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Equal Justice under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr. Tribute

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> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.[1]
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> How long? Not long. Because the arm of the moral universe is long but it bends toward justice.[2]
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> If we abdicate responsibility to address the difficult questions of our time, those in need of refuge from the torrents of political, economic, and religious forces will find no haven in the law and the law will no longer be supreme.... A judge must always be consumed by a passion for justice which propels judgment toward the just conclusion.[3]

Judge Frank M. Johnson, Jr.'s judicial career is a profile in courage. From 1955 until his retirement from the bench in 1996, Judge Johnson unfailingly worked to make the abstract language of the Constitution a meaningful reality. In the process, he helped to reshape and renew both his native South and the nation as a whole. For Judge Johnson, "[t]he true strength of the Constitution l[ay] in its flexibility, its ability to change, to grow, and to respond to the special needs and demands of our society at a

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. MARTIN LUTHER KING, JR., *Our God Is Marching On!*, *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 119, 124 (James Melvin Washington ed., 1992); *see also* Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965) (providing the injunction that facilitated the Selma-to-Montgomery march, a march that culminated with Dr. King's delivery of *Our God Is Marching On!* on the steps of the Alabama state capitol).

3. Judge Frank M. Johnson, *Reflections on the Judicial Career of Robert S. Vance*, 42 ALA. L. REV. 964, 968, 970 (1991).

particular time."[4] His career was a testament to this vision of the Constitution as a dynamic shield against injustice.

As I was growing up in Moss Point, Mississippi, a small town on the Mississippi Gulf Coast, I was blissfully unaware of the ways in which federal judges like Frank Johnson had transformed the institutions that served as the setting for my most basic formative experiences. The public schools in Moss Point were desegregated in the early 1970s, with the active assistance of the National Guard, just a few years before I began grade school. Although I had no appreciation of it at the time, I enjoyed the considerable benefits associated with a fully integrated learning environment only because of the unfailing dedication and considerable personal courage of the federal judges who worked to make the rights set forth in *Brown v. Board of Education*[5] something more than mere legal abstractions. From the public library, to the public parks, to the recreational department, the fact of integration in my home town—and indeed throughout my home state—was, for the most part, a function of determined effort on the part of African-American citizens, their white allies, and the federal courts.

At the heart of the civil rights movement was a commitment to force the United States to live up to the grand words in the Declaration of Independence, words notably absent from the Constitution of 1787. The Constitution, of course, was at its inception and remains today a work in progress. During the celebrations associated with the Constitution's bicentennial in 1987, more than a few commentators emphasized that the Framers' document did a poor job of implementing the "self-evident" truth, proclaimed in the Declaration of Independence, that "all men are created equal." As Justice Thurgood Marshall wryly put it, "Well, if you're gonna do what they did two hundred years ago, somebody's going to give me short pants and a tray so I can serve coffee."[6]

Following a long and bloody civil war, the American people amended the Constitution to remedy the defects visited upon the republic by the Framers' inability to realize the full promise of the Declaration of Independence. For a time, the guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments took on a meaningful reality under the program of congressional Reconstruction.[7] In 1876, in order to secure the election of

4. Hon. Frank M. Johnson, Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 468 (1977).

5. 347 U.S. 483 (1954).

6. CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 390 (1993); *see also* Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1264 (1992) (recounting Justice Marshall's offer to appear at Chief Justice Warren's proposed reenactment of the signing of the Declaration of Independence in livery and kneebritches, carrying trays).

7. *See generally* JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR (1961).

Rutherford B. Hayes to the Presidency, the Republican Party abandoned its efforts to dismantle apartheid in the states of the former Confederacy.[8] From 1876 to 1954, the amended Constitution's promise of equality largely went unkept. When the project of achieving racial justice in the United States resumed in the middle of the twentieth century, it fell to the federal judiciary to give meaning to the unfulfilled promises of an earlier generation. On the front lines of the federal judiciary at the district court level, and in Alabama particularly, the task of making public institutions reflect "self-evident" truths fell upon the broad shoulders of Judge Frank M. Johnson, Jr.

Almost half a century after the Montgomery bus boycott and the other seminal events of the civil rights era, it is all too easy to forget that the progress toward racial equality has not been solely—or even predominantly—a product of the democratic process, particularly at the state or local level. Rather, the transformation of local and state governments in the South required massive federal judicial intervention. The story of the civil rights movement is very much a story about repeatedly testing the limits of law as an agent of transformative social change, with federal judges playing an integral role in this process.[9]

To be sure, judicial intervention alone could not have accomplished the task at hand; federal legislative reforms, culminating in the passage and enforcement of the landmark Voting Rights Act of 1965, provided a structural framework for the movement.[10] The long journey from apartheid to equality required many heroes, large and small, to assume great burdens in the effort to achieve racial justice.

