

COUNTERBALANCING DISTORTED INCENTIVES IN SUPREME COURT PRO BONO PRACTICE: RECOMMENDATIONS FOR THE NEW SUPREME COURT PRO BONO BAR AND PUBLIC INTEREST PRACTICE COMMUNITIES

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The emergence of a new Supreme Court Pro Bono Bar, made up of specialty practices and law school Supreme Court clinics, has altered the dynamic of litigation related to public interest issues. The new Bar often brings expertise in Supreme Court litigation to cases where there may otherwise be a dearth of resources to support high quality lawyering. But at the same time, this new Bar is subject to market pressures that have important consequences. This Article shows how members of this new Bar are engaged in a race for opportunities to handle Supreme Court cases on the merits. At the certiorari stage, this Bar can be expected to engage in truncated case analysis, avoid coordination with lawyers handling similar cases, and otherwise make decisions that are influenced by each firm's interest in being in a position to handle cases on the merits before the Supreme Court. Moreover, throughout the litigation, this Bar may be influenced by the merits opportunity that provided the incentive to take the case in the first place. This Article explores the implications of this new dynamic in Supreme Court litigation for both pro bono practices and public interest practice communities. With respect to pro bono practices, this Article proposes principles that firms could adopt, including those that relate to the selection of cases for free representation and those that relate to the nature of representation that the pro bono practices provide once the firm has taken on representation. With respect to public interest practice communities, this Article considers the strategic decisions that practice communities face in light of the new Supreme Court Pro Bono Bar. This Article argues that practice communities must anticipate Supreme Court activity on the issues that interest them and must engage constructively both with lawyers whose cases might be possible targets for a petition for writ of certiorari and with the Supreme Court Pro Bono Bar.

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INTRODUCTION

In a recent article, Richard Lazarus describes the emergence of a new Supreme Court Bar that is dominating practice before the Court.¹ This Bar consists primarily of practice groups within law firms, and in some cases entire law firms, that specialize in practice before the Supreme Court. The Bar also contains specialty clinics within law schools that practice solely or primarily before the Supreme Court.² Lazarus concludes that this new Bar is pro-business and has succeeded

¹ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1491–1501 (2008).

² See *infra* notes 31–35 and accompanying text (discussing proliferation of law school Supreme Court clinics).

in reshaping the Supreme Court's docket in ways that favor business.³ The new Supreme Court Bar, however, is also having a dramatic impact on traditional "public interest" cases through its pro bono activities. This Article looks at the new competitive Supreme Court Pro Bono Bar, in which pro bono lawyers offer free services in return for the opportunity to handle merits cases before the Supreme Court. While there is no question that in many cases these lawyers bring sophisticated litigation skills to the cases they take on,⁴ this Article argues that the Supreme Court Pro Bono Bar is subject to incentives that are problematic both for individual clients and for the broader development of the law. These incentives warrant attention by the Supreme Court Pro Bono Bar and by the practice communities of lawyers who work with clients and issues that are the new Bar's targets of opportunity.⁵

The new Supreme Court Pro Bono Bar has emerged at a time when public interest lawyers have been criticized for being enamored with litigation. Even the campaign leading to *Brown v. Board of Education*⁶—generally considered the gold standard in public interest circles for a litigation campaign that built case law strategically and incrementally⁷—has come under attack. Scholars have charged that

³ Lazarus, *supra* note 1, at 1547–49. *But see* Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997, 1011–15 (2009) (arguing, as executive vice president of National Chamber Litigation Center, that Roberts Court shares business community's interest in uniform and predictable legal rules, which, combined with Court's text-based approach to statutory interpretation, provides alternative explanation for apparent pro-business bias).

⁴ *See* Lazarus, *supra* note 1, at 1540–47 (describing value of expert counsel).

