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ADVOCACY HISTORY IN THE SUPREME COURT

The conventional wisdom within the legal academy concerning the meaning of a Supreme Court opinion seems both noncontroversial and unassailable. As evidenced by how law faculty routinely both write and teach, an opinion's meaning naturally depends exclusively on the written words of the official "opinion of the Court" published by the Court on the day the opinion is announced. Although law professors, prompted by conflict within the Court itself on the question,[1] have debated now for decades whether it is legitimate to consider legislative history in determining the meaning of otherwise ambiguous statutory text,[2]

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[1] See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 29–37 (Amy Gutmann ed., 1997); Stephen Breyer, *On the Use of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992).

[2] *See, e.g.*, Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70 (2012); James Brudney, *Confirmatory Legislative History*, 76 Brook. L. Rev. 901 (2011); John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419 (2005); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 Stan.

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there has been a sharply contrasting absence of any legal scholarship examining whether there is a comparable official history to be consulted in resolving ambiguities in the text of the Court's opinions. It has been common ground that there is no "judicial history" analogous to legislative history.[3]

Hiding in plain sight from academic notice is the actual practice of Supreme Court advocates and, even more important, Supreme Court Justices. That practice has long made clear that such an official history does in fact exist and is regularly consulted by both advocates and Justices. It is not found in what many might assume to be the closest analogue: the personal papers of the Justices themselves. Those papers are not part of the official record of the case. Unlike presidential papers,[4] the papers of each Justice—bench memoranda, interchambers

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L. Rev. 1 (1998); John Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 684–89, 710–25 (1997); William N. Eskridge, Jr., *Legislative History Values*, 66 Chi.-Kent L. Rev. 365 (1990); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 Chi.-Kent L. Rev. 441 (1990).

[3] I have found only two prior law review articles that incidentally touch on the role of underlying advocacy in understanding judicial precedent in the course of addressing distinct, but related, issues. But neither considers the issue head-on or the full extent to which the Justices rely on such advocacy to interpret their own prior handiwork. In *Judicial History*, published by the *Yale Law Journal* in 1999, Professor Adrian Vermeule, while addressing a different topic, refers briefly without analysis to how the "Court occasionally interprets its own opinions, and the rules it adopts, by reference to the briefs (including certiorari petitions), questions and answers during oral argument . . . and other materials generated in the course of judicial business before the issuance of an authoritative final text." Adrian Vermeule, *Judicial History*, 108 Yale L.J. 1311, 1328 (1999). Vermeule also describes one case, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), in which a plurality opinion of the Court considered the advocacy underlying a prior ruling in trying to discern the meaning of that prior precedent for the *Cantor* case. Vermeule, *supra*, at 1330. Vermeule, however, never makes clear whether he believes that reliance on advocacy as an interpretive tool is legitimate and leaves the impression that he thinks it may not be, by equating the validity of its use with the use of internal judicial history, which he concludes should be out of bounds. *Id.* at 1354. He also quotes at length from Justice Stewart's dissent in *Cantor*, which took issue with the plurality's reliance on the briefs filed by the parties in the earlier case, arguing that "except in rare circumstances," advocacy "should play no role in interpreting [the Court's] written opinions." *Id.* at 1330–31 (quoting *Cantor*, 428 U.S. at 617–18 (Stewart, J., dissenting)). The other law review article is even more cursory in its treatment of the advocacy history issue than Vermeule's limited discussion. In *The Structure of Judicial Opinions*, a 2001 article published in the *Minnesota Law Review*, Professor John Leubsdorf addresses the issue of "[h]ow far should one go in extending the potential bounds of an opinion" and notes, without elaboration, that courts have sometimes "been known to rely on" prior arguments "to show what issues were before the court, and were therefore embraced by its opinion." John Leubsdorf, *The Structure of Judicial Opinions*, 86 Minn. L. Rev. 447, 492 (2001). What the Leubsdorf article more helpfully adds is a valuable reminder that the Reporter of Decisions used to include, along with the opinion of the Court in the published U.S. Reports, a summary of the arguments made by counsel. *Id.* Based on my survey of the Court's opinions, the Court appears to have discontinued that practice in October Term 1942, and the Court's opinion in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), was one of the last times the Reporter included a summary of counsel's arguments.

[4] Presidential Records Act, 44 U.S.C. §§ 2201–2207 (2012).

memoranda, draft opinions, and voting records—are the exclusive property of the Justice and not generally publicly available.[5]

The comparable contemporaneous history is found instead in the advocacy underlying the Court's ruling—the written briefs and oral argument—all of which is part of the official record of the case that is made publicly available for all to see. In this respect, advocacy history of a case is singularly distinct from any of a host of outside, largely unknowable contextual factors external to the public record in a case that one might speculate influenced the votes of individual Justices and, accordingly, the Court's ruling itself.

To be sure, the Court's reliance on advocacy history has not always been without controversy. In 1976, several Justices sharply criticized Justice Stevens's reliance on such history in his plurality opinion in *Cantor v. Detroit Edison Co.*[6] In *Cantor*, Justice Stevens reviewed in great detail the precise arguments made by the prevailing party in determining the reach and meaning of a prior Court precedent.[7] Justice Stewart, joined by Justice Powell and then-Justice Rehnquist, argued in dissent that Justice Stevens's reliance on advocacy history as a basis for interpreting past rulings "would permit the 'plain meaning' of our decisions to be qualified or even overridden by their 'legislative history,'—*i.e.*, briefs submitted by the contending parties."[8] The dissenters contrasted that practice with reliance on "[t]he legislative history of congressional enactments," which they agreed was legitimate because, unlike advocacy history, that legislative "history emanates from the same source as the legislation itself and is thus directly probative of the intent of the draftsmen."[9]

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[5] The practice of the Justices in releasing their papers is highly idiosyncratic. Some, like Justice White, ordered them mostly destroyed, while others allow for their release a certain number of years after their retirement or death, though current practice is for that period of time to be fifty years or more. *See* Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. Rev. 1665, 1669–72 (2013) (describing ad hoc practices of the Justices). In his article *Judicial History*, Vermeule considers the extent to which draft opinions and internal memoranda circulated between the chambers of the Justices should be considered "as evidence of judicial intention or as interpretive context." Vermeule, *supra* note 3, at 1311. Vermeule ultimately concludes that the Supreme Court's exclusion of such judicial history is "justifiable on structural and institutional grounds." *Id.* at 1354.

[6] 428 U.S. 579 (1976).

[7] *Id.* at 587–91 & nn.18–20 (discussing Parker v. Brown, 317 U.S. 341 (1943)).

[8] *Id.* at 618 (Stewart, J., dissenting).

[9] *Id.*

The views of the *Cantor* dissenters on the use of advocacy history, however, have not prevailed, even while the use of legislative history has, by contrast, come under increasing attack. The Justices in their decision making regularly look to the advocacy underlying previously decided cases to glean precisely what the Court did and did not rule in a discrete set of circumstances. The best Supreme Court advocates all know this.[10] They scour the briefs and oral argument transcripts in prior cases in search of an argument to bolster their client's legal position.[11] As an advocate, before he became a judge, no less than Chief Justice John Roberts himself did so—a practice he has now continued on the bench.[12]

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[10] *See, e.g.*, Email from Jeffrey Fisher, Fac. Dir., Stanford L. Sch. Supreme Ct. Clinic, to author (Jan. 19, 2020) ("[O]ne of the things we often preach in our clinic is the importance of reviewing the briefs underlying prior cases."); Email from Zachary Tripp, Assistant to the U.S. Solicitor Gen., to author (May 6, 2020) ("When I have a case that focuses on the meaning of a prior [Supreme Court] case, I virtually always look at the underlying briefs to try to understand what exactly the question was, how it was teed up, what the arguments were, etc.").

[11] *See, e.g.*, Transcript of Oral Argument at 15, Tull v. United States, 481 U.S. 412 (1987) (No. 85-1259) ("I certainly would ask that the Court consider the petitioner's brief in *Curtis v. Loether* against the government's brief in this case. They precisely mirror on all of the points that the government [makes here], and as we point out this Court unanimously rejected those positions.") (oral argument of Richard N. Nageotte); Transcript of Oral Argument at 26–27, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1992) (No. 90-985) ("As the *Griffin* case came to this Court, there was very little evidence of interstate travel. In fact, the Solicitor General's brief in that case . . . noted in footnote 6 that they believed there had been no allegations of interference with interstate travel.") (oral argument of Deborah A. Ellis); Transcript of Oral Argument at 18–19, United States v. Mead Corp., 533 U.S. 218 (2001) (No. 99-1434) ("Now, the tax counsel amici says no, that case was really about a regulation, not about a ruling. . . . When Justice Marshall was Solicitor General, he filed the Government's brief in the *Correll* case. His successor, Solicitor General Griswold, filed a reply brief. Neither of those briefs mention any regulation.") (oral argument of Kent L. Jones); Transcript of Oral Argument at 32, SEC v. Edwards, 540 U.S. 389 (2004) (No. 02-1196) ("[I]f you go back to the case the SEC has pointed to a number of times, the *Universal Service* case from 1939 in the Seventh Circuit, . . . its position in that case was stated in its brief in that case, and when you look at its brief in that case, it recognizes that it is not dealing with a fixed return. . . .") (oral argument of Michael K. Wolensky); Transcript of Oral Argument at 13, United States v. Georgia, 546 U.S. 151 (2006) (Nos. 04-1203, 04-1236) ("[I]f you go back to the Government's brief in [*Pennsylvania Department of Corrections. v. Yeskey*], when we were dealing with constitutional challenges to the application of Title II to prisons, the Government focused all its energy on defending it as valid Section 5 legislation. . . .") (oral argument of Solicitor General Paul D. Clement); Transcript of Oral Argument at 10, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416) ("Justice Ginsburg: . . . It's not clear, just from the—reading that opinion. [Jennifer G.] Perkell: Your Honor, I would respectfully dispute that, in that our reading of the opinion, as well as the Government's brief in that case, seemed to propose no unusual rule of exhaustion."); Transcript of Oral Argument at 15–16, James v. United States, 550 U.S. 192 (2007) (No. 05-9264) ("I think it can be read either way, although I think even the Government's brief in—or the Respondent's brief in *Taylor* talks about extortion and burglary being crimes that can be committed with no risk of physical injury to another person. . . .") (oral argument of Craig L. Crawford).

[12] *See* Transcript of Oral Argument at 37, United States v. Halper, 490 U.S. 435 (1989) (No. 87-1383) ("[I]t may be distinguishable. If you look back at the government's brief in the *Hess* case, for example, they had no doubt that—there that the penalty was, in essence,

The Supreme Court's October Term 2019 shows how both Supreme Court advocates and the Justices themselves use the advocacy underlying the Court's prior rulings. Advocacy history came up several times, including in two of the Term's highest-profile cases, which otherwise had little in common: *June Medical Services v. Russo*,[13] which concerned abortion rights, and *Our Lady of Guadalupe School v. Morrisssey-Berru*,[14] which addressed the application of the First Amendment Religion Clauses to claims of unlawful employment discrimination by a religious elementary school. But even as the Court's use of advocacy history to determine what the Court previously ruled has largely been accepted, the Justices have disagreed about using advocacy history in other contexts. In particular, analogizing to the reasons why the Court has long declined to give stare decisis effect to its rulings by summary disposition, the Court has in recent years displayed an increased willingness to consider poor or otherwise inadequate adversary presentation in a past case as a justification for more readily second guessing that precedent. Some of the Justices question the legitimacy of that reasoning, which has taken on additional contemporary significance given the Court's increasingly intense internal debates concerning the role of stare decisis.[15]

To date, however, legal scholarship has not considered the role of advocacy history in Supreme Court advocacy and decision making in any of its iterations. This article seeks to bring out of the shadows the role advocacy history plays at the Court. In Part I, which is descriptive and historical, I examine the actual practice of the Justices in deciding cases and drafting opinions of the Court—how, in assessing the meaning of a prior opinion, the Justices consider whether a particular legal argument was made and, if so, whether it was accepted or rejected. Then I consider the more controversial proposition that the relative weakness of a party's argument in a particular case supplies a basis for giving that precedent less weight in assessing its entitlement

criminal.") (oral argument of John G. Roberts, Jr.); *see also infra* text accompanying notes 27 (discussing Chief Justice Roberts's opinion for the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)).

