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Jay D. Wexler

Boston University School of Law

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JUSTICES CITING JUSTICES

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Jay Wexler
Boston University School of Law



JUSTICES CITING JUSTICES

Jay Wexler

SCHOLARS HAVE LONG studied the citation practices of Supreme Court justices, including how often the justices cite academic work such as books and journal articles. For example, in his update to several earlier pieces, Louis Sirico, Jr. observed in a 2000 study that the Court had been citing law review articles at a lower rate than in previous decades, in large part due to a decline in the number of times justices cited pieces from the *Harvard Law Review*.¹ A dozen years later, Brent Newton analyzed the citation practices of the justices in the years between 2001 and 2011, finding that although citations to journal articles had continued to decline, liberal justices were more likely to cite such articles than conservative justices.² Most recently, Adam Feldman, writing for *ScotusBlog*, analyzed how the justices cited academic work during the Court's 2016 and 2017 terms and concluded, among other things, that Justices Clarence Thomas and Neil Gorsuch were more likely than other justices to cite law review articles and that articles written by faculty members of the University of Virginia had been cited more often than faculty from other schools, including higher ranked institutions such as Harvard and Yale.³

Jay Wexler is a professor of law and Michaels Research Scholar at the Boston University School of Law. Copyright 2023 Jay Wexler.

¹ See Louis Sirico, Jr., *The Citing of Law Reviews by the Supreme Court, 1971-1999*, 75 *Indiana L.J.* 1009 (2000). For a list of other sources analyzing citations of academic writing by judges and justices, see *id.* at 1009 n.1.

² Brent Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 *DREXEL L. REV.* 399 (2012).

³ Adam Feldman, *Empirical SCOTUS: With a little help from academic scholarship*,

In the past year, a somewhat parallel scholarly development has hit the limelight, marked by the publication in early 2023 of Richard Re's *Harvard Law Review* article, "Personal Precedent at the Supreme Court."⁴ In that piece, Re argues that judges, including Supreme Court justices, tend to rely on their "previously expressed views of the law," including not only their prior separate opinions but also their published academic scholarship, when deciding new cases.⁵ These "previously expressed views of the law," which Re refers to as "personal precedent," play an extremely important and previously unrecognized role in the development of the law; indeed, Re even suggests that "though typically excluded from the law, personal precedent may actually be its building block."⁶ Re's article attracted substantial attention both from the legal academy⁷ as well as the popular press. Writing for the *New York Times*, for instance, Adam Liptak highlighted Re's piece, quoting an interview with Re in which the University of Virginia professor said of personal precedent, "You've got to reckon with it ... You can't wish it away."⁸

At the intersection of these two lines of inquiry arises a series of natural questions: How often do Supreme Court justices cite law journal articles and other forms of scholarship, including books, written by other Supreme Court justices? How often do they cite their own scholarship? And what are the *reasons* that justices cite legal scholarship written by other justices? If

SCOTUSblog (Oct. 31, 2018), www.scotusblog.com/2018/10/empirical-scotus-with-a-little-help-from-academic-scholarship/

⁴ Richard Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824 (2023).

⁵ *Id.* at 825, 826 ("The range of sources potentially giving rise to personal precedent is expansive, including not just a Justice's separate opinions, but also lower court opinions and even law review articles.").

⁶ *Id.* at 859.

⁷ See, e.g., Gerard Magliocca, "Personal or Impersonal Precedent," prawfsblawg.blogs.com/prawfsblawg/2022/04/personal-or-impersonal-precedent.html (Apr. 5, 2022); Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L.J. 1941, 1970 n.169 (2022) (citing *Personal Precedent*); Amy Howe, "Thursday round-up," www.scotusblog.com/2014/06/thursday-round-up-231/ (June 5, 2014) (linking to Re's piece in *Res Judicata* on personal precedent in a specific case from the 2013 term).

⁸ Adam Liptak, *The Problem of Personal Precedents of Supreme Court Justices*, *New York Times* (April 4, 2022), www.nytimes.com/2022/04/04/us/politics/supreme-court-personal-precedents.html.

personal precedent is as important as *Re* suggests, and if it is as interesting as the attention to his article seems to indicate, one might expect that someone would have analyzed how often and why justices cite journal articles and books written by justices. And yet, with the notable exception of one spectacular short piece analyzing how often justices cite their own scholarship,⁹ the scholarly literature has yet to consider these questions.