⁵ Lawyers in various types of practice work together to share theories and strategies in their common area of practice. I refer to these types of associations as "practice communities." Practice communities may be led by recognized national groups, subject-specific bar associations, or through listservs and practice-specific conferences. Sometimes lawyers organize around a specific litigation campaign; other times, they organize by substantive area of work, such as consumer, employment, or immigration cases.

⁶ 347 U.S. 483 (1954).

⁷ Scholars have debated the degree to which the cases leading up to *Brown* were planned with an eye to a specific Supreme Court strategy and the degree to which the lawyers in these campaigns saw litigation as an agent for change. *Compare* RICHARD KLUGER, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 194–96, 290–94 (2004) (describing specific strategic decisions in litigation campaign against segregation), *and* Stephen C. Yeazell, *Brown, The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977–81 (2004) (describing view of *Brown* litigation strategy as self-consciously designed to attack smaller targets before challenging racial segregation in public schools), *with* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 351–52 (2005) (challenging narrative in which focus of civil rights lawyers was on achieving victory in courts over racial segregation). Regardless of the role of the legal strategy as an independent force of change, the litigation campaign continues to be understood as a model for strategic development of caselaw. *See, e.g.*, MARTHA F. DAVIS,

public interest lawyers place too much faith in litigation⁸ and that they fail to be sufficiently attentive to the interests of their clients when broader law reform interests are at stake.⁹ Regardless of whether these charges are descriptively accurate,¹⁰ there is broad consensus within the legal community on the normative vision of what public interest lawyers should do: (1) They should be sensitive to realistic limitations on obtaining a successful result through litigation; (2) they should be cognizant of the broader institutional and political context of litigation and, in particular, the way that a success in the courts can be undone by the executive branch, Congress, bureaucratic institutions, or political momentum; (3) they should be careful not to privilege litigation solutions over other avenues that might better achieve their objectives; and (4) they should be scrupulously attentive to the interest of any particular client whom they ultimately represent.¹¹

BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–1973, at 56 (1993) (describing how litigation strategy of welfare advocates was modeled on litigation strategy of NAACP Legal Defense Fund lawyers); Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1662 (2010) (looking to Charles Hamilton Houston and Thurgood Marshall as exemplars of sophisticated cause lawyering).

⁸ Gerald Rosenberg's work is well known for criticizing these campaigns for seeking change through the courts. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1991) (arguing that courts can “almost never be effective producers of significant social reform” (emphasis in original)); Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign To Win the Right to Same Sex Marriage*, 42 J. MARSHALL L. REV. 643 (2009) (criticizing litigation campaign around same-sex marriage). Scholars have critiqued Rosenberg's assumptions about the practices of contemporary public interest lawyers. See Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1251–81 (2010) (describing how public interest lawyers were forced into litigation when they preferred legislative solutions); Laura Beth Nielson, *Social Movements, Social Progress: A Response to Professor Rosenberg*, 42 J. MARSHALL L. REV. 671, 682 (2009) (describing how grassroots activism complements litigation).

⁹ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487–88 (1976) (criticizing civil rights lawyers for pursuing objectives that diverged from their client groups); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1211–12 (1982) (discussing conflicts between lawyer interests and class interests).

¹⁰ See, e.g., Cummings & NeJaime, *supra* note 8, at 1304 (critiquing Gerald Rosenberg's account of practices of contemporary public interest lawyers and illustrating how, in same-sex marriage context, public interest lawyers often were forced into litigation when they preferred legislative solutions); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2046–49 (2008) (describing shift toward increased non-litigation advocacy).

