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# Check the Invitation: The Trouble with Appeals Invited by Supreme Court Justices

Michael Gentithes\*

## I. INTRODUCTION

The U.S. Supreme Court sits atop the nation's adversarial system of law, one premised upon the idea that the most just results will be achieved through party presentation of the issues in the crucible of the litigation process.<sup>1</sup> But litigation in the Court increasingly fails to reflect the ideals of procedural justice embedded in that system. Parties and their attorneys play an ever-diminishing role in actually shaping the direction of the law in the nation's highest court.<sup>2</sup> Instead, modern Supreme Court Justices exercise top-down control of the direction of new doctrine to the exclusion of the parties themselves. While the demands of their discretionary docket have decreased, Justices have vastly increased the length and originality of their opinions; their written work is both

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### 1. The value of procedural justice rests upon

the assumption that a good process is the best way to achieve good and fair results. If all of the procedural standards are met, everything should have been done correctly, and that affords the best possibility of getting to the truth, and ultimately to the best "correct" answer. A judge who interferes with the process by stepping out of the role of umpire and into the role of adversarial participant by becoming involved in the fashioning of arguments may risk upsetting the process and producing bad results.

Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 269 (2004); see also STUART HAMPSHIRE, JUSTICE IS CONFLICT 95 (2000) ("No one is expected to believe that [the court's] decisions are infallibly just in matters of substance; but everybody is expected to believe that at least its procedures are just because they conform to the basic principle governing adversary reasoning: that both sides should be equally heard.").

2. This trend might be especially alarming for those litigants who obtain representation from the small cadre of talented practitioners who are often paid thousands of dollars an hour for their alleged abilities to persuade the Justices of our nation's highest court. See Casey C. Sullivan, *How Much Do Top Supreme Court Lawyers Make? An Absurd Amount*, FINDLAW (Aug. 25, 2015, 12:15 PM), [http://blogs.findlaw.com/supreme\\_court/2015/08/how-much-do-top-supreme-court-lawyers-make-an-absurd-amount.html](http://blogs.findlaw.com/supreme_court/2015/08/how-much-do-top-supreme-court-lawyers-make-an-absurd-amount.html).

longer and contains less borrowed language from the parties' briefs than ever before.<sup>3</sup> At the same time, oral arguments are no longer a genuine opportunity for the parties to be heard. They instead resemble a cocktail party amongst the Justices, where the attorney at the lectern is little more than a straight man in the Justice's repartee over the appropriate direction for the law's next evolution.<sup>4</sup>

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3. The Court today hears well under 100 merits cases per Term. See Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958–60 and 2010–12*, 2015 UTAH L. REV. 1005, 1006 n.5 (citing David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 950 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) AND ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006) (“[T]he Supreme Court’s plenary docket has plunged over the last two decades, from 153 signed opinions in 1986 to a comparably paltry seventy-four signed opinions in 2002 and 2003.” (footnote omitted))). The Court’s output has remained at about that level. See *2014 Term Opinions of the Court*, SUP. CT. U.S., <http://www.supremecourt.gov/opinions/slipopinion/14> [<http://perma.cc/GVY5-4DRU>] (last updated June 18, 2015). As recently as the 1980s, the Supreme Court’s caseload was generally regarded as overwhelming. See, e.g., David M. O’Brien, *Managing the Business of the Supreme Court*, 45 PUB. ADMIN. REV. 667, 667 (1985) (“All of the justices now agree that they are overworked by deciding too many cases.”); see also Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366–76 (2006). Nonetheless, it has increased the median length of its opinions from approximately 2000 words in the late 1950s to over 8200 by 2009. See Sullivan & Canty, *supra*, at 1007 n.11 (citing Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 630, 634–35 (2008)). See also Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <http://www.nytimes.com/2010/11/18/us/18rulings.html>.

This increase in opinion length has been attended by a corresponding increase in analytical originality that looks beyond the text of merits briefs to find the Justices’ own preferred analyses and language. See Black & Spriggs, *supra*, at 652. Since 1946, there has been “a clear decrease in the maximum values of language overlap per justice[,] . . . potentially indicating that the Court’s shrinking docket led to less reliance on the merits briefs.” Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language, 1946–2013*, 86 MISS. L.J. 105, 137 (2017).

4. In a comparison of oral arguments in the 1958–1960 Terms and the 2010–2012 Terms, Barry Sullivan and Megan Canty revealed the myriad ways in which Justices have come to dominate the direction of oral argument over the last half-century. See Sullivan & Canty, *supra* note 3, at 1042. The differences in oral argument between those eras

include an increase in the average number of words spoken by the Justices in the later cases; a substantial increase in the percentage of words spoken by the Justices (compared with the percentage of words spoken by counsel) in the later cases; a higher average ratio of Justice statements to questions in the later cases; an almost doubling of the average number of words the Justices spoke during

A microcosm of the trend of top-down lawmaking in the Supreme Court can be seen in the way Justices frequently reach beyond the immediate dispute to invite appeals on related topics that they believe future litigants ought to raise. The line of cases concerning the constitutionality of capital punishment demonstrates this trend. As this Article details, invited appeals often come in the form of what I call *soft invitations*. Simply phrased, those are open questions to the bar that a Justice thinks future litigants should answer, such as Justice Goldberg's dissent in *Rudolph v. Alabama* inviting briefing on three specific questions related to the constitutionality of capital punishment.<sup>5</sup> Increasingly, invited appeals perniciously offer detailed analytical answers to their own questions in what I call *opinion-briefs*. One example of this phenomenon is Justice Breyer's detailed forty-four-page dissent in *Glossip v. Gross* explaining the four specific arguments he would find persuasive for ruling the death penalty unconstitutional, including reams of social science data and dense string cites.<sup>6</sup> Such opinion-briefs are more akin to persuasive advocacy than neutral resolution of a legal dispute; they reach issues the parties never raised in great detail nor with great conviction. This Article critiques opinion-briefs, used by both liberal and conservative Justices to transparently ghostwrite their favored reasoning in a long-standing doctrinal debate,<sup>7</sup> for two reasons.

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each separate speaking turn; and a dramatic shortening of the longest opening and non-opening monologues by counsel in the later cases.

*Id.*

5. *Rudolph v. Alabama*, 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting).

6. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). Breyer himself claims that his method in *Glossip* was inspired by Goldberg, for whom he was clerking at the time Goldberg wrote his *Rudolph* dissent. Adam Liptak, *Death Penalty Foes Split over Taking Issue to Supreme Court*, N.Y. TIMES (Nov. 3, 2015), [http://www.nytimes.com/2015/11/04/us/politics/death-penalty-opponents-split-over-taking-issue-to-supreme-court.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=0](http://www.nytimes.com/2015/11/04/us/politics/death-penalty-opponents-split-over-taking-issue-to-supreme-court.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news&_r=0) [hereinafter Liptak, *Death Penalty Foes*] (“Justice Breyer has told friends that his dissent was partly inspired by a similar one a half-century before. The earlier dissent, by Justice Arthur J. Goldberg, helped create the modern movement for the abolition of the death penalty and led to a four-year moratorium on executions.”).

7. As the Article describes in greater depth below, Breyer's detailed invitation for a future appeal follows a dangerous trend that has appeared in liberal and conservative jurisprudence alike. For instance, before the incessantly criticized and even presidentially discredited decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), Justice Scalia set the table for advocates to argue that corporate political donations should be unlimited in his concurrence in *Federal Election Commission v. Wisconsin Right to Life (WRTL II)*, 551 U.S. 449 (2007). See, e.g., Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L. J. ONLINE 77, 80–84 (2010), <http://yalelawjournal.org/forum/citizens-united-and-its-critics> (collecting critiques in the immediate aftermath of the decision); Ashley Alman, *Barack Obama: “The Citizens United Decision Was Wrong,”* HUFFINGTON POST (Jan. 22, 2015, 2:22 PM), <http://www.huffingtonpost.com/2015/01/21/barack-obama-citizens->

First, the frequent use of opinion-briefs expands the rift between our legal system's faith in adversary procedure and the actual process of litigation in our nation's highest court. Adversarial litigation is our legal way of life, one reflected in the structure of our legal system from top to bottom.<sup>8</sup> This Article begins by describing the Court's departure from traditional adversarial litigation that is driven in part by Justices' frequent use of opinion-briefs. The Article then normatively analyzes that departure from the adversarial ideal. Though opinion-briefs and a top-down style of jurisprudence might seem attractive for a Court that has become the primary policymaking body in our federal government, this Article suggests that, at first blush, opinion-briefs are undesirable. Significant theoretical justifications for opinion-briefs and other forms of top-down decision-making would be necessary to overcome the institutional threats within them that this Article identifies.

Second, opinion-briefs are troubling given their tendency to undermine many traditional notions of appellate jurisprudence. The author of an opinion-brief appears far from neutral, suggesting that both she and perhaps the Court as a whole have decided in advance an issue that the parties have not yet raised and argued. Opinion-briefs likewise disregard any sense of judicial humility; the opinion-brief's author intimates that only she can divine the best legal arguments in support of a particular position, belittling any creative solutions that the bar might muster. Opinion-briefs frequently call for trimming or reversing longstanding bodies of precedent, offending notions of *stare decisis* inherent

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united\_n\_6517520.html (noting President Obama's ongoing disagreement with the decision). The pattern can also be seen in recent litigation regarding the constitutionality of public employee union dues, a topic the Court recently addressed for the third time in the last decade. See generally *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (mem.). See also *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (recent litigation concerning whether Amtrak constitutes a governmental entity).