In this article, I analyze how often and for what reasons Supreme Court justices cite the books and articles of Supreme Court justices. Part I of the article addresses the *how often* question; Part II talks about *why*.

I.

HOW OFTEN DO JUSTICES CITE JUSTICES?

To keep my study manageable, I decided to focus exclusively on the Roberts Court era, both in terms of the justices being studied and the time of the citations. My goal was to find every instance between October 2005 and June 2022 in which any justice who was either on the Court in 2005 or joined the Court thereafter cited a book or article of any other justice who was either on the Court in 2005 or joined the Court thereafter.¹⁰ This means that I excluded any citation that occurred before 2005, even if both the citing justice and the cited justice were on the Court in 2005; for example, if in 2002 Justice Scalia cited an article written by Justice Ruth Bader Ginsburg (or Professor Ginsburg, for that matter), I did not count the instance in the study. To find the citations, I compiled lists of every book or law journal article (contained in Westlaw's JLR database) published by each of the 15 relevant justices and then searched for them in Westlaw's Supreme Court database during the relevant dates.

The following table reports the number of citations of each justice by each justice during the relevant time period, with the citing justices listed on the Y axis and the cited justices on the X axis. The number in each box represents the number of *cases* in which at least one citation occurred. Be-

⁹ Joel Heller, *Auto Citation*, 2021 ILL. L. REV. ONLINE 77.

¹⁰ The cited justice had to have been on the Court (or retired from the Court or deceased) at the time of the citation to be included in the study. Thus, if in 2008 Justice Antonin Scalia had cited an article written by then-Dean Elena Kagan (who didn't join the Court until 2010), the citation would not count for purposes of my study.

cause there were some cases in which a justice cited a particular book or article written by a justice more than once, the total number of *citations*, when different from the number of *cases*, is denoted in a parenthetical. The column on the far right and the row at the bottom tabulate the totals of how many times a justice cited justices and how many times a justice was cited by justices, respectively.

CITATIONS OF EACH JUSTICE BY EACH OTHER JUSTICE
OCTOBER 2005 TO JUNE 2022

| | CJR | JPS | SOC | AS | AMK | DHS | CT | RBG | SGB | SA | SS | EK | NG | BK | ACB | TOTAL |
|-----|-----|------|-----|--------|-----|-----|----|-------|-----|----|----|------|----|----|------|----------|
| CJR | 0 | 0 | 0 | 7 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 11 |
| JPS | 0 | 3(7) | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 5(9) |
| SOC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| AS | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| AMK | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| DHS | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CT | 0 | 0 | 0 | 22 | 0 | 0 | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 26 |
| RBG | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| SGB | 0 | 1 | 1 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 5 |
| SA | 0 | 0 | 0 | 16 | 0 | 0 | 0 | 1 (2) | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 19(20) |
| SS | 0 | 0 | 0 | 10 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 11 |
| EK | 0 | 0 | 0 | 6 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 2(3) | 0 | 0 | 0 | 9(10) |
| NG | 0 | 0 | 0 | 10(11) | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 1(3) | 13(16) |
| BK | 1 | 0 | 0 | 6(7) | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 10(11) |
| ACB | 0 | 0 | 0 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 5 |
| TOT | 1 | 4(8) | 1 | 88(90) | 0 | 0 | 1 | 3(4) | 9 | 0 | 0 | 4(5) | 1 | 5 | 1(3) | 118(128) |

The table reveals several interesting results. The total number of cases in which a justice cited a book or article of a justice is 118, which is perhaps a smaller number than one might have expected; if we assume that the Court decided an average of 70 cases per term during the relevant period, then a justice cited a book or article of a justice in only about one out of

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every ten decided cases. The justice whose extra-judicial writings were cited most often is Justice Scalia by far. Cited in 88 cases, Scalia was cited in nearly ten times more cases than the second most-cited justice, who was Justice Stephen Breyer.

