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Telling Stories about Constitutional Law

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TELLING STORIES ABOUT CONSTITUTIONAL LAW*

*by L. H. LaRue***

Mr. Mike Skarda: Good afternoon. Welcome to today's colloquium sponsored by the Texas Tech Student Bar Association. Before we begin, I should convey that immediately following the lecture, everyone is invited to find their way to the back for a cup of coffee and to meet the LaRues. At around 3:30, those who are interested should proceed up to room 202 for a question and answer session with our guest.

One final short note: I am sure that you all have noticed the court reporter. The Texas Tech Law Review is pleased to announce that it will be publishing the address as delivered in Volume 26, Book 4.

Our guest lecturer holds the Class of 1958 Alumni Professor's chair at the Washington and Lee University School of Law. Professor LaRue's association with W & L did not begin in a professional capacity, though, but rather, in 1955, when he joined the entering freshman class. After receiving his bachelor degree in 1959, he made his way north to Harvard, where three years later, he received his law degree.

Professor LaRue's academic credentials aside, perhaps the most distinguishing feature to his biographical sketch is his nickname, Lash. Those fifty years or older in the audience will, I am sure, recall Lash LaRue, the western movie star, adorned in black garb and equipped with his lone weapon of choice, a black whip used to facilitate justice frontier-style. Even though LaRue acquired the title early in life, you cannot convince Washington and Lee law students of this, for they believe that it was the ingenuity of their predecessors which concocted the name Lash, as everyone supposedly receives at least one lashing from a LaRue exam during their law school career.

The lashings received these days come in constitutional law, legal writing, criminal justice, and jurisprudence. Professor LaRue's publications, in addition to his numerous law review articles and book reviews expounding on the interrelationship between law and literature, include *A Student's Guide to the Study of Law*, *Political Discourse: a Case Study of*

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the Watergate Affair, and work as coeditor of *Rewriting the History of the Judiciary Act of 1789* by Wilfred J. Ritz.

Today's lecture focuses upon Professor LaRue's forthcoming book published by Penn State Press, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority*.

And with that in mind, please join with me in welcoming Professor Lash LaRue.

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Let me begin by thanking you for your kind invitation. Your kindness has made it possible for me to come here and make new friends. In the short time that I have been here, I have managed to talk with a fine group of people who have shared with me their thoughts about law and about teaching. I am grateful; I am in your debt, and I will try to repay that debt by telling you some of my thoughts about constitutional law.

When Mike Skarda asked me to come speak about constitutional law, I told him I had a new book forthcoming, *Constitutional Law as Fiction*, and that I would be glad to come and talk about it. But you need not worry about one thing: I do not intend to inflict upon you a book review of my own book. I am not that shameless, shameless though I am. Instead, I want to share with you some of the theses that have generated my book so that you can understand the pleasure I had in writing it.

My thesis is very simple: Judges tell stories in their opinions; these stories are quite often fictional stories, and, finally, these fictional stories are crucial to the law. Indeed, I wish to contend that some of the most fundamental principles of constitutional law rest upon fictions. However, I don't want to make fun of this. It is a comfort to me, and there is a joy to be had in knowing that some of our greatest of judges are like some of our great novelists. They tell us stories—fictional stories—and they tell us these fictions so that they can tell us the truth. Let me repeat that statement: They tell us fictions so that they can tell us the truth.

As you can tell, I am not one of those who considers the word "fiction" a pejorative. There are those who say that fiction is bad and fact is good. I do not endorse this pejorative view, because I do not believe that the gap between fact and fiction is the same as the gap between true and false. Instead, I believe that the distinction between fact and fiction is different from the distinction between true and false. I am among those who believe that Sophocles and Shakespeare have more to teach us about the human heart than do all the psychologists and sociologists who have ever written. I also believe that if you want to learn about politics, you would do better by reading Shakespeare's history plays than by reading works classified under the title of political science.

Now, I do not wish to contend that our judges are the equals of these great tragedians, but even so, they do share something with these poets, which is that the ratio of true and false in what they have to say is not the same as the ratio between fact and fiction. I could go on a long way in this argument, but I fear that if I argue too much more, I will cross the line that separates argument from preaching. Consequently, I wish to break off from the argument stage of this lecture and start telling you a story.

What I wish to do next is read to you some excerpts from a very famous story. It was published in the *United States Reports*, the author is Hugo Lafayette Black, and the case is *Everson v. Board of Education*.[1] As many of you may already know, the *Everson* case is one of the fundamental cases of First Amendment jurisprudence; it laid the foundation for our current understanding of the Establishment Clause. According to that Clause, the duty of the Congress (and by interpretation, the whole of government—local, state, and federal) is to not establish religion. Of course, this duty is ambiguous. What is a religion? What is it to establish one?