[13] 140 S. Ct. 2103 (2020).

[14] 140 S. Ct. 2049 (2020).

[15] *See*, *e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1404–07 (2020); *id.* at 1402–05 (opinion of Gorsuch, J.); *id.* at 1408–10 (Sotomayor, J., concurring); *id.* at 1410–16 (Kavanaugh, J., concurring); *id.* at 1421–22 (Thomas, J., concurring in the judgment); *id.* at 1432–40 (Alito, J., dissenting).

to stare decisis. In Part II, I focus on several of the highest-profile cases of October Term 2019, in which Supreme Court advocates, and sometimes the Justices themselves, relied on advocacy history.

In Part III, I discuss law teaching and legal scholarship; I offer an illustrative example of how one prominent Supreme Court ruling might be taught and written about differently by taking into account its advocacy history. The case is *Massachusetts v. EPA*,[16] decided in 2007, which is taught across the law school curriculum and is the subject of many law review articles. Perplexing, or even possibly indefensible, rulings by the Court can sometimes be more easily understood by looking at the case's advocacy history.

I. The Court's Reliance on Advocacy History

The best evidence of the actual relevance of the advocacy underlying a Supreme Court opinion in understanding the opinion's meaning is supplied by the Justices themselves. Although the Justices do not review the advocacy history of the Court's precedent in all or even most of their cases, they do so with sufficient regularity to make clear when, why, and how they believe such advocacy bears on a full and accurate understanding of their prior rulings. It might be tempting to dismiss the Justices' use of advocacy history as rhetorical window-dressing that is not truly outcome-determinative, and no doubt there are instances when such a characterization is accurate. But identifying when a reason given in an opinion is a mere make-weight for a predetermined outcome is a hazardous business: What might be a disingenuous make-weight for one Justice, including the opinion writer, might not be for another Justice whose vote was necessary to establish the majority.

Even more important, Supreme Court rulings are not just about the final judgment: a reversal or affirmance of a lower-court judgment. What makes the Court's opinion so important are the reasons the Justices give in support of their conclusions. Lower courts and the Justices in future cases take those reasons seriously, and when those reasons reflect reliance on advocacy history, advocacy history matters—no matter what an individual Justice's motivation might have been for invoking it.

[16] 549 U.S. 497 (2007).

The most common, and least controversial, use of advocacy history is when the Court considers whether certain arguments were made, or not made, and whether those arguments were made by the prevailing or losing party. All the Justices agree that such an inquiry is a fair basis for determining what the Court did and did not decide in a prior case, even when no ambiguity may otherwise be apparent from the text of the earlier opinion. Of course, that threshold agreement does not mean that they necessarily agree in specific cases whether certain arguments were or were not made.

There is, by contrast, far more contention within the Court about whether poor advocacy underlying a prior ruling is grounds for according that ruling less precedential weight and, accordingly, less stare decisis effect. Almost fifty years ago, Justice Lewis Powell first broached the idea that examining advocacy history was fair game in reassessing a case's precedential weight and susceptibility to being overturned. And the direction of the Court's decisions has since been in Justice Powell's favor, with poor underlying advocacy increasingly serving as a proxy for poor legal judicial reasoning—a factor the Justices regularly consider in assessing whether a past precedent warrants overruling.

A. ADVOCACY HISTORY AND THE MEANING OF PRECEDENTS

There are three typical situations in which the Justices look to the underlying advocacy to assess the meaning of their prior rulings. Significantly, the Justices do not just consider whether the earlier opinion itself refers to that advocacy; they consider the underlying advocacy so relevant to discerning the meaning of a precedent that they will examine its content even when the prior opinion itself makes no reference to that advocacy. In that way, they are willing to make certain assumptions about the relationship between the Court's opinion and the advocacy that preceded it.

First, there are cases in which the Justices consider the arguments affirmatively made by the *prevailing* party in a prior case in determining both the meaning and the current precedential weight of the Court's ruling in that case. In these cases, the Court applies the seemingly commonsense proposition that what it held in a prior case coincided with what the prevailing parties were arguing and, to that end, reviews those arguments for evidence regarding what the Court previously held. In some instances, however, such evidence about the meaning of what the Court previously held can, ironically, become a poison pill

capable of eroding that same precedent's current weight should the strength of that prior legal argument now be called into question by intervening circumstances.

The second category of cases consists of those in which the Court considers the arguments made by the *losing* rather than by the prevailing party. Here, the Court is willing to assume, even in the absence of any express mention in the opinion itself, that the Court rejected the arguments made by a nonprevailing party. For the Justices, the existence of the argument in the briefs or oral argument of the unsuccessful party supports reading the Court's opinion as implicitly rejecting the argument. Based on this rationale, the Justices have frequently looked to past briefings and oral arguments and, upon discovering that the same argument being made today was made in a prior case, relied on its prior rejection as a conclusive basis for rejecting the argument anew.

The third and final category is the logical corollary of the first two: cases in which a prior argument was not raised at all. Precisely because previous arguments made, whether accepted or rejected, are relevant in determining the meaning of the Court's prior decisions, the Justices have frequently reasoned that the opposite may also be true: If an argument was not made when a prior case was decided, then it was *not* implicitly rejected by the Court and therefore cannot be so reflexively dismissed by the Court in a future case.

Cases in which advocacy history plays a role cannot always be classified as falling neatly into only one of these three categories. And, of course, in all three categories, the Justices routinely disagree, as they do about most anything else.[17] But, with very few exceptions, the disagreements are less about the merits of undertaking the inquiry into past advocacy than they are about whether arguments were raised, accepted, or rejected in the prior rulings under consideration. While one Justice may argue that a legal argument was raised and implicitly accepted by the Court in a prior ruling, a second Justice may argue that the argument was not raised at all or, if raised, was implicitly rejected.

1. *Prevailing arguments.* The Justices frequently disagree about precisely what they ruled in a prior case and will sometimes review the

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[17] Similar disagreements arise when judges and Justices look to legislative history to aid in the interpretation of statutory language. Even when there might be threshold agreement that such history can be relevant, there can be sharp disagreement whether Congress intended to accept or reject a meaning of the language advanced by the legislation's supporters in the accompanying legislative history.

briefs and oral arguments of the party that prevailed in that case for relevant evidence. That is what Justice Stevens was doing in the *Cantor* case, which drew the ire of three of his colleagues on the Court in dissent.

In *Cantor*, the Court was considering whether the Court, in ruling in *Parker v. Brown* that actions by a state did not violate the Sherman Act, had also immunized from Sherman Act antitrust review private action approved by a state.[18] Justice Stevens's plurality opinion for the Court answered that question by looking at great detail at the arguments made by the parties in *Parker*.[19] Justice Stevens even included an excerpt from the index to the supplemental brief filed by the Attorney General of California (who was, as it happens, Earl Warren), as well as lengthy excerpts from the amicus brief filed by the US Solicitor General.[20] Based on that review, the plurality concluded that the Court's prior ruling in *Parker* did not control the legal issue raised in *Cantor*.

Another example of the Court's use of a prevailing party's argument is *Cannon v. University of Chicago*.[21] In *Cannon*, the Court relied on prior briefing to conclude that the notion that Title VI provided a private right of action was "implicit in decisions of this Court,"[22] namely, *Lau v. Nichols*[23] and *Hills v. Gautreaux*.[24] The Court acknowledged that neither case actually "address[ed] the question of whether Title VI provides a cause of action."[25] According to the Court, however, because "the issue had been explicitly raised by the parties at one level of the litigation or another"—a claim it supported by citing party briefs in the cases—the cases were "consistent . . . with the widely accepted assumption that Title VI creates a private cause of action."[26]

A more recent, higher-profile, and far more controversial example of the Court's reliance on advocacy history is *Parents Involved in*

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[18] 428 U.S. 579, 581 (1976).

[19] *Id.* at 587–90.

[20] *Id.* at 588 n.18.

[21] 441 U.S. 677 (1979).

[22] *Id.* at 702.

[23] 414 U.S. 563 (1974).

[24] 425 U.S. 284 (1976); *see Cannon*, 441 U.S. at 702 n.33.

[25] *Cannon*, 441 U.S. at 702 n.33.

[26] *Id.*

Community Schools v. Seattle School District No 1,[27] decided in 2007. In *Parents Involved*, the parties' disagreement centered on no less than the meaning of the Court's ruling in *Brown v. Board of Education*,[28] universally regarded as one of the Court's most important all-time decisions.[29] *Brown*'s core holding that de jure segregation in public schools violated the Fourteenth Amendment was of course not in question, but what was sharply disputed was how that ruling applied to student reassignment plans voluntarily adopted by public school districts in Seattle, Washington, and Louisville, Kentucky, in order to promote racial integration within those school districts.

The Court held those plans were unconstitutional, with Chief Justice John Roberts writing the plurality opinion for four Justices, and Justice Anthony Kennedy providing the decisive fifth vote in a separate concurring opinion. In his plurality opinion, the Chief Justice's defense of his reading of *Brown* relied heavily on the briefs filed by Thurgood Marshall, lead counsel for the NAACP Legal Defense Fund, and the other members of his team, and the oral argument presented by Robert Carter of the Legal Defense Fund. The Chief argued in effect that what the Court had ruled in *Brown* could be understood by looking at the legal arguments made by the prevailing parties:

> The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." There is no ambiguity in that statement.[30]

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[27] 551 U.S. 701 (2007).

[28] 347 U.S. 483 (1954).

[29] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring) (describing *Brown* as "the single most important and greatest decision in this Court's history").

[30] 551 U.S. at 747 (citations omitted) (first quoting Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 15, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 3 and 5); and then quoting Transcript of Oral Argument at 7, *Brown*, 347 U.S. 483 (No. 8)).

In a concurring opinion, Justice Clarence Thomas quoted even more extensively from the briefs and oral arguments in *Brown* to support his assertion that "my view was the rallying cry for the lawyers who litigated *Brown*."[31]

Some commentators critical of the opinion disputed the Chief's and Justice Thomas's characterizations of the Legal Defense Fund's argument in *Brown*.[32] Two of the lawyers who worked with Marshall on *Brown* were harshly negative, with one referring to the Chief's view as "preposterous."[33] But, for my purposes, what is relevant is the Chief Justice's and Justice Thomas's assertion of the significance of Marshall's and the Legal Defense Fund's arguments to the Court's understanding of *Brown*, rather than whether the Chief's actual portrayal of their argument was more or less persuasive. The latter dispute does remain relevant to the question whether their reliance on advocacy history in *Parents Involved* is best understood as a clear instance of its invocation as mere window-dressing for legal conclusions the opinion authors were already determined to reach rather than a factor that actually influenced their decision to any degree.

Finally, in *Marvin M. Brandt Revocable Trust v. United States*,[34] decided in 2014, the prevailing party in an earlier case was back before the Court in a later case, resisting the import of what it had previously, successfully argued. At issue in *Marvin M. Brandt* was whether the government had, as it was arguing, retained a reversionary interest in land that it had previously conveyed to a railroad after the railroad's subsequent abandonment of the land. In concluding that the argument lacked merit, the Court reasoned that "[t]he government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, in the case of *Great Northern Railway Co. v. United States*."[35] During oral argument, Justice Samuel Alito, a former attorney in the Solicitor General's Office, took

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[31] *Parents Involved*, 551 U.S. at 772.

