

Opening an Oral Argument before the Supreme Court: The Decline of Narrative's Role

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ABSTRACT

In contrast to previous eras, today's oral advocate can expect Supreme Court justices to start asking questions earlier and often. Consequently, the advocate should expect to launch the argument with only a few sentences before the questions begin. These critical sentences offer a brief opportunity to introduce the theme of the subsequent argument. Advocates in other "hot bench" courts face the same challenge.

Our study of opening statements in Supreme Court oral arguments finds that the statements have one of three themes: a conventional legal argument, a policy argument, or a narrative argument. The conventional legal argument is the most common, followed by the policy argument, followed by the narrative argument.

The dearth of narrative arguments—even as supplementary arguments—can have adverse consequences for the advocate seeking to be persuasive and the Court seeking to decide the case properly.

I. INTRODUCTION

In 1940, John W. Davis, the most prominent oral advocate of his era, gave his contemporaries advice on conducting an appellate argument. At the opening of an argument, he counseled, the attorney should state the nature of the case and, briefly, its prior history, state the facts, state the applicable rules of law on which the attorney relies, and "go for the jugular vein."¹ In 1951, Justice Robert H. Jackson advised advocates to "begin with a concise history of the case, state the holding of the court below and wherein it is challenged[,] . . . follow with a careful statement of important facts, and conclude with discussion of the law."²

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1. See John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896–97 (1940), *reprinted in* 3 J. APP. PRAC. & PROCESS 745, 748–50 (2001).

2. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L. REV. 1, 6 (1951).

In today's United States Supreme Court, however, this advice is out of date. Now, questions from the bench come fast and furiously and do not allow for extended opening statements. For example, in the 2005 case of *Kelo v. City of New London*,³ the attorney launched his argument with three sentences (spanning 38 seconds), then the justices began asking questions.⁴ The justices posed questions and made comments 62 times during the petitioner's thirty minute argument and 64 times during the respondent's argument.⁵ During the 1998–2007 Court terms, comments and questions by the justices totaled 87,941, averaging 133 questions per case or more than twice per minute of oral argument.⁶

The attorney can expect the justices to start asking questions before the advocate speaks more than a few sentences and thus prevent the advocate from offering much context for the substantive legal argument. Veteran Supreme Court advocate Seth Waxman has observed: "In all but the rarest of modern appellate courtrooms, for example, we litigate in an environment of interruption, not oration."⁷ Chief Justice John Roberts, Jr. has written, "Nowadays, the most uninterrupted time that an advocate is likely to get before the Supreme Court is a couple of minutes at the outset of argument."⁸

3. *Kelo v. City of New London*, 545 U.S. 469 (2005).

4. Oral Argument at 0:48, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04–108), <https://www.oyez.org/cases/2004/04-108>. Unless otherwise noted, all quotations from oral arguments and all statements relying on these arguments come from case reports on Oyez.org.

5. According to the oral transcriptions on Oyez.org, the attorneys each spoke just under the permitted 30 minutes. For a discussion of the problem of oral arguments crowded with questions, see Louis J. Sirico, Jr., *A Proposal for Improving Oral Argument Before the United States Supreme Court*, 42 PEPP. L. REV. 195 (2015).

6. See RYAN C. BLACK, TIMOTHY R. JOHNSON, & JUSTIN WEDEKING, ORAL ARGUMENT AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 20 (2012).

7. Seth P. Waxman, *In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century*, 3 J. APP. PRAC. & PROCESS 521, 530 (2001). Waxman's description of Supreme Court practice stands in contrast to the oral argument of John W. Davis in *Youngstown Steel and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, Davis spoke for 87 minutes, interrupted by only a single question. WILLIAM HENRY HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 476–77 (1973).

8. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 71 (2005).

