

## Mayer Brown in the Supreme Court of the United States

### A Brief History of the First Hundred (or so) Years

Today, Mayer Brown LLP is widely regarded as having the nation's preeminent Supreme Court practice. The current members of the firm's Supreme Court and Appellate Practice Group have presented approximately 220 Supreme Court arguments—a breadth of experience that is unrivaled in the American legal profession. Indeed, of the five authors of the authoritative treatise on the High Court—*Supreme Court Practice*—three (Kenneth Geller, Stephen Shapiro, and Timothy Bishop) are current Mayer Brown partners.

What may be less widely recognized than our current accomplishments is that Mayer Brown's Supreme Court practice is almost as old as the firm itself. What follows is a brief, anecdotal history of that practice.

### The Early Years

The law firm that would eventually become known as Mayer Brown came into being in 1881 when Levy Mayer, a Chicago native who had recently graduated from Yale Law School (which he entered at the age of 16), joined forces with Adolf Kraus, an established Chicago attorney. Mayer was a multi-talented general practitioner (who was prominently mentioned as a possible replacement for Justice Lamar in 1916), and he conducted some of his most important advocacy in the U.S. Supreme Court.

Mayer's first Supreme Court case was not, however, one of his successes. *Swan Land & Cattle Co. v. Frank*, 148 U.S. 603 (1893)—the first case argued by a Mayer Brown attorney in the Supreme Court—presented the following question:

Whether the circuit courts of the United States can properly entertain jurisdiction of a suit in equity which unites and seeks to enforce both legal and equitable demands, when the right to the equitable relief sought rests and depends upon the legal claim being first ascertained and established, and where the person against whom such legal demand is asserted is not made a party defendant; or, stated in another form more directly applicable to the present case, can a party having a claim for unliquidated damages against a corporation, which has not been dissolved, but has merely distributed its corporate funds among its stockholders, and ceased or suspended business, maintain a suit on the equity side of the United States circuit court against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment, and without making the corporation a defendant and bringing it before the court?

*Id.* at 604. Remarkably, at least to modern eyes, the Court was of the opinion that this question “hardly needs or requires more than its bare statement to indicate the answer that must be made thereto”! *Id.* at 604-05. (The apparently obvious answer was “no.”) One imagines that Levy Mayer at least took some comfort in the dissenting opinion of Mr. Justice Brown: “I concur in the opinion of the court that the question involved in this case needs little more than its bare statement to indicate the answer that should be made to it, but I do not concur in the answer made by the court.” *Id.* at 613.

Mayer found success before the Court in *Keatley v. Furey*, 226 U.S. 399 (1912), a corporations case in which he convinced a unanimous Supreme Court, speaking through Justice Holmes, that it lacked jurisdiction to hear his adversary's appeal. Mayer also prevailed in *Ferris v. Frohman*, 223 U.S. 424 (1912), a copyright case in which he persuaded a unanimous Court—on the strength of his brief alone, without even having to come to Washington to argue the case—that a public performance of a play in England does not deprive the copyright owners of their common-law right in the United States to protection against unauthorized performance, even though, in England, the first public performance of a play constitutes a waiver of common-law protection.

The description by Francis Matthews, an associate at the firm at the time, of another Supreme Court case in which Levy Mayer was involved (*New Jersey v. Anderson*, 203 U.S. 483 (1906)), offers an intriguing look into the peculiar intricacies of Supreme Court practice around the turn of the century:

In 1904 we were retained by the State of New Jersey to test out the question whether the franchise tax levied by the State upon the capital stocks of its corporations was a tax entitled to preferential payment in a bankruptcy proceeding. At the time most of the corporations with large capital were organized in New Jersey and the revenue received by the State from the imposition of franchise taxes was so large that it was not necessary for the State to levy general taxes. The State could surely claim, as one of the lower courts said, that taxes "are the wheels of government; and when taken away or clogged, government ceases to move; or rolls with a rickety and uncertain motion."

