The conventional wisdom within the legal academy concerning the meaning of a Supreme Court opinion would seem both noncontroversial and unassailable. As evidenced by how law faculty routinely both write and teach about Supreme Court opinions, the 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 there has been a sharply contrasting absence of any legal scholarship examining whether there is a comparable official history to be consulted in

¹ Howard and Katherine Aibel Professor of Law, Harvard Law School. I am grateful to Gavan Gideon Duffy, Harvard Law School Class of 2020, for outstanding research in support of this article to Michael Dreeben, Jeff Fisher, Irv Gornstein, Richard Re, Charles Rothfeld, David Strauss, Cass Sunstein, Zach Tripp, Mark Tushnet, and Adrian Vermeule, for their insightful and appropriately skeptical comments on earlier drafts, which improved the article considerably.


resolving ambiguities in the text of the Court’s opinions. Why? For a simple reason. There has been common ground that there is none.

Hiding in plain sight from academic notice is the actual practice of Supreme Court advocates and, even more important, Supreme Court Justices, which 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

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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., 425 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, 425 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.
Presidential papers, the papers of each Justice — bench memoranda, inter-chambers memoranda, draft opinions and voting records — are the exclusive property of the Justice and not generally publicly available. The comparable contemporary 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 for the Court in Cantor v. Detroit Edison Co. 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. Justice Stewart, joined by Justice Powell and then-Justice Rehnquist, argued in dissent that Stevens’s reliance on advocacy history as

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2 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, Judicial History, 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.
4 Id. at 587-91 & nn.18-20.
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

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 decisionmaking 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 And in promising cases they scour the briefs and oral argument transcripts in prior Court rulings 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

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8 Id. at 618 (Stewart, J., dissenting).
9 Id.
10 See, e.g., Email from Jeffrey Fisher, Faculty Dir., Stanford Law Sch. Supreme Court 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 General, to author (May 6, 2020) (“When I have a case that focuses on the meaning of a prior SCT 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
Justice John Roberts himself did so — a practice he has now continued on the bench.¹²

The most recently completed Supreme Court Term is emblematic of the relevance to both Supreme Court advocates and the Justices themselves of the advocacy underlying the Court’s prior rulings. The relevance of advocacy history came up several times, including in two of the Term’s highest profile cases, which otherwise shared little in common: during the Court’s consideration of abortion rights in Russo v. June Medical Services, and the application of the First Amendment Religion Clauses to claims of unlawful employment discrimination by a religious elementary school in Our Lady of Guadalupe School v. Morrissey-Berru.

¹² 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) (“If 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).
But even as the Court’s practice of relying on advocacy history to glean what the Court previously ruled has largely settled, renewed controversy about its legitimacy has risen from its application in other contexts. 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 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_.

To date, however, legal scholarship has not considered the role of advocacy history in Supreme Court advocacy and decisionmaking in any of its iterations. This Article seeks to fill that void in existing legal scholarship by bringing out of the shadows the role advocacy history plays at the Court.

The Article is divided into three parts. Part I is descriptive and historical. It looks to 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. Part I, however, further considers the more controversial proposition whether the relative weakness of a party’s

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13 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).
argument in a particular case supplies a basis for giving that precedent less weight in later assessing its entitlement to *stare decisis.*

Part II highlights the role that advocacy history plays in contemporary Supreme Court decisionmaking by focusing on several significant cases decided during the Court’s most recently completed Term. These include several of the highest profile cases of the Term, in which Supreme Court advocates relied on advocacy history to support their legal arguments before the Court. Also discussed is the reliance of the Justices themselves, and the Court overall, on such arguments.

Finally, Part III focuses on law teaching and legal scholarship. It discusses how the Court’s practice might affect the work of law faculty by offering an illustrative example of how one prominent Supreme Court ruling might be taught and written about differently. The case is *Massachusetts v. EPA,* decided in 2007,\(^{11}\) which is a Court opinion taught across the law school curriculum, and the subject of many law review articles. Part III’s analysis underscores how seemingly perplexing, or even possibly indefensible, rulings by the Court can sometimes be 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.

\(^{11}\) 549 U.S. 497 (2007).
Although the Justices do not review the advocacy history of the Court’s precedent in all their cases or even in 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.

The reasons that the Justices give for their decisions also matter, which is why it lacks persuasive force to respond that those reasons are mere rhetorical window-dressing and not truly outcome-determinative. No doubt there are specific instances when such a characterization might in fact be accurate, though identifying when a reason given in an opinion is a mere make-weight for a pre-determined outcome is extremely speculative. What might be a disingenuous make-weight for one Justice, including the opinion writer, might not be for another Justice’s whose vote was necessary to establish the majority.

