

## Book Review

Timothy R. Johnson and Jerry Goldman (eds.), *A Good Quarrel. America's Top Legal Reporters Share Stories from Inside the Supreme Court*. Ann Arbor: University of Michigan Press, 2009, pp. 195, cloth \$65.00, paper \$24.95, e-book format available.

Reviewed by Molly Selvin

This modest volume is as much an experience as a book. Envisioned as an Internet-age tutorial on the art of oral advocacy, the editors of *A Good Quarrel* present some of the best verbal jousts before the U.S. Supreme Court in recent years—along with a few contests so lopsided that the losing attorneys may have wished they'd slept in that morning.

Part of an instructional toolset that builds on the well known OYEZ Project that Jerry Goldman directs, the book offers thoughtful, front-row analysis of eleven high-profile cases and directs readers to a companion website, [www.goodquarrel.com](http://www.goodquarrel.com), where they can listen to and download recordings of the arguments.

The authors intend their multimedia approach as a way to teach law students what is more an art than skill. And they do that in a novel and engaging fashion.

Most Supreme Court justices, past and present, have acknowledged that the oral arguments they have heard were an indispensable part of their decision making process. “[T]here is no substitute,” wrote Justice John Harlan, “for the Socratic [M]ethod of procedure in getting at the real heart of the issue and in finding out where the truth lies” (7). Yet several justices have been mightily underwhelmed by the advocates in front of them. “I certainly had expected that there would be relatively few mediocre performances before the Court,” wrote Justice Lewis Powell. “I regret to say that performance has not measured up to my expectations” (5). Chief Justice Warren Burger’s disappointment partly prompted his decision to halve the time allotted to each case from two hours to one (6).

*A Good Quarrel* is meant to help law students learn the key skill of oral argument by highlighting some of the best and most humiliating recent performances before the high court. Timothy Johnson and Goldman have enlisted some of the nation’s respected legal journalists, including NPR’s

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Nina Totenberg, David Savage of the *Los Angeles Times*,<sup>1</sup> and Dahlia Lithwick of *Slate*, among others, to bring those arguments to life—and they do that with all the flair, sophisticated analysis, and even humor that they have brought to their listeners and readers over decades of daily reporting.

The contributors were asked to write about a case of their choice. Some picked a landmark contest—*Bush v. Gore*<sup>2</sup> and *Planned Parenthood v. Casey*<sup>3</sup> are two in this category. Others chose a case that they believed epitomized oral advocacy at its best. Greg Stohr, who covers legal affairs for Bloomberg News, chronicled Maureen Mahoney’s winning argument on behalf of the University of Michigan Law School’s affirmative action program in *Grutter v. Bollinger*.<sup>4</sup> Finally, others wrote about the bombs, since those can often be just as instructive. Totenberg picked *Chandler v. Miller*, a 1997 case challenging a Georgia requirement that candidates for state office submit to a drug test, “because the advocates for *both* sides were so ghastly” (III, emphasis in original).

For each of the eleven cases, Johnson, who teaches at the University of Minnesota Law School, and Goldman, a political science professor at Northwestern, wrote a short introductory summary of the question before the justices and its history in the lower courts.

No surprise, the journalists provide lively, colorful accounts of the lawyers who argued each case and how they prepared for battle; they dissect each side’s courtroom strategy; and finally, they size up how the advocates fared before their nine inquisitors. In the process, these longtime high court observers have also teased out important lessons for would-be Atticus Finches.

For instance, Stohr attributes Maureen Mahoney’s win in *Grutter* to old-fashioned, no-stone-unturned preparation. Mahoney, he wrote, spent months reading thousands of pages to educate herself about the record in the case, including the 100-plus amicus briefs filed. She outlined the factual and legal issues; wrote hundreds of note cards listing potential questions from the justices and her answers; and participated in three moot courts in advance of her Supreme Court appearance.

She also tried to anticipate which issues were likely to most vex which justices—and which would strike a chord. So when Justice Sandra Day O’Connor asked about the practical implications of striking down the law school’s affirmative action program, Mahoney was ready with an answer, noting, among other facts, that the number of African-American students at the University of California dropped sharply after voters passed a measure banning affirmative action in higher education admissions.