The campaign to enforce the rule of law in the South benefited tremendously from the professional efforts of Judge Johnson. At terrific cost to himself and his family, he resolutely enforced the Constitution's requirements against recalcitrant state and local governments bent on maintaining a racist status quo. As a district court judge, his rulings were not only trailblazing in the area of civil rights, but often marked the incendiary first contact by state and local officials with the post-*Brown* federal judiciary. No one can gainsay his courage in the face of sustained and premeditated opposition from many corners of the community, most notably the Governor's office.

Given the prevailing views of the majority community during the 1950s

8. *See id.* at 218-27.

9. *See* Ronald J. Krotoszynski, Jr., *Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change*, 47 CASE W. RES. L. REV. 423, 427-32 (1997).

10. *See* Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1412, 1427-28 (1995).

and 1960s, Judge Johnson's commitment to enforcing the concept of equal protection of the laws made him a remarkably unpopular jurist. Cronies of Governor George C. Wallace regularly inveighed against Judge Johnson, publicly urging "responsible Dixie citizens to blacklist federal judges, their families, and their friends."[11] Federal judges like Frank Johnson, bent on holding Alabama constitutionally accountable, "should be scorned, they and their families ostracized by responsible Southerners."[12] Perhaps most famously, Governor Wallace once publicly fulminated against Judge Johnson as an "'integrating, scalawagging, carpet-bagging, race-mixing, bald-faced liar' who 'hasn't ever done anything for Alabama except to help destroy it.'"[13]

The political community's efforts to ostracize and vilify him did not dissuade the Judge from doing his duty. Through this storm of hate and personal invective,[14] Judge Johnson bravely soldiered on, doing his duty as an Article III judge to enforce the mandates of the U.S. Constitution. As he explained, "[I]t's just hard to ostracize people when social status is not very important to them."[15]

But Judge Johnson's legacy is not only one of personal bravery, or commitment to duty: He possessed not only a brave heart; he also possessed a wise heart and a sharp legal mind. Throughout his tenure on the bench, his

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11. ROBERT FRANCIS KENNEDY, JR., JUDGE FRANK M. JOHNSON, JR.: A BIOGRAPHY 178 (1978) (quoting Seymore Trammell, former prosecutor in Barbour County and Bullock County, Alabama).

12. *Id.* (quoting Trammell).

13. TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 87 (1981).

14. Throughout his political career, Wallace attacked Judge Johnson and attempted to inflame public sentiment against him, both personally and professionally, and against federal authority in general. *See* JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 184-259 (1993); YARBROUGH, *supra* note 13, at 87, 95, 119-20, 202; *see also* BASS, *supra*, at 194-95 (recounting gubernatorial candidate Wallace's use of personal invective against Judge Johnson as a stock element in his stump speech). On another occasion Wallace opined that Judge Johnson was in need of "a barbed-wire enema," a comment that Wallace later came to regret. YARBROUGH, *supra* note 13, at 202; *see also* BASS, *supra*, at 3, 266, 339-40, 353 (recounting Governor Wallace's repeated use of the "barbed-wire enema" hyperbole, the national media's reaction to Wallace's "true gutter style," and Wallace's subsequent apology for his language during a *60 Minutes* interview).

15. BASS, *supra* note 14, at 128 (quoting Judge Johnson). Judge Johnson consistently preferred the solitude of "fishing for speckled trout and chewing tobacco and maybe drinking a beer" to "being at the Phantom Ball." *Id.* at 129. Nonetheless, the effect of unceasing public heckling by Governor Wallace and comprehensive social ostracism inevitably took its toll both on the Judge and his family. *See id.* at 112-13, 124-25, 216, 320-21; FRANK SIKORA, THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. 94 (1992). The verbal attacks directed at the Judge's son, and the Klan's bombing of his mother's house, went well beyond what any person in public life might reasonably expect as an incident of holding public office. *See* BASS, *supra* note 14, at 125-26, 216 (describing the Klan's bombing of Judge Johnson's mother's house and Governor Wallace's public attacks on Judge Johnson's son, Johnny).

opinions embodied the maxim *fiat justitia, ruat caeculum*: "Let right be done, though the heavens should fall."[16]

From the perspective of many white Alabamians, the heavens fell in Judge Frank Johnson's courtroom. In a series of pathbreaking decisions, Judge Johnson set about dismantling the system of de jure segregation that affected almost every aspect of community life, from the public schools, to the public libraries, to the parks, to the museums, to the bus station, to the state highway patrol.

