

JOURNAL OF

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Justice Catron.

Chief Justice.

Justice.

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THE SUPREME COURT OF THE UNITED STATES—SCULPTURE BY CARL J. BUEHLER—(THE FOUR 1851)

SUPREME COURT HISTORICAL SOCIETY

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The Society accomplishes its mission by conducting educational programs, supporting historical research, publishing books, journals, and electronic materials, and by collecting antiques and artifacts related to the Court's history. These activities and others increase the public's awareness of the Court's contributions to our nation's rich constitutional heritage.

The Society maintains an ongoing educational outreach program designed to expand Americans' understanding of the Supreme Court, the Constitution and the judicial branch. The Society cosponsors Street Law Inc.'s summer institute, which trains secondary school teachers to educate their students about the Court and the Constitution. It also sponsors an annual lecture series at the Supreme Court as well as occasional public lectures around the country. The Society maintains its own educational website and cosponsors Landmarkcases.org, a website that provides curriculum support to teachers about important Supreme Court cases.

In terms of publications, the Society distributes a *Quarterly* newsletter to its members containing short historical pieces on the Court and articles describing the Society's programs and activities. It also publishes the *Journal of Supreme Court History*, a scholarly collection of articles and book reviews, which appears in March, July and November. The Society awards cash prizes to students and established scholars to promote scholarship.

The Society initiated the *Documentary History of the Supreme Court of the United States, 1789-1800* in 1977 with a matching grant from the National Historical Publications and Records Commission (NHPRC). The project seeks to reconstruct an accurate record of the development of the federal judiciary in the formative decade between 1789 and 1800 because records from this period are often fragmentary, incomplete, or missing. The Supreme Court became a cosponsor in 1979; since then the project has completed seven out of the eight volumes. An oral history program in which former Solicitors General, former Attorneys General, and retired Justices are interviewed is another research project sponsored by the Society.

The Society maintains a publications program that has developed several general interest books: *The Supreme Court Justices: Illustrated Biographies 1789-1995* (1995), short illustrated biographies of the 108 Justices; *Supreme Court Decisions and Women's Rights: Milestones to Equality* (2000), a guide to gender law cases; *We the Students: Supreme Court Cases for and About High School Students* (2000), a high school textbook written by Jamin B. Raskin; and *Black White and Brown: The Landmark School Desegregation Case in Retrospect* (2004), a collection of essays to mark the 50th anniversary of the *Brown case*.

The Society is also conducting an active acquisitions program, which has substantially contributed to the completion of the Court's permanent collection of busts and portraits, as well as period furnishings, private papers, and other artifacts and memorabilia relating to the Court's history. These materials are incorporated into exhibitions prepared by the Court Curator's Office for the benefit of the Court's one million annual visitors.

The Society has approximately 5,700 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enables the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

Requests for additional information should be directed to the Society's headquarters at 224 East Capitol Street, N.E., Washington, D.C. 20003, telephone (202) 543-0400, or to the Society's website at www.supremecourthistory.org.

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Introduction

Melvin I. Urofsky

Each year the Supreme Court Historical Society sponsors a lecture series at the Court. The speakers are, of course, students of the Court and its history, and the Society is pleased and honored that the Justices partake in these sessions, introducing the lecturers and their topics. As someone who has participated in more than one of these series, I can assure you that it is a setting and an audience unlike any other. An added bonus is that the *Journal* then publishes these talks, providing access to a wider audience of men and women, lawyers and lay persons, teachers and students, who are interested in the Court's history.

This past year's topic was advocacy before the Court, and as you can see, I was among the people fortunate to be invited to deliver a talk. As some of you may know, I am now engaged in writing a new biography of Louis D. Brandeis, so the lecture was doubly welcome; in it I was able to present some of the newer ideas I have had since starting the research.

My good friend Jonathan Lurie's paper derived from a prize-winning book that he coau-

thored on the famous *Slaughterhouse Cases*. The audience also witnessed a marvelous interchange that evening, since the man who introduced Professor Lurie had been a classmate of his at Harvard—Justice David Souter.

While no one would claim that the lectures in the series comprise a complete portrait of advocacy before the nation's highest court, they provide snapshots of particular lawyers or of groups of lawyers operating at a certain time. David Frederick's lecture took us back to a time when the Court imposed no time limits on oral arguments; men, and especially women, would crowd into the old courtroom in the basement of the Capitol when orators such as Daniel Webster argued a case. In modern parlance, it was the hottest ticket in town.

Starting in 1879, women in the audience also began to see women at the bar. Mary Clark's piece on women practicing before the Court for the ensuing century not only shows some of the changes that took place, but also mirrors woman's changing role in American society in general and in the legal profession in particular.

Finally, although no effort is made to coordinate the annual lecture with the series, this year it worked out that way. Judge John Roberts spoke about the art of oral advocacy, and how the art has energized the Supreme Court bar, those lawyers who regularly practice in the federal courts and who

often take their cases up to the Marble Palace on appeal.

Although we have a more unified theme than is usual in our issues, there is still that great variety that marks the articles we publish, a diversity that truly reflects the very history of the Court itself.

Supreme Court Advocacy in the Early Nineteenth Century

DAVID C. FREDERICK*

The early nineteenth century was transformative of the Supreme Court's practices. Yet understanding those fundamental changes requires some appreciation of practice before the Court in the late eighteenth century, and the developments in the early nineteenth century produced changes in the Court's practices that are still felt today. In this first half-century or so of the Court's existence, more dramatic developments and changes occurred in oral argument practice than in any other period of the Court's history.¹

Those changes are best understood by reference to three basic themes. One is the effect of the Court in adopting the practice of the King's Bench in one of its earliest sets of rules. That decision started the Court down the path of extended oral arguments. A second theme is the retrenchment from that practice, and the steady evolution toward the use of written briefs to present arguments in the case. This trend began toward the end of the Marshall Court era, which witnessed some of the most celebrated advocates and oral arguments in the Court's history. In describing oral argument practice in that period, some observations may be made about the interplay between political rhetoric and oral argument style in Supreme Court advocacy. Finally, in the Taney Court period, the Court institutionalized several important rules to limit the time allot-

ted to oral argument and to rest increasingly on written arguments in briefs. Those developments launched the modern trend of the Court relying on written briefs with more limited oral arguments.

Late Eighteenth-Century Practice

In the first year and a half of the Supreme Court's existence, the rules of practice led to much uncertainty among practitioners.² The Constitution had created the Court, but the Framers had left vague the contours of its practices and procedures. The Attorney General, as leader of the Supreme Court bar, filed a motion with the Court asking for clarification as to which procedural rules attorneys should follow. On August 8, 1792, the Court responded by issuing an order advising that "this court

consider[s] the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary."³

In a way, this was a curious choice. Initially, the Court had shown a willingness to sort out procedural details through litigation.⁴ But that clearly proved unsatisfactory: the varieties of procedural questions that arose in litigation more than outpaced the Court's ability to refine the rules of practice through common-law methods. In adopting rules at the King's Bench as a model, however, the Court signaled a departure from what had been the apparent aim of the Judiciary Act of 1789 to place a more decidedly native stamp on legal practice in the new Nation. There, Congress had made a federal writ of error a very different type of instrument than the English practice.⁵ Perhaps the Court's aim was simply to provide guidance. At least by following King's Bench procedure, the bar could resort to English books that described what practices lawyers were supposed to follow. Those instructions were fairly well encapsulated in books such as **Rules, Orders and Notices, In the Court of King's Bench from Second of King James I to Hilary Term the Fifteenth of King George II**, published in 1742,⁶ or **The Practick Part of the Law: Shewing the Office of An Attorney, and A Guide for Solicitors in All the Courts of Westminster**, published in 1702.⁷ Those volumes, however, while helpful in the basics, did not contain much advice about how to present a case.

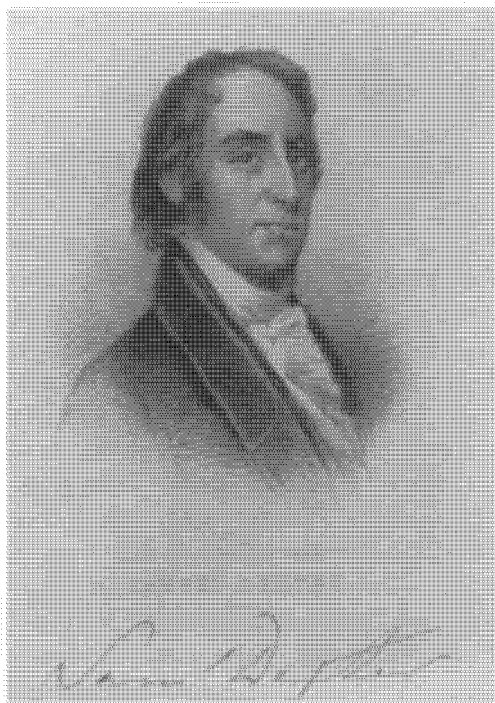
By longstanding tradition, advocates at the King's Bench presented their material orally to the court. For arguments to the House of Lords, the highest tribunal in Britain, advocates would even go so far as to state orally the decision of the court from which the appeal was being taken, and then proceed with a long presentation of the facts and precedents on which they relied in making their appellate argument.⁸ The actual written filings were

quite succinct. A "declaration" might contain a few sentences about the gist of the case and the basic issue presented in the appeal.⁹

For the modern American lawyer, schooled in the traditions of voluminous written briefs, such a practice would seem highly inefficient and impracticable. The rationale for that practice in England has been that the entire judicial process is completely open to public scrutiny: everything the judge learns about the case is presented in open court, which thus diminishes the possibility of out-of-court influence. But in an era of limited communications, that style of practice was challenging for lawyers. To begin with, obtaining access to reported decisions was difficult. The second volume of Dallas's reports of the Court's earliest Term did not appear until 1798, the third until 1799, and the fourth until 1807.

In its first decade, the Supreme Court hewed to the English oral tradition of appellate litigation. As a practical matter, however, even that tradition was rather informal and somewhat irregular throughout the 1790s. Initially, the Supreme Court did not have a very significant appellate docket. Although the first appellate case was docketed in 1792,¹⁰ the Court's appellate docket did not begin to accumulate in earnest until 1796.¹¹ Prior to that year, the Justices spent considerable time riding circuit and handling cases under the Court's original jurisdiction or on special writs, such as writs of mandamus or prohibition.

From the **Documentary History of the Supreme Court** being compiled under the auspices of the Supreme Court Historical Society and the direction of Maeva Marcus, it is possible to glean something about oral argument practice in the 1790s and, through that, to make inferences about argument practice more generally. The notes from oral arguments by Justices and advocates suggest the wide range of sources quoted and cited by counsel, cases from other courts and treatises apparently the most popular among them.¹² Less clear is how active the Court was in questioning counsel. The practice of having counsel read swatches



Samuel Dexter (pictured) argued against Attorney General William Bradford in a 1795 case involving the taking of the privateer ship *Hope* as a prize during the Revolutionary War. The dispute lasted more than a quarter-century and was argued twice before the Supreme Court, which never ruled on the merits.

of prepared treatise and case material, however, was not consistently followed. Some advocates resorted to biblical scripture, history, and Roman law in arguing their cases, rather than the particular matters presented in the case.

The Justices must have found some of that to be quite beside the point. Hence, in 1795, a change in the rules advised that "[t]he Court gave notice to the gentlemen of the bar, that hereafter [the Justices] will expect to be furnished with a statement of the material points of the case."¹³ That rule might be read by modern eyes to be an invitation to file a written brief, but if it was, the bar did not get the hint. Instead, lawyers interpreted that rule as requiring them to fill their oral presentations with citations and long excerpts of learned treatises in support of the argument. The documentary history from this period reveals the existence

of almost no written submissions by attorneys. All business before the Court appears to have been conducted orally.

One argument conducted shortly after that rule change in February 1795 provides an illustration of oral advocacy practice. The case of *Bingham v. Cabot* involved a dispute between William Bingham and the owners of the privateer ship *Pilgrim*—the Cabots—over whether Bingham should be required to pay the *Pilgrim*'s owners for the value of a ship (the *Hope*) that had been taken as prize during the Revolutionary War in 1778. While serving as the Continental Congress's resident agent in Martinique, Bingham had required that the flour on the *Hope* be sold in Martinique, and that various other expenses for repairs be credited until the real owner could be determined. Thus, the action basically involved a claim that a sovereign agent had interfered with the property of a private person.

Although the dispute lasted for more than a quarter-century, and the Supreme Court twice heard argument in the case, it never ruled on the merits. The first time the case came before the Justices, Bingham appealed a circuit court decision issued by Justice Cushing, who had sat alone. Justice Cushing had excluded much evidence in Bingham's favor and then instructed the jury that "the law was such, that, on the evidence offered in the cause, the Plaintiffs ought to recover."¹⁴ This jury evidently understood the purport of the judge's ruling and duly rendered a verdict in favor of the Cabots. Justice Cushing denied a motion for new trial, but had no choice but to allow a bill of exceptions. Bingham's attorney, Attorney General William Bradford, brought a writ of error to the Supreme Court.¹⁵

Although in that era some Justices recused themselves if the Supreme Court sat in review of a circuit court decision they had rendered, Justice Cushing was not one of them. Moreover, because Chief Justice John Jay was absent on a diplomatic mission to England, Justice Cushing presided over the Supreme Court argument. From Bradford's notes of the

argument, it is clear that he spent considerable time describing the facts underlying the dispute before contesting whether the circuit court had jurisdiction over the matter. The Justices must have interrupted his presentation on the exceptions to the evidentiary rulings to allow one of Bradford's opponents, Samuel Dexter, an opportunity to address that issue. Dexter proceeded to describe a long list of cases to defend the circuit court's jurisdiction.¹⁶

After both sides had completed their arguments on the jurisdiction question, the Justices interrupted with a rather unusual move. They announced, in mid-argument, that they would first decide whether the circuit court had jurisdiction before deciding whether Justice Cushing's evidentiary rulings had been correct. Normally, that would have been a fine way to narrow the scope of the decision and decide only what was necessary: if the Court had concluded that Justice Cushing's circuit court lacked jurisdiction, the circuit court judgment would have been vacated and the litigants would have proceeded to admiralty court. But having committed themselves to that decisional point, the Justices then found themselves evenly divided on the jurisdictional question and thus unable to render a decision. Having foreshadowed a potentially dispositive reversal of Justice Cushing's circuit court opinion, the Court ended up resolving this issue with what must have been a somewhat embarrassing public non-decision. On the evidentiary issues, however, the Court overwhelmingly voted to vacate Justice Cushing's rulings and remand the case, where it continued in litigation.

The case was on the brink of its third trip to the Supreme Court in 1804, when William Bingham died. By that time, John Marshall had become the Chief Justice. John Adams' initial choice in 1800 had been John Jay, who had resigned as Chief Justice in 1795 after being elected governor of New York in absentia. But Jay declined to resume as Chief Justice, writing that the Court lacked "energy, weight and dignity."¹⁷ Such could not be said about

the Court after John Marshall's tenure as Chief Justice.

Changes in Oral Argument Practice in the Marshall Court Era

Among the many profound changes in the Supreme Court under Marshall's leadership between 1801 and 1835, the manner and form of oral argument constituted only one. Yet even this issue of basic court practice substantially altered how the Court decided cases and how the bar presented their arguments to the Justices. During the Marshall Court years, the Court began a steady retrenchment away from unlimited oral arguments that stemmed from adoption of the rule in 1792 incorporating King's Bench practice. In 1812, the Court issued a rule limiting oral argument to only two counsel per side.¹⁸ That rule drove the growing trend of Supreme Court specialists who came to dominate advocacy before the Court.

Distinguished Advocates Before the Marshall Court

A golden era in Supreme Court advocacy ensued, featuring lawyers about whom books, articles, and dissertations have been written: William Pinkney, Thomas Emmet, Luther Martin, William Wirt, and Daniel Webster, to name just the most prominent. Each of those advocates brought a distinctive style to the courtroom.

William Pinkney, for example, was a clothes horse, dressing in the latest fashions in his court appearances. At times, he was known to speak in court wearing amber-colored doe-skin gloves. (This is the kind of fashion accessory that likely would draw some comment if any advocate felt emboldened to do it today.) Even with his foppishness, however, Pinkney was an advocate of the first rank. The problem was, he knew it—and he made his opponents know it too. For all his brilliance, Pinkney was prone to insulting his adversaries

Although a first-rate advocate, the always-fashionably-dressed William Pinkney had an unfortunate habit of insulting his adversaries in public. Opposing counsel Daniel Webster locked him in a room in the Capitol after being publicly disparaged.



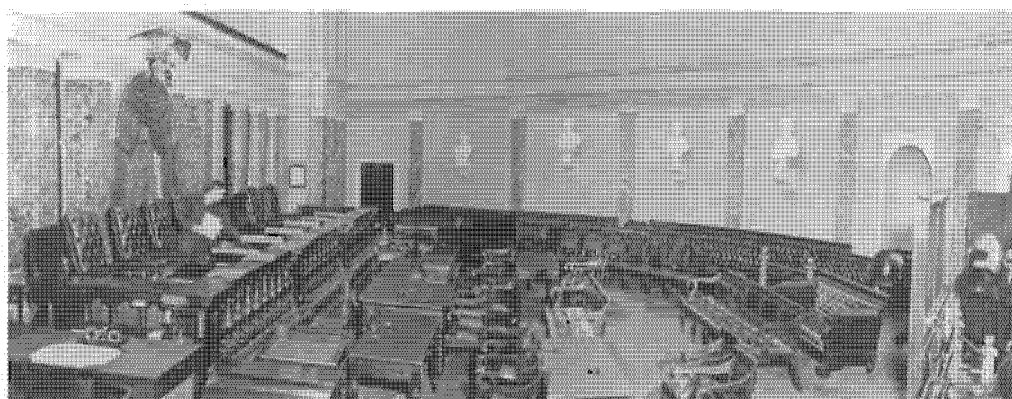
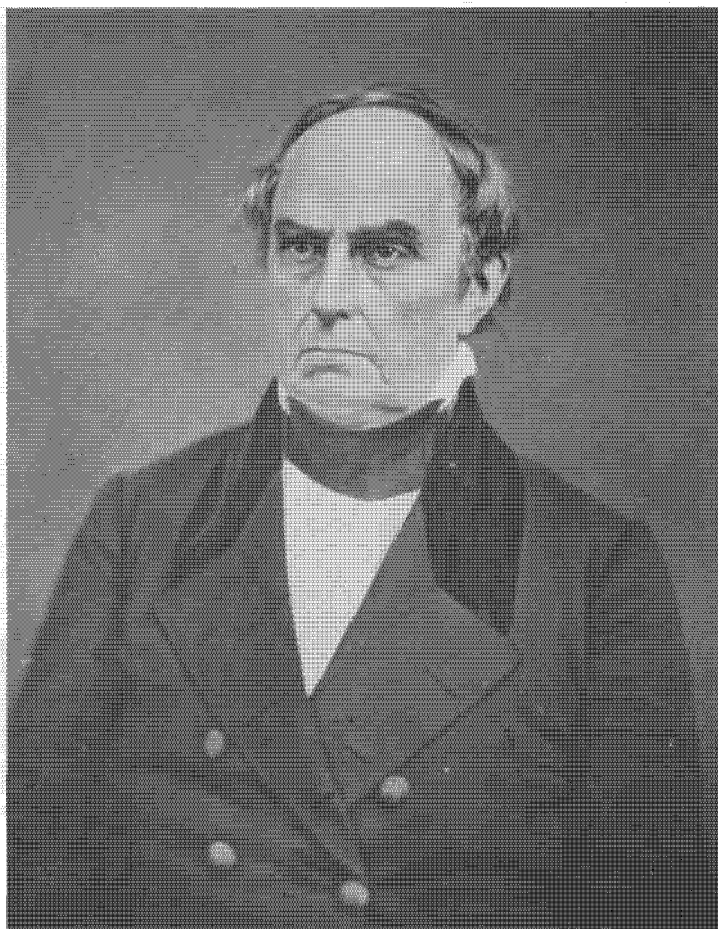
in the courtroom, sometimes with unfortunate results. He once disparaged Daniel Webster in court, whereupon Webster invited Pinkney to a room in the Capitol, locked the door, and put the key in his pocket. What ensued has not been recorded for posterity, but the next morning Pinkney appeared in court and “tendered a very courteous apology to Mr. Webster.”¹⁹ On another occasion, Pinkney said in open court of Luther Martin, at that time the attorney general of Maryland, “He would not long trespass on the patience of the Court, which had been already so severely taxed by the long, though learned argument of the Attorney-General—whose speech, however, was distinguished by these two qualities, that of being remarkably redundant, and remarkably deficient.”²⁰

Pinkney’s view notwithstanding, Martin was known for the “fullness of his legal knowledge” even though he “often appeared in [the Supreme] Court evidently intoxicated.”²¹

Although Chief Justice Roger Taney described him as an advocate in rather contradictory terms, Taney nonetheless believed that Martin “never missed the strong points of his case. . . . He had an iron memory, and forgot nothing he had read; and he had read a great deal on every branch of the law.”²²

Thomas Emmet was known for preparing with a zeal matched by few advocates. He demonstrated a passionate commitment to his legal causes and “put[] his whole soul” into his cases. A contemporary described his arguments this way: “One observes in all his speeches the exertion of a mind naturally capacious, stored with various learning, and adorned, but not encumbered, by the tasteful drapery of an ardent imagination.”²³ Emmet collapsed from a stroke in the middle of an argument in 1827, leading one newspaper to record that there was “something glorious and consolatory” in the manner of his death.²⁴

Daniel Webster preferred reading literature to law, a habit that may explain his magnificent oratorical skills. Webster's arguments in Supreme Court cases became the pillars of the nation's constitutional framework. Below is the courtroom in the Capitol where the Justices heard arguments in the nineteenth century.



Such industry and preparation could not always be attributed to the great Daniel Webster. After working with Webster on a Supreme Court case, Littleton Tazewell, himself a distinguished member of the bar, de-

scribed Webster as "excessively clever, but a lazy dog."²⁵ Webster himself confessed that he preferred reading history and literature to law. "A 'student at law' I certainly was not," he wrote, "unless 'Allan Ramsay's Poems' and

'Female Quixotism' will pass for law books."²⁶ A statistical analysis of Webster's arguments between 1814 and 1851 revealed that he lost slightly more often than he won,²⁷ but statistics alone completely obscure the greatness of his advocacy skills. Webster had the gift of understanding the pulse of the Marshall Court's nationalist sympathies and was able to arm the Court with the arguments that would form the pillars of our constitutional framework.

Another great advocate of the era was William Wirt, who earned his great distinction in the Supreme Court bar while serving as Attorney General from 1817 to 1829. Like Emmet, he worked feverishly to prepare for his arguments, so much so that family members used to refer to Wirt's "annual [S]upreme [C]ourt sickness," an illness brought on by the exhausting preparations that would take him into the wee hours of the night.²⁸ Wirt was



As Attorney General from 1817 to 1829, William Wirt argued thirty-nine cases for the government before the Court. But that figure does not compare with the ninety-nine cases he argued in his much more lucrative private practice. Wirt's frequent absences from the capital for work on private claims were a source of great annoyance to the Monroe and Adams administrations.

described as the "great government lawyer" of the Marshall Court era, but it is noteworthy that, of the 138 cases he argued while Attorney General, only 39 were government cases; the rest were as a private practitioner.²⁹ Indeed, he viewed Attorney General work as such an intrusion on his ability to generate income that he was said to have "waited for another official to request his appearance for the government [in a case] and often failed to see the interest of the United States in cases where it was obviously concerned."³⁰ Although Wirt's frequent absences from Washington to conduct his private practice greatly inconvenienced other members of the Monroe and Adams administrations, no one seems to have complained about the basic incompatibility of having an Attorney General who spent the bulk of his time on private client matters. As Wirt wrote to his wife on one such excursion to litigate a case for a private client, he feared only that "his many absences from the capital would cause a Congressional investigation."³¹

But when he was in Washington, he argued in a great number of the Marshall Court's important constitutional cases: the *Dartmouth College* case,³² *Sturges v. Crowninshield*,³³ *McCulloch v. Maryland*,³⁴ *Cohens v. Virginia*,³⁵ *Gibbons v. Ogden*,³⁶ *Ogden v. Saunders*,³⁷ *Cherokee Nation v. Georgia*,³⁸ and the *Charles River Bridge* case.³⁹ In 1815, even before he became Attorney General, Wirt offered advice on advocacy. Although some of his plea to emotionalism speaks from an entirely different age, his advice bears some resemblance to the process that a modern advocate must endure before feeling fully ready to appear in the Supreme Court:

You must read and meditate, like a Conastoga horse,—no disparagement to the horse by the simile. You must read like Jefferson, and speak like Henry. If you ask me how you are to do this, I cannot tell you, but you are nevertheless to do it. . . . [M]aster

the cause in all its points, of fact and law; digest a profound, comprehensive, simple, and glowing speech for the occasion...[:] no puerile, out-of-the-way, far-fetched, or pedantic ornaments or illustrations, but *simple, strong, and manly—level yourself to the capacity of your hearers*, and insinuate yourself among the heart-strings, the bones and marrow....⁴⁰

Justices in the modern era, of course, seem to be far less prone to allowing an advocate to insinuate himself into their “bones and marrow”—they are far too busy asking questions.

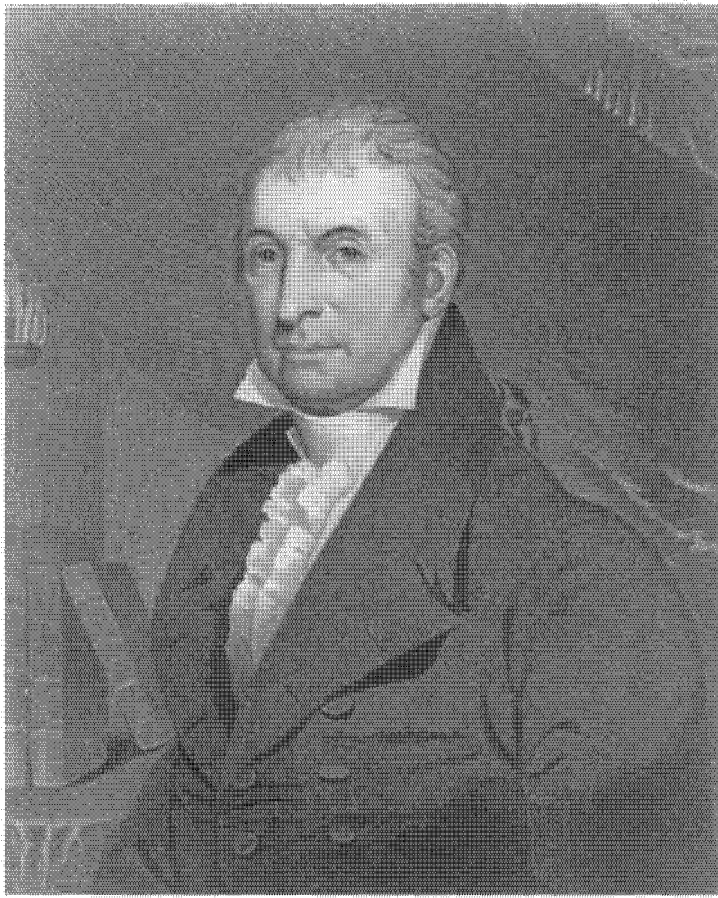
The personal idiosyncracies of these great advocates aside, the force of their intellects had a profound influence on the Court and

on our Nation. These advocates presented argument in some of the most important cases in the Court’s history—quite often against each other. In the 1814 Term, Pinkney argued more than half of the cases decided by the Court.⁴¹ And Martin was one of the losing advocates in the celebrated case of *McCulloch v. Maryland*,⁴² a case whose importance was acknowledged at the time by the Court itself, in waiving its rule limiting argument to two counsel per side.

In *McCulloch*, six advocates presented arguments, including the greatest of the day, Daniel Webster, as well as Pinkney, Martin, Wirt, Walter Jones, and Joseph Hopkinson. All six were regarded as among the most prominent attorneys of the era. In fact, Jones is said to hold the record for most arguments in the Supreme Court, with more than 300.⁴³



Walter Jones (1776–1861), who served as Attorney General of the United States for the District of Columbia, is said to hold the record for the most arguments in the Supreme Court: more than 300.



Luther Martin was Attorney General of Maryland on and off for nearly forty years. He was a frequent advocate before the Court and was one of several distinguished lawyers who argued the landmark *McCulloch v. Maryland* case.

Hopkinson, a prominent member of the Philadelphia bar, was especially well regarded by Chief Justice Marshall and represented the prevailing party in more than half of his Supreme Court cases.⁴⁴ *McCulloch* would not be one of them, although Hopkinson was said to have delivered “a superb argument.”⁴⁵

Similarly, though he delivered it in advocating a losing cause, Martin’s argument was thought to have been one of his finest. Interestingly, his argument invoked the Constitutional Convention, in which he had been a participant in 1787, thus creating a rare merger between the roles of an attorney as both shaper of the historical record and expositor of it in court.⁴⁶ In so arguing, Martin took direct aim at the Chief Justice, who “reportedly took a deep

breath” as Martin signaled that he intended to quote the young John Marshall—who had been a delegate to Virginia’s ratifying convention.⁴⁷ Martin is said to have quoted Marshall as saying words to the effect that the states could not be divested by implication of powers that they had possessed prior to the adoption of the Constitution.⁴⁸ In any Supreme Court argument, where an advocate seeks to gain an advantage or make a point by quoting a Justice’s words directly at him or her, there is a special moment of drama, as everyone in the courtroom is poised to see whether the shot will hit its mark and how the Justice will respond. In this instance, Marshall breathed a sigh of relief. As he later recounted, “I was afraid I had said some foolish things in that debate; but it was not so bad as I expected.”⁴⁹

As the *McCulloch* argument demonstrated, the Court at this time still made no effort to limit the length of attorney presentations. Oral argument could consume numerous days in important cases. In *McCulloch*, for example, the argument began on February 22 and did not end until February 27, a Saturday afternoon. And in *Gibbons v. Ogden*,⁵⁰ which announced the rule that states may not interfere with interstate commerce under the Commerce Clause, the attorneys argued for six days.

Common Types of Arguments Used

In presenting those arguments, the advocates tried a wide range of approaches to attract votes. As Martin's argument in *McCulloch* showed, advocates often referred to history and the debates surrounding promulgation and ratification of the Constitution. Webster also described at length the "immediate causes which led to the adoption of the present Constitution"⁵¹ in his argument in *Gibbons v. Ogden*.

