Meltsner on Oral Advocacy

Develop your individual approach to oral advocacy with the benefit of Professor Michael Meltsner’s insight, derived from a lifetime of experience as an appellate advocate.

Over the course of 2014, Professor Meltsner held a series of training sessions on oral advocacy, featuring practice tips, a skills lecture, and a critiqued Supreme Court argument. To make this training content broadly available to students, the NuLawLab has produced three thematic video modules derived from those sessions. Students should read the materials for oral advocacy (30 pages) that follow this cover page before accessing the three videos using the links below.

Meltsner on Preparation
https://vimeo.com/126602195
(15 minutes)

Meltsner on Presentation
https://vimeo.com/126602195
(25 minutes)

Meltsner on Appellant’s Oral Argument in Lawrence v. Texas
https://vimeo.com/126607768
(40 minutes)
MATERIALS FOR THE ORAL ADVOCACY TRAINING WITH MATTHEWS PROFESSOR MICHAEL MELTSNER

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NORTHEASTERN UNIVERSITY SCHOOL OF LAW
Thoughts on Presenting an Effective Oral Argument

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First, in order to present an effective oral argument, the advocate would do well to ignore all guidance in the abstract and focus instead on the particulars of the case at hand. How a particular case can be effectively argued depends more on the case itself than on any generally applicable set of rules or guidelines. If an adverse decision in your case would truly lead to catastrophic consequences, by all means begin your oral presentation by highlighting those. If you believe the result you seek is compelled by a recent Supreme Court decision, ignore all advice about how to structure the perfect argument; begin and end with that controlling decision. How to play your hand depends largely on the cards you are dealt.

Be particularly skeptical of advice on how to argue an appeal from appellate judges. The great Supreme Court lawyer John W. Davis, in his classic piece on appellate advocacy, asserted that “a discourse on the argument of an appeal would come with superior force from a judge who is in his judicial person the target and the trier of the argument,”1 but Davis’ comment must be qualified in an important respect: most judges give good advice on how to win a winning case. They all say to focus on the language of the statute in a statutory interpretation case, to discuss the facts fairly and objectively, to describe the holdings of any controlling cases. Good advice if the statutory language is helpful, the facts support your position, and the precedent leans your way; perhaps not so good advice if the opposite is true. Judges have no interest in the court reaching a “wrong” result, but fifty percent of clients do.

The substance of what you argue on appeal, then, will be dictated by the strengths and weaknesses of your case. General rules are of no help there. What follows are procedural suggestions, approaches to handling oral argument that may be helpful no matter how easy, or how desperate, your case on the merits.

The central reality that informs these suggestions is that crowded dockets have severely limited the time available for oral argument. Daniel Webster could argue for days before the Supreme Court; today’s advocates have 30 minutes. And that half-hour seems luxurious when compared to the allotments in the federal courts of appeals, where 15-20 minutes is typical and a mere 10 minutes per side is not uncommon.

These limits have affected the way judges approach oral argument, and that in turn affects how lawyers should prepare for it. Judges know that they can no longer expect to learn what a case is about at the argument, even if (as Justice Frankfurter, for one, thought) that was a desirable way of proceeding. There simply is not enough time. As a result, most judges are better prepared for argument than their predecessors, which may account for the prevalence of “hot” benches these days — panels of active, probing questioners. The following suggestions are intended to help advocates with a short amount of argument time, much of it filled with aggressive questions from the bench.

PREPARATION

Although some very good appellate advocates do not do moot courts, rehearsing can be an invaluable part of preparation. Schedule at least three separate moot court sessions, ideally about a week apart, with the last one four days to one week before the actual argument. In this arrangement each session serves a different purpose. The first serves as a sounding board for what may be markedly different approaches, which helps to give a sharper focus to the bulk of the preparation. It is not so important at this stage to have all the answers to the judges’ questions as it is to learn what the difficult questions are, so that you can keep them in mind as you shape your argument.

By the second moot court session, you should have a general approach in mind and some facility in handling the questions, though there is still time for radical surgery if the session suggests that your approach is not calculated to win the hearts and minds of the judges. The third session, just a few days before the actual argument, should be a dress rehearsal, designed to instill confidence in your mastery of the material and to fine-tune responses to anticipated lines of questioning.

You should select as your judges both lawyers who have worked on the case and some who have only read the briefs; experts in the area as well as non-experts. Barrett Prettyman suggests first going through a planned argument uninterrupted, with the judges commenting on both the substance and style of that presentation, and then beginning again with active questioning, continuing in role until the advocate, judges, or questions are exhausted, saving time for evaluation and suggestions at the end. This allows the judges to hear what you would like to say and evaluate that, before you are derailed by questions. It also tends to generate more focused questions.

How to prepare what you plan to say is beyond the scope of this article. Given the prevalence of “hot” benches and abbreviated argument times, however, your preparation should place a premium on making points concisely: you should have at your fingertips 30-second answers to the most likely questions. You may have the opportunity to say more, but far more likely you will be interrupted by another question within 30 seconds of answering its predecessor. You will probably never have the chance to deliver an eloquent four-part, five-minute answer to a question, so do not prepare one. Doing so would not only be a waste of time, but trying to deliver such an answer may prevent you from getting out the meat of your reply, which is all the questioner is interested in in any event. Such extended discussion is for the written brief, not the oral argument.

