on the audiotape is even more illuminating. His voice is arrogant and patronizing, something one would not glean from reading only the transcript.

Another example of an attorney unnecessarily antagonizing the Court is contained in *Cooper v. Aaron*,[19] where Richard Butler, representing a Little Rock school board that refused to obey Supreme Court edicts on racial integration, engaged in the following exchange with the Court:

> *Butler*: The point I'm making is this: that if the governor of any state says that a United States Supreme Court decision is *not* the law of the land, the people of that state, until it is really resolved, have a doubt in their mind and a right to have a doubt.
> *Warren*: I have never heard such an argument made in a court of justice before, and I've tried many a case, over many a year. I never heard a lawyer say that the statement of a governor, as to what was legal or illegal, should control the action of any court.[20]

Of course, the argument of the NAACP's attorney, Thurgood Marshall, won the day, and the Court ordered the Little Rock school board to integrate its schools.[21]

Another of the fascinating exercises prompted by *May It Please the Court* is spotting the Justices who have already made up their minds before oral argument even begins. Perfect examples are *Edwards v. Aguillard*[22] and *DeShaney v. Winnebago Department of Social Services*,[23] in which Chief Justice Rehnquist seemed to tip his hand. In *Edwards*, which

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[18] 369 U.S. 186 (1982); MAY IT PLEASE THE COURT, *supra* note 3, at 7.

[19] 358 U.S. 1 (1958); MAY IT PLEASE THE COURT, *supra* note 3, at 249.

[20] MAY IT PLEASE THE COURT, *supra* note 3, at 253.

[21] An interesting historical sidenote the editors provide is that, rather than obey the Court's decision, the school board closed the schools for over a year, until they were voted out of office. *Id.* at 256-57.

[22] 482 U.S. 578 (1987); MAY IT PLEASE THE COURT, *supra* note 3, at 75.

[23] 489 U.S. 189 (1989); MAY IT PLEASE THE COURT, *supra* note 3, at 39.

dealt with a 1982 Louisiana law requiring a "balanced treatment" of "evolution science" and "creative science" in biology courses, the following colloquy occurred:

> *Topkis*: All right. Now, I said before that this definition that Mr. Bird is so fond of, and I quote it— "origin through abrupt appearance in complex form of biological life, life itself, and the physical universe" —one thing we know about that collection of words is that it has never before been seen upon the face of the earth except in Mr. Bird's briefs .... Mr. Bird is a little slender to play Tweedledum, but that's what he's trying to do. He wants words to mean what *he* says they mean. That didn't fool Alice, and I doubt very much that it will fool this Court.
> *Rehnquist*: Don't overestimate us. *(laughter)*[24]

The Court eventually ruled 7-2 against Louisiana's law. One of the two dissenters was Chief Justice Rehnquist.[25] Similarly illustrative is *DeShaney v. Winnebago County*:

> *Court [Rehnquist]*: And under your theory, I take it, if two policemen see a rape and watch it just for their own amusement, no violation of the Constitution?
> *Mingo*: We would concede that there is no constitutional violation in that particular case.
> *Court*: You're arguing it as well as conceding it. *(laughter)*[26]

Chief Justice Rehnquist went on to write the majority opinion, which supported the view expressed in his hypothetical question.[27]

An equally fascinating aspect of the audio tapes is hearing the timbre of the different justices' voices. For instance, Justice Frankfurter's inflections are those of a careful man who must have worn a bow tie. The timbre of Justice Thurgood Marshall's voice, especially in his later years, reflects the struggles as a black attorney pushing the boundaries of a racist society throughout his personal and professional life. A real shock, however, was Justice O'Connor's voice, which I found to be surprisingly serene, and which must have the effect of calming attorneys arguing before the Court.

Another strong point of *May It Please the Court* is the

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[24] MAY IT PLEASE THE COURT, *supra* note 3, at 84 (Narrator's comments deleted).

[25] *Id.* at 85-86.

[26] *Id.* at 46-47.