¹¹ See generally Cummings & NeJaime, *supra* note 8, at 1240–81 (describing and arguing against critique that lawyers for marriage equality failed to consider or adequately prioritize non-litigation strategies); Rhode, *supra* note 10, at 2046–49 (describing evolution of public interest advocacy to include alternatives to litigation); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 814–15 (2006) (noting that “there is some hope that Progressives may be turning away

The advent of the new Supreme Court Pro Bono Bar means that public interest lawyers face serious obstacles in putting this consensus into practice. Supreme Court Pro Bono lawyers, seeking cases that might warrant review, will bypass non-litigation solutions and even litigation solutions that do not involve representation before the Court.¹²

Whereas an issue-based law reform organization would probably track an issue on an ongoing basis and would be mindful of alternative litigation and non-litigation strategies, a firm engaged in a competitive practice to handle Supreme Court cases may be unfamiliar with the issue. Furthermore, given that the firm's interest in a case is rooted in its potential for Supreme Court litigation, a firm may be primarily concerned with whether one of its lawyers will handle the merits case before the Supreme Court.¹³

Because an issue may not have been monitored over time with an eye to varying strategies—including the development of allies, exploration of administrative and legislative possibilities, and efforts to resolve issues at the circuit level—there may be no entity thinking in advance about what conditions would be most likely to lead to a successful result for the client and others similarly situated if the issue were reviewed by the Supreme Court. These conditions include, for example, the type of facts that would best present the issue, development of studies that would support the desired result, and cultivation of allies who might be helpful as amici. As a result, when the Supreme Court does accept an issue for review, the case that is before the Court may not present it in a way that is most favorable for the petitioner, and there may be fewer and less-developed amicus briefs that provide the broader context in which the particular legal issue arises. This is especially a problem when the writ of certiorari is granted at a time when the Court is inclined to shorten briefing schedules and deny extensions.¹⁴

While the Supreme Court Pro Bono Bar presents these dangers, it also presents an opportunity for resource-strapped practice communities and clients. The offer of free representation by high-quality firms can have obvious benefits when a case or issue is suitable for

from litigation as a strategy for change” and arguing that lawyers must link litigation to broader political strategies); sources cited *supra* note 9 (criticizing litigation that diverges from client interests).

¹² See *infra* Part II.A (presenting implications of competitive practice).

¹³ This is not to say that law reform organizations do not have, at times, their own internal interest in promoting their organization, but rather that there is a different practice culture that may mitigate the drive to have one's own case in the limelight.

¹⁴ See *infra* note 157 (discussing Supreme Court briefing schedules).

review by the Supreme Court. Law firms and law school clinics offer deep pockets for the kind of research that can be key to victory in the Supreme Court—such as fifty-state surveys of laws and procedures, review of obscure legislative history, and systematic case research. The firms also may offer insight into how the opposing party will view the issues and what to expect from opposing briefs. Depending on their familiarity with the litigation of similar issues before the Supreme Court, they may also provide guidance regarding the aspects of a case that might matter to individual Justices. If marshaled well and coordinated with experts in practice communities—particularly experts focused on the risks and benefits of Supreme Court litigation—these resources have the potential to yield very positive outcomes. But if they are used for any case that presents a merits opportunity at the Court without consideration of alternative strategies and without drawing on the experience of others who have litigated similar issues, they can lead to consequences that are detrimental to the client and others affected by the issue.

Presuming that the Supreme Court Pro Bono Bar is here to stay, this Article asks several interrelated questions. First, how do the dynamics of competition for cases affect the way in which this Bar selects and litigates Supreme Court cases? Second, what should a lawyer in one of these pro bono practices do to reduce the influence of the practice's self-interest? Third, what should firms do to mitigate the consequences of their relative lack of familiarity with the relevant substantive areas of law and practice and with any special pitfalls of litigating issues in these areas in the Supreme Court? Fourth, given that representation decisions before the Supreme Court affect not just the individuals named in the case, but also a broader group of individuals who will be affected by the Court's ruling, how should the Pro Bono Bar think about the initial decision to take on a case? Finally, how should the lawyers in public interest practice communities alter their approach to litigation given the reality of the Supreme Court Pro Bono Bar? It is no longer tenable for public interest practice communities to assume that they can control whether and when an issue will be presented to the Supreme Court. Instead, these practice communities must directly face the high likelihood that issues of interest will be pursued at the highest level by pro bono lawyers who may well persuade the Court to consider the issues on the merits.