1. Full disclosure: David Savage was my colleague at the Los Angeles Times.
2. 531 U.S. 98 (2000).
3. 505 U.S. 833 (1992).
4. 539 U.S. 306 (2003).

Mahoney's preparation, Stohr concludes, illustrates "the difference between an advocate who can confidently call on an obscure precedent or facts when needed and one who appears to lack command over the subject matter" (99).

By contrast, Tony Mauro chose a case in which the lawyering triggered a malpractice lawsuit. *Glickman v. Wileman Brothers and Elliott, Inc.*<sup>5</sup> originally was brought by California fruit growers challenging a government check-off program that forced them to pay for advertising they did not like. Mauro, a veteran Supreme Court reporter for a number of publications, tags the growers' longtime lawyer, Thomas Campagne, with the loss.

"Campagne served as exhibit A for the proposition that bad things can happen when a local lawyer refuses to give up a case and bring in a specialist as it makes its way to the nation's highest court" (75). In the months before argument, Campagne stonewalled entreaties to cede the case to a more seasoned—and sophisticated—Supreme Court advocate. And once before the high court justices, his performance was shaky. Campagne, for example, unwisely strayed from the legal issues at hand, all but abandoning his First Amendment argument for a disquisition on the relative merits of different fruit varieties, quite obviously confusing and annoying the justices. Worse still, he became so impassioned about the subject that he tried to inject levity into his argument, speculating that Justice Antonin Scalia would not buy green plums because "you don't want to give your wife diarrhea." Another rule broken, according to Mauro, who dryly observed, "[h]umor usually falls flat at Supreme Court arguments, bathroom humor, even flatter" (75).

Considering his gaffes, failure to moot his argument, and, once before the Court, to directly respond to the constitutional issues Justices Scalia and John Paul Stevens pointedly asked him to address, Campagne was lucky to lose the case by just one vote. The squeaker decision prompted Mauro to observe that a specialist might have "fared better—at least one vote better, which is all Campagne needed to win 5-4 instead of losing 5-4" (75). But even before the justices ruled against him, Campagne's performance so enraged one of the fruit growers that he sued for legal malpractice, fraud, and what Mauro called "an entirely novel tort: failure to refer the case to a Supreme Court specialist" (75). The lawsuit ultimately settled without trial.

*United Auto Workers v. Johnson Controls, Inc.*<sup>6</sup> takes readers ringside to that rarest of Supreme Court arguments, according to journalist Steve Lash, "in which the attorneys on both sides are at the top of their game, most of the justices are thoroughly engaged, and the case presents an issue in which both sides can—and do—argue convincingly that not only the law but also sound public policy is on their side" (159).

The battery manufacturing process entails exposure to high levels of lead that can be particularly harmful to pregnant women and their fetuses. For that reason, battery maker Johnson Controls barred all its female employees from

5. 521 U.S. 457 (1997).

6. 499 U.S. 187 (1991).


jobs associated with battery production unless they could medically document they were sterile. The United Auto Workers challenged this so-called fetal-protection policy as discriminatory in violation of Title VII of the 1964 Civil Rights Act.

The case paired two seasoned and highly skilled attorneys. Marsha S. Berzon, now a member of the Ninth Circuit Court of Appeals, who, as a private practitioner appeared frequently before the high court, represented a group of excluded women. Stanley S. Jaspan, a Milwaukee-based labor and employment specialist, represented Johnson Controls.

Lash, who covered the Supreme Court for more than twenty years for several publications, credits both advocates as skillfully mixing statutory interpretation with arguments about the public good. Berzon claimed, for example, that the text of the 1964 law as well as its broader goal of ending paternalistic company practices that relegated women to dead-end jobs supported the union's position. Fetal-risk policies of the sort Johnson Controls imposed could stigmatize and preclude women from a wide range of jobs due to potential risks of disease, stress, accidents and other dangers. "The net effect of upholding [the company's position] would be to sanction the resegregation of the workforce," she argued (160).

Jaspan countered that the legal and moral duty companies have to protect their workers and their potential offspring trumps requirements of the civil rights law to place fertile women in harm's way. "We're not to leave common sense at the doorstep when interpreting Title VII," he argued. To do so "would violate common sense and the overriding interest in occupational health and safety to require an employer to damage unborn children" (160).