With respect to which justices cite justices most often, the clear leader is Justice Thomas, who cited books or articles written by other justices in 26 cases. Justice Samuel Alito came in second, citing justices in 19 cases. Although it is perhaps unremarkable that neither Justice David Souter nor Justice Sandra Day O'Connor cited the academic work of a justice during the relevant time period, given that they left the bench soon after the study's beginning date, the fact that Justice Scalia did not cite a justice a single time in the nearly 11 relevant terms he sat on the bench does seem significant, particularly because he himself had been cited by other justices so often.

If the data demonstrate one obvious, overarching result, it would be that a majority of citations by one justice to the academic work of another justice are to one particular book, *Reading Law*, by the late Justice Scalia and Bryan Garner.¹¹ Indeed, nearly 60 percent of all cases involving a citation by a justice to a justice involve at least one citation to this book.¹² Excluding citations to *Reading Law*, the numbers look like this:

¹¹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

¹² *Reading Law* was cited 73 times in 71 cases by justices over the studied time period. Specifically, the total number of citations by justice to the book are as follows: CJR 5, JPS 0, SOC 0, AS 0, AMK 2, DHS 0, CT 17, RBG 0, SGB 1, SA 14, SS 10, EK 6, NG 6(7), BK 5(6), and ACB 5.

CITATIONS OF EACH JUSTICE BY EACH OTHER JUSTICE
OCTOBER 2005 TO JUNE 2022, EXCLUDING *READING LAW*

| | CJR | JPS | SOC | AS | AMK | DHS | CT | RBG | SGB | SA | SS | EK | NG | BK | ACB | TOTAL |
|-----|-----|------|-----|----|-----|-----|----|-------|-----|----|----|------|----|----|------|--------|
| CJR | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 2 | 0 | 0 | 0 | 6 |
| JPS | 0 | 3(7) | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 5(9) |
| SOC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| AS | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| AMK | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| DHS | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CT | 0 | 0 | 0 | 5 | 0 | 0 | 1 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 9 |
| RBG | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| SGB | 0 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 4 |
| SA | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 1 (2) | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 5(6) |
| SS | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| EK | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 2(3) | 0 | 0 | 0 | 3(4) |
| NG | 0 | 0 | 0 | 4 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 1(3) | 7(9) |
| BK | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 5 |
| ACB | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| TOT | 1 | 4(8) | 1 | 17 | 0 | 0 | 1 | 3(4) | 9 | 0 | 0 | 4(5) | 1 | 5 | 1(3) | 47(55) |

When citations to *Reading Law* are excluded from the data, Justice Scalia remains the justice whose work was cited most frequently over the time period studied, although his lead over Justice Breyer slips from ten times more citations to only twice as many. Similarly, Justice Thomas remains the justice who has cited the academic work of other justices most frequently, but excluding his 17 citations to *Reading Law* makes the results much closer, with Justice Gorsuch pulling within two cites of Thomas. Similarly, excluding Justice Alito's 14 citations to *Reading Law* drops him from a strong second place to being in a three-way tie for fourth with Justices John Paul Stevens and Brett Kavanaugh when we look at the number of cases in which a justice cited another justice's academic work.¹³

¹³ For more on citations to *Reading Law* by someone who thinks the work is "magisterial,"

II.

WHY DO JUSTICES CITE JUSTICES?

The question of *why* justices cite the academic work of justices obviously calls for speculative reasoning. Still, though, the question is important because it provides a window into the thinking of the justices. Any choice to cite one source over another is a deliberate one that may potentially reveal some insight into how the justices think, how they see themselves in relation to their colleagues, and how they communicate both with their colleagues and with the general public. The studied citations appear to play one of three functions: (1) approving of, honoring, or spotlighting a colleague's ideas or language; (2) scolding a colleague or group of colleagues for departing from the precedent of judicial allies on the bench; and (3) demonstrating that a colleague has departed from their own personal precedent, thus undermining that colleague's reasoning and revealing it to readers as faulty.¹⁴

A majority of the studied citations perform the function of communicating approval of the cited work at least to some degree. After all, nearly all legal propositions can be supported by citations to a variety of sources, so the choice to cite the work of a fellow justice will typically represent a conscious decision to highlight or favor that particular work as opposed to (or in addition to) other sources. Sometimes the citation is straightforward and suggests simply that the citing justice found the cited justice's work helpful or useful for filling out the opinion. For example, when analyzing Justice Alito's "see also" cite in his dissent in *Trump v. Vance* to Justice Kavanaugh's article *Separation of Powers During the Forty-Fourth Presidency and*

see Josh Blackman, *SCOTUS Citations for Scalia and Garner's Reading Law*, joshblackman.com/blog/2015/06/30/scotus-citations-for-scalia-garners-reading-law/ (June 30, 2015).

