

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAYS

A SUPREME COURT HOMECOMING

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I. A LOCAL BOY GOES TO WASHINGTON

I live in a small town on the coast of Maine. My home is across the street from the manicured campus of the liberal arts college where I teach Constitutional Law. I am also a partner in a small law firm, and have developed a niche practice representing catalog and Internet companies, along with their trade associations, in regard to the scope of state regulatory authority under the Commerce Clause.¹

The Commerce Clause, of course, was intended by the Framers to create a free-trade zone among the newly independent states by addressing the protective trade barriers used by various states to discriminate against manufacturers and merchants in other states. Those tariffs, duties, and taxes contributed to the economic crisis of the 1780s and threatened the very viability of the young republic. The Commerce

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1. U.S. CONST. art. VIII, cl. 3.

Clause's solution was to establish a single national marketplace. This vision became the most robust engine of economic growth and prosperity in the history of civilization: the U.S. economy. Indeed, the single-market model created by the Commerce Clause came into being almost 200 years before the Europeans decided to embark on the same experiment—today's European Union.

My case concerned the right to challenge a state law on Commerce Clause grounds in the federal courts.² In an opinion by Justice Thomas, the Court held unanimously that the Tax Injunction Act³ did not bar a federal district court from hearing a challenge brought by my client, the Direct Marketing Association, to a Colorado law requiring out-of-state catalog and Internet retailers to report customer-transaction information to state tax officials.⁴

As might be expected, any Supreme Court decision that affects a large number of businesses will attract considerable attention within the legal community and among industry trade press as well. Moreover, numerous amicus briefs had been filed in my case, which contributed to the attention the case received. So for several days after the decision was issued, I fielded telephone calls from reporters, general counsel, and the like.

What I did not expect, however, was the level of interest this win generated in my hometown. Friends, neighbors, students, and fellow faculty members had been genuinely excited about the prospect of my arguing before the Supreme Court, and they were generous in their expressions of support. After the Supreme Court victory, I received numerous emails and cards of congratulation—even an article in the local newspaper and reports by other media in the state. Apparently,

2. *Direct Marketing Ass'n v. Brohl*, ___ U.S. ___, 135 S. Ct. 1124 (2015).

3. 28 U.S.C. § 1341 (2015).

4. The DMA maintained that such reporting obligations violate both the Commerce Clause and consumers' right to privacy, and that these issues are appropriate for determination by a federal court. *See, e.g.*, Brief for Petitioner at *12, *63, *Direct Marketing Ass'n v. Brohl*, 2014 WL 4477665 (U.S. Sept. 9, 2014) (No. 13-1032) (noting that even the DMA's original complaint in the district court "alleged multiple constitutional violations resulting from the Colorado Act, including claims under the Commerce Clause," and arguing that "that the State lacks the power under the Commerce Clause to impose . . . notice and reporting obligations on out-of-state retailers with no physical presence in the state").

less than a handful of currently practicing Maine attorneys have had the opportunity of appearing before the United States Supreme Court, and some journalists considered this to be a newsworthy “local boy makes good” story.

B. AN INVITATION FROM THE LIBRARY

A few weeks after the decision, I received a call from the program director at our town library asking if I would be willing to be the featured speaker at a “donors and friends” reception, where I could explain my Supreme Court case. I accepted the invitation without much forethought or reflection on what I would say. As the date approached, however, I grew somewhat nervous. I would be speaking in front of people who knew me well and who would continue to know me after this speech. Would they really be interested in the history of the Tax Injunction Act and the scope of federal jurisdiction over challenges to laws and regulations that deal with state tax administration? I didn’t think so. I broke into a cold sweat as I pictured a roomful of bored library patrons, some of whom were starting to nod off and others of whom were eyeing the exits in the hope of making a quick and quiet retreat. Even worse, I realized, I would have to figure out how to avoid running into anyone who attended this event for at least several weeks, until the mortification of my pettifogging presentation had faded into a distant memory. This wouldn’t do, so after scrapping several legal- and tax-related themes, I decided to take a very different tack.