[27] *Id.* at 48.

historical perspective it adds to the cases, and the fine editing of some of the more verbose opinions. Any student of constitutional law who was called on to recite the facts of *United States v. Nixon*[28] will appreciate that the editors have managed to reduce Chief Justice Burger's stultifying recitation of the history of the case into two, short understandable paragraphs. Moreover, the following summary really brings the case to life:

> The Court had decided. But would the president obey? Nixon exploded and threatened defiance of the Court's order. But it was too late. Three days later, the House Judiciary Committee voted to impeach the president for obstruction of justice. James St. Clair [the president's counsel] finally listened to Watergate tapes and discovered the "smoking gun," Nixon's personal Watergate cover-up order. His impeachment became a certainty. On August 8, 1974, Richard Nixon dictated an eleven-word letter: "I hereby resign the Office of President of the United States." The next day, he left the White House for the last time.[29]

Throughout the book and in the narration of the tapes, the editor's liberal bent is evident. It is no mistake that the book is dedicated to Justices Brennan and Marshall "with gratitude and admiration for helping to preserve our constitution as a living document that protects the rights and dignity of every American." Therefore, the editors' use of death penalty statistics since *Gregg v. Georgia*[30] to persuade the listener that the Court's decision was incorrect is not surprising. Indeed, the editors' historical wrap-up and use of numbers is more persuasive than some of the oral argument presented to the Court in *Gregg*:

> [Brennan and Marshall's] retirements in 1990 and '91 removed the only voices and votes against capital punishment from the Supreme Court. Since the *Gregg* decision, more than twenty-five hundred defendants have been sentenced to death. Most are poor, half are black, many are retarded, and some are juveniles. Critics have charged that the Court is insensitive to these factors. But the Court has rejected claims that poor defendants have a right to good law-

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[28] 418 U.S. 683 (1974).

[29] MAY IT PLEASE THE COURT, *supra* note 3, at 33. Another of the strong summaries is found in Gregg v. Georgia, 428 U.S. 153 (1976), a case upholding Georgia's guidelines for juries asked to impose the death penalty. *See* MAY IT PLEASE THE COURT, *supra* note 3, at 229.

[30] 428 U.S. at 153; MAY IT PLEASE THE COURT, *supra* note 3, at 229.

> yers and that southern white juries are biased against blacks. And the Court has approved the execution of mentally retarded and juvenile defendants.
> No country has more prisoners awaiting execution than the United States. Capital punishment has increased in frequency and controversy since the Supreme Court decided that the death penalty does not offend the Constitution.[31]

The most powerful aspect of *May It Please the Court* is the oral arguments that were made for and against civil rights and affirmative action laws. The best, and most volatile, example occurs in *Regents of the University of California. v. Bakke*.[32] This case is fascinating on at least two levels. First—arguments made by Bakke's counsel—the difference between "goals" and "quotas" continue to be vigorously debated by today's intelligentsia.[33] Second, Justice Marshall's reaction to the argument against set-asides is significant:

> *Narrator*: Justice Thurgood Marshall asked whether [the school] could reserve even *one* place for minorities.
> *Marshall*: So numbers are just unimportant?
> *Colvin*: The numbers are unimportant. It is the principle of keeping a man out because of his race that is important.
> *Marshall*: You're arguing about keeping somebody out, and the other side is arguing about getting somebody in.
> *Colvin*: That's right.
> *Marshall*: So it depends on which way you look at it, doesn't it?
> *Colvin*: It depends on which way you look at it. The problem . . . (Marshall: It *does*?) The problem . . . (Marshall: It *does*?) If I may finish . . . (Marshall: It *does*?) The problem, the problem is . . .
> *Marshall*: You're talking about your client's rights; don't these underprivileged people have some rights?
> *Colvin*: They certainly have the rights to compete . . .
> *Marshall*: To eat cake.[34]

The most horrific arguments, by contrast, were those in the interracial marriage case of *Loving v. Virginia*.[35]

> *Hirschkop*: [T]hey wanted to preserve the racial integrity of their citizens. They wanted not to have a "mongrel" breed of citizens. We find there no requirement that a state shall not legislate to prevent

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[31] MAY IT PLEASE THE COURT, *supra* note 3, at 238.

[32] 438 U.S. 265 (1978) (the affirmative action "set-aside" case); MAY IT PLEASE THE COURT, *supra* note 3, at 305.

[33] *See, e.g.*, HOWARD STERN, PRIVATE PARTS 79 (1993).

