AUTO-CITATION

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INTRODUCTION

With the arrival of another law professor-turned-judge to the Supreme Court, attention again was paid to the otherwise niche world of law review articles. Media coverage and the confirmation hearings of Seventh Circuit Judge Amy Coney Barrett focused on her published writings on issues like stare decisis, abortion jurisprudence, and the Affordable Care Act.[1] It was another reminder of the dangers of a well-documented paper trail for professional judicial advancement. After all, one's academic writing cannot be dismissed as merely expressing the view of a client. Nor is it confined to arguments regarding the current state of the law. Indeed, the point of such writing is to advocate or criticize and maybe even to push the law to where the author thinks it should be. So one day you are on the cutting-edge of legal scholarship, and the next you're answering questions about dwarf-tossing at your confirmation hearing.[2]

Once she and her articles got past the Senate, however, now-Justice Barrett has joined the ranks of authors with the rare opportunity to ensure that their ideas go from law journal to U.S. Reporter. Getting your work cited in a Supreme Court opinion is a cherished goal of many a legal academic. It is often a difficult accomplishment to reach, but when you are an author-turned-justice, you can just do it yourself. October Term 2019 contained two instances of auto-citation, where a justice cites to her or his own extra-judicial writings in an opinion.[3]

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1. *See, e.g.*, Kevin McCoy, *Amy Barrett's Law Review Articles Show How Supreme Court Rulings Like* Roe v. Wade *Could Be Challenged*, USA TODAY (Oct. 12, 2020, 3:35 PM), https://www.usatoday.com/story/news/2020/10/12/barrett-law-review-articles-show-roe-v-wade-possible-challenges/5925860002/ [https://perma.cc/KG7B-AUY9].

2. Scott Nover, *How a Trump Judicial Nominee Reignited the Debate over Dwarf Tossing*, WASH. POST, (Jan. 22, 2019, 8:00 AM), https://www.washingtonpost.com/lifestyle/magazine/how-a-trump-judicial-nominee-reignited-the-debate-over-dwarf-tossing/2019/01/22/65fd885a-0d21-11e9-8938-5898adc28fa2_story.html [https://perma.cc/6SXM-ZJSP]. Then-Professor Neomi Rao's comments on the subject appeared in a blog post rather than a law-review article, but the dynamic is similar.

3. *See infra* Part I.

Citing your own work is the privilege of anyone who publishes, of course.[4] Yet it is a relatively rare occurrence at the Supreme Court. Other than the two from last term, I found only three other examples by any of the current justices.[5]

It was not for lack of opportunities. On the bench, Justice Barrett (Notre Dame) joins fellow former law professors Elena Kagan (Chicago, Harvard) and Stephen Breyer (Harvard). Justices Ginsburg (Rutgers, Columbia) and Scalia (Virginia, Chicago) also shared an academic background before they became judges. Even justices without a career in academia have managed to get their thoughts onto the pages of law journals while in practice or on lower courts.[6] Several of the justices also published student notes or comments in their law school days.[7] And after joining the Court, many of the justices have published speeches or short essays.[8]

Because citation to authority is a cornerstone of legal analysis, the decision of what source to cite for a proposition can be profound and consequential. If the auto-citation is tempting and feasible yet rare, under what circumstances will we see one? The current justices' collection of auto-citations covers a range of substantive topics. Sometimes they appear in areas where the authoring justice has particular expertise, while other times they seem to signal interest in certain arguments or express a personal judicial philosophy.[9] They appear exclusively in concurrences or dissents, which is unsurprising, given that the justice is speaking more for herself or himself than for the Court. And they are made with varying degrees of self-awareness. The immediate past justices were similarly reticent to auto-cite, with one notable exception.[10]

4. *See, e.g.*, Joel Heller, Shelby County *and the End of History*, 44 U. MEM. L. REV. 357, 385 n.130 (2013) (citing Joel Heller, *Faulkner's Voting Rights Act: The Sound and Fury of Section 5*, 40 HOFSTRA L. REV. 929 (2012)).