Hugo Black set forth some general principles that should govern this matter, and perhaps before I get to his story, I should remind you of his statement of principle:

> Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.[2]

I have started by reading the first three sentences from a very famous paragraph; perhaps you have read it. If you are familiar with the First Amendment law of the Establishment Clause, you know that these principles that Hugo Black established have become ever more technical in modern law. Now there is a three-part test, as announced in *Lemon v. Kurtzman*,[3] from which an elaborate amount of technicality has developed, but none of that, of course, is Hugo Black's fault. He established principles. It is later judges who made the law technical.

The story that Hugo Black generated to support these principles is a story that contains both fact and fiction, and it is a story that is both good and bad. Some of the fiction is good and true, and some of the fiction is bad and false. And as I begin plunging into the *Everson* case, let me say that I chose this case precisely because I admire Hugo Black so much. He is one of the greats. My choice of the *Everson* case is one of my ways of testifying that I have not come to debunk. I honor this story as great, even

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1. 330 U.S. 1 (1947).
2. *Id.* at 15.
3. 403 U.S. 602 (1971).

though at all points it does not please me. I do not wish to measure greatness by terms of things which please me; even the parts of the case that do not please me are great.

As I begin, let me point out a remarkable fact about this opinion. It begins on page one of Volume 330, and because there is some of the normal prefatory material that the reporter puts in, Hugo Black's opinion itself starts at page three and then ends on page eighteen. It is a mere fifteen pages and twenty paragraphs, and would that it were true that constitutional law were so written today. There is hardly a judge alive who could write what Hugo Black wrote in forty-five pages, much less in fifteen. I could go on about that, but I am sure you would say it is just an old man being grumpy about the fact that things were done better when he was young; true enough, but it has been downhill.

The opinion begins the way many opinions do, with the standard paragraph that tells you the facts. A New Jersey statute authorized school boards to provide for transportation to schools. Although there is nothing novel in such a statute, the New Jersey statute was somewhat novel in that it said the school board could provide for transportation to private schools as well as public schools. The board did so. The method chosen for providing transportation was to take advantage of a very good and efficient public bus system; parents received reimbursement for the expenses that their children incurred in buying the bus tickets. The interesting thing about the case is that these benefits were provided to the parents of children who went to Catholic parochial schools.

The basic issue in the case was whether the principles that Hugo Black announced, which I alluded to above, led to a declaration that providing transportation for children to Catholic parochial schools is constitutional or unconstitutional. The Court unanimously agreed that the principles that Hugo Black enunciated were good. However, they then split five to four on the result in the case, and on the application of these principles to the facts. Hugo Black said that the transportation was okay, and he had a majority. There were four dissenters.

The second paragraph states another thing that very commonly appears at the beginning of the case, the procedural history of the case. Mr. Everson sued, won in the trial court, lost on appeal before the highest court of New Jersey, and then took his case to the Supreme Court. So far, so good; not much of a story, and no particular fictions.

At this point, there is a digression, from our point of view; Hugo Black, in his third paragraph, states things that are not at issue. There are some equal protection problems in the case, but Hugo Black says that these issues were not raised by the parties and thus are not at issue. In the fourth through the eighth paragraphs, he discusses a due process issue, but that too is a digression from the topic that I wish to discuss in this lecture.

In the ninth paragraph, Black returns to the principal issue for which the case is famous, the Establishment Clause. Now, at this point, I am ready to begin discussing Hugo Black's fictional story, and so perhaps I should say something about my use of the word "fiction." I don't mean anything complicated, or even anything particularly theoretical, about that. I mean nothing more than what one child tells another: "You just made that up; it didn't really happen." Or, as my dictionary puts it, a fiction is produced by the imagination and is not necessarily based upon the facts. You can choose either the dictionary definition or the colloquial definition; either will do for today.

There is a second thing that I wish to say about my use of the word "fiction." I do not mean to establish a dichotomy. It is not the case that any particular story either is or is not a fiction; rather, there is a continuum, with most stories containing some fact and some fiction. It is the relative proportion of those that should interest us, and the ways in which the fiction can contribute to the truth.

With this definition out of the way, let us begin with paragraph ten on page eight, where Black sets out to give us the historical background of the Establishment Clause.

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.[4]

Consider carefully, if you will, this wonderful language purporting to be a factual history, and see if you can discern within it some fiction. Ask yourself: Why did a large proportion of the settlers come to this country? We simply do not know. If you stop and think, there is simply no evidence. A large proportion of the settlers who came to this country did not leave us diaries and letters in which they explain why they came. Furthermore, even if they had left diaries and letters, would we be able to trust them? Some of the most egregious lying that people do is to their diaries. If you have kept one, perhaps you can admit that.