It is noteworthy that the *WRTL II* decision contains a prime example of a soft invitation in Justice Alito's concurrence. See *WRTL II*, 551 U.S. at 482–83 (Alito, J., concurring) (“If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell v. Federal Election Comm'n*, that § 203 is facially constitutional.” (citations omitted)). Such soft invitations “may signal to a litigant that now is a good time to ask for the overturning of precedent” and “make it more likely for a Justice to shape the Court's docket.” Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 796 (2012).

8. Supreme Court Justices “are to be sure extremely able, but they generally need effective, skilled advocates in order to reach well-considered, thoughtful rulings. Absent such external input, the chambers simply do not have the resources to craft significant rulings with the necessary awareness of their likely implications.” Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1542 (2008) (footnote omitted).

in appellate judging.<sup>9</sup> Additionally, opinion-briefs tempt the Justices to misallocate their limited resources by wading into the morass of policy debates with resolutions likely to be driven by massive social science research efforts.<sup>10</sup>

This Article proceeds in four Parts. First, it categorizes invited appeals into the two species discussed above, soft invitations and opinion-briefs, providing a growing catalogue of the latter. In the next two Parts, the Article normatively analyzes those invited appeals, concluding that, while soft invitations have many laudable qualities, opinion-briefs are extremely troubling. Lastly, the Article offers specific advice for practitioners who encounter opinion-briefs, like death penalty abolitionists determining their next move in the wake of Breyer's *Glossip* opinion, arguing that they should not accept the authoring Justice's invitation.<sup>11</sup> Patience is more prudent than accepting an opinion-brief's request for specific arguments.

## II. CATEGORIZING INVITED APPEALS

Concurring and dissenting Justices often describe not only the outcome they believe to be correct, but also the repercussions that ought to flow from that outcome or the questions that remain open in light of that ruling. Though perhaps unnecessary, expansive *obiter dicta* is an accepted part of the judicial process, a sign of inquisitive and forthright jurists considering all relevant factors while seeking the legally correct outcome. This Article's focus, however, is not those relatively innocuous and meandering judicial musings. Instead, I focus on what I call invited appeals, which I further subdivide into two species: (1) soft invitations and (2) opinion-briefs.

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9. As I have discussed in detail elsewhere, the question of whether the Supreme Court has any consistent, guiding principles of *stare decisis* remains open. See generally Michael Gentithes, *In Defense of Stare Decisis*, 45 WILLAMETTE L. REV. 799 (2009) [hereinafter Gentithes, *In Defense*]; Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835 (2012) [hereinafter Gentithes, *Precedent*]. Though resolving that question is beyond the scope of this Article, it is nonetheless notable that invited appeals often call to cut back on existing precedent to some degree. As I will argue below, such reversals of long-standing precedent often have negative normative repercussions.

10. Given these normative drawbacks, this Article ultimately suggests that advocates of the positions taken by the author of an opinion-brief – such as death penalty abolitionists reading Breyer's *Glossip* dissent – should not accept those invitations. See *infra* Part VI.

11. As I argue below, in the time since Breyer issued his opinion, abolitionists have expressed confused and contradictory views on the prudence of directly challenging the death penalty's constitutionality at a time when there is a slowly building groundswell against capital punishment at the state level. Liptak, *Death Penalty Foes*, *supra* note 6. Given the uncertainty that Breyer's arguments will persuade his colleagues to directly hold capital punishment unconstitutional, abolitionists would be better served by continuing to work to undermine the death penalty on a more local level, allowing the movement against capital punishment to continue to grow organically until a clearer tipping point has been reached. *Id.*

### A. *Soft Invitations*

When Justice Goldberg became interested in the constitutionality of capital punishment in the early 1960s, he circulated an open memo to his fellow Justices asking whether the Court “should now request argument and explicitly consider this constantly recurring issue.”<sup>12</sup> Though rebuffed by his colleagues, who did not agree that an invitation for argument on that ultimate question was appropriate, Goldberg decided to issue a generalized invitation for future litigants to answer questions about the death penalty’s constitutionality.<sup>13</sup> Goldberg’s dissent in *Rudolph* is a prime example of a soft invitation for an appeal.<sup>14</sup> Without thoroughly researching or prejudging an issue that had not received adequate attention from the Court, Goldberg simply posed three open questions to the bar. First, he asked whether the punishment of death for the crime of rape violated the Eighth Amendment; second, whether the taking of a life for a crime other than murder was impermissibly disproportionate to the offense; and third, whether the permissible aims of punishment, such as deterrence, isolation, and rehabilitation, might be served by penalties less severe than death.<sup>15</sup>

An opinion such as Goldberg’s is a form of judicial advocacy, and it certainly constitutes judging with an eye toward controversies beyond the immediate case. However, it is not reminiscent of express advocacy by the party to that future appeal. These soft invitations do not suggest how the author is leaning in answering the questions posed (at least not explicitly), and they do not provide a roadmap for the future litigants to follow in order to succeed on one side of that question. They are inquiries offered without an answer, genuine requests for deeper consideration.

A more modern example of a soft invitation can be found in Justice Alito’s concurring opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL II)*,<sup>16</sup> which preceded the Court’s incessantly criticized, and even presidentially discredited, decision in *Citizens United v. Federal Election Commission*.<sup>17</sup> In *WRTL II*, Alito used a single-paragraph concurrence to indicate the possibility that the Court would address the constitutionality of *McConnell v. Federal Election Commission*<sup>18</sup> in a future case, without setting out the arguments or the likely outcome: “If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the

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12. Arthur J. Goldberg, *Commentary: Death and the Supreme Court*, 15 HASTINGS CONST. L.Q. 1, 1 (1987).

13. *Rudolph v. Alabama*, 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting).

14. The defendant in *Rudolph* filed a petition for certiorari after he was convicted of rape and sentenced to the death penalty. *Rudolph v. State*, 275 Ala. 115, 116 (Ala. 1963).

15. *Rudolph*, 375 U.S. at 889–91 (Goldberg, J., dissenting).

16. 551 U.S. 449, 482 (2007) (Alito, J., concurring).

17. 558 U.S. 310 (2010). For examples of the ongoing critical backlash against *Citizens United*, see Abrams, *supra* note 7; Alman, *supra* note 7.

18. 540 U.S. 93 (2003), overruled by *Citizens United*, 558 U.S. 310.

holding in *McConnell v. Federal Election Comm'n*, that § 203 is facially constitutional.”<sup>19</sup> That kind of generalized invitation may have come with a hint of foreshadowing toward Alito’s eventual opinion on the topic, but it was at least phrased as an opportunity for advocates on both sides of the question of *McConnell*’s holding to make their cases. Even commentators who favor campaign finance reform have noted that Alito’s opinion merely “signal[s] to a litigant that now is a good time to ask for the overturning of precedent,” rather than dictating exactly how and why that precedent should be discarded.<sup>20</sup> Prima facie, soft invitations are nothing more than genuine requests for further investigation by those litigants most interested in the topic highlighted by the opinion.<sup>21</sup>

### B. Opinion-Briefs

Standing in contrast to his former mentor’s soft invitation in *Rudolph* is Justice Breyer’s recent dissenting opinion in *Glossip*. There, Justice Breyer began by similarly posing several topics for discussion: whether capital punishment had become seriously unreliable, whether its application was too arbitrary, whether the delays in carrying out that punishment were unconscionable, and whether the tide of public opinion was turning against such penalties.<sup>22</sup> But Breyer was not satisfied with simply posing those questions and awaiting a litigant’s response. Instead, Breyer sought to send a message to death penalty abolitionists about what he saw as the most convincing arguments on each of those topics.

The result is a forty-four-page opinion that reads more like advocacy than neutral resolution of a pressing legal question. The odor of prejudice is strong; none could doubt either Justice Breyer’s position regarding the constitutionality of capital punishment or his specific reasoning behind that position. Though judicial transparency is a laudable goal, Breyer’s opinion provides it only regarding himself; he leaves advocates with uncertain guidance as to how persuasive, if at all, the entirety of his reasoning might be to the rest of the

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19. *WRTL II*, 551 U.S. at 482–83 (Alito, J., concurring) (citations omitted).

20. Hasen, *supra* note 7, at 796.

21. One borderline example of a “soft invitation,” though it comes with the caveat that the author was plainly offering facetious criticism of the majority opinion, is Chief Justice Roberts’s opinion in *Caperton v. A.T. Massey Coal Co.* See 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting). Roberts famously offered no fewer than forty “fundamental questions” that were raised by the majority’s “probability of bias” standard for determining when judicial recusal is necessary. *Id.* at 893–98. Roberts’s questions were open-ended but also written to illustrate “only a few uncertainties” that were created by the majority, rather than to seek genuine input from future litigants in fleshing out the “probability of bias” standard. *Id.* at 898. Roberts did not seek answers to those questions; he sought to prevent them from ever requiring answers by undermining the new test the majority had proposed.

22. *Glossip v. Gross*, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting).



bench.<sup>23</sup> The faux-transparency runs deeper, perhaps, because there is nothing in the conventional understanding of *stare decisis* that requires even Breyer himself to adhere to his expansive thinking in a dissent in any future majority opinion. This is especially true given the horse-trading Breyer would likely need to engage in to persuade a majority of his colleagues to join him in declaring the death penalty unconstitutionally cruel and unusual.