In addition to his historical argument in *Gibbons*, Webster also sought to impress upon the Court the slippery slope of allowing New York to issue an exclusive license for navigation between New Jersey and New York that would override the navigational license *Gibbons* had obtained under a 1793 Act of Congress. As Webster put it in *Gibbons*, if Congress does not have the power to override New York's licensing preference under federal law, "where is the limit, or who shall fix a boundary for the exercise of the power of the States? Can a State grant a monopoly of trade? Can New York shut her ports to all but her own citizens? Can she refuse admission to ships of particular nations?"⁵² In much the same way that Justices in present-day arguments pose hypothetical questions to gauge the outer limits of a party's position, Webster did the same thing rhetorically in his oral argument to the Court. He sought to impress upon the Justices that, if they upheld the state's law in this instance, it would be very difficult to contain future en-

croachments on national authority by states in regulating commerce.

Close textual analysis was also an important advocacy tool. In *McCulloch*, Pinkney compared the use of the term "necessary" as it appears in the Necessary and Proper Clause with its use in Article I, Section 10 of the Constitution, which provides that "No State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be *absolutely necessary* for executing its inspection laws powers." The Necessary and Proper Clause does not contain a modifier of "necessary" with the word "absolutely." Rather, it authorizes Congress "to make all Laws which shall be necessary and proper for carrying into Execution" the powers of the general government. As Pinkney argued, there was "no qualification of the necessity. It need not be absolute. It may be taken in its ordinary grammatical sense. The word *necessary*, standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the subject."⁵³ Chief Justice Marshall's opinion picked up on that theme, where it contrasted the meaning of "necessary" in those two constitutional provisions. As Chief Justice Marshall explained, it is "impossible" to compare those two provisions "without feeling a conviction that the [Constitutional] convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.' This word, then, like others, is used in various senses."⁵⁴

Comparison of Supreme Court Advocacy with Political Rhetoric

Another important dynamic to note during the Marshall Court era was the way in which advocacy in the Supreme Court mirrored political rhetoric. Although advocates did not make overtly political arguments, there are striking similarities between the kinds of arguments used by advocates to persuade Supreme Court Justices and the types advanced by political leaders of the day in their orations. The most

obvious similarity was length. Just as Supreme Court arguments could last for days, so too could political orations last for hours and debates take days. More importantly, political orations of the era conveyed the same combination of history, textual analysis, logic and reason, and emotional appeal of successful Supreme Court arguments.

This is perhaps not too surprising, because the premier Supreme Court advocates of the Marshall and Taney Courts were also politicians or engaged in public life. The year after he argued *McCulloch v. Maryland* with Webster and Wirt as his co-counsel, Pinkney was elected a United States Senator from Maryland. Webster, of course, served stints in Congress as a Representative from New Hampshire and Massachusetts, and then twenty years as a United States Senator. Martin was attorney general of Maryland on and off for nearly forty years; Wirt was the Attorney General of the United States for twelve years; and Jones served as the Attorney of the United States for the District of Columbia for nearly twenty years.

In terms of style, political rhetoric in the earliest years of the Court's history hewed to an overtly obsequious form of address—your most humble “obedient servant” being the norm—and that style appears to have been typical of Supreme Court arguments as well.⁵⁵ That characteristic also evolved. In the early nineteenth century, political rhetoric was marked by greater emphasis—argument by exclamation point, with an elaborate formalism. Eloquence—though certainly not brevity—became the treasured attribute of the politician.⁵⁶ In his famous speech that led to the Missouri Compromise, for example, Pinkney employed many of the same advocacy tools he routinely used as a Supreme Court advocate: analysis of the texts of the Declaration of Independence, Articles of Confederation, and Constitution; use of logical syllogisms to debunk major and minor premises of his opponents; analogizing to the history of ancient Sparta, Rome, and Athens, which de-

scribed themselves as republics but permitted slavery; and appealing to the need for flexibility in the workings of a growing Nation.⁵⁷ At least in that address, however, he did not insult Senators opposing him.

By contrast with the more extended rhetorical discourses in political speech and legal advocacy in the Marshall Court era, consider how both have changed today. In this Court, the best advocates develop a short mantra, which they repeat as the theme of their argument. As John Nields argued in *United States v. Hubbell*:⁵⁸ “[T]he principle is whether you’re relying on the truth-telling of the witness to find out that the document exists. That’s the principle . . . testimony, truth-telling. . . . [I]f you’re compelling a person to tell the truth with the consequence that he loses his liberty, you have a Fifth Amendment problem.”⁵⁹ In our era’s political rhetoric, a mantra can be even simpler: “It’s the economy, stupid.”

Evolution toward Written Briefs

As interesting as the different forms of argument tended to be in the Marshall Court years, there was no sound reason why they could not be presented in written form. The lengthy—often multiple-day—arguments steadily wore on the Court’s patience. Even the most skilled advocates were not spared the Justices’ private impatience with extended oral arguments. Chief Justice Taney, for example, believed that Martin was a “profound lawyer,” but nonetheless complained that he “introduced so much extraneous matter, or dwelt so long on unimportant points, that the attention was apt to be fatigued and withdrawn, and the logic and force of his argument lost.”⁶⁰

Justice Story also complained at times about the length and quality of oral arguments. During arguments, he could be seen assiduously writing. The advocates probably thought he was taking notes on their arguments, which likely caused them to embellish still further the point they were trying to

make. Instead, he was writing verse while listening to oral arguments—"to versify any casual thought suggested to him by the arguments of counsel," as his son put it in his edition of Justice Story's *Life and Letters*.⁶¹ It was clear from some of those poems that Story also was tiring of extended arguments:

Stuff not your speech with every sort
of law,
Give us the grain, and throw away the
straw.

* * *

Who's a great lawyer? He who aims
to say
The least his cause requires, not all he
may.⁶²

Publication of Justice Story's poems must have been a shock to attorneys who had thought he was scrupulously writing notes on their arguments.

As usual, Chief Justice Marshall summed up the problem best. Although in some respects he was a supporter of extended oral arguments, he also spoke of arguments so stultifying that the "acme of judicial distinction" was the "ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says."⁶³

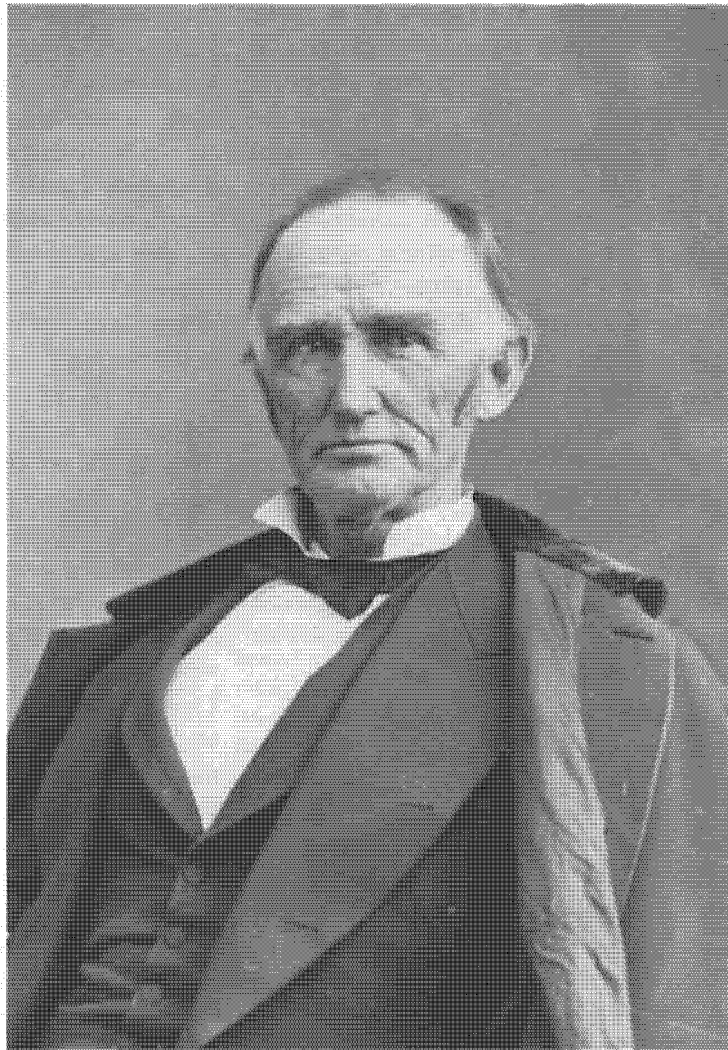
In 1833, the Supreme Court issued a rule signaling that "it would in many cases accommodate Counsel, and save expense to parties, to submit causes upon printed arguments."⁶⁴ Under that rule, the Court suggested that, "in all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments, if the Counsel on either or both sides shall choose so to submit the same."⁶⁵ Thus began the practice of submitting written briefs to the Court. That "order," however, was hortatory, not mandatory, which meant that change would proceed at the pace promoted by the bar. In time, that order led to a profound change in the manner of oral argument in the Supreme Court, because the availability of written briefs rendered unnecessary the long, pedantic ora-

tions that had marked Supreme Court practice up to that time.

Aside from the Justices' collective perceptions that extended oral arguments were unnecessary to the Court's decisionmaking process, the sheer necessities of docket pressures forced a change in the Court's rules governing oral argument. The Court's workload increased from 98 cases in 1810 to 253 cases in 1850. That growing caseload forced the Court to increase the time set aside on its calendar for oral argument, from forty-three days in 1825 to ninety-nine days in 1845.⁶⁶ (By contrast, the calendar in the modern era typically calls for approximately forty days for oral arguments per Term, with the Court hearing argument in approximately eighty cases per Term.) Not only was the Court's docket increasing, but the Justices were not receiving any relief from their circuit-riding duties, which forced them to spend long periods outside of Washington hearing cases.

A second dynamic affecting Court practice was the susceptibility of the Justices to illness, which could cause interruptions in a Justice's ability to hear the entire argument when it took multiple days and which meant that evenly divided cases had to be reargued, at great expense to the litigants and the Court. For example, Justice John McKinley was in ill health throughout his career on the Court, from 1838 to 1852. He is said to have managed to produce only twenty opinions for the Court and two concurrences during his fifteen years of service.⁶⁷ Though a highly productive member of the Court, Justice Story missed the entire 1843 Term due to illness. Shortly after Justice Story returned to the Court, Chief Justice Taney fell ill and missed most of the 1844 Term. Those absences caused a severe backlog of cases to develop.

That backlog of cases and growing opposition among some Justices to protracted arguments led the Court to change its rules in 1849 to provide that no counsel would be permitted to speak in a case without having first filed a printed abstract of points and authorities. The new rule further prohibited an attorney from



The *Dred Scott* case attracted as advocates many leading luminaries of the bar, including Montgomery Blair (pictured), who took Scott's case pro bono, having arranged for others to pay for court costs.

referring to any other book or case not referenced in the points and authorities, and informed the bar that the Court would proceed *ex parte* with the hearing if counsel for a party did not conform to this rule.⁶⁸ Finally, and most importantly, the rule provided that "no counsel will be permitted to speak, in the argument of any case in this court, more than two hours, without the special leave of the court, granted before the argument begins."⁶⁹

Such special leave of court, however, was granted in numerous cases in succeeding years. The *Dred Scott* case was one such example.⁷⁰ Like other great constitutional cases, *Dred*

Scott drew as advocates some of the leaders of the Supreme Court bar, including Reverdy Johnson, Montgomery Blair, Henry S. Geyer, and, eventually, George T. Curtis. Blair took Scott's case pro bono, having arranged for the court costs to be picked up by others. Johnson and Geyer, two Marylanders, represented John Sandford, who claimed to be Scott's owner and master. At the time, Geyer was a United States Senator well known for his pro-slavery stance. Johnson would subsequently become a Senator from Maryland.

The case was argued twice. The first time, in February 1856, each counsel received three

hours of argument time. (At that point, Curtis was not involved in the case.) The parties also filed written briefs, although Blair's brief for Scott was incredibly short for a case of this magnitude, running to a mere eleven printed pages.⁷¹ After a conference, the Court set the case for re-argument on whether it had jurisdiction to decide the case and, if it did, on the merits of whether Scott was a citizen of Missouri. Shortly before the re-argument, Blair filed two more briefs, one of eight pages, the other of forty. Three days before the second argument, Blair persuaded Curtis to participate—a not-insignificant development, because Curtis's brother, Benjamin, was an Associate Justice. In his argument, Attorney Curtis managed to persuade Justice Curtis that Scott should prevail. Justice Curtis dissented and in private correspondence later wrote how persuasive his brother had been.⁷²

Toward a Distinctively American Practice

Dred Scott thus illustrates that the changes in rules to require written briefs and limited oral arguments were still somewhat slow to take effect. Nonetheless, by the time of the Civil War, the emphasis placed on written briefs marked a great change from just decades before.

The Marshall Court era had given rise to some of the most important constitutional cases framing the role of national versus state power. As that doctrine evolved to concentrate power in the national government, the Court's practices were changing to reflect a more distinctly American mode of advocacy. The rigors of travel for the Justices who were required to ride circuit have been well documented.⁷³ It was no less of a nuisance for attorneys to travel to Washington, D.C. to present their cases to the Justices, particularly when it was difficult to predict when an argument would be heard on the Court's docket. During the era of unlimited oral arguments, this problem must have been a source of great frustration for clients and attorneys alike. It also

likely contributed to the concentration in the Washington-Baltimore corridor of the premier Supreme Court advocates of the day, from Martin and Pinkney to Jones and Webster.

As a fledgling nation learning its way through the complexities of national-state relations, a fundamental disagreement on the handling of slavery, and the rise of industrialization, the United States had no great need to follow practice at the King's Bench for cases in the Supreme Court simply for the sake of tradition, as the Court's rules had first prescribed. Although the historical materials of the period do not identify the rise of nationalism as a source for the evolution in the Court's rule of practice, there is no doubt that a growing sense of American identity—noticed by Alexis de Tocqueville in the 1830s⁷⁴—was part of the cultural backdrop against which the Justices were deciding how to handle their workload. Thus, if a uniquely American form of practice could be devised instead of blind adherence to English customs, that was to be preferred. Coupled with the expediency of accommodating travel across long distances and the fatigue of listening to extended oral arguments that decreasingly aided the Justices, the evolution toward written briefs with diminished oral argument time satisfied both the Court's need for greater efficiency and the cultural imperative of adapting American institutions to distinctly American concerns.

The outbreak of the Civil War, which both facilitated transportation networks for military purposes and exacerbated difficulties of attending sessions of Court for run-of-the-mill disputes, brought those various pressures to a head. Over the next hundred years, the time allotted to oral argument would be shortened still further, from two hours per side to thirty minutes per side, which prevails today except in the most unusual cases. But in none of the succeeding periods of time would the manner and form of advocacy in this Court change as dramatically as it did in the first half of the nineteenth century. In that period, as the great constitutional questions of American nationalism

were debated and decided, the Court's practice moved steadily but inexorably away from the English oral tradition and toward a uniquely American blend of written and oral advocacy.

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ENDNOTES

¹See David C. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument* 14-49 (West 2003). This chapter places present-day advocacy in historical context.

²In the 1790s, the Rules of the Supreme Court were issued by orders of the Court on an ad hoc basis. In 1803, William Cranch compiled the first set of rules of the Supreme Court and published them in what is now 5 U.S. (1 Cranch) xv-xvii. Henceforth, when a new Reporter of Decisions was appointed, that Reporter published a compilation of the Rules of the Supreme Court as they then existed in the first volume of that Reporter's series. See 14 U.S. (1 Wheat.) xiii-xix (1816); 26 U.S. (1 Pet.) v-xi (1828); 42 U.S. (1 How.) xxiii-xxxviii (1843). From the earliest set of Cranch's rules, before being admitted to practice, attorneys had to swear an oath in terms that are remarkably similar to the oath required of attorneys in the present day. 35 U.S. (1 Cranch) xvi (1803) (Rule VII, issued Aug. 8, 1792). According to the official documents of the Court, the date given in Cranch's official report of 1791 is incorrect, and the actual date the rule was issued was August 8, 1792. See 4 Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 181n. and 595n. (1992).

⁴See Julius Goebel, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 663 (1971).

⁵*Id.*

⁶*Rules, Orders and Notices, In the Court of King's Bench from Second of King James I to Hilary Term the Fifteenth of King George II* (1742).

⁷*The Practick Part of the Law: Shewing the Office of An Attorney, and A Guide for Solicitors in All the Courts of Westminster* (1702).

⁸See Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 101-03 (1990).

⁹See Thomas Lee, *A Dictionary of the Practice in Civil Actions, In the Courts of King's Bench and Common Pleas, With Practical Directions and Forms* (2d ed. 1825). In that volume, Lee offers a number of forms for declarations and writs of error. See *id.* at 449-50, 646-66.

¹⁰*Collet v. Collet*, docketed February 8, 1792. See 1 J. Goebel, *Antecedents and Beginnings*, at 669.

¹¹Goebels, *supra* note 10, at 663.

¹²6 Marcus, *The Documentary History of the Supreme Court*, at 119-26.

¹³See 5 U.S. (1 Cranch) xvi (Rule VIII, issued February 4, 1795).

¹⁴6 Marcus, *The Documentary History of the Supreme Court* at 558 (citing 3 Dallas 25).

¹⁵*Id.*

¹⁶*Id.* at 603 (reprint of William Bradford, Jr.'s *Notes of Arguments in the Supreme Court* [February 23, 1795]).

¹⁷Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* 447 (1992); Richard B. Morris, *John Jay, the Nation and the Court* (1967); Sandra Van Burkleo, "'Honour, Justice, and Interest': John Jay's Republican Politics and Statesmanship on the Federal Bench," 4 *Journal of the Early Republic* 239-74 (Autumn 1984).

¹⁸See 14 U.S. (1 Wheat.) xviii (1816) (Rule XXIII, issued February Term, 1812). For a succinct overview of these developments, see Stephen M. Shapiro, "Oral Argument in the Supreme Court: The Felt Necessities of the Time," 1985 *Sup. Ct. Hist. Soc. Yearbook* 22-34.

¹⁹G. Edward White, III-IV *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, The Marshall Court and Cultural Change, 1815-1835*, at 243 (1988) (quoting letter from W. Wirt to F. Gilmer).

²⁰Quoted in Theodore C. Waters, "Luther Martin," 14 *A.B.A. J.* 605, 608 (Nov. 1928).

²¹White, *The Marshall Court*, at 230.

²²Samuel Tyler, *Memoir of Roger Brooke Taney* 66-67 (1872).

²³Francis Walker Gilmer, *Sketches, Essays and Translations* 27 (1828).

²⁴White, *The Marshall Court*, at 213-14. Emmet was not the only attorney to expire from an oral argument experience. According to Justice William O. Douglas, one advocate passed out in 1973 while arguing a Fourth Amendment case, which was reargued the following week by a different lawyer. And another lawyer, Prew Savoy, insisted on arguing *Soriano v. United States*, 352 U.S. 270 (1957), even though he was in the last stages of lung cancer. He died within 36 hours of arguing, leading Justice Douglas to write: "[H]e had lived with his case a long time and felt so keenly about it that he wanted to argue it even on his last day on this earth." William O. Douglas, *The Court Years, 1939-1975*, at 181 (1980).

- ²⁵White, *The Marshall Court*, at 220 (quoting letter from L. Tazewell).
- ²⁶Letter from Daniel Webster to Judah Dana, December 29, 1804, XVI, 670, quoted in Maurice G. Baxter, *Daniel Webster and the Supreme Court* 3 (1966).
- ²⁷S. W. Finley, "Daniel Webster Packed 'Em In," 1979 *Sup. Ct. Hist. Soc. Yearbook* 71.
- ²⁸White, *The Marshall Court*, at 263.
- ²⁹*Id.* at 266. See Joseph Charles Burke, "William Wirt: Attorney General and Constitutional Lawyer" 75 (Ph.D. diss. Indiana Univ. 1965).
- ³⁰Burke, "William Wirt," at 76.
- ³¹*Id.* at 80.
- ³²*Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).
- ³³17 U.S. (4 Wheat.) 122 (1819).
- ³⁴17 U.S. 316 (4 Wheat.) (1819).
- ³⁵19 U.S. (6 Wheat.) 264 (1821).
- ³⁶19 U.S. (6 Wheat.) 448 (1821).
- ³⁷25 U.S. (12 Wheat.) 213 (1827).
- ³⁸30 U.S. (5 Pet.) 1 (1831).
- ³⁹*Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).
- ⁴⁰John P. Kennedy, *Memoirs of the Life of William Wirt*, at 342–43 (1849).
- ⁴¹White, *The Marshall Court*, at 208. See also Stephen M. Shapiro, "William Pinkney: The Supreme Court's Greatest Advocate," 1988 *S. Ct. Hist. Soc. Yearbook*, at 40–45.
- ⁴²17 U.S. 316 (1819).
- ⁴³Douglas, *The Court Years*, at 178. Jones has attracted less attention from historians, but in one memorial was favorably compared to Webster, Wirt, and Reverdy Johnson as "the quickest, brightest, and probably the acutest lawyer of the four." Joseph Packard, "General Walter Jones," 7 *Virginia Law Register* 233, 236 (Aug. 1901).
- ⁴⁴Burton Alva Konkle, *Joseph Hopkinson* 156–57 (1931).
- ⁴⁵*Id.* at 225.
- ⁴⁶White, *The Marshall Court*, at 238–40.
- ⁴⁷*Id.* at 239.
- ⁴⁸*Id.* (quoting D. Robertson, *Debates and Other Proceedings of the Convention of Virginia* 298 [2d ed. 1805]).
- ⁴⁹*Id.* (quoting R. Johnson and W. Browne, *Life of Alexander H. Stephens* 183 [1870]).
- ⁵⁰19 U.S. (14 Wheat.) 448 (1821).
- ⁵¹6 Daniel Webster, *The Works of Daniel Webster*, at 9 (1857).
- ⁵²*Id.* at 12.
- ⁵³Henry Wheaton, *Some Account of the Life, Writings, and Speeches of William Pinkney* 563–64 (1826).
- ⁵⁴*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 414–15.
- ⁵⁵For examples of political rhetoric of the times, see Andrew W. Robertson, *The Language of Democracy: Political Rhetoric in the United States and Britain, 1790–1900* 23 (1995).
- ⁵⁶*Id.* at 43–44.
- ⁵⁷*Annals of Congress*, 16th Cong., 1st Sess. 388–418 (Feb. 15, 1820).
- ⁵⁸*United States v. Hubbell*, 530 U.S. 27 (2000).
- ⁵⁹*United States v. Hubbell*, No. 99–166, 2000 WL 230530 at *23 (Feb. 22, 2000); see generally Frederick, *Supreme Court and Appellate Advocacy* at 140–41.
- ⁶⁰Tyler, *Memoir of Roger Brooke Taney*, at 66–67.
- ⁶¹William W. Story, ed., II *The Life and Letters of Joseph Story*, at 89 (1851).
- ⁶²*Id.* at 90.
- ⁶³Albert Beveridge, *The Life of John Marshall*, at 83 (1919).
- ⁶⁴See 42 U.S. (1 How.) at xxxv (Rule XL, issued Jan. Term, 1833).
- ⁶⁵*Id.*
- ⁶⁶See Gerhard Casper and Richard Posner, *The Workload of the Supreme Court* 12–13 (1976).
- ⁶⁷Hall, *The Oxford Companion to the Supreme Court* 540 (1992).
- ⁶⁸See 48 U.S. (7 How.) i (1849) (Rule 53, issued Jan. Term 1849). See also 51 U.S. (10 How.) v (1851) (Rule 58, issued Dec. Term 1850, establishing that the printed argument had to be filed before the oral argument if the Court was to receive it).
- ⁶⁹See 48 U.S. (7 How.) i (1849) (Rule 53, issued Jan. Term, 1849).
- ⁷⁰*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
- ⁷¹Carl Brent Swisher, *The Taney Period* 1836–64, at 605–06 (1974).
- ⁷²*Id.* at 614.
- ⁷³See generally J. Glick, "On the Road: The Supreme Court and the History of Circuit Riding," 24 *Cardozo L. Rev.* 1753, 1765–66 (Apr. 2003).
- ⁷⁴Alexis de Tocqueville, *Democracy in America* 543–44 (H. Mansfield and D. Winthrop eds., 2000).

Ex-Justice Campbell: The Case of the Creative Advocate

JONATHAN LURIE

It can be argued that so-called appellate judicial distinction sometimes results from a Justice basking in the positive reaction to a decision that may be based in part—or even in totality—on arguments raised by counsel. If this is true, who, then, is the distinguished figure? The successful advocate is one who can persuade an appellate court as to the soundness of the position he or she takes. The Justice gets the credit, while the attorney gets the fee. But is there more to being a great advocate besides winning cases? This article examines aspects of John Campbell's career, in what may be called "the case of the creative advocate." It will focus in particular on the greatest case he ever argued, the *Slaughterhouse Cases*,¹ and will draw on the recent book I coauthored with Ronald Labbé.²

At the outset, it should be noted that John Campbell is one of the more unique jurists to serve on the Supreme Court. This is not due, however, to the fact that he resigned from the Court and later returned to practice before it. A number of other Supreme Court Justices have taken such a step, and two may be mentioned here. Benjamin Curtis served with Campbell and, after his resignation, also went on to argue a great many cases before his old tribunal. Curtis, it might be noted, had been one of Andrew Johnson's lawyers during his impeachment trial, and later declined an appointment from this beleaguered chief executive to be his Attorney General. Closer to our own era, Abe Fortas immediately comes to mind.³ But

John Campbell has four additional claims to uniqueness.

In the first place, Campbell is the only Justice ever to resign because his state seceded, although in 1861 the Court was heavily Southern in judicial background as well as viewpoint. No other Justice followed suit, their Southern sympathies notwithstanding. Further, Campbell is the only ex-Justice ever to be imprisoned by federal authorities for several months, and ultimately pardoned by a Chief Executive (in this case, Andrew Johnson). Also, he appears to be the only Justice to have attended West Point, even though he did not graduate. It is not the function of historians to speculate on "what-if" types of

questions, but one can only wonder what might have happened had Campbell followed a military career rather than one in the law. Finally, he is apparently the only lawyer to have been appointed to the Court at the *unanimous* request of all the sitting Justices.⁴ Of course, from time to time many individual Justices have conferred with the Chief Executive about a possible appointment, but for the entire Bench to join in a written request that one individual be selected is indeed unusual.

Campbell's nomination must be seen in the context of the futility and fiasco concerning President Millard Fillmore's three failed appointments. The second Vice President to succeed to high office because of an incumbent's death, Fillmore had a difficult time dealing with Congress, particularly the Senate. One of his Supreme Court nominations went to Senator Judah Benjamin, who declined. Benjamin later resigned from the Senate when his state, Louisiana, seceded. During the Civil

War, he filled several positions within Jefferson Davis's Confederate Cabinet. When the Confederacy collapsed, he managed to flee to England, where he mastered British common law and became a distinguished barrister. Another of Fillmore's nominations failed to receive even Senate consideration, let alone a vote.

The judicial seat was still open when Franklin Pierce took office in March 1853. One of the most consistent of the Northern dough-faces to occupy the Presidency, Pierce readily acquiesced in the Court's "request"—and the forty-one-year-old Campbell took his seat. He had received unanimous Senate confirmation.

Campbell's background is no less interesting than the path that brought him to the Supreme Court. Born in Georgia in 1811, he graduated "with first honors" from Franklin College (now the University of Georgia) when he was fifteen. He was then appointed to the Military Academy at the behest of John C. Calhoun, a friend of his father, but before he could graduate the older Campbell suddenly died. Campbell did not do that well at the Point, but apparently neither did Ulysses Grant. At the age of seventeen he taught school to raise funds so as to pay off family debts; in 1829, at the ripe old age of eighteen, he was admitted to the Georgia Bar.

For reasons that remain unclear, Campbell chose not to remain in Georgia. Instead, he moved to Alabama shortly thereafter, and there his career flourished. He turned down two nominations to the Alabama Supreme Court and argued many cases before this tribunal. He may have actively sought the nomination to the Supreme Court; as has been noted, others certainly did on his behalf.⁵ The Senate confirmed Campbell within four days after receipt of the nomination.

Campbell's stint on the Court was relatively brief—barely eight years. Indeed, his tenure was about as long as that of Chief Justice Salmon Chase, before whom he argued in 1872 and 1873. It is, I think, fair to state that Campbell was not a particularly distinguished



MILLARD FILLMORE

The last Whig to be President, Millard Fillmore had such a difficult relationship with the Democrat-controlled Senate that all three of the candidates he proposed to fill Justice John McKinley's seat were rejected.



Fillmore offered a Supreme Court seat to Senator-elect Judah P. Benjamin, but the Louisiana lawyer preferred to go through with his election to the Senate. Had Benjamin accepted the nomination in 1852, he would have been the first Jewish Supreme Court Justice.

jurist. For example, he wrote no major opinions that have endured in significance, and he concurred in one of the more infamous decisions in Supreme Court history, the *Dred Scott* case.⁶ On the other hand, his concurrence was far more circumspect than that of Chief Justice Roger B. Taney. Campbell held simply that Missouri law controlled that case; therefore, *Scott* remained a slave and could not sue. Campbell believed, however, that slavery would evolve into extinction, and that secession was hence both unwise and unnecessary. He freed his slaves before the war broke out.

Campbell resigned from the Supreme Court in April 1861. He appears to have given no specific reasons. Possibly it was a sort of loyalty to his state, possibly a belief that he could be more effective at home than in Washington, D.C., possibly an awareness

that his financial rewards as Justice were far from what he earned as an attorney. Campbell had some inconclusive contact with Secretary of State William Seward shortly before the Confederate attack on Sumter. Why Seward and not Lincoln? In the first few months of Lincoln's administration, Seward tried to persuade as many as he could that *he*, and not the recently elected President, represented the brains, savvy, and power in the new administration. Seward soon learned the real truth, however, and ultimately became one of Lincoln's most trusted supporters—and a close friend as well.⁷

Campbell served as a less-than-effective assistant secretary of war under Jefferson Davis. By 1864, he seems to have been committed to gaining an end to the fighting, but without surrendering the two essential and



President Franklin Pierce (pictured) made a good choice for his one and only appointment to the Supreme Court. Forty-one-year-old John Archibald Campbell of Alabama was a nationally respected trial lawyer who favored state's rights but also supported improving the lot of slaves. He was promptly confirmed.

unchangeable Confederate prerequisites: independence and the perpetuation of slavery. He was one of the three Confederate representatives who participated in the fruitless negotiations with Lincoln at Hampton Roads, Virginia. Alone among the Cabinet—and at considerable risk to his own safety—Campbell awaited Union forces in Richmond after the city had surrendered and had been abandoned by the Confederacy. He may well have met with Lincoln again during the President's very short visit to Richmond. What passed between the two men is unknown.