[32] Goodwin Liu, *"History Will Be Heard": An Appraisal of the Seattle/Louisville Decision*, 2 Harv. L. & Pol'y Rev. 53, 62 n.57 (2007) ("[T]he meaning the plurality assign[ed] [to the brief] is clearly not what the *Brown* lawyers intended."); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 Harv. L. Rev. 131, 152 (2008) (characterizing the Chief Justice's description of *Brown* as "radically incomplete").

[33] Adam Liptak, *The Same Words, But Differing Views*, N.Y. Times (June 29, 2007), https://www.nytimes.com/2007/06/29/us/29assess.html.

[34] 572 U.S. 93 (2014).

[35] *Id.* at 102 (citing Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942)).

the government to task for failing to fully acknowledge the extent to which it was departing from its prior arguments that had prevailed: "I think the government gets the prize for understatement with its brief in this case" by merely acknowledging that "the government's brief" in the prior case "lends some support to petitioner's contrary argument."[36] Alito pointedly read out loud at the argument "the subject headings of the government's brief in *Great Northern*."[37]

2. *Losing arguments.* The Justices also often consider, in deciding on the meaning of a precedent, whether the Court already considered and rejected a similar argument in that earlier case. Of course, the prior opinion itself can make that explicit. But when it doesn't on its own, the Justices do not hesitate to review the underlying advocacy to better understand the Court's earlier ruling. Their assumption is that the Court implicitly rejected arguments advanced either by a losing party or by a party who prevailed, but on another ground.

An especially high-profile example is *District of Columbia v. Heller*,[38] in which both the parties and the Justices looked to the briefing and argument underlying a prior decision. At issue in *Heller* was whether the Second Amendment confers on individuals a right to possess a firearm wholly apart from any service in a militia. The Court ruled five to four in favor of such an individual right. Front and center in the dispute between the majority and dissenting Justices was the import of the Court's prior ruling in *United States v. Miller*.[39] All sides tried to argue that the Court's treatment of the federal government's argument in *Miller* provided support for their respective positions.

The majority opinion, written by Justice Antonin Scalia, contended that *Miller* did not contradict the *Heller* majority's view in favor of an individual right: *Miller* ruled "only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[40] By contrast, Justice Stevens's opinion for the dissenters advanced a very different reading of *Miller*: "The view of the Amendment we took in *Miller* [is] that it protects the right to keep and bear arms for certain

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[36] Transcript of Oral Argument at 24, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (No. 12-1173).

[37] *Id.* at 24–25.

[38] 554 U.S. 570 (2008).

[39] 307 U.S. 174 (1939).

[40] *Heller*, 554 U.S. at 625.

military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownerships of weapons. . . ."[41]

Both the majority and dissent relied heavily on the briefing and argument in *Miller* to support their positions, as did respondents' counsel in *Heller*. For instance, in *Miller*, the Solicitor General had argued that the Second Amendment did not confer rights on individuals to bear arms but established only a collective right to members of a state militia.[42] Justice Scalia's opinion for the Court in *Heller* referred expressly to the Solicitor General's argument in *Miller* in reasoning that the *Miller* Court, by declining to engage with the argument, should best be understood as having implicitly rejected the collectivist theory. The *Heller* respondents had argued the same to the Court in their brief:

> Petitioners' collective-purpose interpretation is . . . at odds with this Court's only direct Second Amendment opinion in *Miller*. In examining whether Miller had a right to possess his sawed-off shotgun, this Court never asked whether Miller was part of any state-authorized military organization. . . . Indeed, the government advanced the collectivist theory as its first argument in *Miller*, but the Court ignored it. The Court asked only whether the gun at issue was of a type *Miller* would be constitutionally privileged in possessing.[43]

The Solicitor General's brief in *Heller* acknowledged the significance of the federal government's brief in *Miller* in understanding what the *Miller* Court ruled.[44]

What remains striking, of course, about the *Heller* Court's reliance on advocacy history to read *Miller* so narrowly is that it sharply contrasts with what had been *Miller*'s settled meaning over decades. Either all those petitioners who had previously sought to challenge their possession of firearms convictions failed to raise the advocacy history argument to resist *Miller*'s assumed sweep or the Court had a

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[41] *Id.* at 637 (Stevens, J., dissenting).

[42] Brief for the United States at 4–5, *Miller*, 307 U.S. 174 (No. 696) ("[T]he right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security. Indeed, the very language of the Second Amendment discloses that the right has reference only to the keeping and bearing of arms by the people as members of the state militia.").

[43] Respondent's Brief at 40, *Heller*, 554 U.S. 570 (No. 07-290) (citation omitted).

[44] Brief for the United States as Amicus Curiae at 19 n.4, *Heller*, 554 U.S. 570 (No. 07-290) ("Although the Court's decision (following the government's own brief in *Miller*) supports a mode of analysis that interprets the Second Amendment in light of the relationship between the regulated firearms and 'the preservation or efficiency of a well regulated militia' . . . the Court did not express any holding on whether or to what extent the Amendment applies only to 'militia related' activities." (footnote omitted) (emphasis added)).

change of heart about *Miller* and merely used that history to support its new view.

There are plenty of other instances, like *Heller*, when the Justices have looked to underlying advocacy to determine precisely what arguments they had already considered and rejected when it was not otherwise clear on the face of the previous opinion itself that the argument had been rejected. Here are a few additional, illustrative examples.

In *Preston v. Ferrer*,[45] the Court examined the written briefs to show that arguments in favor of overruling *Southland Corp. v. Keating*[46] relied on by respondent had already been "considered and rejected" in *Allied-Bruce Terminix Cos. v. Dobson*.[47] As support for that claim, the *Preston* Court directly compared arguments of respondent in his brief to the arguments in an *Allied-Bruce Cos.* amici brief.[48] For the *Preston* Court, the Court's prior rejection of the same argument supported the Court's rejecting it again.

Jones v. United States[49] offers an especially effective use of advocacy history because it was the same party (the United States) in both the current and past cases. The *Jones* Court relied on briefing to demonstrate that *Russell v. United States*[50] had implicitly rejected a broad construction of 18 U.S.C. § 844(i). The government in *Jones* argued that 18 U.S.C. § 844(i), which makes arson of property "used in interstate . . . commerce or in any activity affecting interstate . . . commerce" a federal crime, applied to the arson of a private residence.[51] In support, its brief cited *Russell*, which held that the statute applied to rental property;[52] the argument in *Jones* was that property is "used" in commerce merely by, for instance, "receiving natural gas."[53] The *Jones* Court, however, noted that the *Russell* Court "did not rest its holding on [such an] expansive interpretation advanced

[45] 552 U.S. 346 (2008).

[46] 465 U.S. 1 (1984).

[47] *Preston*, 552 U.S. at 353 n.2; *see* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

[48] *Preston*, 552 U.S. at 353 n.2.

[49] 529 U.S. 848 (2000).

[50] 471 U.S. 858 (1985).

[51] *Jones*, 529 U.S. at 850–51.

[52] Brief for the United States at 19–23, *Jones*, 529 U.S. 848 (No. 99-5739).

[53] *Id.* at 855–56.

by the Government both in *Russell* and in this case."[54] The Court contrasted the government's brief in *Russell*[55] with the Court's holding.[56]

Finally, in *Maine v. Moulton*,[57] the Court similarly looked to the briefs to learn that the Court had already considered and rejected in *Massiah v. United States*[58] the same argument that the government was now making in *Maine*. Once satisfied by the briefs that the same argument had previously been raised and rejected in *Massiah*, the *Moulton* Court quickly rejected the government's argument that post-indictment statements by a defendant, recorded by a witness cooperating with the government, could be used at trial so long as the government had an interest in investigating crimes beyond those charged.[59] The Court cited the government's brief in *Massiah* to establish that the *Massiah* Court was "faced with the very same argument made by the Solicitor General in this case."[60]

3. *Arguments not made*. If the Court did not previously consider an argument that the Justices now consider important, that may provide a reason to conclude that the Court's previous ruling cannot be fairly read to have decided a particular issue at all. The most obvious example is when the Court, relying on the absence of legal argument by the parties on a particular issue, dismisses language in a prior precedent as mere dictum even if that language might otherwise appear to be central to the Court's reasoning. The absence of prior argument on the issue can be invoked as strong evidence that part of the Court's opinion was not necessary to the Court's ruling.

Sometimes the opinion itself may make clear on its own what amounts to the Court's ruling rather than mere dictum, but other times the opinion does not. In the latter cases, the best evidence of the actual legal issues before the Court may be found in the formally required "Questions Presented" in the petition for a writ of certiorari. As the Court's own rules make clear, the questions presented

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[54] *Id.* at 856 n.8.

[55] Brief for the United States at 15, *Russell*, 471 U.S. 858 (No. 84-435) ("Petitioner used his building on South Union Street in an activity affecting interstate commerce by heating it with gas that moved interstate.").

[56] *Russell*, 471 U.S. at 862 (focusing on rental property as an activity *affecting* commerce); *see Jones*, 529 U.S. at 856 n.8.

[57] 474 U.S. 159 (1985).

[58] 377 U.S. 201 (1964).

[59] *Moulton*, 474 U.S. at 178–79.

[60] *Id.* at 179 n.15.

define the issues that the Court will consider. Unless the Court's own order granting review expressly provides otherwise, the questions presented as set forth in the petition and those issues "fairly included therein" formally define the legal issues before the Court,[61] except "in the most exceptional cases" where prudence warrants overcoming the "heavy presumption against" expanding the issues that the Court considers.[62]

No less than Chief Justice John Marshall explained the relationship between legal arguments advanced and the distinction between the Court's holding and dictum. In *Cohens v. Virginia*,[63] Marshall described the relationship between dicta and precedent by considering what counsel had argued in *Marbury v. Madison*:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.[64]

On the "single question before the Court" in *Marbury*, the Chief Justice explained:

> The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the Court in support of this decision, some expressions are used which go far beyond it. *The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the Court is directed*.[65]

The Court has since picked up on this language from *Cohens* to measure precedential weight on the basis of arguments advanced by counsel: "For the reasons stated by Chief Justice Marshall in [*Cohens*],

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[61] Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

[62] *See*, *e.g.*, Yee v. City of Escondido, 503 U.S. 519, 535–37 (1992) (first quotation quoting Stone v. Powell, 428 U.S. 465, 481 n.15 (1976)).

[63] 19 U.S. (6 Wheat.) 264 (1821).

[64] *Id.* at 399–400.

[65] *Id.* at 400 (emphasis added).

we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."[66]

Justice Owen Roberts used similar logic to try to explain why his famous "switch in time" during the New Deal—when he voted in *West Coast Hotel Co. v. Parrish*[67] in 1937 to overrule *Adkins v. Children's Hospital*[68] despite having voted just a year before to sustain *Adkins* in *Morehead v. New York ex rel. Tipaldo*[69]—was not the result of political pressure. Justice Roberts claimed that he voted to overrule *Adkins* in *West Coast* but not in *Tipaldo* because counsel in *Tipaldo* had not advocated overruling *Adkins*.[70] His explanation appears in a memo Justice Roberts wrote to Justice Frankfurter, which was published after the former's death:

> Both in the petition for certiorari, in the brief on the merits, and in oral argument, counsel for the State of New York took the position that it was unnecessary to overrule the *Adkins* case in order to sustain the position of the State of New York. It was urged that further data and experience and additional facts distinguished the case at bar from the *Adkins* case. The argument seemed to me to be disingenuous and born of timidity. I could find nothing in the record to substantiate the alleged distinction. At conference I so stated, and stated further that I was for taking the State of New York at its word. The State had not asked that the *Adkins* case be overruled but that it be distinguished. I said I was unwilling to put a decision on any such ground. The vote was five to four for affirmance, and the case was assigned to Justice Butler. I stated to him that I would concur in any opinion which was based on the fact that the State had not asked us to re-examine or overrule *Adkins* and that, as we found no material difference in the facts of the two cases, we should therefore follow the *Adkins* case. The case was originally so written by Justice Butler, but after a dissent had been circulated he added matter to his opinion, seeking to sustain the *Adkins* case in principle. My proper course would have been to concur specially on the narrow ground I had taken. I did not do so.[71]

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[66] *See* Cent. Valley Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006).