But 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, which lower courts and the Justices in future cases take seriously. Those reasons, including reliance on advocacy history, accordingly matter.

The most common, and least controversial, circumstance within the Court for considering 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 deciding what the Court did and did not
previously rule in a prior case, even when no ambiguity may otherwise be readily apparent from the text of the Court’s 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.

Where, however, there is far more contention within the Court is 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. The Court’s Use of Advocacy History in Determining the Meaning of Its Precedent

There are three typical situations when the Justices look to the underlying advocacy to assess the meaning of their prior rulings. These are all instances when the Justices will do more than just consider whether the Court’s earlier opinion itself expressly refers to that advocacy. What is significant is that the Justices consider the underlying advocacy so potentially 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 when 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, review those arguments for relevant 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 are 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 considered highly relevant in determining the meaning of the Court’s prior precedent, the Justices have frequently reasoned that the converse may also be true: it can be relevant that an argument was *not* made at all. Here’s how. 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.

Given these three distinct circumstances when the Justices consider the advocacy underling prior rulings relevant to gleaning their meaning and weight, it is not unusual for the Justices to consider whether particular legal arguments were raised at all in prior cases and, if raised, whether they were accepted or rejected. And, just like they do about most anything else, they routinely disagree. 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.

Because, moreover, these three inquiries are obviously closely related, cases in which these disputes arise cannot always be classified as falling neatly into only one of the three circumstances in which the Justices treat prior advocacy as relevant. While one Justice may

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15 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.
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 briefs and oral arguments of the party that prevailed in that prior 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. 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. Stevens even included an excerpt of the Attorney General of California’s index to its supplemental brief, as well as lengthy excerpts from the amicus brief filed by the U.S. Solicitor General. Based on that review, the plurality concluded that the Court’s prior ruling in Parker did not control the legal issue raised in Cantor.

428 U.S. at 581.
Id. at 587–90.
Id. at 588 n.18.
Another example of the Court’s reliance on a prevailing party’s argument is *Cannon v. University of Chicago.*\(^{19}\) In *Cannon*, the Court used briefing to argue that the notion that Title VI provided a private right of action was “implicit in decisions of this Court,”\(^{20}\) namely *Lau v. Nichols*\(^{21}\) and *Hills v. Gautreaux.*\(^{22}\) The Court acknowledged that neither case actually “address[ed] the question of whether Title VI provides a cause of action.”\(^{23}\) 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.”\(^{24}\)

A more recent, higher profile, and far more controversial example of the Court’s reliance on advocacy history is *Parents Involved in Community Schools v. Seattle School District No 1*,\(^ {25}\) 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*,\(^ {26}\) universally accepted as one of the Court’s most important all-time decisions.\(^ {27}\) *Brown*’s core holding that de jure segregation in public schools violated the Fourteenth Amendment was of course not in

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\(^{19}\) 441 U.S. 677 (1979).

\(^{20}\) *Id.* at 702.


\(^{22}\) 425 U.S. 284 (1976); see *Cannon*, 441 U.S. at 702 n.33.

\(^{23}\) *Id.*

\(^{24}\) *Id.*


\(^{26}\) 347 U.S. 483 (1954).

\(^{27}\) *See* 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”).
question, but what was sharply disputed was the significance of that ruling as applied to student reassignment plans voluntary 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 written 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.\footnote{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 \textit{Brown} to support his assertion that “my view was the rallying cry for the lawyers who litigated \textit{Brown}.”\footnote{551 U.S. at 772.}

Some commentators critical of the opinion disputed the Chief’s and Justice Thomas’s characterizations of the Legal Defense Fund’s argument in \textit{Brown}.\footnote{Goodwin Liu, “\textit{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, \textit{The Supreme Court and Voluntary Integration}, 121 HARV. L. REV. 131, 152 (2007) (characterizing the Chief Justice’s description of \textit{Brown} as “radically incomplete”).} Two of the lawyers who worked with Marshall on \textit{Brown} were harshly negative, with one referring to the Chief’s view as “preposterous.”\footnote{Adam Liptak, \textit{The Same Words, But Differing Views}, N.Y. TIMES (June 29, 2007), https://www.nytimes.com/2007/06/29/us/29assess.html.} But, for the purposes of this Article, what is relevant is the Chief Justice’s and Justice Thomas’s assertion of the relevancy of Marshall’s and the Legal Defense Fund’s arguments to the Court’s understanding of \textit{Brown}, rather than whether the Chief’s actual portrayal of their argument was more or less persuasive. The latter dispute, however, nonetheless remains relevant to the question whether their reliance on advocacy history in \textit{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,*[^32] decided in 2014, the prevailing party in the 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.*”[^33] During oral argument, Justice Samuel Alito, a former attorney in the Solicitor General’s Office, took 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.”[^34] Alito pointedly read out loud at the argument “the subject headings of the government’s brief in *Great Northern.*”[^35]