Instead of talking about the case, I decided to describe the experience. In a way, my appearance before the Supreme Court was somewhat like swimming with orcas, or having tea with Winston Churchill, or playing a round of golf with Arnold Palmer, or visiting the Lost City of Aztlan—a personal adventure that no one in the audience had experienced or was likely to encounter in his or her lifetime. My task was only to be their eyes and ears, and then to convey my emotions by telling them what the experience felt like. In other words, I decided to make them feel as if they were participants along with me in this escapade—first-hand witnesses to the spectacle of an argument before the United States Supreme Court. My cold sweat

subsided, my confidence was restored, and my fingers became itchy to start typing an outline for my presentation.

C. AN UNEXPECTED DISCOVERY: AMERICANS (MOSTLY) LOVE THE SUPREME COURT

One take-away from my library presentation was the realization that there is a substantial repository of respect that most people, at least in Maine, have for the Supreme Court. Politicians are held in relatively low regard, and there is great skepticism concerning the motives and effectiveness of Congress. Feelings about the President vary depending on one's political affiliation. The Supreme Court, by contrast, holds a special place in the minds and hearts of most Americans.

The secrecy of the Justices' deliberations, the religious-like garb they wear, and the Greek temple from which these oracles issue their rulings all contribute to the mystique of the Court. But high courts in other countries have similar judicial dress and impressive architecture, yet no other nation's constitutional court is held in quite the same regard that Americans attribute to our Supreme Court. This level of esteem, even affection, for the Court is shared across a wide spectrum of the citizenry, even though many may strongly disagree with various of the Court's decisions. There appears to be a residual confidence, independent of particular rulings, that the Supreme Court is at its core an institution committed to securing justice and protecting individual freedoms. To go further, many Americans view the Supreme Court as a kind of ballast for the ship of state as our federal government navigates the rough political waters that pummel its other two branches. And I found the library audience's interest in "their" Supreme Court to be both avid and sincere.

D. A NEAR DISASTER: THE LOWER-COURT PROCEEDINGS

Most people, of course, are unfamiliar with how a case gets to the Supreme Court, including the long odds against the Justices agreeing to hear the case. So I included in the library talk a description of my oral argument in the Tenth Circuit, which turned into an almost disastrous event.

I flew out to Denver the day before the oral argument, and checked into a downtown hotel. In the early evening, after dinner, I decided to go for a walk. While strolling along and thinking about arguments in support of my position, I noticed that the sole on one of my shoes had started to separate from the upper. As I continued walking the separation increased, so I turned around to return to the hotel. Halfway back to the hotel, the other sole started to tear off as well. By the time I got back to the hotel, both soles on my favorite pair of dress shoes were three-quarters separated from their uppers, and I was shuffling along as though wearing flip-flops.

These were the only shoes I had brought. By this time of night, all the stores in downtown Denver were closed. My legal career depended on finding a cobbler. So I checked with the concierge at my hotel, but no shoe-repair shop was open. (I guess hotels do not have cobblers on call.) Last resort: I asked the attendant at the reception desk to get me a roll of duct tape from housekeeping. I then bound the soles on my brown wingtip shoes with duct tape to the uppers, making them look like a pair of saddle shoes from a circus show.

I was first on the list next morning, and, after having carefully walked to the Byron White Courthouse so as not to unravel the duct-tape fix, I settled into my chair at counsel table before the three judges entered and took their seats. When called to the podium, I pulled down my pants as far as I could, so that the cuffs covered most of my shoes, and proceeded forward. After the half hour of argument, I then confronted the challenge of getting back to counsel table. The duct tape was most apparent on the back of my shoes and would have been very visible if I turned around with my back to the bench. I was concerned that it might even look like I was trying to play a joke—one in very bad taste—on the court. So, with a half-smile on my face, I walked backwards to counsel table until I reached my seat. The library audience loved this story. The image of me shuffling backwards until I bumped into the counsel table left them in stitches.