The second thing to focus on in this story of persecution is that Hugo Black tells us a story about religious war. But were those wars purely religious? Did not economics, politics, greed, and the normal sad state of the human soul contribute? Was religion the excuse that generated the propaganda that accompanied those wars, or was religion the cause of those wars? Ladies and gentlemen, I do not know the answer, and I won't

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4. *Everson*, 330 U.S. at 8.

pretend to offer one, but I can report to you that the answer to that question is a controversial, complicated, historical problem. Hugo Black, with great eloquence, swept past these difficulties and declared that those persecutions were "generated in large part" by religious establishments.[5] Unfortunately, it is true that persecuting seems natural to miserable creatures such as ourselves. Our century has surely seen as much persecution as any century, and the secular murderers, be they on the left or on the right, are equal in number to the religious murderers.

After those two sentences comes one of the great sentences of Hugo Black's story, and I hope you share with me an appreciation of just how good it is.

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects. Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.[6]

Surely one can quibble, but surely quibbling is idle. One could quibble by saying that this magnificent sentence may be the truth, but not the whole truth. But such quibbles are misplaced. The sentence is so magnificent that logical quibbles seem totally out of place. Indeed, I wish to praise that sentence by echoing the language that Matthew Arnold used to praise Homer, when he said that Homer's language was eminently rapid, was eminently plain and direct, was plain and direct both in its syntax and in the substance of ideas, and was eminently noble. Hugo Black is one of the few people who has ever bore the title "Judge" for whom such praise would not provoke laughter. The language is so powerful, so moving, that it persuades.

The next section of Justice Black's fiction begins this way:

> These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend.[7]

Fair enough; accurate enough; but there is a certain droll quality in the word "practices." In the previous paragraph, establishing churches and persecuting dissenters was something that people did. It was an active force let loose in the world. Now, it has become something abstract, like practices. The point of it as a story is, of course, that the colonials now are

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5. *Id.*
6. *Id.* at 9.
7. *Id.*

somewhat innocent. They didn't do it; the practices did it. And these practices are snuck into their charters by the mean old Brits, who are cunning enough and canny enough to do such a thing, and thus these terrible practices were let loose here in America.

Well, that is a wonderful story, but it ignores one possibility that some historians might think is slightly more plausible, which is that the colonials were not fleeing from religious bondage, as Hugo Black would have it, but that they were fleeing *with it.* When the Puritans came to New England, they came with religious bondage as their cheap hope and desire for life. They did not intend to flee from the religious bondage; they merely wished to choose a different form of religious bondage.

This part of the story does have, as I say, a quality of fiction, but after making the colonials innocent, Black gains the narrative advantage of having a fictionally more plausible way out. The colonials are innocent, and so the twelfth paragraph can begin this way.

> These practices became so commonplace as to shock the freedom loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment.[8]

Righteous indignation, as you all know, is a powerful force once set loose upon the world, and so the innocent colonials who have been victimized by these "practices" can become shocked and feel abhorrence. If they are shocked and feel abhorrence, then the next part of the story must be an account of how the dynamics of "abhorrence" and "indignation" will play out. As Hugo Black says, no one locality and no one group can rightly be given entire credit; but then he tells a story that does give most of the credit to one locality, Virginia, and most of the credit to a group of two, Madison and Jefferson.

He put it as follows:

> The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion does not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When

8. *Id.* at 11.

> the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson.[9]

The story here is of a leader who puts out a call to which people respond. When Jefferson and Madison speak, the people of Virginia hear and agree. If so, ladies and gentlemen, this event differed from every other event in the history of our species. There is always a difference between leaders and followers, in that leaders understand their proposals differently than their followers do. Eighteenth century Virginia was not a uniform and homogenous society. It was split on the grounds of class, on the grounds of religion, and on many other grounds. And I think we can know, without too much investigation, that different people understood the proposal differently. It always, I am willing to assert, happens that way.

Justice Black's story about the politics of disestablishing the Anglican church is a fiction because he leaves out so much of what actually happened. The most important thing that he left out was the alternatives that were on the legislative agenda. When the proponents of establishment saw that there was a chance it would be defeated, they did as proponents often do; they came up with an alternative, which was a scheme for multiple establishments. According to this alternative, everybody had to go to some church, but each got to choose which church. This alternative was hotly debated, and when it came down to the crucial point, the Baptists and the Presbyterians opted for no establishment instead of multiple establishments. Why? I can't give you anything that would not be a fiction of my own about the why. I suspect that there are several reasons.