[^33]: Id. at 102 (citing *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942)).
[^35]: Id. at 24–25.
2. Losing Arguments

The Justices also often consider, in deciding on the meaning of its prior 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 based on the assumption 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,\(^{36}\) when both the parties in their briefing and oral argument and the Justices in their several opinions looked to the briefing and argument underlying a prior Court ruling to determine its meaning. At issue in Heller was whether the Second Amendment conferred 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, and 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.\(^{37}\) All sides tried to argue that the Court’s treatment of the federal government’s argument in Miller provided support for their opposing 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 law-abiding purposes, such as short-barreled shotguns.” 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 military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownerships of weapons.”

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 individual to bear arms but established only a collective right to members of a state militia. 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

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38 *Heller*, 554 U.S. at 625.
39 *Id.* at 637 (Stevens, J., dissenting).
40 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.”).
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.  

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.  

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 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 Court opinion itself that the argument had been rejected. Here are a few additional, illustrative examples.

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42 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*) . . . (emphasis added)).
In *Preston v. Ferrer*, the Court examined the written briefs to show that arguments in favor of overruling *Southland Corp. v. Keating* relied on by respondent had already been “considered and rejected” in *Allied-Bruce Terminix Cos. v. Dobson*. 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. For the *Preston* Court, the Court’s prior rejection of the same argument supported the Court’s doing so again.

*Jones v. United States* is to similar effect and 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* 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. In support, its brief cited *Russell*, which held that the statute applied to rental property; the argument in *Jones* was that property is “used” in commerce merely by, for instance, “receiving natural gas.” The *Jones* Court, however, noted the *Russell* Court “did not rest its holding on [such an] expansive interpretation advanced by the

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*Preston*, 552 U.S. at 353 n.2.
529 U.S. 848 (2000).
*Jones*, 529 U.S. at 850–51.
*Id.* at 855–56.
Government both in *Russell* and in this case.” The Court contrasted the government’s brief in *Russell* with the Court’s holding.

Finally, in *Maine v. Moulton*, the Court similarly looked to the written briefs to learn that the Court had already considered and rejected in *Massiah v. United States* 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. 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.”

3. Arguments Not Made

So too, the absence of the Court’s prior consideration of an argument that the Justices now consider important may provide a reason to conclude that the Court’s ruling cannot be fairly read to have decided a particular issue at all. The most obvious example is when the Court,

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52 Id. at 856 n.8.
53 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.”).
54 *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 *Moulton*, 474 U.S. at 178-79.
58 Id. at 179 n.15.
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 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, except “in the most exceptional cases” where prudence warrants overcoming the “heavy presumption against” expanding the issues that the Court considers.

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 *Cohen v. Virginia*,

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59 SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).


61 19 U.S. (6 Wheat.) 264 (1821).
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.  

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.*

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62 Id. at 399–400.
63 Id. at 400 (emphasis added).
The Court has since picked up on this language from *Cohen* to measure precedential weight on the basis of arguments advanced by counsel: “For the reasons stated by Chief Justice Marshall in *Cohen*, we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.”

Justice Owen Roberts used similar logic to try to explain why his infamous “switch in time” during the New Deal —— when he voted in *West Coast Hotel Co. v. Parrish* in 1937 to overrule *Adkins v. Children’s Hospital* despite having voted just a year before to sustain *Adkins* in *Morehead v. New York ex rel. Tipaldo* —— 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*. 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

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65 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.”).
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.\(^6\)

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.”\(^7\)

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\(^7\) *Id.* at 315.
More than a half-century later in *Citizens United v. Federal Election Commission*, 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*, a case the dissent asserted had been “reaffirmed” by the Court in three recent cases. 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. 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.

**B. The Use of Advocacy History in Determining Whether Supreme Court Precedent Should Be Overruled**

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 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.

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70 Id. at 377.
71 Id.
72 Id.
73 Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020); see also, e.g., Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019).
The origins of the notion that inadequate legal advocacy undermines a ruling’s precedential effect can be found in the Court’s treatment of *per curiam* and other kinds of summary dispositions. The Court has long and frequently 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 even more sweeping proposition that weak advocacy in a prior case can likewise support giving prior precedent less weight. This final thread turns on the quality of the advocacy, encompassing cases even where the ruling was not the result of a truncated process lacking the opportunity for full briefing and oral argument. The Justices reason that its prior ruling is not entitled to respect because the Court may have reached a different result had it had the benefit of better advocacy.

The 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 Court ruling that has itself become over the years a settled part of
law, could be fairly viewed as too thin a reed upon which to justify a ruling to overrule 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 judgement 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.

