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Douglas E. Abrams

University of Missouri School of Law, abramsD@missouri.edu

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Recommended Citation

Douglas E. Abrams, *Lochner v. New York (1905) and Kennedy v. Louisiana (2008): Judicial Reliance on Adversary Argument*, 39 *Hastings Const. L.Q.* 179 (2011)

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Lochner v. New York (1905) and *Kennedy v. Louisiana* (2008): Judicial Reliance on Adversary Argument

by DOUGLAS E. ABRAMS*

Introduction

It was Thursday morning, February 23, 1905, and Chief Justice Melville W. Fuller opened oral argument in a case destined to shape the course of American constitutional history. The Supreme Court's calendar that day included a largely unnoticed appeal by Joseph Lochner, the owner of a small bakery in Utica, a city of about 63,000 persons in rural upstate New York.¹ Three years earlier, the state had fined Lochner \$50 for employing a worker for more than sixty hours a week in violation of the state's Bakeshop Act, a maximum-hours law passed unanimously by both houses of the legislature and swiftly signed by Governor Levi P. Morton in 1895.

By a narrow five-to-four vote, the Court reversed the bakery owner's misdemeanor conviction. Writing for the majority, Justice Rufus W. Peckham held that the Act violated "liberty of contract," an interest that a few Court decisions had found in the Fourteenth Amendment's Due Process Clause. The constitutional liberty enjoyed by Joseph Lochner and his employees alike, wrote Justice Peckham, turned on whether the 1895 legislation was "a fair, reasonable and appropriate exercise of the police power of the State," or whether the legislation was "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to

* Associate Professor of Law, University of Missouri School of Law. B.A. 1973, Wesleyan University; J.D. 1976, Columbia University School of Law.

1. U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICS OF CITIES HAVING A POPULATION OF OVER 30,000: 1906, at 88 (1908) (stating 1905 Utica population as 63,647 persons).

him appropriate and necessary for the support of himself and his family.”²

Lochner's slender majority chose the latter, and Justices John Marshall Harlan and Oliver Wendell Holmes filed stinging dissents. Writing for himself and Justices Edward Douglass White and William R. Day, Justice Harlan accused the Court of “seriously cripp[ing] the inherent power of the States to care for the lives, health and well-being of their citizens.”³

In one of the most memorable dissents in Supreme Court history, Justice Holmes charged that the majority had embraced “an economic theory which a large part of the country does not entertain,” namely, laissez faire economics associated with Herbert Spencer’s Social Darwinism, which taught that a nation’s economy develops best when the fittest survive in the marketplace free from government regulation.⁴ Holmes argued that by empowering courts to impose their own economic views on the nation, *Lochner* thwarted “the right of a majority to embody their opinions in law.”⁵

The Supreme Court interred *Lochner's* economic substantive due process doctrine by 1937, but the decision “continues to hover over constitutional law like a ghost.”⁶ *Lochner's* immortality highlights an intriguing question (discussed in Part I of this article) concerning the choices of two swing Justices to join the bare majority. If the brief filed by the losing New York Attorney General had not appeared so paltry next to the sterling brief of Joseph Lochner’s winning counsel, might the Court have ruled the other way?

Even for today’s lawyers who may never argue an appeal as profound as *Lochner*, the Court’s evident turnabout from an apparent razor-thin victory for the state to a victory for the convicted defendant underscores judicial reliance on advocacy in the adversary system of civil and criminal justice. This reliance assumed the Supreme Court spotlight most recently in 2008, when *Kennedy v. Louisiana* held, five-to-four, that the Eighth Amendment prohibits

2. *Lochner v. New York*, 198 U.S. 45, 56 (1905).

3. *Id.* at 73 (Harlan, J., dissenting).

4. *Id.* at 75 (Holmes, J., dissenting).

