

## Law and Politics Book Review

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### [A GOOD QUARREL: AMERICA'S TOP LEGAL REPORTERS SHARE STORIES FROM INSIDE THE SUPREME COURT](#)



by Timothy R. Johnson and Jerry Goldman (eds). Ann Arbor: University of Michigan Press, 2009. 216pp. Cloth. \$65.00. ISBN: 9780472116362. Paper. \$24.95. ISBN: 9780472033263.

Reviewed by Richard L. Pacelle, Jr., Georgia Southern University. Email: [rpacelle \[at\] georgiasouthern.edu](mailto:rpacelle[at]georgiasouthern.edu).

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How many times do you walk through a store and see a product and think “I wish I thought of that?” When I received the book, *A GOOD QUARREL*, those were my exact sentiments. For some reason (for a number actually), the academy has until recently largely ignored the significance of oral arguments. And why shouldn’t political scientists who study the courts ignore oral arguments? From a sheer practical perspective, it is difficult to treat the information gleaned from a mass of oral arguments systematically. Content analysis is very difficult to do well. Substantively, the barrier was even higher. The dominant framework for understanding Supreme Court decision making has been the attitudinal model. Taken to its logical conclusion, the notion that due to their lifetime tenure and position atop the judicial hierarchy, justices vote their sincere policy preferences (Segal and Spaeth 2002) suggests that oral arguments are nice window dressing, but little more. If attitudes are determinant of decisions, then oral arguments cannot, almost by definition, influence individual level decisions. Even some justices have remarked that they are a waste of time and seldom change a vote in a case. But intuitively and theoretically, most analysts just assume that cannot be correct.

The discipline’s two primary scholars of oral arguments, Timothy Johnson and Jerry Goldman, have edited a book that peels back the purple curtain to look at oral arguments from the perspective of many of the major court reporters of our time. And if that was not enough (and don’t you think it ought to be?), the editors have added a website ([www.goodquarrel.com](http://www.goodquarrel.com)) with audio links so readers can listen to excerpts of the actual oral arguments they are reading about. This certainly adds to the experience for judicial process and public law wonks and should be an added inducement for today’s I-Pod toting, shorter attention span generation. Political science continues its advances into the twenty-first century.

The editors have enlisted most of the best known court reporters of the time, including veterans like Fred Graham, Nina Totenberg, David Savage, Tony Mauro, Lyle Denniston and Tim O’Brien. Each brings an insider’s perspective and most have an apparent facility

with the academic research as well. The Court reporters write about oral arguments for a range of cases from the most visible to much less momentous decisions about which most readers will never have heard. Among the interesting arguments included in this book are one by a white supremacist who argued his own case, badly, but still won, an oral [\*549] argument that led to a malpractice suit against the attorney who lost, *BUSH v. GORE*, the Michigan affirmative action cases, *PLANNED PARENTHOOD v. CASEY*, an extremely restrictive state campaign finance law, and an oral argument by Richard Nixon in between his stints as a presidential candidate.

We get interesting glimpses into the personalities and styles of the justices and into the strategies of the litigants. The chapters are enlivened by the audio recordings on the website. Readers (and listeners) will hear Justice Scalia parrying with the attorneys and often throwing a lifeline to a foundering advocate whose position he is trying to rescue. We get a sense of the impatience of Justice O'Connor when an argument has wandered. Justice Stevens is portrayed as generally quiet, listening intently, until the end when he often asks "the question they [the lawyers] fear most" (p.137). Justice Thomas, as we have come to know, does not engage in such banter. Chief Justice Roberts comes across as a tough questioner, and many of the authors note his success and preparation as a litigant before he ascended to the center seat. We get to see the good, the bad, and the ugly oral arguments, although in not every circumstance does that correlate with the result of the case. We are reminded that, though the litigants may come to the Court with a script, they may quickly be forced to depart from it. In a few instances, like the *PLANNED PARENTHOOD* case, the litigants had ulterior motives that went beyond the charge the Court gave them when it granted the petition.