Sometimes, an advocate may utter only a single sentence before the justices begin their questions.⁹

Our informal survey indicates that other courts vary in how quickly they tend to begin questioning the advocate.¹⁰ Writing about courts in general, Chief Justice Roberts has advised:

Forget what you may have learned about how to structure an argument: a review of the facts, the holding below, and so on. There simply isn't enough time. Try to have one opening sentence that tees up the issue in an advantageous way, and then proceed immediately to the meat of the argument. Most judges today are well prepared, will be bored by a recitation of the facts or holding below, and will move you to the heart of the case with questions if you tarry on background.¹¹

This state of affairs makes it important to begin oral argument with a brief persuasive statement before the questioning begins.¹² Chief Justice Roberts has recalled:

When I was preparing for Supreme Court arguments, I always worked very hard on the first sentence, trying to put in it my main point and any key facts, because I appreciated that the first sentence might

9. *E.g.*, Transcript of Oral Argument at 3, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No.12-696); Transcript of Oral Argument at 3, *Wood v. Moss*, 134 S. Ct. 2056 (2014) (No. 13-115).

10. See Georgetown Law Library, Briefs, *Oral Arguments and Other Court Documents Research Guide*, http://www.law.georgetown.edu/library/research/guides/briefs_arguments.cfm (including links to oral arguments in other courts). A number of individual state court websites provide links to oral arguments.

11. John G. Roberts, Jr., *Thoughts on Presenting an Effective Oral Argument*, *School Law in Review* 1997, 7–1, 7–4 (1997). Roberts has suggested that the justices “overdo it a bit” with their questions during oral argument. See *Roberts: Bench a little too hot during oral arguments*, D.C. DICTA (July 1, 2013), <http://lawyersusaonline.com/dcdicta/2013/07/01/roberts-bench-a-little-too-hot-during-oral-arguments/> (linking to *Roberts Says High Court Asks Too Many Questions*, YAHOO! NEWS (June 29, 2013), <http://news.yahoo.com/roberts-says-high-court-asks-too-many-questions-155314820.html>).

12. See Amy Bitterman, *In the Beginning: The Art of Crafting Preliminary Statements*, SETON HALL L. REV. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510949 (emphasizing the importance of effective preliminary statements in appellate briefs).

well be the only complete one I got out in the course of the argument.”¹³

The shift to the short opening statement calls for an analysis of its consequences for the advocate and the Court. Our study finds that oral advocates are focusing on traditional logical legal arguments and giving little attention to a case’s narrative. This article examines the opening statements that the lawyers for petitioners make in arguing before the Supreme Court. The study offers insight into what typical openings lawyers use, what the contents of openings suggest about what lawyers believe to be persuasive, and what the openings tell us about the importance of context for traditional legal arguments—or lack of importance. It further notes the adverse consequences for advocacy when narrative plays a diminished role.

II. THE STUDY

For this study, we downloaded the openings of the petitioners’ oral arguments on Oyez.org, which provides the arguments in both transcript and audio formats.¹⁴ We selected the oral arguments of the 2012, 2013, and 2014 Supreme Court terms in order to have the most recent complete terms as of this writing. Our goal was to categorize these openings into whatever typology emerged. What emerged was not a complex typology, but a simple one.

We eventually grouped the openings into three categories:

(1) conventional legal arguments, such as arguments based on the text of a document, statute or regulation,¹⁵ arguments

13. Roberts, *supra* note 8, at 71. According to the leading treatise on Supreme Court practice:

In this dynamic environment, the key is flexibility, and flexibility is a product of sound preparation. Counsel must expect to be interrupted within minutes or even seconds, and should not be thrown off by questioning that is both early and frequent. However, counsel must also be prepared to speak for a few minutes at the outset, arriving at the podium with a well-considered opening statement in mind.

STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 798 (10th ed. 2013).

14. In some instances, Oyez.org did not report the oral argument, and we located missing arguments elsewhere online.

15. See NOAH A. MESSING, *THE ART OF ADVOCACY* 113 (2013) (explaining textual arguments).

applying the law to the facts of the case,¹⁶ arguments based on legislative or statutory history,¹⁷ and arguments based on other historical information;¹⁸

(2) policy arguments, which are arguments urging resolution of an issue in a way that advances or protects a particular social value implicated in the issue;¹⁹ and

(3) narratives, that is, facts giving persuasive context to a party, the relevant events, and the law.²⁰

Our experience in categorizing these openings showed that any effort at creating subcategories would be overly refined and artificial. We found that in opening statements, conventional legal arguments predominated over policy arguments and particularly over narrative arguments.