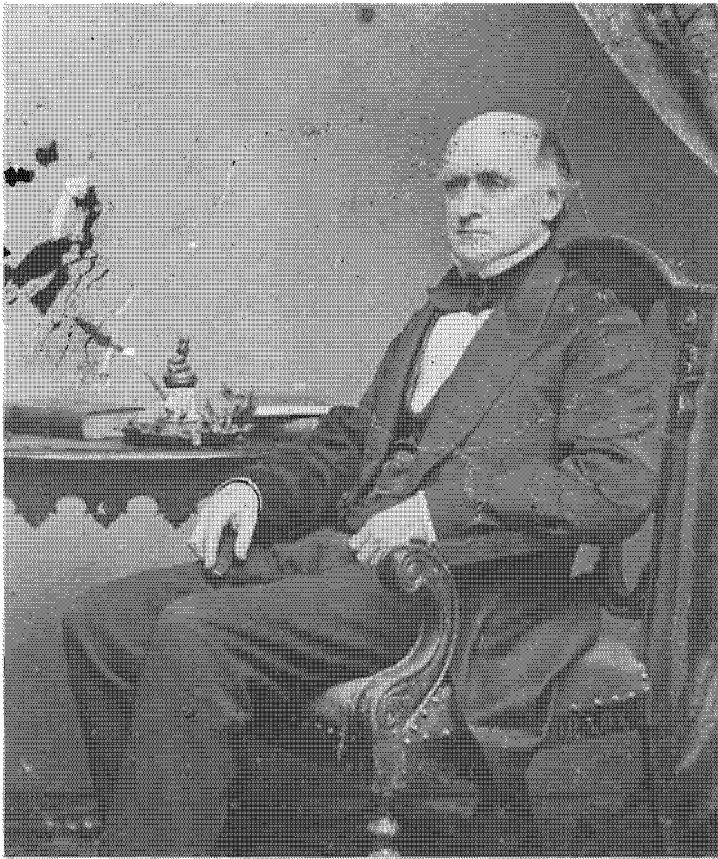
But Lincoln's assassination by John Wilkes Booth changed the entire picture. Arrested and imprisoned for about four months after the assassination, Campbell was released by Johnson, at the request of Justices Benjamin Curtis and Samuel Nelson. He was also pardoned. The President's action made it possible

for him to resume and rebuild his law practice, but Campbell also benefited from the *Test Oath Cases*, decided by a badly divided Court in 1867.⁸ His case was very similar to that of the plaintiff in *Ex parte Garland*. He had already resumed his practice, however, within his newly adopted state Louisiana, to which he had relocated on his return to the South in 1861.

To oppose secession was one thing, and Campbell had. To acquiesce in abolition was another—and again, Campbell had. Yet he yearned for the restoration of the old South, without slaves, but with its sense of place and social stability intact, and this appeared to be gone. Further, as he reconstructed his law practice and library in Louisiana, his anger with what he perceived to be a misguided—if not actually malevolent—process of Reconstruction led him to use his considerable skills as an attorney to hinder and restrict its course whenever he could. Campbell's anger can be better understood if one looks at his perspective. He had suffered much.

Imagine a former Supreme Court Justice who had visited on at least two occasions with the President, who was regarded by many contemporaries as an extremely able and distinguished attorney, who had seen his very impressive law library—along with the rest of his property in Alabama—destroyed by Union troops, who had been confined in prison, and who had finally returned to his new home in New Orleans only to see his old world turned upside down. One can understand why he might have had a sense of angry resentment. From 1869 to 1873, as one scholar has noted, the unifying theme of his newly reestablished legal practice was “his intense and ardent opposition to Reconstruction”—one which specifically included the new role that African Americans now seemed destined to play in it.⁹

This former Supreme Court Justice, writes Professor Michael Ross, “was a bitter, hate-filled man.” “We have,” complained Campbell, “Africans in place all about us.



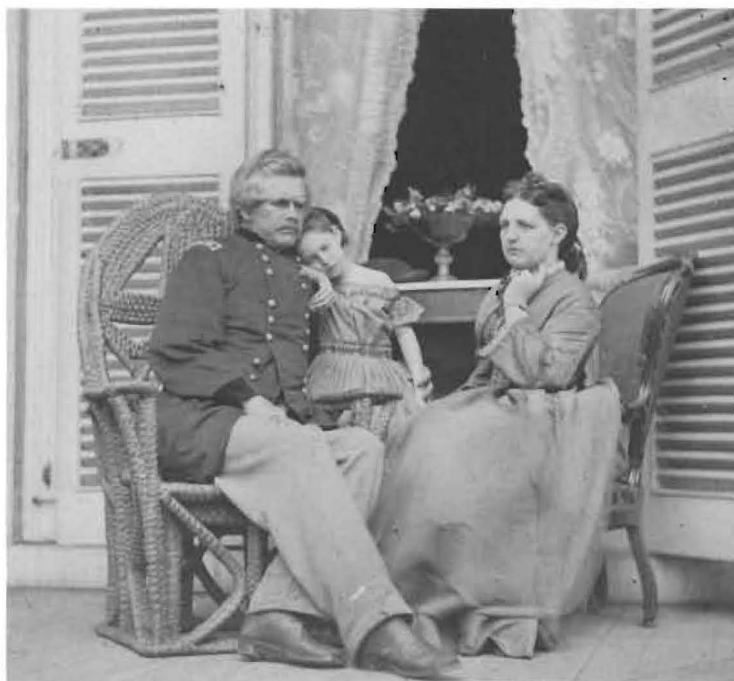
Justice Campbell's tenure on the Court was cut short after eight years when he resigned in 1861 to serve as assistant secretary of war for the Confederate States of America. Although personally opposed to secession and the war, he felt duty-bound to join the Confederate cause.

They serve as jurors, post office clerks, custom house officers and day by day they barter away their obligations and duties." In fact, "corruption is the rule."¹⁰ But these conditions reflected a deeper crisis. Campbell poured out his bitterness to his old friend and former judicial colleague, Justice Nathan Clifford. "We are fast losing all of our ancient notions of what is becoming and fit in administration. The public are tolerant of corruption, maladministration, partiality in courts, worthlessness in juries, and regard government only as a means of exploitation. Indifference to anything wrong, is the common (s)entiment... Discontent, dissatisfaction, murmurings, complaints, even insurrection would be better than the insensibility that seems to prevail."¹¹

Unlike many of his Louisiana contemporaries, Campbell did not turn to violence, intimidation and terror. Those were not his

weapons of choice. His ultimate goals, however, were not that different from the Ku Klux Klan and its ilk. Like them, he sought to delay, hinder and obstruct Reconstruction measures wherever possible. But he sought to do so not through the robe as much as through the writ. He returned to the courtroom, where starting in 1868 he "launched [a series] of obstructionist law suits," as Michael Ross has recently shown.¹² The most famous of these were, of course, the *Slaughterhouse Cases*. A few words of background about them might be appropriate here.

The case arose in the wake of actions undertaken by the recently reconstituted and racially integrated Louisiana legislature in 1869. The 1869 statute was just one out of several innovative proposals adopted by this body, and in the eyes of conservative, white males—the vast majority of whom refused



Campbell risked his own safety to stay in Richmond and await Union forces after the city had surrendered. Pictured is the Richmond residence of Jefferson Davis and the table on which General Lee signed the surrender. General Edward Ord and his wife and child occupied the mansion when this photo was taken in 1865.

to have anything to do with the Republican “reconstructed” administration—they were all equally offensive. It made little difference if they involved the newly freed slaves, which the Slaughterhouse Act did not.

The manifest hostility of white opponents to the statute notwithstanding, it would be a serious error to regard the Slaughterhouse Act of 1869 as just one example of many that might be offered of alleged Republican skullduggery and corruption within the reconstructed South. Although it was indeed the product of a Reconstruction legislature and thus in itself suspect to white Louisiana *regardless* of content, the new legislation in fact represented the culmination of longstanding efforts to reform the sanitation practices in New Orleans. The state of sanitation in the Crescent City was well described by an observant contemporary as “one long, disgusting story of stagnant drainage, foul sewerage, environing swamps, ill and unpaved streets, no sanitary regulations, and filth, endless filth everywhere.”¹³ For at least one generation, reformers had urged that the slaughterhouses be relocated to an area of

the city where they might be less of a threat to public health. Indeed, even as the Civil War drew nigh, a local regulatory statute had been proposed to the city fathers, one very similar to the law that would ultimately be enacted in 1869. In other words, as both New Orleans and Louisiana headed towards Reconstruction, slaughterhouse reform had been debated, discussed, deferred, and defeated for more than a generation. What apparently was needed in the context of 1868–69 was an aggressive group of entrepreneurs willing both to take risk and to seek profit. In post-Civil War New Orleans, such groups were not hard to find.

In return for building and equipping a central abattoir large enough to accommodate the needs of all the butchers who would use it, a select group of seventeen individuals were given the exclusive rights to operate this facility. After the statute took effect, beef could be *sold* anywhere the seller desired, but it could only be *slaughtered* in the centralized slaughterhouse. Further, the statute not only stipulated what fees could be imposed by the new corporation, but also provided heavy penalties if

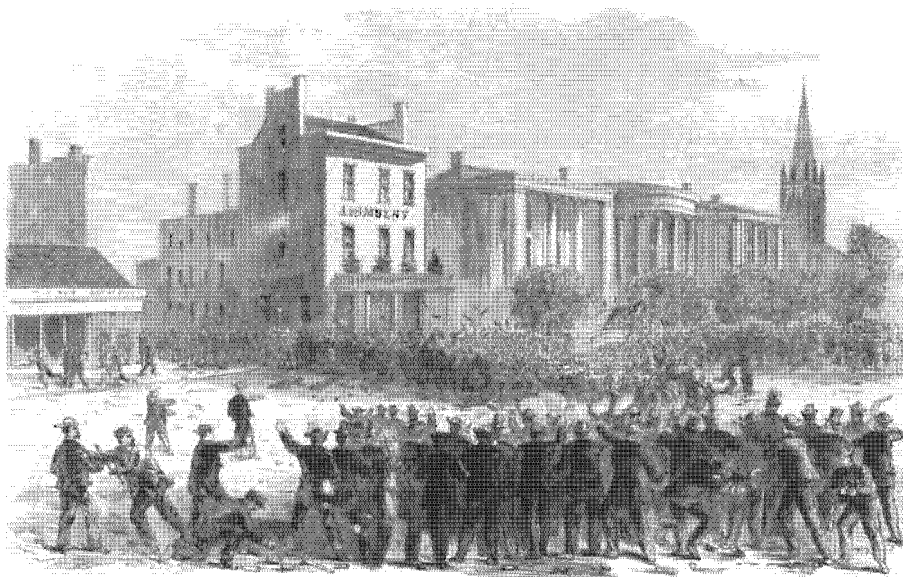


Campbell poured out his bitterness about the difficulties of Reconstruction to his old friend and former colleague Justice Nathan Clifford (right), a Southern sympathizer from Maine. Now living and practicing law in New Orleans, Campbell wanted to return to the gentler ways of the old South—albeit without slaves. Below, newly freed slaves are pictured rioting in New Orleans in 1866.

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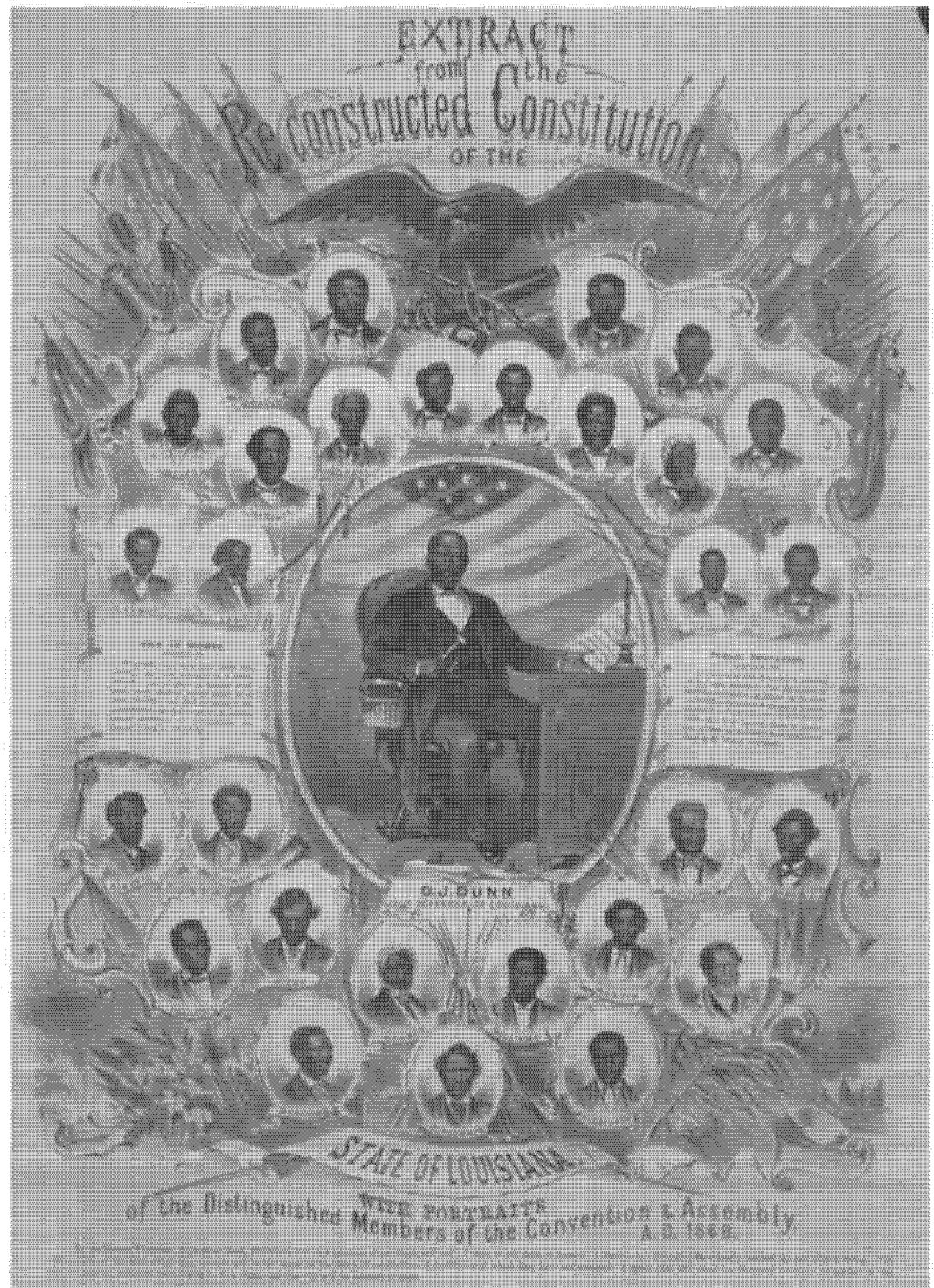
HARPER'S WEEKLY.

[August 25, 1866.]

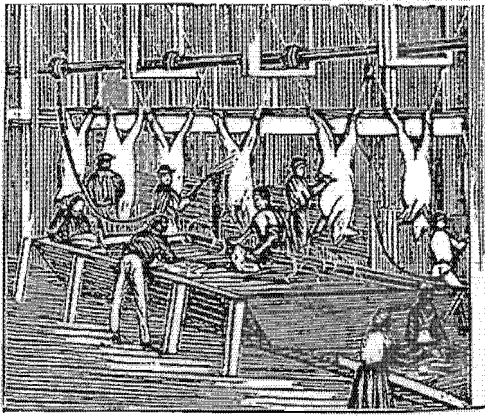


THE SCENE IN NEW ORLEANS—THE FREEDMEN'S PROCESSION MARCHING TO THE THEATRE—THE STRUGGLE FOR THE BLAU.

[Engraved by Thompson & Davis.]



This extract from the reconstructed constitution of Louisiana shows twenty-nine African-American delegates to the 1868 Louisiana Constitutional Convention. The racially integrated legislature passed a series of innovative proposals in 1869, including an act providing for a centralized slaughterhouse, which all butchers were required to use. Although the act had nothing to do with Reconstruction, it was automatically viewed as offensive by conservative whites, since it came from a "reconstructed" Republican legislature.



HOGS—SLAUGHTERHOUSE.

Slaughterhouse legislation had long been debated in New Orleans. The state of sanitation was so bad that reformers urged that the slaughtering of animals be located in a part of the city where it would pose less of a public health threat.

legitimate butchers were denied use of its facility. Organized, articulate, aggressive, and apparently well-financed, the butchers went into attack mode as soon as the act became law, and hundreds of lawsuits seeking injunctive relief and/or its reverse were filed.

In state courts, Campbell first focused on the alleged corruption of the legislature. But this tactic did not work well, in part because of the enduring legacy of *Fletcher v. Peck*, which had been decided in 1810.¹⁴ In this case, Chief Justice Marshall declined to look at legislative motive or to explore the issue of possible legislative corruption. Further, innuendo was not proof; one of Campbell's opponents angrily demanded that if there was criminal collusion concerning enactment of the slaughterhouse statute, Campbell should provide the court with specific names, dates, and other such evidence.¹⁵ This was impossible. Thus, once Campbell moved into federal court, he abandoned the issue of corruption. In fact, Campbell had found another judicial field in which he could sow some new ideas far beyond Louisiana law.

In examining Campbell's arguments in federal court, attention should be given to Campbell's dual motive. He certainly was anx-

ious to win for his butchers. Thus, in attacking, for example, the Slaughterhouse Act of 1869, Campbell took apparent aim at a statute that his clients believed was inimical to their interests. In reality, however, he had a deeper objective. More offensive to Campbell than the statute, I suspect, was the process and pervasive atmosphere of graft, greed, and government by military imposition that had enabled such an act to become law in the first place—namely, Reconstruction itself. Given the fact that the police power was a long-held legislative prerogative, extensively supported by both state and federal judicial authority, he had to find a new legal strategy with which to attack the 1869 statute, as well as to attain his deeper objective.

He chose as his key weapon the recently ratified Fourteenth Amendment. He constantly sought to employ the new constitutional realities of Reconstruction as a legal weapon against the process itself, and thus to hasten its ultimate demise. And so he worked to apply, not only the new Thirteenth and Fourteenth Amendments, but also the recently enacted Civil Rights Act of 1866 to his clients. The irony of his choice of weapons was not lost on the local press. "Few [observers]," noted the *Daily Picayune*, "would have dreamed . . . it . . . necessary to appeal to the Civil Rights Bill to protect the rights of the people in this or any other Southern city from invasion."¹⁶ But the only remedy for current conditions apparently rested in the federal courts, and there employing "poison as an antidote for poison (sic)."¹⁷

Campbell argued, first of all, that compelling butchers to slaughter only in a certain place and only upon payment to a favored group of individuals was an illegal case of discrimination against the inherent rights of an American citizen. Quoting—and occasionally misquoting—from a wide variety of sources, he also denounced the monopoly given the chosen seventeen individuals under the new law. He could have been familiar with Justice Stephen Field's very recent opinion in the *Test*

Oath Cases, decided in 1867. In *Cummings v. Missouri*, Field had emphasized that as part of certain inalienable rights, one finds that "*all honors, all positions are alike open to every one, and that in protection of these rights, all are equal before the law.*"¹⁸ Again, one should note the importance of these landmark cases for Campbell personally.

In 1867, with the Fourteenth Amendment awaiting ratification, Field had relied on "certain inalienable rights." Unlike Field, Campbell had more specifics upon which to draw. In terms of the Thirteenth Amendment, he added that the Louisiana statute was nothing less than a crude cause of subservience and of involuntary servitude. Campbell was too able an attorney not to realize that insistence that an Amendment against involuntary servitude be applied to his white butchers might not be a persuasive argument. Nor was it, one suspects. But most important for him was the Fourteenth Amendment. Here Campbell sensed a possibility of new judicial interpretation—and he went for it. He insisted that this new enactment protected his clients from the blatant attempt by the state of Louisiana to interfere with the God-given privilege of pursuing a chosen calling. Even as Campbell argued the broad impact of the Fourteenth Amendment for his butchers, he claimed in another case that it also protected the right of his client, a theatre owner, to segregate his audience. Campbell seems to have been far less interested in exactly what the amendment implied for the newly freed African American than in what it might offer to white Southerners resisting Reconstruction.

But the privilege to pursue one's chosen calling was only the beginning for Campbell. Abandoning states' rights—on behalf of which he had seceded a decade before—and using the Amendment as his mouthpiece, Campbell trumpeted a new sense of federal authority, limiting the state legislatures as never before. He had in mind, of course, the Southern states under Reconstruction, specifically Louisiana. Campbell had already lost before the Louisiana Supreme Court.¹⁹ In one sense, he had nowhere

else to turn but to the federal courts, seeking *federal judicial* intervention. In order to attain this goal, he proposed to recast and redefine the postwar federal Union, giving the national government what he once had so strenuously denied it—dominant power over the states. Consistency troubled Campbell not!

His weapon here was the first section of the new Amendment—the Privileges and Immunities, Due Process, and Equal Protection clauses. Campbell wrote that the new amendments "go very far to determine that the Constitution . . . creates a national government and is not a federal compact."²⁰ The vehicle through which this new power would be exercised was, of course, the federal courts, with judges serving for life—through whom, Campbell hoped, the current abuses and miseries of reconstruction could soon be mitigated, if not eliminated. His passion for his cause comes through in the eloquence of his brief: "Woe!, woe!, woe! To this country if these tribunals falter in the performance of their duty."²¹

And thus Campbell argued, first before the state courts in Louisiana and ultimately before the Supreme Court, with a deep-seated sense of injustice that reached far beyond the immediate case. The results are so well known that it is unnecessary to go into great detail here. He almost won: the Court rejected his argument by a single vote. But he had concentrated on *what* he believed the Amendment did, rather than focusing on a more balanced analysis of *why* it had been adopted. Absent from his arguments was any major consideration of slavery, its road to extinction, and the plight of the ex-slave in the South between 1865 and 1873.

Campbell's opponents emphasized, first, the conditions that had led Congress to act during the spring of 1866, when the new enactment went to the states for ratification, and second, the dramatic implications for traditional federalism under Campbell's interpretation. They called attention not so much to the *words* as much as to what they believed the congressional Framers had *intended*.



Campbell represented the butchers in *Slaughterhouse* when their case came before the Supreme Court in 1870. He abandoned his states'-rights philosophy to argue that the federal authority of the Fourteenth Amendment should predominate over state legislative actions. Campbell lost his case by a single vote, but his vision of the scope of the Fourteenth Amendment eventually prevailed.

Refusing to conclude that in the Fourteenth Amendment Congress had envisaged such a change of the traditional federal system as was asserted by Campbell, a five-member majority declined to catch Campbell's pitch. The spokesman for the Court was Justice Samuel F. Miller, who had once practiced medicine and was very familiar with both slaughterhouse practices and sanitation necessities in an urban environment. Miller vindicated the statute as a police measure, harsh, but legal, agreeing with Campbell's opponents that the privilege to follow a career as a butcher did not imply an inherent right to slaughter anywhere one desired. He also accepted the claim that public policy had long endorsed the practice of encouraging private enterprise through the granting of exclusive privileges to undertake certain activities beneficial to the public interest but that government was unable or disinclined to initiate. He explored the con-

ditions which had led Congress to adopt the Fourteenth Amendment, and he was unable to perceive in it what Campbell had envisaged—with the possible exception of the freedmen, who were *not* parties in *this* case.

Three brief excerpts from Miller's opinion should be noted. First, Miller summarized the events leading to adoption of the post-war amendments. "In the light of this recapitulation," he wrote, "almost too recent to be called history, but which are familiar to us all . . . no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race . . . and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."²² Furthermore, although Miller conceded Campbell's point that others besides the former slaves might fall within the Amendment's protection, he insisted on understanding the fundamental purpose that had inspired the enactment. "What we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy."²³ Was it "intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?" Was the Court expected to become "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens?" Declining to slide down the slippery slope as described by Campbell's opponents, Miller ultimately put the point very simply: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the States which ratified them."²⁴

One finds a sense of nostalgia in Miller's words. His majority opinion looked back at what once had been. Campbell, on the other hand, anticipated a new federalism, defined and dominated by the federal judiciary.

Perhaps Miller believed that *this* case simply did not lend itself to a good analytical definition of what privileges and immunities included. Whatever they might be, he was confident that they did not extend to white butchers bickering over where they could slaughter beef in a dense urban environment.

Seeking to clothe what Miller believed to be a less-than-significant issue in the impressive raiment of a new, boldly innovative, and controversial constitutional doctrine, Campbell had insisted on the applicability of the Fourteenth Amendment to the white butchers. Further, he had distorted the meaning and clear language of the 1869 statute, claiming that it barred his butchers from plying their trade, when in fact it limited *where* beef and pork were to be slaughtered—a very different matter. He might have been on firmer constitutional ground in his anti-monopoly stance. Yet even here, Miller and the majority refused to accept his claim. Instead, they apparently accepted the opposite side's rebuttal of Campbell's antimonopoly argument. A monopoly, noted Charles Allen (soon to sit on the Massachusetts Supreme Judicial Court), represented "an exclusive privilege, *granted without consideration*."²⁵ Such was not, he insisted, what existed here. In return for the grant, the company had to expend large sums of money to purchase the land, build the facility, and stock it with all the necessary accoutrements common to a slaughterhouse. In a real sense, Allen argued, the proprietors were under a compulsion every bit as stringent as that complained of by Campbell's clients.²⁶

Hindsight often serves as a wonderful crutch for the legal historian, freely available to all who can benefit from its potential support. And in retrospect, it seems clear that the *Slaughterhouse Cases* represented an inappropriate judicial vehicle by which to explore the meaning of the Fourteenth Amendment for the first time. Both Campbell's rationale and rhetoric placed the Court in a difficult position. None could deny that the Fourteenth Amendment certainly was intended to apply to the newly freed African

Americans. But what about its broad wording? And what about traditional federalism, under which, as Professor Les Benedict put it, "primary responsibility for governing relationships among Americans and for protecting their rights from infringement . . . would remain with the states"?²⁷ Campbell invited the Court to assume vast new powers over state legislative actions. In 1873, Miller's majority was not prepared to do this.

However, by 1890, the year of Miller's death, the Court had taken this step, with his halting, seemingly uncertain concurrence.²⁸ Indeed, within four years after Miller's 1873 opinion in the *Slaughterhouse Cases*, the Court had begun to move in the direction delineated by Campbell, even if Miller could not see it.²⁹ In the 1884 sequel to the *Slaughterhouse Cases*, he demonstrated how limited he considered his earlier opinion to be. Placing another Louisiana statute (one that, incidentally, repealed the original monopoly under the Slaughterhouse Act of 1869) strictly within the state police power, Miller added what can only be described as an intriguing afterthought: "which is *all* that was decided by this court in the *Slaughterhouse Cases*."³⁰

Besides rejecting Campbell's argument, Miller may in addition have resented not only Campbell's resignation, but also his continued zeal for the late rebellion. Miller offered a number of private observations about Campbell in correspondence with William P. Ballinger, his brother-in-law. In Miller's opinion, by resigning to aid the Confederacy, Campbell had supported and assisted those involved in "overthrowing a government he had sworn to support and in whose service he held one of the highest posts of honor his country had to give."³¹ Miller mused that "no man that has survived the rebellion is more saturated today with its spirit . . . [H]e deserves all the punishment he has received or can receive, not so much for joining in the rebellion as for the persistency with which he continues the fight when all good men ought to seek to forget it as much as possible."³² Was Miller perhaps referring here to Campbell's repeated invitations

to the Court to exercise the type of judicial guardianship Campbell had called for in the *Slaughterhouse Cases*? Furthermore, Miller had heard of no action by Campbell aimed at "healing the breach he contributed so much to make."³³ To the contrary, "he has made himself an active leader of the worst branch of the New Orleans democracy. Writing their pronouncements, arguing their cases in our Court, and showing all the evidences of a discontented and embittered old man, filled with all the disappointments of an unsuccessful partizan [sic] politician."³⁴ Another observer, however, described Campbell during one of his last appearances before his old Court: "He has neither the presence, voice nor tongue of the orator, but when he speaks in his thin, measured tones, never wasting a word, the Supreme Court of the United States listens as it listens to almost no other man."³⁵

What might be said of these contrasting assessments? Miller's harshness towards Campbell, it might be noted, matches the harshness Campbell had expressed in his own description of Reconstruction in the South. And while I feel that Miller's comments are right on point, it can be seen—again, with the benefit of hindsight—that Campbell pointed the Court in a new direction, even though, at the time, a bare majority was unwilling to follow it. Thus, in yet another ironic twist of the *Slaughterhouse* legacy, there may be a sort of perverse vindication in our later legal history for Campbell after all. Here is what he wrote of the Fourteenth Amendment, even as he sought to harness it to an unsuccessful attempt to beef up his butchers' cause. The new provision, he wrote, "is not confined to any race or class. It comprehends all within the scope of its provisions. . . . The mandate is universal in its application to persons of every class and every condition of persons."³⁶ In rhetoric, at least, Campbell recognized the importance of race—even though he insisted that it had nothing to do with his clients. Nevertheless, this is a noble vision, albeit one Campbell had employed in a much less than noble cause. And four Justices accepted his insistence that the enactment

had indeed altered—forever—the traditional concept of federalism. But it fell to Justice Joseph P. Bradley (a Rutgers graduate, it might be noted) and not Miller to articulate the potential in the new Amendment. "It is futile," Bradley noted, "to argue that none but persons of the African race are intended to be benefited by this new amendment." Congress may indeed have seen their travails as the "primary cause," but the language "is general, embracing all citizens and I think it was purposely so expressed."³⁷

Within his own lifetime, Campbell saw the Court move towards incorporating substantive due process into the Fourteenth Amendment. But he would not live to see future members of the Court on which he had once sat slowly and uncertainly accede to his insistence concerning the universality of the amendment's scope, even as they often denied its applicability to blacks. Yet ultimately the Court accepted his contention. Beginning in 1925, as is well known, the Justices embarked on what Justice Benjamin Cardozo described twelve years later as a course through which various portions of the Bill of Rights have been "brought within the Fourteenth Amendment by a process of absorption."³⁸ Plaintiffs and defendants from "every class and every condition of persons" have now been placed within its protection.³⁹ Blacks and other minorities—including women, with whom Campbell was not concerned—are now routinely placed within the rubric he framed in 1873. If his point of universality did not receive acceptance then, in a much broader judicial context it has since—and for much better causes.