5. *Id.*

6. Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 222–23 (1999); see also, e.g., Paul Kens, *Lochner v. New York: Rehabilitated and Revised, But Still Reviled*, 20 J. SUP. CT. HIST. 31 (1995) (“Few cases in American history continue to attract more attention” than *Lochner*); Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 456 (2005) (“one of the most intriguing constitutional cases ever decided”).

imposition of the death penalty for rape of a child where the crime did not result, and was not intended to result, in the victim's death.⁷

The confluence of capital punishment and the defendant's brutal rape of his eight-year-old stepdaughter assured that *Kennedy*, decided in the midst of the hotly contested presidential election campaign, would rank as one of the most controversial decisions of the entire Term. Within a day, Republican John McCain attacked *Kennedy* as "an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime."⁸ Democrat Barack Obama, himself a former constitutional law professor at the University of Chicago, agreed that "the rape of a small child, 6 or 8 years old, is a heinous crime," and said that the Constitution permits states to decide that "under narrow, limited, well-defined circumstances the death penalty is at least potentially applicable."⁹

For the closely divided Court, *Kennedy's* Eighth Amendment holding turned on whether a "national consensus" existed against permitting capital punishment for nonfatal child rape. A day after the presidential candidates weighed in, controversy grew when a blogger reported a potentially significant oversight in the majority and dissenting opinions. As the Court surveyed the landscape of American law and disagreed about the consensus issue, no Justice mentioned that Congress had overwhelmingly authorized capital punishment for nonfatal child rape under military law in 2006, and that a 2007 presidential executive order had implemented the legislation by adding the authorization to the Manual for Courts-Martial.

The *Kennedy* majority and the dissenters overlooked these authorities because no party or *amicus* had cited or discussed them in their briefs. Part II discusses the brief writers' lapse and the institutional challenge that it caused the Court before and after the state of Louisiana petitioned unsuccessfully for rehearing.

As Part III discusses, *Lochner* and *Kennedy* together demonstrate the contemporary vitality of Justice Felix Frankfurter's message that in the adversary system of civil and criminal justice, "the

7. *Kennedy v. Louisiana*, 554 U.S. 407, 413, *reh'g denied*, 554 U.S. 945 (2008).

8. *McCain, Obama Disagree with Child Rape Ruling*, MSNBC (June 26, 2008, 1:26 PM), http://www.msnbc.msn.com/id/25379987/ns/politics-decision_08/t/mccain-obama-disagree-child-rape-ruling/.

9. *Id.*

judicial process [is] at its best” when courts receive “comprehensive briefs and powerful arguments on both sides.”¹⁰

I. Nineteen Pages That Changed History

To establish that New York’s maximum-hours law was an unreasonable exercise of the state’s police power, Joseph Lochner’s counsel submitted a lengthy, carefully researched brief whose appendix supplemented legal doctrine with research from medical journals indicating that bakery work was not inherently hazardous to employees’ health.¹¹ One scholar has called the submission “an incipient ‘Brandeis Brief.’”¹² The term “Brandeis Brief” today describes a filing that combines legal analysis with relevant evidence from the social sciences, but lawyer Louis D. Brandeis did not prevail with his fabled Supreme Court submission until *Muller v. Oregon*, which distinguished *Lochner* three years after the Utica bakery owner’s brief provided a useful template.¹³

The New York Attorney General’s office evidently did not take Joseph Lochner’s Supreme Court appeal seriously, a costly lapse that seems particularly surprising because the state’s two appellate courts had each affirmed the conviction by only scant one-vote margins over strong dissents.¹⁴ Attorney General Julius M. Mayer’s “incredibly sketchy”¹⁵ nineteen-page brief provided the Justices little factual analysis or legal argument, few citations to precedent, and barely any mention of medical authorities which plausibly indicated that toiling twelve-hours per day for six to seven days each week in damp, dusty, rat-infested bakeries in urban slum tenement cellars debilitated most workers before they turned forty-five and caused many to die young.¹⁶ The Attorney General did not even try to expand on medical

10. *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring), *overruled in part on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1964).