[67] 300 U.S. 379 (1937).

[68] 261 U.S. 525 (1923).

[69] 298 U.S. 587 (1936).

[70] Though Justice Roberts focused on what he perceived to be the disingenuousness of *Tipaldo* counsel's argument, statements arguing more generally against the overruling of a decision where a party has not advocated doing so appear in other opinions. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) ("I am not convinced that [two precedential cases] were correctly decided. . . . Respondents did not, however, advocate overruling [the two cases], and I am reluctant to consider such a step without the benefit of briefing and argument.").

[71] Felix Frankfurter, *Mr. Justice Roberts*, 104 U. Pa. L. Rev. 311, 314–15 (1955).

Justice Roberts further explained that he later voted to overrule *Adkins* in *West Coast* because "the authority of Adkins was definitely assailed and the Court was asked to reconsider and overrule it. Thus, for the first time, I was confronted with the necessity of facing the soundness of the Adkins case."[72]

More than a half-century later in *Citizens United v. Federal Election Commission*,[73] Chief Justice Roberts used a similar argument in responding to the dissent's criticism of the majority for overruling *Austin v. Michigan Chamber of Commerce*,[74] a case the dissent asserted had been "reaffirmed" by the Court in three recent cases.[75] In a separate concurring opinion, the Chief disputed the dissent's characterization of the Court's recent precedent by pointing out that in none of those three cases, unlike in *Citizens United*, had "a single party" raised the question whether the Court's prior precedent should be overruled.[76] In the absence of anyone raising the issue, the Chief argued, the Court's prior precedent could not fairly be deemed to have been reaffirmed.[77]

B. Advocacy History and Overruling Precedent

The far more controversial use of advocacy history is when Justices decide that a prior ruling should be overruled because incomplete or otherwise poor advocacy led to a poorly reasoned decision. "'[T]he quality of the decision's reasoning'" is one of the most prominent factors the Justices consider in trying to decide whether stare decisis should be a bar to the Court's overruling a prior case,[78] and the quality of the advocacy may directly affect the quality of the Court's work.

The origins of the notion that inadequate legal advocacy undermines a ruling's precedential effect can be found in the Court's treatment of summary dispositions. The Court has long and frequently

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[72] *Id.* at 315.

[73] 558 U.S. 310 (2010).

[74] 494 U.S. 652 (1990).

[75] *Id.* at 377.

[76] *Id.*

[77] *Id.*

[78] Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).

acknowledged that because such rulings are not the result of full briefing on the merits and oral argument—for example, single-sentence summary reversals or affirmances or even lengthier per curiam opinions based only on the Court's consideration of the jurisdictional pleadings—they are less weighty even though they are nonetheless binding precedent until formally reconsidered by the Justices.

The Court's stated justification for according less weight to such summary dispositions—that they were not the product of the most thorough briefing and argument—is what has led the Justices in yet another thread of cases to embrace the more sweeping proposition that weak advocacy in a prior case can likewise support giving prior precedent less weight, even when the ruling was not the result of a truncated process lacking the opportunity for full briefing and oral argument. The Justices reason that the prior ruling is not entitled to as much respect because the Court may have reached a different result had the Justices had the benefit of better advocacy.

This reasoning has obvious intuitive force. But no less obvious is its potential to undermine stare decisis. Especially with the benefit of hindsight, it may prove not so difficult to identify arguments that could have been raised, but were not, and to speculate that had they been raised, the Court might have reached a different result. Such a speculative inquiry, especially in the context of a prior decision that has itself become over the years a settled part of law, could be fairly viewed as an insufficient basis for overruling prior precedent.

1. *Summary dispositions.* The Court decides the vast majority of its cases after full briefing and oral argument. But a handful of times every year, the Court decides cases after considering only the jurisdictional pleadings, most often a petition for a writ of certiorari, a brief in opposition, and the petitioner's reply to that opposition. The Court does not take the next step of granting the petition and requesting full briefing and oral argument by the parties. The Court instead acts "summarily" by reversing or affirming the judgment below based on the jurisdictional pleadings alone. The Court's action is based on the apparent rationale that the merits are sufficiently straightforward, or perhaps of no anticipated precedential import, and that the Court accordingly need not bother wasting its time on the matter by ordering full briefing and argument. Quite often when the Court acts in this fashion, it is to reverse a lower-court judgment, but summary affirmances can also happen (if, for example, the Court wants to resolve a circuit split but does not believe the issue warrants

full briefing and argument, or if the case is before the court on appeal, not certiorari, so the Court must decide the merits).

In some instances, the Court's only formal statement consists of a single sentence declaring that the judgment below is reversed or affirmed without any further explanation. In other instances, the Court's judgment is accompanied by an unsigned per curiam opinion, which may itself be no more than one or two sentences long, or may instead be many pages in length, offering a fuller explication of the Court's reasoning.[79]

The use of summary dispositions to rule on the merits has long been controversial on the obvious ground that the jurisdictional pleadings that serve as the exclusive basis of such rulings are not designed to provide the Justices with the kind of full ventilation of legal issues necessary for a merits ruling.[80] Individual Justices have not infrequently sharply criticized the practice,[81] though presumably they have on other occasions agreed to join such rulings in support of outcomes they personally favor. The Supreme Court Rules, moreover, expressly contemplate such summary rulings,[82] and there have been suggestions in recent years that the Court is expanding their use as an expeditious way to oversee the lower courts without the need for full briefing and oral argument.[83]

For my purposes, however, what is relevant is not whether summary dispositions are a wise practice, but that the Justices attach less precedential weight to such rulings because they appreciate that the underlying advocacy is less thorough. As the Court explained in

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[79] Not all unsigned orders or per curiam opinions, however, are the result of such summary dispositions absent full briefing and argument. The most well-known counterexample is *Bush v. Gore*, 531 U.S. 98 (2000), resolving the dispute over the counting of ballots in Florida during the 2000 presidential election, though the rushed nature of the Court's consideration of the case—only five days transpired between the jurisdictional grant of review and the release of the Court's unsigned per curiam opinion following merits briefing and oral argument—makes the case little different from summary disposition as a practical matter. Another famous ruling that resulted in a per curiam opinion following full merits briefing and oral argument is *Buckley v. Valeo*, 424 U.S. 1 (1976). See *infra* notes 104–106 and accompanying text.

[80] Ernest J. Brown, *Foreword: Process of Law*, 72 Harv. L. Rev. 77, 79–82 (1958).

[81] Alex Hemmer, *Courts as Managers:* American Tradition Partnership v. Bullock *and Summary Dispositions at the Roberts Court*, 122 Yale L.J.F. 209, 211 n.9, 223 nn.74–76 (2013).

[82] Sup. Ct. R. 16.1.

[83] Hemmer, *supra* note 81, at 218–23.

Edelman v. Jordan in 1974,[84] although summary rulings are clearly of precedential value, "they are not of the same precedential value as would be an opinion of this Court treating the question on the merits."[85] In *Edelman*, the Court explicitly disapproved a series of one-sentence summary affirmances regarding the meaning of the Eleventh Amendment, "[h]aving now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument."[86]

In 1998, the Court in *Hohn v. United States*[87] extended the reasoning of *Edelman* to discount the significance of the Court's prior per curiam opinion in *House v. Mayo*[88] that was several pages long, not a mere one- or two-sentence summary ruling. For the majority, it was not the length of the *House* opinion but the fact that the opinion was "rendered without full briefing or argument" that warranted its receiving diminished precedential weight.[89] During oral argument, Justice Ginsburg characterized the Court's prior ruling as "a rather skimpy opinion. It was per curiam and there was no opposition, and it wasn't a very well aired case, was it?"[90] Dissenting in *Hohn*, Justice Scalia expressed concern about the longer-term implications of the Court's willingness to discount the precedential value of all summary opinions in this manner:

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[84] 415 U.S. 651 (1974).

[85] *Id. at* 671; *see also, e.g.*, Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979) ("Our summary dismissals . . . do not . . . have the same precedential value here as does an opinion of this Court after briefing and oral argument. . . ."); Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976) (noting that a summary affirmance is not "of the same precedential value as would be an opinion of this Court treating the question on the merits" (quoting *Edelman*, 415 U.S. at 671)); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14 (1976) ("[The parties] direct our attention initially to [a summary affirmance that decided questions presented in the case] . . . , but having heard oral argument and entertained full briefing on these issues . . . we proceed to treat them here more fully."); Fusari v. Steinberg, 419 U.S. 379, 391–92 (1975) (Burger, C.J., concurring) ("[A]lthough I agree wholeheartedly with the Court's reasoned discussion of the tension between [a summary affirmance, on the one hand,] and [an opinion in another case, on the other], we might well go beyond that and make explicit what is implicit in some prior holding. . . . An unexplicated summary affirmance . . . is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."); Allen v. Wright, 468 U.S. 737, 764 (1984) ("[T]he decision has little weight as a precedent on the law of standing. This Court's decision . . . was merely a summary affirmance; for that reason alone, it could hardly establish principles contrary to those set out in opinions issued after full briefing and argument.").

[86] *Edelman*, 415 U.S. at 671.

[87] 524 U.S. 236 (1998).

[88] *See* House v. Mayo, 324 U.S. 42 (1945).

[89] *Hohn*, 524 U.S. at 251.

[90] Transcript of Oral Argument at 37, *Hohn*, 524 U.S. 236 (1998) (No. 96-8986).

> The new rule that the Court today announces—that our opinions rendered without full briefing and argument (hitherto thought to be the strongest indication of certainty in the outcome) have a diminished *stare decisis* effect—may well turn out to be the principal point for which the present opinion will be remembered. It can be expected to affect the treatment of many significant *per curiam* opinions by the lower courts, and the willingness of Justices to undertake summary dispositions in the future.[91]

Justice Scalia proved prescient in suggesting that the *Hohn* rationale would have unanticipated results, though the Justice himself did not shy away from embracing that rationale when the occasion later suited his own jurisprudential ends.[92]

2. *Beyond summary dispositions.* Nor has the Court limited its willingness to discount the precedential weight of opinions that are, as in *Hohn*, the product of limited briefing and the absence of oral argument to summary dispositions. Both before and after *Hohn*, Justices have taken the lesson from their summary disposition rulings that incomplete advocacy undermines precedential weight and applied that lesson far more broadly to cases that were the product of full briefing and argument, but where the Court either reached out to decide issues not fully briefed or the advocacy itself was poor.

The former can be more fairly characterized as a self-inflicted wound,[93] while the latter underscores the extent to which the Justices

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[91] *Hohn*, 524 U.S. at 260 (Scalia, J., dissenting).

[92] *See infra* text accompanying notes 100–102 (discussing Heller v. District of Columbia, 554 U.S. 570 (2008)).