Of course, the complete extent of the Fourteenth Amendment's coverage has not yet been definitively set forth. Can it ever be? One thinks of the perceptive observation of Lawrence Friedman, who reminds us that a basic goal of our legal history is that we continuously be aware of a key reality: that the process of accommodating law to change "is never signed, sealed and delivered; it is always incomplete, always inchoate, always a work in progress, a work that is never done."⁴⁰

And so we return to the question raised at the outset. Was Campbell a great advocate? His contemporaries certainly thought so, and even Miller acknowledged his considerable legal skills. More than a century after his death, he can be remembered for pointing the Court in a new direction with regard to constitutional interpretation—one in which it ultimately moved with benefits far beyond both what he argued and what he probably desired. Is this enough? Each generation has its own definition of greatness, shaped not only by its own perception of the past but also by what it expects the future will make of the individual considered to be great. "But sir," asks the military aide to General Burgoyne in Shaw's play *The Devil's Disciple*, "[w]hat will history say?" To which Burgoyne replies: "History, sir, will tell lies, as usual."⁴¹ With regard to Campbell, the jury may still be deliberating. Perhaps its ultimate verdict has yet to be rendered. Beyond that,

"this deponent sayeth not."

ENDNOTES

¹⁸³ U.S. (16 Wall.) 36 (1873).

²See Ronald M. Labbé and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction and the Fourteenth Amendment*, (Lawrence: University Press of Kansas, 2003) (hereafter L&L).

³See Laura Kalman, *Abe Fortas* (New Haven: Yale University Press, 1990), 370–401.

⁴See Justine Staib Mann, *The Political and Constitutional Thought of John Archibald Campbell* (Ann Arbor: University Microfilms, 1966), 14.

⁵*Ibid.* 5–14.

⁶⁰ U.S. (19 How.) 393 (1857).

⁷See Phillip Shaw Paludan, *The Presidency of Abraham Lincoln* (Lawrence: University Press of Kansas, 1994), 21–69, 168–81.

⁸See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) and *Ex parte Garland*, 71 (4 Wall.) U.S. 333 (1867). Like Garland, Campbell had taken an oath to support the Confederacy. The federal statute under review in this case, however, banned from future legal practice any lawyer who had taken such an oath. This statute was declared unconstitutional by Justice Stephen Field, who, even before the Fourteenth Amendment had been ratified, pointed to an inherent right to choose and practice one's calling. Campbell could not know it at the time, but much of Field's

argument anticipated what Campbell himself would later claim in the *Slaughterhouse Cases*.

⁹See Michael A. Ross, "Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign against Louisiana's Republican Government, 1868–1873," in *XLIX Civil War History* (2003), 235–53.

¹⁰*Ibid.*, 241–42.

¹¹Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890* (Cambridge, MA: Harvard University Press, 1939), 180. Fairman's work has been very well supplemented, if not surpassed, by Michael A. Ross's *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era* (Baton Rouge: Louisiana State University Press, 2003).

¹²See Ross, "Obstructing Reconstruction, 244."

¹³See L&L, chapters two and three, wherein the long efforts to bring about improved sanitation in greater New Orleans are discussed at some length. This quotation is from Dr. Stanford Chaillé. *Ibid.*, 35.

¹⁴*Fletcher v. Peck*, 6 Cranch 87 (1810).

¹⁵See L&L, chapters 5 and 6, for information on the various state-court lawsuits dealing with the 1869 Slaughterhouse Act.

¹⁶L&L, 143.

¹⁷*Ibid.*, 143.

¹⁸See note 8.

¹⁹*Ibid.*, 127–35.

²⁰*Ibid.*, 188.

²¹See Campbell's *Slaughterhouse* brief, cited in L&L, 113–14.

²²83 U.S. 70–71.

²³*Ibid.*, 72.

²⁴*Ibid.*, 78–79. See also L&L, chapters 8 and 9.

²⁵Cited in L&L, 204.

²⁶L&L, 204.

²⁷Cited in L&L, 246.

²⁸See *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418, 459 (1890).

²⁹See *Munn v. Illinois*, 94 U.S. 113 (1877).

³⁰Cited in L&L, 238 (emphasis added).

³¹Fairman, 352, 363.

³²*Ibid.*

³³*Ibid.*, 352.

³⁴*Ibid.*

³⁵Quoting a Washington reporter in Clare Cushman, *The Supreme Court Justices* (Washington: Congressional Quarterly, 1993), 165.

³⁶Quoted in L&L, 193.

³⁷Quoted in *ibid.*, 228.

³⁸*Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937).

³⁹See L&L, 193.

⁴⁰Bernard Shaw, *The Devil's Disciple* (Baltimore: Penguin Books, 1941), 73.

⁴¹Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), 689.

Louis D. Brandeis: Advocate Before and On the Bench

MELVIN I. UROFSKY

On January 3, 1916, members of the Chicago Bar Association listened attentively as one of the country's best-known attorneys and reformers rose to speak to them. No one in the audience, not even their guest of honor, knew that within a few days the President of the United States would nominate him to become a member of the United States Supreme Court. In his speech that day, Louis Dembitz Brandeis spelled out his views on the problems confronting law in a rapidly changing society, and placed much of the blame for social unrest and popular disrespect for the law on judges who refused to recognize the economic and social developments taking place all around them:

Political as well as economic and social science noted these revolutionary changes. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently eighteenth-century conceptions of the liberty of the individual and of the sacredness of private property.... Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away. Where any doubt as to the con-

stitutionality of such statutes could find lodgment, courts all too frequently declared the acts void.... The law has everywhere a tendency to lag behind the facts of life.¹

In the two decades before he gave this talk, and for the nearly quarter-century that he sat as an Associate Justice of the Supreme Court, Louis Brandeis tried to convince judges that the law they interpreted had to be viewed in the light of modern conditions, and that in their opinions they had to take into account the social and economic facts of modern life. He did this both as an advocate before the bar and as a member of the nation's highest tribunal.

Act One: The Lawyer as Advocate

From his youth, Louis Brandeis loved the law. Inspired by his uncle, Lewis Naphtali Dembitz, a practicing attorney as well as a brilliant legal scholar, from the time Brandeis entered Harvard Law School on September 27, 1875 until he retired from the Supreme Court on February 13, 1939, he never regretted this choice, and he gloried in the challenges and opportunities of the law.

He entered Harvard during one of its most exciting times—that of the Langdellian reforms—and his instant infatuation with the law shone clearly in his letters home. “You have undoubtedly heard,” he wrote to his brother-in-law Otto Wehle, “how well I am pleased with everything that pertains to the law.”² To his sister he declared “Law seems so interesting to me in all its aspects; it is difficult for me understand that any of the initiated should not burn with enthusiasm.”³

After compiling a near-perfect record at the law school, Brandeis practiced briefly in St. Louis before returning to Boston to form a successful partnership with his law school classmate, Samuel D. Warren, the scion of a prosperous paper-manufacturing family. To help meet their expenses, the two took over the editorship of a legal periodical, but Brandeis made clear that above all he wanted to practice law. “Although I am very desirous of devoting some of my time to the literary part of the law, I wish to become known as a practicing lawyer.”⁴ Success would not dampen this enthusiasm. Well after his abilities had been recognized by all, he would write to his brother Alfred about his impatience during a quiet spell. “I really long for the excitement of the contest—that is a good prolonged one covering days or weeks. There is a certain joy in the draining exhaustion and backache of a long trial, which shorter skirmishes cannot afford.”⁵

Brandeis’s success as a lawyer rested on several grounds. First, one has to note his sheer



At an early age, Louis Dembitz Brandeis was inspired to enter the legal profession by his uncle, Lewis N. Dembitz (pictured), a practicing attorney and a brilliant legal scholar.

brilliance and enthusiasm for the law. Problems with his eyes led him to hone his already formidable memory; during a trial he could recall all of the pertinent facts of the case on a moment’s notice. His wide reading often made him more knowledgeable on a subject than so-called expert witnesses. His handling of oral argument, according to various reports, was among the best of his time, and clients flocked to his office because, among other things, he was one of the best legal technicians in the country.⁶ Years later, Mr. Justice Sutherland, himself an extremely capable lawyer, declared of Brandeis, “My, how I detest that man’s ideas. But he is one of the greatest technical lawyers I have ever known.”⁷

Brandeis, however, was never a mere technician. In a period when the role of the attorney underwent an enormous transition from simple advocate to counsel,⁸ he remained not only an effective advocate for the interests of his clients, but a model of how a well-informed lawyer could guide and advise those clients.

Brandeis went out of his way to know as many facts as possible about an issue, and believed he had to know as much about the non-legal areas of the problem as did his clients. After all, why should they come to him unless his knowledge and perspective were greater than their own? In a chapbook he wrote: "Know thoroughly each fact. Don't believe client witnesses. Examine documents. Reason; use imagination. Know bookkeeping—the universal language of business; know persons . . . Know not only specific cases, but whole subjects. Can't otherwise know the facts. Know not only those facts which bear on direct controversy, but know all the facts and law that surround."⁹ These lessons he never forgot, either as a lawyer or as a judge, and these lessons he taught not only to

attorneys who worked for him, but also—with varying degrees of success—to judges before whom he appeared.¹⁰

By any number of standards, Brandeis enjoyed great success in his profession. He attracted important clients,¹¹ enjoyed the respect of his peers, and in terms of income ranked among the top six moneymakers at the Boston bar and in the top group in the country. In 1890, at the age of thirty-four, he earned more than \$50,000 a year (about \$987,000 in current dollars), while 75 percent of the lawyers in the country made less than \$5,000 annually. In 1912, when he devoted much of his time to reform work, he still received over \$105,000 from his law practice. By frugal living and conservative investment, at a time when there was



Brandeis became one of the top moneymakers in the country when he practiced law in his thirties. His frugal habits and wise investments eventually made him a millionaire despite his orienting his practice to advocacy and pro bono work.

no income tax, Brandeis accumulated his first million by 1907 and his second before he went onto the Court in 1916. Despite the Depression and major gifts to his children and to charities, he died in 1941 leaving an estate of more than \$3,000,000.¹²

* * *

Brandeis, however, while a successful attorney, differed in many details from his co-practitioners. To begin with, he would not take a case unless he believed his client stood in the right. Both would-be clients as well as those already on his roster would enter his deliberately cold office and would then—with their coats on—have to convince Brandeis that they had a legitimate claim. If he agreed, he would prove a committed and ferocious advocate; if not, he would either refuse to take the case or try to convince them to settle. He developed a new style of law that he termed “counsel to the situation,” in which he tried to get all sides to agree on a resolution fair to all their interests. This practice, while greatly valued by many of his clients, upset others, and few lawyers at the time understood what he tried to do. As much as anything, opponents at his confirmation hearings in 1916 complained that he had not defended their interests when they thought they had hired him as their lawyer.¹³

Other lawyers shared some of these traits in greater or lesser degree. What made Brandeis stand out is that he not only mastered changes in the practice of law in his time, but also saw beyond that to the larger changes taking place in society. He believed fervently that life and law could not be artificially separated, and in an age of increasing specialization—even within his own law firm—he refused to be trapped by narrowness. According to his partner, Brandeis practiced in every area of the law except criminal matters, and may have perhaps even taken a few cases there.¹⁴

In addition, while Brandeis had no objection to earning lucrative fees, the mere making of money did not satisfy him. Once a man made

enough to take care of his obligations to his family, he needed to do something worthwhile. For Brandeis, money by itself mattered little; what counted was that it gave him freedom to pursue other endeavors, such as progressive reform and Zionism.¹⁵ He first became involved in reform activities in the mid-1890s, when his clients hired him to represent them in public-service activities, such as the cleanup of the city's institution for paupers in 1894. He accepted the fees and then returned them; before long, he was refusing fees entirely, much to the confusion of some of his clients.

When Edward A. Filene tried to get a bill from Brandeis after the successful conclusion of a fight against a traction company, one that Brandeis saw as a struggle to protect the public, Brandeis kept putting him off. Filene finally confronted Brandeis in his office, and later wrote that Brandeis “told me he never made a charge for public service of this kind; that it was his duty as it was mine to help protect the public rights; and when I remonstrated, saying that he and his family were dependent upon his income, he told me that he had resolved early in life to give at least one hour a day to public service, and later on he hoped to give fully half his time.”¹⁶ In fact, by 1914 Brandeis spent nearly all of his time as a reformer, and he pioneered pro bono work in the legal profession. It is little wonder that he gained the sobriquet “the people's attorney.”¹⁷

* * *

In the course of his commercial practice, Brandeis occasionally had cases that went to the Supreme Court, beginning in 1896.¹⁸ But the case that made his reputation as one of the great advocates before the Supreme Court and that changed the way all future lawyers would have to think in terms of defending or attacking legislation came about because of his reform work. It actually began with a case in which he had no involvement, *Lochner v. New York*, a 1905 decision in which the Court, by a 5-4 decision, struck down a state statute establishing



Members of the National Consumer's League (NCL), including Florence Kelley (third from left) and Brandeis's sister-in-law Josephine Goldmark (not pictured), persuaded Brandeis to take on the *Muller* case on behalf of Oregon laundry workers. They provided him with reams of statistics about long workplace hours and their effect on women's health. At right is a NCL exhibit persuading consumers to buy only goods made under favorable working conditions.

a maximum of ten hours a day for bakers.¹⁹ At the time, reformers condemned the decision, seeing it as an impenetrable barrier to further enactment of protective legislation by the states. They applauded the ringing dissent by Oliver Wendell Holmes, Jr., in which he condemned the majority for deciding the case "upon an economic theory which a large part of the country does not entertain The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."²⁰

When Curt Muller, a Portland laundry manager, challenged an Oregon law establishing a ten-hour day for women workers in factories and laundries, Josephine Goldmark (Brandeis's sister-in-law) and Florence Kelley approached Brandeis on behalf of the National



Consumers' League to defend the law. He agreed to do so on two conditions: first, that he officially represent the State of Oregon in

court, and thus be in full charge of the litigation; and second, that the Consumers' League provide him with a massive amount of data on the effects of long working hours on women.²¹

Brandeis had spotted a loophole in the majority decision in *Lochner*: Justice Rufus Peckham had claimed that the New York statute did not represent a legitimate use of the state's police power, because no evidence had been presented to show that the bakers needed any such protection.²² He thus allowed that the police power could be invoked to regulate working hours *if* it could be shown that working conditions warranted the interference of the state. Other reformers failed to see what Brandeis immediately recognized. *Lochner* did not have to be overturned, but one had to establish a factual connection between the law and the conditions of life that had invoked it. Facts, not legal syllogisms, had to be utilized, an idea that had permeated Brandeis's private practice as well as his reform work. He frequently quoted the old maxim that "Out of the facts grows the law," and later on would lecture his Brethren that "The logic of words should yield to the logic of realities."²³

Long before he took on the Oregon case, Brandeis had written, "A judge is presumed to know the elements of law, but there is no presumption that he knows the facts."²⁴ Teaching the judges the facts of industrial life is what he attempted to do in defense of the Oregon law. His brief in *Muller v. Oregon*,²⁵ as we all now know, consisted of less than three pages of traditional legal citation and more than 100 pages of excerpts from articles, reports, and governmental documents that Ms. Goldmark had collected for him, all supporting the proposition that long working hours had deleterious effects on the health of women workers. As he later commented, the brief should have been entitled "What Every Fool Knows."

In his oral argument, as recalled by Ms. Goldmark, Brandeis "slowly, deliberately, without seeming to refer to a note, built up his case from the particular to the general . . . It was the result of intense preparation before-

hand, submerging himself first in the source material, he was determining the exclusion or inclusion of detail, the order, the selectiveness, the emphasis which marked his method. Once determined upon, it had all the spontaneity of a great address because he had so mastered the details that they fell into place, as it were, in a consummate whole."²⁶

The Brandeis brief drew a highly unusual comment in the opinion by Justice David Brewer: "It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters."²⁷ The Court went on to unanimously uphold the Oregon statute.

The importance of this method of arguing before the high court cannot be overestimated. Until *Muller*, counsel emphasized the law in the abstract—that "brooding omnipresence," as Holmes called it—without reference to the reality of everyday life. Oregon had passed this law because long hours adversely affected the health of women workers. Nearly fifty years later, the National Association for the Advancement of Colored People attacked Jim Crow laws by arguing that segregation adversely affected the minds and hearts of black people.²⁸ More recently, the Supreme Court heard two important cases from Michigan on affirmative action, and the briefs by both litigants and *amici* informed the Justices of the importance, in real life, that affirmative action had in the lives of colleges and law schools.²⁹

Following his success in *Muller*, Brandeis utilized the technique in defense of other protective legislation in both state courts and the Supreme Court, and he advised others on how to prepare a "Brandeis brief." He successfully defended an Ohio statute regulating hours for women in both the Ohio Supreme Court³⁰ and the Supreme Court.³¹ In his last appearance as an attorney in the old Court chambers, he defended an Oregon law that

established an Industrial Welfare Commission to regulate not only hours and safety conditions, but also wages in factories. He won a unanimous decision in the Oregon court,³² and then argued the case before the U.S. Supreme Court on December 17, 1914.³³ We have an eyewitness account of Brandeis's performance that day, from Judge William Hitz of the District of Columbia Supreme Court, and it is worth quoting:³⁴

I have just heard Mr. Brandeis make one of the greatest arguments I have ever listened to. . . . When [he] began to speak, the Court showed all the inertia and elemental hostility which courts cherish for a new thought, or a new right, or even a new remedy for an old wrong, but he visibly lifted all this burden, and without orationizing or chewing of the rag he reached them all and held even Pitney quiet.

He not only *reached* the Court, but he *dwarfed the Court*, because it was clear that here stood a man who knew infinitely more, and who cared infinitely more, for the vital daily rights of the people than the men who sat there sworn to protect them.

The reporter of the Court, Charles Henry Butler, told Hitz that "no man this winter had received such close attention from the Court as Brandeis got today." The Justices could not reach a decision, however, and ordered reargument. By then Brandeis had gone onto the Court, leaving Felix Frankfurter to handle the case. The case was first argued on 16 and 17 December 1914; it was ordered reargued on 12 June 1916, and oral argument took place on 18 and 19 January 1917. The Justices split 4-4, because LDB recused, thus leaving the decision of the Oregon court in place but not establishing a binding precedent for future challenges to minimum wage legislation.

* * *

Act Two: The Judge as Advocate

Woodrow Wilson named Brandeis to the Court in January 1916, and after a bruising confirmation battle, the people's attorney took the oath of office on 5 June of that year. Both the President and many progressives expected that the new Justice would have a great impact on the Court, and would continue to advocate for a living law.³⁵ But few, I suspect, anticipated how great an influence he would be, or how effectively he would use his position—not to argue for specific laws or programs, but to teach the facts of life to his fellow Justices.

Some of his admirers occasionally wondered if perhaps he overdid it. "If you could hint to Brandeis," Harold Laski wrote to Holmes, "that judicial opinions aren't to be written in the form of a brief it would be a great relief to the world. [Roscoe] Pound spoke rather strongly as to the advocate in B. being over-prominent in his decisions." Although Holmes apparently agreed, there was little he could do.³⁶

Actually, the great majority of Brandeis's opinions are succinct, a recitation of the facts, the law, and the decision. These are the 454 opinions he wrote in speaking *for* the Court. Whenever he wrote the majority opinion, he recognized that he did not speak just for himself, and so he kept the holdings narrow, a trait that also fit well into his philosophy of judicial restraint. But the great opinions, the ones Laski apparently objected to, are almost all dissents.³⁷ There Brandeis spoke for himself and whoever chose to join him, and he carried on the same campaign that he had fought before donning the black robes—teaching the Justices that economic and social facts could not be ignored in interpreting the law.

The achievements of Mr. Justice Brandeis in bringing the law into conformity with life are so numerous and extensive that we can only touch upon them briefly in this article. The story of Brandeis and free speech, for example, would be an essay unto itself, as would the issue

of privacy. So please bear with me if I do not cover your favorite Brandeis opinion; for that you will have to await the book.

If anyone expected that Brandeis would have to wait a few Terms before he found his voice, they soon learned otherwise. In his first Term, he wrote more than twenty opinions for the Court, and dissented twice. In both dissents, he set out in great detail the facts that had led the legislature to act as it did. In May 1917, he dissented in *New York Central Railroad v. Winfield*.³⁸ His Brethren held that in the Federal Employer Liability Act, Congress had preempted the field of compensation for injuries to railroad workers. In dissent, Brandeis lectured them on the important role that states had to play in this area, which Congress could not have meant to bar.

Just before the end of the Term, Brandeis dissented in a 5-4 decision in which the majority struck down a Washington state statute prohibiting private employment agencies from taking fees from workers for whom they found jobs. The state intended that the costs should be borne by the employers, not by poor workers. In the majority opinion, Justice McReynolds did not even mention why the state had passed this statute, or the evils it addressed. Brandeis entered a lengthy dissent that was, indeed, a Brandeis brief, citing numerous state and federal labor reports as well as law review articles—the first time any Justice had cited such materials in an opinion.³⁹ At first the other Justices found such citations somewhat disconcerting, and some viewed them as unsuitable for opinions by the Supreme Court. But Brandeis kept on using them. Willard Hurst recalled how he and Brandeis used law review notes for one opinion, playing with the wording so as not to unduly upset the Brethren. “Mr. Justice McReynolds,” Brandeis remarked with a twinkle, “did not favor Law Review articles.”⁴⁰

Brandeis believed in judicial restraint—that is, that judges should not interpose their views of the wisdom of legislative policy in deciding the constitutionality of the measure. Especially when the laws involved regulation

of the marketplace and the protection of labor, he believed that judges should only ask if the legislature had the power to do so under the Constitution; if it did, then the wisdom—or foolishness—of the statute should not be considered. The massive dissents, however, did address part of that question. When conservatives like McReynolds dismissed protective laws out of hand because they did not like the philosophy behind them, Brandeis felt he had to show that the legislature had made a valid choice in exercising its police powers. Nebraska had passed a statute regulating the size of a loaf of bread that the conservatives on the Taft Court struck down as an unwarranted interference in the market place. The Brandeis dissent explains why Nebraska passed the law, and in doing so tells us more than we should ever want to know about the baking business.⁴¹

Brandeis documented these opinions with the help of his law clerks, one each Term sent to him “sight unseen” from the Harvard Law School by Felix Frankfurter. At the time the Justices did not have individual chambers in the Capitol, and each worked out of his home. Brandeis had rented an apartment above his living quarters on California Street where he had his library, and where he and his clerk would work. Several of them told the same story of laboring through the night to gather the material requested by the Justice, and at 5:00 or 5:30 in the morning sliding an envelope with their research notes under the door of the study, only to feel it taken and pulled through from the other side. And several also repeated a comment Brandeis apparently made quite often. After working through several drafts of an opinion, the Justice would say, “Now I think the opinion is persuasive, but what can we do to make it more instructive?”⁴²

* * *

If Brandeis, as part of his philosophy of judicial restraint, thought judges should defer to legislative wisdom in matters of economic regulation, he nonetheless believed that courts had a more active role to play



Brandeis (right) joined Holmes (left) in the unanimous *Schenck* opinion and accepted Holmes's "clear and present danger" test. Brandeis's opinions in a series of free speech cases would influence his Brethren and transform the jurisprudence of the First Amendment's Speech Clause.

in the defense of civil liberties. When the Court heard a challenge to the 1918 Sedition Act, Brandeis joined Holmes in a unanimous opinion upholding the conviction of Charles Schenck and accepted Holmes's "clear and present danger" test.⁴³ Seven months later he also joined Holmes, but this time in dissent

in the *Abrams* case.⁴⁴ He later explained this shift when he told Felix Frankfurter "I have never been quite happy about my concurrence [in *Schenck*] . . . I had not then thought the issues of freedom of speech out—I thought at the subject, not through it."⁴⁵ Once he did think the matter through, Brandeis set out to educate his

Brethren, and in doing so transformed the jurisprudence of the First Amendment's Speech Clause.

The elegance of Holmes's *Abrams* opinion masked the fact that it gave little guidance to lower courts. "Clear and present danger" is a very subjective test; to conservative jurists, any criticism of the status quo appeared clearly and presently dangerous. As Brandeis noted, "Men may differ widely as to what loyalty to our country demands, and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees."⁴⁶

In another speech case in 1920, *Gilbert v. Minnesota*, Brandeis, who had long objected to the Court's use of due process to protect property and strike down reform legislation, declared that "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."⁴⁷ That case, conjoined with two opinions by Justice McReynolds on the rights of parents to educate their children,⁴⁸ led to the startling statement by Justice Sanford, in *Gitlow v. New York*, that "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights protected by the due process clause of the Fourteenth Amendment from impairment by the States."⁴⁹ And thus began the process of incorporation.

Brandeis's greatest contribution to free-speech jurisprudence came in his concurring opinion in *Whitney v. California*.⁵⁰ While one may admire Brandeis opinions for their logic, their technical excellence, and their lucidity, in only a few instances did the prose rise to a level of elegance. In *Whitney* Brandeis delivered as ringing a defense of liberty as anything the more quotable Holmes ever wrote:

Those who won our independence believed that the final end of the state

was to make men free to develop their faculties; and that in government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.⁵¹

Where Holmes used the metaphor of the marketplace of ideas, which is in essence a negative means of protecting speech, Brandeis suggested a positive reason for the Speech Clause. The highest honor in a democracy is to be a citizen, but it carries the responsibility to participate in the governing process. To make informed decisions on public matters, the citizenry had to have the information necessary to weigh all sides of an issue. If the state silenced unpopular speakers, then it crippled the citizen in the performance of his or her responsibility. Free speech is necessary not just as an individual right, but as the bedrock of democratic government.⁵²

* * *

Brandeis had been an advocate of privacy ever since the early days of his practice. In 1890, he and Sam Warren had written a pioneering article on the subject that Dean Roscoe Pound said did "nothing less than add a chapter to our law."⁵³ Although there may be no mention of the word in the Constitution, Brandeis believed that the "right to be let alone" constituted a basic right of the American people. He got the chance to explicate this view when the Court first confronted wiretapping, in *Olmstead v. United States*.⁵⁴

In investigating a prohibition ring, government agents tapped the suspects' homes, and on the basis of some 775 pages of notes, secured a conviction under the National Prohibition Act. At the trial, the defendants had

raised the constitutional issue that a search had been made without a warrant. On appeal, Chief Justice Taft, speaking for a 5-4 majority, dismissed the Fourth Amendment argument. No actual intrusion had been made into the house; therefore, no search within the meaning of the Fourth Amendment had taken place.⁵⁵ Holmes entered a short dissent, and the Brahmin in him came through in his characterization of wiretapping as a "dirty business."⁵⁶ But he deferred to and joined in what he termed Brandeis's "exhaustive" opinion.

Brandeis objected to the Court's opinion on three grounds. First, the Fourth Amendment did not just protect against actual invasion of one's home; rather, the Framers had intended it to protect the sense of security one felt in one's home, knowing that the government could not enter without a warrant issued under probable cause. To allow someone to eavesdrop might have met some fine technicality, but it violated

the very spirit that the Fourth Amendment had been intended to protect.

Second, Brandeis objected—as did Holmes—to the government acting lawlessly in order to catch criminals. "Our Government," he lectured the majority, "is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law."⁵⁷ Discussing the case, he told his niece Fannie that "[l]ying and sneaking are always bad, no matter what the ends. I don't care about punishing crime, but I am implacable in maintaining standards."⁵⁸

The bulk of Brandeis's dissent, however, laid out his views on the meaning of privacy in a free society. "The makers of our Constitution," he declared, undertook "to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against



Brandeis dissented in a 1927 Court opinion permitting police to use wiretaps in the homes of suspected bootleggers without a warrant. It was in this case, *Olmstead v. United States*, that he articulated the right to privacy. Pictured here, agents raid a lunchroom on Pennsylvania Avenue in Washington, D.C. during the height of Prohibition.

the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” This “right to be let alone,” because of its importance, had to be given the greatest protection, and any unauthorized intrusion into a person’s privacy “must be deemed a violation of the Fourth Amendment.”⁵⁹

Brandeis worried that new inventions would make it ever easier for the government, unless restrained, to invade the sanctity of a home or office without actually entering the premises. In their 1890 article, Warren and Brandeis had warned about new inventions. “Mechanical devices,” they declared, “threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” Four decades later, Brandeis warned that “the progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.”⁶⁰ In his folders on *Olmstead*, Brandeis had a newspaper clipping about a new device called “television.” Like most men of his time, Brandeis believed in progress, but he did not consider all change for the good, and he refused to use the telephone, which he condemned as an invasion of his privacy.

* * *

This litany could go on indefinitely, but there are two other aspects of Brandeis the advocate that I should like to mention. First, he was the first Justice to cite a law review article in a Supreme Court opinion, and he saw law schools and law reviews as part of his campaign to educate bench and bar about the facts of life. Law schools could be instruments of great good in teaching the next generation of lawyers (and judges) about the proper way to meld life and law. Nothing pleased Brandeis

more than when his clerks passed up lucrative opportunities in law firms to enter academia as law teachers.

He also believed that law reviews had not only an opportunity but also an obligation to cast a critical eye on decisions of the Supreme Court and other federal and state courts. He peppered Felix Frankfurter with requests to have his students write articles on important cases and issues. “Wouldn’t it be possible,” he asked in one instance, to have law school students write articles “bearing on the redress for the invasion of civil and political rights through arbitrary etc., government action, by means of civil suits.”⁶¹ At another time he wrote, “Glad to see the Harv. Law Review performing in May issue its function of enlightened public opinion on U.S.S.C. With 20 such organs, & the service continued throughout 10 years, we may hope to see some impression made. There must be persistence.”⁶² The law reviews recognized and appreciated Brandeis’s interest in their product, and on his seventy-fifth birthday the Columbia, Yale and Harvard law reviews all devoted issues to his work on the Bench.