¹⁴ Two observations in the way of caveats. First, I don't mean to make any hard claims about the deep psychological motivations of a justice who decides to cite the work of a colleague. We can't possibly know for sure what these motivations are unless the justices tell us, which they never do. Second, although in my data I did attempt to casually code each citation I found by my best guess as to what the function (and thus possibly the purpose) of the citation was, I didn't calculate any totals, and I won't report any specific numbers or percentages here. Part of the reason for that is that I don't feel particularly confident in many of my guesses, but another part is that it hardly matters exactly what percentage of times a citing justice, for instance, sought to scold other justices as opposed to honor the cited justice.

Beyond, for the proposition that a President who is concerned about an ongoing criminal investigation “is almost inevitably going to do a worse job as President,”¹⁵ there’s not a lot one can say about the function of the citation other than that it strengthened the opinion a bit.

In other situations, the citation appears to play a stronger role, going so far as to honor or spotlight a colleague’s ideas or language. An example might be Justice Alito’s citation to Justice Gorsuch’s book *A Republic if You Can Keep It* in his *Dobbs* majority opinion. In describing the importance of precedent and *stare decisis*,¹⁶ Alito quotes Gorsuch’s characterization of precedent as “a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges.”¹⁷ The full quotation of Gorsuch’s somewhat eloquent language suggests that Alito did not want simply to provide a citation to show that precedent is important but rather to specifically highlight Gorsuch’s unique turn of phrase.

A significant subset of the “approval” category of citations might better be described as an “homage” to a deceased justice’s ideas or language. This rather large subset typically involves citations to Justice Scalia’s work following his death in 2016. An example that would appear to spotlight Scalia’s unique facility with language is Justice Gorsuch’s citation of Scalia’s *Duke Law Journal* article *Judicial Deference to Administrative Interpretations of Law* in his concurrence in *Kisor v. Wilkie*. There, Gorsuch labels as a “fantasy” Justice Kagan’s view that *Auer* deference applies “where the scales of justice are evenly balanced between two equally persuasive readings,”¹⁸ quoting Scalia’s article for the counter proposition that, “If nature knows of such equipoise in legal arguments, the courts at least do not.”¹⁹ Most of the justices’ citations to Scalia and Garner’s *Reading Law* also fall into this “approval” cate-

¹⁵ *Trump v. Vance*, 140 S.Ct. 2412, 2427 (2020) (Alito, J., dissenting) (citing Brett Kavanaugh, *Separation of Powers in the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461 (2009)).

¹⁶ Ha!

¹⁷ *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228, 2262 (2022) (citing NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 217 (2019)).

¹⁸ *Kisor v. Wilkie*, 139 S.Ct. 2400, 2429 (2019) (Gorsuch, J., concurring).

¹⁹ *Id.* at 2400, 2429-30 & n.31 (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 520).

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gory, although most are of the “simple and straightforward” variety; typically a justice will state a fairly uncontroversial proposition of statutory interpretation and then cite *Reading Law* as support, almost as though the book were a sort of restatement of interpretive principles that needs no further justification.²⁰

A second category of citations seem to have the function of scolding one or more justices for departing from the position or judicial philosophy of a judicial ally. Typically this involves one conservative justice appearing to critique another conservative justice for misapplying or ignoring the teachings of Justice Scalia, and as such my claim relies on the premise that most of the time most of the conservative justices would like to be seen as the true inheritors of Scalia’s originalist, textualist judicial philosophy. One example of this type of citation is the majority opinion in *Bostock v. Clayton County*, where Justice Alito criticizes Justice Gorsuch’s majority opinion holding that Title VII prohibits discrimination based on gender identity or sexual orientation, citing Scalia’s book *A Matter of Interpretation*:

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated – the theory that courts should “update” old statutes so that they better reflect the current values of society. See A. Scalia, *A Matter of Interpretation* 22 (1997).²¹