Part I describes the new market for Supreme Court pro bono cases and its highly competitive structure. Part II explores the implications of the competition for merits cases for client-centered representation and for the development of the law. Part III looks more closely at one case and asks how it might have been handled differently

outside the competitive model of the new Supreme Court Pro Bono Bar. Part IV explores principles and strategies both for the law firms that handle Supreme Court matters on a pro bono basis and for the practice communities that work in the substantive areas that are targeted by Supreme Court Pro Bono practices.

I

THE NEW SUPREME COURT BAR AND THE COMPETITION FOR PRO BONO CASES

Richard Lazarus's study of the new Supreme Court Bar presents impressive statistics showing the emergence of a small coterie of lawyers who practice before the Court.¹⁵ Whereas in 1980, seventy-six percent of cases were argued by lawyers presenting their first Supreme Court argument, by 2007, the comparable figure was forty-three percent.¹⁶ Even more startling, in 1980, only two percent of arguments were presented by persons who had argued ten or more prior cases; by 2007, twenty-eight percent of arguments were presented by lawyers with such experience.¹⁷ Lazarus attributes these statistics to the emergence of a highly specialized private Supreme Court Bar.¹⁸

¹⁵ Lazarus, *supra* note 1, at 1519–21.

¹⁶ *Id.* at 1520 tbl.3.

¹⁷ *Id.*; see also John G. Roberts, Jr., *Oral Advocacy and the Reemergence of the Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 78 (2005) (recounting increased odds that advocate at Supreme Court would have argued before Court previously).

¹⁸ See Lazarus, *supra* note 1, at 1519–21 (discussing increasing number of expert lawyers who have argued multiple cases before Supreme Court). Firms with practice groups that are geared to Supreme Court and appellate cases, and which are often led by a former Solicitor General or other person with substantial Supreme Court experience, include: Akin Gump Strauss Hauer & Feld LLP, *Practices & Services: Supreme Court & Appellate*, AKIN GUMP STRAUSS HAUER & FELD LLP, <http://www.akingump.com/services/ServiceDetail.aspx?service=269> (last visited Mar. 1, 2011); Covington & Burling LLP, *Litigation: Appellate Litigation / Supreme Court Practice*, COVINGTON & BURLING LLP, http://www.cov.com/practice/litigation/appellate_supreme_court/ (last visited Mar. 1, 2011); Gibson Dunn, *Appellate and Constitutional Law*, GIBSON DUNN, <http://www.gibsondunn.com/practices/Pages/acl.aspx> (last visited Mar. 1, 2011); Jenner & Block, *Appellate and Supreme Court Practice*, JENNER & BLOCK, http://www.jenner.com/practice/practice_detail.asp?ID=19 (last visited Mar. 1, 2011); Jones Day, *Issues & Appeals*, JONES DAY, http://www.jonesday.com/issues_appeals/ (last visited Mar. 1, 2011); Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., *Supreme Court and Appellate Practice*, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C., <http://www.khhte.com/matterssupremecourtappellate.php> (last visited Mar. 1, 2011); King & Spalding, *Appellate Litigation*, KING & SPALDING, http://www.kslaw.com/portal/server.pt?space=KSPublicRedirect&control=KSPublicRedirect&PracticeAreaId=2&us_more=0 (last visited Mar. 1, 2011); Latham & Watkins LLP, *Supreme Court and Appellate*, LATHAM & WATKINS LLP, <http://www.lw.com/practices.aspx?page=practicedetail&practice=41> (last visited Mar. 1, 2011); Mayer Brown, *Supreme Court & Appellate*, MAYER BROWN, <http://www.mayerbrown.com/supremecourtappellate/> (last visited Mar. 1, 2011); O'Melveny & Myers LLP, *Appellate*, O'MELVENY & MYERS

As firms compete for prominence in the Supreme Court Bar, they seek to demonstrate substantial experience in Supreme Court advocacy. These firms often present their experience in terms of the sheer number of cases that their lawyers have handled on the merits and argued.¹⁹ None of this should be surprising. A client looking for a lawyer in any field is likely to seek a person with experience. Although other forms of experience, such as substantive experience in the relevant legal field, may be helpful for litigators arguing at the Court,²⁰ the essence of the Supreme Court Bar's pitch is that it offers specialized experience in the way the Supreme Court works.²¹ Part of that pitch is therefore showing that a particular lawyer or firm has extensive and recent experience with the forum.