Secondly, Brandeis husbanded his resources and carefully chose cases on which he would make a stand. William O. Douglas, Brandeis’s successor on the Court, made little effort to build coalitions or reach out and proselytize. He had the theory, he declared, “that the only soul I had to save was my own.”⁶³ Brandeis had a far more institutional view of his role on the Court, and of the role of the Court not only in interpreting the law, but also in teaching the nation what the Constitution meant. By no means did this imply a rampant activism; in fact, Brandeis’s view of judicial restraint led him to comment about the Court’s business that “the most important thing we do is *not* doing.”⁶⁴

In numerous cases Brandeis prepared drafts of dissents and then silently filed them away. In a few instances, he was able to convince his Brethren that his views were correct, and so even if he did not write the Court’s opinion his views prevailed. In one

instance, Brandeis had prepared a full dissent when Chief Justice Edward Douglass White died, and the case was held over until the new Chief Justice, William Howard Taft, took over. Brandeis met with Taft and convinced him to vote his way—not on the merits of the case, but on jurisdictional grounds—and carried the entire Court with him.⁶⁵ As Brandeis told Frankfurter, “[T]hey will take from Taft but wouldn’t from us. If good enough for Taft, good enough for us, they say—and a natural sentiment.”⁶⁶

Fully aware of the conservatism of his colleagues, Brandeis chose to do what any good educator—or advocate—would do. Don’t waste time on the small issues (and in those days, before the 1925 Judges’ Bill, the Court heard a lot of minor matters) but concentrate your energies on the issues that are important. When Brandeis did dissent, then, the people whom he wanted to reach listened carefully, and in the end his strategy proved successful.

* * *

All of this—the fact-laden Brandeis briefs, the extensive dissents, the effort to teach others—constituted part of Brandeis the Advocate’s effort to teach judges the facts of a case as well as the law. Years earlier, during his campaign to establish savings-bank life insurance, he had written: “If we should get tomorrow the necessary legislation, without having achieved that process of education, we could not make a practical working success of the plan.”⁶⁷ He well realized, however, that education took time, and that one should not expect immediate results. But, as he said, “My faith in time is great.” Looking back, we can now see that time rewarded that faith.

- Brandeis’s notion of judicial restraint in regard to economic regulation anticipated the great constitutional battles of the 1930s, and ended with the Court adopting a simple rational-basis test for such measures that

made no effort to enquire into the wisdom of the statute.⁶⁸ His guidelines on how the Court should interpret the Constitution, expressed in the mid-1930s, are now considered authoritative.⁶⁹

- The idea that the Fourteenth Amendment’s Due Process Clause incorporated individual liberties as well as property rights bore fruit in Brandeis’s own lifetime. He saw the Court apply the Speech Clause to the states in the *Gitlow* case, and a few years later saw the Press Clause as well as the right to counsel in capital cases incorporated as well.⁷⁰
- The great lesson on speech took a while, but eventually the Court abandoned the notion of seditious libel once and for all.⁷¹
- The right to privacy, enunciated in *Olmstead*,⁷² is still a matter of debate for scholars and jurists who are concerned that the word itself does not appear in the Constitution. But ever since *Griswold v. Connecticut* (1965),⁷³ a majority of the Court as well as the American people believe that the right to be let alone is a fundamental right of the people.
- Brandeis’s objections to wiretapping without a warrant led Congress in 1934 to prohibit wiretapping evidence in federal courts. In 1967, the Court adopted Brandeis’s views in *Berger v. New York*, finally bringing wiretapping within reach of the Fourth Amendment and requiring a warrant.⁷⁴ In another 1967 wiretapping case, Justice Potter Stewart adopted a very Brandeisian approach when he declared that “[T]he Fourth Amendment protects people, not places.”⁷⁵
- Although in *Olmstead* Brandeis’s clerk worried that the old man was going too far when he cautioned against machines that could see into houses, the “old man” proved prescient, and subsequent courts have maintained his belief that a person’s home should be safe from any form of government snooping. Just three Terms ago, the Court held that police use of thermal imaging without a warrant to determine whether anyone was growing marijuana on

the premises violated the homeowner's privacy and the Fourth Amendment's Warrant Clause.⁷⁶

- A stickler for jurisdiction, Brandeis wanted the Courts to stay within the bonds established for them by the Constitution, even if at times this led to unpopular results. He condemned venue-shopping, made possible by Justice Story's opinion in *Swift v. Tyson* that created a federal commercial common law.⁷⁷ Brandeis opposed this throughout his career on the Court, and he lived to see the Court accept his view in a case that is still studied by every first-year law student, *Erie Railroad Co. v. Tompkins* (1938).⁷⁸
- As the Roosevelt appointees came onto the Court, the aversion to law review articles and other extralegal sources of information evaporated, and for the last half-century the citing of law reviews and other non-case sources has become routine in both state and federal courts.

One could, I suppose, argue whether Justices of the Supreme Court should be involved in this sort of activity, but I think it is important to note that Brandeis was not a results-oriented judge who bent the law to support the programs he favored. He opposed much of the New Deal, yet voted in most instances to uphold programs he personally disliked. He also drew a distinction between judicial restraint when evaluating economic regulation and such restraint when looking at infringements on individual liberties. He signed onto Justice Harlan Fiske Stone's famed Footnote Four in *Carolene Products*, which declared that courts should impose a higher level of scrutiny on cases involving civil rights and liberties.⁷⁹

Brandeis did have a cause, though, one that today I think no member of this Court would gainsay: namely, that in order to avoid formalization and sterilization of the law, judges must always be aware of the real-life conditions that lie behind the cases. Once

aware of those facts, then they could decide wisely what to do. At Brandeis's funeral, Dean Acheson noted in his eulogy: "To him truth was less than truth unless it were explained so that people could understand and believe."⁸⁰

Of all the people he wanted to understand the truth, none mattered more to him than judges. As I end, let Mr. Justice Brandeis, advocate extraordinaire, have the last word. In his dissent in *New State Ice*, he tried, as always, to educate his Brethren. Yes, he admitted, judges had the power to strike down legislation. "But in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."⁸¹

ENDNOTES

¹Louis D. Brandeis (hereafter LDB), "The Living Law," 10 *Illinois Law Review* 461, 463-64 (1916).

²LDB to Otto A. Wehle, 12 March 1876, in Melvin I. Urofsky and David W. Levy, eds., *Letters of Louis D. Brandeis* (5 vols., Albany: State University of New York Press, 1971-1978) (hereafter *Brandeis Letters*), 1: 6.

³LDB to Amy Brandeis Wehle, 20 January 1877, *id.*, 1: 14.

⁴LDB to Samuel D. Warren, 30 May 1879, *id.*, 1: 35.

⁵LDB to Alfred Brandeis, 21 March 1887, *id.*, 1: 73.

⁶An account of Brandeis's practice is Edward F. McClennan, "Louis D. Brandeis as a Lawyer," 33 *Massachusetts Law Quarterly* 1 (1948). McClennan, who had been one of Brandeis's partners, prepared this article as a memorandum to aid Alpheus T. Mason in writing Brandeis's biography.

⁷Quoted in Samuel J. Konefsky, *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas* (New York, Macmillan, 1956), 305 n54.

⁸The change in the role of the lawyer, resulting from the growth of business and the concomitant growth of government regulation, can be explored in many sources. One of the best remains James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown, 1950). Hurst, it might be noted, was one of Brandeis's favorite law clerks.

⁹Undated memorandum, "What the Practice of Law Includes," Louis D. Brandeis Papers, University of Louisville Law Library, Louisville, Kentucky.

¹⁰See LDB to William Harrison Dunbar, 2 February 1893 and 19 August 1896, *Brandeis Letters*, 1: 106, 124. At the time, Dunbar was a junior associate in the firm; he would later become a partner.

¹¹But, as Allon Gal points out, the Brandeis firm never attracted the big banks, railroads, and other businesses controlled by the Brahmin elite. Rather, the firm represented many mid-sized companies, some of which, such as Filene's Department Store and restaurant owner Howard Johnson, would later become big businesses. In addition, an overwhelming number of his clients were, like Brandeis, Jewish. Allon Gal, *Brandeis of Boston* (Cambridge: Harvard University Press, 1980), 42–45.

¹²Hurst, *Growth of American Law*, 311; Alpheus T. Mason, *Brandeis: A Free Man's Life* (New York: Viking, 1946), 640.

¹³United States Senate, *Hearings Before the Subcommittee of the Committee on the Judiciary . . . on the Nomination of Louis D. Brandeis To Be an Associate Justice of the Supreme Court of the United States* (2 vols., Washington, D.C.: Government Printing Office, 1916). See also Mason, *Brandeis*, chs. 30–31, and A. L. Todd, *Justice on Trial: The Case of Louis D. Brandeis* (New York: McGraw-Hill, 1964).

¹⁴McClennan, "Brandeis as a Lawyer," 22–23. In the 1880s, Brandeis went to England to negotiate patent rights for a new paper-bleacher for the Warren paper companies.

¹⁵Brandeis's Zionist career is outside the scope of this paper. For those interested, see Melvin I. Urofsky, *American Zionism from Herzl to the Holocaust* (Garden City: Doubleday, 1975), *passim*.

¹⁶Edward A. Filene, "Louis D. Brandeis As We Know Him," *Boston Post*, 14 July 1915.

¹⁷Brandeis also developed the idea of a citizens' lobby in his fights against J. P. Morgan's efforts to monopolize New England transportation, as well as his fights for the establishment of savings-bank life insurance. See Mason, *Brandeis*, chs. 11–13.

¹⁸*Wisconsin Central Railroad Co. v. United States*, 164 U.S. 190 (1896); *Murphy v. Massachusetts*, 177 U.S. 155 (1900); *Huguley Manufacturing Co. v. Galtion Cotton Mills*, 184 U.S. 290 (1902); *Riverdale Cotton Mills v. Alabama & Georgia Manufacturing Co.*, 198 U.S. 188 (1905); *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U.S. 206 (1908); *Ingersoll v. Coram*, 211 U.S. 335 (1908); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912).

¹⁹198 U.S. 45 (1905).

²⁰*Id.* 74, 75 (Holmes, J., dissenting). The best single book on the case is Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* (Lawrence: University Press of Kansas, 1990).

²¹The best account of the preparation for the case, and the roles of the various players, can be found in Josephine

Goldmark, *Impatient Crusader: Florence Kelley's Life Story* (Urbana: University of Illinois Press, 1953), ch. 13.

²²198 U.S. at 57.

²³*DiSanto v. Pennsylvania*, 273 U.S. 34, 37, 43 (1927) (Brandeis, J., dissenting).

²⁴Mason, *Brandeis*, 248–49.

²⁵208 U.S. 412 (1908). The brief was published, along with the Court's decision, in LDB and Josephine Goldmark, *Women in Industry: Decision of the United States Supreme Court in Curt Muller vs. State of Oregon: Upholding the Constitutionality of the Oregon Ten Hour Law for Women and Brief for the State of Oregon* (New York: National Consumers' League, 1908).

²⁶Memorandum by Josephine Goldmark for Alpheus Mason, 6 November 1944, cited in Mason, *Brandeis*, 250.

²⁷208 U.S. at 419.

²⁸*Brown v. Board of Education*, 347 U.S. 483 (1954). The briefs can be found in Philip B. Kurland, *16 Landmark Briefs and Arguments of the United States Supreme Court* 63 (1975).

²⁹*Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Gutter v. Bollinger*, 539 U.S. 306 (2003).

³⁰*Ex parte Anna Hawley*, 85 Ohio 495 (1911).

³¹*Hawley v. Walker*, 232 U.S. 718 (1914).

³²*Stettler v. O'Hara*, 69 Ore. 519 (1914).

³³*Stettler v. O'Hara*, 243 U.S. 629 (1917).

³⁴William Hitz to Felix Frankfurter, 17 December 1914, cited in Mason, *Brandeis*, 253.

³⁵See Melvin I. Urofsky, "Wilson, Brandeis, and the Supreme Court Nomination," *Journal of Supreme Court History* 28 (2003): 145–56.

³⁶Harold Laski to Oliver Wendell Holmes, Jr., 13 January 1918, in Mark DeWolfe Howe, ed., *The Holmes-Laski Letters* (2 vols., Cambridge: Harvard University Press, 1953), 1: 127; Holmes to Laski, 5 November 1923 and 21 November 1924, in *id.*, 556, 675.

³⁷Brandeis wrote only seventy-four dissenting opinions in his twenty-three years on the Bench, an average of about three a Term. He did, of course, also join in most of the dissents filed by Holmes, and later by Harlan Fiske Stone. 3824 U.S. 147, 154 (1917).

³⁸*Adams v. Tanner*, 244 U.S. 590, 597 (1917) (Brandeis, J., dissenting).

³⁹Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge, MA: Harvard University Press, 1984), 364.

⁴⁰*Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924) (Brandeis, J., dissenting).

⁴¹Paul Freund, cited in Philippa Strum, *Brandeis: Beyond Progressivism* (Lawrence: University Press of Kansas, 1993), 70. In *Morning and Noon* (Boston: Houghton Mifflin, 1965), 80, Dean Acheson recalls that he collected fifteen pages of footnotes for a minor case. Other cases in which Brandeis wrote extensive, fact-laden dissents

include *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 289 (1923); *New State Ice Co. v. Liebman*, 285 U.S. 262, 280 (1932); *Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933).

⁴³*Schenck v. United States*, 249 U.S. 47 (1919).

⁴⁴*Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

⁴⁵Melvin I. Urofsky, ed., "The Brandeis-Frankfurter Conversations," 1985 *Supreme Court Review* 299, 323-24.

⁴⁶*Schaefer v. United States*, 251 U.S. 466, 482, 495 (1920) (Brandeis, J., dissenting).

⁴⁷254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).

⁴⁸*Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁴⁹268 U.S. 652, 666 (1925).

⁵⁰274 U.S. 357 (1927).

⁵¹*Id.* at 375 (Brandeis, J., concurring).

⁵²The best explication of this opinion is Vincent Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*," 29 *William & Mary Law Review* 653 (1988).

⁵³Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890). The Pound statement is in Mason, *Brandeis*, 70.

⁵⁴277 U.S. 438 (1928).

⁵⁵*Id.*

⁵⁶*Id.* at 470 (Holmes, J., dissenting). Justice Butler also entered a well-reasoned dissent that shredded the Chief Justice's arguments. *Id.* at 485 (Butler, J., dissenting).

⁵⁷*Id.* at 485 (Brandeis, J., dissenting).

⁵⁸Quoted in Strum, *Beyond Progressivism*, 139.

⁵⁹277 U.S. at 478, 479.

⁶⁰Warren and Brandeis, "Privacy," 195; 277 U.S. at 571.

⁶¹LDB to Frankfurter, 25 June, 1926, in Urofsky and Levy, *Brandeis Letters*, 5: 226. There are numerous examples of such requests throughout this volume. Brandeis also frequently suggested articles for Frankfurter for the *New Republic*.

⁶²LDB to Frankfurter, 14 May 1923, in Melvin I. Urofsky and David W. Levy, eds., "Half Brother, Half Son": *The Letters of Louis D. Brandeis to Felix Frankfurter* (Norman: University of Oklahoma Press, 1991), 140. In that issue, Manley O. Hudson criticized two recent Supreme Court decisions, *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922), and *New York, New Haven & Hartford Railroad Co. v. Frucher*, 260 U.S. 141 (1922), in "The Turntable Cases in the Federal Courts," 36 *Harvard Law Review* 826 (1923). Brandeis joined Holmes in the majority opinion for the first case, but deplored the willingness of the Court to review such cases. In the same issue appeared an anonymous student note on *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U.S. 1 (1919), re-argued at 260 U.S. 327 (1922), a case in which

Holmes had written the majority opinion and Brandeis had dissented.

⁶³James F. Simon, *Independent Journey: The Life of William O. Douglas* (New York: Harper & Row, 1980), 250.

⁶⁴Urofsky, "Brandeis-Frankfurter Conversations," 313.

⁶⁵The case was *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922). The decision voided damages assessed by a lower court against the union under the Sherman Act during a violent strike against the company. The Clayton Antitrust Act had supposedly exempted unions from this sort of penalty, and apparently in the first go-round, the vote had been 5-4 to sustain the penalties. Then White died, and Taft accepted Brandeis's reasoning but based it on jurisdictional grounds. For the unpublished dissent and the workings of the Court in this case, see Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* (Cambridge, MA: Harvard University Press, 1957), ch. 5.

⁶⁶Urofsky, "Brandeis-Frankfurter Conversations," 307.

⁶⁷LDB to Henry Morgenthau, Sr., 20 November 1906, in Urofsky and Levy, *Letters*, 1: 483.

⁶⁸See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

⁶⁹*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

⁷⁰*Gitlow v. New York*, 268 U.S. 652 (1925); *Near v. Minnesota*, 283 U.S. 697 (1931) (press); *Powell v. Alabama*, 287 U.S. 45 (1932) (counsel).

⁷¹*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁷²*Olmstead v. United States*, 277 U.S. 438 (1927).

⁷³381 U.S. 479 (1965).

⁷⁴388 U.S. 41 (1967).

⁷⁵*Katz v. United States*, 389 U.S. 347, 351 (1967).

⁷⁶*Kyllo v. United States*, 533 U.S. 27 (2001).

⁷⁷16 Pet. 1 (1842).

⁷⁸304 U.S. 64 (1938). For the story of this fight, see Edward A. Purcell, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of Federal Courts in Twentieth-Century America* (New Haven: Yale University Press, 2000). One might also note that in Brandeis's opinion in *Erie*, he cited an article by Felix Frankfurter—"Distribution of Judicial Power Between Federal and State Courts," 13 *Cornell Law Quarterly* 499 (1928)—that he had probably instigated. 304 U.S. at 73, n. 6.

⁷⁹*United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁸⁰Dean Acheson, "Mr. Justice Brandeis," 55 *Harvard Law Review* 191, 192 (1941).

⁸¹*New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

Women as Supreme Court Advocates, 1879–1979

MARY L. CLARK*

I. Introduction

As 2004 marks the 125th anniversary of women's admission to the Supreme Court bar, this is a fitting occasion to reflect on women's experiences and achievements before the Court. Given that this is a *history* piece, this paper will focus principally on the first 100 years of women's advocacy before the Court, from 1879 to 1979.¹ In this 100-year period, women's membership in the Supreme Court bar grew from two or one or *no* women per year between 1879 and 1900 (at a time when men were joining at the rate of 250 to 350 per year)² to over 5 percent of new admittees by 1979. Today, women constitute 25 percent of the roughly 4,500 to 5,000 new admittees each year,³ but only 8 percent of the bar overall.

What you find in broad brushstroke in studying the history of women's advocacy before the Court is that, in the first several decades, women advocates were drawn principally from solo and small practices—typical of most attorneys of their day—and were not litigating women's rights claims before the Court. In the first half of the twentieth century, women advocates were drawn principally from government agencies at the local, state, and national levels, and, again, with few exceptions, were not litigating women's rights claims before the Court. In the 1960s and 1970s, a

growing number of women advocates were affiliated with civil-rights advocacy groups, explicitly involved in litigating sex- and race-discrimination cases before the Court. Finally, in the last twenty-five years, women advocates before the Court have been affiliated in roughly equal measure with government agencies, non-profit advocacy groups, and law-school faculties. Women presenting argument as members of the leading law firms remain extremely rare.⁴

After highlighting some of the most notable women advocates of the last century, I



Myra Bradwell was a successful Chicago entrepreneur who made a fortune publishing legal texts. Trained as a lawyer, she was refused admittance to the Illinois bar because of her sex. The Supreme Court upheld the state bar's refusal in 1873, but women were able to join most state bars by the end of the century.

conclude with thoughts on why it matters that women have appeared, and continue to appear, before the Court.

II. Women's Initial Entry Into the Legal Profession

Women first entered the legal profession in the United States immediately following the conclusion of the Civil War. Their numbers grew modestly but steadily through the turn of the century,⁵ despite the Supreme Court's 1873 decision in *Bradwell v. Illinois*,⁶ which rejected Myra Bradwell's claim that Illinois had violated the Fourteenth Amendment's Privileges and Immunities Clause when it refused her admission to its bar on the grounds of sex. In concurring in the judgment in *Bradwell*, Justice Bradley now famously (or infamously) declared:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which

belongs to the female sex evidently unfits it for many of the occupations of civil life.

Ultimately, he concluded:

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁷

Even with the holding and rhetoric of *Bradwell*, women succeeded in joining most states' bars in the latter part of the nineteenth century, such that by 1900, there were one thousand women lawyers in the United States.

An increasing number of law schools began to admit women at this time,⁸ with women seeking—and gaining—access on the grounds that they were equal in their abilities to men and should therefore learn the law alongside men. By contrast, women gained admission to medical schools on the ground that women's inherently nurturing natures suited them especially well for the care of women and children, with many aspiring doctors attending all-women's medical schools.⁹ Largely because of the different ideologies shaping women's entry into the two professions, there were *seven* times as many women doctors as lawyers at the start of the twentieth century.¹⁰

III. Women First Admitted to the Supreme Court Bar

Belva Lockwood (1830–1917) had been a member of the District of Columbia bar for three years when she first applied for membership in the Supreme Court bar in 1876. At that time, as now, an applicant for the Court's bar was required to “demonstrate a minimum of three years' membership in good standing in the bar of her state's highest court, and to have her application sponsored by a current member of the Supreme Court bar. If her application was approved, admission [was] . . . moved and granted in open court. It was not until the 1970s that applications for admission to the Supreme Court bar [could be] processed by



Belva Lockwood lobbied Congress hard to petition for women to be admitted to the Supreme Court bar. Part of her strategy included addressing Senators she didn't know "as though they were old familiar friends."

mail."¹¹ Once admitted, attorneys could file briefs and present argument, but most, then as now, joined the bar principally for its symbolic value.

Chief Justice Morrison Waite authored the order denying Lockwood's application, which declared:

By the uniform practice of the court, from its organization to the present time... none but men are admitted to practise [sic] before it as attorneys and counsellors. This is in accordance with immemorial usage in England, and the law and practice in all the States until within a recent period...¹²

Not easily defeated, Lockwood lobbied Congress to amend the Court's bar admission rules to include women. Her petition to Congress read as follows:

[Y]our petitioner has been debarred from admission... on the ground that she is a woman, and that fact has

been largely published over the country much to the detriment of her law practice upon which your petitioner and her family are dependant [sic] for support.

Wherefore your petitioner prays your Honorable Body for the passage of an Act enabling her or any other woman similarly situated to be admitted to the said... Court on the same terms as men...¹³

Lockwood proved to be a tenacious lobbyist. "Nothing was too daring for me to attempt," she later confessed. Among other things, she addressed senators she didn't know "as though they were old familiar friends."¹⁴

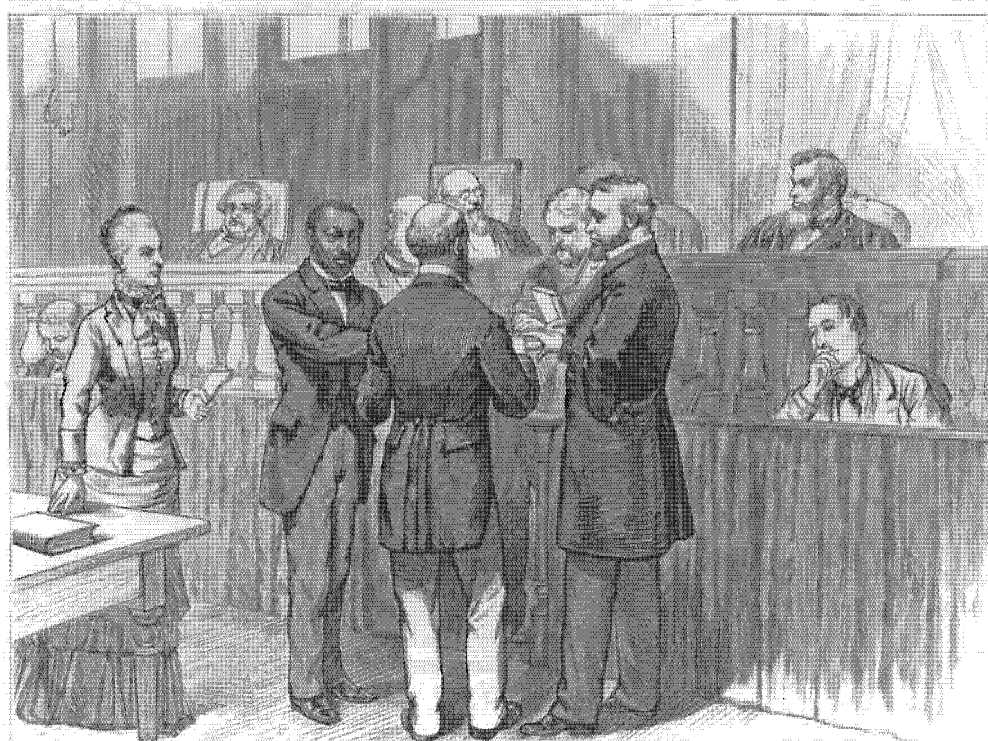
After three years of Lockwood's lobbying, Congress enacted an "Act to Relieve Certain Legal Disabilities of Women," providing for women's membership in the Supreme Court bar.¹⁵ Successfully reapplying for admission in 1879, Lockwood became the first woman to join the Court's bar. Albert Riddle, a white professor at Howard Law School, moved her application.¹⁶ A year later, Lockwood moved the admission of Samuel Lowery of Huntsville, Alabama, the first Southern black to be admitted to the Court's bar.¹⁷

Once the Court's doors were pried open, women began to sponsor one another's membership in the bar as a type of old-girls' network. The movants included the Pier family of lawyers—a mother and three daughters—who were without peer in sponsoring one another's Supreme Court bar membership in the 1890s.¹⁸ "These [earliest women] members were well known to one another. They worked together in the woman suffrage movement... and corresponded with one another about personal and professional issues."¹⁹ Addressing one another as "Sisters in Law," they grappled with issues of what to call themselves—"Lady Lawyers" or just plain "Lawyers," of how to manage competing demands of work and family, and even of what to wear as professional women. Whether to wear one's hat in court was an issue of no small concern for the earliest women

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FRANK LESLIE'S ILLUSTRATED NEWSPAPER.

[50, 20 MARCH 18, 1880.]



IN RE-ADMISSION TO THE UNITED STATES SUPREME COURT OF THE FIRST COLORED LAWYER AT WASHINGTON, FEB. 24.—FROM AN ILLUSTRATION BY J. C. ADAMS, COURTESY PAGE 27.

A year after she herself was permitted to become a member of the Supreme Court bar in 1879, Lockwood (left) moved the admission of Samuel Lowry of Huntsville, Alabama. Lowry (second from left) became the first Southern black admitted to the Supreme Court bar.

lawyers. A well-dressed, modest woman of that day wore a hat whenever in public. At the same time, a lawyer was expected to take his hat off in court. Demands of modesty prevailed over those of professional custom, and women's hats remained on in court.

Despite what I would now call a widely held "feminist consciousness" among these first women (though the term "feminist" was first used only decades later),²⁰ only one of the first women Supreme Court bar members litigated a women's rights claim before the Court.²¹ This again was Lockwood, who brought an original action in the Court on behalf of herself and all other similarly situated women who were denied membership in the Virginia state bar on the ground of sex.

By contrast, the handful of earliest women members who actually appeared before the Court did so in disputes concerning wills, property, and contracts, typical of the solo or

small law offices in which they practiced. And, given men's greater participation in business and property holding at this time, it is not surprising to learn that these women advocates represented male clients more often than they did female.

IV. Belva Lockwood, the First Woman to Argue Before the Court

Belva Lockwood was the first woman to argue before the Supreme Court,²² doing so in 1880, the year following her admission to the bar. There, in the case of *Kaiser v. Stickney*,²³ Lockwood sought to use married women's legally disadvantaged status to benefit her clients, a married couple who sought to disavow the wife's transfer of property to a third party.²⁴ Though Lockwood opposed restrictions on married women's property rights as a matter of principle, she nevertheless invoked

traditional understandings of the limited nature of married women's dominion over property in pressing her clients' case. The Court rejected Lockwood's argument on factual grounds, finding that the property transfer was valid because it had been executed by both husband and wife.²⁵

After running for President on the Equal Rights party ticket in the 1880s, Lockwood petitioned the Supreme Court in 1894 to direct the state of Virginia to admit her to its bar, from which she had been excluded on the basis of sex. In relying on *Bradwell* to reject Lockwood's petition, the Court concluded that Virginia had not violated the Fourteenth Amendment's Privileges and Immunities Clause by interpreting the word "persons" to mean "male," and not "male and female persons," in defining who was eligible for its bar.²⁶

Lockwood's next, last, and most famous argument was on behalf of the Eastern Cherokee Indian Nation, heard for two days in 1906.²⁷ There, "the Supreme Court affirmed [a lower court] judgment, awarding over a million dollars with interest against the United States" as reparations for its forced relocation of the Cherokees.²⁸

V. Highlights of Some of the Most Notable Women to Appear Before the Court in the Century Following Lockwood

In the first decades of the twentieth century, when there was one woman attorney for every 5,000 to 10,000 lawyers in the United States, a couple of dozen women filed certiorari petitions and/or merits briefs in the Supreme Court, mostly appearing on behalf of local, state, or federal governments. As with the earliest women advocates, essentially no one in this second wave litigated cases directly framing women's rights issues before the Court.²⁹

Annette Abbott Adams (1877-1956)

Annette Abbott Adams graduated from Boalt Hall Law School in 1912, the only woman in

her class. Thereafter, Adams trained with a voice instructor to lower her voice in order to promote her career prospects.³⁰ In 1914, she appeared at trial against John Preston, the U.S. attorney for the Northern District of California. Adams is said to have so impressed Preston that he hired her as one of his assistant U.S. attorneys, making her the first woman to serve in that position. When Preston was called to Washington to serve as assistant attorney general in 1918, Adams was named to fill his vacancy as U.S. attorney, the first woman to hold that post and the only one to do so until the Carter administration.