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.\footnote{74}{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 \textit{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 \textit{per curiam} opinion following merits briefing and oral argument — makes the case little different from summary disposition as a practical matter.}

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.\footnote{75}{Ernest J. Brown, \textit{Foreword: Process of Law}, 72 \textit{Harv. L. Rev.} 77, 79-82 (1958).} Individual Justices have not infrequently sharply criticized the practice,\footnote{76}{Alex Hemmer, \textit{Courts as Managers: American Tradition Partnership v. Bullock and Summary Dispositions at the Roberts Court}, 122 \textit{Yale L. J. Online} 209, 211 n.9, 223 nn.74-76 (2013).} though presumably 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,\footnote{77}{SUP. CT. R. 16.1.} 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.\footnote{78}{Hemmer, \textit{supra} note 76, at 218-23.}

For the purposes of this Article, 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 fulsome. As explained by
the Court in *Edelman v. Jordan* in 1974,\(^79\) 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.”\(^80\) And, in *Edelman*, the Court formally 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.”\(^81\)

In 1998, the Court in *Hohn v. United States*\(^82\) extended the reasoning of *Edelman* to discount the significance of the Court’s prior *per curiam* opinion in *House v. Mayo*\(^83\) that was not a mere one- or two-sentence summary ruling, but a more fulsome opinion several pages in length. For the majority, however, it was not the length of the *House* opinion but the fact the opinion was “rendered without full briefing or argument” that warranted its receiving

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\(^80\) *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, 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 unexplained 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.”).
\(^81\) 415 U.S. at 671.
\(^82\) 524 U.S. 236 (1998).
diminished precedential weight.\textsuperscript{84} 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?”\textsuperscript{85} Dissenting in \textit{Hohn}, Justice Scalia expressed concern about the longer term implications for the Court’s precedent of the Court’s willingness to discount the precedence of all \textit{per curiam} opinions in this manner:

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 \textit{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 \textit{per curiam} opinions by the lower courts, and the willingness of Justices to undertake summary dispositions in the future.\textsuperscript{86}

Justice Scalia proved prescient in suggesting that the \textit{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.\textsuperscript{87}

2. Beyond Summary Dispositions

Nor has the Court limited its willingness to discount the precedential weight of their opinions that are, as in \textit{Hohn}, the product of limited briefing and the absence of oral argument to

\textsuperscript{84} \textit{Hohn}, 524 U.S. at 251.
\textsuperscript{85} Transcript of Oral Argument at 37, \textit{Hohn}, 524 U.S. 236 (No. 96-8986).
\textsuperscript{86} \textit{Hohn}, 524 U.S. at 260 (Scalia, J., dissenting).
\textsuperscript{87} See text accompanying notes 95–97, \textit{infra} (discussing \textit{Heller v. District of Columbia}, 554 U.S. 570 (2008)).
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, while the latter underscores the extent to which the Justices are aware of their dependence on outstanding advocacy in their decisionmaking. 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

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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.\textsuperscript{89}

In his concurring opinion in \textit{Monell v. Department of Social Services},\textsuperscript{90} decided in 1978, two decades before \textit{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 \textit{Monell} was whether the Court should overrule its prior decision in \textit{Monroe v. Pape}\textsuperscript{91} that municipalities were not subject to suit under Section 1983.\textsuperscript{92} In a separate concurring opinion, Justice Powell defended the \textit{Monell} Court’s decision to overrule \textit{Monroe} partly on the basis that “the ground of decision in \textit{Monroe} was not advanced by either party and was broader than necessary to resolve the contentions made in that case.”\textsuperscript{93} As further explained by the Justice:

\begin{quote}
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 benefit of a full airing of all the
\end{quote}

\textsuperscript{89} See note __, \textit{supra}. 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 \textit{Hudson v. United States}, 522 U.S. 93, in 1997 to overrule \textit{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 \textit{Hudson}, the Court concluded that its ruling in \textit{Halper} was “ill considered” and had “proved unworkable,” 522 U.S. at 101-02. Who was the counsel in \textit{Harper} 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.

\textsuperscript{90} 436 U.S. 658 (1978).

\textsuperscript{91} Monroe v. Pape, 365 U.S. 167 (1961).

\textsuperscript{92} \textit{Monell}, 536 U.S. at 662.

