The Use and Effectiveness of Analogy in Supreme Court Oral Argument

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In the Supreme Court's Guide for Counsel, the Clerk of the Court reminds advocates that "[o]ral arguments are not designed to summarize briefs, but to present the opportunity to stress the main issues of the case that might persuade the Court in your favor."[1] Given the limited time during which advocates must make the case to the Court, the arguments that counsel elects to put forward is of monumental strategic importance. Although analogy is a staple of judicial reasoning,[2] surprisingly little of the prevailing literature on appellate advocacy touches upon how advocates can use analogies to good effect during oral argument.[3] This oversight is especially surprising considering the Court's explicit demand for appropriate comparisons. As Justice Breyer candidly inquired this term: "[W]hat's the best one? What's the best analogy?"[4]

To assess the impact of oral argument on Supreme Court decision-making, I conduct a qualitative examination of the use of analogy during oral argument, measured by whether—and to what degree—analogies used during oral argument inform the Court's written opinions in the cases we have reviewed this term that have since been decided.[5] To frame my analysis, I rely on the scholarship of David Frederick, an accomplished Supreme Court oral advocate. In his guide *Supreme Court and Appellate Advocacy*, Frederick explores how advocates before the Court are asked to "elicit comparisons with and distinctions to other areas of law."[6] In underscoring that "Supreme Court judging is heavily based on drawing analogies," Frederick highlights two discrete uses of analogy: (1) "analogies to other principles [and areas] of law" championed by advocate Edwin Kneedler and (2) factual "analogies to real-life common-sense situations" perfected by now-Chief Justice John Roberts.

In surveying the thirteen decided cases we have studied this term from the lectern to decision, I examine these two principle modes of analogical reasoning and draw two general conclusions: first, analogies to other principles or areas of law offered by advocates seems to be slightly more persuasive than comparisons to factually-analogous situations similarly offered, which tended to fail in roughly half the cases. Second, an advocate's failure to distinguish a factual analogy offered by the Court was exceptionally detrimental.

I. Comparisons to other principles or areas of law

Frederick argues that comparisons to other principles or areas of law is persuasive in shaping the Court's reasoning—an "effective way to demonstrate to the [C]ourt that the rule being proposed is not a frolic and a detour." Specifically, Frederick notes how Kneedler—an advocate who has appeared before the Court numerous times this term—has championed

[1] https://www.supremecourt.gov/casehand/guideforcounsel.pdf

[2] Bryan A. Garner, *The Winning Oral Argument* 60–61 (2009) (noting how advocates should [f]ormulate the rule for which your case stands — and be willing to show how the rule would apply *by analogy* to other cases").

[3] Mark R. Kravitz, *Words to the Wise: David C. Frederick's Supreme Court and Appellate Advocacy*, 5 J. APP. PRAC. & PROCESS 543, 549 (2003) ("Frederick … includes subjects that are not covered by much of the existing literature on appellate advocacy … includ[ing] a useful discussion of how advocates use analogies to good effect, and … specific examples of advocates' use of analogies in Supreme Court arguments.").

[4] *Manuel*, Oral Arg. T. at 46.

[5] I limit my review of cases to those decided before May 1, 2017.

[6] David C. Frederick, *Supreme Court and Appellate Advocacy* 143–146 (West Group 2003).

offensive and defensive use of legal analogy. This term, the utility of legal analogy rings true. Legal analogies to other areas or principles of law have been frequently articulated at oral argument and consistently ground the Court's decisions.

A. Successful use of legal analogy

This term, six particular uses of legal analogy at oral argument became instrumental in the Court's decisions. These include: *Lewis v. Clarke*, *Pena-Rodriguez v. Colorado*, *Manuel v. Joliet*, *Nelson v. Colorado*, *Dean v. United States*, and *Moore v. Texas*.[7]

Lewis. Perhaps the most dispositive use of legal analogy this term was in the tribal sovereign immunity context. Since the Supreme Court has never decided a question of tribal sovereign immunity in personal-capacity tort actions like in *Lewis*, the parties relied almost exclusively on analogy to federal, state, and diplomatic sovereign immunity for employees. In *Lewis*, a tribal limousine driver who was sued in his individual capacity asserted tribal sovereign immunity as an affirmative defense. The injured victim's counsel successfully argued by analogy that recognized forms of governmental sovereign immunity do not extend to cloak employees in an individual capacity action. The opening statements by counsel proceeded analogically:

> In an individual capacity action against a *government* employee, the plaintiff seeks relief from the employee personally. The judgment is not enforceable against the *government*. For that reason, such an action does not implicate sovereign immunity… [I]t applies equally when the defendant is an employee of an *Indian* tribe.[8]

Applying this analogy, the Court held that "[t]here is no reason to depart from these general rules [of governmental immunity] in the context of tribal sovereign immunity." The legal analogy to federal, state, and diplomatic governmental immunity functionally ended the case.

Pena-Rodriguez. In *Pena-Rodriguez*, the Court decided whether the Sixth Amendment requires that the no-impeachment rule give way to allow a trial court to reconsider a jury verdict when a juror makes a clear statement of racial animus resulting in a conviction. At oral argument, the Justices grappled with how to draw a limiting principle around racial bias to distinguish it from other forms of private bias. Defensively, petitioner's advocate Jeffrey Fisher offered various analogies to show why race is different from private bias. While noting first that "tiers of scrutiny provide a helpful analogy" of racial animus as different in kind, Fisher continued with "*Batson* [a]s another helpful analogy." Fisher further marshalled *Bolling* as evidence of "analogy … of how the Sixth Amendment [is applied] to different kinds of alleged bias."[9] Although neither the tiers of scrutiny nor the *Bolling* analogy was discussed in the Court's decision, the Court cited *Batson* as an analogous case to justify treating racial bias differently as

[7] *Lewis v. Clarke*, —S.Ct.—, (2017); *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017); *Manuel v. Joliet*, 137 S.Ct. 911 (2017); *Nelson v. Colorado*, —S.Ct.—, (2017); *Dean v. United States*, —S.Ct.—, (2017); *Moore v. Texas*, 137 S.Ct. 1039 (2017).
[8] *Lewis*, Oral Arg. T. at 3.
[9] *Pena-Rodriguez*, Oral Arg. T. at 9–16.

"especially pernicious" in the "administration of justice"—warranting an exception to the no-impeachment rule separate from private bias. Legal analogy provided a limiting principle.

Manuel. After being detained for forty-eight days after a wrongful arrest, Manuel filed a § 1983 claim alleging that his detention constituted a Fourth Amendment unreasonable seizure. By contrast, the respondent argued that the appropriate analogy to the detention is malicious prosecution for which the Due Process Clause, not the Fourth Amendment, is the appropriate framework. The choice of analogy in *Manuel* is not purely an academic or rhetorical exercise. Whether unreasonable seizure or malicious prosecution is the correct analogy is legally significant because, if the latter, then the claim must be brought in state court if there is an adequate state law tort remedy under Due Process Clause jurisprudence; here, the state claim is barred by the state statute of limitations. Alternatively, if unreasonable seizure is the right analogy, then the claim can proceed in federal court under the Fourth Amendment.

Manuel's attorney, Stanley Eisenhammer therefore opened his argument with analogy: "what this case is about is whether the petitioner may bring a Fourth Amendment claim for unlawful detention pursuant to legal process."[10] He then defensively distinguishes the respondent's proposed analogy: "[T]his case is not about whether there's some constitutional tort named malicious prosecution." The Court's decision tracked Eisenhammer's analogy, holding that "Manuel stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention"—thereby viewing his claim as an "unconstitutionally unreasonable" extension of his "wrongful arrest under the Fourth Amendment" and not a separate malicious prosecution claim.[11]

Nelson. The Colorado Exoneration Act requires wrongfully-convicted individuals to prove their innocence in a civil proceeding to receive a return of money paid in conjunction with a conviction later vitiated. In *Nelson*, the Court determined that this state statute violated the Due Process Clause. In winning reversal, petitioner's advocate Stuart Banner provided a legal analogy to the seizure of property by the state, for which reimbursement of the property interest is required: "when a State is holding onto property that belongs to one of its citizens, the State has an obligation to have a procedure that is adequate for returning the property." By contrary, the respondent analogized the legal question to one of compensation—rather than property right infringement: "this Court's precedents have treated [such claims] not as a return for property but as a claim for compensation."[12] The Court accepted Banner's legal analogy to "property deprivation," rather than post-conviction claims for compensation. Framing the right as a natural property right was crucial: if analogized to compensation cases, the Court would have faced the difficult task of justifying why compensation to the wrongfully convicted is an automatic right. Analogy to property rights mooted this inquiry.