Some of the more interesting instances of “scolding” involve competing citations by conservative justices to *Reading Law* in different opinions in the same case. In these cases, the battle for true succession to Justice Scalia is at its most pitched. Take, for example, the case of *Yselta del Sur Pueblo v. Texas*.²²

²⁰ See, e.g., *Department of Commerce v. New York*, 139 S.Ct. 2551, 2600 (2019) (Alito, J., concurring) (citing *Reading Law* for proposition that, “The provisions of a text should be interpreted in a way that renders them compatible, not contradictory”); *Shular v. United States*, 140 S.Ct. 779, 788 (2020) (Kavanaugh, J., concurring) (quoting *Reading Law* for proposition that the rule of lenity “comes into operation at the end of the process of construing what Congress has expressed, not at the beginning”).

²¹ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1756 (2020) (Alito, J., dissenting).

²² 142 S.Ct. 1929 (2022).

That case concerned the proper interpretation of a statute governing which type of gambling operations tribes in the state of Texas could offer and pitted a tribe that wanted to offer bingo against the state. Justice Gorsuch's majority opinion, which was joined by Justice Amy Coney Barrett and the liberal justices of the Court, held for the tribe, while the Chief Justice's dissent, joined by Justices Thomas, Alito, and Kavanaugh, would have held for the state. Both opinions cited *Reading Law* to support their positions; in response to a point made by the dissent, the majority cited the book for the proposition that "courts regularly consult preambles and recitals even in statutes and contracts,"²³ while the dissent claimed that the tribe's position would violate the "canon against surplusage."²⁴

Finally, there are the "gotcha" citations.²⁵ These are the rarest type of citations but also probably the most interesting, because they presume the importance of what Re calls "personal precedent" and then criticize a fellow justice for departing from it. Indeed, Re foresees such citations in his article, observing that a "fundamental reason for judges to find personal precedent attractive" is because "people generally want to appear, both to themselves and others, as consistent,"²⁶ that "[p]ersonal precedents can include a justice's non-judicial writings, such as law-review articles,"²⁷ and that justices naturally want to avoid being criticized for departing from personal precedent. On this latter point, Re writes that:

Majority-opinion authors usually avoid elevating a dissenter's personal precedent by relying on it to indict the dissenter. By comparison, dissenters feel freer to wield personal precedent as a cudgel – and doing so fosters legal stability. In particular, a dissenter might turn the majority justices' personal precedents against them by showing a contradiction between what the Court is doing now and what some of its members proclaimed [earlier]. The feeling of being personally inconsistent is bad enough, but being called out for it is worse.²⁸

²³ *Id.* at 1943 n.4.

²⁴ *Id.* at 1956 (Roberts, C.J., dissenting).

²⁵ The use of the term "gotcha" in this context comes from Heller, *supra* n.9.

²⁶ Re, *supra* n.4, at 829.

²⁷ *Id.* at 846.

²⁸ *Id.* at 839.

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In my study, I identified perhaps ten citations to academic work over the past 17 years that could possibly be categorized as “gotcha” cites.²⁹ For instance, in his concurrence in *West Virginia v. EPA*,³⁰ Justice Gorsuch asserted the general point that allowing Congress robust power to delegate its policy-making authority to agencies (as Justice Breyer seemingly favored by joining Justice Kagan’s dissent in the case) would be problematic because, “[l]egislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him.”³¹ In making his point, Gorsuch quoted Breyer’s 2010 book *Making Our Democracy Work: A Judge’s View*, in which Breyer wrote that with such delegation, “the president may not have the time or willingness to review [agency] decisions.”³²

Probably the two most controversial “gotcha” citations in recent years have involved cases about substantive due process. In *Obergefell v. Hodges*, which held that same-sex couples have a fundamental right to marry, Chief Justice John Roberts’s dissent lamented the Court’s insistence on stepping into (and putting an end to) what he believed was a robust democratic debate occurring among the people regarding same-sex marriage:

By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.³³

The cherry on the top of the Chief’s argument, though, was his citation to a law review article by none other than his colleague Justice Ginsburg, a fervent supporter of both same-sex marriage and abortion rights, who did

²⁹ It’s important to remember that these are only the “gotcha” cites involving the academic work of the justices. Likely far more common are “gotcha” cites that cite separate opinions written or joined by the justice being critiqued. Hopefully, at some point, someone will study how the justices cite the separate opinions of other justices, but it won’t be me.