[93] *See*, *e.g.*, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2436 (2015) (Breyer, J., concurring in part and dissenting in part) (arguing for "full briefing" before deciding the issue); Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 774 (2011) (Kennedy, J., dissenting) (criticizing deciding an issue without "briefing or argument from the criminal defense bar, which might have provided important counsel"); City of Indianapolis v. Edmond, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (declining to consider overruling earlier decisions "without the benefit of briefing and argument"); City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting) (noting, in arguing that an earlier decision was wrongly decided, that the conclusion was reached "without briefing or argument on the issue"); Pounders v. Watson, 521 U.S. 982, 993 (1997) (Stevens, J., dissenting) (arguing it is "unwise to answer [a question] without full briefing and argument"); Missouri v. Jenkins, 515 U.S. 70, 140 (1995) (Souter, J., dissenting) (noting that "[n]o one on the Court has had the benefit of briefing and argument informed by an appreciation of the potential breadth of the ruling"); Batson v. Kentucky, 476 U.S. 79, 118 (1986) (Burger, C.J., dissenting) (advocating "reargument and briefing" on an issue before deciding it); United States v. Johns, 469 U.S. 478, 489 (1985) (Brennan, J., dissenting) (arguing "it is improper for the Court without briefing or argument to suggest how it would resolve this important and unsettled question of law"); Harris v. Rosario, 446 U.S. 651, 652 (1980) (Marshall, J., dissenting) (criticizing the Court for "rush[ing] to resolve important legal issues without

are aware of their dependence on outstanding advocacy in their decision making. The Justices may well be "Supreme," but that does not mean they are necessarily omniscient in identifying on their own all the potential pitfalls of ruling in a particular way. They are highly dependent on the insights provided by others, especially the lawyers who appear before them in their written and oral advocacy.[94]

In his concurring opinion in *Monell v. Department of Social Services*,[95] decided in 1978, two decades before *Hohn*, Justice Lewis Powell explained why he believed that it is appropriate to afford opinions based on inadequate advocacy less precedential weight. At issue in *Monell* was whether the Court should overrule its prior decision in *Monroe v. Pape*[96] that municipalities were not subject to suit under Section 1983.[97] In a separate concurring opinion, Justice Powell defended the *Monell* Court's decision to overrule *Monroe* partly on the basis that "the ground of decision in *Monroe* was not advanced by either party and was broader than necessary to resolve the contentions made in that case."[98] As further explained by the Justice:

> Any overruling of prior precedent, whether of a constitutional decision or otherwise, disserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without

full briefing or oral argument"); California v. United States, 438 U.S. 645, 693 (1978) (White, J., dissenting) (criticizing the majority for "discard[ing] [precedential] holdings in a footnote" "[w]ithout briefing and argument"); Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting) (arguing that, before departing from an earlier opinion, the Court should have sought out "that aid which adequate briefing and argument lends to the determination of an important issue"); *cf.* Citizens United v. FEC, 558 U.S. 310, 385 (2010) (Roberts, C.J., concurring) (noting the "careful consideration" given the issue: "two rounds of briefing in this case, two oral arguments, and 54 *amicus* briefs").

[94] *See* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 93 Geo. L.J. 1487 (2008); see *infra* note 163 and accompanying text. The other side of the same coin, however, is how the Justices might also reach poor decisions because of their vulnerability to particularly outstanding advocacy by counsel representing one of the parties before the Court. That unstated phenomena might explain the Court's unanimous decision in *Hudson v. United States*, 522 U.S. 93 (1997) to overrule *United States v. Halper*, 490 U.S. 435 (1989), a decision by the Court reached only eight years earlier, also by a unanimous Court. In *Hudson*, the Court concluded that its ruling in *Halper* was "ill considered" and had "proved unworkable." *Hudson*, 522 U.S. at 101–02. Who was the counsel in *Halper* who on behalf of his client managed to persuade the Justices to adopt such an "ill considered" and "unworkable" rule? An attorney with a private law firm making his first appearance before the Court: John G. Roberts, Jr.

[95] 436 U.S. 658 (1978).

[96] Monroe v. Pape, 365 U.S. 167 (1961).

[97] *Monell*, 536 U.S. at 662.

[98] *Id.* at 709 (Powell, J., concurring).

> benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases. I also would recognize the fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 inapplicable to official municipal policies.[99]

In 2008, again in *Heller*, Justice Scalia's majority opinion for the Court embraced Justice Powell's reasoning as a basis for discounting the precedential weight of the Court's 1939 ruling in *United States v. Miller* that the Second Amendment did not confer an individual right to bear arms. Taking issue with Justice Stevens's argument that the *Miller* ruling should be respected because the *Miller* Court had reviewed "many of the same sources that are discussed at greater length by the Court today,"[100] Justice Scalia's *Heller* opinion responded that this was in fact not true, "which was not entirely the Court's fault":[101]

> The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make the case the beginning and the end of this Court's consideration of the Second Amendment).[102]

Seven years later in 2014, in yet another high-profile case, *McCutcheon v. FEC*,[103] the Court again embraced Justice Powell's reasoning in *Monell*, agreeing that inadequate advocacy in a prior case is, by itself, sufficient grounds to discount the case's precedential weight, wholly apart from whether the prior ruling was at all summary in nature. And, unlike in *Heller*, the *McCutcheon* Court was not faced with a prior ruling in which one of the parties literally had not showed up to argue. In *McCutcheon*, the Chief Justice, writing for the Court, discounted the precedential weight of *Buckley v. Valeo*[104] based on the limited nature of the legal arguments made in the case. Citing to *Hohn*, the *McCutcheon* Court reasoned that the case could not "be resolved merely by pointing to three sentences in *Buckley* that were written without the benefit of

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[99] *Id.* at 709 n.6.

[100] District of Columbia v. Heller, 554 U.S. 570, 623 (2008) (quoting *id.* at 676–77 (Stevens, J., dissenting)).

[101] *Id.*

[102] *Id.*

[103] 572 U.S. 185 (2014).

[104] 424 U.S. 1 (1976).

full briefing or argument on the issue."[105] Although *Buckley v. Valeo* was nominally an unsigned per curiam opinion, it was rendered after full merits briefing and oral argument and the majority opinion alone was 144 pages long. The oral advocates included legal luminaries of the day: Deputy Solicitor General Daniel Friedman, former Solicitor General Archibald Cox, Lloyd Cutler, Ralph Spritzer, Brice Claggett, and Ralph Winter. Yet because, as the *Buckley* Court itself had acknowledged, the constitutionality of the aggregate individual campaign contribution limit at issue "ha[d] not been separately addressed at length by the parties,"[106] the *McCutcheon* Court discounted the prior ruling.

McCutcheon has, moreover, not proven out of the ordinary in evidencing the Court's willingness to extend the *Hohn* rationale to fully briefed and argued cases. In *Johnson v. United States*,[107] decided a year after *McCutcheon*, Justice Scalia himself authored an opinion for the Court that drew on the exact language he had repudiated in *Hohn* to deny stare decisis effect to two cases, *James v. United States*[108] and *Sykes v. United States*,[109] that had held the residual clause of the Armed Career Criminal Act was not void for vagueness:

> This Court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. . . . *James* and *Sykes* opined about vagueness without full briefing or argument on that issue—a circumstance that leaves us "less constrained to follow precedent."[110]

The Court, however, decided both *James* in 2007 and *Sykes* in 2011 after full briefing and oral argument. The former opinion was forty-one pages long and the latter forty-nine pages long. Unlike in the Court's earlier cases in which it discounted summary rulings because the truncated procedures limited the nature of the advocacy provided, in *Johnson* as in *McCutcheon*, the Court chose to discount the weight of its prior precedent based on its view that the actual briefing and argument, while not formally limited as in a summary disposition, had nonetheless not provided for a full adversarial testing of all the issues decided in the prior cases.

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[105] *McCutcheon*, 572 U.S. at 202.

[106] *Id.* at 200 (alteration in original) (quoting *Buckley*, 424 U.S. at 38).

[107] 135 S. Ct. 2551 (2015).

[108] 550 U.S. 192 (2007).

[109] 564 U.S. 1 (2011).

[110] *Johnson*, 135 S. Ct. at 2562–63 (quoting *Hohn*, 524 U.S. at 251).

Even more recently, in *Knick v. Township of Scott*,[111] decided in 2019, the Chief Justice's opinion for the Court justified overruling *Williamson County Regional Planning Commission v. Hamilton Bank*[112] in part because of the decision's "poor reasoning," resulting from the limited nature of the advocacy that the Court had received in the case.[113] According to the *Knick* majority, the Court had made the mistake of "adopt[ing] the reasoning of the Solicitor General" as expressed by an amicus brief for the United States, which had raised an argument even though "[n]either party had raised the argument before."[114] That was relevant, according to the majority, because "[i]n these circumstances, the Court may not have adequately tested the logic of the [*Williamson County*] state-litigation requirement or considered its implications."[115] The Court's reliance on the notion that *Williamson County* had been decided "without adequate briefing from the parties" was expressly invited by the brief filed by the petitioner and their supporting amici in *Knick*.[116]

Not surprisingly, now that the Justices have been making increasingly clear that they are open to these arguments, more advocates are making them—suggesting that it may soon become open season for the advocates of today to challenge the quality of advocacy of their forbearers. For instance, during October Term 2018, the *Knick* petitioner and her amici were not the only counsel making this kind of argument as part of their pitch that the Court should overrule longstanding precedent. The petitioner in *Gamble v. United States*[117] made a similar argument in contending that the Justices should overrule the Court's 1927 decision in *United States v. Lanza*.[118] At issue in *Gamble* was the validity of the so-called "dual sovereignty doctrine," which provides that the Fifth Amendment's Double Jeopardy Clause is not

[111] 139 S. Ct. 2162 (2019).

[112] 473 U.S. 172 (1985).

[113] *Knick*, 139 S. Ct. at 2174.

[114] *Id.*

[115] *Id.*

[116] Petitioner's Brief on the Merits at 22, *Knick*, 139 S. Ct. 2162 (No. 17-647); Brief Amicus Curiae for the American Farm Bureau Federation et al. in Support of Petitioner at 18, *Knick*, 139 S. Ct. 2162 (No. 17-647) ("Misled by this inadequate exploration of the issues, the Court in *Williamson County* inadvertently set a trap for property owners by failing to consider preclusion.").

[117] 139 S. Ct. 1960 (2019).

[118] 260 U.S. 377 (1922).

triggered where there are two sovereigns and two laws, and accordingly no double prosecutions for the "same offense." *Lanza* provided the foundational precedent for the dual sovereignty doctrine.[119]

In support of *Lanza*'s overruling, an amicus brief in support of petitioner in *Gamble* stressed that "[w]hen the case reached this Court, the defendants received abysmal representation."[120] Their brief was "meandering," presented arguments that were "quite hard to discern," and "inept counsel" failed to question the validity of the dual sovereignty doctrine.[121] The majority, however, declined to address this argument, and Justice Kagan left little doubt during oral argument that she found the claim unpersuasive. During her questioning of petitioner's counsel, Justice Kagan suggested that petitioner's argument that *Lanza* should be overruled because "the arguments weren't properly presented" before the Court decided the case wasn't especially convincing given that "it's an 170-year-old-rule that's been relied on by close on 30 justices . . . at one time or another."[122]

Justice Gorsuch, by contrast, was a fan of this argument. In dissent, he pointed out, like *Gamble* petitioner's counsel, that in *Lanza* "the defendants did not directly question the permissibility of successive prosecutions for the same offense under state and federal law."[123] According to Justice Gorsuch, that lapse of effective advocacy was why the "Court did not consult the original meaning of the Double Jeopardy Clause or consult virtually any of the relevant historical sources," which, he argued, rendered that aspect of the *Lanza* ruling no more than "dictum."[124] As described above, using prior advocacy to characterize an aspect of a prior Court opinion as "dictum" is a close cousin to using such inadequate advocacy to argue that the prior ruling should be overruled.