5. To identify the universe of auto-citations, I searched Westlaw's law-review database by author for each justice, then keycited every result. I also searched by author in Hein Online to capture articles too old to appear in Westlaw, then searched Westlaw for Supreme Court opinions containing the words in the title of those articles. I searched the Library of Congress catalogue for justice-authored books, then followed the same process as with the Hein Online articles.

6. *See, e.g.*, Neil M. Gorsuch, *The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change*, 2004 WIS. L. REV. 1347 (2004); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989).

7. Some of these works were unattributed when first published, but are identifiable with a little research. *See, e.g.*, Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187 (1989); Elena Kagan, Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619 (1986); Sonia M. Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 YALE L.J. 825 (1979); Samuel A. Alito, Jr., Note, *The Released Time Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202 (1974); Comment, *First Amendment—Media Right of Access*, 92 HARV. L. REV. 174 (1978) (Roberts); Comment, *The Supreme Court 1977 Term: Contract Clause—Legislative Alteration of Private Pension Agreements*, 92 HARV. L. REV. 86 (1978) (Roberts); *Developments in the Law—Zoning, Takings Clause*, 91 HARV. L. REV. 1462 (1978) (Roberts).

8. *See, e.g.*, Sonia Sotomayor, *In Memoriam: Judge Stephen Reinhardt*, 131 HARV. L. REV. 2098 (2018); John G. Roberts, Jr., *A Tribute to William H. Rehnquist*, 106 COLUM. L. REV. 487 (2006).

9. *See infra* Part I.

10. *See infra* p. 82.

I. "SOME PEOPLE SAY": AUTO-CITATION IN PRACTICE

The most recent auto-citation came courtesy of Justice Kagan in the waning days of last term. Before she was Justice Kagan, Professor Kagan wrote extensively about administrative law.[11] It comes as little surprise, then, that her auto-citation came in an administrative law case. Her dissent in *Seila Law LLC v. CFPB*[12]—the case that invalidated the Consumer Financial Protection Bureau's single-director structure—twice cites her 2001 Harvard Law Review opus *Presidential Administration.*[13] That article discussed presidential control over administrative agencies,[14] and *Seila Law* dealt with the extent to which such control is constitutionally required.[15] The thinking might go, who better to cite on that point than an expert in the field, even if that expert is me?

In her typically arch fashion, Justice Kagan lets it be known that she saw what she did there:

> The President's engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests. See, well, Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331-2346 (2001).[16]

Her winking identification of who those "some people" are presents auto-citation as humor. The "see, well" signal sounds almost like an apology, albeit more of the sorry-not-sorry variety. But it is also an acknowledgement that the upshot of her dissent—she would uphold an agency structure challenged as overly insulated from presidential control[17]—is somewhat in tension with her previously expressed support for presidential control over agencies. Perhaps it was an effort to preempt use of the article against her by the majority. Indeed, Chief Justice Roberts had pulled that move a few years earlier, citing *Presidential Administration* in a dissent from a majority opinion joined by Justice Kagan.[18]

Justice Kavanaugh's turn came in *Shular v. United States*, a case involving a sentence enhancement under the Armed Career Criminal Act.[19] The Court unanimously rejected the defendant's reading of the ACCA's enhancement provision as not covering his prior convictions.[20] Justice Kavanaugh wrote separately to emphasize his views regarding application of the rule of lenity—the doctrine that courts should construe ambiguous criminal statutes in favor of

11. *See, e.g.*, David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

12. 140 S. Ct. 2183 (2020).

13. Kagan, *supra* note 11.

14. *Id.*

15. *Seila Law*, 140 S. Ct. at 2191.

16. *Id.* at 2236–37 (Kagan, J., dissenting).

17. *Id.*

18. City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). The Chief actually got in a double-gotcha, also citing Justice Breyer's book *Making Our Democracy Work* (Breyer, too, had joined the majority opinion).

19. 140 S. Ct. 779 (2020).