The same concern needs to be kept in mind in deciding what points to attempt to make apart from responding to questions. Oral argument may be the most exciting and visible part of the appellate process, and judges — who ought to know — are always expounding on how important it is, but no doubt the written brief typically plays a greater role in shaping the decision.

Do not make the mistake of viewing the argument as simply an oral version of your written brief. This is more than just the prohibition against reading your argument — everyone knows not to do that, and if you do not know, the rules of most courts tell you in no uncertain terms. The point is instead that some arguments are more suited to oral presentation than others, and that factor needs to be taken into account in figuring out what you intend to say. Your brief may lead with a rather intricate roadmap through various regulatory provisions, and give second place to an analysis of the purposes of the regulatory program, while the oral argument may lead with the latter point — not because it is stronger than the first, but because it can be more effectively presented orally, while an oral presentation of the first might engender only confusion. The brief and oral argument should work together and complement each other; they do not stand alone.


3. See, e.g., S. Ct. Rule 28.1; Fed. R. App. P. 34(a); D.C. Cir. Rule 34(a) ("This court will not entertain any oral argument that is read from a prepared text.").
Supreme Court Clerk William K. Suter, in his very helpful "Guide for Counsel in Cases to be Argued before the Supreme Court of the United States," puts it this way:

Remember that briefs are different from oral argument. A complex issue might take up a large portion of your brief, but there might be no need to argue that issue. Merits briefs should contain a logical review of all issues in the case. Oral arguments are not designed to summarize briefs, but present the opportunity to stress the main issues of the case that might persuade the Court in your favor.

CASING THE JOINT

The heading of this section comes from Judge Aldisert, and it is difficult to overemphasize the importance of his advice. Unless you are intimately familiar with the court before which you are to argue, always — if possible — arrive in town a day early and observe a session of the court. If nothing else, this will help ensure that you end up where you are supposed to be on argument day. I failed to heed this advice recently when I was arguing a case in state court. I secured detailed instructions the day before from my client on how to find the courthouse, situated out in the country: "take route so-and-so, turn left onto route so-and-so, and turn right when you see the courthouse from the road — its a huge complex, you can’t miss it." When I headed out from my hotel that morning, with plenty of time to spare, the fog was so thick you could not see a thing, let alone a "huge" courthouse off the road. After several false turns I barely made it in time for the argument!

On a less dramatic level, the fact is that the mundane mechanics of an argument are conducted differently in different courts. Some courts like you to introduce yourself and note any reservation of time for rebuttal at the outset; others — the U.S. Supreme Court, for example — do not. No panel is going to rule against you if you do the wrong thing (I once saw a lawyer introduce not only himself but his proud family in the guest section to the Justices), but a critical part of the oral presentation is conveying a sense of confidence in your position. That is hampered if it appears that you do not know what you are doing when it comes to the protocol of the court.

Always make a point of talking to the courtroom bailiff in advance of the argument session. You can learn, for example, how rigorous the court is in enforcing time limitations. You may discover that the judges always allow counsel a minute or two for rebuttal, even if they have used up all their allocated time — information that can significantly impact how to budget your time.

If you can observe the same judges who will hear your argument, you may also pick up valuable clues to questions they might ask. Supreme Court observers, for example, know that Justice O’Connor will likely ask the first question, that the Chief Justice might ask an advocate for the Supreme Court case that most supports his position, and that Justice Breyer often asks a comprehensive question about the advocate’s theory of the case near the end of his argument time. Any "local knowledge" you can gain about your panel or court along these lines can help eliminate the element of surprise from your argument.

WHAT TO BRING TO THE PODIUM

A recent survey of Supreme Court practitioners by Barrett Prettyman reveals a wide variety of practices when it comes to what they bring to the podium with them for the argument. Some bring nothing, others (myself included) a page or at most two of notes, still others carefully constructed notebooks. With


5. The Supreme Court practice is quite to the contrary. One prominent practitioner, upon seeing his red light go on (signaling he had used his entire 30 minutes), said "I had intended to save some time for rebuttal." The Chief Justice responded: "But you have not."

whatever you are comfortable keep three rules in mind:

1. Don’t lose whatever you intend to bring. One partisan of the notebook school, who had the second argument at a Supreme Court session, made the mistake of placing his invaluable notebook at counsel’s table, only to have it inadvertently spirited away by counsel in the prior case, who was hastily stuffing his papers in his trial bag to make his exit. Something of a wrestling match took place while the panicking first lawyer tried to retrieve his notebook from the uncomprehending departing lawyer, while the Justices — anxious to get on with the next case — curiously looked on.

2. Make certain whatever you bring fits on the lectern. For example, the space on the Supreme Court lectern is about 12 inches top to bottom. Counsel who bring legal size papers or a legal size notebook, will spend much of their argument time juggling their materials to keep them from sliding off the lectern.