Dean. In *Dean*, the Court considered whether 18 U.S.C. § 924(c), which imposes a consecutive mandatory-minimum term for offenders who possess a firearm in furtherance of a crime of violence or drug trafficking, prohibits a judge from exercising discretion in sentencing

[10] *Manuel*, Oral Arg. T. at 3.
[11] Importantly, the advocates also analogized his claim to false arrest and state law (not Constitutional) malicious prosecution to calculate the statute of limitations accrual period. This statute of limitations issue was not decided by the Court.
[12] *Nelson*, Oral Arg. T. at 12, 47.

the predicate offenses. Petitioner's advocate Alan Stoler analogized the statutory language in 18 U.S.C. § 924(c), to 18 U.S.C. § 1028A, which creates mandatory-minimum terms for identity theft. The Court was persuaded by Stoler's analogy, concluding that because Congress explicitly mandated that district courts "shall not in any way reduce" the underlying sentence based on, "or otherwise take into account," the mandatory minimum when determining the proper sentence for the underlying offense of identity theft, that "Congress could have written the statute to include what they included in 1028A" in § 924(c) and "didn't do so in this instance."[13] In reasoning that "§1028A tracks §924(c) in relevant respects" but does in fact "goes further," the Court justified broad judicial discretion in sentencing predicate offenses in the §924(c) context.

Moore. In grappling with the appropriate standard for intellectual disability in capital punishment cases, the Court determined that the Texas Court of Criminal Appeals erred in not using "adjudications of intellectual disability … informed by the views of medical experts." In oral argument, the petitioner's counsel Clifford Sloan noted that not even Texas itself used the outdated factors that the state used for mental disability in capital punishment cases in analogous areas of law. Sloan underscored that "Texas uses these … factors and this prohibition on current medical standards *only* in the death penalty context [and] in no other intellectual disability context."[14] The Court relied on legal analogy, noting "Texas itself does not follow *Briseno* in contexts other than the death penalty" and that Texas used different criteria for "assess[ing] students for intellectual disabilities" and "intellectual-disability diagnoses of juveniles[s]."

II. Factual comparisons to real-life common-sense situations

Frederick similarly suggests that comparisons to real-life common-sense situations can be powerful, noting how Chief Justice Roberts as advocate "best employed" this rhetorical device in "spend[ing] considerable time in the preparation process thinking of analogies to use at oral argument." In reviewing the cases decided this term, the import of factual analogies to "bring[] something new to the argument" or suggest "a new way to look at the advocate's position" appears to be somewhat overstated. Factual analogies appear to be less persuasive in permeating the Court's reasoning though they are occasionally successful.

A. Successful use of factual analogy

Use of factual analogy was successful in *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1* and *Expressions Hair Design v. Schneiderman*.[15]

Endrew. In *Endrew*, respondent's counsel Neal Katyal used factual analogy to elucidate the appropriate legal standard for "some benefit" in educational progress for students under the guiding *Rowley* standard and the Individuals with Disabilities Education Act (IDEA). When the Court asked Katyal to distinguish *Rowley*'s "some benefit" requirement from the petitioner's contention that a "significant" benefit need be attained, Katyal explained the difficulty of applying the "significance" standard through analogy to a standard bargain:

[13] *Dean*, Oral Arg. T. at 23.
[14] *Moore*, Oral Arg. T. at 15.
[15] *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988 (2017); *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 615 (2017).

> If I have a duty to benefit you, Justice Ginsburg, if I give you no benefit, I think courts can easily review that. I've given you no benefit, I've fallen down on my duty. It can't be that the standard is, if I benefit you significantly, that's the standard; or if I benefit you equally with your colleagues or something like that.[16]

By analogizing the "significance" standard to an easily understood contractual or commercial obligation, Katyal underscored not only that "significance" was not an appropriate manifestation of the "some benefit" standard, but also that "significance" is untenable as a legal requirement. Although the Court did not articulate a standard for "some benefit," the Court did consequently reject the "significance" standard of educational progress as unsound.