For the 2012 term, our study found that of the 71 cases in which the Court heard oral argument, 47 of the opening statements relied on conventional legal arguments, 12 relied on policy arguments, and 12 relied on narratives.

For the 2013 term, our study found that of the 68 cases in which the Court heard oral arguments, 32 of the opening statements relied on conventional legal arguments, 21 relied on policy arguments, and 15 relied on narratives.

For the 2014 term, our study found that of 63 cases in which the Court heard oral arguments, 43 of the opening statements relied

16. *See id.* at 97 (explaining how to apply facts to arguments).

17. *See id.* at 125 (explaining arguments based on legislative history).

18. *See id.* at 147 (explaining historical arguments).

19. Here, we modify the definition proposed by Michael Smith: “A policy argument is an argument made by a legal advocate to a court that urges the court to resolve the issue before it by establishing a new rule that advances or protects a particular social value implicated by the issue.” *The Sociological and Cognitive Dimensions of Policy-Based Persuasion*, 22 J.L. & POL’Y 35, 39 (2013).

20. A narrative provides “just the new essential information and assumes the reader [or other audience] has adequate banks of relevant prior topical knowledge to create context and meaning.” KENDALL HAVEN, *STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY* 79 (2007). Technically, “narrative” and “story” have different definitions. A “story” gives more than information; it gives “a detailed, character-based narration of a character’s struggles to overcome obstacles and reach an important goal.” *Id.* Because the opening statements in the oral arguments that we studied are so short, they do not include enough information to constitute a story and perhaps have too much of a persuasive element to constitute a narrative. In any case, the terminological distinction has no bearing on this study, and we use the terms interchangeably.

on conventional legal arguments, 11 relied on policy arguments, and 7 relied on narratives.²¹

We counted only the initial petitioners' arguments. Thus, when two advocates argued for the petitioner, we omitted the second opening argument. In the rare cases in which the Court heard a reargument, we omitted the opening in the reargument.

To be clear, many openings included elements from more than one category. Almost all included at least some reference to a conventional legal argument. We categorized the openings according to the theme that predominated.

Here is an example of an opening employing a conventional legal argument. In *Walden v. Fiore*,²² the petitioner's counsel successfully argued that Nevada lacked personal jurisdiction over the defendant-petitioner. The attorney argued that Ninth Circuit's holdings were inconsistent with Court precedent and with a statute, respectively.

In holding that the—in holding that respondents could bring this *Bivens* lawsuit against Officer Anthony Walden in Nevada, the Ninth Circuit made two errors that independently require a reversal.

First, as to personal jurisdiction, the Ninth Circuit held that it was sufficient that respondents have connections to Nevada, and that Officer Walden allegedly targeted his conduct at them, knowing of their contacts with Nevada. That plaintiff-centered approach is inconsistent with this Court's precedence which emphasize that the defendant himself must have meaningful contacts with the forum State.

Second, as to venue, the Ninth Circuit relied on the fact that the respondents felt in Nevada the effects of Officer Walden's alleged conduct in Georgia. That similarly Plaintiff-centered approach is in conflict with the text of the venue statute, 1391(b)(2) which focuses on where the events or

21. We are not counting one case in which the attorney's opening was interrupted so quickly that we could not classify his words. Oral Argument, *Reyes Mata v. Lynch*, 135 S. Ct. 2150 (2015) (No. 14–185), <https://www.oyez.org/cases/2014/14-185>. We also are not counting one case in which Justice Scalia began questioning before the attorney was able to begin her argument. Oral Argument, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, (2015) (No. 13–1412), <https://www.oyez.org/cases/2014/13-1412>.