Indeed, the Judge spent his professional life pushing, pulling, and sometimes forcing government to honor its commitment to equal justice.[17] As he put it, "[T]he Constitution guarantees each citizen full and equal membership in society."[18] For Judge Johnson, "[t]he hallmark of any society that claims to be civilized has to be its ability to do justice—to apply rules with equal favor to both the privileged and the downtrodden."[19] To achieve justice, a judge must "consistently protect[] the law from the passions of the moment, from politics, from partisanship, from prejudices, from personal, local, or sectional interests and unethical influences."[20] Judge Johnson's judicial opinions reflect an unwavering commitment to equality, to fundamental fairness, and to the equal dignity of all persons under law.

Beginning in 1956, in *Browder v. Gayle*,[21] Judge Johnson vindicated the notion that the law recognizes no differences in citizenship based on race. As he told his first law clerk after casting his decisive vote in *Browder*, "Well, we got up on this horse, now we got to ride him."[22] He continued to enforce the concept of equal protection of the law in a line of cases following *Browder*, and in the process desegregated virtually every public institution in Alabama.

Judge Johnson's concept of the equal dignity of all persons was not limited to questions of race. He brought the same scrutiny to bear on

16. As one of Judge Johnson's colleagues observed, "Judge Johnson's revolutionary willingness to take constitutional mandates to their logical conclusions is inspirational to any judge who may be facing an unconstitutional and difficult status quo." Judge Sam D. Johnson, *Foreword* to *Fifth Circuit Survey: June 1994-May 1995*, 27 TEX. TECH. L. REV. 423, 426-27 (1996).

17. For a list of Judge Johnson's major desegregation decisions, see Frank M. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 905-06 (1976).

18. Judge Frank M. Johnson, Jr., Remarks at the Dedication Ceremony, Frank M. Johnson, Jr. Federal Building and United States Courthouse (May 22, 1992), *in* 989 F.2d LXXXIX, CXI.

19. *Id.* at CX.

20. *Id.* at CX-CXI.

21. 142 F. Supp. 707 (M.D. Ala.) (striking down an Alabama statute and a Montgomery, Alabama, city ordinance requiring racial segregation on public transportation, including Montgomery's municipal buses), *aff'd per curiam*, 352 U.S. 903 (1956). *Browder* represented the legal culmination of the Montgomery bus boycott, a massive social protest effort initiated by Rosa Parks and subsequently led by Dr. Martin Luther King, Jr.

22. Charles R. McManis, *Introduction* to Johnson, *supra* note 4, at 456.

classifications that imposed burdens on the basis of gender. In cases like *Frontiero v. Laird*[23] and *White v. Crook*,[24] he required that the government refrain from imposing special burdens on women solely on account of their gender. In this respect, he was ahead of his time. Although the Supreme Court has come to demand "an exceedingly persuasive justification" for gender-based classifications only in the last decade,[25] Judge Johnson viewed such government classifications with great skepticism some thirty years ago.

Judge Johnson also recognized the essential dignity of prisoners and those suffering from mental illness, persons all too often ignored, forgotten, or despised by the general society, persons to whom the political process in Alabama routinely turned a blind eye. In *Wyatt v. Stickney*,[26] he required the State of Alabama to improve the conditions of those involuntarily committed to the state's mental hospitals. Conditions in these hospitals were unspeakable, with patients living in filth and dying of dehydration.[27] Similarly, in *Pugh v. Locke*,[28] Judge Johnson required the state to observe

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23. 341 F. Supp. 201, 209-11 (M.D. Ala. 1972) (Johnson, J., dissenting) (arguing that "administrative convenience" could not justify a rule imposing gender-based burden by requiring a female military employee to prove her husband's dependence on her income while imposing no equivalent burden on a male military employee to demonstrate his wife's dependence on his income), *rev'd sub nom.* Frontiero v. Richardson, 411 U.S. 677 (1973).

24. 251 F. Supp. 401 (M.D. Ala. 1966) (prohibiting Alabama officials from refusing to seat racial minorities or women on juries in the state courts); *cf.* Hoyt v. Florida, 368 U.S. 57, 60-65 (1961) (upholding Florida's automatic exemption of women from state-court juries as an appropriate gender-inspired "privilege"). Alabama law affirmatively restricted jury service to male citizens and, in practice, to white male citizens. *See White*, 251 F. Supp. at 405-08 & n.14.