In 1920, Adams herself was called to Washington to serve as an assistant attorney general, where her primary responsibility was enforcing Prohibition. She was again the first woman to hold this office. Adams was named to this post shortly after the 1919 ratification of the Eighteenth Amendment,³¹ prohibiting commerce in liquor, and the 1920 ratification of the Nineteenth Amendment, guaranteeing women the right to vote. Some ascribe the President's choice of Adams to an effort to "woo" the new women voters (and thus an early manifestation of concern for the gender gap in voting).³²

Though she was in office for slightly under a year, Adams argued five Supreme Court cases, losing only one. Three of the cases involved Prohibition, one railroad safety, and the other tax forfeitures. In each case, Adams was the only woman to appear on brief or at argument.³³

Mabel Walker Willebrandt (1889-1963)

Earning the moniker "Prohibition Portia," Mabel Walker Willebrandt oversaw the federal government's enforcement of Prohibition, along with tax and insurance-law matters, as Adams' successor between 1921 and 1929. In interviewing Willebrandt for this post, President Warren Harding noted that the only thing against her was her age (32), a condition,



As an assistant attorney general in the 1920s, Mabel Willebrandt gained national fame for vigorously enforcing the Prohibition Act. She argued frequently before the Supreme Court but struggled during oral arguments to understand the Justices, as she was losing her hearing.

Willebrandt assured him, that would go away with time.³⁴

Willebrandt participated in more than 270 cases at the certiorari stage³⁵ and twenty-two cases at the merits stage during her eight years with the Justice Department, presenting oral argument in at least ten cases, including four that were argued in the same month.³⁶ In each case, Willebrandt was the only woman to appear on brief or at argument.

The vast majority of cases in which Willebrandt participated related to Prohibition. While Willebrandt, like Adams, had not been a prohibitionist before coming to Washington, she "was determined to uphold the law"³⁷ once in office. Among her Supreme Court cases was one defending against a challenge to the Prohibition Act as unconstitutionally discriminating between malt liquor and "spiritous and vinuous liquors" by allowing doctors to continue prescribing wine and spirits for medicinal pur-

poses, but not beer.³⁸ The Court ruled with the government in that case.

The Associated Press called Willebrandt "the most famous woman attorney during the first half of the twentieth century."³⁹ One of her biographers went even further, calling Willebrandt the most famous American woman of her time.⁴⁰ In eulogizing her, Willebrandt's friend and former law partner, Judge John Sirica, declared, "If Mabel had worn trousers, she could have been President."⁴¹

Nevertheless, Willebrandt's time in office was a difficult one, for, among other things, she was losing her hearing.⁴² In writing to her mother the night before arguing a case in the 1923 Term, Willebrandt confessed, "Each time it's such a struggle not to be terrified over my ears. [The Justices] talk so low."⁴³

Though Willebrandt actively campaigned for Hoover in 1928, she was forced out of office following his 1929 inauguration—some



Susan Brandeis (right) is the only daughter of a sitting Justice to have argued before the Court. Justice Brandeis recused himself from argument and decision in the 1925 case and urged his daughter to "raise [her] professional performance as high as [her] abilities and hard work would make possible."

say because she was too outspoken a figure in enforcing Prohibition.⁴⁴ Willebrandt's hoped-for federal judgeship, as reward for her government service, was dashed on the same shores.⁴⁵

Susan Brandeis (1893-1975)

To date, the only daughter of a sitting Justice to argue before the Court⁴⁶ is Susan Brandeis, daughter of Associate Justice Louis Brandeis.⁴⁷ Justice Brandeis recused himself from argument and decision in the 1925 case of *Margolin v. United States*,⁴⁸ involving a challenge to a federal statute prohibiting attorneys from charging more than \$3 for work in preparing a veteran's benefits claim.

The novelty of Brandeis' argument won front-page attention in the *New York Times*, which announced, "Brandeis's Daughter in Supreme Court Today to Argue New York War Insurance Fee Case."⁴⁹ As Frank Gilbert, son of Susan Brandeis, recounts, after the argument:

Grandfather [Justice Brandeis] wrote mother [Advocate Brandeis] who was then thirty-two:

"You are certainly getting fine publicity and fruits will come later if you will raise your professional performance as high as your abilities and hard work would make possible.

Lovingly, Father."⁵⁰

A unanimous Court rejected Brandeis' argument and upheld the attorney-fee limitation.

1940s and 1950s

As with many fields of endeavor, women's opportunities in the legal profession expanded during World War II, only to contract with men's return from war and the postwar emphasis on stability, security, and domesticity. It was during the war, for example, that the first female Supreme Court law clerk, Lucille Lomen, was hired, by Justice William O. Douglas in 1944. It would be another twenty-two years before the next woman law clerk was hired,⁵¹ and another fifteen or so years beyond that before there was anything resembling a critical mass of women serving as Supreme Court clerks. How the service of women law clerks affected the Justices' receptivity to women advocates can only be guessed,⁵² and becomes a factor only at the very tail end of the period under consideration here, if at all.⁵³

Despite women's service on many fronts during the war, the Court upheld a state law prohibiting women from serving as bartenders shortly after the war's conclusion. This was the case of *Goesaert v. Cleary*,⁵⁴ in which a woman, Anne Davidow, argued on behalf of the plaintiffs in the Supreme Court. In its opinion rejecting the women's claims, the Court made light of the idea of women tending bar, replete with references to Shakespeare's alewife.⁵⁵

Women pursuing legal careers in the postwar era spoke of being out of step with the dominant cultural expectations of the time—for women to marry young, bear children, and stay home. Indeed, as late as 1961, the Supreme Court relied on an understanding of women as the "center of home and family life" to uphold a Florida law excluding women from service as jurors unless they specially registered their interest in advance.⁵⁶ Gwendolyn Hoyt, who had been convicted of murdering her husband by an all-male jury, argued on appeal to the Court that a jury that included some women might have

responded more sympathetically to her evidence of ongoing abuse by her husband. *Hoyt* was briefed by two women—Raya Dreben for petitioner and Dorothy Kenyon for the ACLU as *amicus* in support of petitioner⁵⁷—but argued by men.

In spite of a postwar environment that discouraged the interests and ambitions of professional women, a small number were active in the Supreme Court at this time, two of whom are highlighted below.

Bessie Margolin (1909–1996). As an attorney with the Labor Department in the 1940s, 1950s, and 1960s, Bessie Margolin "rose to become assistant solicitor in charge of Supreme Court litigation" and associate solicitor for Fair Labor Standards.⁵⁸ Margolin participated in dozens of Supreme Court cases while at the Labor Department,⁵⁹ where she was the expert on the Fair Labor Standards Act (FLSA), the federal law regulating wages and hours of work,⁶⁰ and most of her Court arguments involved interpreting the FLSA.⁶¹

Unlike Adams and Willebrandt, who were the only women on either side of their cases, Margolin was accompanied on brief by other women attorneys with the Labor Department.⁶² As with Adams and Willebrandt, however, Margolin's cases by and large did not present women's rights issues. In reflecting on Margolin's ability as an advocate, Justice William O. Douglas observed, "She was crisp in her speech and penetrating in her analyses, reducing complex factual situations to simple, orderly problems."⁶³

Beatrice Rosenberg (1908–1989). Appearing at approximately the same time as Margolin, Beatrice Rosenberg is said to hold the women's record for presenting argument in the Court—thirty cases in as many years.⁶⁴ By contrast, the record for men in the twentieth century "belongs to Deputy Solicitor General Lawrence Wallace, who has argued more than 150 cases" in the Supreme Court.⁶⁵

A career attorney with the Justice Department's Criminal Division between 1943 and 1972, Rosenberg rose through the ranks to the position of chief of criminal appeals, where she was recognized for her expertise on search-and-seizure law.⁶⁶ Among the cases Rosenberg participated in before the Court were *Abbott Labs v. Gardner*,⁶⁷ holding pre-enforcement review of regulations issued by the Secretary of Health, Education, and Welfare not prohibited by the Food, Drug, and Cosmetics Act; and *Welsh v. United States*,⁶⁸ reversing Welsh's conviction for draft evasion on the grounds that his nontheistic conscientious objection was held with "the strength of more traditional religious convictions."

One colleague described Rosenberg's oral advocacy style as spellbinding, "[She] was a very powerful woman . . . I was awe-struck by [her]."⁶⁹ Justice Douglas, in *The Court Years*, included Rosenberg on a short list of Justice Department attorneys who, in his estimation, "made more enduring contributions to the art of advocacy before us than most of the 'big-name' lawyers."⁷⁰

Women Appointed to Represent Pro Se Parties in the Supreme Court. During the period in which Margolin and Rosenberg were appearing regularly, the Court appointed its first woman to represent the interests of a *pro se* party before it.⁷¹ This was Helen Washington, a tax attorney at the Justice Department, who was appointed in 1959.⁷² Dean Acheson, considered to be the first man to serve in this capacity, had been named more than twenty-five years earlier.⁷³

1960s and 1970s

Two of the most prominent Supreme Court advocates of all time appeared on behalf of civil rights advocacy groups in the 1960s and 1970s: Constance Baker Motley, of the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund (LDF); and Justice Ruth Bader Ginsburg, of the

American Civil Liberties Union's (ACLU) Women's Rights Project.

Constance Baker Motley (1921-present).

Constance Baker Motley argued ten race-discrimination cases before the Court in the early 1960s, winning nine of them.⁷⁴ The one case she lost was subsequently overturned. This was the case of *Swain v. Alabama*,⁷⁵ upholding the use of race-based peremptory challenges in jury selection, which the Court would later reject in *Batson v. Kentucky*.⁷⁶

Having joined the Inc. Fund immediately after graduating from Columbia Law School, in 1946, Motley participated in the Supreme Court briefing of all of the major race-discrimination cases of her time.⁷⁷ When Thurgood Marshall left the Inc. Fund for a federal appellate judgeship in 1961,⁷⁸ Motley and colleague Jack Greenberg took over the LDF's Supreme Court arguments.⁷⁹ The cases in which Motley argued fell into three broad categories: sit-ins, criminal procedure, and desegregation of public services.⁸⁰ Motley argued a total of five sit-in cases before the Court, prevailing in each of them, despite having to argue two on one day in the fall of 1962⁸¹ and two on another day in the fall of 1963.⁸² Back-to-back argumentation was nothing new for Motley, who once argued four appeals on the same day in the Fifth Circuit.⁸³

During Motley's argument in *Hamilton v. Alabama*,⁸⁴ establishing the right to counsel at arraignment in capital cases, Motley observed, "[Justice] Douglas seemed to pay no attention. He appeared to be writing letters and doing other work, as usual." "Apparently [he] was paying attention," she later recognized, because he wrote the opinion for a unanimous Court reversing Hamilton's conviction. Indeed, Douglas "place[d] [Motley] in the top ten of any group of advocates at the appellate level in this country,"⁸⁵ comparing her to Charles Hamilton Houston, "the highest compliment I have ever received," said Motley.⁸⁶



National Association for the Advancement of Colored People lawyer Constance Baker Motley was photographed in 1962 when she and her colleague Jack Greenberg (right) represented James Meredith (center) in his segregation case against the University of Mississippi. Motley worked with Thurgood Marshall on *Brown v. Board of Education* and other landmark litigation that desegregated schools and Southern universities.

When President Johnson invited Motley to the White House to announce his intention of naming her to the U.S. District Court for the Southern District of New York in 1966, thus making her the first African American woman nominated for a federal judgeship, Johnson told Motley that Attorney General Ramsey Clark “was the first person to bring [Motley] to his attention,” doing so on the strength of her Supreme Court arguments.⁸⁷

Ruth Bader Ginsburg (1933–present). It goes almost without saying that Justice Ruth Bader Ginsburg briefed and argued the leading women’s rights cases of the 1970s as co-founding director of the ACLU’s Women’s Rights Project.⁸⁸ The rulings that resulted from the Project’s litigation campaign represented no less than a revolution in women’s le-

gal status, overturning a century of Supreme Court precedent that had tolerated—indeed, embraced—differential treatment of women and men.⁸⁹

When the Project was formed in 1972,⁹⁰ Ginsburg had just recently joined Columbia Law School as its first tenured female faculty member and had worked out an arrangement whereby she could devote half her time to the Project. In many ways, Ginsburg and the Project followed the step-by-step approach modeled by Marshall, Motley, and the NAACP LDF in their pathbreaking litigation for racial justice. The Project’s litigation agenda was grounded in formal equality principles, maintaining that similarly situated men and women should be treated the same under the law. This may seem an unsurprising principle now, but it was by no means widely accepted at that

time. In looking back on this period, Ginsburg has observed, "In one sense, our mission in the 1970s was easy: the targets were well defined. There was nothing subtle about the way things were. Statute books in the States and Nation were riddled with what we then called sex-based differentials."⁹¹

While Ginsburg defined the mission as "easy" in one sense, one of the biggest challenges she and the Project faced was how to persuade the Court that sex-based differentials, long viewed as benign and even beneficial to women, were instead deeply harmful—to men as well as women. Ginsburg later noted:

Our mission was to educate... decisionmakers in the nation's legislatures and courts. We tried to convey to them that something was wrong with their perception of the world. We sought to spark judges' and lawmakers' understanding that their own daughters and granddaughters could be disadvantaged by the way things were.⁹²

In furtherance of its equality goals, the Project participated as party representative or friend of the Court in a number of cases demonstrating the ill effects of sex stereotyping on men as well as women, as in the case of *Weinberger v. Wiesenfeld*.⁹³ There, the Project represented Stephen Wiesenfeld in his efforts to obtain surviving spouse benefits to care for his infant son, where his wife had died in childbirth and the governing Social Security Act provision extended benefits only to surviving wives, on the compound assumption that mothers—and *not* fathers—were involved in the daily care of their children and that fathers—and *not* mothers—were their families' breadwinners.⁹⁴ The Court adopted the Project's argument that such distinctions violated the Fifth Amendment's Due Process Clause and struck down the provision.

Between 1971 and 1979, Ginsburg filed merits briefs on behalf of parties in a total of nine cases,⁹⁵ arguing six.⁹⁶ In nearly all of the

cases, Melvin Wulf, the ACLU's legal director, joined Ginsburg on the brief. Also joining them on the briefs were a number of women attorneys with the Project, including Brenda Feigen Fasteau, Kathleen Peratis, and Susan Deller Ross.⁹⁷ In addition to its party representation, the Project submitted *amicus* briefs in fifteen other cases raising sex discrimination questions before the Court.⁹⁸ Ginsburg did all this while pressing for legislative reform,⁹⁹ engaging in public education on the issues,¹⁰⁰ teaching law at Columbia, co-authoring one of the first casebooks on sex discrimination law,¹⁰¹ and raising two children. Reflecting on this period, Ginsburg exclaimed, "It was wonderful, it was really exhilarating... but we were always tired."¹⁰²

The impact of the Project's litigation campaign cannot be overstated. In the words of former Boalt Hall Dean Herma Hill Kay:

Quite literally, it was [Ginsburg's] voice, raised in oral argument and reflected in the drafting of briefs, that shattered old stereotypes and opened new opportunities for both sexes. She built, and persuaded the Court to adopt, a new constitutional framework for analyzing the achievement of equality for women and men. In doing so, Ginsburg in large part created the intellectual foundations of the present law of sex discrimination.¹⁰³

Following the Project's overwhelming success, there was a significant rise in *amicus* participation in the Court by other women's rights advocacy groups, including the National Organization for Women, the Women's Legal Defense Fund, and the National Women's Law Center.

Harriet Sturtevant Shapiro. (1928-present)¹⁰⁴ The history of women's first 100 years as Supreme Court advocates would not be complete without highlighting the career of the first woman member of the Solicitor General's Office, Harriet Shapiro, who was hired by then—Solicitor General Erwin Griswold



"It was really exhilarating... but we were always tired," recalled Justice Ginsburg (center) about her time litigating at the Women's Rights Project in the 1970s. Her son James and nephew David (below with Ginsburg, left to right) attended her 1979 argument in *Duren v. Missouri* challenging a law that allowed women—but not men—to opt out of jury service to attend to their home and family.

in 1972. Over the course of the next twenty-nine years with the Solicitor General's Office,¹⁰⁵ Shapiro briefed seventy-two cases and argued seventeen,¹⁰⁶ a record passed only recently by Beth Brinkmann, who argued nineteen cases for the Office between 1994 and 2001.¹⁰⁷

Shapiro was not, however, the first woman from the Solicitor General's Office to argue before the Court. That distinction belongs to Jewel LaFontant,¹⁰⁸ a political appointee, who preceded Shapiro in presenting argument in the Court's 1972 Term.

I began this article by addressing the problem of the hat for early women lawyers, and I would like to conclude by highlighting the problem of the morning coat for women in the Solicitor General's Office. The charcoal-gray morning coat has been, and continues to be, the standard uniform worn by male members of the Solicitor General's Office when appearing before the Court.¹⁰⁹ What were women in the Solicitor General's Office to do with this

uniform? Some custom-designed skirt suits resembling morning coats, while others opted for other somber-colored suits. The retention of the morning-coat tradition marks women advocates as different from the norm, as "nonuniform," as had the hat of an earlier era.

VI. Why Does It Matter That Women Have Served—and Continue to Serve—as Supreme Court Advocates?

In considering the question of "why it matters" that women have served as advocates before the Court, I have developed a number of hypotheses, which are neither mutually exclusive nor exhaustive of potential explanations for the significance of women's participation in the Court.

1. Equality/nondiscrimination

This hypothesis suggests that women's participation as Supreme Court advocates is



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important, regardless of its impact on case outcomes, because we as a society value equality of opportunity and freedom from discrimination in gaining access to professional experiences of this nature.

2. Legitimacy/representativeness

This hypothesis posits that having women participate in the Supreme Court process promotes public trust and confidence that justice will be served. Women's participation furthers the perceived legitimacy of the judicial process as a more inclusive and representative system.

3. Insider/outsider

Borrowing from the political-science literature, this hypothesis asserts that it is important to have "insiders" operating within the system who can advocate "outsider" perspectives for those who do not otherwise have access to or influence over decisionmakers. This hypothesis applies with particular force to advocacy before the Supreme Court, where some repeat players take on the mantle of "insiders," gaining credibility in front of and trust from the Justices, which they can then use to benefit "outsiders"—who have historically included women.

4. Educational/inspirational

This hypothesis recognizes that women's participation at the highest levels of the profession is important for shattering stereotypes and modeling possibilities of women's achievements in the law for present and future generations.

5. Difference

This hypothesis anticipates that different styles of argumentation, ideology, and/or outcomes can be associated with women's Supreme Court advocacy. Whether premised on biology, biography, or both, there is less evidence of women modeling a different style of advocacy and more of women bringing a different set of issues to the table, changing the

agenda and thereby changing the shape of the law through their participation. In this regard, there has been a notable increase in the number of cases brought before the Court raising concerns of particular interest to women as the number of women advocates has grown. I think here of cases related to employment discrimination, violence against women, sexual harassment, family-leave rights, affirmative action, and gay rights, to name but a few.

* * *

In the end, arguing before the Supreme Court connotes being the ultimate lawyer, the ultimate gentleman, and even the ultimate warrior, given that military references are not infrequent in the Supreme Court practice literature.¹¹⁰ The importance of advocacy in this forum for making a mark on history cannot be overestimated, where the greats have shaped the law, as well as the public's and the profession's understanding of what it means to be a lawyer. In a profession inextricably linked in the public's mind with authority, the exercise of that authority by women at the highest level is a powerfully symbolic act.

And in those cases in which women have presented argument on issues of particular concern to women, the effect of women's participation is that much more profound. No longer must women ask men to plead their interests. Instead, they are empowered to state their own cases, and in so doing, further empower themselves.

*Special thanks to Dean Claudio Grossman for supporting the research that enabled this talk, and to my assistants, Erin Shute, Amy Jiron, Christina Vitale, and Emily Gallas, for their wonderful work.

ENDNOTES

¹An earlier article examined the experiences of the first twenty women members of the Supreme Court bar, who joined between 1879—the year the Court's rules were changed to provide for women's admission—and 1900.

Mary L. Clark, "The First Women Members of the Supreme Court Bar, 1879-1900," 36 *San Diego L. Rev.* 87 (1999).

²In the 1883 Term, for example, there were 279 new admittees—and no women. *Id.* at 93 (citing Supreme Court Attorney Rolls, Vol. 3 [1870 Term-1883 Term] [on file with the National Archives]). In the 1889 Term, there were 322 new admittees, including five women. *Id.* (citing Supreme Court Attorney Rolls, Vol. 4 [1884 Term-1897 Term] [on file with the National Archives]).

³Clare Cushman, "Women Advocates Before the Supreme Court" 26 *J. of S. Ct. Hist.* 67, 79 (2001). While 230,000 attorneys have joined the Court's bar since its creation, women number only in the several thousand. **The Supreme Court A to Z** (Congr. Quarterly 1998) at 40.

⁴Assistant to the Solicitor General Harriet Shapiro, whose own career is highlighted below, remarked on this phenomenon in an interview with the *Washington Post*, suggesting, "Maybe one of the reasons women don't do it as much is because [the opportunity] goes to the biggest name in the firm...or the person who has the most clout in the office." Joan Biskupic, "Women Are Still Not Well-Represented Among Lawyers Facing Supreme Test; Despite Gains for Female Advocates, High Court Is Largely a Man's Venue," *Washington Post*, May 27, 1997, at A03.

⁵See Mary L. Clark, "The Founding of the Washington College of Law: The First Law School Established By Women for Women," 47 *Am. U. L. Rev.* 613, 618 n. 27, 621 n. 42, 622 n. 45, 634 n. 149 (1998) (recounting early history of women in legal education and the profession). Some of the early "firsts" for women in the legal profession include:

- Arabella Mansfield, who in 1869 became the first woman admitted to any state's bar when she successfully read for the Iowa bar;
- Washington University Law School in St. Louis, Missouri, which in 1870 became the first law school to open its doors to women;
- Ada Kepley, who graduated from the Union College of Law in Chicago in 1871, becoming the first woman to graduate from any law school; and
- Charlotte Ray, who became the first African-American woman to join a state's bar when she became the first woman member of the D.C. bar in 1872.

⁶*Bradwell v. Illinois*, 83 U.S. 130, 139 (1873).

⁷*Id.* at 141 (Bradley, J., concurring).

⁸Some law schools admitted women from the time of their founding—for example, Howard Law School (in 1869) and the University of Michigan Law School (in 1870). Others did so by amending their original male-only admission policies to include women—for example, New York University Law School, in 1890. Nevertheless, most aspiring lawyers entered the profession at this time, not

by graduating from law school, but by apprenticing in the office of an established bar member. The apprenticeship model was a significant hurdle for women to overcome, because few attorneys were willing to take a women-trainee into their practices. Those women who found apprenticeships often did so in the law offices of their husbands or fathers.

⁹Clark, *supra* note 1, at 116. See also Virginia G. Drachman, "My 'Partner' in Law and Life: Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America," 14 *Law & Soc. Inquiry* 221, 228-30 (1989) (noting, "Set against women's entry into medicine, the entrance of women into the legal profession was decidedly modest. In the second half of the 19th century, 14 regular all-women's medical schools opened to provide women with the medical education unavailable to them at the male-run medical schools. By 1880, there were more than 2,400 women doctors, representing 2.8 percent of the physicians in the United States, and by 1900, their numbers had risen to more than 7,000 and they made up 5.6 percent of the doctors nationwide.").

¹⁰There were 7,000 women doctors at the turn of the century, as compared with 1,000 women lawyers. Drachman, *supra* note 10, at 228-30.

¹¹Clark, *supra* note 1, at 3 (citing McGuire, *supra* note 4, at 135). Today, approximately, two-thirds of new admissions are done by mail. **Supreme Court A to Z**, *supra* note 3, at 41.

¹²The Order went on to note, "[T]he Court does not feel called upon to make a change, until such a change is required by statute, or a more extended practice in the highest courts of the States." Order of November 6, 1876, in *Summary of Events*, 11 *Am. L. Rev.* 1876-1877, at 367 (Moorfield Storey and Samuel Hoar, eds., 1877).

¹³From Lockwood's original petition to Congress, on file with the Congressional Records Division of the National Archives. Emphasis in original.

¹⁴Jill Norgren, "Before It Was Merely Difficult: Belva Lockwood's Life in Law and Politics," 24 *J. of S. Ct. Hist.* 16 (1999). Myra Bradwell's *Chicago Legal News* gave extensive coverage to Lockwood's efforts to join the Supreme Court bar. See, e.g., "Women's Right to Practice in the U.S. Courts," *Chi. Legal News* 169 (Feb. 10, 1877) (reporting introduction in House of Representatives of "Bill to Relieve the Legal Disabilities of Women"); "Women as Lawyers," *Chi. Legal News* 271-72 (May 11, 1878) (reporting House debate on bill); see also "Summary of Events," 12 *Am. L. Rev.*, 1877-1878, at 391 (Samuel Hoar and Moorfield Storey eds., 1878) (reporting introduction in House of bill "providing that women should be admitted on the same terms as men to practise [sic] in all the Federal courts.").

¹⁵"An Act to Relieve Certain Legal Disabilities of Women," 20 *Stat.* 292 (1879) (providing "[t]hat any

woman who shall have been a member of the bar of the highest court of any State . . . for the space of three years, and who shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.”).

¹⁶J. Clay Smith, Jr., *Emancipation: The Making of the Black Lawyer 1844-1944* (1993) at 85 n. 224.

¹⁷Clark, *supra* note 1, at 92.

¹⁸The single biggest proponent of the old-girls' network was Ellen Spencer Mussey, founding Dean of the Washington College of Law, the first law school established by women and for women, in 1896. Dean Mussey moved the Supreme Court bar membership of at least twenty-five of her women graduates in the first twenty years of the law school's operation. "Women Admitted to Practice in the Supreme Court of the United States," on file at the Supreme Court Library (listing ninety-seven women admitted to practice before the Supreme Court by 1920 and noting that Mussey sponsored twenty-five of them).

¹⁹Clark, *supra* note 1, at 88. See Virginia Drachman, *Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890* (1993). The "Equity Club" was a correspondence society of women attorneys that operated in the 1880s and 1890s.

²⁰See, e.g., Nancy Cott, *The Grounding of Modern Feminism* (Yale Univ. Press 1987) at 13.

²¹The other major women's rights case of the time, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), involving a constitutional challenge to the exclusion of women from suffrage in Missouri, was briefed and argued by Mr. Francis Minor, husband of Virginia Minor, the denial of whose petition to vote gave rise to the action.

²²Norgren, *supra* note 15 at 30.

²³131 U.S. app. clxxxvii (1880). Lockwood's co-counsel in the Court, Michael Woods, argued the appeal, which stretched on for two days, though Court records note that Lockwood also spoke on behalf of the Kaisers.

²⁴See Plaintiffs' Bill of Complaint at 1-5, *Kaiser v. Stickney* (equity doc. 15, No. 4552), on file in the National Archives with the Supreme Court records for this case (131 U.S. app. clxxxvii).

²⁵131 U.S. app. clxxxvii.

²⁶The Court in *In re Lockwood*, 154 U.S. 116 (1894), declared, "It was for the Supreme Court of Appeals to construe the statute of Virginia in question, and to determine whether the word 'person' as therein used is confined to males, and whether women are admitted to practice law in that Commonwealth." *Id.*

²⁷*United States v. Cherokee Nation*, 202 U.S. 101 (1906). Lockwood's oral argument was reported in the *Washington Post*. "Court Hears Woman, Mrs. Lockwood Argues Before Supreme Tribunal," *Washington Post*, January 18,

1906, at 9 (reporting, "First Time in History that the Justices Have Listened to an Oral Argument From a Member of the Gentler Sex, Spoke Rapidly, but with Clearness").

²⁸Clark, *supra* note 1, at 105 (citing 202 U.S. at 132).

²⁹Neither *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), nor *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), involved female counsel in the Supreme Court, though Josephine Goldmark assisted Felix Frankfurter in developing the social-science data relied on in the *Adkins* brief, just as she had assisted Brandeis in his brief in *Muller v. Oregon*, 208 U.S. 412 (1908). *Goesaert v. Cleary* was briefed and argued by a woman in the Supreme Court, Anne R. Davidow, who represented twenty-four women bartenders in the case. 335 U.S. 464, 465-66 (1948).

³⁰Beverly Blair Cook, "Annette Abbott Adams," in *Notable American Women* (1989) at 3.

³¹The Eighteenth Amendment was repealed by the Twenty-First Amendment in 1933.

³²Kenneth Jost, "Women at Justice: Meese Was Part of the Problem. Is Thornburgh the Solution?" 75 *A.B.A. J.* 54 (Aug. 1989).

³³Upon leaving office, Adams "criticized the country for being 'hysterical about booze' and the government for the laxity of enforcement of prohibition laws." Cook, *supra* note 31, at 4. Adams returned to California in 1921, engaging in private practice before being named to the California appellate court in 1942. See Joey Dean Horton, "Annette Abbott Adams," Stanford Law School's women's history website, <http://www.law.stanford.edu/library/wlhb/papers/aaahtml.html> (last accessed December 18, 2004).

While in private practice, Adams filed petitions for review in seven cases in the Court. Five of these were denied outright: see *Kaneda v. United States*, 259 U.S. 583 (1922) (cert. denied from Ninth Circuit); *Baldini v. United States*, 262 U.S. 749 (1923) (cert. denied from Ninth Circuit); *Littleton v. United States*, 269 U.S. 562 (1925) (cert. denied from Ninth Circuit); *Interstate Transit Co. v. Rogers*, 284 U.S. 640 (1931) (cert. denied from California Supreme Court); and *Standard Oil Co. of California v. United States*, 309 U.S. 654 (1940) (cert. denied from Ninth Circuit). Two were dismissed after cert. had been granted: see *Higgins v. California Prune and Apricot Growers, Inc.*, 273 U.S. 781 (1927) (cert. dismissed with costs per stipulation of counsel); and *Southern California Edison Co. v. Herminghaus*, 275 U.S. 486 (1927) (cert. dismissed as improvidently granted). In several of these cases, Adams' successor as assistant attorney general, Mabel Walker Willebrandt, was on the other side of the case.

³⁴Dorothy M. Brown, "Mabel Walker Willebrandt," in *Notable American Women* (1989) at 734-37.

³⁵Dorothy M. Brown, *Mabel Walker Willebrandt: Power, Loyalty, and Study of Law* (Univ. of Tenn. Press 1984) at 75.

³⁶*Id.* The month was February 1927.

³⁷Brown, *supra* note 35, at 735.

³⁸*James Everard's Breweries v. Day, Prohibition Director of the State of New York*, 265 U.S. 545 (1924). Another Prohibition-era case in which Willebrandt participated was *Cunard Steamship Company v. Mellon*, 262 U.S. 100 (1923), presenting the question of whether liquor could remain in storage on foreign vessels temporarily docked in U.S. ports without violating the Eighteenth Amendment and/or the Volstead Act. Despite noting that the laws of France, Italy, and Holland required the stocking of intoxicating liquors for the benefit of crew and passengers, Justice Van Devanter, writing for the Supreme Court majority, concluded that Prohibition applied to foreign vessels, even to those in U.S. waters on a temporary basis. *Id.* at 119.