First, there was a tax revolt. The tax in favor of religious establishment was attacked by some people simply because it was a tax; then, as now, citizens were happier when their taxes were being reduced rather than increased.

Second, who would administer the multiple establishment proposals? It would most likely have been the Anglicans because they were the traditional elite, and the Baptists and Presbyterians wouldn't have trusted them.

Third, there was also a very strong tradition within religious communities that any church that comes into affiliation with the state will be corrupted by the state. You are all familiar, perhaps, with the metaphor of the wall between church and state, which is commonly attributed to Thomas Jefferson. In Jefferson's version of the metaphor, the wall is supposed to keep the church out of the affairs of the state. The metaphor actually originated with Roger Williams, who established the Rhode Island Colony, and he used the metaphor to say that the state should be kept out of the

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9. *Id.* at 11-12.

affairs of the church. Using the common eighteenth century metaphors in which the garden was good and the wilderness was bad, he compared the state to a wilderness and the church to a garden, stating that the wilderness must be fenced out of the garden. So while Jefferson and Madison may have had secular goals in wanting to erect the wall, the disciples of Roger Williams had religious goals.

Fourth, there was a political theory about the importance of virtue. Those who wrote our Constitution believed that a democracy rests upon the virtue of its citizens, and that, in turn, virtue rested upon religion. It was precisely because religion was so important to democracy that the state shouldn't have been messing with it. The common rhetoric of today, that anything that the state does will be irremediably blighted, was a complaint made in those days about the relationship between the state and religion.

At any rate, all of the above reasons—taxes, distrust of those who were to administer, the metaphor of the garden and the wilderness, a political theology of virtue—and not any one reason in particular, generated the attack on multiple establishments. The only particular fictional question I really wish to raise is that if we had to construct a fiction about why nonestablishment succeeded in Virginia, to whom should we give the major credit? Should we give the credit to Madison and Jefferson, or should we give the credit to the Baptists and the Presbyterians? Surely, the credit should be shared. Madison and Jefferson made the proposals and wrote the laws, but they did not supply the political muscles. The number of Enlightenment philosophies of the sort that they represent could be counted on one hand, maybe two. The political muscle came from the Baptists and the Presbyterians.

Now that I have presented to you Justice Black's fiction, let me return to some of the themes with which I began this lecture and see if I can tie up the loose ends. For example, I hope that the foregoing illustrates what I meant when I said that judges tell fictional stories in their opinions. The foregoing doesn't prove that, of course, but it illustrates the nature of my claim by presenting to you an example of a fiction as it appears in a judicial opinion.

I also said that I did not intend to mock these fictions. You may doubt that I am not mocking, since the particular fiction that Justice Black tells reads more like a melodrama than like sober history. His story has three highly schematized parts: the Evil Europe from which the colonials fled; the Innocent Colonials who were victimized by practices that the mean old Brits snuck into their charters; and the saviors, Jefferson and Madison, who led the colonials into liberty. To be sure, this story is a long way from being good history, but these fictions have their truths.

Justice Black may not have identified the precise evil in a historically accurate way, but evil there was. The colonials were not innocent, but they

did have hopes, and a constitution is about hopes, not realities. The Constitution says what the drafters hoped would happen, and so I think due credit must be given to the innocence, as well as the guilt, of the colonials. As for the "saviors," Jefferson and Madison—they weren't the saviors of Virginia; other people deserve that credit. They do, however, deserve honor. They are greater than you and I, and I am willing to admit their superiority. Consequently, I think that we should admit the truth as well as the falsehood that is in Justice Black's fiction.

Another claim that I made early in the lecture was the claim that some of the fundamental principles of constitutional law rest upon fictions. To vindicate this claim, you need to ponder the relationship between Justice Black's story and the paragraph which sets forth his legal test for Establishment Clause problems. What is the relationship between the story and the test? The story tells you about the great danger of religion to the public peace. In Hugo Black's story, religion is a danger to peace and good order. Consequently, if you believe that story, you will be convinced that we need legal principles that will neutralize religion, isolate it, and keep it away from the public forum. Now, I do not come today to offer a solution to the Establishment Clause problem. That is not my thesis for today. My thesis for today is that our Establishment Clause jurisprudence comes from the persuasiveness of a story as told by Hugo Black, a story that has been retold by the Supreme Court over and over again, and a story that judges believe. If I have made that thesis plausible, I have carried, I hope, my main burden for today.