One might wonder why a death penalty opponent would second-guess the normative value of such an openly friendly opinion on the Court. The answer comes from a long-term strategic perspective. As I will argue in more detail below, if such opinion-briefs become an accepted high court practice, they will surely be utilized by Justices on all sides of important constitutional debates, some of which might not so neatly align with the goals of criminal justice reform or other aspects of the abolitionist bar's legal agenda. In fact, other Justices have already written opinion-briefs addressing a number of other issues spanning the political gamut.

One example comes from Justice Scalia's concurring opinion in *WRTL II*.<sup>24</sup> Scalia composed that opinion just three years before the Court's *Citizens United* ruling, setting out the precise arguments he hoped would be made by conservative members of the bar in a future appeal.<sup>25</sup> He began by explaining his position that restrictions on any corporate spending were unconstitutional, and thus *McConnell v. Federal Election Commission*<sup>26</sup> and *Austin v. Michigan Chamber of Commerce*<sup>27</sup> should be overruled.<sup>28</sup> Using a method that would later be reflected in Justice Breyer's *Glossip* dissent, Scalia first discussed his understanding of the history of campaign finance law beginning with *Buckley v. Valeo*, which had long given political speech in the form of campaign donations extensive First Amendment protection.<sup>29</sup> He then argued that *Austin* and *McConnell* came to improperly restrict those donations where the donor was a corporate entity, a distinction without basis in precedent or the Constitution.<sup>30</sup>

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23. Though Breyer also arguably provided some transparency for the views of Justice Ginsburg, who joined his opinion, that transparency is limited. Ginsburg has in no way committed herself to the precise analysis Breyer presented in future cases and is far less restrained by that dissent than she would be by a majority opinion to which she had joined.

24. *WRTL II*, 551 U.S. at 483–504 (Scalia, J., concurring).

25. Scalia was one of “[t]hree other Justices [who] concurred in the judgment to express their desire to overturn *McConnell* and *Austin*” in *WRTL II*. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1904 (2014).

26. 540 U.S. 93 (2003), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 876 (2010).

27. 494 U.S. 652 (1990), *overruled by* *Citizens United*, 558 U.S. 876.

28. Hasen, *supra* note 7, at 785.

29. *WRTL II*, 551 U.S. at 483–504 (Scalia, J., concurring).

30. *Id.* at 485–91. Scalia claimed that all tests for the “functional equivalent of express advocacy” will be unconstitutionally vague chills upon speech, and thus that the entire approach in *McConnell* should be discarded in favor of a ruling that all corporations have the same speech rights as other citizens. *Id.* at 492–500. Ultimately,

Scalia then analyzed the application of the Court's *stare decisis* doctrine to the *Austin* and *McConnell* opinions, concluding that they were ripe for overruling.<sup>31</sup> Finally, Scalia invited future litigants to directly argue that those Supreme Court precedents should be overruled, an effort that would bear fruit in *Citizens United*.<sup>32</sup>

Justice Scalia did not hesitate to use similar tactics in cases prizing reform of the criminal justice system. His dissents in *James v. United States*<sup>33</sup> and *Sykes v. United States*,<sup>34</sup> which set the table for the Court to declare the residual clause of the Armed Career Criminals Act ("ACCA") unconstitutionally vague in *Johnson v. United States*,<sup>35</sup> are prime examples. In *James*, Scalia considered a clause of the ACCA that imposed a mandatory minimum fifteen-year sentence for federal firearms offenders with three prior convictions for "violent felonies" that are in part defined by an ambiguous residual clause.<sup>36</sup> Scalia held that this clause would force the Court to either conceive a "coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a smaller subset of crimes" or "recognize the statute for the drafting failure it is and hold it void for vagueness."<sup>37</sup> For the time being, he left that choice open-ended, giving future litigants some wiggle room.<sup>38</sup> However, Scalia grew impatient with the briefing that did not seek to declare the ACCA void for vagueness in *Sykes*. There, Scalia pressed the Court to "admit that the ACCA's residual provision [defining a 'violent felony'] is a drafting failure and declare it void for vagueness,"<sup>39</sup> overruling a series of prior cases, including *James*. Citing to his own *James* dissent, Scalia predicted that the Court would soon be mired in an "endless" series of "ad hoc application[s] of ACCA to the vast variety of state criminal offenses."<sup>40</sup> He then outlined the argument he believed was most persuasive for holding the ACCA's residual clause void for vagueness, explaining how neither the Court's current test nor any others that might be proposed could provide the constitutionally required clarity.<sup>41</sup> On those grounds, Scalia would write a majority opinion in *Johnson* just four years later, holding the residual clause unconstitutional.<sup>42</sup>

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Scalia expressed his already-made decision that he would overrule *McConnell* and only joined in the majority's result. *Id.* at 504.

31. *Id.* at 500–03.

32. *Id.* at 503–04.

33. 550 U.S. 192, 214 (2007) (Scalia, J., dissenting), *overruled by* *Johnson v. United States*, 135 S. Ct. 2551 (2015).

34. 564 U.S. 1, 28 (2011) (Scalia, J., dissenting), *overruled by* *Johnson*, 135 S. Ct. 2551.

35. 135 S. Ct. 2551.

36. 18 U.S.C.A § 924(e)(2)(B) (West 2017).

37. *James*, 550 U.S. at 229–30 (Scalia, J., dissenting).

38. *Id.* at 230.

39. *Sykes*, 564 U.S. at 28 (Scalia, J., dissenting).

40. *Id.* at 33.

41. *Id.* at 34–35.

42. *Johnson v. United States*, 135 S. Ct. 2551, 2256–60 (2015).

It is noteworthy that the parties in *Johnson* initially failed to answer Scalia's invitation to argue that the ACCA's residual clause was void for vagueness; it was not until the Court, likely at Scalia's urging, ordered reargument on that very question that the parties first broached the topic.<sup>43</sup> Thus, Scalia was not willing to wait for his opinion-briefs in *James* and *Sykes* to take root. He forced the parties to present the issue before they were even willing to answer his invitation, taking the opportunity to forge new doctrine of the very sort he suggested in those opinion-briefs. Though this may have been an outcome lauded by criminal justice supporters, the means to that end may have opened the door to similarly spectacular outcomes for those with a different political agenda.

One such issue recently treated in a judicial opinion-brief is the constitutionality of public union dues, a topic being addressed once again this Term. In *Knox*, Justice Alito issued a none-too-subtle challenge to the constitutionality of such dues.<sup>44</sup> Alito expressly criticized the opt-out approach to public union employees' dues, suggesting that in prior cases,

[The Court] did not pause to consider the broader constitutional implications of an affirmative opt-out requirement. Nor did [it] explore the extent of First Amendment protection for employees who might not qualify as active "dissenters" but who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a State-favored union.<sup>45</sup>

He went on to expressly criticize standing precedent on the topic, strongly hinting that the views in prior decisions such as *Abood* and *Hudson* "approach, if they do not cross, the limit of what the First Amendment can tolerate."<sup>46</sup> Alito all but begged like-minded attorneys to argue that those prior decisions are unconstitutional:

[B]y allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers. In the new situation presented here, we see no justification for any further impingement.<sup>47</sup>

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43. See Rory Little, *(Re-)Argument Preview: Is Possession of a Sawed-Off Shotgun a "Violent Felony"?* *The Government Is Not Going Down Without a Fight*, SCOTUSBLOG (Apr. 17, 2015, 11:00 AM), <http://www.scotusblog.com/2015/04/re-argument-preview-is-possession-of-a-sawed-off-shotgun-a-violent-felony-the-government-is-not-going-down-without-a-fight/>.

44. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2284 (2012).

45. *Id.* at 2290.

46. *Id.* at 2291.

47. *Id.* at 2295.

Though the parties in *Harris v. Quinn*<sup>48</sup> obliged Alito by debating the ongoing salience of *Abood*,<sup>49</sup> his 2013 decision in that case did not explicitly overrule it. Instead, it provided greater refinement of the rationale he believed supported such a move. After recapping his questioning of *Abood* in *Knox*, Alito turned to an “examin[ation of] the path that led to this Court’s decision in *Abood*.”<sup>50</sup> Alito then articulated his doubts about the *Hanson* decision, which “dismissed the objecting employees’ First Amendment argument with a single sentence.”<sup>51</sup> Next, Alito casted doubt on *Street*, which followed *Hanson*’s reasoning, before directly criticizing *Abood*’s analysis of public-sector collective-bargaining agreements.<sup>52</sup> At his argumentative zenith, Alito specifically criticized *Abood* for assuming that compulsory payments to public sector unions were constitutional under *Hanson* and *Street*, noting his belief that wages and pensions for public employees are inherently political issues and highlighting the practical administrative difficulties in determining what a public sector union spends on political activity.<sup>53</sup> But despite spending twelve pages dissecting the flaws in *Abood*, Alito ultimately resolved the question before him on the grounds that the specific employees at issue in the case did not qualify as “full-fledged public employees.”<sup>54</sup> Alito thus made plain that he believed *Abood* should be overruled given the First Amendment concerns he highlighted, leaving his dissection of that opinion as a roadmap for future brief writers squarely addressing the question in a later appeal. As will be discussed in more detail below, the unresolved constitutional status of public employee union dues demonstrates how an opinion-brief’s author might be unable to later deliver a majority supporting her position due to a variety of unforeseeable influences.<sup>55</sup>

*Harris v. Quinn* was not the last time Alito wrote the brief for future litigants in forthcoming constitutional cases. In recent litigation that considered whether Amtrak constitutes a governmental entity for purposes of determining the validity of the “metrics and standards” it issues on the performance and scheduling of passenger railroad services, Alito issued a similar opinion-brief.<sup>56</sup> Though Alito concurred that Amtrak was a governmental entity, he added a twelve-page opinion that equaled the length of Justice Kennedy’s majority ruling.<sup>57</sup> Alito provided complex arguments suggesting that there were

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48. 134 S. Ct. 2618 (2014).