20. *Id.*

defendants.[21] Unlike Justice Kagan and administrative law, there is no indication Justice Kavanaugh has a particular interest in criminal sentencing. On the one hand, his short concurrence (and the auto-citation it contains) seems to address an obscure issue—the rule of lenity is not exactly a hot topic. On the other, it taps into a larger point about statutory interpretation, and specifically about canons of construction that depend on a judicial finding of ambiguity, that was the subject of a book review Kavanaugh wrote for the Harvard Law Review when he was on the D.C. Circuit:

> [T]his Court has repeatedly explained that the rule of lenity applies only in cases of "grievous" ambiguity . . . . To be sure, as Justice Scalia rightly noted, the term "grievous ambiguity" provides "little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity." Reading Law, at 299 (quoting United States v. Hansen, 772 F.2d 940, 948 (C.A.D.C. 1985) (Scalia, J., for the court)); see also Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118 (2016).[22]

Kavanaugh's auto-citation is in some ways more humble than Kagan's. He gives no signal emphasizing that *that* Kavanaugh is *this* Kavanaugh. And the reference to his work follows after the citation to former Justice Scalia as the primary authority for the proposition. But for the same reason, it also does not serve much of a purpose apart from getting the justice's own name in there. In addition, there is no pincite, suggesting the whole article is worth a read. And here is where the impact of this auto-citation becomes clearer. Justice Kavanaugh uses the auto-citation to show that his concurrence is not just about the rule of lenity. Pointing readers to the article as a whole places the seemingly small-bore issue in the larger context of the judge's role in statutory interpretation. The citation signals to readers that the broader topic is something he is still interested in and might be open to considering in a future case. It is also a hint to arguments he would find compelling—because he made them himself.

Justice Thomas took a different tack to auto-citation in his concurring opinion in *Gamble v. United States*.[23] After joining the majority opinion in continuing to uphold the dual-sovereignty doctrine as consistent with the Double Jeopardy Clause, he wrote separately to address stare decisis.[24] Justice Thomas describes his suspicion of the doctrine and his doubt that it should serve as much of a constraint on judges who believe that an earlier decision was wrongly decided. In explaining his reasoning, he points to a speech he had given that touched on the topic:

> As I have previously explained, "[m]y vision of the process of judging is unabashedly based on the proposition that there are right and wrong

21. *Id.* at 787–89 (Kavanaugh, J., concurring).
22. *Id.* at 788 (Kavanaugh, J., concurring).
23. 139 S. Ct. 1960 (2019).
24. *See id.* at 1980–89 (Thomas, J., concurring).

> answers to legal questions." THOMAS, Judging, 45 U. Kan. L. Rev. 1, 5 (1996).[25]

The *Gamble* auto-citation is distinct from Kagan's and Kavanaugh's in that Justice Thomas uses his earlier work to express a very general, and personal, point about his own approach to the judicial role. It addresses a trans-substantive issue, not focused on a particular area of expertise or interest. Moreover, he expressly and straightforwardly acknowledges that he was citing his own previously expressed personal views, using the first person both in his introduction to the quote and in the quote itself.

Justice Thomas' use of an auto-citation is not surprising, given his penchant for writing separately to express sometimes idiosyncratic views. If he is speaking for himself anyway, he might as well do so twice over—speaking for himself by citing himself. In some ways, the auto-ness of the citation reinforces his point. If there is a right answer to the question of stare decisis, and he believes he has that answer, then he does not need any additional authority to make the point. But this particular auto-citation is a bit of a mystery. It is unclear why such a proposition garnered a citation at all. He could have expressed the same sentiment, or pretty much just said the same thing, without the quotation. So why cite to a law review? Perhaps he liked that it appeared in the Kansas Law Review, in line with his laudable mission of elevating a broader range of law schools. Quoting a speech he delivered over two decades ago also shows the longstanding nature of his beliefs on the topic. Though given his views on stare decisis, his past writings would not necessarily bind him.

Looking back a little further, Justice Breyer had two auto-citations in the early 2000s, both of which dealt with the topic of sentencing. Specifically, they both touched on the *Apprendi* line of cases, and their requirement that all facts that serve to increase a sentence beyond the statutory maximum be found by a jury.[26] Justice Breyer had dissented in *Apprendi*[27], and the auto-citations served to further express his disagreement with the doctrine and its implications.