3. Finally, ignore whatever you bring. Judge Silberman of the D.C. Circuit makes the point that “[n]otes are crutches, and when you look down you lose the attention of the court.” You may not feel comfortable enough to go to the podium without notes, but at the same time realize you will almost never have the chance to look at them once the argument begins. Most appellate benches are so active these days that the brief pause you might take to glance at your notes simply provides an opening for the next question.

THE APPELLEE’S ARGUMENT

It is critically important for those arguing “bottom side” — appellees or respondents — to act, when they stand up, as if they have been listening to what was going on during their opponent’s presentation. You are entering the unfolding drama midstream, and if you do not pick up the flow (redirecting it, if necessary), you will lose any chance to be effective. When arguing bottom side, prepare several different openings, and use the one that corresponds most closely to the court’s interest, as revealed by the judges’ questions to your adversary. If the court has just spent one-half hour peppering the other side with questions on issue B, you look silly and as if you have something to hide if you rise and announce that you would like to talk about issue A. By all means get to issue A if you need to, but deal with what the court is interested in first.

TIME

Much of the preceding advice has been based on the severe time constraints facing oral advocates these days before most appellate tribunals. Therefore, this suggestion may come as a bit of a surprise: try not to use all your time. Having the red light end your argument conveys the impression that you did not do what you set out to do, that you were derailed somewhere along the line, that you were still in the process of persuading rather than having accomplished that result. If you cannot end just before the red light goes on, it contributes significantly to conveying the important impression of confidence: I could go on talking, but I’ve said enough to convince you, so I’ll just stop now. If the judges have more
questions, don't worry — they'll ask them. But there is no recorded instance of judges objecting that a lawyer sat down too soon.

REBUTTAL

Always leave time for rebuttal, if only a minute. Even if you do not use it, it will help keep your opponent honest. If you are arguing at the Supreme Court and have not saved any rebuttal time, you're out of luck. In most other courts, however, the presiding judge will listen for a minute or so if you pop up and say something like "If I could respond briefly." Know the practice of your court. ⑧

If you are an appellee and your opponent has saved time for rebuttal, you can often effectively turn that time to your advantage. If it fits in with the flow of your argument, you can end with an indirect challenge to the appellant, along the lines of "We argued in our brief that appellant had no answer to X, and we did not hear one in appellant's opening argument. Perhaps we will hear it in his remaining time." This can completely disarm your adversary, who has no doubt been preparing an effective rebuttal. He either has to respond to your challenge (and presumably, since you get to select the challenge, the response is weak), or he has effectively to concede your point, if he fails to respond and adheres to his (presumably stronger) planned rebuttal. Even then, in many instances the judges will say "Wait a minute. What is your answer to your opponent's last point?" As an appellee you do not have the last word, but you may be able to select the last subject.

QUESTIONS

Perhaps the most important skill for today's appellate oralist is handling questions. You should, as John W. Davis remarked, "rejoice" when the judges ask questions, because it (1) shows that you have not yet put the panel to sleep, and (2) allows you to focus on precisely what at least one judge is interested in. As noted earlier, you should have prepared very concise answers to every question you can reasonably anticipate. But be sure and listen carefully to the question before delivering one of your prepared replies: don't assume the judge is asking a question you're ready for, just because that makes the answering easier. And don't assume that the question is hostile — don't fire on the lifeboats coming to save you.

In fact, many lawyers react too defensively to questioning in general, as if the judge is trying to trip them up. These lawyers try to get in an answer that does no perceptible harm to their position and get back to what they were saying as soon as possible. That approach is wrong. Oral argument is not some quiz show, in which you win so long as you avoid any pitfalls the judges may try to spring on you. Try to react to what you can learn from the questions, and adjust your approach accordingly. If you had planned on making points A, B, and C, in that order, but the judges jump in with questions on point C, by all means deal with that first — and not just to the extent necessary to answer the questions. Such flexibility will give a more natural flow to your argument, and facilitate a meaningful dialogue with the bench. Indeed, in rehearsing, you should present your argument in every conceivable order — ABC, BCA, CAB, BAC, ACB, CBA — precisely so that you can readily adjust it in response to the order of the questioning.

REFERENCES TO EXHIBITS, APPENDICES, AND THE LIKE

By all means cite to the record, if it helps you: "Petitioner contends that we failed to object to this evidence. Of course we objected,

⑧. The First Circuit actually discourages advance reservation of time for rebuttal, on the grounds that "[n]ot only does such action reduce the limited time allotted but is likely merely to allow repetitious argument." ⑨ First Cir. Rule 34.1(b). The court goes on, however, to note that "[i]f unexpected matters arise, such as the need for factual correction, the court is prepared to give counsel who have not reserved time a brief additional period for real rebuttal." ⑩ id.

⑨. Davis, supra, n. 1 at 897.
Joint Appendix page 32." But generally do not invite the court to look at the record, briefs, or anything else. You may think that would be more effective, but for some reason it almost never works out well. First, it takes an enormous amount of time — your valuable, limited time — to get all the judges looking at the right brief or other document. Second, you automatically lose eye contact with them while they look at the page or fumble around trying to locate the correct brief. Third, you may never get that contact back. Once invited to read a line or two, many judges will read on, or glance at the next page — judges, particularly appellate judges, are often better readers than listeners. If you give the correct reference, any judge who’s interested can check it out later.