49. See Lyle Denniston, *Argument Preview: Is Abood in Trouble?*, SCOTUSBLOG (Jan. 18, 2014, 12:06 AM), <http://www.scotusblog.com/2014/01/argument-preview-is-abood-in-trouble/>.

50. *Harris*, 134 S. Ct. at 2627.

51. *Id.* at 2629.

52. *Id.* at 2627–30.

53. *Id.* at 2632–33.

54. *Id.* at 2634–41.

55. See *infra* Part IV.

56. See *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring).

57. See generally *id.*

further constitutional infirmities created by that classification of Amtrak.<sup>58</sup> He first noted that Amtrak's board members must take an oath to support the Constitution and receive a commission,<sup>59</sup> then observed that the arbitration provision of one of Amtrak's authorizing statutes violates the private non-delegation doctrine in contravention of separation of powers principles,<sup>60</sup> and finally suggested that the president of Amtrak must be appointed by the President and confirmed by the Senate.<sup>61</sup> None of those rulings controlled the outcome of the case; they were instead detailed suggestions of how future litigants ought to argue against the constitutionality of various portions of Amtrak's authorizing statutes.

A final example drawn from Justice Kennedy's concurring opinion in *Direct Marketing Ass'n v. Brohl*<sup>62</sup> demonstrates that opinion-briefs are gaining traction even amongst the Justices at the Court's ideological center. In that case, the Court held that a consortium of online retailers could sue to enjoin Colorado from imposing notice and reporting requirements for sales to Colorado customers.<sup>63</sup> What the retailers sought to enjoin was a Colorado statute designed to work around negative Commerce Clause jurisprudence that required a retailer to have some physical presence in the State before the State could collect use and sales taxes from that retailer.<sup>64</sup> Though the Court's opinion had Kennedy's "unqualified join and assent," he wrote separately to raise an issue the parties never broached in their briefs – whether to overturn the underlying negative Commerce Clause precedents that caused Colorado to create the reporting requirements.<sup>65</sup>

Though Kennedy acknowledged that *Brohl* itself was not an "appropriate" case to reconsider those negative Commerce Clause precedents, he invited future litigants to "find an appropriate case for this Court to reexamine" them.<sup>66</sup> He then outlined the "powerful case to be made" for imposing tax collection duties on online retailers without a physical presence in the State.<sup>67</sup> Using statistics to highlight the growth of online retail in the past fifty years and the estimated tax loss states have suffered under the Court's negative Commerce Clause jurisprudence, Kennedy provided the analytical structure for an argument to overrule those cases.<sup>68</sup> He even suggested that his prior 1992 vote to uphold those precedents, as well as those of Justices Scalia and Thomas, were

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58. *See id.*

59. *See id.* at 1235.

60. *See id.* at 1236.

61. *See id.* at 1239.

62. 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

63. *Id.* at 1129.

64. *Id.* at 1128.

65. *Id.* at 1134 (first citing *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967); and then citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992)).

66. *Id.* at 1135.

67. *Id.*

68. *Id.*

“based on *stare decisis* alone” and thus “underscore[d] the tenuous nature of that holding.”<sup>69</sup> The implication was clear: if a future litigant were to raise a challenge to those negative Commerce Clause precedents on the grounds Kennedy outlined, Kennedy believed he could convince a majority of his colleagues to adopt that reasoning and overrule those prior decisions. Indeed, future litigants, such as the State of South Dakota, seem keen to enact legislation that would provide a test case for Kennedy and his colleagues.<sup>70</sup>

### III. ACCEPTABLE INVITED APPEALS – SOFT INVITATIONS

Not all invited appeals are created equal. For that reason, not all invited appeals are worthy of the same normative condemnation. In this Part, I analyze the less-troubling soft invitations before returning to opinion-briefs in the following Part.

On first impression, a Justice who enhances transparency by inviting certain legal challenges does no grievous harm. As I have written elsewhere, transparency is vital to the Court’s work.<sup>71</sup> A soft invitation for discussion of a certain topic, or exploration of one possible outcome in a case that no party has previously pressed, might give litigants advance notice of the questions that are the most intriguing to the Justices, even if they do not know how those questions might be resolved. This would allow litigants to craft arguments that seem most likely to be persuasive and to cull research in fields that are most relevant to the Court’s internal debate.

Soft invitations might also increase predictability of the Court, to the extent that the inviting Justice provides insight into her likely position in a future appeal. The predictability gains from a soft invitation are likely to be minimal; such invitations are characterized by the open-minded approach taken by the inviting Justice, and thus they provide, at most, more tea leaves for practitioners to read regarding that Justice’s opinion on the issue. Nonetheless, even an insubstantial increase in the predictability of Supreme Court litigation might be normatively laudable.

Perhaps most importantly, soft invitations indicate high degrees of honesty and humility in the authoring Justice.<sup>72</sup> When the invitation is not an indication that the Justice has already decided the future appeal and genuinely seeks to hear more discussion of the topic, there is much to be gained from answering the invitation. Soft invitations will allow the organic development of theories on both sides of the issue, without any prejudgment by the decision-

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69. *Id.* at 1134.

70. Jennifer McLoughlin, “*Quill*” Case Challenging Nexus Law Heading to S.D. Court, BLOOMBERG (Apr. 28, 2016), <http://www.bna.com/quill-case-challenging-n57982070441/>.

71. See, e.g., Michael Gentithes, *Sunsets on Constitutionality & Supreme Court Efficiency*, 21 VA. J. SOC. POL’Y & L. 373 (2014).

72. For a discussion of the proper place that such judicial humility should have in adjudication, see Gentithes, *Precedent*, *supra* note 9.

maker. The Justice is speaking in humility and honesty; she admits of being unconvinced by something but not yet of making up her mind or knowing the precise grounds upon which the Court should reach the proper decision. Ultimately, what she invites is a real, live controversy, one with unanswered questions and genuine positions taken by the opposing parties.

The temptation for a Justice to issue such soft invitations in areas where she believes neither party has answered the most pressing questions is understandable given the dual role that judges in our adversarial system must play. Federal judges must both resolve immediate controversies before them and set broadly applicable precedent; when these goals conflict due to poor party presentation of issues, judges often wish to step in and address the arguments that the parties did not.<sup>73</sup> In the interest of creating broadly applicable and reliable precedent, such soft invitations for additional argument on a topic seem justified. Those invitations can be made openly, without deciding the issue in advance, and without blatantly advocating from the bench.

These kinds of open-ended calls for argument might be particularly useful if offered in new and emerging areas of law, or where they avoid directly undermining confidence in that which was already decided. They must also be phrased generally and are most effective when joined by multiple Justices across the political spectrum who can affirm that the Court's position is undecided and in need of further refinement through the crucible of litigation. That will signal to litigants not that the Court is sure to undermine a longstanding legal principle, but instead that it is in need of advice in a troubling legal area, if there are any parties interested in the topic and willing to provide argument on the issue.

Soft invitations might also be normatively desirable as a release valve for the pressure Justices feel to issue a *sua sponte* ruling on a topic that was neither briefed nor argued in order to assure the accuracy and longevity of their precedents.<sup>74</sup> Inviting an appeal is an attractive alternative to deciding a case *sua sponte* without any argument from parties on either side. So long as the invitation is not so specific as to suggest that the Justice has already reached a conclusion on the issue, it serves our sense of procedural justice well to utilize soft invitations as such a release valve.<sup>75</sup>

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73. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 452 (2009).

74. See, e.g., Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1255–56 (2002) (collecting examples of the Court's *sua sponte* rulings).

75. It should be noted that a Supreme Court Justice feeling this pressure has many options short of a full-throated invitation for a future appeal. First, the Justice can simply note the issue and have the parties discuss it themselves in a reargument of the exact same case. The Justice might also choose to rely upon invited amici to address the question on its mind: "It is not uncommon for the Court to introduce new questions; most commonly, it does so by asking the parties to brief and argue an additional question to the one presented in the petition for certiorari, either when certiorari is granted or when ordering reargument in a case." Brian P. Goldman, *Should the Supreme Court*

#### IV. OPINION-BRIEFS AND PROCEDURAL JUSTICE IN AN ADVERSARIAL SYSTEM

Opinion-briefs, as I have described them, may be far more pernicious than the soft invitations discussed previously. These briefs can play a starring role in the decline of adversary procedure within the Supreme Court.

To normatively evaluate opinion-briefs, one must first frame them in the context of Supreme Court Justices' recent efforts to exercise ever-increasing control of the direction of litigation in their courtroom. Justices have subtly begun to shape the arguments in the Supreme Court to the exclusion of the parties and their advocates, thereby imposing from the bench their own narratives and analytical structures for cases. Consider that, although the Court today hears roughly seventy-five merits cases per Term,<sup>76</sup> it has increased the median length of its decisions from 2000 words in the late 1950s, to over 8200 by 2009.<sup>77</sup> Writing fewer opinions per Term affords the Justices the opportunity to expound their own favored approaches to troubling legal problems, beyond those that are presented in the briefs themselves. In a recent study of language overlap between the parties' briefs and opinions in merits cases between 1946 and 2013, Adam Feldman has revealed "a clear decrease in the maximum values of language overlap per justice over time[,] potentially indicating that the Court's shrinking docket led to less reliance on the merits briefs."<sup>78</sup> Indeed, while thirteen Justices appointed before Justice Powell authored an opinion with more than 40% of its language overlapping the briefs, none since Justice Powell has done so.<sup>79</sup> In fact, only Justice Ginsburg of the presently sitting Justices has even approached the 30% barrier.<sup>80</sup>

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*Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 931–32 (2011) (footnote omitted).