Expressions. In *Expressions*, the Court concluded that a New York General Business Law prohibiting credit card surcharges was an infringement on free speech, not a regulation of business conduct. In doing so, the Court noted that "A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases" and subsequently detailed various types and modes of prohibited commercial messaging. The Court's factual analogy directly parallels the petitioner's analogy during oral argument: the advocate argued that the statute makes it unlawful to "describe [a] pastrami sandwich as $10, and then tell you that it's going to cost a certain percentage more ... to pay with a credit card."[17] The analogy guided the Court's reasoning that the statutory restriction was one on free speech, not conduct.

B. Unsuccessful use of factual analogy

Factual analogy failed and distracted the Court from the critical legal issues in *Star Athletica, L.L.C. v. Varsity Brands, Inc.* and *Bethune-Hill v. Virginia State Bd. of Elections*.[18]

Star Athletica. In attempting to shape the separability test for useful articles in pictorial, graphic, and sculptural works under the Copyright Act in the context of cheerleading uniforms, the advocates expended much of oral argument proposing and responding to a seemingly never-ending slew of factual analogies to show how expressive design and functional utility were or were not separable. This included designs on: military uniform camouflage, lunch pails, notebooks, tapestries, rugs, wallpapers, screen-printed t-shirts, little black dresses, and wrestling singlets—among many others.[19] *Not a single* articulated factual analogy found its way into the Court's decision. Interestingly, the limited analogies the Court did use—a "cardboard model of a car," a "fresco painted on a wall, ceiling panel, or dome," and a design that is "imaginatively removed from [a] guitar's surface"—appear to be creatures of the Court's own imagination. The advocates' obsessive use of factual analogy appears to have eclipsed the rather straightforward statutory interpretation issues on which the case was ultimately decided.

Bethune-Hill. In this racial gerrymandering case, advocates attempted to factually analogize and distinguish the instant facts to determine whether the case was in the "same basket" as the Court's 2015 ruling in *Alabama Legislative Black Caucus* v. *Alabama*. As it

[16] *Endrew*, Oral Arg. T. at 27.
[17] *Expressions*, Oral Arg. T. at 5.
[18] *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002 (2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788 (2017).
[19] *Star Athletica*, Oral Arg. T. at 4–7, 23, 29, 33, 49, 57, 66.

pertained specifically to one legislative district that allegedly employed racial predominance to ensure that Black voters could elect their preferred candidate, the advocates debated whether the facts here were factually similar enough to trigger *Alabama*'s narrow-tailoring mandate. In opposing the district, challengers argued that the "*Alabama* approach is the right approach," whereas the state of Virginia argued that "it's a mistake to put this in the same basket as *Alabama*"—underscoring that the movement of Black voters into the district was factually distinguishable from *Alabama* because the racial target here was used was a factor, not a numerical quota.[20] The Court seemed uninterested in this factual analogy, summarily applying *Alabama* and finding that *Alabama*'s narrow-tailoring requirement had been met because the race-based considerations were in-fact necessary to avoid liability under the Voting Rights Act. Rather than applying the test articulated in *Alabama*, the advocates engaged in an unnecessary back-and-forth factual comparison to the facts of the leading case.

Importantly, the failed use of factual analogy this term appears in the context of highly-technical subject areas: intellectual property and redistricting law. I do not rule out the possibility that the advocate's use of factual analogy here is not for persuasive effect, but purely explanatory power. In other words, complicated subject areas may require analogies for pedagogical reasons which would not ultimately be "meaningful" if measured based on prevalence in opinions alone.

C. Failure to distinguish court-offered factual analogies

While I initially studied the effect of advocate-provided analogy, Court-provided factual analogy recurred in my survey. Importantly, advocates failed to distinguish court-offered factual analogies in three cases—*N.L.R.B. v. SW General, Inc.*, *Buck v. Davis*, and *Beckles v. United States*[21]—and this appeared to have had a detrimental effect on the legitimacy of the advocate's position.