The first came in a concurrence in *Harris v. United States*, a case about whether *Apprendi* applied to facts that result in application of a mandatory-minimum sentence.[28] Concurring, Justice Breyer agreed that it did not, but went on to comment generally on the concept of mandatory minimums:

> During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike. *See, e.g.*, Remarks of Chief Justice William H. Rehnquist, Nat. Symposium on Drugs and Violence in America 9-11 (June 18, 1993); Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9,

25. *Id.* at 1984 (Thomas, J., concurring).
26. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
27. *Id.* at 523.
28. 536 U.S. 545, 557 (2002).

> 1994) (mandatory minimums are "imprudent, unwise and often an unjust mechanism for sentencing"); Breyer, Federal Sentencing Guidelines Revisited, 14 Crim. Justice 28 (Spring 1999) . . . .[29]

The second came two years later, in his *Blakely v. Washington*[30] dissent, which reiterated his disagreement with *Apprendi*. As part of his critique, he argues that the decision would force lawmakers to reformulate sentencing:

> A first option for legislators is to create a simple, pure or nearly pure 'charge offense' or 'determinate' sentencing system. See Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 8-9 (1988).[31]

These examples fall squarely within the "expertise" category of auto-citation. Although it was not among his core academic issues of antitrust and administrative law when he taught at Harvard Law School, sentencing is a topic Justice Breyer has thought about for years. He was counsel to the Senate Judiciary Committee when Congress was considering sentencing reform and served on the original Sentencing Commission that set the Federal Sentencing Guidelines when he was a First Circuit judge.[32] In both *Harris* and *Blakely*, Justice Breyer uses auto-citations to repeat arguments he has made at greater length elsewhere. Though not as explicitly as Justice Kagan's or Justice Thomas' example, the *Harris* auto-citation seems to acknowledge the authorship of the cited source by including it among citations from other justices. Justice Breyer's own work appears only after the words of his colleagues, perhaps guarding against accusations of self-dealing. By the time of *Blakely*, he perhaps was ready to forego the niceties and point just to himself and his longstanding familiarity with the issue.

None of the other current justices have yet managed to pull an auto-citation. The urge might be there, however. Although he has yet to auto-cite on the Supreme Court, Justice Gorsuch did so when he was on the Tenth Circuit.[33]

Auto-citations were similarly rare among the immediate past justices, with one exception. Chief Justice Rehnquist and Justices Souter, O'Connor, and Kennedy never cited their own publications. Neither did Justices Blackmun or Marshall. Despite authoring one of the "most-cited law-review articles of all time,"[34] Justice Scalia only auto-cited once (and not even to that article).[35] Justice Ginsburg likewise had only a single example.[36]

29. *Id.* at 570 (Breyer, J., concurring).

30. 542 U.S. 296 (2004).

31. *Id.* at 330 (Breyer, J., dissenting).

32. *See* Stephen Breyer, *Federal Sentencing Guidelines Revisited*, CRIM. JUST., Spring 1999, at 28, 28.

33. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 n.1 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 912 (2016)).

34. Fred R. Shapiro & Michelle Pearse, *The Most Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012) (listing Scalia's *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), as number 36 on the "all time" list).

35. Harmelin v. Michigan, 501 U.S. 957, 986 n.11 (1991) (citing Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590–93 (1989-1990)).

36. Vermont v. Brillon, 556 U.S. 81, 89 n.5 (2009) (citing Ruth Bader Ginsburg, Book Review, 92 HARV. L. REV. 340, 343–44 (1978)).