76. See Sullivan & Canty, *supra* note 3, at 1006 n.5 (citing Stras, *supra* note 3, at 950). The Court's output has remained at about that level. See *2014 Term Opinions of the Court*, *supra* note 3. As recently as the 1980s, the Supreme Court's caseload was generally regarded as overwhelming. See, e.g., O'Brien, *supra* note 3, at 667 ("All of the justices now agree that they are overworked by deciding too many cases."); see also Starr, *supra* note 3 at 1366–76.

77. See Sullivan & Canty, *supra* note 3, at 1007 n.11 (citing Black & Spriggs, *supra* note 3, at 630, 634–35).

78. Feldman, *supra* note 3, at 137.

79. *Id.* at 138.

80. As Feldman notes:

Another way to look at the Justices comparatively is through their maximum overlap values. This shows their potential willingness to incorporate a high level of language found in a merits brief. The maximum value has decreased appreciably over time. The last justice (by date of appointment) with a maximum value of 40% or greater in an individual case was Justice Powell. Thirteen of the Justices have maximum values of 40% or greater including and prior to the appointment of Justice Powell. Since Justice Powell's appointment, the two highest overlap values in a case are 37% each for Justices Rehnquist and



At the same time that they have expanded the length and originality of their written opinions, Justices have changed their practices during oral arguments in ways that reflect a restive bench eager to play just as prominent a role as the litigators in shaping their colleagues' views and analytical approaches.<sup>81</sup> In a comparison of oral arguments in the 1958–60 and 2010–12 October Terms of the Supreme Court, Barry Sullivan and Megan Canty revealed the myriad of ways in which oral argument has become far more Justice-centric over the last half-century.<sup>82</sup> The differences in oral argument between those eras

include an increase in the average number of words spoken by the Justices in the later cases; a substantial increase in the percentage of words spoken by the Justices (compared with the percentage of words spoken by counsel) in the later cases; a higher average ratio of Justice statements to questions in the later cases; an almost doubling of the average number of words the Justices spoke during each separate speaking turn; and a dramatic shortening of the longest opening and non-opening monologues by counsel in the later cases.<sup>83</sup>

The Justices have increased by nearly a quarter the number of words they speak in the thirty minutes now typically allotted to each side at oral argument.<sup>84</sup> Further, “[m]easured purely by words, the current Justices are 2.280 times more talkative than their predecessors.”<sup>85</sup> In the newer cases, Justices “also actively assisted some counsel, suggesting better arguments or helping counsel fill in gaps.”<sup>86</sup>

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O'Connor. Justice Ginsburg is the last Justice appointed with an instance where the percentage of overlapping language between a brief and opinion exceeded 30%. The two Justices with the lowest maximum overlap values in a case are Justices Breyer and Kagan with values of 16% and 15% respectively.

*Id.* at 139–40 (footnote omitted). This is not to say that briefs have become wholly irrelevant in the modern era. As Feldman notes, “[B]riefs have remained a stable resource for the Justices and clerks and a resource they tend to use in fairly similar amounts.” *Id.* at 149; *see also* Lazarus, *supra* note 8, at 1542 (noting that in interviews, 88% of Supreme Court clerks acknowledge reading briefs filed by frequent litigators before the Court more closely).

81. Sullivan & Canty, *supra* note 3, at 1075 (“Justices may see oral argument as an opportunity to test their forensic skills against those of counsel. In that game, the Justices not only call the balls and strikes, but also pitch, bat, and field.”).

82. *Id.*

83. *Id.* at 1042.

84. *Id.* at 1043 (“Although the Court reduced by half the time allotted for oral argument (from a default rule of one hour to one-half hour to the side in each case), the Justices increased their total words per case by 23.7%. At the same time, the average words spoken by counsel in each case decreased by 45.8%.” (footnote omitted)).

85. *Id.* at 1044.

86. *Id.* at 1061. One prominent example of this kind of assistance can be seen in the Obamacare cases, where Justice Sotomayor pushed Solicitor General Donald

By exerting greater and greater control over the litigation process in their courtroom, Supreme Court Justices have changed the way legal doctrine evolves in our nation. Though the Court sits at the pinnacle of an adversarial system,<sup>87</sup> it is no longer a place where that system is actively practiced. Justices typically offer detailed assistance for some litigants, providing support for their positions and even, in the case of opinion-briefs, thorough outlines of the arguments that the supportive Justice believes will be most persuasive to her colleagues.<sup>88</sup> At the same time, a Justice's scorn for some litigants is hardly disguised at all, finding expression in vitriolic terms at oral argument and in written opinions.<sup>89</sup>

This pattern presents a threat to an adversarial system of justice that is supported by a wide breadth of theoretical justifications.<sup>90</sup> At the core of those justifications, is a faith that "a good process is the best way to achieve good and fair results. If all of the procedural standards are met, everything should have been done correctly, and that affords the best possibility of getting to the truth, and ultimately to the best 'correct' answer."<sup>91</sup> This tenet runs throughout the American legal system. The parties are the primary drivers of the law's development in a bottom-up adversarial process at both the trial and appellate levels. Party-controlled litigation, even on appeal, gives decision-makers "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."<sup>92</sup> Yet the Justices seem fixated on a more top-down model of lawmaking, where Justices announce broad policy pronouncements with little party input. Such a system would resemble Continental European justice systems more than our American tradition.

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Verilli to turn his argument towards the taxing power with specific, friendly questions. *Id.* at 1064.

87. As the Court has noted in the past, our adversarial system "rests on a principle of party presentation as many systems do not. In many systems, the court does shape the controversy and can intrude issues on its own. But in our adversarial system, we rely on counsel to do that kind of thing." Goldman, *supra* note 75, at 909 (quoting Transcript of Oral Argument at 34, *Greenlaw v. United States*, 554 U.S. 237 (2008) (No. 07-330)).

88. Sullivan & Canty, *supra* note 3, at 1061.

89. *See id.* at 1076.

90. *Id.* at 1077 ("How, for example, does one square the basic idea of legal representation and the lawyer's role in an adversarial system with a reality in which the Justices not only speak more than the lawyers, but also seem to do battle for one side or the other?").

91. Cravens, *supra* note 1, at 269 ("A judge who interferes with the process by stepping out of the role of umpire and into the role of adversarial participant by becoming involved in the fashioning of arguments may risk upsetting the process and producing bad results.").

92. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

### A. *How Opinion-Briefs Undermine the Adversarial System*

Opinion-briefs exacerbate the trend against traditional American notions of procedural justice in Supreme Court practice. When a Justice announces not only her interest in a particular legal topic unaddressed by the parties, but goes so far as to outline what she has predetermined to be the best reasoning to resolve that issue without ever reading briefs or hearing arguments, she undermines the sense that our judicial system offers the opportunity for all parties to be heard before a decision is rendered.<sup>93</sup> At their most basic level, such intrusions into the usual adversary process allow Justices to “substitut[e] their judgment[s] as to what issues should be in play for the parties”. That represents an expansion of the judicial role from passive arbiter to more active inquisitor, and in constraining the parties’ freedom to shape their own case, it undermines their sense of procedural justice.<sup>94</sup>

Opinion-briefs also allow the Justices to thwart the ability of future litigants to offer alternative theories or approaches to a troubling legal problem. Because an opinion-brief calls for future litigation with precisely outlined arguments in great specificity, it does not allow any realistic opportunity for the parties to present flaws in the logic by which the Justice has already been convinced. After committing to such a detailed analysis in a signed opinion, that Justice will likely fall prey to several cognitive biases that will preclude her from any reconsideration or adjustment. Confirmation bias will lead the Justice to discount any disconfirming evidence.<sup>95</sup> Given the resources that the Justice and her clerks have already devoted to researching the issue and utilizing social science data available to support her conclusions, cognitive dissonance will make it especially difficult to change her view.<sup>96</sup> And the phenomenon of “escalating commitment,” whereby an individual’s dedication to a pre-conceived decision only increases in the face of mounting disconfirming evidence, will

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93. Cravens, *supra* note 1, at 251 (“A judge who interferes with the [adversarial] process by stepping out of the role of umpire and into the role of adversarial participant by becoming involved in the fashioning of arguments may risk upsetting the process and producing bad results.”); *see also* HAMPSHIRE, *supra* note 1, at 95.

94. Goldman, *supra* note 75, at 943–44; *see also* Miller, *supra* note 74, at 1260 (“[S]ua sponte decisions trouble judges because due process interests are implicated when a court recasts the questions presented and decides a case on issues not discussed by the parties without remanding or providing an opportunity for briefing.”).

95. Confirmation bias “leads individuals to discount disconfirming evidence encountered after that individual has made up her mind. In other words, confirmation bias causes people to tend to become close-minded and ignore new information once they have committed themselves to a particular position.” Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 288 (2016) (footnote omitted).