In this era of abbreviated argument times and prepared, active judges, the advocate must be flexible and able to think on his feet. As one court recently noted, however, “[t]hinking on one’s feet is a useful tool of appellate advocacy only if the thinker has a suitable foothold in the record.” The only way to develop the necessary flexibility is relentless preparation — at the end of the day, that remains the one overriding key to presenting an effective oral argument.

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10. Uno v. City of Holyoke, 72 F.3d 973, 985 (1st Cir. 1995).
While it may not change the outcome, an opportunity to present your case before an appellate panel should not be missed or taken lightly, explains Gary Watt of Archer Norris.


by Gary Watt

Much has been written about whether oral argument really makes any difference. Win or lose, good oral argument does. Effective oral advocacy makes a difference to the clients, the courts and sometimes, even the outcome. The question should not be can oral argument win the case. Occasionally, it will. The question should be can oral argument help the cause. The answer is almost always "yes."

"Read 'em and weep" is probably an apt description for the losing party after the appellate court's decision is announced. Given that eventuality, oral argument presents the one and only opportunity for the advocates to come face-to-face with the judges and test the court's view of the issues before the fateful moment. As one appellate court put it, oral argument can "clear the air" and "is often as effective as a catalytic converter" for doing so. *TJX Cos., Inc. v. Superior Court*, 87 Cal. App. 4th 747 (2001). As another court put it, oral argument presents an "opportunity to go straight to the heart!" *Mediterranean Constr. Co. v. State Farm Fire & Casualty Co.*, 66 Cal.App.4th 257 (1998).

Good oral argument can crystalize the issues and for the moment — however fleeting — engage the court in a discussion on the crux of the matter. There will only be one other time to learn the court's views, but those views should not come as a shock if oral argument has been effectively utilized. For those thinking of waiving oral argument, why should clients be kept in the dark until an adverse decision comes out? Having the client attend the oral argument, and briefing the client on what the tea leaves indicate afterward, can be a very effective way to further the professional relationship. There is little to be gained by waiting for a decision before discussing defeat.

Of course, in some federal appeals, there will be no opportunity for oral argument. But in the California state appellate courts, oral argument is a right. But whatever forum oral argument is in, embrace the opportunity and go all out. "A lively interchange between counsel and the bench, not possible by the submission of written briefs, may lead a judge to rethink
his or her position and even alter the outcome of the proceeding." *Lewis v. Superior Court*, 19 Cal.4th 1232 (1999) [Kennard, J., dissenting].

There are caveats, of course, on the definition of a "lively interchange." Some interchanges are lively, but hardly productive. Fist pounding, name calling, and other histrionics are the wrong kind of lively. Resist the temptation to attack the trial court judge, opposing counsel or the appellate court. And enthusiasm must not result in talking over the judges, or worse, cutting them off. Otherwise, a different kind of lively interchange may arise and at great cost in terms of precious minutes lost and long-term credibility.

Perhaps one way to thoughtfully approach preparation for oral argument is to consider what a favorable decision would look like. Even federal circuit mem-dispos state more than just "you win, you lose." How does the answer to that question affect the oral argument? Inherent in any answer is how well a favorable decision fits within existing precedent, how far the decision might extend, the policy implications of such extension, and so on. Will a favorable decision be a house of cards or a solid edifice? Find the edifice, and then describe its key features at oral argument. Of course, intimate knowledge of the record and the law is essential. Chief Justice William H. Rehnquist once told an advocate: your performance "made us gravely wonder, you know, how well-prepared you were for this argument." *Oral Arg. Tr., Shalala v. Whitecotton*, No. 94-372, 1995 WL 116213 (Mar. 13, 1995).


Some critics of oral argument observe that if it could actually change the outcome, it would speak very poorly of the lawyer's briefs. But as long as there is oral argument, why not embrace it for what it can be, rather than denigrate it for what it frequently cannot achieve? Oral argument
can be a supplement to the well-written brief. Oral argument can provide
an opportunity to advise the client of the probable and very personal
outcome. In some instances, oral argument may be the catalyst for
settlement. And now and then, if enthusiastically embraced, "oral
argument may lift up the fallen" instead of "caus[ing] the tottering to fall."
TJX Cos., Inc.

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Oral Argument

14.1 Importance of Oral Argument

Lawyers frequently wonder whether, when a case has been fully briefed, the oral argument is important. If the briefs have been read, can the argument make any meaningful contribution to the judges' understanding of the case? If the briefs have not been carefully studied in advance, can the judges obtain an adequate first impression of a case from a short oral presentation? How relevant is the oral argument to the decision-making process?

Only judges are in a position to give authoritative answers to those questions. What they have said and written indicates that they find the oral argument desirable and important, particularly for a court which, like the Supreme Court of the United States, relies heavily on oral argument to supplement the written briefing. For example, Chief Justice William H. Rehnquist has said that oral argument is a "vital element of the judicial process." 4

preme Court, is likely to accept for oral argument cases which raise questions of a substantial and difficult character. To resolve such questions, the Court needs the fullest possible assistance from counsel, both in their briefs and their oral arguments. Counsel are expected to engage in a dialogue with the Justices that will serve to clarify the facts and the issues in the case and that will make a decisive impression as to the merits of the dispute. Only the lawyer who is fully prepared, articulate, and at ease can expect to fulfill the role assigned to him in this great process.