\textsuperscript{93} \textit{Id.} at 709 (Powell, J., concurring).
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.\footnote{Id. at 709 n.6.}

In 2008, again in \textit{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 \textit{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 \textit{Miller} ruling should be respected because the \textit{Miller} Court had reviewed “many of the same sources that are discussed at greater length by the Court today,”\footnote{District of Columbia v. Heller, 554 U.S. 570, 623 (2008) (quoting \textit{id.} at 676–77 (Stevens, J., dissenting)).} Justice Scalia’s \textit{Heller} opinion responded that this was in fact not true, “which was not entirely the Court’s fault”\footnote{\textit{Id.}}:\footnote{\textit{Id.}}

\begin{quote}
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).\footnote{\textit{Id.}}
\end{quote}
Seven years later in 2014, in yet another high-profile case, *McCutcheon v. FEC,* 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* 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 full briefing or argument on the issue.” 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,” the *McCutcheon* Court discounted the prior ruling.

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100 *McCutcheon,* 572 U.S. at 202.
101 *Id.* at 200 (alteration in original) (quoting *Buckley,* 424 U.S. at 38).
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,\textsuperscript{102} 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\textsuperscript{103} and Sykes v. United States,\textsuperscript{104} 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.”\textsuperscript{105}

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,

\textsuperscript{102} 135 S. Ct. 2551 (2015).
\textsuperscript{103} 550 U.S. 192 (2007).
\textsuperscript{104} 564 U.S. 1 (2011).
\textsuperscript{105} Johnson, 135 S. Ct. at 2562–63 (quoting Hohn, 524 U.S. at 251).
had nonetheless not provided for a full adversarial testing of all the issues decided in the prior cases.

Even more recently, in *Knick v. Township of Scott,* decided in 2019, the Chief Justice’s opinion for the Court justified overruling *Williamson County Regional Planning Commission v. Hamilton Bank* 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. 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.” 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.” 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.*

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

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106 139 S. Ct. 2162 (2019).
108 *Knick,* 139 S. Ct. at 2174.
109 *Id.*
110 *Id.*
111 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 explanation of the issues . . .”).
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*\(^\text{112}\) made a similar argument in contending that the Justices should overrule the Court’s 1927 decision in *United States v. Lanza*.\(^\text{113}\) 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 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.\(^\text{114}\)

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.”\(^\text{115}\) 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.\(^\text{116}\) 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

\(^{112}\) 139 S. Ct. 1960 (2019).
\(^{113}\) 260 U.S. 377 (1922).
\(^{114}\) J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309 (1932).
\(^{116}\) *Id.* at 14, 16.
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.”

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.”

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.” 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. Illustrative Cases from October Term 2019

The Court’s most recently completed Term, October Term 2019, underscores the extent to which advocacy history has become a regular feature of Supreme Court decisionmaking. 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

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118 *Gamble*, 139 S. Ct. at 2007 (Gorsuch, J., dissenting).
119 *Id.*
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.

For instance, nothing is more routine at the Court than the denial of certiorari. The Court does it thousands times of year. The legal effect is plain; the judgment below is left undisturbed. No less clear is that a decision to deny review says nothing at all 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.*, Justice Alito, joined by Justices Thomas and Gorsuch, did just that by publishing a statement concurring in the denial of certiorari. 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 Airline, Inc. v. Hardison*, but that the Solicitor General was also correct that *Patterson* did not present “a good vehicle for revisiting *Hardison*.” Justice Alito supported his view that *Hardison* should be reconsidered in a future case because of the limited nature of the briefing by the parties in that case: “the

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120 140 S. Ct. 685 (2020) (mem.).
121 *Id.* at 685 (Alito, J., concurring in the denial of certiorari).
122 *Id.*
123 *Id.* at 686.
parties’ briefs in *Hardison* did not focus on the meaning of [the statutory] term” interpreted by the Court in that case.\(^{124}\) For Justice Alito and the two Justices who joined his opinion, the absence of such argument by counsel weakened the precedential weight of the Court’s *Hardison* decision and invited its reconsideration.

In April, Justice Gorsuch, dissenting in *Thryv, Inc. v. Click-To-Call Technologies, LP*,\(^{125}\) relied on advocacy history in a different way: to interpret the meaning of a prior Court ruling 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.\(^{126}\) In rejecting Justice Gorsuch’s reading of its 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 underlying advocacy serves in the Court’s reasoning.\(^{127}\)

In *June Medical Services, LLC v. Russo*, advocacy history was relevant to the arguments of the parties in one of the biggest cases of the Term and, argued on March 4, the last case

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\(^{124}\) *Id.*

\(^{125}\) 140 S. Ct. 1367 (2020) (Gorsuch, J., dissenting).

\(^{126}\) *Id.* at 1386.