96. *Id.* at 289 (“Cognitive dissonance can operate to make it more difficult for an individual to change her mind, particularly where resources have already been based on an earlier view.”).

likely tether the Justice to the words of her opinion-brief.<sup>97</sup> The Justices themselves have even confirmed the effect that these cognitive biases can have upon them when they declare their positions in cases where the Court is deadlocked due to vacancies or recusals.<sup>98</sup>

Given those biases in favor of the analysis spelled out in an opinion-brief, the parties will be hard-pressed to respond with anything but a parroted version of that analysis. The parties will utilize the Justice's analytical structure as the basis for claims that respond to the invitation. Rather than formulating their own approaches, those advocates will be hemmed in by the pen strokes of the earlier opinion-brief.

Justices might be tempted to violate norms of procedural justice more readily in an era of seemingly intractable political polarization. Without judicial action, many of the primary social problems facing the country could go unaddressed. But that call to activism in times of political stasis is doubly misguided. First, it overestimates the ability of an individual Justice, and even the Court as a whole, to address relevant matters of social policy.<sup>99</sup> Second, the structure of our government actually requires Justices to do less in an era of polarization: “[C]ourts and commentators have worried for generations about judicial review precisely because legislative supremacy is a fundamental premise of democratic self-government.”<sup>100</sup> At a time when national faith in our government is at its ebb, judicial overreach might further undermine citizens' respect for our constitutional system as a whole and the judicial branch specifically. In that context, opinion-briefs are particularly misguided.

Opinion-briefs also raise a smaller procedural justice concern within the specific context of the Supreme Court Rules. By limiting themselves only to those questions presented in the petition for certiorari, rather than offering detailed invitations for future arguments, Justices serve an important notice function that is partially constitutive of procedural justice. Supreme Court Rule 14.1(a) addresses the importance of including all questions to be reviewed in the petition for certiorari:

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97. *Id.*

98. For instance, Justice Brennan confirmed the effect of escalating commitment on the Justices, noting that the “practice of not expressing opinions upon an equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment.” *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (Brennan, J., dissenting).

99. In *Foreword: The Court's Agenda – and the Nation's*, Frederick Schauer argues that only a miniscule proportion of the nation's real policy agenda comes before the Supreme Court, or courts in general, in any given year, and thus threats that the Court might meaningfully legislate from the bench are overblown. Frederick Schauer, *Foreword: The Court's Agenda – and the Nation's*, 120 HARV. L. REV. 4, 9–10 (2006).

100. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1204 (2006) (quoting William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 844 (2001)).

[Doing so] provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the respondent to sharpen the arguments as to why certiorari should not be granted. Were [Justices] routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review.<sup>101</sup>

The opinion-brief's author does just that.<sup>102</sup>

### B. Constitutional Concerns with Opinion-Briefs

Beyond their effect upon the adversarial system, opinion-briefs raise troubling constitutional concerns. They may be a slippery slope towards the erosion of procedural due process rights guaranteed by our nation's founding document.

When a Justice writes an opinion-brief, she is no longer directly considering the "case" or "controversy" before the Court, pursuant to its Article III ambit.<sup>103</sup> An opinion-brief falls outside the resolution of any case or controversy. It is an open discussion of a hypothetical legal issue that might be raised by parties in a future case. Justice Scalia has remarked that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards

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101. *Yee v. City of Escondido*, 503 U.S. 519, 535–36 (1992). When the Court restricts its ruling to those issues presented in the petition, it also efficiently selects appropriate cases to be heard:

Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources.

*Id.* at 536.

102. Of course, if a Justice is not satisfied with the issue presented in the petition for certiorari, she has other options to expand the field of argument, while still allowing both parties their say, be it through additional briefing or argument or through the participation of invited amici. Frost, *supra* note 73, at 501 ("If a judge realizes that there is an important legal argument that has been overlooked, or valuable precedent that has gone uncited, the judge does not act as advocate if she points out the missing information and provides *both* parties with an opportunity to address the issues she has identified.").

103. U.S. CONST. art. III, § 2; Frost, *supra* note 73, at 486 ("Courts are not charged with enforcing the Constitution in the abstract, and may do so only in the context of specific cases and controversies.").

of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”<sup>104</sup> Opinion-briefs risk upsetting that balance.

It is understandable that a Justice would feel compelled to address issues she believes must be resolved to establish an accurate body of precedent. It seems to conserve sparse judicial resources by immediately reaching the issues in a salient way, rather than waiting for parties to bring a case and make the most persuasive arguments. But the Constitution requires Justices to play a less active role. The Constitution “prioritizes constraints on power, which by design are inefficient. [W]hile courts might be frustrated by biting their tongues until a litigant raises the theory they would prefer to use in resolving a question, constitutional structure would suggest they should accept that check on their authority.”<sup>105</sup> Though Justices might be able to step in and suggest to parties that they have missed a particular argument and ought to consider it in a re-argument or other forum,<sup>106</sup> the Constitution, at least facially, prohibits going further.<sup>107</sup>

Justices who author a detailed opinion-brief commit a sin similar to Justices who *sua sponte* decide issues not presented by the parties. Such *sua sponte* appeals contravene the Court’s own promise not to resolve questions that were not addressed by the litigants or lower courts.<sup>108</sup> Commentators have decried the procedural unfairness when appellate courts resolve issues on appeal without giving the parties an opportunity to be heard.<sup>109</sup> Opinion-briefs

104. Goldman, *supra* note 75, at 940 n.180 (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)); *see also* Cravens, *supra* note 1, at 272 (“[C]ourts generally do not take it upon themselves to rearrange the lawsuit before them so that the plaintiffs will get the most effective relief available to them. They do not fix those situations in which the plaintiff has, for example, sued the wrong party, sued under the wrong statute, or failed to request the most suitable form of relief.”).

105. Goldman, *supra* note 75, at 965.

106. Amanda Frost specifically suggests that such invitations should be willingly made by the Court. Frost, *supra* note 73, at 508 (“[I]f judges do see an argument missed by the parties, they should be free to raise it on the condition that it is closely related to the legal question before them, and the parties are given a chance to voice their views on the issue.”). Frost also accuses the Supreme Court of “retain[ing] seemingly standardless discretion to violate the norm of party presentation whenever it wishes to do so.” *Id.* at 465.

107. Goldman, *supra* note 75, at 965.

108. Miller, *supra* note 74, at 1255–56 (“[Although t]he Supreme Court often insists it will not decide issues that have not been raised below[,] . . . some of the Supreme Court’s most famous opinions decided issues not presented by the briefs or addressed below.”). According to Miller, prominent examples of such behavior by the Court include *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Mapp v. Ohio*, 367 U.S. 643 (1961), *Washington v. Davis*, 426 U.S. 229 (1976), *Younger v. Harris*, 401 U.S. 37 (1971), and *Stanley v. Illinois*, 405 U.S. 645 (1972). *Id.* Others have similarly criticized the Court’s past instances of *sua sponte* discussion of an issue on appeal, specifically in *Erie*. *See, e.g.*, Frost, *supra* note 73, at 450–51.

109. Miller, *supra* note 74, at 1289–90.

are similarly troubling. Though opinion-briefs do not offer the Court's final word on the topic as do *sua sponte* appeals, they suggest that the authoring Justice herself has already formed her opinion based upon the specific analysis presented in the opinion and even suggest that the rest of the bench might be convinced if a future litigant has the temerity to so argue in a future case.

Admittedly, though a Justice's opinion-brief seems contrary to the spirit of a Supreme Court of limited jurisdiction, it might not actually be unconstitutional. Much of what the Court does in the opinions it issues is not strictly necessary to resolve the case or controversy before it, and this alone is not unconstitutional. *Dicta* abounds in most decisions, as do concurring and dissenting opinions that explain alternate reasoning and outcomes that do not control the case or the future direction of the law explicitly. And in any event, the Article III concerns raised by an opinion-brief are resolved once actively interested parties do bring a live case or controversy to the Court in response to the invitation.<sup>110</sup> Nonetheless, opinion-briefs offer logic and reasoning that were unnecessary to resolve that active controversy, all without party input. They presage an erosion of due process by allowing the Court, rather than parties, to contest key legal issues and drive the formation of new doctrine. That slippery slope is at least undesirable, if not directly unconstitutional.

## V. OPINION-BRIEFS AND THE PERCEPTION OF THE SUPREME COURT

When a Justice invites future argument or consideration of a new topic without maintaining an open mind, she casts herself as an advocate out to persuade her colleagues, not a neutral arbiter resolving a pressing legal question. The opinion-brief's author thus invites not only a future appeal, but also several pernicious evils that could change the common perception of the Supreme Court. Should opinion-briefs become too prevalent, they could wholly undermine the Court's authority in our society.

### A. *Dissolving the Veil of Neutrality*

Opinion-briefs open the Court to accusations of politicized decision-making, undermining the public's belief in the Court's neutrality. When a Justice writes an opinion-brief, she appears to be nothing more than an interested party. Yet the perception of her neutrality is vital to her ability to definitively resolve controversies.<sup>111</sup> As Owen Fiss has observed, it would be "foolish for the judge

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110. *Id.* at 1257–58.