25. United States v. Virginia, 518 U.S. 515, 524 (1996).

26. 325 F. Supp. 781 (M.D. Ala.), 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). To this day, this class action remains under the continuing jurisdiction of the court. As Stephen Bright has explained, "So great was Alabama's resistance to properly treating its mentally ill, that the litigation has continued for over twenty-six years and has produced at least thirty-nine reported decisions." Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 837 (1998).

27. This is no overstatement:

> There were severe health and safety problems: Patients with open wounds and inadequately treated skin diseases were in imminent danger of infection because of the unsanitary conditions existing in the wards, such as permitting urine and feces to remain on the floor; there was evidence of insect infestation in the kitchen and dining areas. . . . Aides frequently put patients in seclusion or under physical restraints, including straitjackets, without physicians' orders. One resident had been regularly confined in a straightjacket for more than nine years. . . . The patients suffered brutality, both at the hands of the aides and at the hands of their fellow patients; testimony established that four Partlow residents died due to understaffing, lack of supervision, and brutality.

Wyatt, 503 F.2d at 1310-11.

28. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam). For a history of this litigation and its mixed legacy, see LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989).

constitutionally mandated minimum standards of care for the state's prison population. The shocking conditions in Alabama's state prisons included "lack of sanitation . . . in living areas, infirmaries, and food service," and "unguarded, overcrowded dormitories, with no realistic attempt by officials to separate violent, aggressive inmates from those who are passive or weak"[29] and led to "rampant violence."[30]

It is all too easy to ignore or dismiss claims brought on behalf of those at the margins of society. Judge Johnson easily could have avoided undertaking the hard task of remedying the deplorable conditions in the state's mental hospitals and prisons. He could have employed any number of the so-called "passive virtues" to escape the controversy associated with holding the state accountable for the fashion in which it was treating its least powerful citizens.[31] Judge Johnson did not shirk his constitutional duty; rather, as he had always done before, he embraced it and faced the firestorm that inevitably followed.

As Chief Justice Marshall explained 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."[32] Quoting Blackstone, Chief Justice Marshall opined that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy," and that "every right, when withheld, must have a remedy, and every injury its proper redress."[33] For Marshall, the availability of an effective remedy for a violation of a right was the very essence of the rule of law; a government ceases to be "a government of laws, and not of men" when "the laws furnish no remedy for the violation of a vested legal

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29. *Pugh*, 406 F. Supp. at 329.

30. *Id.* at 325. As Judge Johnson explained,

> [T]he wardens of these facilities, because of the inconvenience and because they are not trained to screen medical complaints, many times refuse to provide needed medical attention. . . . There is a chronic shortage of medical supplies throughout the system. . . . Rags have been used as a substitute for gauze sponges, out-of-date drugs have been administered, and oxygen tanks in a prison ambulance have remained empty and unusable . . . . Medical personnel are continually called upon to perform services for which they have not been trained and for which they are not qualified. . . . Unsupervised prisoners, without formal training, regularly pull teeth, screen sick call patients, dispense as well as administer medication, including dangerous drugs, give injections, take X-rays, suture, and perform minor surgery.

Newman v. Alabama, 349 F. Supp. 278, 283 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974).

31. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 113-27 (1962); Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47-58 (1961); *cf.* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27-28 (1979) (arguing that courts have an obligation to provide effective remedies for proven constitutional wrongs in order to "remove the condition that threatens . . . constitutional values").

32. 5 U.S. (1 Cranch) 137, 162 (1803).

33. *Id.* at 163.

right."[34] Judge Johnson's consistent refusal to deny plaintiffs a meaningful remedy for proven constitutional wrongs at the hands of the state both reflects and embodies these principles. As he once put the matter: "Faced with defaults by government officials . . . a judge does not have the option of declaring that litigants have rights without remedies."[35]

Judge Johnson brought a practical wisdom to his decisions, creatively fashioning relief equal to the task at hand. Often this required him to abandon more traditional forms of prohibitory injunctive relief in favor of more specific, affirmative injunctive commands. As he once explained, "[I]f we, as judges, have learned anything from *Brown v. Board of Education*, it is that prohibitory relief alone affords but hollow protection from continuing abuse by recalcitrant governments."[36] Judge Johnson's creative use of injunctions led some to level the charge of "judicial activism" against him; he responded that "[t]he courts possess only so much power as the other branches relinquish" by failing to observe constitutional obligations.[37]

Judge Johnson's passion for justice led him to embrace highly creative solutions to difficult legal problems. When faced with entrenched opposition by local voting registrars to the registration of African-American citizens, he helped to pioneer the use of the "freezing principle," by which racial minorities seeking to become registered voters had to be enrolled under the same standards and procedures used previously to enroll white voters.[38] The U.S. Court of Appeals for the Fifth Circuit subsequently adopted this standard for use in other voting rights cases involving racial

34. *Id.*

35. Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 274 (1981); *see also* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 9-12, 36-37, 86-95 (1978) (defending the use of structural injunctions when necessary to eradicate unconstitutional conditions in state-operated institutions, even when such injunctions displace local control in favor of federal judicial supervision).

36. Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 910 (1979); *see also* United States v. Alabama, 192 F. Supp. 677, 682 (M.D. Ala. 1961) ("The evidence in this case is so abundantly clear in portraying the discriminatory acts and practices, which acts and practices clearly violate the Constitution and laws of the United States, that this Court is of the firm opinion that this case warrants not only a prohibitory decree but a decree mandatory in nature."), *aff'd*, 304 F.2d 583 (5th Cir. 1962).

37. Johnson, *supra* note 36, at 912.

38. *See* United States v. Penton, 212 F. Supp. 193, 201 (M.D. Ala. 1962) (ordering local voting registrars "[t]o establish the actual 'qualification standards' under which the Board of Registrars has accepted white applicants in the past and to set forth the rules and standards which the Board is to follow in determining whether applicants are qualified to register to vote in Montgomery County, Alabama"). For a description of how local registrars employed race-based standards for voter registration in order to deny black citizens suffrage, see *id.* apps. D & E at 209-14 (providing a transcript of a statement by a voting registrar who admitted to using race-based standards in evaluating applications and a transcript of a statement by an illiterate nonminority who had received assistance from the Board and whose application the Board had accepted).

discrimination in enforcing voting qualifications.[39] The Voting Rights Act of 1965 later also incorporated the "freezing principle."

In *Williams v. Wallace*,[40] Judge Johnson articulated the "proportionality principle" as a test for balancing requests to use public property for speech activity against the government's claim that the property should be reserved for its more regular uses. *Williams* involved a request for an injunction authorizing a mass protest march from Selma to Montgomery, Alabama. In issuing this injunction, Judge Johnson explained that "the extent of a group's constitutional right to protest peaceably . . . must be . . . found and held to be commensurate with the enormity of the wrongs being protested and petitioned against."[41] The result of this injunction is well known—the Selma-to-Montgomery march energized the civil rights movement and provided a powerful statement to the nation, ultimately leading to the enactment of the Voting Rights Act of 1965.[42]

Throughout his judicial service, Judge Johnson impartially applied the grand clauses of the Constitution to protect the weak, the powerless, the marginalized dissenters within the political community. *Jager v. Douglas County School District*[43] provides a good example. Nothing is more sacred to Southern culture than high-school varsity football; nothing is more traditional than an invocation or prayer prior to the commencement of the game. Notwithstanding the popularity of the practice and its commonplace nature, Judge Johnson vindicated the Establishment Clause claim of a lone dissenter who objected to being required to sit quietly during an invocation before the start of a high-school varsity football game.[44]

I know from lived experience that Judge Johnson's personal views about the Establishment Clause were somewhat more ambivalent. During my clerkship, Judge Johnson swore me in to the State Bar of Georgia. The paperwork from the bar included a mandatory religious oath and made no provision for the use of an affirmation in lieu of the oath. Assuming that Judge Johnson would be troubled by this omission, and eager to demonstrate my knowledge of the law, I noted with alacrity that if a would-be notary public could not lawfully be required to take a religious oath incident to achieving that office,[45] surely a member of the bar could not be required to take such an oath. The Judge's reaction was quite surprising: He

39. *See, e.g.*, United States v. Duke, 332 F.2d 759, 768-70 (5th Cir. 1964); United States v. Atkins, 323 F.2d 733, 743-45 (5th Cir. 1963); United States v. Lynd, 301 F.2d 818, 823 (5th Cir. 1962); United States v. Louisiana, 225 F. Supp. 353, 393-96 (E.D. La. 1963) (three-judge court).

40. 240 F. Supp. 100 (M.D. Ala. 1965).

41. *Id.* at 108.

42. *See* Krotoszynski, *supra* note 10, at 1425-28.

43. 862 F.2d 824 (11th Cir. 1989).

44. *See id.* at 831-34.

45. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (holding invalid a Maryland requirement for a religious oath incident to becoming a notary public).

stared at me for what seemed like an eternity, and said nothing; finally, he spoke, asking me, "Do you have a problem with the oath?" I mumbled, "No, of course not Judge," and wondered how I could have so badly misjudged the situation. Judge Johnson immediately brightened and said, "Good, that's good." He then opined that the oath was a mere formality, that he had taken it or an oath quite like it "four or five times," and that, in his view, such an oath should offend the sensibilities of only a very few.

Although initially surprised, I later understood that Judge Johnson correctly had surmised that, in point of fact, I did not have any particularly compelling personal objection to the oath. Indeed, it was little more than a kind of debating point to me. On the other hand, I harbor absolutely no doubts that Judge Johnson would have vindicated an Establishment Clause challenge brought against the oath by a would-be member of the State Bar of Georgia who actually maintained a good-faith objection to the oath. In this way, he possessed an uncanny ability to separate his personal views from his duties as an Article III judge. Thus, those who assumed, based on a reading of his opinions, that Judge Johnson was a liberal maverick outside as well as inside the courtroom were routinely disappointed, for he was surprisingly traditional, indeed conservative, in his personal life, aesthetics, and sensibilities. He also viewed the law as being about real consequences to real people, as opposed to mere abstractions more suitable for a debating society than for a federal court charged with resolving actual cases and controversies.[46]

Judge Johnson's unflinching commitment to equality led him to author what remains, to many observers, a remarkable opinion in *Hardwick v. Bowers*.[47] The case involved the arrest of an openly gay man for engaging in consensual sodomy with another man in his own home, behavior that violated Georgia's anti-sodomy statute. Hardwick, claiming that Georgia threatened him with prosecution for this behavior, argued that the Georgia statute violated his federal constitutional rights.

Judge Johnson began his analysis of the merits by noting that "[t]he Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society."[48] These rights include the right to conceive and bear a child, the right to marry, the right to maintain a common household among family

46. In this regard, Judge Johnson routinely reminded his more theoretically minded clerks that we "don't write for the law reviews." By this, he meant that he wanted his opinions to speak directly and plainly to the actual dispute between the parties in language that could be understood by a reasonably intelligent person. Judge Johnson despised opinions that put more emphasis on style than substance, and was particularly disparaging of colleagues who routinely "overwrote" opinions, pronouncing such opinions the product of "whoop-de-doos."

47. 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

48. *Id.* at 1211.

members, and the right to oversee the upbringing of a child. Applying the line of cases beginning with *Griswold v. Connecticut*,[49] Judge Johnson observed that "[t]he intimate association protected against state interference does not exist in the marriage relationship alone."[50] Citing *Eisenstadt v. Baird*,[51] he noted that the Constitution generally prohibits the state from treating people differently with respect to this right of intimate association, and explained that "[t]he benefits of marriage can inure to individuals outside the traditional marital relationship."[52] Completing the analogy to marriage, Judge Johnson concluded that "[f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage."[53]

Essentially, Judge Johnson analogized gay and lesbian relationships to the marital relationship, noted that physical intimacy could play a largely identical role in both traditional and nontraditional highly personal relationships, and required the State of Georgia to demonstrate a compelling interest before burdening the exercise of the right to intimate association. Moreover, even if the state could identify a compelling state interest, it was obliged to show that "this statute is the most narrowly drawn means of safeguarding that interest."[54] This is a classic example of Judge Johnson's unwavering commitment to the equality principle: Having identified the right at issue as fundamental—essential to personal happiness and autonomy—he refused to defer to arbitrary limitations on the exercise of this right, particularly when the state sought to enforce those limitations against a disfavored cultural minority.

The Supreme Court, of course, did not see things quite the same way. In an opinion dripping with sarcasm at the very idea that homosexual sodomy enjoyed constitutional protection, Justice White summarily dismissed Hardwick's claim. For Justice White, the right to intimate association applied only to those in the majority. Chief Justice Burger, in a particularly unfortunate concurring opinion, invoked the spirit of *Leviticus* against Hardwick and others like him.[55] Justice White and Chief Justice Burger failed to recognize the fundamental unfairness of denying a basic right to an entire class of persons in the absence of a terribly important reason for doing so. Unlike Judge Johnson, they did not see Hardwick's claim as a demand for equal treatment, but rather as a demand for special and unwarranted accommodation for an undeserving cultural minority.