\(^{127}\) *Id.* at 1376 n.8.
argued in person at the Court itself rather than telephonically. 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,128 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.129 In response, those challenging the Louisiana restrictions, citing to the Texas brief,130 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 the June Medical Services case too.131

Petitioner June Medical stressed the same argument 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.132 The second of those errors was its acceptance of “legal arguments that this Court rejected four years ago.”133 Justice Kagan,

128 136 S. Ct. 2292 (2016).
129 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.”).
130 Brief for Petitioners at 35, June Medical Services L.L.C. v. Russo, No. 18-1323 (U.S. Nov. 25, 2019).
131 Id. (“But the Court in Whole Woman’s Health was not moved by that argument, and in fact rejected the premise . . . .”).
132 Transcript of Oral Argument at 5, June Medical Services, No. 18-1323 (U.S. Mar. 4, 2020).
133 Id. at 5.
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?” Implicitly recognizing that rejected legal arguments are a settled basis for interpreting the meaning of prior Court precedent, Texas in turn responded in its brief with the necessary back-up argument that, if so, the Court should then overrule *Whole Woman’s Health*.  

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 *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.” The headline instead was that 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.” The Chief declined the dissent’s argument that factual differences between the two cases were sufficient to

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134 Id. at 43 (Kagan, J.).
136 __ S.Ct. __ (2020), slip op. 40 (Breyer, J.) (plurality)
137 Id., slip op. 2 (Roberts, C.J., concurring)
support a different outcome. Those challenging the Louisiana law therefore successfully persuaded a majority of the Court by their 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* suggests a second touchstone for the Court’s exploration of advocacy history: in the Court’s consideration of the threshold jurisdictional issue raised in *June Medical*, whether the doctors possessed Article III standing to challenge the constitutionality of the Louisiana law. In concluding that such third party standing had been sufficiently established in *June Medical* notwithstanding a possible conflict of interest between doctors and patients seeking abortions, Justice Breyer’s plurality opinion relied on the Court’s 1976 decision in *Craig v. Boren*. In *Boren*, the Court permitted a vendor of 3.2% beer to challenge a law permitting females, but not males, to purchase beer at the younger age of 18. 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.”

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138 Id., slip op. 13.
140 Id. slip op. 30 (Alito, J., dissenting)
In *Our Lady of Guadalupe v. Morrissey-Berru*,¹⁴¹ argued on May 11, the relevance of 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 Lutheran Church and School v. EEOC*,¹⁴² decided in 2002, the Court held that there was a “ministerial exception” to employment discrimination laws brought against religious schools, but did not address the question whether that exception applied to a lay teacher.¹⁴³ The party seeking to bring the employment discrimination claim in *Hosanna* was a teacher who was also an ordained minister.¹⁴⁴

In *Our Lady of Guadalupe*, the respondent teachers contended in their written briefs that the Supreme Court in 1986 had already established binding precedent in *Ohio Civil Rights Commission v. Dayton Christian Schools*,¹⁴⁵ 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

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¹⁴¹ *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 School v. Morrissey-Berru*, Nos. 19-267 & 19-348 (U.S. Mar. 4, 2020).


¹⁴³ Id. at 190, 196.

¹⁴⁴ Id. at 177-78.

terminating her employment. The Court, in an opinion written by Chief Justice Rehnquist, held that the federal trial court had erred by failing to abstain from adjudicating the case, which, because of the important state interests implicated by the case, should have been heard by state courts. But, of potential relevance to Our Lady of Guadalupe, the Court majority opinion added that “Dayton’s constitutional claim should be decided on the merits” because the state Civil Rights Commission “violates no constitutional rights by merely investigating the circumstances of [the employee’s] discharge in this case.” 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.”

Relying on the advocacy history underlying the Dayton ruling, the respondents in Our Lady of Guadalupe argued in their briefs that the Supreme Court in Dayton had held that a “lay teacher in a religious elementary school [can] sue her employer.” They pointed out that the losing argument advanced by the Dayton Christian School in Dayton was “precisely” and “the very same argument the Schools make here,” which the Court in Dayton “unanimously rejected.” 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, which “stressed ‘the religious functions carried out by every

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146 Id. at 628.
147 Id.
148 Id. at 632 (Stevens, J., concurring in the judgment).
149 Brief for Respondents, supra note 141, at 1.
150 Id. at 26.
151 Id. at 24–26 (quoting Brief for Respondent at 19, 24, 31, Dayton Christian Schools, 477 U.S. 619 (No. 85-488); Transcript of Oral Argument at 44, Dayton Christian Schools, 477 U.S. 619 (No. 85-488)).
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.’”

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 respondent teachers had done in their written briefs, 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.153

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.154

152 Id. at 25 (quoting Brief for Respondent at 31, Dayton Christian Schools, 477 U.S. 619 (No. 85-488)). Petitioners’ reply brief in Our Lady of Guadalupe seeks mostly to deflect respondents’ argument rather than address it, claiming it “smacks of desperation.” Reply Brief for Petitioners at 10, Our Lady of Guadalupe, Nos. 19-267 & 19-348 (U.S. Apr. 3, 2020). They contend, 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.