II. October Term 2019

The Court's October Term 2019 underscores the extent to which advocacy history has become a regular feature of Supreme

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[119] J.A.C. Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309 (1932).

[120] Brief of Amici Curiae Law Professors in Support of Petitioner at 14, *Gamble*, 139 S. Ct. 1960 (No. 17-646).

[121] *Id.* at 14, 16.

[122] Oral Argument at 20, *Gamble*, 139 S. Ct. 1960 (No. 17-646).

[123] *Gamble*, 139 S. Ct. at 2007 (Gorsuch, J., dissenting).

[124] *Id.*

Court decision making. Advocates before the Court frequently relied on advocacy history in their arguments to the Court, and the Court and individual Justices did the same in their opinions. Reliance on advocacy history was evident in a wide range of contexts: from the seemingly most mundane matters such as denials of petitions for a writ of certiorari to the most significant—rulings on the merits, including in two of the highest-profile cases of the Term.

Nothing is more routine at the Court than the denial of certiorari. The Court does it thousands of times a year. The legal effect is plain; the judgment below is left undisturbed and, in principle, a decision to deny review says nothing about whether the Court believes the decision below was correct. No doubt for that same reason, it is highly unusual for the Court or an individual Justice to offer an explanation for why review is being denied.

Yet in *Patterson v. Walgreen Co.*,[125] Justice Alito, joined by Justices Thomas and Gorsuch, did just that by publishing a statement concurring in the denial of certiorari.[126] In agreeing with the Solicitor General, whose views on the jurisdictional issue the Court had invited, Justice Alito stated that the Court should, as the Solicitor General had recommended, reconsider the validity of its prior ruling in *Trans World Airlines, Inc. v. Hardison*,[127] but that the Solicitor General was also correct that *Patterson* did not present "a good vehicle for revisiting *Hardison*."[128] Justice Alito supported his view that *Hardison* should be reconsidered in a future case by citing what he described as the limited nature of the briefing by the parties in that case: "the parties' briefs in *Hardison* did not focus on the meaning of [the statutory] term" interpreted by the Court in that case.[129] For Justice Alito and the two Justices who joined his opinion, the absence of such argument by counsel weakened the precedential weight of *Hardison* and invited its reconsideration.

In April, Justice Gorsuch, dissenting in *Thryv, Inc. v. Click-to-Call Technologies, LP*,[130] relied on advocacy history in a different way: to

[125] 140 S. Ct. 685 (2020) (mem.).

[126] *Id.* at 685 (Alito, J., concurring in the denial of certiorari).

[127] *Id.*

[128] *Id.* at 686.

[129] *Id.*

[130] 140 S. Ct. 1367 (2020) (Gorsuch, J., dissenting).

interpret the meaning of a prior decision in determining its impact on arguments being made in *Thryv*. In particular, Justice Gorsuch compared the arguments being made by the petitioner in *Thryv* to the arguments made by a nonprevailing party in a case decided by the Court just two years earlier. Upon concluding that what "Thryv argues today" was essentially the same argument, relying on the same language, made by the losing party in that earlier case, Justice Gorsuch concluded that the Court's controlling precedent required rejection of Thryv's argument too.[131] In rejecting Justice Gorsuch's reading of that precedent, however, the majority pointed out that the dissent's "view of our precedent" was not one that even the respondent advanced, further underlining the role that advocacy serves in the Court's reasoning.[132]

In *June Medical Services, LLC v. Russo*,[133] advocacy history was relevant to the arguments of the parties in one of the biggest cases of the Term. At issue in *June Medical* was whether restrictions placed on abortion providers by Louisiana amounted to an unconstitutional undue burden on a woman's right to access to an abortion. Front and center in the case was whether the Court's 2016 decision in *Whole Woman's Health v. Hellerstedt*,[134] striking down a similar set of restrictions in Texas, required invalidation of the Louisiana law. The U.S. Court of Appeals for the Fifth Circuit had upheld the Louisiana law in part by distinguishing *Whole Woman's Health* on the ground that the defenders of the Louisiana law were raising a legal argument not raised in the Texas case.[135] In response, those challenging the Louisiana restrictions, citing to the Texas brief,[136] argued that Texas had in fact made all those same arguments which the Court had rejected in *Whole Woman's Health* and therefore was bound by precedent to reject in *June Medical Services* too.[137]

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[131] *Id.* at 1386.

[132] *Id.* at 1376 n.8.

[133] 140 S. Ct. 2103 (2020).

[134] 136 S. Ct. 2292 (2016).

[135] June Medical Services L.L.C. v. Gee, 905 F.3d 787, 806 (5th Cir. 2018) ("The benefit from conformity was not presented in *WWH*, nor were the reasons behind the conformity . . . directly addressed.").

[136] Brief for Petitioners at 35, *June Medical Services*, 140 S. Ct. 2103 (2020) (No. 18-1323).

[137] *Id.* ("But the Court in *Whole Woman's Health* was not moved by that argument, and in fact rejected the premise. . . .").

Petitioner June Medical stressed the same point in its oral argument. Its counsel began the argument by highlighting "two fundamental errors" made by the Fifth Circuit in upholding Louisiana's restrictions on abortion providers.[138] The second of those errors was its acceptance of "legal arguments that this Court rejected four years ago."[139] Justice Kagan, later in the argument, challenged counsel for respondent Texas on that same ground: "[I]t seems that Whole Woman's Health precludes you from making this credentialing argument, doesn't it?"[140] Texas, in its brief, had made the backup argument that, if necessary, the Court should overrule *Whole Woman's Health*—thus implicitly recognizing that rejected legal arguments are a basis for interpreting the meaning of a precedent.[141]

In one of the Court's most stunning rulings of the Term, the Court struck down the Louisiana law on the ground that, as dictated by its prior ruling in *Whole Women's Health*, the state law imposed an undue burden on a woman's right to obtain an abortion and therefore was unconstitutional. It was of course not at all surprising that the four remaining Justices from the *Whole Women's Health* majority reached that result, concluding that "[t]his case is similar to, nearly identical with, *Whole Women's Health*" and "the law must consequently reach a similar conclusion."[142] The headline instead was that the Chief Justice, who had dissented in *Whole Women's Health* and who made clear in *June Medical* that he still believed *Whole Women's Health* was wrongly decided, nonetheless concluded that stare decisis required him to vote to strike down an essentially identical law in *June Medical* that "imposes a burden on access to abortion just as severe as that imposed by the Texas law."[143] The Chief rejected the dissent's argument that factual differences between the two cases were sufficient to support a different outcome.[144] Those challenging the Louisiana law therefore successfully persuaded a majority of the Court by their

[138] Transcript of Oral Argument at 5, *June Medical Services*, 140 S. Ct. 2103 (2020) (No. 18-1323).

[139] *Id.* at 5.

[140] *Id.* at 43.

[141] Brief for the Respondent/Cross-Petitioner at 67, *June Medical Services*, 140 S. Ct. 2103 (2020) (No. 18-1323).

[142] 140 S. Ct. at 2133 (plurality opinion).

[143] *Id.* at 2134 (Roberts, C.J., concurring).

[144] *Id.* at 2139–41.

arguments, which included extensive reliance on advocacy history, that the case could not be fairly distinguished from *Whole Women's Health*.

Justice Alito's dissenting opinion in *June Medical* also used advocacy history, addressing a threshold issue raised in *June Medical*: whether the doctors possessed standing to challenge the constitutionality of the Louisiana law. In concluding that such third-party standing had been sufficiently established in *June Medical* notwithstanding what the dissent described as a possible conflict of interest between abortion providers and patients seeking abortions (whose protection was the ostensible purpose of the Louisiana law), Justice Breyer's plurality opinion relied on the Court's 1976 decision in *Craig v. Boren*,[145] which, Justice Breyer said, was similar in relevant respects to *June Medical*. In *Craig*, the Court permitted a vendor of 3.2 percent beer to challenge a law permitting females, but not males, to purchase beer at the younger age of eighteen; the law was justified partly on the ground that it would keep young men from driving while intoxicated. Justice Alito's response in dissent makes plain that he looked to the underlying advocacy to support his view that *Craig* failed to support Breyer's view: "Suffice it to say that there is no indication that this supposed conflict occurred to anybody when *Craig* was before this Court."[146]

In *Our Lady of Guadalupe v. Morrissey-Berru*,[147] argued on May 11, 2020, advocacy history was front and center in the litigation before the Court. The question presented in *Our Lady of Guadalupe* was whether the First Amendment's Free Exercise and Establishment Clauses barred a court's consideration of an employment-discrimination claim brought against a religious elementary school by a lay teacher at the school. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[148] decided in 2002, the Court held that there was a "ministerial exception" to employment discrimination claims brought against religious schools but did not address the question whether that exception

[145] *Id.* at 2117 (plurality opinion) (citing Craig v. Boren, 429 U.S. 190 (1976)).

[146] *Id.* at 2169–70 (Alito, J., dissenting).

[147] 140 S. Ct. 2049 (2020). *Our Lady of Guadalupe* was one of two consolidated cases from the Ninth Circuit, both raising the same legal issue. The other case was *St. James School v. Biel*, 140 S. Ct. 680 (2019) (mem.) (granting certiorari). The respondent teachers in the two consolidated cases filed one joint brief with the Court. *See* Brief for Respondents, *Our Lady of Guadalupe*, 140 S. Ct. 2049 (2020) (Nos. 19-267 & 19-348).

[148] 565 U.S. 171 (2012).

applied to a lay teacher.[149] The party seeking to bring the employment discrimination claim in *Hosanna* was a teacher who was also an ordained minister.[150]

In *Our Lady of Guadalupe*, the respondent teachers contended that the Supreme Court in 1986 had already established binding precedent in *Ohio Civil Rights Commission v. Dayton Christian Schools*,[151] left undisturbed by *Hosanna-Tabor*, that a lay teacher at a religious school could file an employment-discrimination claim. The *Dayton* case concerned a lay teacher at a religious school who filed a complaint with a state civil rights commission, alleging that the school had engaged in unlawful sex discrimination in terminating her employment. The school sued in federal district court to enjoin the state administrative proceedings. The Court, in an opinion written by Chief Justice Rehnquist, held that the federal trial court should have abstained from adjudicating the case and instead allowed it to proceed before the commission, with review by state courts.[152] But the Court, in reaching that conclusion—in a passage of potential relevance to *Our Lady of Guadalupe*—rejected the school's argument that the federal court should have intervened because "the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights"; on the contrary, the Court said, the state Civil Rights Commission "violates no constitutional rights by merely investigating the circumstances of [the employee's] discharge in this case."[153] On this point, the four concurring Justices agreed: "neither the investigation of certain charges nor the conduct of a hearing on those charges is prohibited by the First Amendment."[154]

Relying on the advocacy history underlying *Dayton*, the teachers in *Our Lady of Guadalupe* argued that the Supreme Court in *Dayton* had held that a "a lay teacher in a religious elementary school [can] sue her employer."[155] They asserted that the losing argument advanced by the Dayton Christian School in *Dayton* was "precisely" the "very same argument the Schools make here," which the Court in

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[149] *Id.* at 190, 196.

[150] *Id.* at 177–78.

[151] 477 U.S. 619 (1986).

[152] *Id.* at 628.

[153] *Id.*

[154] *Id.* at 632 (Stevens, J., concurring in the judgment).

[155] Brief for Respondents, *supra* note 147, at 1.