111. Put another way, "[t]he consequence of a court 'becom[ing] an active inquirer' is a failure 'to convince society at large that the court system is trustworthy' by virtue of 'appear[ing] to be an advocate rather than a neutral arbiter.'" Goldman, *supra* note 75, at 947 (second and third alterations in original) (quoting Stephan Landsman, *The Decline of the Adversary System*, 29 BUFF. L. REV. 487, 491 (1980)); see also Miller, *supra* note 74, at 1303 ("[P]arties and counsel may not perceive the court's judgment as fair and legitimate unless they get their say before the court decides.").

to assume a representational role” and undermine judicial impartiality.<sup>112</sup> In allowing herself to appear politically motivated, the opinion-brief’s author makes an institutionally costly choice that “makes the Court seem less like what we consider to be a Court (executing the commands of others) and more like a policy maker (choosing what policy to make).”<sup>113</sup> That undermines the perception that, at a minimum, the Court’s procedures allow both sides to a controversy the equal opportunity to be heard.<sup>114</sup>

Opinion-briefs that successfully generate future appeals decided on the grounds proposed by the inviting Justice undermine the perception of the Court as a neutral body. The inviting Justice appears to be little more than a law professor expounding upon pet issues from her lectern. Rather than deciding the case before her, the opinion-brief’s author has made a superfluous and highly specific suggestion of the future direction of the law, a prophecy that she herself aims to fulfill in the future. This is a far cry from a neutral arbiter lacking any policy agenda.

The tarnish caused by opinion-briefs might not be repaired when two interested parties litigate the issue later, in response to the Court’s invitation, even if neither claims to be directly responding to that judicial invitation. The opinion-brief itself was so detailed as to suggest that, in the eyes of the authoring Justice, the outcome was a foregone conclusion. That prejudgment of the future case is troubling. As Lon Fuller noted, “[I]n the absence of an adversary presentation, there is a strong tendency by any deciding official to reach a conclusion at an early stage and to adhere to that conclusion in the face of conflicting considerations later developed.”<sup>115</sup> The public is likely to conclude that both the opinion-brief’s author and the Court as a whole prejudged the case in

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It should be noted that at least some commentators have long decried the Justices’ lack of neutrality in light of the Court’s certiorari powers, which allow Justices to choose both the cases they will hear and the issues they will address within those cases. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1718–26 (2000) (collecting commentaries decrying the Court’s agenda-setting powers).

112. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 26 (1979).

113. Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1384 (1997). In part for that reason, Lawrence Lessig concludes that, “All things being equal, a rule that reveals a political choice is a worse rule than a rule that does not. There is a pressure to select rules that don’t reveal this political choice.” *Id.*

114. HAMPSHIRE, *supra* note 1, at 95 (“No one is expected to believe that [the Court’s] decisions are infallibly just in matters of substance; but everybody is expected to believe that at least its procedures are just because they conform to the basic principle governing adversary reasoning: that both sides should be equally heard.”).

115. Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34, 43 (Harold J. Berman ed., 1961). Again, others have suggested that accusations that the Court is overly political and prone to legislate from the bench are overblown in light of the small proportion of the nation’s policy agenda that comes before it. See Schauer, *supra* note 99, 9–10.



favor of a preferred policy outcome, failing to act as a neutral arbiter of the case.

### B. Eroding Stare Decisis

One problem ancillary to the method that Justices employ in opinion-briefs concerns their typical substance. As the above discussion demonstrates, opinion-briefs often call for the disruption of settled precedent, perhaps without justification under the Court's existing principles of *stare decisis*.<sup>116</sup> Opinion-briefs typically focus on the Court's earlier work in the area of law at issue, without separately considering, as the Court's own precedents about precedent require, previous decisions' practical workability, reliance interests they have engendered, their status as a remnant of abandoned doctrine, or changes in facts so significant that the old precedents are robbed of significant application.<sup>117</sup> Opinion-briefs might even represent a Justice's surreptitious effort to trim existing precedent in the pernicious spirit of what Professor Barry Friedman has coined "stealth overruling."<sup>118</sup> Opinion-briefs can thus be a form of subtraction by addition,<sup>119</sup> an effort by the authoring Justice to subtly undermine existing doctrine until it can later be cast aside as "unworkable" or nothing more than a remnant of doctrine that has been abandoned.<sup>120</sup>

Calls for doctrinal reversal in an opinion-brief are particularly troubling because the authoring Justice initiates them *sua sponte*. The Court typically reverses its prior decisions "only with the greatest caution and reticence," and doing so on a Justice's "own invitation and without adversarial presentation is both unfair and unwise."<sup>121</sup> The opinion-brief's author appears to have decided that reversal is appropriate without ever hearing from any interested litigant;

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116. A full discussion of the consistency of the Court's application of *stare decisis* is beyond the scope of this Article, though I have written extensively on that topic elsewhere. See Gentithes, *In Defense*, *supra* note 9; Gentithes, *Precedent*, *supra* note 9. For purposes of the present argument, it is worth noting that a common thread amongst opinion-briefs is the call to cull long-standing doctrine or even outright reverse previously decided cases. Such calls for reversal plainly raise concerns for supporters of *stare decisis* in any form.

117. The Court's most definitive statement on those circumstances is its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992). For a discussion on the appropriateness of the factors considered there, see Gentithes, *In Defense*, *supra* note 9, at 810.

118. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

119. See Gentithes, *Precedent*, *supra* note 9, at 884–89.

120. *Id.* at 852.

121. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2299 (2012) (Sotomayor, J., concurring) ("It deprives the parties and potential amici of the opportunity to brief and argue the question. It deprives us of the benefit of argument that the parties, with concrete interests in the question, are surely better positioned than we to set forth.").

where the invitation successfully creates a future appeal that does reverse doctrine or precedent, *stare decisis* will be eroded without due care and consideration.

By addressing the validity of a prior case *sua sponte*, the authoring Justice is on ground parallel to reaching an issue of constitutionality unnecessarily in violation of the doctrine of constitutional avoidance.<sup>122</sup> In both instances, the Justice is reaching sensitive issues needlessly, rather than resolving issues on narrower grounds that might be less deleterious to the public's faith in the Court as an institution.<sup>123</sup> This should resonate doubly with Justices considering an invitation to overrule precedent, which may both undermine the Court's prior work and tread upon the work of elected branches.<sup>124</sup>

### C. Misallocating Judicial Resources

Opinion-briefs also misallocate scarce judicial resources and publicly insert the Justices into policy debates better left to legislative bodies more institutionally competent to analyze them. They require the Justice and his clerks to cull what research does exist and shape it into legal arguments, rather than simply calling the proverbial balls and strikes of litigation.

First, opinion-briefs insert the authoring Justice into policy debates better left to the legislature, with the full weight of research capabilities, policy experimentation, and public debate Congress can bring to bear. Supreme Court Justices simply lack the wherewithal to do the kind of widespread, independently verifiable research that can be performed by other branches of government with bodies specifically designed for that policy-making function.<sup>125</sup> A Justice's inability to perform that necessary social research to resolve vast

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122. One scholar notes, "Avoidance is perhaps the preeminent canon of federal statutory construction; its pedigree is so venerable that the Supreme Court invoked a version of it even before *Marbury v. Madison*." Adrian Vermeule, *Saving Constructions*, 15 GEO. L.J. 1945, 1948 (1997).

123. The national perception of the Court is at the forefront of the primary justification for the constitutional avoidance doctrine, "minimiz[ing] the instances of judicial review in which an unelected court invalidates the work product of the democratically accountable branches." Morrison, *supra* note 100, at 1204.

124. The Court does sometimes invite an argument on appeal specifically to serve the doctrine of constitutional avoidance. Frost, *supra* note 73, at 480 ("In the past, the Supreme Court has resolved cases on grounds outside the questions presented to avoid a constitutional issue . . ."). That seems to be appropriate, because inviting an appeal on those grounds is conservative, not activist, because it is a tool to avoid an unnecessarily expansive new reasoning. In those cases, "issue creation can be a method by which courts constrain judicial power in response to litigants who would prefer to expand it." *Id.* at 481.

125. Goldman, *supra* note 75, at 952.

problems is one of the very reasons for Article III's case or controversy requirement. Unelected judges simply are not able to perform the tasks necessary to make such vast policy choices.<sup>126</sup>

Second, opinion-briefs can only be created if the authoring Justice attempts to cull the research that does exist on the issue and shape it into legal arguments, which requires going beyond her role as legal umpire. Supreme Court Justices are surely capable thinkers and persuasive writers, but allegedly, they have traded in their playing uniforms as litigators for the neutral robes in which they preside. They have a few clerks and staff members, rather than hundreds of firm attorneys who might be hired by a litigant, at their disposal. Furthermore, their interest in a given case is far more limited than the nearly unbounded interest of a litigant who had been pursuing a particular result for years or even decades before the case reached the Supreme Court. Even some authors of opinion-briefs acknowledge the potential pitfalls of relying solely upon the Justices and their clerks to perform the necessary research to reach an accurate conclusion. Regarding some of the studies he cited in *Glossip*, Breyer noted that "this research and these figures are likely controversial. Full briefing would allow us to scrutinize them with more care."<sup>127</sup> Breyer thus admits that he cannot do all of the research himself – neither he nor even the Court as a whole is institutionally competent to do so.<sup>128</sup>

The Justice's limited resources should be allocated to testing the mettle of parties' finely tuned positions that have already culled any relevant social science data on the problem, rather than generating policy-based arguments of their own. Even if a Justice is competent to digest this information, she is not competent to do the research herself, too – she must rely upon the parties to do a thorough job of that research and assembly.

#### D. Disregarding Judicial Humility

One of the most desirable characteristics in adjudicators is a degree of humility, both in assessing new problems and in acknowledging that the work of their judicial forebears is worthy of significant deference.<sup>129</sup> Opinion-briefs are a public indication of the authoring Justice's disregard for that kind of humility. They are instead symptomatic of an overtly hubristic Justice, one who apparently believes only she can formulate the best arguments to prevail on a

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126. *Id.* at 951–52.