The situation was a peculiar one. One New Jersey Court had held that the franchise tax was not a tax but an arbitrary imposition (as all taxes really are). Another New Jersey Court had held that the franchise tax was a tax. There were two Federal decisions in other states, one holding one way and one the other, each relying on the New Jersey decision supporting its conclusion, and neither decision referred to the other. It was in this situation that the State concluded to make a final test of the question and the opportunity came in a bankruptcy proceeding in Chicago involving a New Jersey corporation. We filed the State's claim in that proceeding asserting priority. The Referee decided against us and his action was affirmed by the Judge of the District Court, and then by the Court of Appeals. We filed a petition for an appeal to the United States Supreme Court based on the conflict in the decisions of the lower courts, which appeal was allowed.

I drafted the brief for the Supreme Court and it was set up in type at the printers [in Chicago] awaiting Levy Mayer's revision on his return from a trip to New York. In this state of the matter we were surprised one morning to receive a telegram from the Clerk of the Supreme Court that the case would be on the call the following morning. The rules required that the briefs be on file, and that any oral arguments be made, at that time. We asked opposing counsel to extend the time to file briefs and to waive the oral argument, which they declined to do. We could not get the briefs printed in time to catch the Washington train but they were ready in the early afternoon, barely in time for me to take the New York train. I got off at Harrisburg in the very early morning at which point I took a milk train to Washington and arrived about noon without baggage. In the

meantime one of the Assistant Attorney Generals of New Jersey had driven in an auto across the state and caught the midnight train to Washington. We met in the Supreme Court and I had an opportunity to acquaint him with the case.

The case was reached about 4 o'clock in the afternoon and as opposing counsel were not present and had no brief on file, the case was discussed in an informal way, which was very satisfactory. The Court was impressed with the unique situation presented by the conflicting decisions. At the conclusion of the hearing the Attorney General of the United States came into court and asked the court to give opposing counsel an opportunity to file a brief, an opportunity they had denied to us. It seems that they discovered we had found a way to get to Washington in time for the hearing. We did not deem it wise to object but the Court allowed us time for a reply and we took full advantage of that. The Court reversed the lower courts by a five to three vote. Opposing counsel afterwards expressed themselves that if they had been present the result might have been different and that they had learned a lesson in professional courtesy. And if I had not caught that train we may not have been successful.

Perhaps Levy Mayer's most important arguments in the Supreme Court were made on behalf of the liquor industry in its battle against prohibition. In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), Mayer challenged on Takings Clause and Tenth Amendment grounds the constitutionality of the War-Time Prohibition Act, which made it illegal to sell alcoholic beverages in the United States during the First World War. And in *Rhode Island v. Palmer (The National Prohibition Cases)*, 253 U.S. 350 (1920), Mayer argued that the Eighteenth Amendment was invalid for a variety of procedural and substantive reasons. The Court rejected his arguments, but refused to divulge its reasoning. Mayer's biographer, Edgar Lee Masters, had this to say of the oral argument in the *Palmer* case:

Mr. Mayer's oral argument was a marvel of condensation and directness and went straight to the mark on all the points involved. He was frequently interrupted with questions by the Chief Justice and various members of the court. His argument showed that he had every detail and every fact in every decision applicable at the end of his tongue. At the conclusion of his oral argument he rose to a very high level of eloquence. He was asked by one of the Justices whether the Tenth Amendment was subject to amendment, which was asking if the powers not delegated by the States to the United States might be taken away from the states, and whether the rights reserved to the states by not being granted might be annihilated by the same procedure which brought about the prohibition movement. Indeed, to ask the question was to raise the point whether the police power of the states, which had been invaded by the Eighteenth Amendment, could be taken from them by it. Mr. Mayer's answer to the inquiring Justice was this:

"No, sir, it [Tenth Amendment] is not subject to amendment in my judgment except with the consent of every state. You are coming to the fork of the roads. In one direction lies the unlimited power of amendment; in the other the slogan 'back to the Constitution.' By the Census of 1910 a minority of our population, 40,000,000, resided in thirty-six states, while the majority, 50,000,000, resided in twelve states. [Thus, if the Tenth Amendment is subject to amendment, it is] permissible under Article Five for two-thirds