154 Id.
The Court’s opinion in *Our Lady of Guadalupe* sided with the petitioners. 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 on advocacy history, a seven-Justice majority held that its 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. 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 *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. In short, why advocacy

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156 *Id.*, slip op. 27.
matters to Supreme Court decisionmaking and accordingly why, relatedly, otherwise seemingly anomalous Court rulings may quickly be explained by looking at the underlying advocacy. This Article builds on that earlier scholarship by taking 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.

Both these relationships between advocacy and Supreme Court decisionmaking provide rich pedagogical opportunities for law professors in how they teach Supreme Court opinions. And, for that same reason, legal scholars are apt to stumble in their own efforts to evaluate a Court ruling by failing to consider the advocacy underlying that ruling.

One prominent example, *Massachusetts v. Environmental Protection Agency*, nicely illustrates these pedagogical opportunities and scholarly pitfalls. The Court’s *Massachusetts* opinion is widely considered by environmental scholars and practitioners to be one of the Court’s most significant environmental law rulings of all time. 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

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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. The case is also exceedingly well known outside of 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, constitutional law, and federal courts classes in law schools across the nation. As a result, law students are likely to read and discuss the *Massachusetts* case in multiple classes during their three years of law school.

Because, however, those teaching the case in law school classrooms are largely unaware of the advocacy history underlying the Court’s opinion, they are missing a rich pedagogical 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, wholly unaware that there are actual answers to their questions supplied by the readily-available advocacy history.

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A. Existing Scholarly Commentary on *Massachusetts*

In *Massachusetts*, the Court addressed three distinct legal issues: (1) whether the Massachusetts 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 in postponing its determination whether the emissions of such pollutants by new motor vehicles endangered public health and welfare.\(^{163}\) 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.”\(^{164}\) According to two of the nation’s leading administrative law scholars, Harvard Law Professors (and my faculty colleagues) Cass Sunstein and Adrian

\(^{163}\) *Massachusetts*, 549 U.S. 497.

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”\(^{165}\) — 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 decisionmaking all the time because of their practical need to allocate limited agency resources among competing priorities.\(^{166}\) 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.”\(^{167}\)

Professors Sunstein and Vermeule, moreover, have proffered an alternative basis for the Court’s ruling in *Massachusetts* that they contend would, unlike the one suggested by the actual language of the Court’s opinion, have justified the result reached by the Court. In particular, 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

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\(^{165}\) Sunstein & Vermeule, *supra* note 164, at 160.

\(^{166}\) *Id.*

\(^{167}\) *Id.* at 175.
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.” 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.”

Sunstein’s and Vermeule’s self-described effort to “reconstruct” Massachusetts unsurprisingly exhibits all the skills of the outstanding legal scholars they plainly are. They persuasively point out how the broader reading of the Court’s holding supported by the language of the opinion would lead to absurd results contradicted by the longstanding, settled background principles of administrative law. They intelligently posit narrower and far more defensible theoretical bases for the result reached by the Court. And, in traditional academic fashion, they assign formal names for legal principles that would have better guided the Court’s reasoning: first, an “anti-circumvention principle,” and next, 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-

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168 Id.
169 Id. at 162.
170 Id. at 182–83.
171 Id. at 189.
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, had the Court been more considerate and thoughtful, the
Justices in the majority could and should have rested the decision on these grounds.

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 glean what was that the
Court’s actual reasoning in the case. Examination of 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 decisionmaking 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 offending language in the *Massachusetts* Court’s majority opinion that has caused so much confusion and debate within the academy 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.”\(^\text{172}\) The second is its conclusion, after reviewing the several policy reasons proffered by EPA, that EPA’s reasons were arbitrary and capricious: “Although 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.”\(^\text{173}\)

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


\(^{173}\) *Id.*
Clean Air Act.” 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.”

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 decisionmaking 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. In short, what Sunstein and Vermeule and other commentators necessarily miss by not considering the underlying advocacy in Massachusetts is that counsel for petitioners had in litigating the case years earlier before the Court made precisely the same judgments later made by legal scholars about valid and invalid arguments. And the petitioners had accordingly carefully crafted their concessions and legal arguments before the Court in order to maximize their odds of

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174 Brief for the Petitioners at 35, Massachusetts, 547 U.S. 497 (No. 05-1120), 2006 WL 2563378.
175 Id. at 38.
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 longstanding “background principles of administrative law,” agencies might well be entitled to deference in the timing of their decisionmaking based on factors such as “resource constraints” or “competing priorities.”176 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.”177 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.”178 Although petitioners did not formally invent a label for its legal theory akin to Sunstein and Vermeule’s “anti-abdication principle,” that was precisely the point they were making, merely absent the scholarly rhetoric.