11. See, e.g., David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1494–96 (2005).

12. Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 19 n.77 (1991).

13. *Muller v. Oregon*, 208 U.S. 412 (1908).

14. *People v. Lochner*, 76 N.Y.S. 396 (App. Div. 1902) (3-2 vote), *aff’d*, 69 N.E. 373 (N.Y. 1904) (4-3 vote), *rev’d, Lochner v. New York*, 198 U.S. 45 (1905).

15. Paul Kens, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 127 (1998).

16. *Id.* at 6–14; David E. Bernstein, *supra* note 11, at 1494–96.

discussion advanced by a concurring judge when the New York Court of Appeals upheld *Lochner's* conviction.¹⁷

Labor leader Samuel Gompers said later that the Court might have decided *Lochner* differently if the Justices could have seen for themselves the squalid working conditions that marked the nation's bakeries, including the one in Utica, New York.¹⁸ With the Justices unable to take testimony or receive other live evidence from eyewitnesses or expert witnesses, however, the parties' briefs were the Court's eyes and ears.

Historians have speculated about why the state Attorney General's office paid only lip service to Joseph *Lochner's* Supreme Court appeal. The likely reasons do not reflect well on the office's approach to advocacy. Perhaps Attorney General Mayer assumed a relatively easy victory because the Court, in *Holden v. Hardy*, had upheld a state's maximum-hours statute for coal miners in 1898 by a seemingly comfortable seven-to-two margin.¹⁹ Professor Paul Kens suggests that, even if not overconfident, the Attorney General may have lacked enthusiasm for the challenged Bakeshop Act because he personally opposed most economic regulatory legislation.²⁰ Perhaps the Attorney General brushed aside *Lochner's* case because his office faced deadlines in another Supreme Court appeal that seemed more important, though the decision in the other appeal would ultimately pass into history largely unremembered.²¹

Whatever the impulse for the state's evident inattention in *Lochner*, the imbalance that marked the parties' briefs may have transformed a close decision for the state into a close decision for the bakery owner. Evidence indicates that Justice Harlan initially drafted the opinion of the Court, and that Justice Peckham initially drafted a dissent. Justice Harlan's son later said that his father's original draft was for the majority, and another commentator argued that the tone and structure of Justice Harlan's ultimate dissent suggest the same.²²

The two swing votes, Justices Henry Billings Brown and Joseph McKenna, ended up joining the five-to-four majority under

17. *People v. Lochner*, 69 N.E. 373, 382–84 (N.Y. 1904) (Vann, J., concurring), *rev'd*, *Lochner v. New York*, 198 U.S. 45 (1905).

18. Paul Kens, *supra* note 6, at 35.

19. *Holden v. Hardy* 169 U.S. 366 (1898); David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 299, 317 (Michael C. Dorf ed., 2d ed. 2009).

20. Paul Kens, *supra* note 15, at 127.

21. *Id.* at 128; David E. Bernstein, *supra* note 11, at 1495–96.

22. David E. Bernstein, *supra* note 19, at 317 & n.109.

circumstances that suggest that the parties' briefing played a significant role in the outcome. Justice Brown had written the majority opinion upholding maximum-hours legislation for mine workers in *Holden v. Hardy*, and neither he nor Justice McKenna had previously voted to strike down state labor legislation for violating the Fourteenth Amendment.²³

The two swing Justices likely switched from Harlan to Peckham during the Court's internal deliberations. Professor David E. Bernstein concludes that "the unusual votes of Brown and McKenna . . . can most plausibly be attributed to the creativity of *Lochner's* brief in presenting a statistics-filled appendix showing that baking was not an especially unhealthful profession, combined with the singularly ineffective brief filed by New York."²⁴

On April 17, *Lochner's* five-Justice majority—with Justices Brown and McKenna safely on board—announced that "[t]here is, in our judgment, no reasonable foundation for holding [the 1895 Bakeshop Act] to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker."²⁵ To the contrary, the majority concluded, the Act had "no . . . direct relation to, and no . . . substantial effect upon, the health of the employee."²⁶