\* \* \* of a quorum [—that is, a mere minority—] of each House ratified by the Legislatures of three-fourths of the states which contain a minority of the population to change the Constitution, to abolish this Court, and to eradicate Article Three which provides for the judicial power of this and other Federal courts. It will not do to say that the people are too wise to do this. This court has turned down the argument over and over again. The claim that the delegation of power should not be checked because it will not be abused is no answer to the charge that power does not exist. As Chief Justice Marshall said in *McCulloch v. Maryland* (4 Wheaton 316), what state would entrust itself as a member of the Constitution of this Union if it knew that any other state could take away its power of local self-government? The theory of our government and the protection and preservation of our institutions does not rest upon confidence, that great Chief Justice proclaimed. [I]f the provision in Article Five is the only \* \* \* limitation on the power to amend the charter of this government, and of our political existence, then the presidency may be abolished. A republican form of government may be annihilated, or a state religion established. Article Five itself, which provides for an amendment by three-fourths of the legislatures, can itself be repealed or reduced to a minority. The very proposition is staggering and it does not make any difference whether we are discussing whiskey or the sugar of Louisiana or the cotton of South Carolina, or the tobacco of Maryland and Connecticut, or the hops of Washington. I rise above the question that this concerns intoxicating liquors. I dwell upon the principle that is involved. Should the Constitution be uprooted? In a learned discussion to which I listened yesterday, one of Your Honors [Brandeis, J] referred to the fact that the minority of to-day may become the majority of to-morrow. Is it an idle proposition, is it an opium dream to suggest in this august presence the possibilities that may result from changes in political and social policies and theories, from wise and unwise, sane and insane agitation and clamor? If you remove that which the Constitution was for, as much as anything else, the protection of the minority against the majority—if you remove this check and balance, where do you leave this government and its future? Yes, the question is more than the prohibition of intoxicating liquors. The police power of the states is synonymous with sovereignty, with the state itself. Remove the police power from the state and no state exists. There is practically nothing within the exercise of the sovereign governmental powers of the states that does not finally find root in the police power as it is understood in American government. Would the thirteen original states have ever formed this Union if they believed that their sovereign power of local self-government could be destroyed without their consent?"

Another early Mayer Brown partner who had a substantial Supreme Court practice was Thomas A. Moran, a former Illinois Appellate Court judge who joined the firm in 1892. One of Moran's most memorable victories, obtained for the Illinois Trust and Savings Bank, was *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898), in which Moran convinced the Court to reject an equal protection challenge to certain provisions of the Illinois inheritance tax laws. Perhaps the most noteworthy aspect of this case is that Moran's opponent was former President Benjamin Harrison, who argued the cause for the losing side.

Another interesting case of Moran's was *Ambrosini v. United States*, 187 U.S. 1 (1902). In his memoirs, Francis Matthews described the *Ambrosini* case:

Fifty cents was the amount involved in the suit of *Peter Ambrosini v. The United States* decided by the United States Supreme Court. Ambrosini \* \* \* operated a saloon in Chicago. To secure his license he was obligated by City ordinance to furnish a \$300 bond with sureties conditioned that he would observe all ordinances, etc. The War Revenue Act required a 50-cent revenue stamp to be affixed to all bonds. Ambrosini was indicted for failure to affix such a stamp to his bond. We defended the suit in order to make a test case. Ambrosini was found guilty and fined. We prosecuted an appeal to the Supreme Court on the ground that the bond was required as a part of the law regulating the sale of intoxicating liquors and it was therefore an instrumentality of the State in the exercise of its sovereign powers which it was beyond the power of the Federal Government to tax. This view was upheld by the Supreme Court, which followed the famous decision of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, that "the power to tax involves the power to destroy" and that if the Federal Government could require a 50¢ stamp by way of tax it could make the tax prohibitive and thus interfere with the State's power to regulate liquor traffic. After this decision Levy Mayer sent for Ambrosini and told him that the Supreme Court had upheld his constitutional rights and he was quite impressed.