E. A FEW DETAILS THEY NEVER KNEW

The library audience was as surprised about the long odds of the Supreme Court's agreeing to hear a case as they were to learn how relatively few published opinions the Court actually issues each year. The common misimpression is that if a party really believes that justice was denied, and has the patience and money to pursue an appeal, then anyone can "take their case all the way to the Supreme Court." The fact that every year the Court receives over nine thousand petitions for certiorari (the audience loved the Latin phraseology, but did not understand why a simple English term would not suffice), and usually accepts less than one percent for oral argument, struck some as rather unfair, because it leaves the remaining aggrieved parties with no recourse.

The small number of cases reaching the Court seemed especially problematic to my neighbors given the fact that less than a hundred written opinions per year are divided among nine Justices, each of whom has four law clerks to assist with research and writing. To this up-early-in-the-morning audience of hard-working Mainers, it seemed as though the Justices' workload did not require much heavy lifting. On the other hand, people were astonished at the wordiness of the Justices' writing when I told them about the ever-increasing length of Supreme Court opinions—4,751 words for the median majority opinion, and, when including concurring and dissenting opinions, 8,265 words for the median case report.⁵ Moreover, I told them, some opinions can approach 50,000 words.⁶ They found this hard to believe. It is difficult to explain to non-lawyers why that amount of verbiage is necessary to decide a case, or how such disquisitions help the public understand the reasoning of the Court. In any event, I told them, Justice Thomas used 4,100 words in my case, and the entire decision came in at 5,421 words.

There was considerable interest in the Supreme Court building itself. In an age when many new federal courthouses

5. Adam Liptak, *The Roberts Court: Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1.

6. *Id.* (referring to *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), which came to roughly 47,000 words.)

look like modern art museums (the John Joseph Moakley United States Courthouse in Boston being a good example), this classic Greek temple of justice, with its solemn and stately Corinthian columns and a staircase nearly ascending to heaven, clearly contributed to the awe—even reverence—with which my audience viewed the nation’s highest court.

The assembled were disappointed to learn, however, that for security reasons the public can no longer enter the courthouse through the massive bronze front doors at the top of the forty-four marble stairs, but must, like arguing counsel, enter the building on the plaza level through a security checkpoint. (The public is still able to exit the building through the great doors.) They felt somewhat heartened upon learning that at least two members of the Court, Justices Breyer and Ginsburg, objected to closing the grand entrance to the public, and agreed with Justice Breyer’s comment that “[t]o many members of the public, this Court’s main entrance and front steps are not only a means to, but also a metaphor for, access to the Court itself.”⁷

F. WHO, ME NERVOUS? (AND OTHER QUESTIONS)

As might be expected, several people inquired whether I was nervous when arguing. It was not as easy a question to answer as might be expected. Was I nervous the night before the argument? Absolutely. Poring over index cards and mispronouncing case names while answering imagined questions before a hotel-room mirror is certainly not relaxing or confidence-building. But the next morning, when the Chief Justice called my name and I stepped up to the podium with no notecards, my mind suddenly cleared, and I really was not nervous. Perhaps it is like a racehorse when the starting gate opens. This is no time for hesitation. The horse, and the Supreme Court advocate, just run for all they are worth.

I told my audience that the configuration of the Supreme Court bench is actually conducive to settling in for a conversational give and take with the Justices. Many federal and

7. Stephen J. Breyer, *Statement Concerning the Supreme Court’s Front Entrance*, J. S. CT. U.S., OCT. TERM 2009 831, 831 (May 3, 2010) (noting that Justice Ginsburg joined Justice Breyer’s Statement).

state appellate courtrooms have considerably higher benches that are set far back from the podiums at which lawyers argue. This results in a very formal atmosphere, with both lawyers and judges inclined to speechify rather than to talk using a normal voice and cadence. In contrast, the Supreme Court bench is only slightly elevated, and despite the Court chamber's forty-four-foot-high ceiling and twenty-four Italian-marble columns, it is remarkably close to the lawyer's podium. Moreover, the bench is curved into an arc, so that the Justices can see each other, but also so that the advocate is more the center of things. It is easier to make eye contact with the Justices in this surprisingly intimate setting than in most appellate courts, and the inclination is to speak in a normal voice.