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

176 Reply at 1, 19, Massachusetts, 547 U.S. 497 (No. 05-1120), 2006 WL 3367871.
177 Id. at 19.
178 Id. at 22.
principle were their best, if not only, hopes of winning, petitioners’ counsel of record 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 arguing counsel began his argument by expressly acknowledging that “EPA possesses a good deal of discretion in applying the statutory endangerment test,” but its mistake here was nonetheless resting its ruling “on impermissible grounds.”\(^{179}\) 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.”\(^{180}\) 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.\(^{181}\) “Rejecting mandatory motor vehicle regulation as a bad idea is simply not a policy choice that Congress left to EPA,” the Massachusetts counsel argued.\(^{182}\)

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

\(^{179}\) Transcript of Oral Argument at 3–4, Massachusetts, 547 U.S. 497 (No. 05-1120).
\(^{180}\) Id. at 4.
\(^{181}\) Id. at 19.
\(^{182}\) Id. at 20.
sooner,” petitioners’ counsel freely acknowledged that EPA possessed just such discretion based “on background principles of administrative law.”183 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.”184

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?185

The Massachusetts petitioners’ 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

183 Id. at 19.
184 Id. at 19.
185 Id. at 20.
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.”

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.

Indeed, 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’ prevailing, sought to get their counsel to abandon the concession. As soon as counsel stood up for his rebuttal, Justice Scalia pounced, before arguing counsel could utter a single introductory word, with 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?

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.”

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186 Id. at 20–21.
187 LAZARUS, supra note Error! Bookmark not defined., at 201–02.
188 Transcript of Oral Argument, supra note 179, at 52.
189 Id.
Although the Court’s official oral argument transcript indicates that the courtroom erupted in widespread 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 was looking like might be the petitioners’ winning argument. So, when the Massachusetts counsel sought to move on, Justice Breyer quickly interrupted and brought him right back to his response to Justice Scalia’s question:

> 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?\(^\text{190}\)

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.”\(^\text{191}\)

In short, the advocacy underlying the Court’s ruling in Massachusetts provides strong evidence regarding how best to resolve the ambiguity in the Court’s reasoning otherwise created by the opinion’s language in isolation, with which legal scholars and lower courts have struggled. There is little reason to suppose that the Court was “absurdly” overturning decades of background principles of administrative law that allow agencies in the absence of a

\(^{190}\) *Id.* at 53.

\(^{191}\) *Id.*
prescribed statutory deadline to defer decisionmaking 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 given 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

As I have previously written, advocacy matters a lot in Supreme Court decisionmaking. Advocacy frequently explains why the Court’s docket reflects certain kinds of legal issues and not others. 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 in which it hears each year on the merits.

192 Lazarus, Advocacy Matters, supra note 157; Lazarus, Docket Capture at the High Court, supra note 157.
This Article adds yet another layer to that earlier thesis. Advocacy history also matters. A close examination of the history underlying a Court precedent 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.

To be sure, there are undoubtedly other factors that one can fairly speculate influenced the votes of individual Justices in particular cases and, accordingly, the outcome of the Court’s rulings in those cases no doubt play a role. Advocacy is clearly not the only thing that matters. So too do the sum total of each of each Justice’s own professional and personal life experiences. And Justices similarly learn from current events in the world surrounding them. Or even a good book a Justice happens to have read or be reading at the time.

But none of those speculative possibilities detract from this Article’s thesis about the singular role that advocacy history has played and legitimately should play. Those other factors are all external to the official public record in a case, which is precisely what makes them inherently so speculative. By contrast, the advocacy history, including both the written briefs and oral argument, are part of the Court’s official record in a case. And, it is that difference which both explains and justifies why the Court’s decisionmaking regularly includes formal
analysis of advocacy history in explaining what it previously ruled and whether those prior rulings are entitled to *stare decisis* effect.

Legal academics should take fuller account of the special role advocacy history plays in the Court’s decisionmaking both in their teaching and writing about the Court. There are rich pedagogical opportunities readily available in demonstrating to students the 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 decisionmaking. 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, advocacy history could 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?¹⁹ So too just because it may be legitimate to invoke

¹⁹ Professor Richard Re raised this and a serious of promising questions in comments made in an earlier draft of this article.
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 Court ruling *stare decisis* effect because its underlying advocacy was somehow deficient. By applying the analytical tools of their trade to examine the practice of the Court’s reliance 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 such reliance, including in important cases when *stare decisis* is at stake.

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191 Justice Kagan raised this important inquiry in comments she made during the oral argument in *Gamble*. See text accompanying note __, supra.