Alfred S. Austrian, who entered the firm after graduating from Harvard Law School in 1891, was perhaps best known for his representation of Charles Comiskey in connection with the 1919 "Black Sox" scandal, but he was also a prolific Supreme Court litigator. Austrian litigated a series of constitutional law cases seeking to overturn various statutes on due process and equal protection grounds. For instance, in *Dreyer v. Illinois*, 187 U.S. 71 (1902), Austrian argued that the use of parole boards—still a new concept at the time—violated the Due Process Clause by vesting judicial power in the hands of executive officers. In addition, emboldened by the philosophy of the *Lochner* era, Austrian unsuccessfully attempted to convince the Court: (1) that the grading of a municipal license fee for theaters according to the price asked for the highest priced seats, rather than according to revenue, constituted a denial of equal protection (*Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61 (1913)); and (2) that a California statute that criminalized the keeping of billiard or pool tables for hire except by large hotel keepers constituted a denial of equal protection and substantive due process (*Murphy v. California*, 225 U.S. 623 (1912)). In the latter case, the Court remarked: "That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons." *Id.* at 629. Austrian indeed faced an uphill battle against precedent in that case: "For Lord Hale in 1672 (*Rex v. Hall*, 2 Keble, 846) upheld a municipal bylaw against keeping bowling alleys because of the known and demoralizing tendency of such places." *Murphy*, 225 U.S. at 630.

Like Austrian, Levy Mayer also undertook to convince the Court to extend its *Lochner*-era laissez-faire jurisprudence. In *Stafford v. Wallace*, 258 U.S. 495 (1922), Mayer was able to persuade only Justice McReynolds—the most conservative of the anti-New Deal "Four Horsemen"—that the Packers and Stockyards Act of 1921, which regulated business practices in the meat industry, exceeded Congress's power under the Commerce Clause.

Levy Mayer was not the only Supreme Court advocate in the family. His brother, Isaac Mayer, argued for the firm on behalf of the Wrigley Company in an unfair competition case (*L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.*, 277 U.S. 97 (1928)), and his nephew, Richard Mayer, argued two cases for the firm: a banking case (*City of Marion v. Sneed*, 291 U.S. 262 (1934)), and a price-fixing and unfair competition case (*Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936)).

It was also around this time that the firm hired its first of many former Supreme Court law clerks: Irving B. Goldsmith, a 1926 graduate of Harvard Law School, joined the firm following his clerkship with Justice Brandeis. The firm in general and the Supreme Court and Appellate Practice Group in particular have benefited greatly over the years from contributions by former Supreme Court law clerks, who bring a special insight into the Court's operations.

The 1930s also saw oral arguments before the Court by Frederic Burnham, who joined the firm in 1917, and Herbert Friedlich, who joined in 1926. Burnham argued *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), a banking case, and *United States v. Borden Co.*, 308 U.S. 188 (1939), an antitrust case. Friedlich, who had been a protégé of Felix Frankfurter at Harvard Law School, argued *Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648 (1935), an important bankruptcy case. In the 1940s, Friedlich went on to argue two significant tax cases: *Harrison v. Schaffner*, 312 U.S. 579 (1941), and *Spiegel's Estate v. Commissioner*, 335 U.S. 701 (1949).

Leo Tierney, who came to the firm after working on some of the government's biggest antitrust cases with Thurman Arnold in the Justice Department's Antitrust Division, argued four cases in the Court: three antitrust cases (*Glore, Forgan & Co. v. United States*, 330 U.S. 806 (1947); *United States v. Employing Lathers Ass'n*, 347 U.S. 198 (1954); *United States v. Borden Co.*, 347 U.S. 514 (1954)) and one case presenting Commerce Clause and federal preemption issues (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)). Another repeat player in the Court was H. Templeton Brown (the "Brown" of Mayer Brown). Nearly 20 years separated his first argument (*Public Utils. Comm'n v. United Air Lines, Inc.*, 346 U.S. 402 (1953)), from his last (*Decker v. Harper & Row Publishers, Inc.*, 400 U.S. 348 (1971)). The *Decker* case involved important questions about the scope of the attorney-client privilege in the corporate context. Brown prevailed when the decision below was affirmed by an equally divided Court, with Justice Douglas choosing not to participate.