It is in that context that oral argument before the Supreme Court assumes a unique importance. The Court needs and responds to intelligent and creative discussions by counsel as it struggles to resolve some of the more difficult legal problems of the times. And it is in that context that the Justices themselves have spoken of the importance of oral argument. As Chief Justice Hughes once wrote, "the desirability of a full exposition by oral argument in the highest court is not to be gainsaid," for it is "a great saving of time of the court in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff." Chief Justice Hughes also observed: "I suppose that, aside from cases of exceptional difficulty, the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote."3

Thirty years ago, in agreement with Chief Justice Hughes' statement that the reaction to the oral argument usually remains unchanged, Justice Harlan stated that since the Court usually takes its first and oft-decisive vote in the conferences held within a day or two following the oral arguments heard that week, the oral presentation is fresh in the Court's mind at this critical point.4

More recently, Justice Brennan has said that "oral argument is the absolutely indispensable ingredient of appellate advocacy. *** Often my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument; indeed, that is the practice now of all the members of the Supreme Court. *** Often my idea of how a case shapes up is changed by oral argument. *** Oral argument with us is a Socratic dialogue between Justices and counsel."5 Justice Brennan has also observed: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument."6 In sum, Justice Powell has said, "the fact is, as every judge knows, that the quality of advocacy—the research,
briefing and oral argument of the close and difficult cases—does contribute significantly to the development of precedents."

As if to emphasize the high value thus placed by the Court on oral argument, some members of the Court have voiced increasing disappointment at the quality of some of the oral arguments that are being made. Justice Powell, for example, has recently noted his "disappointment in the quality of briefs and oral arguments" before the Court, adding:

"I am generalizing, of course, and should not be understood as saying that all or even the great majority of cases before us are poorly briefed or argued. The Chief Justice has spoken on this subject with his usual perception and force. As he has noted, and as we all recognize, the quality of written and verbal advocacy varies quite widely. Many of our cases are superbly presented by highly competent counsel, and that competency is not necessarily related to age and experience. Some of the best advocacy I have witnessed has come from fairly young members of the bar, who tend to be especially thorough in their research and briefing.

"But the delight of the occasional high level of counsel performance is diluted by the more numerous performances that one must rate as 'average or poor.' Of course, no one expects a John W. Davis in every case, but I had hoped for greater assistance from briefs and oral arguments than we often receive. I certainly had expected that there would be relatively few mediocre performances before our Court. I regret to say that performance has not measured up to my expectations.

"I have only admiration for those who recognize the potential importance of, and who prepare carefully for, Supreme Court litigation. I wish their example were more widely followed."

The fact that the Court amended its rules in 1970 to reduce from one hour to one-half hour the time allotted each side for oral argument in most cases does not reflect any diminution in the Court's respect for the value of oral argument. Other appellate courts have severely limited the time available for oral argument, and, in some cases, have eliminated oral argument completely; but they have done so largely to conserve their judicial energies in disposing of ever-increasing numbers of appeals as of right, a situation which does not pertain in the Supreme Court.

While the Supreme Court has experienced dramatic increases in recent years in the filing of petitions and applications for review, the Court grants

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8 Id. at 1-2. Justice Burger, in speaking of the caliber of some lawyers who appear before the Court, has stated: "The quality is far below what it could be." Remarks to District of Columbia Judicial Conference, reported in The Washington Post, June 4, 1975.

9 The Commission on Revision of the Federal Court Appellate System, in recognizing that some courts of appeals have drastically reduced or eliminated oral arguments in certain classes of cases, concluded that oral argument is an essential part of the federal appellate process but that "to mandate oral argument in every case would clearly be unwarranted." Report, supra note 6, 67 F.R.D. at 254-55. The commission suggested that oral argument might be eliminated under a uniform appellate rule where (1) the appeal is frivolous; (2) the dispositive issues have been recently authoritatively decided; or (3) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument. 67 F.R.D. at 255. These standards are now embodied in Rule 34(a) of the Federal Rules of Appellate Procedure and are followed by the courts of appeals. The Supreme Court, however, does not accept for plenary review cases which fall in any of those categories.
review and hears oral argument only in those relatively few cases deemed important enough to warrant full consideration. For many years the number of oral arguments each term remained fairly constant, ranging from 130 to over 170. That number reflected what the Court felt it could effectively hear and resolve each year. In the 1981 Term, however, the Court granted review of 210, an increase of 50 in two years. This number was larger than a number of the Justices believed the Court could hear in one term. In the words of Justice White, this means "that we shall not be current in our work; cases will be ready for argument and we shall not be ready for them. This is something new and disturbing **10." In the immediately succeeding terms, the number receded from the 1981 level. But if the upward trend is renewed, some remedial measures—on which there is so far no agreement—will be called for. See Sec. 1.16, supra.