³⁹John G. Tomlinson, Jr., "Earnest and Sincere in Their Work," 10 *S. Cal. Rev. L. & Women's Stud.* 117 (2000).

⁴⁰"1985 Survey of Books Related to the Law: Mabel Walker Willebrandt: A Study of Power, Loyalty and Law," 83 *Mich. L. Rev.* 1057 (1985) (observing, "At one time, Mabel Walker Willebrandt was the most famous woman in America.").

⁴¹Brown, *supra* note 35, at 734-37.

⁴²At this time, she was also going through a divorce and adopting a child. Brown, *supra* note 36, at 123.

⁴³Brown, *supra* note 35, at 734-37.

⁴⁴*Id.*

⁴⁵Brown, *supra* note 36, at 50, 109. After leaving the Justice Department, Willebrandt returned to California and to private practice. She appeared once more before the Court, in 1933, in a case challenging the Federal Radio Commission's allocation of radio frequencies under the new Federal Radio Act. There she represented the owners of a radio station who intervened in support of the Federal Radio Commission to defend its allocation of frequencies as reasonable, not arbitrary or capricious. *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co. (Station WJBO)*, 289 U.S. 266 (1933). This was the first time that the Court upheld the power of the Commission to regulate broadcasting. Brown, *supra* note 36, at 207-09.

⁴⁶The author recently confirmed this fact with Judith Gaskell, U.S. Supreme Court Librarian, whose assistance is greatly appreciated.

⁴⁷Brandeis served on the Court from 1916 to 1939.

⁴⁸269 U.S. 93 (1925).

⁴⁹*Supreme Court Decisions and Women's Rights* (Clare Cushman ed., Congr. Quarterly 2001) at 234.

⁵⁰Frank B. Gilbert, "Susan Brandeis: A Justice's Daughter Argues Before His Court," in *Supreme Court Decisions and Women's Rights*, *id.* at 234.

Advocate Brandeis participated in a second case before the Court while her father was an Associate Justice. This case involved a dispute under the Bankruptcy Act concerning claims for future rent payments by landlords. Susan

Brandeis briefed, but did not argue, this case. But, here again, as in *Margolin*, Justice Brandeis recused himself from argument and decision. This time, Brandeis won; the Court reversed the lower court's judgment and remanded for further proceedings for the landlord to demonstrate its future rent claim. Susan Brandeis also filed two petitions for review in the Supreme Court that were denied. *See The Cuban-American Sugar Co. v. United States*, 309 U.S. 681 (1939); *Buckley v. Christmas*, 314 U.S. 679 (1941).

⁵¹This was Margaret Corcoran, who was hired by Justice Hugo Black in 1966. Corcoran was the daughter of Thomas Corcoran, a Washington insider better known as "Tommy the Cork." Subsequently, Martha Field clerked for Justice Abe Fortas in 1968, Barbara Underwood clerked for Justice Thurgood Marshall in 1971, and an increasing number of women clerked for various Justices in the years that followed. *See* Ruth Bader Ginsburg, "Founder's Day Remarks," 5 *Am. U.J. Gender and L.* 1, 3 (1996).

⁵²*See, e.g.,* Ruth B. Cowan, "Women's Rights Through Litigation," 8 *Colum. Hum. Rts. L. Rev.* 373, 381 (1976).

⁵³Indeed, one might ask the converse: to what extent was the Justices' receptivity to hiring women law clerks influenced by the advocacy of women lawyers before the Court?

⁵⁴335 U.S. 464, 467 (1948).

⁵⁵Justice Frankfurter, writing for the Court, observed, "We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare . . ." 335 U.S. at 465.

⁵⁶368 U.S. 57, 64-65 (1961).

⁵⁷For more details, see Linda Kerber, *No Constitutional Right To Be Ladies* (Hill and Wang 1998).

⁵⁸*See* Cushman, *supra* note 3, at 77.

⁵⁹Though I have not been able to confirm it, Margolin is said to have presented argument in twenty-seven cases. *See, e.g., Supreme Court Decisions and Women's Rights*, *supra* note 50, at 228.

⁶⁰Margolin subsequently played the same role with respect to the Equal Pay Act of 1963 and the Age Discrimination in Employment Act of 1967.

⁶¹Margolin's Supreme Court arguments included: consideration of whether a business was an employer for purposes of the Act, *Goldberg v. Whitaker House*, 366 U.S. 28 (1961); what it meant to be "engaged in commerce" for purposes of the Act, *Mitchell v. Zachry*, 362 U.S. 310 (1960); and whether a given employment practice qualified under the Act's "retail or other service" exemption, *see, e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); and *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966).

⁶²Most frequently joining Margolin on brief was Sylvia Ellison. *See, e.g., Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961).

⁶³William O. Douglas, *The Court Years* (Random House 1980) at 184-85.

⁶⁴See *Supreme Court Decisions and Women's Rights*, *supra* note 50, at 228. I have not been able to confirm this figure.

⁶⁵See Cushman, *supra* note 3, at 77 (noting, "The all-time women's record for arguments before the Supreme Court belongs to Beatrice Rosenberg [1908-89] a low-profile but brilliant government attorney who, as an authority on search and seizure, argued more than thirty cases before the High Court. [The men's twentieth-century record belongs to Deputy Solicitor General Lawrence G. Wallace, who has argued more than 150 cases.]").

⁶⁶After three decades at Justice, Rosenberg moved to the Appellate Division of the Equal Employment Opportunity Commission, where she was instrumental in arguing that sexual harassment constituted prohibited sex discrimination under Title VII of the Civil Rights Act. Rosenberg retired from the government in 1979. "Honors and Appointments," *Legal Times* (Nov. 13, 1995) at 16.

⁶⁷387 U.S. 136 (1967). Rosenberg briefed, but did not argue.

⁶⁸398 U.S. 333 (1970). Rosenberg briefed, but did not argue.

⁶⁹*Washington Times*, December 13, 1989, at B5.

⁷⁰Douglas, *supra* note 64, at 186. Hailed as a great mentor of young attorneys, male and female, Rosenberg's career in public service was posthumously recognized by the District of Columbia bar, which established the "Beatrice Rosenberg Award for Distinguished Service," bestowed annually upon a member of the bar whose "career contributions to the government exemplifies the highest order of public service." "Honors and Appointments," *Legal Times* (Feb. 17, 1997) at 13.

⁷¹Following graduation from National University Law School (George Washington University's predecessor), Washington practiced law with her father, who sponsored her Supreme Court Bar admission in 1939. See "Helen Washington," *Washington Post*, March 2, 1978.

⁷²*Burns v. Ohio*, 358 U.S. 939 (1959) (order granting motion to appoint counsel for appellant). Washington succeeded in obtaining a reversal for her client. 360 U.S. 252 (1959).

⁷³Acheson was appointed in 1932. Again, the author thanks Supreme Court Librarian Judith Gaskell for uncovering this information.

⁷⁴Cushman, *supra* note 3, at 72 ("The first female African-American lawyer to join the Supreme Court bar—Chicago Law School-trained Violette N. Anderson—did so eleven years after Conley. Anderson was admitted in 1926 on motion of James A. Cobb, a black judge in the District of Columbia.").

⁷⁵380 U.S. 202 (1965). Shortly after her argument in *Swain*, Motley was elected Manhattan borough presi-

dent. Thereafter, Motley was named to the U.S. District Court for the Southern District of New York by President Johnson in 1966. The *New York Times* reported her nomination as front-page news. Senator James O. Eastland, long-time Chair of the Senate Judiciary Committee and senior Senator from Mississippi, stalled Motley's nomination for seven months. As part of his effort to derail her candidacy, Eastland claimed that Motley had been active in the Young Communist League. Motley believed the opposition to her appointment was motivated by gender as well as race bias: "There was tremendous opposition to my appointment, not only from Southern senators, but from other federal judges. Some of this opposition was racial, but some of it had to do with my being a woman." Mary L. Clark, "One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges," 49 *Vill. L. Rev.* 487, 516 (2004) (quoting Linn Washington, *Black Judges on Justice: Perspectives from the Bench* 128 [New Press 1994]).

Having been rated "qualified" by the ABA, Motley was confirmed by the Senate in August 1966. Motley credited her selection by Johnson to her work as an attorney in the civil-rights movement, and not to her race or gender. When she met with Johnson on the day of her appointment, "he told me he had called every civil rights leader in the country and every one of them was backing my appointment 100 percent." See Constance Baker Motley, *Equal Justice Under Law: An Autobiography* 213 (Farrar, Strauss, and Giroux 1998), quoted in Clark, *id.*

⁷⁶476 U.S. 79 (1986).

⁷⁷Motley worked with Thurgood Marshall on *Brown v. Board of Education* and other landmark litigation, including the lawsuits that resulted in the integration of the Universities of Alabama, Georgia, and Mississippi, among others. See Motley, *supra* note 77, at 106, 122.

⁷⁸President Kennedy appointed Marshall to the U.S. Court of Appeals for the Second Circuit in 1961. See "Thurgood Marshall," Federal Judges Biographical Database, <http://www.fjc.gov/newweb/jnetweb.nsf/hisj> (last accessed December 18, 2004).

⁷⁹Motley, *supra* note 77, at 193.

⁸⁰Motley won all three of the desegregation cases that she argued before the Court: one involving the Atlanta public schools, *Calhoun v. Latimer*, 377 U.S. 263 (1964); the second a restaurant facility at a municipal airport, *Turner v. Memphis*, 369 U.S. 350 (1962); and the third a municipal park, *Watson v. Memphis*, 373 U.S. 526 (1963). In *Watson*, the Court reversed the lower court's judgment authorizing park officials to take up to several years to desegregate their facilities, ruling instead that its "*Brown II* decision, allowing for delay in public school desegregation . . . did not apply to a city's municipal park system" where integrating parks did not present the same administrative challenges as integrating schools. 373 U.S. at 530-32. Motley, *supra* note 77, at 196.

⁸¹These were *Gober v. Birmingham*, 373 U.S. 374 (1963), and *Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963). Their decisions were also announced on the same day, in May 1963. In *Gober*, the Court overturned the convictions of students found guilty of trespass in Alabama state court for seeking service at a department-store lunch counter. In the companion case, *Shuttlesworth*, a minister active with Martin Luther King, Jr. was convicted of aiding and abetting trespass because he had counseled the students before their sit-in. The Court reversed Shuttlesworth's conviction on the grounds that, having set aside the students' convictions, "there could be no conviction for allegedly aiding and abetting them." *Shuttlesworth*, 373 U.S. at 265.

⁸²These were *Barr v. Columbia*, 378 U.S. 146 (1961), and *Bouie v. Columbia*, 378 U.S. 347 (1963). Their decisions were also announced on the same day, in June 1964. In *Barr*, "petitioners had been convicted of trespass and breach[ing] the peace for sitting at a lunch counter in a local pharmacy. The Supreme Court found no evidence that petitioners" had done anything other than ask for service. Motley, *supra* note 77, at 198–200. The third sit-in case Motley argued in 1964 was *Hamm v. Rock Hill*, 379 U.S. 306 (1964).

⁸³Washington, *supra* note 77, at 139.

⁸⁴368 U.S. 52 (1961).

⁸⁵Douglas, *supra* note 64, at 185.

⁸⁶Motley, *supra* note 77, at 194.

⁸⁷See Motley, *supra* note 77, at 213.

⁸⁸The other co-founding director was Brenda Feigen Fasteau, a 1969 graduate of Harvard Law School. See Karen O'Connor, *Women's Organizations' Use of the Courts* (Lexington Books 1980) at 127.

Other notable women advocates active in the Supreme Court at this time included: Eleanor Holmes Norton, who was Mel Wulf's second-in-command at the American Civil Liberties Union (ACLU) in the 1960s; Kathleen Peratis, who succeeded Justice Ginsburg as director of the Women's Rights Project, Project attorney Susan Deller Ross; Jane Picker of the Women's Law Fund in Cleveland; Harriet Rabb of the New York City Corporation Counsel's Office (and NYCLU board member, who left to start an employment discrimination clinic at Columbia Law School in 1971); Sarah Weddington of Texas; and Wendy Williams of the California-based Equal Rights Advocates.

⁸⁹Before addressing the Women's Rights Project's litigation directly, the author would like to recognize the influence of Pauli Murray, an African-American lawyer, political scientist, and Episcopalian minister, whose writings on the parallels between race and sex discrimination shaped the thinking of a generation of students and scholars, including Justice Ginsburg. See, e.g., Pauli Murray and Mary O. Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 *George Wash. L. Rev.* 232 (1965). Murray's influence also came through her service on the ACLU Board, where, in the late 1960s,

she advocated pursuing an aggressive litigation campaign against sex discrimination. Kerber, *supra* note 58, at 194–95. (National Organization of Women founding member Faith Seidenberg, an attorney from Syracuse, New York, likewise advocated ACLU engagement on these issues at this time, as did Barbara Preiskel, then general counsel of the Motion Picture Association, and Catherine Roraback, solo practitioner in New Haven, who worked with Yale Law Professor Thomas I. Emerson on *Griswold v. Connecticut*, 381 U.S. 479 (1965).)

To honor Murray's leadership on sex discrimination issues, Ginsburg named Murray—along with Dorothy Kenyon, a leading civil-rights and women's-rights lawyer and judge—on the first brief that she filed in a sex-discrimination case in the Supreme Court. This was the ACLU's brief for the appellant in *Reed v. Reed* in the Court's 1971 Term. Brief for Appellant in *Reed*, 404 U.S. 71 (1971). See also Kerber, *supra* note 58, at 199–204 ("Neither Kenyon nor Murray had actually participated in the writing of the brief, but Ginsburg was determined to acknowledge the intellectual debt which contemporary feminist legal argument owed to 'those brave women.' The succession of names on the *Reed* brief was the sign of a torch passed by one generation and aggressively claimed by another.").

Thus, while Murray was not herself a Supreme Court advocate, she played a critical role in the history of women's Supreme Court advocacy. See, e.g., Serena Mayeri, "Constitutional Choices: Legal Feminism and the Historical Dynamics of Change," 92 *Calif. L. Rev.* 755 (2004) (highlighting Murray's pragmatic approach to advocating expansion of women's legal status).

⁹⁰A host of individuals have provided helpful accounts of the formation of the Women's Rights Project, including: Cowan, "Women's Rights Through Litigation," 8 *Colum. Human Rights L. Rev.* 373; Cushman, ed., *Supreme Court Decisions and Women's Rights*, *supra* note 50; Cynthia Fuchs Epstein, *Women in Law* 137–38 (2d ed. 1993); Herma Hill Kay, "Celebration of the Tenth Anniversary of Justice Ruth Bader Ginsburg's Appointment to the Supreme Court of the United States: Ruth Bader Ginsburg, Professor of Law," 104 *Colum. L. Rev.* 1, 12 (2004) (hereafter "Ruth Bader Ginsburg, Professor of Law"); Kerber, *supra* note 58, at 199–204 (see also Linda K. Kerber, "Sally Reed demands Equal Treatment," in *Days of Destiny* 440 [James McPherson & Alan Brinkley, eds. 2001]); O'Connor, *Women's Organizations' Use of the Courts*, *supra* note 90, at 123–30; Wendy Williams, "Sex Discrimination: Closing the Law's Gender Gap," in *The Burger Years: Rights and Wrongs in the Supreme Court, 1969–86* 109 (Herman Schwartz ed., 1987); and, of course, Justice Ginsburg herself. See, e.g., Ruth Bader Ginsburg, "Comment on *Reed v. Reed*," *Women's Rights Law Reporter* 7 (1977); Ruth Bader Ginsburg, "Comment: *Frontiero v. Richardson*," *Women's Rights Law*

Reporter 2 (1973); Ruth Bader Ginsburg, "Gender and the Constitution," 44 *U. Cin. L. Rev.* 1 (1975); Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms," 1975 *Sup. Ct. Rev.* 1; Ruth Bader Ginsburg, "Sex Equality and the Constitution," 52 *Tul. L. Rev.* 451 (1978); Ruth Bader Ginsburg, "Sexual Equality Under the Fourteenth and Equal Rights Amendments," 1979 *Wash. U. L. Q.* 161 (1979); Ruth Bader Ginsburg, "Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School," 102 *Colum. L. Rev.* 1441 (2002) (hereafter "Remarks for the Celebration").

⁹¹Ginsburg, "Remarks for the Celebration," *supra* note 92, at 1441.

⁹²Ruth Bader Ginsburg, "Foreword to Symposium: Women, Justice and Authority," 14 *Yale J.L. & Fem.* 213, 214-15 (2002) (hereafter "Foreword to Symposium"). As Justice Brennan characterized it in his opinion in *Frontiero v. Richardson*, "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism,' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973). This pedestal/cage metaphor was first used by California Supreme Court Justice Peters in the *Sail'er Inn* case. *Sail'er Inn, Inc. v. Kirby*, 95 Cal. Rptr. 329, 341 (Cal. 1971).

⁹³In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Ginsburg briefed and argued as counsel for plaintiff appellee Wiesenfeld), the Court struck down certain sex-based distinctions in the Social Security Act that provided survivor benefits to wives and children in the case of working husbands' deaths, but only to the children—and not to the husband—in the case of a working wife's death. This, the Court held, violated the Fifth Amendment's Due Process Clause because it discriminated against female wage-earners by providing them less protection for their survivors than male wage-earners received and perpetuated an archaic and overbroad generalization that women's wages were not as vital to their families' support as were men's wages.

⁹⁴The Project followed a similar strategy in *Craig v. Boren*, 429 U.S. 190 (1976), where the Project filed an *amicus* brief challenging the constitutionality of a state law that set a higher minimum drinking age for men than women for 3.2 beer.

⁹⁵The Women's Rights Project filed briefs on the merits in the following cases:

Reed v. Reed, 404 U.S. 71 (1971);
Struck v. Secretary of Defense, cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972);
Frontiero v. Richardson, 411 U.S. 677 (1973);
Kahn v. Shevin, 416 U.S. 351 (1974);
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975);
Edwards v. Healy, 421 U.S. 772 (1975);
Turner v. Dep't of Employment Security, 423 U.S. 44 (1975);

Califano v. Goldfarb, 430 U.S. 199 (1977); and
Duren v. Missouri, 439 U.S. 357 (1979).

⁹⁶Justice Ginsburg presented argument on behalf of the Women's Rights Project in the following cases:

Frontiero v. Richardson, 411 U.S. 677 (1973);
Kahn v. Shevin, 416 U.S. 351 (1974);
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975);
Edwards v. Healy, 421 U.S. 772 (1975);
Califano v. Goldfarb, 430 U.S. 199 (1977); and
Duren v. Missouri, 439 U.S. 357 (1979).

⁹⁷See, e.g., Fasteau in *Frontiero*, 411 U.S. at 677 (Fasteau's then husband, Marc Fasteau, also contributed importantly to the Project's brief in *Frontiero*), and Ross in *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Vorchheimer v. Sch. Dist. of Philadelphia*, 430 U.S. 703 (1977).

⁹⁸The Women's Rights Project filed *amicus* briefs in the following cases:

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973);
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1972);
Corning Glass Works v. Brennan, 417 U.S. 188 (1974);
Geduldig v. Aiello, 417 U.S. 484 (1974);
Liberty Mutual Insurance Co. v. Wetzel, judgment vacated for want of an appealable order, 424 U.S. 737 (1976);
General Electric Co. v. Gilbert, 429 U.S. 125 (1976);
Craig v. Boren, 429 U.S. 190 (1976);
Coker v. Georgia, 433 U.S. 584 (1977);
Dothard v. Rawlinson, 433 U.S. 321 (1977);
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977);
Univ. of California Regents v. Bakke, 438 U.S. 265 (1978);
Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978);
Orr v. Orr, 440 U.S. 268 (1979);
Califano v. Westcott, 443 U.S. 76 (1979); and
Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980).

⁹⁹Ginsburg, "Remarks for the Celebration," at 1446.
¹⁰⁰*Id.*

¹⁰¹Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, *Text, Cases, and Materials on Sex-Based Discrimination* (1974).

¹⁰²Kerber, *supra* note 58, at 204. Three of the most significant cases on which Ginsburg worked during her time at the Project:

1. *Reed v. Reed*, 404 U.S. 71 (1971) (Ginsburg briefed).

Ginsburg filed a brief for appellant in *Reed v. Reed* in the summer of 1971 as a volunteer lawyer with the ACLU, before the Women's Rights Project was formed. *Reed* had been spotted by ACLU General Counsel Marvin Karpatkin. See Epstein, *supra* note 92, at 137. In *Reed*, a mother and father, by then divorced, each petitioned to be named estate administrator for their seventeen-year-old son, who had died of self-inflicted gunshot wounds while on a custodial visit with his father. The probate court judge appointed the father as administrator despite the fact that the mother's application had been filed first in time because Idaho law provided that, "as between persons equally entitled to administer a decedent's estate [such as a mother and father], 'males must be preferred to females.'" Ginsburg, "Remarks for the Celebration," at 1444 (quoting Idaho Code § 15-314).

Ginsburg framed the issue for decision in *Reed* as whether the sex-based distinction contained in the Idaho code "created a 'suspect classification' requiring close judicial scrutiny." Brief for Appellant in *Reed* at 5. As such, Ginsburg invited use of the strict-scrutiny standard of review, hitherto applied only to cases of fundamental rights, such as voting, and to classifications based on race and national origin. Strict scrutiny requires the government, in defending its law, to articulate a compelling justification and demonstrate that the chosen means were narrowly tailored to serve the governmental purpose.

Ginsburg analogized sex to race:

[I]t is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference.

Brief for Appellant in *Reed*, at 5. Ginsburg appended to her *Reed* brief a compilation of sex-based differentials then currently reflected in state and federal law. According to Ginsburg, "Research for the brief and appendix was supplied by law students from NYU, Rutgers, and Yale." Ginsburg, "Foreword to Symposium," at 214. Relying on this compendium, Ginsburg argued:

The distance to equal opportunity for women in the United States remains considerable in face of the pervasive social, cultural and legal roots of sex-based discrimination.

Brief for Appellant in *Reed* at 6. Noting that the Court itself was implicit in this discrimination, Ginsburg underscored how far social norms had changed:

Prior decisions of this Court have contributed to the separate and unequal status of women in the United States. . . . [But] . . . [i]n very recent years, a new appreciation of women's place has been generated in the United States. Activated by feminists of both sexes, courts and legislatures have begun to recognize the claim of women to full membership in the class "persons" entitled to due process guarantees of life and liberty and the equal protection of the laws.

Brief for Appellant in *Reed* at 5-6, 10.

In a unanimous opinion authored by Chief Justice Warren E. Burger, the Court struck down the Idaho law as violative of the fourteenth amendment's equal protection clause. This was the first time in history that the Court struck down a law on the grounds of sex discrimination.

2. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Ginsburg briefed and argued as amicus, where local counsel—Joe Levin, Morris Dees's partner at the Southern Poverty Law Center—had agreed to allow Ginsburg to direct the litigation in the Supreme Court, but later expressed concern at Ginsburg's emphasis on heightened-scrutiny rather than rational-basis review in the merits brief).

The complainants in *Frontiero* were Sharron Frontiero, an Air Force officer, and her then husband, Joseph Frontiero, a full-time college student. Sharron Frontiero had been denied access to military housing and medical benefits for her husband on the same terms that male officers had for their wives. While a male officer's spouse was presumed dependent upon him for support, regardless of how much she earned, Sharron Frontiero had to prove that her husband relied on her earnings for more than one-half of his support in order to gain dependent spouse benefits for him.

Eight Justices voted to strike down the sex-based classification in *Frontiero* as unconstitutional. In writing for a plurality of four Justices, Justice Brennan specifically cited the data Ginsburg set forth in her brief on women's underrepresentation in politics as underscoring the need for heightened scrutiny of sex-based classifications:

[W]omen are vastly under-represented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this

underrepresentation is present throughout all levels of our State and Federal Government.

411 U.S. at 686 n. 17 (citing Joint Reply Brief of Appellants and American Civil Liberties Union [*amicus curiae*] at 9). Brennan proceeded to apply strict scrutiny to the military benefit program's sex-based classification, reasoning that sex-based classifications, like those based on race, were inherently suspect because sex, like race, was an immutable characteristic.

3. *Craig v. Boren*, 429 U.S. 190 (1976) (Ginsburg briefed as *amicus*).

Craig was most important for resolving years of uncertainty as to the level of scrutiny with which sex-based classifications would be reviewed. There, the Court articulated a new intermediate scrutiny standard, located between the traditional rational basis review and the strict scrutiny accorded fundamental rights and race-based classifications. Applying this standard to the facts at issue in *Craig*, the Court struck down an Oklahoma law setting a different legal age for purchasing 3.2 beer for women and men—18 for women, and 21 for men.

¹⁰³Kay, "Ruth Bader Ginsburg, Professor of Law," at 20.

¹⁰⁴Office of the Solicitor General, "In re Harriet S. Shapiro, Esq.: Petition for a Writ of Appreciation (2000)" at 2.

¹⁰⁵Shapiro's work with the Solicitor General's Office was divided into roughly three periods. Her first decade was spent drafting briefs and arguing cases. Her second was engaged with drafting briefs, rather than arguing. In her last decade, she assumed a variety of other tasks, including screening cert petitions in criminal cases and responding to Freedom of Information Act requests. See "Petition for a Writ of Appreciation for Harriet Shapiro," bestowed upon Shapiro on the occasion of her retirement from the Solicitor General's Office in 2001. The author thanks Beth Brinkmann for bringing this petition to her attention.

¹⁰⁶Shapiro's seventeen argued cases included:

- *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (Shapiro argued, but did not brief), holding not violative of the Fifth

Amendment Due Process Clause a U.S. Navy regulation that allowed up to thirteen years of commissioned service to women before being mandatorily discharged for failure to obtain promotion, while requiring men's mandatory discharge upon being twice passed over for promotion, even when fewer than thirteen years had elapsed;

- *Califano v. Boles*, 443 U.S. 282 (1979) (Shapiro briefed and argued on behalf of the Secretary of Health, Education, and Welfare as a party; joining Shapiro on brief were two women—Assistant Attorney General Barbara Babcock and Justice Department attorney Susan Ehrlich—and a number of male colleagues), holding not violative of the Fifth Amendment Due Process Clause a provision of the Social Security Act that limited mothers' insurance benefits to widows and divorced wives of male wage-earners, thereby excluding mothers of children born outside of marriage; and
- *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (Shapiro briefed and argued on behalf of The Equal Employment Opportunity Commission as a party), holding violative of the Pregnancy Discrimination Act a limitation in a company's health-insurance coverage of pregnancy-related costs for male employees' spouses.

¹⁰⁷Beth S. Brinkmann, "First Arguments at the Supreme Court of the United States: A First Argument in the Tradition of Many," 5 J. App. Prac. & Process 61 (2003).

¹⁰⁸LaFontant had been promoted to the rank of deputy solicitor general by 1975. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

¹⁰⁹*Supreme Court A to Z*, *supra* note 3, at 427.

¹¹⁰See, e.g., Kenneth Mack, "A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the Legal Profession, 1925–1960," 87 *Cornell L. Rev.* 1405, 1414–15 (2002). ("Until women were admitted to the profession, courtrooms were battlefields where men engaged in forensic warfare in front of all-male juries and judiciaries").

Oral Advocacy and the Re-emergence of a Supreme Court Bar

JOHN G. ROBERTS, JR.*

Over the past generation, roughly the period since 1980, there has been a discernible professionalization among the advocates before the Supreme Court, to the extent that one can speak of the emergence of a real Supreme Court bar. Before defending that proposition, it is probably worth considering whether advocacy makes a difference—whether oral argument matters. My view after one year on the opposite side of the bench is the same as that expressed by no less a figure than Justice John Marshall Harlan—the second one—forty-nine years ago, after he completed his year on the Court of Appeals for the Second Circuit.¹ Justice Harlan lamented what he saw as a growing tendency among the bar “to regard the oral argument as little more than a traditionally tolerated part of the appellate process,” a chore “of little importance in the decision of appeals.”² This view, he said, was “greatly mistaken.”³ As Justice Harlan told the bar, “[Y]our oral argument on appeal is perhaps the most effective weapon you have got.”⁴

By the time he made his remarks to the Fourth Circuit Judicial Conference meeting in Asheville, Judge Harlan had become Justice Harlan, and his remarks included reflections on not only his time on the Court of Appeals but also a few months on the Supreme Court as well. My experience has been limited to what Article III of the Constitution refers to as an “inferior” court—surely James Madison’s fabled gift for finding just the right word failed him in that instance. Oral argument before a court of appeals and the Supreme Court differs

in some significant respects. On the court of appeals, we hear arguments in panels of three and hear many more cases than the Supreme Court hears. We therefore give the parties less time for oral argument. Rather than the half-hour per side that is typical in the Supreme Court, we often budget ten or fifteen minutes a side. But at the same time, because we sit in groups of only three, we are able to be a little more flexible, keeping counsel as long as we think they are being useful—an additional ten minutes, fifteen minutes, even a half-hour.



"Your oral argument on appeal is perhaps the most effective weapon you have got," Justice John Marshall Harlan remarked in 1955 in an address to the judicial conference of the Fourth Circuit. Having served on the Court of Appeals for the Second Circuit and recently been appointed to the U.S. Supreme Court, Harlan viewed the tendency to belittle the value of oral argument as a mistake.

We also hear argument regularly from intervenors and *amici*, while in the Supreme Court the only non-party that is heard from, except in rare cases, is the United States, through the Solicitor General's Office.

There is also a substantive difference between arguments before the Supreme Court and before a court of appeals. In the court of appeals, we spend quite a bit of time at argument debating and puzzling over what Supreme Court opinions mean, because we are bound by them inexorably. That is typically not a significant part of an argument in

the Supreme Court. Most advocates there have found that it is not a worthwhile expenditure of their time to debate with the authors about what their opinions mean. But these distinctions aside, the enterprise of oral argument and its role is really quite similar in a court of appeals and the Supreme Court.

My main conclusion after a year of being on the other side of the bench is that oral argument is terribly, terribly important. I feel more confident about that now than I ever did as an advocate—now, when the question "does oral argument ever matter?" does not carry the

same existential angst it did when it was what I did for a living. Oral argument matters, but not just because of what the lawyers have to say. It is the organizing point for the entire judicial process. The judges read the briefs, do the research, and talk to their law clerks to prepare for the argument. The voting conference is held right after the oral argument—immediately after it in the court of appeals, shortly after it in the Supreme Court. And without disputing in any way the dominance of the briefing in the decisional process, it is natural, with the voting coming so closely on the heels of oral argument, that the discussion at conference is going to focus on what took place at argument.