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49. 381 U.S. 479 (1965).
50. *Hardwick*, 760 F.2d at 1212.
51. 405 U.S. 438 (1972).
52. *Hardwick*, 760 F.2d at 1212.
53. *Id.*
54. *Id.* at 1213.
55. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) ("Condemnation of [homosexual sodomy] is firmly rooted in Judeao-Christian moral and ethical standards.").

It is always dangerous to predict the future, but in this, as in so many other instances, I suspect that the verdict of history ultimately will vindicate both Judge Johnson's understanding of the interests at issue and his analysis of the state's general ability to regulate private, intimate relationships between consenting adults.[56] As he observed in a different context, "The Constitution is not an inert and lifeless body of law from which legal consequences automatically flow. To the contrary, it is dynamic and living, requiring constant reexamination and reevaluation."[57] Judge Johnson's opinion in *Bowers* reflects not only a "dynamic and living" conception of the Constitution, but also a basic recognition of the equal dignity of all persons.

Judge Johnson's approach in *Bowers* also reflects his judicial pragmatism in construing constitutional text. He consistently rejected any particular dogma in evaluating constitutional claims, holding that "[a]ny doctrinal approach to interpreting the Constitution, at whichever extreme, is both inappropriate and unworkable."[58] He was particularly critical of attempts to define constitutional interpretation in terms of a single animating objective, emphasizing that "[t]he Framers were pragmatic men and the Constitution is a practical blueprint."[59] For Judge Johnson, the Constitution's "genius lies in its generality. Perfect logical consistency has always given way to practical distinction, as well it should."[60]

It also bears noting that Judge Johnson's personal views about sexual minorities were somewhat more ambivalent than the sweeping language of his opinion would suggest. As he told one law clerk, "*Bowers* was a very hard decision for me to write." That Judge Johnson did what he perceived to be his constitutional duty, despite lingering personal doubts about the morality of nontraditional intimate relationships, is a tribute to his professionalism and fairness. As the Judge repeatedly emphasized, "[I]t is one thing for a judge to adopt a theory of political morality *because it is his own*; it is another for him to exercise his judgment about what the political morality implied by the Constitution is."[61] Judge Frank Johnson possessed the ability to read the Constitution's mandates independently of his own personal morality, an attribute that all judges should, but rarely do, possess. As the Judge put the matter, "Adjudication of constitutional issues requires an openness of mind and a willingness to decide the issues solely on the

56. *Cf.* Powell v. State, 510 S.E.2d 18, 21-26 (Ga. 1998) (holding Georgia's anti-sodomy statute unconstitutional on state constitutional grounds); *see also* Romer v. Evans, 517 U.S. 620 (1996). *But cf. id.* at 644 (Scalia, J., dissenting) ("Coloradans are, as I say, *entitled* to be hostile toward homosexual conduct.").

57. Johnson, *supra* note 4, at 468.

58. *Id.*

59. Johnson, *supra* note 36, at 908.

60. *Id.*

61. *Id.* at 909.

particular facts and circumstances involved, not with any preconceived notion or philosophy regarding the outcome of the case."[62] *Bowers* in many ways provides a clear example of Judge Johnson following this mode of judicial analysis.

These cases all reflect Judge Johnson's belief that a federal judge has a responsibility to do substantial justice in the cases coming before him; for him, the judicial task required more than the mechanical application of precedent to facts. Sound judging must reflect three distinct virtues: reason, courage, and integrity. Reason implied an obligation to use the tools of a jurist's trade when deciding cases; courage meant "not physical bravery, but the moral courage to do what is right in the face of certain unpopularity and public criticism";[63] and "integrity" referred not merely to honesty or good ethics, but rather implied "a passion for justice informed by a deep and abiding compassion that propels the judge toward not only the logical conclusion—but also the just conclusion."[64] Further developing his concept of judicial integrity, Judge Johnson explained that "[a] judge must always be consumed by a passion for justice which propels judgment toward the just conclusion."[65]

Judge Johnson's judicial legacy is a substantial, indeed enormous, contribution to the project of creating a truly just and democratic society. An essential element of any such polity must be the recognition and implementation of the equal dignity of all persons under law; to state the proposition a bit differently, a just and democratic society guarantees to all its citizens equal justice under law.