The reduction of the time allowed for oral argument was the culmination of the Court’s experience with the longer one-hour argument per side. Long before 1970 the Court had found that the issues in most cases could be adequately explored in arguments limited to one-half hour, and more and more cases came to be placed on what was known as the "summary calendar." The oral argument in cases previously put on the summary calendar was limited to one-half hour per side. The summary calendar limitation on oral argument came to be the norm, however, and what is now Rule 38 merely codified that norm. Longer argument time can still be obtained, of course, for those cases that are shown to be so complex or important as to justify it. See Rule 38.3.
Your Skills: Top 10 Tips to Prepare for Oral Argument

The court of appeal has set your case for argument in 30 days. How should you prepare? Here are our “Top Ten” suggestions:

1. Reread the briefs and the trial court’s ruling.

By the time the court sets your case for argument, many months may pass since you filed your briefs. To prepare for argument, one good starting point is simply to reread the briefs, in order, as some judges have told us they do. Doing this provides a good overview that balances the big picture and the fine points. Other judges tell us they begin by reading the trial court’s rulings or statement of decision. That makes sense, too. If you’re the appellant, focus on where the court went wrong; otherwise, remind yourself of the key law and evidence that led the court to reach the right conclusion. Once you’ve read the briefs and the trial court’s opinion, you’re ready to take the next step.

2. Re-familiarize yourself with what is (and isn’t) in the record.

Next, review the “record,” i.e., the appendix (or clerk’s transcript or excerpts of record) and the reporter’s transcript (or at least the summaries). You don’t have to read every word, but pay special attention to the evidence and any rulings by the trial court. It’s amazing what you will discover by going to the next level of detail in recalling what your case is about. In terms of building confidence, there’s no substitute for getting back in touch with, for example, the actual language of the disputed contract provision, and the overall chronology of events. Rereading the closing arguments at trial can also be helpful in reconstructing the key issues and what the “fight” was all about. Reviewing the record can also help you avoid the dreaded question, “Counsel, where is that in the record?”

3. Make an outline (but not a “script”).

Almost never, of course, will an appellate court allow you to make an uninterrupted “presentation” of your argument. Nonetheless, it could happen. Even if it doesn’t, preparing an outline will help you organize your
thoughts and decide which issues are really the most important. By “outline,” we don’t mean a script or a word-for-word prepared speech. Or even a lengthy document with detailed headings and subheadings. An effective outline is more like a thematic summary of your most important points in the order that, given sufficient time, you will make them. Even if you don’t end up using the outline, the exercise of preparing it will help you focus and feel prepared and confident. And if the unexpected happens and you do encounter Mount Rushmore, you’re all set.

(4) Prepare “greatest hits – facts” and “greatest hits – law.”

On one page, write down the five to 10 best facts in your case, complete with record citations and perhaps even short quotations. Then, do the same with your three or four best legal authorities, again with pin cites and verbatim quotes of the particularly helpful language from the opinions. As with the outline, this exercise may or may not actually help you, in the moment, in argument. Given the right question from your panel or assertion by your opponent, however, having the key facts and law at your fingertips — with pertinent citations — can build great credibility. Even if that opportunity doesn’t arise, going through this exercise is a great way to help you focus on what’s most important about your case.

(5) Review and update your most important authorities.

However obvious this may seem, it still essential to review your most important cases. You don’t have to read every case. But rereading the most important four or five, from start to finish, is a good idea. Make sure you also update the key cases. There’s nothing worse than emphasizing a case and how important it is than to have your opponent point out it has been overruled or superseded by new authority. Also, we’ve seen this happen.

(6) Write a “questions and answers” memorandum.

A great way to prepare is to pose questions — and write short answers — on as many questions as you reasonably think might come up at argument. Try to keep your answers as short as possible and create answers that are more like “thought bits” than paragraph. (At the argument, you just won’t have time for lengthy answers.) Doing this may help you look at your case in a new way and distill your key points to their essence. If time permits, you might also write a similar memorandum from your opponent’s perspective. Warning: despite all your best efforts, it’s almost guaranteed the court will ask a question that wasn’t on your list. When that happens, just look the panel in the eye, and do the best you can.

(7) Decide how to start.

Particularly if you are the appellant who has to break the silence, it’s a good idea to script out how you will begin. You should avoid lengthy (and usually boring) formal recitations and instead focus right away on what’s most important. Something like, “Your Honor, I’d like to get right to the heart of the matter. What matters most in this case is ______________.” This direct approach maximizes the value of that magical time, just when you are getting started, when the court is likely to be most receptive. It also helps you to set the agenda rather than play defense. At least for a while.

(8) Talk with your friends and colleagues.

There’s no better way to prepare for argument than to talk about your case with other people. Barge into someone’s office, interrupt what they’re doing, and say, “I’ve got an argument in the court of appeal tomorrow. Ask me anything.” Then talk about the case, how to make your pitch, and listen to what your friend or colleague says. You’ll be surprised at what you learn, and you will get in the habit of having a real conversation about your case. This approach is much more helpful than reading more cases or practicing before a mirror.

(9) Think about making a tactical concession.