The impact of *Lochner*, and thus the impact of the parties' briefing in the case, has proved great: According to one leading constitutional scholar, the decision "threatened the very legitimacy of judicial review by setting the Court against the democratic branches without doctrinal justification or institutional competence."²⁷ Application of *Lochner's* dual touchstones—reasonableness and arbitrariness—lay not with the political branches, but with a Court that soon grew increasingly hostile to federal and state economic regulation. By the time the nation confronted the depths of the Depression in the early 1930s, the decision had morphed into a

23. *Id.* at 317.

24. *Id.* at 317–18.

25. *Lochner*, 198 U.S. at 58.

26. *Id.* at 64.

27. Benno C. Schmidt, Jr., *The Court in the Progressive Era*, 22 J. SUP. CT. HIST. 14, 18 (1997); see also, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, (2003); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1386 (2001); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 Geo. L.J. 1, 1–14 (2003).

“constitutional monstrosit[y]” that “disembowel[ed] federal and state efforts to protect workers from predatory employers.”²⁸

By the time the Supreme Court interred economic substantive due process in 1937,²⁹ the “*Lochner* era” had seen the Court strike down nearly two hundred social welfare and regulatory measures.³⁰ *Lochner*’s demise led to Justice Harlan Fiske Stone’s Footnote Four in *United States v. Carolene Products Co.* (1938), which foreshadowed tiered analysis by contrasting the Court’s new deference to economic regulation with independent review of claims implicating civil rights and personal liberties.³¹

II. “The Parties to the Case Missed It”

In *Kennedy v. Louisiana* in 2008, the Court’s Eighth Amendment holding depended on whether capital punishment for nonfatal rape of a child was consistent with “the evolving standards of decency that mark the progress of a maturing society.”³² Writing for the majority, Justice Anthony M. Kennedy concluded that “[t]he evidence of a national consensus with respect to the death penalty for child rapists . . . shows divided opinion but, on balance, an opinion against it.”³³ The Court stated that a rapist of a child could be executed in only six of the thirty-six states that have capital punishment, and could not be executed under federal law.³⁴

Dissenting Justice Samuel A. Alito, Jr. (joined by Chief Justice Roberts, and Justices Scalia and Thomas) forcefully challenged the majority’s finding of a national consensus.³⁵ The dissenters disputed the lineup of the states and its meaning, but took no issue with the majority’s statement that federal law did not permit capital punishment for rape of a child.

Two days after the Court handed down its decision in *Kennedy*, a military law blogger reported that the Justices had overlooked a

28. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 480 (1982).

29. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

30. Strauss, *supra* note 27, at 373 (citations omitted).

31. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1098–1100 (1982).

32. *Kennedy v. Louisiana*, 554 U.S. 407, 419, *reh’g denied*, 554 U.S. 945 (2008).

33. 554 U.S. at 426.

34. *Id.* at 422–26.

35. *Id.* at 448–61 (Alito, J., dissenting).

recent authority relevant to the constitutional analysis.³⁶ Ten briefs were filed in the case, but neither party and no *amicus* informed the Court that in a 421-page omnibus military authorization bill in 2006, Congress included a half-page section that amended the Uniform Code of Military Justice to add the death penalty for child rape.³⁷ The votes on the omnibus bill were overwhelming, 95-0 in the Senate and 374-41 in the House.³⁸ Nor did any brief in *Kennedy* inform the Court that President George W. Bush had added the death penalty amendment to the Manual for Courts-Martial by executive order.³⁹ “We’re not talking about ancient history,” said the military law blogger. “This happened in 2006.”⁴⁰

News of *Kennedy*’s oversight quickly spread from coast to coast when Linda Greenhouse wrote a front-page story about the Court’s “factual flaw” in the *New York Times*.⁴¹ The White House Press Secretary told reporters that the Administration was “disturbed . . . that the Court’s decision might be based on a mistake.”⁴² In a letter to the Court, eighty-five Congress members asked the Justices to rehear the case because “a central factual basis for the majority opinion was not only incomplete, but inaccurate.”⁴³