127. *Glossip v. Gross*, 135 S. Ct. 2726, 2759 (2015) (Breyer, J., dissenting); see also *id.* at 2765 (noting the Court may not be institutionally competent, and this should be left to representative branches).

128. Breyer's own shortcomings as a researcher opened his opinion to one of the harshest rebukes offered by Justice Scalia in his concurring opinion. Specifically, Scalia critiqued his reliance upon a study of the "egregiousness" of 205 capital crimes, noting that "[e]gregiousness is a moral judgment susceptible of few hard-and-fast rules" that could be distilled into such a study. *Id.* at 2748 (Scalia, J., concurring).

129. See *Gentithes, Precedent*, *supra* note 9.

particular issue. Opinion-briefs beg the question: is the Justice so vain that she thinks only she can spot issues worthy of presentation?

Opinion-briefs are made in such starkly specific terms as to invite not just an appeal, but a forgone conclusion as to that appeal's outcome. But that precludes genuine discussion and organic development of the parties' positions through percolation in the lower courts. Rather, the Justice seems to suggest that, without the aid of any litigation history, she has managed to divine the most accurate legal position. She also implicitly asserts that she has convinced the majority of her colleagues of that position and can carry a majority of the Court along with her, if only a compliant attorney would raise the arguments she has detailed.

The result is that the bench becomes a lectern for Justices to expound their views on pet issues, rather than the proverbial home plate from which to call balls and strikes. The Justice is telling Americans that she believes jurisprudence in a given area must take a specific direction in the future, rather than allowing them to discover that truth either through the political process or through the crucible of contested litigation lacking a predetermined outcome. Making such a pronouncement is unbecoming of a Justice on our nation's highest court. The author of an opinion-brief indicates her lack of the humility necessary to effectively resolve the most highly contentious legal issues in the country.

## VI. HOW TO RESPOND TO OPINION-BRIEFS SUCH AS *GLOSSIP*

This Article's normative analysis begs the question – if opinion-briefs are so undesirable, how should thoughtful litigators respond to their issuance? More specifically, how should death penalty abolitionists who have waited to spot cracks in the veneer of constitutionality for capital punishment respond to Justice Breyer's opinion-brief in *Glossip*? This Part offers some practical advice for lawyers facing that quandary.

In general, there is reason to doubt the reliability of an opinion-brief's prediction of the Court's likely direction in a future case, despite the authoring Justice's insinuations. Though the argument is likely already won for the author, her colleagues, even those who sign on to the opinion-brief, are far from committed to the same reasoning or even outcome in future cases. Indeed, if the authoring Justice had already convinced her colleagues of the propriety of her position, she could just as easily have issued a majority decision resolving the issue *sua sponte* rather than an invitation for future litigation. The authoring Justice's inability to issue such a decision must stem partially from the lack of shared conviction by her fellow Justices.

The Justice authoring an opinion-brief may believe that her analysis will be persuasive to her colleagues when it comes from a litigant in a future case. But the sheer number of variables at play makes that assumption dubious, even if the authoring Justice expressly claims that she can drag her colleagues along with her. To name but a few of these variables, Justices who signed on to the

opinion-brief could change their minds; new research could emerge that challenges the social science in the opinion brief; the parties to the subsequent case could unearth an argument that the authoring Justice and her clerks overlooked; or, as has been the case this Term, there may be changes to the bench itself. The latter scenario is in play in this Term's litigation regarding the constitutionality of public employee union dues. As noted above, though Justice Alito was plainly hostile to such dues in *Knox*, leading parties to directly argue that *Abood* should be overruled in the subsequent *Harris v. Quinn* litigation, Alito was not able to cobble together a majority of the court willing to overturn *Abood*.<sup>130</sup> Given the untimely passing of Justice Scalia, his opportunity may now be lost; this Term's *Freidrichs v. California Teachers Ass'n* case, which again addressed the issue, resulted in a four-four tie amongst the Justices, leaving *Abood* in place for the foreseeable future.<sup>131</sup>

Thus, opinion-briefs seem exceptionally likely to foment confusion from litigants as to the Court's most likely direction and whether the time and expense of further litigation is really justified. Regarding Justice Breyer's *Glossip* dissent, David R. Dow noted that only two Justices signed the dissent, claiming that it "means so little in terms of the imminent demise of the death penalty that I wouldn't spend any time on it."<sup>132</sup> In contrast, Professor Alan Dershowitz claimed that "Justice Breyer would not have written this dissent if he did not think this was a good time to bring cases to the attention of the court."<sup>133</sup> Others have agreed with Dershowitz, such as Richard Dieter of the Death Penalty Information Center, who noted after reading *Glossip* that "[t]he death penalty itself, I think, is in trouble."<sup>134</sup>

Even if an opinion-brief accurately predicted that a majority of the Justices would be persuaded by a future brief following its precise format, it would represent a troubling development for Supreme Court litigators. *Accurate* opinion-briefs would be institutionally troubling for all of the reasons I have discussed above. They would undermine American procedural justice and increase the prevalence of top-down lawmaking by Justices-cum-policymakers. They would also alter the way the Court is perceived in fundamentally troubling ways. Lastly, litigators themselves should be wary of such opinion-briefs because they might foreclose their ability to creatively resolve cases and controversies in other areas. The Justices may become emboldened to prejudge

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130. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2299 (2012) (Sotomayor, J., concurring).

131. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.).

132. Liptak, *Death Penalty Foes*, *supra* note 6.

133. *Id.*

134. Adam B. Lerner, *Justice Breyer's Dissent: Death Penalty May Be Unconstitutional*, POLITICO (June 29, 2015, 1:09 PM), <http://www.politico.com/story/2015/06/supreme-court-justice-stephen-breyer-death-penalty-may-be-unconstitutional-119547> (last updated June 29, 2015, 5:35 PM). Dieter bases that belief on suggestions in past decisions that Kennedy might someday side with Breyer on the issue and that Sotomayor and Kagan are likely sympathetic as well. *Id.*

more and more of their docket, freezing out the interested litigator as the driving engine of doctrinal development.

The opinion-brief's author may even create a "penumbra" equivalent to the penumbra of constitutionality created by acknowledging a possible constitutional infirmity.<sup>135</sup> The opinion-brief casts unresolved doubt over a line of jurisprudence, creating the possibility that the lower courts will have to resolve the confusion perpetually. Although the authoring Justice simultaneously calls for a resolution of that penumbra by asking for future argument on the topic, that resolution is not always immediately forthcoming, as seen in the *Friedrichs* litigation.<sup>136</sup>

Perhaps most importantly, opinion-briefs threaten to undermine the groundswell of public opinion in favor of massive social changes. They invent controversies that members of the Supreme Court bar are happy to litigate for the publicity but which might not have arisen on their own at the same pace. If the issues highlighted by the authoring Justice were truly so compelling, the bar would certainly have raised them in due time and perhaps with better cases or more developed theories under their belts. Justice Goldberg himself, an avid opponent of the death penalty, noted how changes in public opinion in the past had justified the Court in changing its position, and his hope was that "it may change again in the not too distant future."<sup>137</sup>

Thus, death penalty abolitionists responding to *Glossip* might be better served by not responding at all. Accepting Breyer's invitation has the potential to short-circuit the organic process of changing public opinion by calling for a premature resolution of the issue. At a time when capital punishment is losing popularity state by state, and public opinion is shifting on the topic, patience may be the best course. The groundswell of support must be massive before such a change can be dictated by the nine unelected members of the Supreme Court. Furthermore, answering Justice Breyer's opinion-brief risks cementing a dangerous trend amongst Justices of all political stripes. Though death penalty abolitionists may be only too happy to take on Breyer's invitation, will they be equally enthusiastic if less-friendly Justices offer such invitations on other troubling questions? For instance, as discussed earlier in this Article, there is a distinct possibility that in the near future Justices may follow through in overruling *Aboud* on the constitutionality of public union dues, following a pattern similar to that seen regarding the constitutionality of efforts to reform campaign finance. By responding to an opinion-brief on capital punishments, advocates would be legitimizing that tactic in numerous other areas of law with possibly damaging consequences. The best route for all may be to foreclose opinion-briefs as a route for change on any topic, even those near and dear to a particular advocate's heart.

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135. See Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

136. See *Friedrichs*, 136 S. Ct. 1083.

137. Goldberg, *supra* note 12, at 5.

## VII. CONCLUSION

An appeal invited in a detailed opinion-brief is a tempting elixir for Supreme Court litigants. Opinion-briefs contain friendly language from the authoring Justice in support of a particular position, and they are replete with language and analysis that can easily be cribbed for future certiorari petitions and substantive briefs. But litigants and Justices alike should heed the potentially disastrous normative repercussions of such invited appeals. As this Article has argued, they can undermine our sense of procedural justice, misallocate scarce judicial resources, dissolve the veil of neutrality that should envelope the Supreme Court, inappropriately contravene *stare decisis*, and allow Justices to disregard any lingering sense of humility in favor of activist policymaking from the bench. They can also undermine the organic groundswell of support for a favorable policy and truncate the creative analytical efforts of Supreme Court advocates. While open-ended soft invitations for future argument on a topic yet to be decided may be permissible, or even desirable, detailed opinion-briefs that spell out the analysis of which the authoring Justice has already become convinced are dangerous material. Both Justices and litigants should seek to avoid this whenever possible.