What makes the search for experience in the Supreme Court different from other legal markets is that it is a very crowded market in terms of the supply of lawyers, with a tight constraint on numbers of cases. The Court only hears about seventy to ninety cases a year.²²

LLP, <http://www.omm.com/appellate/> (last visited Mar. 1, 2011); Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, *Appellate Litigation*, ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP, http://www.robbinsrussell.com/subs/displaypage.php?pname=appellate_litigation (last visited Mar. 1, 2011); Sidley Austin LLP, *Our Practice: Appellate*, SIDLEY AUSTIN LLP, <http://www.sidley.com/appellate/> (last visited Mar. 1, 2011); Williams & Connolly LLP, *Appellate*, WILLIAMS & CONNOLLY LLP, <http://www.wc.com/practice-profile-514.html> (last visited Mar. 1, 2011). In addition, the firm of Goldstein, Howe & Russell, P.C., practices primarily in the Supreme Court. See GOLDSTEIN, HOWE & RUSSELL, P.C., <http://www.howerussell.com/> (last visited Mar. 1, 2011).

¹⁹ See, e.g., GOLDSTEIN, HOWE & RUSSELL, P.C., *supra* note 18 (stating that firm was counsel in seven merits cases before Supreme Court last Term); JENNER & BLOCK, *supra* note 18 (stating that firm has handled twenty-two Supreme Court arguments in past nine Terms); SIDLEY AUSTIN LLP, *supra* note 18 ("Since the [Appellate] practice was formed in 1985, the team . . . has briefed well over 160 cases on the merits before the Court and argued more than 85 cases."); *Supreme Court and Appellate Practice Group*, MAYER BROWN, <http://www.appellate.net/> (last visited Mar. 1, 2011) (stating that firm attorneys have argued over 200 cases before Supreme Court and have argued average of four per Term).

²⁰ See, e.g., Tony Mauro, *Appealing Practice*, AM. LAW., Oct. 2000, at 80, 85 (describing Justice O'Connor as valuing specialized knowledge of bankruptcy lawyers in bankruptcy case).

²¹ Seasoned Supreme Court advocates know not only how to stress the kinds of arguments that make a case seem most attractive for review, but also how most effectively to tap into the kinds of concerns that are likely to make a law clerk wary of recommending in favor of plenary review. Lazarus, *supra* note 1, at 1510.

²² The Supreme Court website lists ninety-two opinions for the October 2009 Term; eighty-three for the October 2008 Term; seventy-three for the October 2007 Term; and seventy-five for the October 2006 Term. *Opinions*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/opinions/opinions.aspx> (last visited Mar. 1, 2011) (listing merits opinions by Term). Those who follow Supreme Court practice do not view all of these decisions as merits decisions. See SCOTUSblog *FINAL Stats OT 09*, SCOTUSBLOG, 1 (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/>

Meanwhile, the bar that seeks to handle Supreme Court cases has grown: At least twenty-four law firms have or seek to establish Supreme Court practices.²³ To be an attorney who can boast of several arguments a year is difficult in this market. Indeed, to be able to claim one argument a year or every few years is no simple matter: There are just too many lawyers chasing too few arguments. As in any market in which there is an imbalance between demand and supply, the result is intense competition.