Let me now step back from, and say a few words about, what I see as the larger implications of my lecture. If you are persuaded by this particular lecture, you might then wonder how widespread is the phenomenon of which I speak. Well, the only way to proceed is for you to start looking for stories in opinions and start asking whether they might be both fictional and essential.

In my book, I talk about two stories that are sometimes not even seen as stories, because they are stories about constitutional law itself. In *Marbury v. Madison*, John Marshall tells a story about the necessity for judicial review.[10] He asserts that if the legislature is final as to the constitutionality of its own statutes, then the legislature can change the Constitution by merely passing a statute. He goes on to tell a story about the need for law to be unchanging, and not to be the subject of political whim. But, ladies and gentlemen, stop and think: If it is true that permitting the Legislature to be final entails that it can change the Constitution by passing a statute, then it will also be true that permitting judges to be final entails that they can change the Constitution by deciding a case. I

10. *See* 5 U.S. 137, 179-80 (1803).

will leave it to your constitutional law course to discover the facts: whether the Constitution has remained unchanging throughout our history, or whether judges have changed the Constitution through the process of deciding cases. I will remind you, however, that *Brown v. Board of Education*[11] and *Roe v. Wade*,[12] the two cases that established the unlawfulness of school segregation and the unlawfulness of prohibiting abortion, are cases that most people think changed the law. Whether the change was for better or worse, not many people dispute the fact of change.

Let it be granted, then, that we have change; what is the story we tell about change? In *McCulloch v. Maryland*, John Marshall tells us that the story of change is really the story of growth.[13] The story of change as growth is a story that you have heard since your first day in law school; you heard sentences early on that state "in the development of the common law." The story of growth rests on an interesting metaphor. Is the law like a tree? Does it grow? The facts of change are different from the facts of growth. Growth is an orderly process; you have a seed that provides the DNA and the DNA generates the tree. If our law has changed as dramatically as some of us think it has, sometimes changing course and constantly discarding revered precedents, then the metaphor of growth may also be a fiction.

However, I don't want to criticize John Marshall for writing fiction. Indeed, I do not see how one can interpret the Constitution without writing some fiction. Constitutions—like contracts, like statutes, like deeds—are practical documents designed to produce practical consequences in the world. If you want to interpret a document that is a practical document, you have to ask yourself: What were they trying to do? To answer the question, "what were they trying to do," you have to tell the story about what they were doing. What problems did they face? Why did they think these problems needed to be dealt with? What solutions did they imagine would be keys that would open the lock, and so forth. You cannot interpret a practical document without telling some sort of story about how and why it came to be.

However, in telling the story of what they were trying to do, you have to ask: Who is the "they?" "They" are lots of different people, and "they" disagreed among themselves. The people who wrote our Constitution differed sharply about what they thought they were writing. When we tell the story, we can rub off the rough edges and declare some of them to be winners and some of them to be the true guiding light. If we polish up the stones and present them as jewels, we will have some pretty fictions.

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11. 347 U.S. 483 (1954).
12. 410 U.S. 113 (1973).
13. *See* 17 U.S. 316, 353 (1819).

I will end with a famous insult. Thomas Reed Powell was once one of our most distinguished constitutional lawyers; his honors included both the presidency of the American Association of Law Schools and the presidency of the American Political Science Association. One of Powell's favorite sayings, which he never wrote down, but which an oral tradition has preserved, is the following: "The law is something that relates to something else. If you can talk about something that relates to something else, without talking about the something else, then you have the legal mind."

In constitutional law, what is the something else? I would say persuasion. And I ask you: Do you think that we are doing a good job of persuading our fellow citizens about constitutional law? Please observe that everyone out there is interested in constitutional law and that they are all engaged in making constitutional arguments. If you read the newspapers published here in Lubbock, I am sure you will discover what I read in the newspapers published back in Virginia. There are letters to the editors about guns. The Second Amendment is important to a lot of people; I assume you know that. Furthermore, you should know that people out there care about abortions; people care about prayer in public schools; they care about affirmative action. Our fellow citizens care about all of these things, and they argue about them. They are busy "doing" constitutional law.

Constitutional law is not something that we lawyers do alone, nor should we. You can check me on this, but my memory is that the Constitution does *not* start off by saying, "We the Lawyers of the United States." Consequently, I think that one of our jobs is to persuade all of those people out there—how shall I finish this sentence? At the very least, we need to persuade them that we are not insane, which is what I sometimes think they believe about us lawyers. We need to persuade them about the core principles of constitutional law. Ladies and gentlemen, there is only one way to persuade our fellow citizens: not by engaging in policy analysis, not by talking about three-part tests, and not by propounding clever ways to balance fifteen different factors. If we are to persuade, we need to tell a good story.