The justices focused for a time on implications for the company's liability. Justices Anthony Kennedy and Antonin Scalia, in particular, pushed Berzon hard on the question of whether women whose children were injured due to lead exposure could sue for damages. But in the end, the court unanimously ruled that Johnson Controls' fetal-protection policy violated the 1964 Civil Rights Act, as Lash concludes, grappling, "like the skilled attorneys who argued before them...with the legal and public policy issues of women's rights and employer obligations..." (168).

The speaker icons  sprinkled throughout this chapter and the others correspond to audio snippets on the *goodquarrel.com* site. Click on each case name, choose which portions of the argument you wish to hear, then listen on the computer or download the audio files to an MP3 player. Readers also can click on "Oral Argument" to hear the entire argument in a case from start to finish. Finally, the "Opinion" and "Opinion Announcement" features provide the Court's opinion for each case and a reading of the justices announcing their decision in open court. (The e-book format should make this particularly easy, depending on the e-reader capabilities.)

Some of these audio clips are available elsewhere, including on *OYEZ.com* and through the Supreme Court's own site. But by combining them, the book and companion website offer an unusual window into courtroom artistry as well as ignominy. Listen for yourself; tell your law students to listen.

As valuable as *A Good Quarrel* is for aspiring litigators, it is equally instructive on the Constitution and our judicial system for lay readers, although perhaps unintentionally so. That Americans display frightening ignorance about our system of government is tiresome news. Two-thirds of Americans polled last year were unable to name even one Supreme Court justice, and a 2006 poll found that more people could identify characters on the satirical cartoon show *The Simpsons* than could recall any provision of the First Amendment.<sup>7</sup>

Little wonder that hearings over recent Supreme Court nominees as well as those named to the lower courts predictably devolve into sloganeering about "strict constructionists," "activists," or "wise Latinas." And little wonder that in the uproar following a federal district judge's ruling last year overturning California's same-sex marriage ban, defenders of the 2008 voter-passed state constitutional amendment railed against the actions of a judge, who, they claimed, unlawfully "overruled" the wishes of seven million voters.<sup>8</sup>

I would venture that few voters, including those with strong views on both how the Constitution "should" be interpreted and who should do that task, actually have read many, if any, Supreme Court opinions or comprehensive newspaper or blog accounts of those contests. (One might ask the same question of senators, whom the Constitution tasks with voting on presidential picks for the federal bench.) Instead, Americans too often turn to partisans like Rush Limbaugh to parse whether high court justices as well as district court judges reached the "right" decision by their lights. Equally troubling in terms of judicial independence, some conservative websites now rate judicial candidates and nominees on their record or potential as an "activist" or "strict constructionist."<sup>9</sup>

The confirmation hearings for Justices Sonia Sotomayor and Elena Kagan, during which a number of Republican senators denounced the nominees for statements or past actions that exposed their allegedly "activist" bent, contribute

7. Tanya Roth, FindLaw Survey: Can You Name the Supreme Court? June 2, 2010, *available at* [http://blogs.findlaw.com/law\\_and\\_life/2010/06/findlaw-survey-can-you-name-the-supreme-court.html](http://blogs.findlaw.com/law_and_life/2010/06/findlaw-survey-can-you-name-the-supreme-court.html); Characters from "The Simpsons" More Well Known to Americans than Their First Amendment Freedoms, Survey Finds, News Release, McCormick Tribune Freedom Museum, Mar. 1, 2006, *available at* [http://www.freedomproject.us/files/pdf/museum.survey\\_release.pdf](http://www.freedomproject.us/files/pdf/museum.survey_release.pdf).

8. *See, e.g.*, Howard Mintz, Federal judge Strikes Down California's Ban on Same-Sex Marriage, San Jose Mercury News, Aug. 4, 2010, *available at* [http://www.mercurynews.com/samesexmarriage/ci\\_15677141?nclick\\_check=1](http://www.mercurynews.com/samesexmarriage/ci_15677141?nclick_check=1) ("With a stroke of his pen, Judge Walker has overruled the votes and values of 7 million Californians who voted for marriage as one man and one woman," said Brian Brown, president of the National Organization for Marriage, in a statement.").