³⁰ 142 S.Ct. 2587 (striking down the Obama Administration’s “Clean Power Plan” as being beyond EPA’s statutory authority).

³¹ *Id.* at 2618 (Gorsuch, J., concurring).

³² *Id.*

³³ 576 U.S. 644, 710 (2015) (Roberts, C.J., dissenting).

famously critique *Roe v. Wade* as cutting off democratic deliberation. Roberts wrote:

As a thoughtful commentator observed about another issue, “The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.” Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385-386 (1985) (footnote omitted).³⁴

More recently, in *Dobbs v. Jackson Women’s Health Organization*,³⁵ Justice Alito’s majority opinion cited Justice Ginsburg’s 1992 *NYU Law Review* article *Speaking in a Judicial Voice* not once but twice on the way to overruling *Roe v. Wade*. The first citation came in a footnote following Alito’s observation that *Roe* “sparked a national controversy that has embittered our political culture for a half century.”³⁶ The footnote read in full:

See R. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1208 (1992) (“*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue”).³⁷

Sixty-five pages later, Alito quoted the same piece again when criticizing *Casey*’s affirmance of *Roe*:

Roe “inflamed” a national issue that has remained bitterly divisive for the past half century. *Casey*, 505 U.S., at 995 (opinion of Scalia, J.); see also R. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1208 (1992) (*Roe* may have “halted a political process,” “prolonged divisiveness,” and “deferred stable settlement of the issue”). And for the past 30 years, *Casey* has done the same.³⁸

³⁴ *Id.*

³⁵ 142 S.Ct. 2228 (2022).

³⁶ *Id.* at 2241.

³⁷ *Id.* at 2241 n.4.

³⁸ Unlike the Roberts cite to Ginsburg in *Obergefell*, which of course occurred when Justice Ginsburg was still alive and on the bench, the Alito citations are a little less obviously “gotchas” and might rightly be categorized as either a scolding citation or somewhere in the middle of scolding and gotcha, since Justice Ginsburg had already died at the time of

Justices Citing Justices

Cornell Law's Michael Dorf has already decimated Justice Alito's citations to Justice Ginsburg in *Dobbs*,³⁹ but what about the practice of these "gotcha" citations generally? I'm not a fan. I take Re's point about the potential importance of personal precedent, and I agree that most judges would not want to be called out as violating their own such precedent. And I further agree that it might be a reasonable (though fairly light) criticism of a justice that they have departed from their own personal precedent. Finally, if over time the concept of personal precedent becomes widely known and accepted, there might become a day when a brief citation to an earlier inconsistent writing of a justice would be easily understood as demonstrating a present lack of principle. But given that nobody currently thinks that a justice must conform in all particulars to everything they've ever said in the past, any legitimate use of past writings to point out a current inconsistency has to, in my view, provide a good amount of context about what such an inconsistency means and explain the necessary caveats to understanding that inconsistency as a problem for it to be at all persuasive.

None of the gotcha citations I found fit those criteria, which is not surprising because such a discussion of context and caveats concerning a specific citation isn't really as suitable for judicial opinions as it is for, say, a journal article. To me, a quick citation to a past inconsistent writing reads more like an *ad hominem* attack than a reasoned criticism. It's too clever by half, a blunt instrument where care and subtlety is required. The gotcha citation is a lazy form of argument, one that might be excusable if shouted by one teenager to another over fries at the mall or even perhaps in a forum like Twitter, where everyone understands the superficiality of the discourse, but not when aimed by one Supreme Court justice at another in the formal opinions of our highest court. Until the day comes when following personal precedent is universally understood as an inexorable command, it would be better if the justices would just cut it out with the "gotchas."



the citation. Personally, I feel the spirit of the citation is more gotcha than anything else.

³⁹ Michael C. Dorf, *Dobbs Double-Cross: How Justice Alito Misused Pro-Choice Scholars' Work*, Verdict (July 6, 2022), verdict.justia.com/2022/07/06/dobbs-double-cross-how-justice-alito-misused-pro-choice-scholars-work.