The *Washington Post* editorialized that the Court should “show a little judicial humility” by rehearing the case.⁴⁴ The Justices seldom grant a petition for rehearing,⁴⁵ but the *Post* said that “[t]he Supreme Court’s legitimacy depends not only on the substance of its rulings but also on the quality of its deliberations Before the court

36. Dwight Sullivan, *The Supremes Dis the Military Justice System* (June 26, 2008), <http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html>.

37. Nat’l Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3264, § 553(a) (2006); 10 U.S.C. §§ 856, 920 (2000 ed., and Supp. V); MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV, Art. 120, ¶ 45.f(1), p. IV-78 (2008).

38. Roll call vote for H.R. 1815, 109th Cong. (Dec. 19, 2005) <http://www.govtrack.us/congress/bill.xpd?bill=h109-1815&tab=votes>.

39. Executive Order No. 13,447, 72 Fed. Reg. 56179 (Sept. 28, 2007).

40. Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, July 2, 2008, at 1.

41. *Id.*

42. Linda Greenhouse, *Justice Dept. Admits Error In Failure to Brief Court*, N.Y. TIMES, July 3, 2008, at 15.

43. *Rehberg Calls on Supreme Court to Reconsider Opposition to Death Penalty for Child Rapists* (July 10, 2008), http://www.house.gov/list/press/mt00_rehberg/071008_SUPCOChildRapePenalty.html (reproducing the letter).

44. Editorial, *Supreme Slip-Up*, WASH. POST, July 5, 2008, at 6.

45. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 15.5, at 814 (9th ed. 2007).

declares its final view on national opinion about the death penalty, it should accurately assess the view of the national legislature.”⁴⁶

Writing in the *Wall Street Journal*, Professor Laurence H. Tribe urged the Court to “revisit its seriously misinformed . . . ruling” because, “[p]articularly when the court’s division tracks the usual liberal/conservative divide, its credibility depends on both candor and correctness when it comes to the factual predicates for its rulings.”⁴⁷

The spotlight extended beyond the Court itself. The U.S. Solicitor General did not file a brief in *Kennedy*, but the Justice Department’s public affairs office responded to the military blogger’s revelation with a statement expressing “regret that the department didn’t catch the 2006 law.”⁴⁸ “It’s true that the parties to the case missed it,” said the Department, “but it’s our responsibility” to know about the federal law and inform the Court.⁴⁹

Counsel for the state of Louisiana admitted that the 2006 congressional amendment had simply “eluded everyone’s research.”⁵⁰ Defense counsel said that his research revealed only an older military capital punishment provision that “[w]e just assumed . . . was defunct. We figured if somebody in the government thought otherwise, we’d hear about it.”⁵¹

Louisiana’s petition for rehearing urged that the state’s “significant error . . . should neither inhibit the Court’s work nor diminish its fealty to the Constitution.”⁵² “[B]oth political branches,” the petition argued, “have recently and affirmatively authorized the death penalty for child rape. . . . Such a clear expression of democratic will, at the very least, calls into question the conclusion that there is a ‘national consensus against’ the practice.”⁵³

46. *Supreme Slip-Up*, *supra* note 44, at 6.

47. JONATHAN ADLER, *Tribe on Kennedy v. Louisiana*, THE VOLOKH CONSPIRACY (July 31, 2008), http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml#1217509784 (quoting Prof. Tribe’s July 31, 2008 article, *The Supreme Court is Wrong on the Death Penalty*); *The Supreme Court Is Wrong on the Death Penalty*, SEX OFFENDER RESEARCH: ISSUES, NEWS, RECIDIVISM (July 31, 2008), http://sexoffenderresearch.blogspot.com/2008_07_31_archive.html (same).