Dayton "unanimously rejected."[156] And they buttressed their claim over multiple pages in their brief with detailed and lengthy verbatim excerpts from the briefs filed by the Dayton Christian Schools in *Dayton*,[157] which "stressed 'the *religious functions* carried out by every teacher at [Dayton Christian Schools],' including 'conducting devotionals, providing direct instruction in Bible study, integrating Biblical precepts into every subject taught, and giving witness to religious truth by examples and conduct.'"[158]

During the *Our Lady of Guadalupe* oral argument, however, the petitioner religious schools sought to turn the tables by enlisting advocacy history in support of their position before the Court. But instead of focusing on the advocacy history of *Dayton*, as the teachers had done, petitioners focused on the advocacy underlying *Hosanna-Tabor*. Petitioners' counsel commenced his oral argument by asserting that "[i]f Respondents' arguments give some members of the Court déjà vu all over again, that is because Respondents have recycled many of the arguments that Court unanimously rejected eight years ago in *Hosanna-Tabor*":[159]

> The pretext inquiry, the notice requirement, the idea that freedom of association makes freedom of religion entirely unnecessary all were raised in *Hosanna-Tabor* and rejected unanimously. Eight years later, Respondents' argument are not any more convincing.[160]

The Court sided with the petitioners.[161] But in this instance, the advocacy history debate that preoccupied the opposing counsel did not make it into either the majority or dissenting opinions. Consistent with petitioners' argument, but with no reference to their reliance

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[156] *Id.* at 26.

[157] *Id.* at 24–26 (quoting Brief for Respondent at 19, 24, 31, Ohio Civ. Rts. Comm'n v. Dayton Christian Schs., 477 U.S. 619 (No. 85-488); Transcript of Oral Argument at 44, *Dayton Christian Schools*, 477 U.S. 619 (1986) (No. 85-488)).

[158] *Id.* at 25 (quoting Brief for Respondent at 31, *Dayton Christian Schools*, 477 U.S. 619 (1986) (No. 85-488)). Petitioners' reply brief in *Our Lady of Guadalupe* sought mostly to deflect respondents' argument rather than address it, claiming it "smacks of desperation." Reply Brief for Petitioners at 10, *Our Lady of Guadalupe*, 140 S. Ct. 2049 (2020) (Nos. 19-267 & 19-348). It contended, without citation, that the respondents in *Hosanna-Tabor* made the same argument (further embracing the relevance of advocacy history) and that the *Dayton* Court itself never indicated whether the teacher in that case was a lay teacher. *Id.*

[159] Transcript of Oral Argument at 6–7, *Our Lady of Guadalupe School*, 140 S. Ct. 2049 (2020) (No. 19-267).

[160] *Id.*

[161] 140 S. Ct. 2049 (2020).

on advocacy history, a seven-Justice majority held that the prior decision in *Hosanna-Tabor* was "sufficient to decide the cases before us." According to the majority, "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith," the First Amendment Free Exercise and Establishment Clauses bar the adjudication of an employment-discrimination claim between the school and the employee.[162] But the respondents' extensive reliance on the advocacy history underlying the *Dayton* case made no apparent impact at least on the face of either the majority or dissenting opinions. Neither opinion cited even once to the *Dayton* case, let alone its advocacy history.

III. The Use of Advocacy History in Law Teaching and Legal Scholarship

In prior scholarship, I have sought to demonstrate how the quality of Supreme Court advocacy—whether outstanding or poor—affects what cases the Court decides to hear on the merits as well as the outcome in those cases it decides to hear.[163] Advocacy matters to Supreme Court decision making, and, relatedly, seemingly anomalous decisions can sometimes be explained by looking at the underlying advocacy. This article takes the further step of demonstrating how Supreme Court advocacy not only explains *why* the Court has ruled the way it has but also *what* it has ruled. These relationships between advocacy and Supreme Court decision making provide rich pedagogical opportunities for law professors in how they teach Supreme Court opinions. And, for that same reason, legal scholars might stumble in their own efforts to evaluate a decision if they do not consider the underlying advocacy.

One prominent example, *Massachusetts v. Environmental Protection Agency*,[164] nicely illustrates these pedagogical opportunities and

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[162] *Id.* at 2069.

[163] *See* Lazarus, *supra* note 94; Richard J. Lazarus, *Docket Capture at the High Court*, 119 Yale L.J.F. 89 (2009) [hereinafter Lazarus, *Docket Capture at the High Court*]; Richard J. Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1507 (2012) [hereinafter Lazarus, *The National Environmental Policy Act*]; *see* Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 Stan. L. Rev. 137, 146–62 (2013); Joan Biskupic, Janet Roberts & John Shiftman, *At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, Reuters (Dec. 8, 2014), https://www.reuters.com/investigates/special-report/scotus/.

[164] 549 U.S. 497 (2007).

scholarly pitfalls. *Massachusetts* is widely considered by environmental scholars and practitioners to be one of the Court's most significant environmental law rulings of all time.[165] A five-Justice majority held that allegations of climate injury could satisfy Article III standing requirements, that greenhouse gases constitute "air pollutants" within the meaning of the federal Clean Air Act, and that the U.S. Environmental Protection Agency abused its discretion in declining to determine whether emissions of greenhouse gases from new motor vehicles could reasonably be anticipated by EPA's administrator to endanger public health or welfare.

But *Massachusetts*'s legal significance is not limited to environmental law. Because it is a leading Supreme Court case concerning both Article III standing and the scope of judicial review of agency action, the case is routinely featured and taught in administrative law,[166] constitutional law,[167] and federal courts[168] classes in law schools across the nation. But if those teaching the case in law school are unaware of the advocacy history underlying the Court's opinion, they are missing an opportunity to teach more fully about what the Court ruled in the case. The same is true for legal scholarly analysis of the Court's ruling. Scholars have written, debated, and theorized about the import of the Court's ruling, unaware that there are potential answers to their questions supplied by the readily available advocacy history.

A. SCHOLARLY COMMENTARY ON MASSACHUSETTS

In *Massachusetts*, the Court addressed three distinct legal issues: (1) whether the petitioners possessed the Article III standing required to bring the lawsuit in the first instance; (2) whether EPA had lawfully concluded that greenhouse gases were not "air pollutants" within the meaning of the Clean Air Act; and (3) whether, even if greenhouse gases were Clean Air Act air pollutants, EPA had abused its discretion

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[165] *See, e.g.*, J.B. Ruhl & James Salzman, *American Idols*, Envt'l F., May/June 2019, at 40.

[166] *See, e.g.*, Stephen G. Breyer et al., Administrative Law and Regulatory Policy (8th ed. 2017); Peter Strauss et al., Gellhorn and Byse's Administrative Law Cases and Comments (12th ed. 2018).

[167] Erwin Chemerinsky, Constitutional Law 53–59 (6th ed. 2017); Noah Feldman & Kathleen M. Sullivan, Constitutional Law 43–47 (20th ed. 2018); Geoffrey R. Stone et al., Constitutional Law 97–105 (5th ed. 2018).

[168] Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 149, 283–86 (7th ed. 2015).

in postponing its determination whether the emissions of such pollutants by new motor vehicles endangered public health and welfare.[169] Although it was immediately clear when the Court announced its ruling in April 2007 that the *Massachusetts* petitioners had run the table, winning on all three issues, far less clear were the precise grounds of the Court's reasoning and therefore its precedential impact on future cases.

Most controversial of all for legal scholars seeking to assess the Court's ruling are its grounds for deciding that EPA had abused its discretion in deciding, in effect, not to decide the endangerment issue. Legal scholars have pointed out that the opinion is susceptible to many possible readings, from quite narrow to quite broad, the latter of which is "supported by important passages in the opinion."[170] According to two of the nation's leading administrative law scholars, Harvard law professors (and my faculty colleagues) Cass Sunstein and Adrian Vermeule, "the Court seems to hold that in deciding whether to decide, agencies *may consider only the same factors that would be relevant to the primary decision itself*"[171]—referring in the *Massachusetts* context to the factors relevant in deciding whether an endangerment was in fact presented by new motor vehicle emissions of greenhouse gases. As Sunstein and Vermeule correctly go on to point out, that would be "a puzzling holding, one that is flatly inconsistent with the larger structure of administrative law" because agencies legitimately defer decision making all the time because of their practical need to allocate limited agency resources among competing priorities.[172] As further described by Sunstein and Vermeule, the resulting confusion in the lower courts forced to wrestle with the implications of the *Massachusetts* Court's "absurd" conclusion has prompted legal scholars to dismiss it, "labeling *Massachusetts v. EPA* as wrongly decided or impossibly confused."[173]

Professors Sunstein and Vermeule proffered an alternative basis for the Court's ruling in *Massachusetts* that they contend would, unlike

[169] *Massachusetts*, 549 U.S. 497.

[170] Cass Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 Geo. L.J. 157, 159 (2014); *see* Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision*, 2009 Mich. St. L. Rev. 67; Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 Admin. L. Rev. 565, 611 (2014).

[171] Sunstein & Vermeule, *supra* note 170, at 160 (emphasis in original).

[172] *Id.*

[173] *Id.* at 175.

the one suggested by the actual language of the Court's opinion, have justified the result reached by the Court. They argue that although EPA could have lawfully deferred its endangerment determination for any of a host of reasons unrelated to whether an endangerment exists, including limited agency resources, "there is a legitimate concern underlying the broader passages in *Massachusetts v. EPA*, which is that the EPA was in effect circumventing the statutory scheme through inaction."[174] They accordingly propose that "even in the absence of a statutory deadline, agencies are subject to a general *anti-circumvention principle*: when deciding whether to decide, agencies may not circumvent express or implied congressional instructions by deferring action."[175] They then go on to argue that the anti-circumvention principle suggested by *Massachusetts* is still an "overly broad prophylactic approach" and suggest that an "anti-abdication principle" would be far preferable "by providing a standard, rather than a rule, and thus sweeping in fewer cases in which agencies genuinely do have good reasons to defer decisionmaking."[176]

In their self-described effort to "reconstruct" *Massachusetts*, Sunstein and Vermeule persuasively point out how the broader reading of the Court's holding suggested by the language of the opinion would lead to absurd results contradicted by the long-standing, settled background principles of administrative law.[177] They posit narrower and far more defensible theoretical bases for the result reached by the Court: an "anti-circumvention principle," and its close relative the "anti-abdication principle." They argue that while the anti-circumvention principle offers a good explanation for what the Court was trying to achieve prophylactically, the anti-abdication principle is better still because it offers a narrower ground, rooted in the impropriety of a federal agency deferring any decision because of its rejection of Congress's policy judgment. Their claim is not that the language of the Supreme Court's opinion actually evidences any intent to rest on either of these narrower theoretical bases they have identified for the first time. It is instead that the Justices in the majority could and should have rested the decision on these grounds.

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[174] *Id.*

[175] *Id.* at 162 (emphasis in original).

[176] *Id.* at 189.

[177] *Id.* at 182–83.

B. WHAT THE MASSACHUSETTS ADVOCACY HISTORY REVEALS

What is missing from Sunstein and Vermuele's otherwise excellent analysis is any awareness of the availability of the advocacy history underlying *Massachusetts* to illuminate the Court's reasoning in the case. That advocacy history provides strong evidence that the majority opinion is best read to have in fact been narrowly based on the very anti-circumvention and anti-abdication principles upon which Sunstein and Vermeule fault the Court for not relying. That same history also leaves little doubt that the Justices were not endorsing the overly broad approach for which commentators have sharply criticized the Court, based on the supposition that the Court had absurdly held that agencies could not defer discretionary decision making on the basis of traditional background principles of administrative law, including the need to decide how best to allocate limited agency resources among competing agency priorities.