### Supreme Court Litigation At Mid-Century

The firm's Supreme Court practice took a giant leap forward in 1954, when Robert Stern became a partner. Before joining the firm, Stern had spent thirteen years in the Office of the Solicitor General. His tenure in that office culminated in his service as Acting Solicitor General from 1952 to 1954. During his time in the Solicitor General's office, Stern argued more than 50 cases in the Supreme Court, including the Julius and Ethel Rosenberg espionage case, *Rosenberg v. United States*, 346 U.S. 273 (1953). Stern was also among the principal brief writers in highly publicized New Deal cases such as *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act on Commerce Clause grounds), *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act's regulation of the wages and hours of employees engaged in the production of goods in interstate commerce), and *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the production of wheat for home consumption was subject to Congress's commerce power).

Among Stern's many noteworthy opponents was Thurgood Marshall, who argued against him in *Adams v. United States*, 319 U.S. 312 (1943), a case involving federal criminal jurisdiction over a rape that took place on a military base. In his memoirs, published in the *Journal of Supreme Court History*, Stern recalled the *Adams* case and his relationship with Marshall:

One of my first, but not most important, arguments was a rape prosecution of an African American from Louisiana. The legal principle was whether the federal government had seemingly accepted jurisdiction over the land on which the rape occurred. The Department of Justice had abandoned the view of jurisdiction which prompted the institution of the case, and through me had confessed error in the Supreme Court. The defendants were represented by Thurgood Marshall, and our agreement as to the disposition of that case turned out to be the beginning of a long friendship. We were almost the same age.

Long before he became Solicitor General or a judge or Justice, Thurgood made efforts to have the Department of Justice (which meant the S.G.) file *amicus* briefs on behalf of his clients, usually in cases involving racial discrimination against blacks. Often he was successful. The last of these cases in which I participated was none other than the famous case of *Brown v. Board of Education*. The Democratic Solicitor General, Philip Perlman, had refused to allow the government to file an *amicus* brief in support of Thurgood. When Perlman retired for reasons unrelated to that case, my position as first assistant to the Solicitor General resulted in my becoming Acting Solicitor General. As a result, with Philip Elman, who then wrote the *amicus* briefs on race discrimination subjects, I managed to persuade the new (Democratic and then Republican) Attorneys General to file an *amicus* brief on Thurgood's side. This continued when the *Brown* cases were reargued (after I left for Chicago), with Phil still filing briefs that may have had some influence on the final decisions.

Robert L. Stern, *Reminiscences of the Solicitor General's Office*, 1995 J. SUP. CT. HIST. 123, 128.

Stern authored the standard mid-century work on appellate litigation (*Appellate Practice in the United States*) and was a co-author of the first eight editions of the authoritative treatise on Supreme Court litigation (*Supreme Court Practice*). He was "single[d] out as the man who knows more about the practice of the Court than anyone else." *Editor's Note*, 1995 J. SUP. CT. HIST. 123, 123 (citing LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987)). Stern continued to have a substantial practice in the Supreme Court for decades after joining Mayer Brown. He participated in numerous cases in the Court, and gave a number of oral arguments, including two important antitrust cases: *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586 (1957), and *United States v. E.I. Du Pont de Nemours & Co.*, 366 U.S. 316 (1961). In his memoirs, Stern recalled one particularly interesting brief that he drafted during this period:

In the 1970s a Justice admonished the president of the ABA that its *amicus* briefs were often not of high quality. The result was that the ABA president appointed a committee, of which Erwin Griswold was the chairman and I was the next in line, to review and approve any *amicus* briefs in the Supreme Court before they could be filed. I remember a case for which the brief from Texas was clearly unsatisfactory. The only other available

member of the committee and I were required to rewrite it in a very few days while she was also teaching at Rutgers Law School in New Jersey and I was in Chicago. Thus I became acquainted with the high quality of Ruth Bader Ginsburg's work before she became a judge or a Justice.

Stern also authored numerous scholarly articles on constitutional and administrative law, including more than half a dozen published in the *Harvard Law Review*.