The exception is the bow-tied jurist from Illinois. Among the current and immediate past justices, Justice Stevens stands out by far as the auto-citation champion. He logged a total of thirteen auto-citations across nine opinions from 1984 to 2010. Those citations reference seven different articles, ranging from the Penn and Chicago Law Reviews[37] to the Illinois Bar Journal.[38] They appear in majority opinions, concurrences, and dissents. The topics covered in the cited articles range from statutory interpretation[39] to sovereign immunity[40] to internal Supreme Court practice.[41] Justice Stevens sometimes explicitly acknowledged what he was doing, introducing the citation with an "As I have explained before …."[42] The practice reached its pinnacle with his dissent in the Second Amendment case *McDonald v. Chicago*—his final opinion before retiring—which featured three auto-citations.[43]

II. OF AUTHORS AND UMPIRES: AUTO-CITATION IN THEORY

As these examples show, auto-citations can serve a variety of roles. They can give added weight to an argument by indicating that the justice is speaking from a position of personal expertise—and perhaps, by contrast, that the author of a majority or dissenting opinion is not. They can deflect charges of hypocrisy or inconsistency by reconciling, or at least acknowledging, prior views. They also can identify issues the justice might want to hear more about. And they can signal to advocates an avenue of argument the justice would find compelling in a future case.

So why is the auto-citation such a relatively rare phenomenon? It is not for lack of options, given the fair-sized corpus of publications by the justices. And the rise of digital legal databases like Westlaw or Hein Online make those prior works more readily available and thus easier to cite. It could be a sign of humility.

37. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995) (citing John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 20, 25–26 (1992); John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992)).

38. County of Los Angeles v. Kling, 474 U.S. 936, 938 n.1 (1985) (Stevens, J., dissenting) (citing John Paul Stevens, *Address to the Illinois State Bar Association's Centennial Dinner*, 65 ILL. B.J. 508, 510 (1977)).

39. Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 293 n.12 (2010) (citing John Paul Stevens, *The Shakespeare Canon*, 140 U. PA. L. REV. 1373, 1376 (1992)); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 66 n.2 (2004) (Stevens, J., concurring) (citing John Paul Stevens, *The Shakespeare Canon*, 140 U. PA. L. REV. 1373, 1383 (1992)).

40. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 741 (2003) (Stevens, J., concurring) (citing John Paul Stevens, *Two Questions About Justice*, 2003 U. ILL. L. REV. 821 (2003)); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 54 n.2 (1994) (Stevens, J., concurring) (citing John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1124–25 (1993)).

41. New York v. Uplinger, 467 U.S. 246, 249 n.2 (1984) (Stevens, J., concurring) (citing John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 11–14 (1983)).

42. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 96 n.16, 97–98 (1996) (Stevens, J., dissenting) (citing John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1124–25, 1126 (1993)).

43. 561 U.S. 742, 864 n.8, 876–77, 882 (2010) (Stevens, J., dissenting) (citing John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 20 (1992); John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 291 (1986); John Paul Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437, 446–48 (1985)).

But anyone with the smarts, connections, and accomplishments to make it to the Supreme Court probably has a healthy ego.

Perhaps it is because the auto-citation implicates the sometimes fraught issue of the role that a judge's personal views play in shaping her jurisprudence. The presence of an auto-citation signals that the justices are people who had thoughts and interests about legal issues before they joined the bench or outside of their role as a judge. The hesitancy to auto-cite may be an effort to push back against any recognition of judicial personhood and to maintain the appearance of objectivity. After all, Chief Justice Roberts' umpire never would say "as I explained in Nationals vs. Mets, March 30, 2014, this is a strike." Even jurists who do not subscribe to the Chief's metaphor may be cautious about invoking their own work; it may be too direct an expression of off-the-bench views even for those who acknowledge such views exist.

Whether the past term's increase in auto-citations augurs an uptick remains to be seen. Several of the newer justices have more extensive pre-Supreme Court publication histories.[44] Increased polarization on the Court may lead to more forceful, and in turn more personal, arguments. Along with the possibility of shifts in abortion jurisprudence and an expanded Free Exercise doctrine, the incidents of auto-citations are one more thing to look for as the October Term 2020 opinions begin to issue. Before rushing to set up Westlaw keycite alerts for all justice-authored articles, though, know that, some people say, that database can be unreliable.[45] Rely on your own research. It's what an auto-citing justice would do.

44. *See supra* Part I.

45. *See*, of course, Joel Heller, *Subsequent History Omitted*, 5 CAL. L. REV. CIRCUIT 375, 378 (2014) (identifying errors in Westlaw's keycite characterizations).