Oral argument is also a time—at least for me—when ideas that have been percolating for some time begin to crystallize. I—and I think many judges—are aggressively skeptical when they prepare to confront a case. Upon reading a brief, my reaction is not typically “Well, that’s a good argument,” or “That’s persuasive,” but instead “Says you. Let’s see what the other side has to say.” In researching the cases, my reaction is, “I bet there’s some authority on the other side that balances it out.” But however open you try to keep yourself to particular positions, those doors begin to close at oral argument. After all, the voting is going to take place very soon thereafter, and the luxury of skepticism will have to yield to the necessity of decision. Those closing doors often get a push from what happens at argument, whether it be the questions from the other judges or the responses by the attorneys. And the former can be just as important as the latter, because it is the protocol on the inferior court on which I sit—and, I believe, the general practice on the Supreme Court as well—that the judges do not discuss the cases before oral argument except in unusual situations. Thus, oral argument is the first time you begin to get a sense of what your colleagues think of the case through their questions.

Throughout the history of the Supreme Court, other Justices have shared Justice

Harlan’s view on the importance of oral argument. Justice Joseph Story reported that

[Chief Justice Marshall] was solicitous to hear arguments, and not to decide causes without hearing them No matter whether the subject was new or old; familiar to his thoughts or remote from them; buried under a mass of obsolete learning, or developed for the first time yesterday—whatever was its nature, he courted argument, nay, he demanded it.⁵

Chief Justice Charles Evans Hughes said that oral argument was desirable because it allowed the Court to “more quickly . . . separate the wheat from the chaff.”⁶ In 1951, Justice Robert H. Jackson reported that the Justices on his Court would unanimously say that they relied heavily on oral argument.⁷ And fifty years later, the current Chief Justice has written that oral argument does make a difference and that in a significant minority of the cases he has left the Bench feeling differently about a case than when he went on.⁸ Thus, as the character of oral argument has evolved throughout the history of the Court, the Justices have not wavered in their commitment to its importance.

It used to be that you could have an oral argument at the Supreme Court and win your case without actually having to go through the oral argument. In his memoir, Erwin Griswold describes the practice of the Hughes Court of sometimes cutting off a respondent when the Justices had heard enough and were prepared to rule in the respondent’s favor—a practice that still exists on many courts of appeals.⁹ According to Griswold, Chief Justice Hughes once told a respondent’s counsel that “[t]he Court does not care to hear further argument,” but counsel kept talking. The Chief Justice repeated his statement. The counsel just spoke more loudly, apparently having understood the Chief Justice to say “We can’t hear you,” as opposed to “We don’t care to hear you.” At this point an exasperated Chief Justice looked



In his memoir, Erwin Griswold described how the Hughes Court would sometimes cut off a respondent when the Justices had heard enough and were prepared to rule in the respondent's favor. Griswold served as Solicitor General from 1967 to 1973.

to the petitioner's counsel, who of course had just realized he was going to lose his case because they were cutting off the respondent's argument, and said "Won't you please tell counsel that the Court does not care to hear further argument." Petitioner's counsel got up, strode to the lectern, and said "They say they would rather give you the case than listen to you."¹⁰ Which I guess was drawing some solace from his defeat.

Oral argument today—both in the Supreme Court and in most courts of appeals—consists largely of responding to questions from the bench. In his famous 1940 lecture on oral advocacy to the Association of the Bar of the City of New York, John W. Davis told advocates that they should state the nature of the case, its prior history, the facts, and the applicable rules of law.¹¹ In his equally famous 1951 talk to the State Bar of California, Justice Jackson said "[B]egin

with a concise history of the case, state the holding of the court below and wherein it is challenged[,]...follow with a careful statement of important facts, and conclude with discussion of the law."¹² Well, those must have been the days. Nowadays, the most uninterrupted time that an advocate is likely to get before the Supreme Court is a couple of minutes at the outset of argument. When I was preparing for Supreme Court arguments, I always worked very hard on the first sentence, trying to put in it my main point and any key facts, because I appreciated that the first sentence might well be the only complete one I got out in the course of the argument.

Supreme Court oral argument has always been vigorous and rigorous. Some advocates have collapsed in the face of it. The story has been told oftentimes of Solicitor General Stanley F. Reed paling and being unable to



Solicitor General Stanley F. Reed was unable to continue his argument defending the Agricultural Adjustment Act in 1935 after being barraged with technical questions from the Justices.

proceed when he was faced—as the *New York Times* put it—with “a barrage of technical questions” from the nine Justices while trying to defend New Deal legislation before the

Hughes Court.¹³ A little less well-known is the story of the advocate in a commercial-fraud case that was argued sixty years ago. The Justices were a bit exercised about the facts,



Thomas Ewing, a Senator from Ohio who would serve in the Cabinet under two Presidents, fainted while delivering oral argument before the Supreme Court in 1869. The propensity to faint obviously ran in the family: his son, General Thomas Ewing (pictured), suffered the same misfortune when he collapsed before the Justices during oral argument in 1895.

and the questioning focused on a particular affidavit. At one point, Justice William O. Douglas demanded to know "who drafted this affidavit?," at which point the lawyer fainted dead away, hitting his head on the table on the way to the floor. Court was adjourned and a doctor was called for. When argument resumed, the lawyer—bruised but unbowed—stood up, looked at Justice Douglas, and said, "That he had."¹⁴

The fault in these cases, however, does not rest entirely with an overly aggressive Court. There is some interesting evidence that the problem may be hereditary. The *Washington Post* of October 23, 1895 carried an item describing how General Thomas Ewing had fainted and collapsed while arguing a case be-

fore the Supreme Court. The story went on as follows:

An extraordinary coincidence that was brought to the mind of one of the ancient Supreme Court employees, and that was amply verified in the course of the day, was the fact that about forty years ago, Hon. Thomas Ewing, the father of Gen. Ewing, who was twice a United States Senator from Ohio, Secretary of the Treasury under President Harrison, and the first Secretary of the Interior under President Taylor, had precisely such a mishap, affecting him in a very similar way, and under exactly the same conditions. While making an argument before the Supreme Court he fell in a faint to the floor, in about three feet of the spot where his son sunk on the carpet yesterday.¹⁵

When the elder Ewing collapsed, he was actually not removed from the Court until after midnight.¹⁶ The Court did not continue to hear arguments in other cases over the prone body of Senator Ewing. It adjourned; the Justices gathered around Senator Ewing; his family and friends were called for; and physicians were summoned. He eventually recovered and went on to live several more years of a very productive life. Among the family members who came to his side while he lay in the well of the Court was his son, who continued the family swooning tradition years later.¹⁷

Practically every advocate who has given any kind of advice about arguing before the Court has the same advice about questions: answer them. Former Solicitor General Rex Lee always used to say that oral advocates need to practice saying two words—yes and no.¹⁸ Never put off answering a question. This is how Davis put it in his famous talk: "If you value your argumentative life do not evade or shuffle or postpone, no matter how embarrassing the question may be or how much it interrupts the thread of your argument."¹⁹ Now,



When seasoned advocate John W. Davis (pictured) made his 138th oral argument in the *Steel Seizure Case*, he was able to defer answering a question by Justice Frankfurter about an earlier case he had argued, *Midwest Oil*. When opposing counsel Solicitor General Philip Perlman tried the same delaying tactic, however, Frankfurter persisted until Perlman answered his question.

fast-forward twelve years from that advice to the high drama of oral argument in the *Steel Seizure* case.²⁰ It was Davis's 138th argument before the Court, and perhaps his greatest day before it. His brilliance seemed to quiet the Justices²¹—except, of course, for Justice Felix Frankfurter, who asked about *United States v. Midwest Oil Co.*,²² a case Davis had argued forty years earlier when he was Solicitor General that seemed to be inconsistent with his present position.

MR. JUSTICE FRANKFURTER:
What about the holding operation whereby the President took action in the Midwest Company cases, and the relationship of his action to the will of Congress?

MR. DAVIS: It fell to my lot to argue that case. May I finish my brief presentation before I answer Your Honor?

MR. JUSTICE FRANKFURTER:
Yes.²³

And it was in fact some time before Davis returned to Frankfurter's question, saying "Now, Your Honor mentioned the *Midwest Oil* cases. Let me dispose of that."²⁴

But what was particularly revealing is what happened next, when Solicitor General Philip Perlman stood up to argue, defending President Truman's seizure of the mills. It was not to be Perlman's greatest day before the Court; he would have better. This time he was being badgered with questions.²⁵ Justice

Frankfurter asked him the same question he had asked Davis.

MR. JUSTICE FRANKFURTER:
... Do you suggest that this non-action of Congress is the equivalent to what was done in the *Midwest Oil* case?

MR. PERLMAN: I want to go into that *Midwest Oil* case later on.²⁶

But Frankfurter would not let him do that. He just ignored Perlman's effort to put off the question and came back with a half-dozen more questions on the same subject.²⁷ This surely must have seemed very unfair to Perlman. I think the lesson is: just because John W. Davis gets away with something, don't think that you're going to as well.

Over the last generation of advocacy before the Supreme Court, one thing that has remained fairly constant has been the level of questioning. I took the first and last cases of each of the seven argument sessions in the 1980 Term and the first and last cases in each of the seven argument sessions in the 2003 Term and added up the questions, and the statistics confirm that impression. There was an average of eighty-seven questions per argument in 1980 and ninety-one per argument in 2003. In both the 1980 and 2003 Terms, there were significantly more questions, on average, for the respondent than for the petitioner.

Davis famously said that an advocate should "[r]ejoice when the Court asks questions."²⁸ "[A]gain I say unto you," he wrote, "rejoice." But apparently too much rejoicing can be a bad thing. Recent studies have begun to suggest that you can tell how a case is going to come out simply by seeing which side was asked the most questions:²⁹ the side with the most questions is going to lose. In the twenty-eight cases I looked at, fourteen from the 1980 Term and fourteen from 2003, the most-questions-asked "rule" predicted the winner—or, more accurately, the loser—in twenty-four of those twenty-eight cases, an 86 percent

prediction rate. So the secret for successful advocacy—you don't need to read Davis, you don't need to read Jackson—the secret to successful advocacy is simply to get the Court to ask your opponent more questions.

But while the level of questioning has remained constant over the last generation, there have been other changes, and significant ones. Others have commented often enough about the decline in the number of cases the Supreme Court hears on the merits.³⁰ The Court now hears just over half the number of cases it heard in 1980. There has been a lot of hand-wringing at the bar, of course, over this. I used to think it was a problem, but over the last year I have come to realize that it is not that serious a problem at all. I think the phenomenon is largely explained by the abolition of the Court's mandatory appellate jurisdiction in 1988, and perhaps by the departure from the Court of Justice Byron R. White. Justice White constantly advocated having the Court hear more cases, to the extent that he would write and regularly publish dissents from denials of certiorari, listing the various circuit conflicts he thought the Court was overlooking.

But whatever the reasons, the sharp decline in the number of opportunities for lawyers to argue before the Court has been accompanied, perhaps paradoxically or perhaps not, by an even more dramatic rise in the number of experienced Supreme Court advocates appearing before the Court, both in absolute terms and proportionately. That, in any event, was my impression, and I decided to test it by comparing the lawyers who argued in the 1980 Term and those who argued in the 2002 Term. In 1980, looking at oral arguments by non-federal government attorneys—that is, basically excluding the Solicitor General's Office—fewer than 20 percent of the advocates had ever appeared before the Supreme Court before. In 2002, that number had more than doubled, to over 44 percent.

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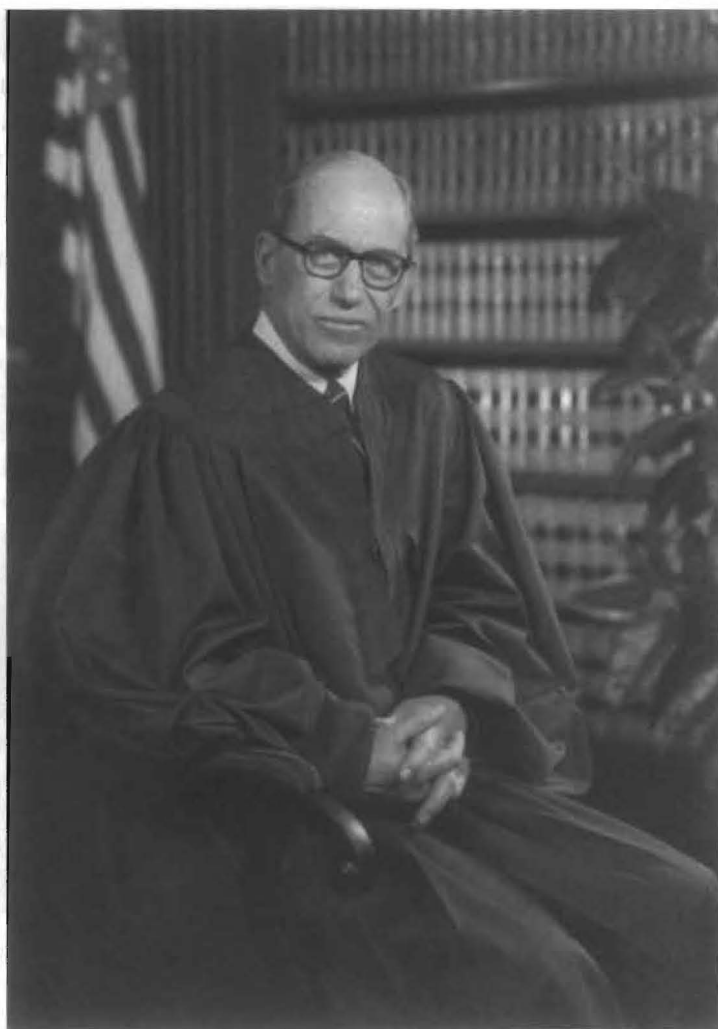
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The author suggests that the retirement of Justice Byron R. White from the bench may have contributed to the reduction in the number of cases the Court agrees to hear each Term. A constant advocate for the Court to hear more cases, White would regularly write dissents from denial of certiorari, listing the various circuit conflicts he thought the Court was overlooking.



or recidivists—those with at least three previous arguments before the Court. In 1980, only 10 percent of non-Solicitor General arguments were presented by experienced counsel. In 2002, that number had more than tripled, to 33 percent. In 1980, only three lawyers outside the Solicitor General's Office argued twice before the Court, out of some 240 argument slots for non-Solicitor General lawyers, accounting for 2.5 percent of the arguments. (For two of those three, it was their first and second arguments ever.) But in 2002, there were fourteen different non-Solicitor General repeat performers who argued at least twice—many more than twice—accounting for fully

24 percent of the non-Solicitor General argument slots, a tenfold increase.

I should be quick to point out that an experienced advocate does not necessarily make for a better argument. Several of the Justices have gone out of their way to emphasize that many first-timers—many only-timers—have presented wonderful arguments.³¹ I observed first arguments in the Supreme Court by Michael Dreeben, Walter Dellinger, and Seth Waxman from the very uncomfortable position of the opposing counsel's chair. On each of those occasions, I would have gladly traded for a grizzled veteran as an opponent. But it is reasonable to suppose that arguing before the

Court is, like most things (including judging), something that you hope to get better at as you go along.

This rise in the number of experienced practitioners before the Supreme Court is reflected in, and abetted by, another development over the past generation: the rise of Supreme Court and appellate practice departments in major law firms. This is largely a phenomenon of the past twenty-five years, not limited to Washington, D.C., but certainly very evident there. In establishing Supreme Court and appellate practice as a recognized specialty, these private law offices, of course, have a very successful model on which to draw. Since 1870, the federal government has had such a specialized office—the Solicitor General's Office. This type of development in the profession has had something of a snowball effect. If one side hires a Supreme Court specialist to present a case, it may cause the client on the other side to think that they ought to consider doing that as well. This is just a variant on the old adage that one lawyer in town will starve, but two will prosper.

There has been a corresponding development on the state and local government side. More and more states are copying the federal model and establishing state solicitor general's offices. These offices certainly are devoted to and focused on litigation before their state supreme court and their state courts of appeals. But they also appear far more frequently before the Supreme Court of the United States now than they did in 1980. In the 2003 Term, for example, a solicitor general or someone from that office appeared for the states of Alabama, Illinois, Michigan, Ohio, Tennessee, Texas, and Washington. I do not want to put too much weight on the label, but in fact if you do have an office of appellate specialist at the state level, I think it is natural to hope and assume that lawyers from that office will bring more experience and expertise to their cases before the Supreme Court.

Along with the rise of specialists in the private bar and the rise of specialists repre-

senting state and local government, the United States Office of the Solicitor General is appearing in proportionately more cases before the Supreme Court than it did before. That office has gone from appearing as a party or an amicus in just over 60 percent of the cases in 1980 to appearing at argument in over 80 percent of the cases the last three Terms. Interestingly, the office's absolute numbers have remained about the same as the Court's docket has contracted. In 1980 the Solicitor General appeared in some sixty-six cases; in the last three Terms, he was in sixty-five, sixty-two, and sixty-two. I do not think the Supreme Court's docket has contracted simply by eliminating cases in which there was no interest on the part of the federal government. Instead, over the past several years the Solicitor General has filed and argued in cases that that office would have let pass twenty-five years ago.

There is a certain institutional dynamic at work here: the Solicitor General must sign off on every appeal by the federal government throughout the federal judiciary, from any level to any other level. If the federal government loses in a district court and wants to appeal to the court of appeals, that has to be approved by the Solicitor General. That role is much appreciated by those of us on the inferior courts, because it helps ensure (at least in theory) that the United States is maintaining a consistent litigation position throughout the country. But it is an enormously heavy burden on the very limited resources of the Solicitor General's Office to review, in every case, whether the government should appeal and what position it should take. The lawyers who do that work end up working extremely hard, often on very mundane issues. The reward, of course, is that those same lawyers have the opportunity to appear for their country before the Supreme Court. So however much the Supreme Court's docket may contract, there is pressure to have someone from the Solicitor General's Office appear in more and more of those cases.

The net result is that the experienced lawyers of the Solicitor General's Office, on

a relative basis, are appearing far more frequently before the Supreme Court than they did a generation ago. This, too, contributes to the snowball effect. A client may not think that it needs a Supreme Court specialist until it finds out that the federal government's Supreme Court specialist is joining what, up to then, had been a purely private dispute.

Now, when you step back from all these developments and look at the net consequence, it is eye-catching. In 1980, the odds that the advocate making his way to the lectern for an oral argument before the Supreme Court had ever been there before were about one in three, including representatives of the Solicitor General's Office. By 2002, those odds were over 50 percent. It is interesting to note that a generation ago, a number of the Justices commented quite critically on the quality of oral argument before the Court.³² Justice Lewis F. Powell said that he had high expectations of the bar when he joined the Court, but that the bar's performance "has not measured up to my expectations."³³ From Justice Powell, those are very harsh words. Chief Justice Warren Burger made the need for improved advocacy a recurring theme of his speeches, focusing on the poor quality of advocacy by those representing the states and local governments.³⁴ Around 1980, retired Justice Douglas said that 40 percent of the oral advocates before the Court were "incompetent."³⁵ And in a 1983 lecture, the current Chief Justice attributed the disrepute into which oral argument was falling to the prevailing poor quality of oral advocacy, noting that for many advocates before the Supreme Court, oral argument seemed to be an opportunity to present their brief "with gestures."³⁶

My bold claim today, looking back at the last twenty-four years, is that things have changed, and for the better. First, there have been some very specific institutional changes. The establishment of an advocacy program at the Academy of State and Local Governments and similar programs at the

National Association of Attorneys General were a direct response to Chief Justice Burger's critique.³⁷ These organizations provide not only amicus help, but also moot court training and other assistance to the representatives of state and local government. There has been a recent rise of similar programs available to all advocates before the Court. The Georgetown University Supreme Court Institute provided rigorous moot court preparation for advocates in two-thirds of the cases argued before the Supreme Court during the 2003 Term. The Institute's moot court program is highly valued by novice and experienced advocates alike because of the high quality and skill of the judges that Institute director Professor Richard Lazarus is able to attract to do the moot courts. These programs have made it easier for both first-timers and experienced advocates to do a more professional job before the Court.

There have even been changes along these same lines in the Solicitor General's Office. Everyone who has served in the Solicitor General's Office shares a belief that that office enjoyed a golden age roughly corresponding to the time that they served there. Suggesting that something has improved in the Office of the Solicitor General will to many seem like heresy, because it implies that there was at one time a need for improvement. All I will note is that a generation ago it was not the rule—certainly a practice, maybe even a common practice, but not the rule—that Solicitor General's Office lawyers went through moot courts before their arguments. That requirement was instituted by Judge Kenneth Starr, and I believe it has stuck, which I think has allowed some lawyers from the Office of the Solicitor General to become even better advocates.

I would not go so far as to say that the re-emergence that I have identified of a Supreme Court bar was a response to the judicial criticism prevalent a generation ago. But perhaps to the extent that the Justices at that time identified an opportunity for improved

quality and professionalism, the bar identified the same opportunity and responded. The Supreme Court bar that I have been discussing is, of course, nothing like the Supreme Court bar of the John Marshall era. No one today is going to argue in half of the Court's cases, as William Pinkney did one year.³⁸ But more and more, there are familiar faces appearing at the lectern—not just the curiously attired lawyers from the Solicitor General's Office, but faces from the private bar and from the states as well. If I am right about this, I think it raises a number of interesting questions. If there has been a re-emergence of the Supreme Court bar, when did the old one die, and what killed it? What is the relationship between the Court's shrinking docket and the rise of the Supreme Court bar? More generally, is a specialized bar a good thing or a bad thing for the Court?

Obviously better advocacy—if in fact that is what comes with more experienced advocates—is a good thing. A well-argued case will not necessarily be well decided; sometimes the judges get in the way. But there is a significant risk that a poorly argued case will be poorly decided.³⁹ That is a risk of our adversary system. More experienced, better advocates should be a good thing.

But the developments I have noted do raise some concerns. Take the presence of someone from the Office of the Solicitor General in more than 80 percent of the Court's argued cases. If you asked me as an abstract proposition whether I would be troubled by the idea that the executive branch was going to file something in every case before the Supreme Court explaining its views, as a sort of super law clerk, my answer would be yes, I would find that very troubling. Eighty percent is pretty close to every case, and as the discernible federal interest in a matter before the Court wanes, concern about the role being played by the government increases.

On the private side, I would suppose that the Justices are pleased to see good and experienced advocates present a case. But there

is no denying that something is lost as the bar becomes more specialized. The Chief Justice has referred to the "intangible value of oral argument," the point at which counsel and Court look each other in the eye and have a public "interchange" about the case.⁴⁰ If you have a case arising in Iowa that works its way through the Iowa courts, goes to the Iowa Supreme Court, and works its way to Washington, I think there is something beneficial both for the U.S. Supreme Court and certainly for the Iowa bar to have Iowa attorneys present that case. That is true, of course, only to the extent that those attorneys are able and willing to learn what practice before the Supreme Court is like and what it demands of them. That may turn out to be a very big challenge. It may be that not many lawyers with different practices to maintain can set aside the months necessary effectively to brief and to prepare for argument in a case before the Supreme Court. There is a corresponding challenge on the part of the specialist as well: to become intimately steeped in the local character and details of any particular case, so that they are able to convey that to the Justices.

Whether an advocate is a recidivist or presenting his first and only argument before the Court, he needs to have something of the medieval stonemason about him. Those masons—the ones who built the great cathedrals—would spend months meticulously carving the gargoyles high up in the cathedral, gargoyles that when the cathedral was completed could not even be seen from the ground below. The advocate here must meticulously prepare, analyze, and rehearse answers to hundreds of questions, questions that in all likelihood will actually never be asked by the Court. The medieval stonemasons did what they did because, it was said, they were carving for the eye of God. A higher purpose informed their craft. The advocate who stands before the Supreme Court, whether a veteran or novice, also needs to infuse his craft with a higher purpose. He must appreciate that what happens here, in mundane

case after mundane case, is extraordinary—the vindication of the rule of law—and that he as the advocate plays a critical role in the process. The advocate who appreciates that does infuse his work with a higher purpose, and that higher purpose will steel him for the long and lonely work of preparation, will bring the proper passion to his cause, will assuage the bitterness of defeat and moderate the elation of victory, and will, more and more, forge a special bond with his colleagues at the Supreme Court bar.

*This article is the printed version of a lecture delivered at the Supreme Court Historical Society's Annual Meeting on June 7, 2004.

ENDNOTES

¹John M. Harlan, "Address Delivered Before the Judicial Conference of the Fourth Circuit at Asheville, North Carolina (June 24, 1955)," in John M. Harlan, "What Part Does the Oral Argument Play in the Conduct of an Appeal?" 41 *Cornell L.Q.* 6 (1955).

²*Id.* at 6, 10–11.

³*Id.* at 6.

⁴*Id.* at 11.

⁵Albert J. Beveridge, *The Life of John Marshall* 94 n. 1 (1916) (quoting Justice Story in 3 *John Marshall: Life, Character and Judicial Services* 377 [John F. Dillon ed., 1903]).

⁶Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, *Supreme Court Practice* 578 (6th ed. 1986) (quoting Hon. C. E. Hughes, *The Supreme Court of the United States* 62–63 [1928]).

⁷Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations," 37 *A.B.A. J.* 801 (1951) ("I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations.").

⁸William H. Rehnquist, *The Supreme Court* 243 (Knopf 2001) (1987) ("Speaking for myself, I think [oral argument] does make a difference: In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench.").

⁹See Erwin N. Griswold, *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer* 92 n. 25 (1992).

¹⁰*Id.*

¹¹John W. Davis, "The Argument of an Appeal," 26 *A.B.A. J.* 895, 896–97 (1940).

¹²Jackson, *supra* note 7, at 803.

¹³"Reed in Collapse; AAA Cases Halted," *New York Times*, December 11, 1935, at 1.

¹⁴William O. Douglas, *The Court Years* 181 (1980). The case being argued was *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

¹⁵"Gen. Thomas Ewing III; Compelled to Suspend His Argument Before the Supreme Court," *Washington Post*, October 23, 1895, at 3. General Ewing collapsed while presenting oral argument in *Farmers' Loan & Trust Co. v. Chicago, Portage & Superior Ry. Co.*, 163 U.S. 31 (1896).

¹⁶*Memorial of Thomas Ewing* 284–85 (Ellen E. Sherman ed., 1873). Senator Ewing collapsed while presenting oral argument in *Maguire v. Tyler*, 75 U.S. (8 Wall.) 650 (1869).

¹⁷*Id.* at 284.

¹⁸Rex E. Lee, "Oral Argument in the Supreme Court," 72 *A.B.A. J.* 60, 61 (1986).

¹⁹Davis, *supra* note 11, at 897.

²⁰*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²¹Rehnquist, *The Supreme Court*, *supra* note 8, at 185 ("Davis's argument I thought was masterful.... [T]he Court had appeared to be almost in awe of Davis, and asked him only one question during his ninety minutes of argument").

²²236 U.S. 459 (1915).

²³Transcript of oral argument, *Youngstown Sheet & Tube Co. v. Sawyer* (Nos. 744, 745) (May 12, 1952), in 48 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 893 (Philip B. Kurland and Gerhard Casper eds., 1975) (hereafter oral arg. tr.).

²⁴*Id.* at 896.

²⁵See Rehnquist, *The Supreme Court*, *supra* note 8, at 185 ("Perlman was virtually peppered with questions from the [J]ustices"); Joseph A. Loftus, "High Court Jurists Sharply Question Defense of Seizure," *New York Times*, May 13, 1952, at 1 ("For nearly all of the two hours and ten minutes that [Perlman] was on his feet... he was under the steady pressure of interrogation."); Chalmers M. Roberts, "Right to Grab Steel Mills Is Argued in High Court; Justices Question Perlman on Failure to Use Taft-Hartley Act," *Washington Post*, May 13, 1952, at 1 ("Perlman... was the target of searching questions from practically all of the nine [J]ustices").

²⁶Oral arg. tr. at 907.

²⁷See *id.* at 907–09.

²⁸Davis, *supra* note 11, at 897.

²⁹See, e.g., Charles Lane, "Questions from the Bench Seen as Clues to Final Outcomes," *Washington Post*, November 3, 2003, at A17.

³⁰See, e.g., Arthur D. Hellman, "The Shrunken Docket of the Rehnquist Court," 1996 *Sup. Ct. Rev.* 403.

³¹See, e.g., Jackson, *supra* note 7, at 802; Rehnquist, *The Supreme Court*, *supra* note 8, at 248–49.

³²See Stern, Gressman, and Shapiro, *supra* note 6, at 578–79.

³³*Id.* at 579 (quoting Remarks of Justice Powell at Fifth Circuit Judicial Conference, “The Level of Supreme Court Advocacy” 4 [May 27, 1974] [unpublished manuscript]).

³⁴See generally *id.* at 579 n. 8 (citing Chief Justice Burger’s remarks to District of Columbia Judicial Conference); Warren Burger, “Opening Remarks at the Conference on Supreme Court Advocacy (October 17, 1983),” in 33 *Catholic U. L. Rev.* 525 (1984).

³⁵Douglas, *supra* note 14, at 183.

³⁶William H. Rehnquist, “Oral Advocacy: A Disappearing Art,” 35 *Mercer L. Rev.* 1015, 1024 (1984).

³⁷See Burger, *supra* note 34, at 525–26.

³⁸G. Edward White, III–IV *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States; The Marshall Court and Cultural Change, 1815–1835* 208 (1988) (Pinkney “argued over half the cases before the Marshall Court in the 1814 Term”).

³⁹See Rehnquist, “Oral Advocacy,” *supra* note 36, at 1020 (“I am a firm believer in the proposition that a poorly argued case, whether in the briefs or in oral argument, is apt to be a poorly decided case”).

⁴⁰*Id.* at 1021 (“The intangible value of oral argument is, to my mind, considerable. It is and should be valuable to counsel, to judges, and to the public [O]ral argument offers an opportunity for a direct interchange of ideas between court and counsel.”).

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Correction

On page 272 of the previous issue, George Julion should have been identified as a Representative from the State of Indiana. On page 266, Thaddeus Stevens was correctly identified as representing Pennsylvania, but he served in the House of Representatives.

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