N.L.R.B. In *N.L.R.B.*, Justice Kagan offered a factual common-sense analogy to clarify a complicated matter of statutory interpretation:

> "I'm at a restaurant, and I -- I'm talking to my waiter, and I place three orders. I say, number 1, I'll have the house salad. Number two, I'll have the steak. Number three, I'll have the fruit cup. And then I tell the waiter, notwithstanding order number three, I can't eat anything with strawberries. So on your theory, the waiter could bring me a house salad with strawberries in it, and that seems to me a quite odd interpretation of what's a pretty clear instruction: No strawberries."[22]

In *N.L.R.B.*, the Court was, of course, not concerned with salads and strawberries, but with the Federal Vacancies Reform Act of 1998 (FVRA) and specifically whether a provision limiting the legitimacy of certain appointments in subsection (b)(1)—which begins "[n]otwithstanding subsection (a)(1)"—overrides only (a)(1), or applies to both (a)(2) and (a)(3). General Gershengorn, arguing for a narrow view of the (b)(1) limitation, tried to distinguish the analogy because plain language must be understood based "on history and on practice."

[20] *Bethune-Hill*, Oral Arg. T. at 33, 15, 51.
[21] *N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929 (2017); *Buck v. Davis*, 137 S.Ct. 759 (2017); *Beckles v. United States*, 137 S.Ct. 886 (2017).
[22] *N.L.R.B.*, Oral Arg. T. at 8.

However, this wasn't enough to persuade. Though Justice Kagan's dinner analogy to the (b)(1) "notwithstanding" provision did not appear in the opinion, a very similar factual analogy did:

> "Suppose a radio station announces: 'We play your favorite hits from the '60s, '70s, and '80s. Notwithstanding the fact that we play hits from the '60s, we do not play music by British bands.' You would not tune in expecting to hear the 1970s British band "The Clash" any more than the 1960s "Beatles." The station, after all, has announced that "we do not play music by British bands." The "notwithstanding" clause just establishes that this applies even to music from the '60s, when British bands were prominently featured on the charts. No one, however, would think the station singled out the '60s to convey implicitly that its categorical statement "we do not play music by British bands" actually did not apply to the '70s and '80s."

Gershengorn's failure to successfully neutralize the dinner analogy doomed his plain language argument—the equivalent analogy in the Court's decision confirms this failure.

Buck. In debating whether counsel's statement that race is probative in determinations of "future dangerousness" violate the Eighth Amendment in the death penalty context, counsel was unable to answer the Court's call to draw a distinction between racially-charged comments offered by the defense in the instant case and similar testimony offered by the prosecution in analogous cases in which all agreed would be prejudicial. Counsel's failure to distinguish these two scenarios informed the Court in analogizing racially-charged remarks offered by the defense to those offered by the prosecution. Underscoring how the State was unable to discriminate between the two situations, the Court noted that the State tried to argue that the case was distinguishable "because Buck's own counsel, not the prosecution, elicited the offending testimony," but declared "We are not convinced." The Court then vacated the conviction.

Beckles. Finally, in *Beckles*, the Court grappled with whether a residual clause in the Sentencing Guidelines that made any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another" as a violent felony was unconstitutionally vague. The Court previously interpreted an identically-worded provision in the Armed Career Criminals Act and declared it unconstitutionally vague in *Johnson*. Despite identical language, respondent's counsel Michael Dreeben tried to distinguish the direct analogy by focusing on how the ACCA necessarily fixed a higher range of sentences, whereas the Guidelines post-*Booker* were just advisory. Whether Dreeben's argument persuaded the Court is unclear because the Court unanimously held that the Guidelines were immune from vagueness challenges.

Conclusion

Several general principles become apparent after reviewing the analogical reasoning in the cases decided this term. Foremost, even though, as Frederick observes, Chief Justice Roberts "tended to eschew … legal analogies … because he regarded them as riskier and less prone to be perfect fits," effective use of legal analogy is highly persuasive to the Roberts Court. Second, factual analogies can also be persuasive, but appear to be somewhat less persuasive and should be used more sparingly. However, failure to distinguish a factual analogy offered by the Court can be detrimental to one's case. Determining whether these principles hold true will require a more robust investigation of the remainder of the Court's cases both this term and beyond.