48. Linda Greenhouse, *supra* note 42, at 15.

49. *Id.*

50. Linda Greenhouse, *supra* note 40, at 1.

51. *Id.*

52. Petition for Rehearing at 3, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343) 2008 WL 2847069.

53. *Id.*

In its *amicus* brief supporting the state's petition for rehearing, the Justice Department reiterated its regret for not previously bringing the recent federal developments to the Court's attention. The Acting Solicitor General, however, argued that the Court's "erroneous and materially incomplete assessment of the 'national consensus' concerning capital punishment for child rape... undermines the foundation for the Court's decision."⁵⁴ "[R]ehearing is warranted," the Department concluded, "to ensure that a material omission in the decisionmaking process has not tainted the Court's decision on a matter of such profound constitutional, moral, and practical importance."⁵⁵

The Court became (in the words of the *Christian Science Monitor*) "a spectacle of sound and fury"⁵⁶ when it denied rehearing on the first day of its new Term but added footnotes and a few words to the majority and dissenting opinions before they reached the United States Reports.⁵⁷ Writing for the five-Justice majority that denied rehearing, Justice Kennedy explained that congressional authorization of the death penalty for nonfatal child rape in the military "does not draw into question [the] conclusions that there is a consensus against the death penalty for the crime in the civilian context."⁵⁸

The *Washington Post* found the explanation "unconvincing" and warned that "the court may have damaged, even if slightly, its own reputation" by "leav[ing]—deservedly or not—the impression that a majority of the court refused to hear new facts and alter their positions."⁵⁹

54. Mot. for Leave to File Br. and Br. for the United States as Amicus Curiae Supp. Pet. for Reh'g at 2 *Kennedy v. Louisiana*. (July 2008), <http://www.justice.gov/osg/briefs/2008/3mer/1ami/2007-0343.mer.post.html>.

55. *Id.*; see also *Kennedy v. Louisiana*, 129 S. Ct. 27 (Sept. 8, 2008) (order inviting the parties and the Department to file briefs "addressing not only whether rehearing should be granted but also the merits of the issue raised in the petition for rehearing"); Supplemental Br. for Resp't. in Supp. of the Pet. for Reh'g, *Kennedy v. Louisiana*, 2008 WL 4359580 (September 24, 2008).

56. Warren Richey, *Despite Gaffe, Supreme Court Won't Revisit Landmark Child-Rape Ruling*, CHRISTIAN SCIENCE MONITOR, Oct. 2, 2008, at 25.

57. *Kennedy*, 554 U.S. at 426 n.*, 459 n.6 (Alito, J., dissenting).

58. *Kennedy v. Louisiana*, 129 S. Ct. 1, 2 (2008) (statement of Kennedy, J., denying rehearing).

59. Editorial, *Case Closed*, WASH. POST, Oct. 2, 2008, at A22.

III. “Unless the Case . . . is Adequately Presented”

“Ours is an adversarial system, and courts rely on lawyers to identify the pertinent facts and law.”⁶⁰ This reliance, evident in *Lochner* and most recently in *Kennedy*, is a cornerstone of civil and criminal justice in the United States, but is not universal among western legal systems.

In the inquisitorial process that marks many European Continental systems, the trial judge investigates cases, calls and questions witnesses, and presents evidence; the parties’ lawyers generally assume subordinate roles, often limited to submitting questions that the judge may ask.⁶¹ Consistent with the court’s dominant role is the continental maxim, *iura novit curia* (“the court knows the law”), which suggests that regardless of the content or quality of counsel’s oral or written submissions in civil or criminal cases, the court will inevitably apply the relevant sources of law.⁶²

The American adversary system assumes that courts do not necessarily “know the law” unless the submissions of the parties and *amici curiae* present it, together with claims and arguments that the parties frame. As Justice Brandeis ascended to the Supreme Court bench in 1916, he advised that “[a] judge rarely performs his functions adequately unless the case before him is adequately presented.”⁶³ Judges and their law clerks sometimes engage in independent research when an apparent shortcoming appears in the parties’ treatment of issues properly raised, but the exercise imposes heavy institutional costs on courts that manage swelled dockets, and it remains the exception rather than the rule.⁶⁴

Recognition that even experienced judges might overlook statutes, precedents and other authorities that the parties fail to present is nearly as old as the American judicial system itself. The Supreme Court has long held that “[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled

60. *In re Cont’l Cas. Co.*, 29 F.3d 292, 295 (7th Cir. 1994).