22. 134 S. Ct. 1115 (2014).

omissions giving rise to the claim occurred, not where the impact of those events or omissions may be felt.²³

Next is an example of an opening statement employing a policy argument. In *CTS Corp. v. Waldburger*,²⁴ the petitioner's counsel successfully argued that the statute of limitations for CERCLA (Comprehensive Environmental Response, Compensation and Liability Act) does not preempt a state statute of repose. The attorney argued that the policy of federalism and other considerations required a narrow reading of the federal statute.

CTS should prevail here based on the text of Section 9658 as well as its structure, historical context, and other relevant considerations, all of which make clear that it is a federalism comprise [sic]²⁵ having no effects on statutes of repose. Section 9658 should be construed narrowly to do the one thing that Congress intended it to do, which is to postpone in some situations a single State law statute of limitations commencement date.²⁶

Lastly, here is an example of an opening statement employing a narrative. In *Lozano v. Alvarez*,²⁷ the petitioner's counsel unsuccessfully argued that the policy of equitable tolling applies to the Hague Convention's provision on international child abduction. Equitable tolling pauses the running of a statute of limitations when a litigant has diligently pursued his or her rights. The narrative displays the emotive appeal of the petitioner's plight.

I represent Manuel Jose Lozano, a father who loves his daughter. Respondent kidnapped that daughter and concealed her from Mr. Lozano, first in the United Kingdom for nearly eight months; then in France, then in the United States. In *Abbott*, this Court recognized child abduction to be one of the worst forms of child abuse, and that the Convention therefore aims to deter and prevent child abduction

23. Transcript of Oral Argument at 3–5, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12–574).

24. 134 S. Ct. 2175 (2014).

25. “Comprise” appears to be a misspelling of “compromise.”

26. Transcript of Oral Argument at 3, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014) (No. 13–339).

27. 134 S. Ct. 1224 (2014).

from occurring in the first instance. Equitable tolling furthers that aim. By contrast the rule adopted by the Second Circuit provides a playbook for thwarting the Convention.²⁸

As these examples suggest, with any effort at categorizing, not all items easily fall into the available categories. For example, in *Burt v. Titlow*,²⁹ the Michigan Solicitor General successfully argued that under the highly deferential standard of review, the state prisoner here could not ask a federal court to set aside a sentence for ineffective assistance of counsel.

No court has ever held that AEDPA [Antiterrorism and Effective Death Penalty Act] and *Strickland* can be satisfied by presumption based on a silent record.

Yet that is precisely the approach the Sixth Circuit adopted in granting habeas relief here.

The record doesn't say how attorney Toca [the criminal defendant's trial lawyer] investigated or what advice attorney Toca gave, but based on that record silence, the Sixth Circuit assumed Toca was ineffective.

And under AEDPA and *Strickland*, the presumptions run the opposite way.

Now, if there's one thing that the Court takes away from the oral argument this morning, I hope that it's — it's this: How upside down the Sixth Circuit's analysis is when it says on Page 19A of the petition appendix that Toca was deficient because the record contains no evidence that he advised Titlow about elements, evidence, or sentencing exposure.

The correct question is whether the record contains evidence that Toca did not do those things.

And that record silence is dispositive in favor of the State on habeas review.

Now, if we could pull the curtain back and see what really happened here, it may be the case that Toca gave the proper advice, that he advised Titlow

28. Transcript of Oral Argument at 3, *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014) (No. 12–820).

29. 134 S. Ct. 10 (2013).

about all the perils of going to trial, and that Titlow continued to maintain her innocence.

Under *Strickland*, we're supposed to presume that Toca did exactly that, especially when it's Titlow's burden to satisfy the burden of proof, and she failed to do that.

So I'd like to begin with our first issue, which is AEDPA deference and the performance prong of *Strickland*.³⁰

Although this comparatively lengthy opening statement (one minute, twenty-seven seconds) arguably could be classified as either a conventional legal argument or as a predominantly narrative argument, we classified it as a conventional legal argument, because the argument focused on the legal argument, though bolstered by the narrative. In any case, certainly other classifiers would differ in how they would categorize specific opening statements. We believe, however, that they would reach an aggregate result close to ours.