Many observers of the Supreme Court date the emergence of the new Supreme Court Bar and the competition for cases to the mid- to late 1990s, when Tom Goldstein created a new business model for Supreme Court litigation.²⁴ Goldstein refined the art of identifying cases before they reached the Court and cold-calling lawyers to offer to handle their cases. He began by taking on cases pro bono and then expanded to paid clients.²⁵ Goldstein's model for obtaining merits cases at the Supreme Court was wildly successful, allowing him to build a record of Supreme Court arguments.²⁶ Not surprisingly, his strategy spread to other firms.²⁷ More recently, Goldstein helped expand the model to law school clinics through his collaboration with

Final-Stats-OT09-0707101.pdf (identifying cases that did not "count" as merits dispositions and concluding that there were only eighty-six merits dispositions for October 2009 Term).

²³ See Tom Goldstein, *The Expansion of the "Supreme Court Bar,"* SCOTUSBLOG (Mar. 2, 2006, 11:32 AM), <http://scotusblog.com/blog/2006/03/the-expansion-of-the-supreme-court-bar/> (noting that in six years since 1999, fifteen firms had sought to join nine established firms with Supreme Court practices).

²⁴ This is not to say that Goldstein invented the model, but that he is the most well known for catapulting attention to this approach. See *The High Court's Star Attorney—The Kid*, LAW CROSSING, <http://www.lawcrossing.com/article/1203/The-High-Court-s-Star-Attorney-The-Kid/> (last visited Mar. 1, 2011) (describing how when Goldstein worked at Jones Day, lawyers would conduct daily sweeps of caselaw looking for circuit splits that might justify Supreme Court review).

²⁵ *Id.*

²⁶ In the 2005–2006 Term, for example, by which time Goldstein was connected with the Stanford Supreme Court Clinic, see *infra* note 28, he managed to be counsel or co-counsel in more than ten percent of the Court's docket. The numbers are tied to pro bono work, which has been calculated as half of his cases. LAWRENCE S. WRIGHTSMAN, *ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH* 59 (2008).

²⁷ Tony Mauro, *Paper Chaser: How a Young, Self-Employed Lawyer Became the Best Supreme Court Litigator in Washington*, WASHINGTON MONTHLY, July/Aug. 2004, at 8, 9, available at <http://www.washingtonmonthly.com/features/2004/0407.mauro.html> ("The graybeards of Supreme Court practice frowned at first and muttered about [Goldstein's] lack of etiquette that bordered on barratry—the lawyers' crime of stirring up disputes. No one is muttering now. Supreme Court veterans speak admiringly of Goldstein, and they imitate his tactics. Today, lawyers who lose at the appeals court report they often get multiple offers of help to petition the Supreme Court.").

Stanford Law School.²⁸ These clinics, like the firm practices, have spread to other schools.²⁹

Goldstein's early success resulted in part from the fact that he was the most public and aggressive lawyer to use these tactics.³⁰ Today, as the number of specialized Supreme Court practices has increased, and as they have been joined by law school clinics that specialize in Supreme Court matters,³¹ the competition is more fierce.³² Firms and clinics that follow the entrepreneurial model by making calls to lawyers who have lost circuit cases may discover that they have substantial competition. Often, the lawyer who has lost a case that presents a circuit split may hear from several firms on the

²⁸ *Stanford Clinic Shakes Up the Supreme Court Bar*, STANFORD LAW SCHOOL, <http://www.law.stanford.edu/news/details/3204/Stanford%20Law%20Clinic%20Shakes%20Up%20Supreme%20Court%20Bar/> (last visited Mar. 1, 2011).

²⁹ See Lazarus, *supra* note 1, at 1502 (describing growth of law school Supreme Court clinics).

³⁰ See WRIGHTSMAN, *supra* note 26, at 59–60 (describing Goldstein's approach).