Stuart Bernstein, who was first in his class at the University of Chicago Law School and Editor-in-Chief of the *University of Chicago Law Review*, came to the firm shortly after graduating and quickly established himself as an expert in labor and employment law. In the 1960s and 1970s, Bernstein argued five cases in the Supreme Court, including *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the case that established that a plaintiff has a private right of action under Title IX of the Education Amendments of 1972. In 1977, Bernstein had an experience that is almost unique among Supreme Court advocates in private practice: he argued two cases on the same day—*United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977), both of which involved employment discrimination claims brought by female flight attendants. Bernstein won the first case but lost the second.

The 1970s also saw Mark Berens, a tax and international law specialist, argue two tax cases in the Supreme Court. In one of them, *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973), Berens convinced the Court to vacate a decision of the Illinois Supreme Court sustaining the constitutionality of Illinois' general revenue use tax as applied to aviation fuel stored in Illinois.

Another interesting case from this period was argued by Wayne Whalen (the former chair of the Style and Drafting Committee at the Illinois Constitutional Convention). In *Cousins v. Wigoda*, 419 U.S. 477 (1975), Whalen convinced a divided Supreme Court that the First Amendment precludes a state court from invoking state law to enjoin elected delegates from participating in the Democratic National Convention.

### **The Modern Era**

The modern era in the firm's Supreme Court practice began in 1982, when Stephen Shapiro returned to Mayer Brown (where he had previously been a partner) after a stint as Deputy Solicitor General in charge of the federal government's business litigation in the Supreme Court. It has been remarked that, following his return to Mayer Brown, Shapiro "established the first modern Supreme Court specialty practice" in the country. Krista M. Enns, Note, *Can a California Litigant Prevail in an Action for Legal Malpractice Based on an Attorney's Oral Argument Before the United States Supreme Court?*, 1998 DUKE L.J. 111, 118. In a sense, this is true: the American legal scene has never witnessed a Supreme Court practice as large and as experienced as the Supreme Court and Appellate Practice Group that Shapiro helped to assemble at Mayer Brown. But, as the foregoing makes clear, Shapiro was not starting from square one. In developing this practice, he was able to build not only on his own experience and the experience of his many talented colleagues who followed him from the Solicitor General's office, but also on a century-old tradition of active Supreme Court practice at the firm.

Shapiro's blueprint for building a modern appellate practice group was aimed at creating in the private sector the same kind of Supreme Court expertise that the federal government enjoyed (and that gave the government a decided advantage over the private bar). To do that, Shapiro persuaded some of the best and most experienced members of the Solicitor General's office to join the firm; recruited a number of outstanding younger lawyers from the Solicitor General's office; and recruited Supreme Court and other outstanding appellate court law clerks as well as other recent law school graduates with outstanding academic records. Shapiro also recruited a number of prominent legal academics at the nation's leading law schools, who brought to the group additional expertise in important substantive areas of law.

Shapiro, who is a co-author of the ninth edition of *Supreme Court Practice* along with the late Eugene Gressman, Kenneth Geller, Timothy Bishop, and Edward Hartnett, has himself argued 29 cases in the Court—over half since returning to Mayer Brown. Most of his arguments have come in important business cases. For example, Shapiro has recently argued several important antitrust cases, including the largest private antitrust case in history (*Credit Suisse First Boston v. Billing*, 551 U.S. 264 (2007)), another case described in the ABA Journal as “the most important antitrust case in a generation” (*F. Hoffmann-LaRoche, Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004)), and a case impacting the entire insurance industry (*Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993)). Shapiro's arguments also include three prominent securities cases (*Stoneridge Investment Partners v. Motorola, Inc.*, 552 U.S. 148 (2008), *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), and *Chiarella v. United States*, 445 U.S. 222 (1980)), a tax case involving Commerce Clause issues (*American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987)), and an important case involving settlement class actions (*AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

A number of Shapiro's colleagues at the Solicitor General's office followed him to Mayer Brown, among them Andrew Frey and Kenneth Geller. Frey, who was first in his class at Columbia law school, spent 14 years in the Solicitor General's office; for most of that time, he held the position of Deputy Solicitor General. In his years in the government and in private practice, Frey has argued 65 cases in the Supreme Court. Many of his arguments have led to landmark decisions on topics ranging from criminal law and procedure (e.g., *Moran v. Burbine*, 475 U.S. 412 (1986)), to constitutional limitations on punitive damages (*Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1995); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)).