III. THE DECLINE OF NARRATIVE OPENINGS

Even in the openings that we classified as conventional legal arguments or as policy arguments, rarely is there any subsidiary narrative strand. In comparison, in the days of long openings, lawyers enjoyed the freedom of discussing the facts at length and building a persuasive narrative. Prominent lawyers of that time emphasized the importance of this practice. For example, in his famous 1940 speech on arguing appeals, John W. Davis advised:

A case well stated is a case far more than half argued. Yet how many advocates fail to realize that the ignorance of the court concerning the facts in the case is complete, even where their knowledge of the law may adequately satisfy the proverbial presumption. The court wants above all things to learn what are the facts which give rise to the call upon its energies; for in many, probably in most cases, when the facts are clear there is no great trouble about the law.³¹

30. Transcript of Oral Argument at 3–4, *Burt v. Titlow*, 134 S. Ct. 10 (2013) (No. 12–414).

31. Davis, *supra* note 1, at 750.

As our study shows, the viewpoint of today's advocate is markedly different. To explain the decline of narrative, we offer two explanations. First, the attorney may believe that the justices find narrative relatively insignificant in their deliberations. Second, the attorney may believe that justices prefer advocates to confine narrative argument to the brief, given the time constraints of oral argument.

A. *A Perception that Today's Justices Find Narrative Less Persuasive than Conventional Legal and Policy Arguments*

The shift away from narrative suggests that attorneys assume the justices are more interested in conventional legal argument and policy arguments as frameworks for deciding cases.

For example, in *Kelo v. City of New London*,³² a regional agency condemned the property of several individuals, including the home of lead petitioner Susette Kelo, in a working class area. The agency acted to make room for Pfizer, a pharmaceutical corporation that promised to open facilities in New London and revitalize the economically depressed city. Kelo unsuccessfully argued that the Constitution did not permit using eminent domain for general economic development, and that therefore the agency had acted invalidly.³³

The facts in the case made for a compelling story. Kelo, a single nurse had purchased her dream house where the Thames River meets Long Island Sound and had spent her resources restoring it. Now, a city and a corporation were planning to tear her house down. Proof of the story's power came after the Court rendered its decision when many were outraged that the government's power was so extensive. In response, over 43 states amended their statutes to limit the exercise of eminent domain.³⁴ In their brief, Kelo's lawyers acknowledged the personal narrative in the Statement of the Case:

Petitioner Susette Kelo, a registered nurse, lives down the block from the Derys at 8 East Street. She purchased the Victorian-era house in 1997 and since that time has made extensive improvements to it. She loves the water view from her home, the

32. 545 U.S. 469 (2005).

33. See *id.* at 472–77; JEFF BENEDICT, *LITTLE PINK HOUSE* (2009) (narrating the story of the case).

34. See Ann Marie Cavazos, *Beware of Wooden Nickels: The Paradox of Florida's Overreaction in the Wake of Kelo*, 12 U. PA. J. BUS. L. 685, 697 (2011).

people in the area, and the fact that she can get in a boat and be out in the Long Island Sound in less than ten minutes.

Wilhelmina Dery, Susette Kelo, and their neighbors, the other Petitioners in this case, stand to lose their homes through eminent domain to make way for private business development in the hope that the new development projects will create more tax revenue and jobs than the homes that currently occupy this peninsula of land along the Thames River. Petitioners have poured their labor and love into the fifteen homes they own in total. They are places where they have lived for years, have raised their families, and have grown old. Petitioners do not want money or damages. They only seek to stop the use of eminent domain so that they may hold on to their most sacred and important of possessions: their homes.³⁵

At oral argument, however, Kelo's attorney apparently decided that the justices would find the narrative of little interest. Therefore, he chose to open with a policy argument and never highlighted the narrative:

This case is about whether there are any limits on government's eminent domain power under the public use requirement of the Fifth Amendment. Every home, church or corner store would produce more tax revenue and jobs if it were a Costco, a shopping mall or a private office building. But if that's the justification for the use of eminent domain, then any city can take property anywhere within its borders for any private use that might make more money than what is there now.³⁶

Ironically, Justice Ginsburg brought this opening statement to a close with a question offering a narrative favoring the respondents:

Mr. Bullock, you are leaving out that New London was in a depressed economic condition, so

35. Brief of Petitioners at 2–3, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04–108).

36. Oral Argument at 0:49, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04–108), available at <https://www.oyez.org/cases/2004/04-108>.

this is distinguished from the case where the state has no particular reason for wanting this, but the critical fact on the city side, at least, is that this was a depressed community and they wanted to build it up, get more jobs.³⁷

Thus, even in a case with a powerful narrative, the advocate cast it aside in favor of a conventional policy argument.

The belief that appellate judges are uninterested in narratives may be open to question.³⁸ In one limited study, judges and other legal professionals read two sets of briefs. One set provided legally relevant facts and tightly focused on legal precedents and legal reasoning. The second set intertwined an appealing story with the argument.³⁹

Most readers found the second set of briefs more persuasive. These readers mostly included appellate judges, appellate staff attorneys, practitioners, and law professors.⁴⁰ Appellate law clerks divided evenly between the two sets.⁴¹ The latter group consisted of those individuals with the least experience and the individuals closest to their law school training, which likely emphasized narrow legal reasoning.⁴² In the aggregate, those individuals who had held their current positions for a long time generally found the story briefs more persuasive.⁴³ Presumably, this study of written briefs has relevance to persuasiveness in oral argument and shows the power of narrative.

A number of scholars have emphasized the interplay between narrative and conventional legal reasoning.⁴⁴ The focus on conventional legal reasoning, then, fails to employ all methods of reasoning and persuasion that might influence a court.

37. *Id.*

38. A narrative opening need not consist of a statement of the facts of a case. Presumably the Court is well versed in them. The narrative highlights key facts in order to give context to the legal argument and introduce a persuasive theme to a case. See SHAPIRO, ET AL., *supra* note 13, at 798 (noting the importance of facts and advising that “the presentation of facts must be woven into the fabric of the oral argument and its legal development”).

39. Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 LEGAL COMM. & RHETORIC: JALWD 1, 10–18 (2010).

40. *Id.* at 20.

41. *Id.*

42. *Id.* at 29–30.

43. *Id.* at 21–22.

44. See, e.g., *infra* notes 55–59.

B. *A Perception that Today's Justices Find Narrative Dispensable in Oral Argument*

Attorneys may believe that given the limited time for oral argument, going to the legal heart of the case leaves no time for the narrative. Thus, oral arguments focus on legal arguments, and to a lesser degree, policy arguments. As a result, the legal argument may be deprived of the rich context that narrative offers.

Consequently, the appellate brief—not the oral argument—has become the place to emphasize the narrative argument. This shift aligns with the long, gradual trend moving the central focus of the client's entire argument from the oral argument to the appellate brief.⁴⁵

As for oral argument, initially, the Court followed the British practice of hearing lengthy oral arguments and not imposing time limitations. Not until 1849 did the Court restrict the length of oral argument, and then it limited them to two hours per lawyer unless the Court granted special leave for longer arguments, which it would permit on occasion.⁴⁶ For example, in the *Dred Scott*⁴⁷ case, the Court allotted each counsel three hours, and on reargument, it heard twelve hours of oral argument.⁴⁸

Over time, the Court limited the length of oral arguments. In 1858, it limited each side to two oralists and limited each side to two hours of argument unless it gave special permission for longer arguments.⁴⁹ In 1911, the Court changed the time limits for oral argument yet again, this time determining the length allowed by category.⁵⁰ The general rule was to allow each side one and a half hours of oral argument, though cases concerning the jurisdiction of the court below and certain criminal appeals were limited to forty-five minutes per side.⁵¹ It also limited oral argument to thirty minutes per side for the summary document, forty-five minutes per side in certified cases, and one hour each per side in other cases on the regular docket. In 1970, the Court revised its rules again. Oral arguments were now set for one half-hour per side, barring special

45. See Sirico, *supra* note 5, at 205 (discussing in more detail the history briefly summarized here).

46. *Id.* at 201.

47. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

48. Sirico, *supra* note 5, at 205.

49. *Id.* at 206.

50. *Id.* at 207.

51. *Id.*

permission, and each side was limited to one oralist, again barring special permission.⁵²

As for briefs, not until 1795 did the Court request attorneys to furnish it with a statement of the material points of the case.⁵³ In 1849, it increased its emphasis on written argument by requiring the attorneys to file a detailed printed abstract of the case.⁵⁴ In 1872, it required briefs to contain the following: a concise statement of the case; an assignment of errors; a brief of the argument containing a clear statement of the points of law and the relevant facts; a setting out of the charge of a court, when relevant to the argument; and a quotation of the full substance of any evidence that was admitted or rejected. In 1911, the Court revised and detailed the required contents for a brief. In 1970, it again revised its rules on the content of briefs. 1980 marked the first time that the Court imposed page limitations on briefs. In 2010, the Court moved from prescribing page limitations to prescribing maximum word counts to limit the length of briefs.

As this history demonstrates, the Court gradually chose to limit oral argument and increase reliance on written argument. Because narrative arguments usually take more time to develop, the Court, directly or indirectly, has dissuaded oral advocates from employing their limited time at the podium to tell the story of the case. Consequently, advocates infrequently focus on narratives in their opening statements.

IV. THE IMPLICATIONS OF DIMINISHING THE NARRATIVE ARGUMENT

The diminution of the narrative in the oral argument has consequences for advocacy in the appellate brief, the growing academic interest in persuasive narrative, and the role of narrative in serving as a check on logical legal reasoning.

The telling of a persuasive narrative has shifted to the brief. However, the mindset that deemphasizes the narrative in the oral argument also will deemphasize it in the brief. Moreover, consigning the narrative to the brief prevents the oral advocate from emphasizing what may be a compellingly persuasive story in the eyeball-to-eyeball dialogue with the court. The advocate thus fails to maximize the power of the client's story.

52. *Id.* at 208.

53. *Id.* at 202.

54. *Id.* at 205.

The diminution of narrative runs contrary to current explorations into persuasion. A growing literature emphasizes employing narrative in persuasive argument.⁵⁵ With its roots in rhetoric,⁵⁶ cognitive research,⁵⁷ and fiction writing,⁵⁸ the literature argues that humans innately find stories the best road to understanding.⁵⁹ The most profound root reaches back to Aristotle's

55. See, e.g., PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* (2014) (focusing on storytelling in trials); RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, *YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING* (2012) (emphasizing the teaching of storytelling in first year Legal Writing courses); Nancy Levit, *Legal Storytelling: The Theory and the Practice—Reflective Writing Across the Curriculum*, 15 LEG. WRITING 259 (2009) (advocating more teaching of storytelling across the law school curriculum). The Legal Writing Institute and the Clinical Legal Education Association cosponsor the Biennial Applied Legal Storytelling Conference, which has an online presence at http://lwionline.org/applied_storytelling_conferences.html.

56. E.g., J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEG. COMM. AND RHETORIC 67 (2013) [hereinafter Rideout, *A Twice-Told Tale*]; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING 54 (2008) [hereinafter Rideout, *Storytelling*].

57. E.g., ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE & MIND* (2001).

58. E.g., Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001); Cathren Koehlert-Page, *Come a Little Closer So That I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399 (2011); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U.L. REV. 767 (2006).

59. Narrative helps understand the law:

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.

Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983). “Stories help us create knowledge, reinforce knowledge, and change existing knowledge and beliefs. They are a primary form of human communication.” Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING 3, 7 (2008).

categorization of the modes of persuasion—logos, ethos, and pathos. Narrative is rooted in pathos, the appeal to emotion.⁶⁰ The narrative of a case, then, gives context to a conflict and may play a central role in determining the outcome of a case.