For veteran analysts of the judiciary in the academy, there will be few surprises about the general operation of the Court. But for the uninitiated, there are treasure troves of information about the formal and informal process (including the idea that this is really the only time that the justices really interact to discuss the case). For those who are teaching constitutional law or judicial process, there are all kinds of "inside baseball" (no pun intended) information that can enliven the discussion of the various cases in class. The cases chosen for this book are certainly not representative of oral arguments as a whole, but it is amazing to discover how many decisions on who is going to argue these particular cases were settled by a coin flip.

If there are doubts about the importance of oral arguments, they are lost on the authors of the chapters. There is an adage that says in effect, a good oral argument cannot win a case, but a bad one can surely lose a case. But the court reporters do not subscribe to that. They acknowledge that some justices have largely made up their minds before they come in the room and that some litigants have an uphill climb regardless of the quality of their presentations. But they all see the merits of this opportunity to ventilate issues. On the larger normative grounds, a number talk about the spectacle and would agree with the editors when they write "justices in open court put on a most remarkable – arguably the most impressive – display of any of our federal institutions" (p.3).

There is something almost paradoxical about this book that adds to its appeal (again, no

pun intended). Clearly the reporters covering the Court chafe under some of the restrictions that the Court places on media coverage. We are told in a number of chapters about the Court's [\*550] reluctance to open its doors to cameras (the retirement of Justice Souter removes one obstacle). Several of the justices provide explanations for their position on this issue (and they are the usual litany). As a result, Court processes, in general, oral arguments, in particular, are far from the public view. The Court does almost nothing to educate the public about its role or procedures. This book unmasks a little of the mystery. It also suggests that the fears of opponents of televised coverage exaggerate the deleterious effects. This is a book that would be useful in a number of introductory and upper level courses. I hope that the University of Michigan Press will try to market it more broadly. It is the type of book that informed citizens should read.

The book provides a number of stark examples of the fine lines that the Court often has to draw in cases. Virtually all of the cases discussed had a relevant precedent that, while close, was not exactly controlling on the instant case. Some justices wrestle with their felt need of reconciling the present with the past. Other justices search for the reed that will permit them to grab on to a precedent they favor or the loose thread that will permit them to decide the case in the opposite direction without overturning the existing precedent. The litigants, reporters, and justices know there are certain minds that cannot be swayed no matter how persuasive the argument. There is an attempt to identify the justices in the middle who hold the key to victory or defeat and to pitch the arguments to them.

It is necessary to quibble a little with the book. In the next edition, the editors should really consider putting a broader context in place. The introductory chapter should be expanded to develop the notions of the importance of oral arguments a little more fully. But more importantly, the editors should have spent a brief concluding chapter summing up and tying together for the audience the major points they should take from reading these serial narratives while reiterating the importance of oral arguments.

Another small problem that consistently runs through the vignettes is the lack of closure. Most of the reporters tell us the results of the case, but it is often a terse recitation of who won (Nina Totenberg's seven word P.S. being the most extreme example). Some would argue that the true value of the oral arguments is not so much in changing votes in a case, but in influencing the language of the opinions. But we get no sense of that from most of the reporters. I offer this critique advisedly because it is very difficult to attribute the language of an opinion to anything in the briefs or orals or to know what the justices might have written had the oral argument been different.

None of that should detract from the overall message that this is a book that experts and neophytes will enjoy and find interesting. As the forward by Richard Lazarus concludes "Read, listen, and enjoy." And if this book contributes to the debate surrounding public access to the Court and televised oral arguments, that is an added bonus. In the words of Justice Brandeis (quoted by Tim O'Brien) "Sunlight is the best of disinfectants" (p.41). The authors have put their acknowledgments at the end of the book. I presume that this is so that the last word in the book would not belong to Richard Nixon. [\*551]

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