I explained too that it is hard to be nervous when you are being peppered with questions. According to one Supreme Court blog, there were a combined total of ninety questions posed to counsel during the one hour of oral argument in my case.⁸ I was struck by how the Justice's questions were aggressive but polite, respectful of both the attorneys and the interests at stake for the parties. Their questions did not lack creativity or humor. For example, one issue in the case concerned the meaning of the word "collection" in the Tax Injunction Act. Justice Kagan posed a hypothetical regarding the collection process based on assigning one of her law clerks to go out for pizza who, upon returning with the pie, would be confronted with the task of having to collect contributions from the other clerks, including those who were "delinquent."⁹ The example brought chuckles and a few guffaws from the other Justices and the spectators in the chamber, none of which were recorded in the transcript.¹⁰

Another audience member asked about Justice Thomas's then ten years of silence on the bench. Although authoring the opinion in *Brohl*, he was the only Justice who did not ask a

8. Ed Lee, *Predicting the Winners in Direct Marketing v. Brohl and DOT v. AAR*, ISCOTUS-NOW (Dec. 8, 2014), <http://blogs.kentlaw.iit.edu/iscotus/predicting-winners-direct-marketing-v-brohl-dot-v-aar/>.

9. Tr. of Oral Argument, *Direct Marketing Ass'n v. Brohl*, ___ U.S. ___, 135 S. Ct. 1124, at 16–17 (Dec. 8, 2014).

10. *Id.* (showing question but failing to note that it generated laughter in the courtroom); compare, e.g., Tr. of Oral Argument, *Smith v. United States*, 507 U.S. 197 (Dec. 7, 1992), at 32 (noting laughter in response to both Chief Justice's question and advocate's answer).

question during oral argument. At one point, however, he leaned over and whispered something into Justice Scalia's ear, and Justice Scalia promptly asked me a question. A connection? Maybe.

It was surprising to some members of the audience that oral argument was limited to a half hour per side (which is generous compared to the time allowed by some appellate courts). The image of Daniel Webster arguing—not just for hours, but literally for days—before the early Marshall Court in constitutional controversies such as the *Dartmouth College* case¹¹ and *McCulloch v. Maryland*¹² bears little resemblance to the rapid-fire, almost staccato, pace of today's typical Supreme Court argument.

A ten-year-old boy in the audience had waited patiently through the Q & A session while the adults asked their questions, so I called on him when he raised his hand. He stood up at his seat in the last row of folding chairs and asked, "What did you have for breakfast that morning?" In fact, I remembered quite clearly that I had bran flakes with sliced strawberries and black coffee—sort of like a marathoner's meal before the big race.

The evening closed with a polite round of applause followed by light hors d'oeuvres and only slightly heavier one-on-one conversations. I was heartened to see that non-lawyer folks, at least in my hometown, have a great reservoir of respect for the justice system and the members of the Supreme Court who preside over that system. In an age of cynicism directed at the electoral process and the institutions and leaders it produces, the least-representative branch, at its highest level, is viewed as the fairest and most effective branch of the federal government. To most Americans, the concept of "justice" is not an abstraction, nor is it some far-away aspirational goal. They see justice as both foundational to our democracy and personal to the protection of our freedoms. To my neighbors, the Supreme Court symbolizes and embodies this nation's commitment to the rule of law, and, as the words on the main portico of the Supreme Court Building state, "Equal Justice Under Law."

11. *Dartmouth Coll. v. Woodward*, 17 U. S. 518 (1819).

12. 17 U.S. 316 (1819).