Geller, who had previously served as a prosecutor in the Watergate Special Prosecution force, spent ten years in the Solicitor General's Office, rising to the level of Deputy Solicitor General. He has argued 42 times in the Supreme Court, including significant cases in the areas of corporate law (e.g., *United States v. Bestfoods*, 524 U.S. 51 (1998)), administrative law (*Heckler v. Chaney*, 470 U.S. 821 (1985)), and criminal procedure (*Crist v. Bretz*, 437 U.S. 28 (1978)). He is co-author of *Supreme Court Practice*.

Other alumni of the Solicitor General's office who came to Mayer Brown in the 1980s and 1990s include Andrew Pincus, Charles Rothfeld, Philip Lacovara, Michael McConnell, Paul Bator, Kathryn Oberly, Roy Englert, Lawrence Robbins, and Michael Kellogg.

Andrew Pincus has been at Mayer Brown since 1988, except for a several-year period during which he served first as General Counsel of the Department of Commerce and then as General Counsel of Andersen Worldwide S.C. He has argued 21 cases in the Supreme Court, including two antitrust cases that he

won unanimously (*Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006), and *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)), as well as a number of cases that involved Commerce Clause challenges to state restrictions on the disposal of out-of-state waste (*Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994); *Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992)).

Charles Rothfeld, a former law clerk to Justice Blackmun, spent four years in the Solicitor General's office and later served as Special Counsel to the State and Local Legal Center, a national coordinating group for Supreme Court litigation by state and local governments. Rothfeld has argued 25 cases in the Supreme Court, including cases involving state taxation (*Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009)), federal limitation on state truck registration fees (*Yellow Freight System, Inc. v. Michigan*, 537 U.S. 36 (2002)), legislative immunity (*Bogan v. Scott-Harris*, 523 U.S. 44 (1998)), Indian law (*Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995)), and civil rights (*Heck v. Humphrey*, 512 U.S. 477 (1994)).

Lacovara, who like Frey was first in his class at Columbia Law School, served as an Assistant to the Solicitor General under Thurgood Marshall, as Deputy Solicitor General under Erwin Griswold, and as Counsel to Watergate Special Prosecutor Archibald Cox. He has argued 17 cases in the Supreme Court, including the landmark Watergate tapes case, *United States v. Nixon*, 418 U.S. 683 (1974), and a constitutional challenge to a Puerto Rican electoral statute, *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), in which Lacovara squared off against former Justice Abe Fortas.

Michael McConnell was affiliated with Mayer Brown between 1989 and 2002, before leaving to become a judge on the U.S. Court of Appeals for the Tenth Circuit. Both before and after joining Mayer Brown, McConnell argued many important constitutional law cases, including *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999) (state action/procedural due process), *Rosenberger v. Rec-tor & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (free speech/Establishment Clause), and *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Establishment Clause). Paul Bator, a professor who taught federal courts and constitutional law at Harvard Law School and the University of Chicago Law School, was of counsel to the firm and argued two cases in that capacity before his death: *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of the federal sentencing guidelines (the firm represented the United States Sentencing Commission), and *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988), an important First Amendment case.

Kathryn Oberly, since 2009 a judge on the D.C. Court of Appeals, left the firm in 1991 to accept a position with our client, Ernst & Young (where she rose to be Vice Chair and General Counsel), but not before arguing the landmark employment law case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Michael Kellogg, Roy Englert, and Lawrence Robbins have all left the firm to form their own firms, but in the cases of Englert and Robbins, not before making several Supreme Court appearances while at Mayer Brown.

Although we were saddened to say goodbye to such outstanding colleagues, we have been pleased to welcome Dan Himmelfarb, who joined us in November 2007 after serving for five years in the Solicitor General's office. A former law clerk to Justice Thomas, Dan has argued ten cases in the Supreme Court.