[34] MAY IT PLEASE THE COURT, *supra* note 3, at 312-13.

[35] 347 U.S. 483 (1954); MAY IT PLEASE THE COURT, *supra* note 3, at 277-89.

> the obliteration of racial pride but must permit the corruption of blood even though it weaken and destroy the quality of its citizenship. These are racial, and equal protection thoroughly proscribes these.
> *Narrator*: Hirschkop also quoted [the lower court's opinion].
> *Hirschkop*: He says: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents." And I needn't read the whole quote, but it's a fundamentally ludicrous quote.[36]

The State responded:

> *McIlwaine*: [T]he statute before the Court in this case . . . covers all the dangers which Virginia has a right to apprehend from interracial marriage . . . .
> *Warren*: There are people who have the same feeling about interreligious marriages. But because that may be true, would you think that the state could prohibit people from having interreligious marriages?
> *McIlwaine*: I think that the evidence in support of the prohibition of interracial marriages is stronger than that for the prohibition of interreligious marriages; but I think that . . .
> *Warren*: How can you say that?
> *McIlwaine*: Well, we say that principally . . .
> *Warren*: Because you believe that?
> *McIlwaine*: No, sir. We say it principally on the basis of the authority which we have cited in our brief.
> *Narrator*: Warren [went on to force] McIlwaine to confess that he didn't personally believe his argument.[37]

The arguments by McIlwaine and the lower court's opinion, which rarely appear in textbooks, are a paradigm of the strength of *May It Please the Court*. It is difficult to imagine someone making this argument in a classroom today. As the editors point out,

> Racial attitudes change slowly, but they have changed with the law. Fifty years ago, nine out of ten Americans opposed mixed marriages. Recent polls show only one in four are still opposed, most of them older. There are now a million interracial couples in the United States, including Supreme Court justice Clarence Thomas and his wife.[38]

But only through this sort of historical context will we understand the attitudes of the day, more fully understand the Su-

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[36] MAY IT PLEASE THE COURT, *supra* note 3, at 280.

[37] *Id.* at 281-83.

[38] *Id.* at 286.

preme Court opinions and hopefully learn from them.

In summary, *May It Please the Court* is an especially valuable tool for those teaching or learning constitutional law. Classes in basic constitutional law, civil liberties and criminal procedure are notorious for having ambitious curricula which cannot be fully covered. They tend to either cover a large number of cases in a relatively short period of time, or skip important cases toward the end of the semester. Accordingly, trying to interpret Supreme Court opinions without any historical background is a much more difficult, if not a futile, exercise. This work solves that problem. The editors also have done an excellent job of cutting through a lot of the superfluous language of the oral arguments and Supreme Court opinions. *May It Please the Court* could not be utilized to teach a constitutional law course on its own, but that is not its aim. At worst, the work might be characterized as the equivalent of constitutional *Cliffs Notes*.[39] It is a tool to enhance the learning experience and to provide a historical, philosophical and factual background to the Court's decisionmaking process. Viewed in that light, *May It Please the Court* is an important work. Perhaps it will spur the Court to abandon its desire to become an intellectual cloister.

AUTHOR'S NOTE

Between the time this Book Review was first written and published, the Supreme Court announced that it was removing all restrictions on the use and copying of all its oral argument tapes. Any member of the public is now welcome to go to the National Archives in Washington, D.C., with recording equipment, or can pay $12.75 for each 1 hour tape. One publisher has already announced that it plans to offer the Supreme Court arguments on CD-ROM,[40] and there is talk of making the book into a television series on public television. Although the Court provided no reason for lifting the restrictions, there

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[39] As such *May It Please the Court* might be helpful to at least one of the newer justices in catching up with Supreme Court jurisprudence, as it contains an excellent summary of *Roe v. Wade*.

[40] *See* Linda Greenhouse, *Supreme Court Eases Restrictions on Use of Tapes of Its Argument*, N.Y. TIMES, Nov. 3, 1993, at A22.

is little doubt that *May It Please the Court* was the impetus for the justices' change of heart. Whatever the arguments as to the quality of this book, the fact that it caused the Supreme Court to give unprecedented access and use to its audiotape collection marks the work as an extremely important contribution to legal scholarship.