Nothing builds credibility more than conceding a point that is not reasonably in dispute or acknowledging a weak point in your case. You might try something like, “Although I disagree with my opponent on many things, I do agree that __________________.” Or, “The trial court applied the correct legal test and focused on the right evidence. It just reached the wrong conclusion.” Or, “I acknowledge the fourth district ruled the other way earlier this year.” You get the idea. This approach can be both disarming and effective. Just make sure you don’t
concede anything that is game-changing. (Nothing worse than seeing a footnote in the court’s opinion to the effect that, “At oral argument, counsel acknowledged her appeal lacked merit.”)

(10) Know your panel.

Most times, although not always, you’ll know who the members of your appellate panel will be. If you do, check their judicial biographies, talk with other lawyers who have appeared before them, and find out if they’ve written opinions on the key issue or issues in your case. If you’ve not appeared before the panel before, you might also observe them in action on another day before your case is scheduled. Being prepared is a great way to feel prepared. And feeling prepared builds confidence. In rare cases, you may also be able to remind a panel member of a case where he ruled in your favor. On the other hand, if a panel member has previously taken an unhelpful position on an important issue in your case, you might as well know that going in.

Follow these ten steps and you’ll be prepared and feel prepared. And remember, when the late Supreme Court Justice Otto Kau was asked for the secret to being a success as an appellate lawyer, he had a simple answer: “Represent respondents.” Exactly. Good luck!

Robert J. Stumpf, Jr., Karin Vogel and Guylyn Cummins are members of Sheppard Mullin’s certified appellate specialist team and have handled more than 300 appeals and writs, including more than 75 published appellate opinions. Bob Stumpf currently chairs the Appellate Law Advisory Commission, which administers the appellate specialist certification program for the State Bar of California.

Fulton County Launches Odyssey Computer System After Sanctions, Law Firm In Porn Suits Dissolves

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INTRODUCTION

This guide is meant to serve as a brief primer on how to be a successful oral advocate. What follows is a series of general tips; some are specific to moot court or oral advocacy, while others are simply tips for good public speaking. Many of these tips are among the most common suggestions offered to competitors. Hopefully this will help you prepare for this year's competition.

This primer is by no means meant to serve as a complete guide. Great advocates develop their own style, realizing which techniques and style of argument work for them (and which do not). However, mastery of the suggestions below is more likely than not to leave you better than you began.

Good luck!

RESOURCES

One of the more popular guides to appellate advocacy is Making Your Case: The Art of Persuading Judges, written by Justice Antonin Scalia and Bryan Garner (West 2008). The book provides a great deal of practical advice on both written and oral advocacy. Other resources on reserve in the law library include:

- Mary Beth Beazley, A Practical Guide to Appellate Advocacy (Aspen 2010)
- Carole C. Berry, Effective Appellate Advocacy: Brief Writing and Oral Argument (West 2009)
- Alan D. Hornstein, Appellate Advocacy in a Nutshell (West 1998)
- Michael D. Murray and Christy Hallam DeSanctis, Appellate Advocacy and Moot Court (West 2006)

Another great resource is hearing talented oral advocates in action—listening to how they address judges, how they conclude an argument, how they handle rapid-fire questions (and what type of questions they get), how they are able to pivot from an accusatory question into a point in their favor, etc. You can listen to Supreme Court oral arguments at oyez.org, where you can also search by advocate. Some of the finest oral advocates of the past generation include: pre-bench John Roberts, Ted Olson, Seth Waxman, Carter Phillips, Paul Clement, Maureen Mahoney, Paul Smith, and Walter Dellinger.

* This guide was originally compiled by Cleve Doty (JD '09) in Fall 2008. It appears here as amended by Prerak Shah (JD '10) in Fall 2009 and Nick Tarasen (JD '12) in Fall 2011.
Interview with Former Solicitor General Paul Clement

Whether he still gets nervous before Supreme Court appearances

I've always said if I ever get to the point where I'm no longer nervous, I'm going to find something else to do... One of the things that you just absolutely have to do before you go in front of the Supreme Court is to prepare and prepare and prepare and prepare. What keeps you going that final mile is the nerves. I mean, if you get to the point where you're like, "I can do this. I'm not going to embarrass myself," you'd eventually embarrass yourself.

Preparing for a Supreme Court argument

I'm a big believer in the moot courts. It's like the old American Express commercial: I wouldn't leave home without them. I wouldn't go into the Supreme Court of the United States without having done at least two moot courts, where you get a group of individuals, colleagues who are really smart, and you try to basically simulate the kind of questions the justices are going to ask. Even if you've heard the question before, it's hard to answer a question coherently from a Supreme Court justice. If you've never heard the question or a question like it before of that type, it's well-nigh impossible...

The other thing that I've learned over time is you can't really be over-prepared for a Supreme Court argument, so you really have to acknowledge the fact that you're not going to have quite as much time as you'd like. You're not going to be able to turn over every stone in the process of preparing. So what I've found over time is that you want to figure out, "All right, what kind of case is this, and what kind of preparation is going to be rewarded?" Some cases are very record intensive, so you really have to bear down in the record. Some cases are precedent intensive, so what you need to do is really read every Fourth Amendment...
complicated web of regulations fits together.