In addition to the former members of the Solicitor General's staff, many other Mayer Brown attorneys have argued cases in the Supreme Court in recent years. For instance, in the 2006 Term, Evan Tager argued *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), and in the 2005 Term, David Gossett argued his second case, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). Tim Bishop, a former clerk to Justice Brennan, has argued four cases in the Court, most recently *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In 2000, Donald Falk argued *Jones v. United States*, 529 U.S. 848 (2000). Jim Holzhauer, a former law clerk to Chief Justice Burger, has argued a number of times in the Court, most recently in *Intermodal Rail Employees Association v. Atchison, Topeka & Santa Fe Railway Co.*, 520 U.S. 510 (1997).

Associates at Mayer Brown also have had many opportunities to present arguments in the Supreme Court. Most recently, Steve Sanders—who has since left for academia—argued *Pottawattamie County, Iowa, et al. v. McGhee, et al.*, No. 08-1065 in November 2009. David Gossett argued his first case, *Central Laborers Pension Fund v. Heinz*, 541 U.S. 739 (2004), as an associate, and won unanimously. Before him, Eileen Penner, also now a partner, argued successfully in *Hohn v. United States*, 524 U.S. 236 (1998). Similarly, Javier Rubinstein, who has since left the firm to become General Counsel of PricewaterhouseCoopers International, argued his first case (*Rogers v. United States*, 522 U.S. 252 (1998)) as an associate.

Over the years, the firm's Supreme Court and Appellate Practice Group has benefited from the insight and experience of many former Supreme Court law clerks. The group now includes former clerks to Chief Justice Burger (Jim Holzhauer), Justice Brennan (Tim Bishop), Justice White (John Goldberg), Justice Blackmun (Charles Rothfeld, Andy Schapiro), Justice Stevens (Michele Odorizzi, John Muench), Justice O'Connor (Eugene Volokh), and Justice Thomas (Dan Himmelfarb). Many associates and summer associates who have worked in the practice group have gone on to serve as Supreme Court law clerks. The Supreme Court and Appellate Practice Group also currently includes dozens of former law clerks who served on the federal courts of appeals.

In addition to Eugene Volokh and John Goldberg, who are currently affiliated with the Supreme Court and Appellate Practice Group, the group has benefited over the years from close collaboration with a number of leading academics, including Michael McConnell, Larry Kramer, Paul Bator, Arthur Miller, Peter Huber, John Wiley, Larry Marshall, Dan Kahan, and Martin Redish. Several of the group's practitioners have taught full-time or as adjunct professors at the nation's leading law schools. Jim Holzhauer, for example, served for three years on the faculty of the University of Chicago Law School before joining the group. Tim Bishop has also taught at several law schools, including the University of Chicago and Northwestern. Philip Lacovara has taught courses on constitutional issues at several New York schools, including Columbia Law School, and has taught federal courts at Georgetown University Law School in Washington. He has also presented guest lectures at Yale Law School and Columbia. Mike Lackey and Kevin Ranlett teach a course on appellate litigation at George Washington University Law School in Washington. Others in the practice group who have served as adjunct professors include Steve Shapiro, Andy Frey, John Muench, Eileen Penner, Jeff Sarles, David Gossett, and Paul Hughes.

The firm's Supreme Court practice is now established in four cities (Chicago, New York, Palo Alto, and Washington) and is composed of dozens of highly qualified attorneys. A Mayer Brown attorney has argued at least one case in the Supreme Court during each Term since 1988. In the 1996-2009 Terms, 17

different Mayer Brown attorneys argued a total of 49 cases. In the October 2010 Term, Mayer Brown attorneys have argued or will argue four more.

### **A Century of Supreme Court Practice**

Mayer Brown attorneys have argued hundreds of cases before the Supreme Court over the past century. As extensive as this list may be, it still does not capture the volume of work that the firm has done in the Court. The members of Mayer Brown Supreme Court and Appellate Practice Group have also drafted hundreds of petitions for certiorari and briefs in opposition to certiorari. Mayer Brown attorneys have also drafted many influential amicus curiae briefs in important cases, or have had a substantial role in drafting the merits briefs.

And the best is yet to come. Building on this heritage, Mayer Brown looks forward to adding new chapters to its tradition of serving the needs of clients in the United States Supreme Court.