Some might argue that logical reasoning acts as a restraint on narrative; however, narrative may act as a restraint on logical reasoning. Consider how essential to an argument are the qualities of narrative fidelity, external narrative coherence, and external narrative coherence.

According to this argument, a judicial decision must “ring true” with the stories that the audience knows to be true from its experience; that is, the argument must have “narrative fidelity.”⁶¹ Further, it must accept a narrative that is plausible; that is, the argument must have “narrative coherence.”⁶² Narrative coherence requires “external coherence;” that is, the narrative must correspond with the audience’s background social knowledge and cultural presuppositions.⁶³ Narrative coherence also requires “internal coherence”; that is, all the aspects of the narrative—the plot, the characters, the setting—must join together without contradictions.⁶⁴ Thus, diminishing the role of narrative diminishes the validity and plausibility of the logical legal argument.

In *Kelo v. City of New London*, for example, the Court endorsed the story of a dying city whose only hope was accommodating a major corporation that wanted to move in and generate jobs and economic development.⁶⁵ The accommodation required condemning residential property and compensating the property owners for their economic loss. This story would ring true with acceptance of the doctrine of eminent domain and its very long history (narrative fidelity). Further, the story corresponds with the legal audience’s background social knowledge and cultural presuppositions about the powers and responsibilities of government. In addition, the story is internally consistent.

On the other hand, the Court could have endorsed a contrary story of a hard-working woman who lost her cherished home because of an oppressive and insensitive government. This story

60. ARISTOTLE, *RHETORIC* bk. 1, at 1356a (W.D. Ross ed., W. Rhys Roberts trans., Oxford rev. ed. 1959) (c. 350 B.C.E.); LOUIS J. SIRICO, JR. & NANCY L. SCHULTZ, *PERSUASIVE LEGAL WRITING* 12–14 (4th ed. 2015) (explaining pathos).

61. Rideout, *Storytelling*, *supra* note 56, at 69–78.

62. Rideout, *A Twice-Told Tale*, *supra* note 56, at 71; Rideout, *Storytelling*, *supra* note 56, at 64–66.

63. Rideout, *A Twice-Told Tale*, *supra* note 56, at 71–74.

64. *See id.* at 74–77.

65. 545 U.S. 469, 472–75 (2005).

would ring true with closely held notions of private property rights and individual freedom. Further, it corresponds with the audience's presupposition that there must be some limitation on the government's power to exercise eminent domain. In addition, the story is internally consistent.

With two such powerful narratives, it is no wonder that some justices (the majority) adopted the first one, and some adopted the second.⁶⁶ In any case, the persuasiveness of the narratives would justify highlighting them at the start of the oral argument. However, neither advocate did so. Yet, based on the public outcry following the decision, the second narrative captured public opinion and led to legislative change narrowing the scope of eminent domain in many states.⁶⁷ Thus, the second narrative proved persuasive in other sectors of American government. That narrative persuaded the public and the politicians to reject the conventional legal argument that most likely had the best chance of winning in the courts. So, perhaps the takeaway is that Kelo's attorney missed an opportunity to strengthen his argument.

V. CONCLUSION

With the shift to short openings for oral argument and aggressive questioning by the justices, the oral advocate has moved from an introduction highlighting a narrative theme to one that relies on conventional legal and policy arguments. The advocate

66. For example, in the majority opinion, Justice Stevens emphasizes the economic plight of New London:

Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

Id. at 473. In her dissent, Justice O'Connor portrays the homeowners as victims in a contest between powerful and the powerless:

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

Id. at 505. Justice Stevens, Souter, Ginsburg, and Breyer were in the majority, with Justice Kennedy concurring. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas dissented.

67. See Cavazos, *supra* note 34, at 697.

apparently believes that the justices find narrative arguments not particularly persuasive or that the justices prefer to have this argument confined to the brief. With the decline in narrative arguments, however, advocates may be losing a persuasive tool, and the justices are depriving themselves of critical context for their case deliberations.