Whether he focuses on specific justices in arguments before the Supreme Court

One way to define a Supreme Court advocate's job is to get to five for your client. It can be very satisfying to have four justices give a ringing endorsement to your position, but it's still called a loss, last time I checked. ... In most cases, you have a theory as to how you're going to get to five, and sometimes it involves one justice playing a critical role. Very often, it's building a coalition where you were going to have some justices adopting one position and another justice or two adopting a different position. Those are the hardest cases because, any time you are building a coalition, you have to figure out how to get these additional people on board without losing the people you started with. In some ways, that can be the most challenging. One thing that's a little bit different about arguing cases in the Supreme Court relative to the courts of appeals is that in the Supreme Court, all nine justices are free to have their own view of a particular area of the law. In the lower courts, if there's a Supreme Court case on point, even if they don't like it much, they might grouse about it a little bit, but they're going to follow the Supreme Court case.

Why he doesn't use notes while appearing before the Supreme Court

Most people bring notes to the podium, but they're there more as a security blanket. At the Supreme Court of the United States, if they ask you a question and you are standing there paging through some notes trying to see what you wrote down, you are not serving your client well. I'm probably one of a handful that goes up there without any notes, but most of the lawyers, certainly the good lawyers there, they're not looking at what they brought up there. That's just something that kind of help them sleep a little better the night before. ... The questions are so important, and you really don't want anything to distract you from trying to pick up on the nuance.

Sometimes people have this idea that the ideal argument would be: you get up there and you say everything you wanted to. You use some lofty rhetoric.

If you were to do that, and the justices weren't asking questions, I mean, you might as well just be talking to a wall, right? Even though it makes your job harder, you want lots of questions.
JUSTICE Kennedy delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, [*563] resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another [**2476] man, Tyron Garner, engaging in a sexual act. [***516] The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "deviate sexual intercourse" as follows:
"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
"(B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

We granted certiorari [to consider]
"1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?
"2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary [***517] to reconsider the Court's holding in Bowers.
The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented.

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so [*567]* for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows [*3519] homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." *Id.,* at 192, 92 L.Ed.2d 140, 106 S.Ct. 2841. In academic writings, and in many of the scholarly amicus briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions [*568] in *Bowers*. Brief for Cato Institute as Amicus Curiae 16-17; Brief for American Civil Liberties Union et al. as Amici Curiae 15-21; Brief for Professors of History et al. as Amici Curiae 3-10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial
times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. ("The modern terms homosexuality and heterosexuality do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see Chitty, supra, at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the Bowers decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so... Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. In summary, the historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious
beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

Of even more Importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v United Kingdom*, 45 Eur. Ct. H. R. (1981) P 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), the Court reaffirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices. Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.
The second post-Bowers case of principal relevance is Romer v. Evans, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of Bowers has been brought in question by this case, and it should be addressed...

To the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere. The European Court of Human Rights has followed not Bowers but its own decision in Dudgeon v United Kingdom. See P. G. & J. H. v United Kingdom, App. No. 00044787/98, P 56 (Eur. Ct. H. R., Sept. 25, 2001); Modinos v Cyprus, 259 Eur. Ct. H. R. (1993); Norris v Ireland, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The rationale of Bowers does not withstand careful analysis. In his dissenting opinion in Bowers Justice Stevens came to these conclusions: "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute
further no legitimate state interest which can justify its intrusion into the personal and private life of the individual. The judgment of the Court of Appeals for the Texas Fourteenth District is reversed.

CONCUR BY: O'CONNOR

The Court today overrules Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). I joined Bowers, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."

[*581] The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants...The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct--and only that conduct--subject to criminal sanction.

DISSENT BY: SCALIA; THOMAS

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable, -the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. Bowers held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "further no legitimate state interest which can justify its intrusion into the personal and private life of the individual... The Court embraces instead Justice Stevens' declaration in his Bowers dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review. ..

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save Justice O'Connor, embraces: On its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual [*600] acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.
The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races [*40*] insofar as the *partner* was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are "immoral and unacceptable," This is the same justification that supports many [*296*] other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

Justice O'Connor argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor. "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. [*601*] It is instead directed toward gay persons as a class."

Of course the same could be said of any law. A law against public nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law does deny equal protection to "homosexuals as a class," that denial still does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely aligned with the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.

One of the most revealing statements in today's opinion is the Court's grim warning [*297*] that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." It is clear from this that the Court has taken sides in the culture war, departing from its role of reassuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they
believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that [*603] culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress; that in some cases such "discrimination" is mandated by federal statute, see 10 U.S.C. § 654(b)(1) [10 USCS § 654(b)(1)] (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see BSA v. Dale, 530 U.S. 640, 147 L Ed 2d 554, 120 S Ct 2446 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts--or, for that matter, display any moral disapprobation of them--than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," ante, at 156 L Ed 2d, at 526; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made [*604] by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts--and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada. At the end of its opinion--after having laid waste the foundations of our rational-basis jurisprudence--the Court says that the present [***2498] case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and then declares that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not
dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

Justice Thomas, dissenting.

I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." *Griswold v. Connecticut*, 381 U.S. 479, 527, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources. Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" [and] I "can find [neither in the Bill of Rights nor any other part of the [^[606] Constitution a] general right of privacy," *ibid.*, or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions,"