61. See, e.g., Roberta Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 264–65 (2000).

62. See, e.g., P. OBERHAMMER & T. DOMEJ, *Germany, Switzerland, and Austria, in EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 295, 303 (C.H. van Rhee ed., 2005); C.H. VAN RHEE, *Introduction, in EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 185, 190 (C.H. van Rhee ed., 2005).

63. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916).

64. *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 407 (3d Cir. 1980) (“If the court is not supplied with the proper tools to decide cases, then extremely valuable time, already severely rationed, must be diverted from substantive work.”).

upon, are not to be considered as having been so decided as to constitute precedents.”⁶⁵ This holding, a safety valve designed at least partly to enable courts to decline invitations to give precedential effect to an issue previously missed or overlooked, dates from an opinion Chief Justice John Marshall delivered for the Court in 1805.⁶⁶

If anything, the sheer breadth and diversity of contemporary American law leaves judges more dependent than ever before on the parties’ adversary briefing. In recent decades, more and more lawyers have pursued specialty practices.⁶⁷ Specialization means that judges may come from private or public sector careers that exposed them regularly to only some of the substantive law that now fills their dockets. Relatively few lawyers practice civil and criminal law simultaneously, and intricate administrative rules and regulations often create doctrine most familiar to specialists.

The complexities that characterize the contemporary legal landscape leave much room for Chief Justice Marshall’s early holding. To this day, says Justice Antonin Scalia, “[j]udicial decisions do not stand as binding ‘precedent’ for points that were not raised, not argued, and hence not analyzed.”⁶⁸

Conclusion

Chief Justice William H. Rehnquist called *Lochner* “one of the most ill-starred decisions that [the Supreme Court] ever rendered.”⁶⁹ The New York Attorney General’s narrow defeat following his inadequate briefing reminds lawyers that no victory is “easy” until after entry of final judgment and exhaustion of the appellate process, that every case deserves full professional commitment regardless of the advocate’s personal feelings about the cause, and that deadlines and other law office constraints are poor excuses for half-hearted presentation.

Amid the sheer complexity of contemporary American law, the brief writers’ recent oversight in *Kennedy* reinforces the value of meticulous legal research, free from assumptions and reliance on

65. *Webster v. Fall*, 266 U.S. 507, 511 (1925).

66. *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) (“No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.”).

67. SOL LINOWITZ, *THE BETRAYED PROFESSION* 91–112 (1994).

68. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting).

69. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 205 (1987).

adversaries to point out potential shortcomings. No Justice today has a military law background that would have encouraged discovery of a death penalty provision, even one only two years old, in an omnibus military appropriations bill numbering more than 400 pages.

Speaking about the role of adversary briefing, one recent federal district court decision characterized the relationship between counsel and the court as “symbiotic.”⁷⁰ The characterization prevails in the Supreme Court and the lower federal and state courts alike. The Justices decided *Lochner* and *Kennedy* with the information that the parties provided them, a circumstance that recalls the 1885 instruction of then-Judge Oliver Wendell Holmes: “The law is made by the Bar, even more than by the Bench.”⁷¹

70. *Walter Oil & Gas Corp. v. Teekay Shipping*, 270 F. Supp. 2d 855, 865 (S.D. Tex. 2003).

71. Oliver Wendell Holmes, *The Law* (Feb. 5, 1885), in *SPEECHES BY OLIVER WENDELL HOLMES* 16, 16 (1934).

* * *