9. *See, e.g.*, <http://www.judgevoterguide.com>, which uses a simplistic 10-point scale to rate candidates with 1 denoting "activist" and 10 a "strict constructionist."

to this notion that rendering “justice” is a simple process of checking the facts of a case against the 1787 text or, as Chief Justice John Roberts insisted in his 2005 confirmation hearing, calling balls and strikes.<sup>10</sup> Abortion? The word does not appear in the document or the Founding Father’s debates, therefore, many conservative partisans contend, only the states, and not the federal government, may regulate the procedure. Ditto for assisted suicide and the individual insurance mandate in the 2010 health insurance reform act which two dozen state attorneys general and a platoon of conservative interest group lawyers contend, in lawsuits now before federal courts, is an unconstitutional extension of Congress’s Commerce Clause authority.<sup>11</sup>

The Tea Party Movement has certainly sparked new interest in the Constitution: Annotated editions and “translations” into colloquial English have given rise to study groups as well as proposals to repeal the 17<sup>th</sup> Amendment, which calls for direct election of senators, and to amend citizenship provisions to exclude the native-born children of undocumented immigrants. This new attention to the document would be a positive development—if it encouraged more Americans to earnestly engage with the difficult issues and tradeoffs embodied in such phrases as “due process,” “equal protection,” and “to provide for the general defense and common welfare.”

So far, however, there’s little evidence of that. Even the much heralded reading of the Constitution on the House floor as the 112<sup>th</sup> Congress convened left out uncomfortable references to slavery as well as provisions superseded by amendments.<sup>12</sup> And as troubling as the pinched conception of federal authority now resurgent, a view largely out of favor since the early 1930s, is the refusal of many so-called “originalists” to acknowledge the considerable evidence that even the Founders didn’t all agree with their final product and weren’t certain what the heavily compromised document really meant.<sup>13</sup>

So much for the notion that the Philadelphia drafters were oracles rather than mere mortals who reflected their time and ethos.

Obviously, the Constitution is one of the most influential documents in existence. But, as Jill Lepore noted, “it doesn’t exactly explain itself.”<sup>14</sup> However, *A Good Quarrel* helps. Along with enlightening analysis of the oral arguments in eleven cases, the journalists’ accounts show the justices struggling to reconcile

10. See “My Job Is To Call Balls and Strikes and Not To Pitch or Bat,” CNN Politics, Sept. 12, 2005, available at [http://articles.cnn.com/2005-09-12/politics/roberts.statement\\_1\\_judicial-role-judges-judicial-oath?\\_s=PM:POLITICS](http://articles.cnn.com/2005-09-12/politics/roberts.statement_1_judicial-role-judges-judicial-oath?_s=PM:POLITICS).

11. Jill Lepore, The Commandments: The Constitution and its Worshippers, *The New Yorker*, Jan. 17, 2011, at 70, 73 (“Have You Ever Seen the Words ‘Forced Busing in the Constitution?’ read a sign carried in Boston in 1975.”).

12. David Farenthold, Notable Passages of Constitution Left Out of Reading in the House, *Washington Post*, Jan. 6, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010603759.html?sid=ST2011010603624>.

13. *Id.*

14. Lepore, *supra* note 11, at 72.

the complex issues of our time with words written a century or more ago. *Grutter*, again, is a good example. Stohr's account takes readers (and listeners) into the court's red-curtained chamber as Justice O'Connor pushes Maureen Mahoney to reconcile the University of Michigan's preferential program for law school admissions with constitutional guarantees of equal treatment. The nuance of Mahoney's well-constructed argument—that 14<sup>th</sup> Amendment guarantees, civil rights statutes, and economic imperative supported the University of Michigan Law School's admission policy—was lost in many daily newspaper and television accounts, and, as a consequence, lost to many Americans. But she persuaded O'Connor, who, in the end, supplied the deciding vote for the law school and wrote the majority opinion.

That kind of colloquy, with the Constitution on display as the living document it is, is too rarely glimpsed by the public. Allowing video cameras to capture oral argument would be a major step toward improving Americans' woeful understanding of the foundations of their own government, but the justices have steadily rejected reasonable proposals to do that for decades.

"The Supreme Court works very well," observed Tim O'Brien, a former ABC reporter who wrote one chapter, "arguably, more in keeping with what the Framers of our Constitution had in mind than any other institution of government. Few can know or appreciate this virtue, however, because so few can actually see for themselves" (41). Until we can, *A Good Quarrel* should help.