I remember once riding with the Judge to Atlanta for a sitting of the U.S. Court of Appeals for the Eleventh Circuit. Having determined that none of the clerks possessed the good sense to purchase a safe and reliable car,[66] he had barred us from driving him to Atlanta, preferring to drive himself. We were about thirty miles from Montgomery, between Montgomery and Auburn, Alabama. The Judge gestured at a grove of pecan trees and informed us that this land once formed part of a large plantation—a large plantation "worked by human *slaves*." He said nothing more to us, nor did he need to. The silence in the car following the Judge's history lesson was electric; each of the clerks knew that in describing the land's history, the Judge had rejected and condemned it as inconsistent with the

62. Johnson, *supra* note 4, at 468-69.
63. Johnson, *supra* note 3, at 966.
64. *Id.* at 966-69 (emphasis omitted).
65. *Id.* at 970.
66. I owned and drove a 1982 Chevrolet Corvette, which, in the Judge's estimation, reflected poor judgment on my part. I once drove him to the Montgomery airport, a trip during which he again expressed considerable skepticism about my choice of transportation. My co-clerks drove Honda Civics. In Judge Johnson's view, none of us had had the good sense to purchase a Lincoln Town Car.

land's future. As the Judge put the matter in another context, "[I]f the life of the law has been experience, then the law should be realistic enough to treat certain issues as special, as racism is special in American history. A judiciary that cannot declare that is of little value."[67]

It is difficult to reflect on my clerkship with Judge Johnson without experiencing a great deal of emotion. Working for such a remarkable jurist was a profoundly humbling experience. He was not only a hero of the law; he was also a kind and decent man, possessed of an empathy and concern for his extended judicial family that is difficult to describe in a fashion that would do him justice.[68] When I went to work each day during the clerkship year, I knew that I was part of an important project: making the Constitution a lived reality rather than an empty promise. Given my Southern roots, clerking for Judge Johnson was not merely an opportunity to advance some abstract ideological commitment, but also an opportunity to advance the continuing moral evolution of my community. For someone like me who grew up in a society still working to overcome a legacy of racism, Judge Johnson represented a kind of moral compass, a hero who demonstrated quite concretely how one person could make a tremendous difference to the community. I have not had, and will never have, a better professional opportunity. Moreover, I will never have a better mentor or friend.

It is easy to be on the right side of history after history has rendered its verdict. It is a great deal more difficult to be on the right side of history when the need to do so is not terribly obvious to one's peers or to the community in which one lives. Judge Johnson kept a quotation from President Abraham Lincoln on his desk. It read as follows:

> I do the very best I know how—the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything. If the end brings me

67. Johnson, *supra* note 36, at 908.

68. One anecdote helps to convey the Judge's concern for and commitment to his law clerks. Mabelle Drake, the wife of one of my co-clerks, is a member of the Navajo tribe and has degrees in education from Ivy League schools. She sought employment with a state agency charged with assisting Native Americans; incident to her interview with one administrator, she was subjected to openly racist remarks and asked to perform "her song and dance" for the entertainment and amusement of the agency's employees. Judge Johnson asked my co-clerk, John Hueston, how his wife's job hunt was going, and he told the Judge about the incident. The Judge indicated that the incident was unfortunate, but said nothing else to John. Later in the week, an official with the Alabama State Department of Education called Mabelle and offered to assist her in finding a suitable job, explaining that she came very highly recommended. It turned out that Judge Johnson was a friend of this gentleman and had called him after learning of Mabelle's plight. The Judge never said anything about this to my co-clerk. This sort of unexpected kindness was commonplace with the Judge.

> out wrong, ten angels swearing I was right would make no difference.[69]

With the verdict of history now made obvious to all, the end unquestionably has brought Judge Frank M. Johnson, Jr. "out all right."

Judge Johnson's judicial legacy has significantly advanced the cause of justice in both his native South and in the larger national community. Of course, the effort to achieve equality, to realize fully the ideal set forth in the Declaration of Independence, remains an ongoing project. Until women, racial minorities, and sexual minorities routinely enjoy access to positions of power and authority within communities large and small across the United States, within both the private and the public sectors of the community, we cannot deem the battle over and the campaign successful. As Judge Johnson once put the matter, "Sometimes, I think we've come a long way on race, and sometimes I just don't know."[70]

At a time when so many feel a profound disenchantment with public service, Judge Johnson's life and career demonstrate quite convincingly how a single person can make a tremendous difference to his community, his state, and the nation. Moreover, his unwavering commitment to securing equal justice for all should not be forgotten, nor his quest abandoned, nor his legacy squandered. Instead, let us hope that Judge Johnson's life and career will serve as an inspiration to others who follow in his example, working daily to secure equal justice under law.

69. F.B. CARPENTER, SIX MONTHS AT THE WHITE HOUSE WITH LINCOLN 54 (John Crosby Freeman ed., Century House 1961) (1866) (quoting President Lincoln).

70. BASS, *supra* note 14, at 470.