As described in Part I above, the Court regularly considers the arguments made by the prevailing party in determining the meaning of its prior precedent. In *Massachusetts*, not only were the arguments of the prevailing petitioners the source of the broad language in the Court's opinion that commentators and lower courts have since sharply criticized, but their accompanying advocacy makes abundantly clear that they did not intend the absurd meaning suggested by legal commentators and lower courts in reading that language. Nor should, for that same reason, that absurd reading be attributed to the Court. The most plausible reading of the opinion is that the Court, rather than adopting an obviously erroneous position, meant to embrace the approach urged by the advocates who prevailed, however inartfully the relevant passages of the opinion might have been phrased.

The offending language in the *Massachusetts* Court's majority opinion can be found in two sentences. The first is when the Court seems to announce the applicable test for evaluating the legitimacy of an agency decision to postpone a determination: "[O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute."[178] The second is its conclusion, after reviewing the several policy reasons proffered by EPA, that EPA's reasons were arbitrary and capricious: "Although

[178] Massachusetts v. EPA, 547 U.S. 497, 533 (2007).

we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change."[179]

Both the Court's test and its application of the test reflect almost exactly the wording and reasoning of the argument expressed in the brief filed by the prevailing *Massachusetts* petitioners. Petitioners argued that "EPA may not decline to issue emission standards for motor vehicles based on policy considerations not enumerated in Section 202(a)(1) of the Clean Air Act."[180] As further elaborated by petitioners in their brief: "The provision under which EPA made its decision, section 202(a)(1) of the Clean Air Act, is crystalline: EPA is to decide whether to regulate an air pollutant emitted by motor vehicles on the basis of its judgment as to whether public health or welfare may reasonably be anticipated to be endangered by the pollution, and not the grab bag of considerations EPA invoked in this case."[181]

But while making these arguments, which the Court accepted, the prevailing petitioners both freely and repeatedly conceded in their briefs and oral argument that EPA possessed the very kind of background discretionary authority to defer decision making that legal commentators faulted the Court for rejecting. In addition, the only basis the prevailing *Massachusetts* petitioners offered for why the Court should nonetheless rule that EPA had acted arbitrarily and capriciously in deciding not to decide the endangerment issue was the very anti-abdication principle that Sunstein and Vermeule seven years later proffered as what would have been a justifiable basis for the Court's ruling. And the petitioners had accordingly carefully crafted their concessions and legal arguments before the Court in order to maximize their odds of prevailing. For those same reasons, because these were the actual arguments made by the prevailing party before the Court, they provide a legitimate basis for interpreting the meaning of otherwise ambiguous language in the Court's opinion narrowly.

For instance, in their reply brief on the merits, petitioners did not dispute that under long-standing "background principles of

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[179] *Id.*

[180] Brief for the Petitioners at 35, *Massachusetts*, 547 U.S. 497 (No. 05-1120), 2006 WL 2563378.

[181] *Id.* at 38.

administrative law," agencies might well be entitled to deference in the timing of their decision making based on factors such as "resource constraints" or "competing priorities."[182] But, as petitioners stressed, "[n]owhere did EPA assert that it was declining to regulate" for either of those reasons, and the federal government's contrary suggestion in its brief "ignore[d] the actual structure of EPA's decision."[183] Instead of relying on potentially lawful background principles, petitioners' reply brief argued, EPA had based its decision to defer a decision on an illegitimate ground: "the power to ignore statutes it does not like."[184] Although petitioners did not label this the "anti-abdication principle," that was precisely the point they were making.

Nor did either petitioners' concession about the availability of background principles of administrative law or the narrow basis of their anti-abdication argument escape the attention of the Justices during oral argument. Because petitioners knew that making such a concession about background principles of administrative law and relying on a narrow anti-abdication principle were their best, if not only, hopes of winning, petitioners' counsel stressed each during oral argument. And the Justices in response sharply questioned their counsel to make sure he appreciated the narrow nature of their argument, especially because of its potential to allow EPA to reach the same result on remand.

Massachusetts's counsel began his argument by expressly acknowledging that "EPA possesses a good deal of discretion in applying the statutory endangerment test"; its mistake was resting its ruling "on impermissible grounds."[185] For that same reason, counsel stressed, petitioners were not asking the Court to order EPA to regulate greenhouse gas emissions but merely "to visit the rulemaking petition based upon permissible considerations."[186] Counsel further identified the impermissible ground upon which EPA had instead expressly relied: "we disagree with the regulatory approach" laid out by Congress in the Clean Air Act.[187] "Rejecting mandatory motor vehicle

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[182] Reply at 1, 19, *Massachusetts*, 547 U.S. 497 (No. 05-1120), 2006 WL 3367871.

[183] *Id.* at 19.

[184] *Id.* at 22.

[185] Transcript of Oral Argument at 3–4, *Massachusetts*, 547 U.S. 497 (No. 05-1120).

[186] *Id.* at 4.

[187] *Id.* at 19.

regulation as a bad idea is simply not a policy choice that Congress left to EPA," the *Massachusetts* counsel argued.[188]

In response to a question from the Chief Justice about precisely when EPA had abused its discretion by not deciding the endangerment issue and whether the *Massachusetts* petitioners were denying EPA had discretion "to deal with what they regard as the more serious threats sooner," petitioners' counsel freely acknowledged that EPA possessed just such discretion based "on background principles of administrative law."[189] But, counsel pointed out, in the record before the Court, "they do not rely on any of those grounds, they do not rely on lack of information, they did not rely on background principles of administrative law."[190]

At this point, Justice Ginsburg interjected to make sure that counsel for the *Massachusetts* petitioners understood the limited nature of the relief they were seeking with this argument:

> But if you are right and then it went back and the EPA said, well, an obvious reason also is constraint on our own resources, we have the authority to say what comes first, Congress—we couldn't possibly do everything that Congress has authorized us to do; so it's our decision, even though we have the authority to do this, we think that we should spend our resources on other things.
>
> Suppose they said that? You said they didn't say it this time around, but how far will you get if that's all that's going to happen is it goes back and then EPA says our resources are constrained and we're not going to spend the money?[191]

Counsel made clear petitioners understood and accepted all the implications of their narrow argument. He did not deny that EPA could on remand rely on "background administrative law principles," including "we just don't want to spend the resources on this problem," and, if EPA wrote such an opinion, there would only "be a narrow arbitrary and capricious challenge on that. But the point is here they relied on the impermissible consideration that they simply disagreed with the policy behind the statute."[192]

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[188] *Id.* at 20.

[189] *Id.* at 19.

[190] *Id.*

[191] *Id.* at 20.

[192] *Id.* at 20–21.

It was completely clear at the time, moreover, why petitioners were willing to make such concessions and rely only on such narrow arguments: they had calculated that it was their only chance of winning the case on the third issue presented.[193] They were not alone in such an assessment. For that very reason, Justice Scalia, who had left no doubt during oral argument of his hostility to petitioners' position, sought to get their counsel to abandon the concession. As soon as counsel stood up for his rebuttal, Justice Scalia asked a seemingly humorous question: "Mr. Milkey, do you want us to send this case back to the EPA to ask them whether if only the last two pages of their opinion were given as a reason that would suffice? Would that make you happy?"[194] And, when counsel gamely responded that "It would not make us happy, your Honor," Justice Scalia quickly embraced that statement by saying "I didn't think so."[195] Although the Court's oral argument transcript indicates that the courtroom erupted in laughter in response to the exchange, Justice Breyer understood exactly what Justice Scalia was seeking to do, his humorous tone notwithstanding: to get the *Massachusetts* counsel to concede away what might be the petitioners' winning argument. So, when the *Massachusetts* counsel sought to move on, Justice Breyer interrupted and brought him back to his response to Justice Scalia:

> What is your answer to Justice Scalia? Because I thought you said before that you thought it was appropriate for us to send this case back so that they could redetermine in light of proper considerations whether they wanted to exercise their authority. . . . Am I wrong about that?[196]

The *Massachusetts* counsel, then realizing that he had unwittingly walked into Justice Scalia's trap, no less quickly seized the lifeline Justice Breyer was offering and walked back his earlier answer to Justice Scalia: "Your Honor, that is exactly what we want."[197]

In short, the advocacy underlying the Court's ruling in *Massachusetts* provides strong evidence regarding how best to address the issues otherwise created by the opinion's language in isolation, with which legal scholars and lower courts have struggled. There is little

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[193] Richard J. Lazarus, The Rule of Five, 201-02 (2020).

[194] Transcript of Oral Argument, *supra* note 185, at 52.

[195] *Id.*

[196] *Id.* at 53.

[197] *Id.*

reason to suppose that the Court was "absurdly" overturning decades of background principles of administrative law that allow agencies in the absence of a prescribed statutory deadline to defer decision making because of resource constraints, given that the prevailing party readily conceded an agency could. And there was similarly good reason to conclude that the Court not only *should* have but *could* legitimately be understood to have granted relief on a narrowly tailored anti-abdication principle in ruling that EPA had acted arbitrarily and capriciously, when that was the only argument proffered by the prevailing *Massachusetts* petitioners for why they should win on that ground. Although the lower courts and legal scholars have so far neglected to consider the relevancy of that advocacy in reading the *Massachusetts* opinion, it is fair to expect that both Supreme Court practitioners and the Justices themselves will do so in a future case that raises the issue of precisely what the Court ruled in *Massachusetts*, as they have done for decades in analogous circumstances.

Conclusion

Advocacy matters a lot in Supreme Court decision making.[198] Advocacy frequently explains why the Court's docket reflects certain kinds of legal issues and not others. It explains why some cases are granted review and other cases are denied, and which legal questions are presented to the Justices when review is granted. Advocacy also frequently explains why the Court rules the way it does in those relatively few cases that it hears each year on the merits.

Advocacy history also matters. It can explain what the Court has ruled, especially in cases in which the opinion of the Court is otherwise ambiguous, but even in cases when the text of the opinion otherwise might seem clear. The Justices have for decades looked to the advocacy underlying a prior Court ruling to determine its meaning and, far more controversially, to assess its precedential weight. Knowing that, expert Supreme Court practitioners do the same in presenting argument to the Court.

Legal academics should take fuller account of the special role advocacy history plays in the Court's decision making both in their teaching and writing about the Court. There are rich pedagogical opportunities readily available in demonstrating to students the

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[198] Lazarus, *supra* note 94; Lazarus, *Docket Capture at the High Court*, *supra* note 163.

relationship of advocacy to the "why" and "what" of Supreme Court opinions. What at first might seem absurd or wholly inexplicable can, upon revealing the relevant advocacy, quickly make sense to students in exciting ways and, no less important, underscore to future lawyers the importance of their role as legal advocates.

Finally, there is likewise untapped value available to legal scholars who invariably seek to understand both the "why" and "what" of Supreme Court opinions, but have to date not appreciated advocacy's significance in answering each of those questions. This article's primary purpose has been to bring the practice out of the shadows of Supreme Court advocacy and decision making. A secondary goal has been to invite further scholarly assessment of the legitimacy of the practice, including drawing distinctions between its invocation in differing contexts. For instance, could advocacy history be fairly deemed a weightier basis for concluding that the Court decided less than it might otherwise seem from the face of the opinion rather than more?[199] So too just because it may be legitimate to invoke advocacy history to determine what the Court previously ruled does not mean it is equally fair game to use such history to deny a prior decision stare decisis effect because its underlying advocacy was somehow deficient.[200] In these ways, among others, advocacy history seems to be especially important in the Court's increasingly prominent internal debates about the role of precedent. By examining how the Court relies on advocacy history, legal scholars can both enrich their own scholarship and offer the Justices the advantages of scholarly analysis regarding the merits and pitfalls of what they are doing.

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[199] Professor Richard Re raised this and a serious of promising questions in comments made on an earlier draft of this article.

[200] Justice Kagan raised this important inquiry in comments she made during the oral argument in *Gamble*. *See supra* text accompanying notes 117–119.