³¹ Several law schools have established clinics that specialize in Supreme Court practice. See, e.g., *Supreme Court Clinic*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, <http://www.law.northwestern.edu/legalclinic/appellate/supreme-court.html> (last visited Mar. 1, 2011); *Supreme Court Clinic*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW, <http://www.utexas.edu/law/clinics/supremecourt/> (last visited Mar. 1, 2011); *Supreme Court Clinic*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, <http://www.law.upenn.edu/clinic/scc/> (last visited Mar. 1, 2011); *Supreme Court Clinic*, YALE LAW SCHOOL, <http://www.law.yale.edu/academics/supremecourtclinic.htm> (last visited Mar. 1, 2011); *Supreme Court Litigation Clinic*, STANFORD LAW SCHOOL, <http://www.law.stanford.edu/program/clinics/supremecourtlitigation/Overview> (last visited Mar. 1, 2011); *Supreme Court Litigation Clinic*, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, http://www.law.virginia.edu/html/academics/practical/scotus_clinic.htm (last visited Mar. 1, 2011). New York University School of Law ran a Supreme Court clinic for two academic years. See, e.g., *Supreme Court Litigation Clinic Wins Amicus Victory in One Case, Persuades Court To Hear Oral Arguments in Another*, NEW YORK UNIVERSITY SCHOOL OF LAW, http://www.law.nyu.edu/news/SUPREME_COURT_LIT_CLINIC_VICTORY (last visited Mar. 1, 2011) (describing work of clinic). Harvard Law School has a "winter clinical" offering in Washington, D.C. See *Supreme Court Clinic*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/academics/clinical/clinics/supremecourt.html> (last visited Mar. 1, 2011).

³² Telephone Interview with Richard J. Lazarus, Justice William J. Brennan, Jr. Professor of Law & Faculty Dir. of the Supreme Court Inst., Georgetown Univ. Law Ctr. (June 19, 2009). The competition extends to successful litigants in the circuit courts who may face a petition for writ of certiorari from the opposing side. In one case argued in the 2008 Term, for example, a member of the new Bar identified a party who had won in the circuit court as a potential respondent before the Supreme Court and reached out to the party in anticipation that the other side would petition for a writ of certiorari. When the petition was filed, he handled the brief in opposition. Once the case was granted, "lots of" pro bono practices lined up to handle the case. See Tony Mauro, *Former Blogger Makes High Court Debut*, LEGAL TIMES (Oct. 22, 2008), <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202425437216> (describing lawyer's strategy for becoming representative on Supreme Court case by anticipating certiorari petition from other side).

same day, or within a few days, offering to take the case for free to the Supreme Court.³³

Law school clinics add to the competition since each clinic hopes to build a docket of Supreme Court matters.³⁴ The clinics also help facilitate the competition by searching for cases that have a chance to be taken by the Court. Students in at least some of these clinics scrutinize decisions of the courts of appeals and state courts to locate cases that create conflicts in the lower courts. Some clinics openly explain that they “troll” for cases and that they act extremely quickly. As one student at the Virginia clinic explained: “There are a lot of people interested in these cases, so it’s important to stay on top of monitoring the circuits and the states You really have to check every day.”³⁵

In this competitive market, pro bono cases are prized.³⁶ It may be very difficult to convince a paying client to allow a lawyer who is new to the forum to handle a case, so pro bono cases provide an opportunity for lawyers to have their first argument before the Court.³⁷ But the allure of pro bono arguments is not limited to new attorneys: Even a seasoned Supreme Court litigator may seek to show both recent and extensive experience arguing before the Court.³⁸ In the 2008 Term, for

³³ See, e.g., Telephone Interview with Stephen R. Felson, Attorney, Law Office of Stephen R. Felson (June 11, 2010) (describing cold calls from multiple attorneys when certiorari in one of his cases was granted); Telephone Interview with Angela L. Pitts, Assistant Fed. Defender, Ark. Fed. Pub. Defender (July 13, 2010) (describing calls from four lawyers within two days of circuit court loss).

³⁴ See, e.g., STANFORD LAW SCHOOL, *supra* note 31 (“The clinic has compiled a record at both the certiorari and merits stages that would be the envy of any appellate practice. Over the past six years, the clinic has represented parties as lead counsel in over three dozen cases on the merits, winning a substantial majority of those cases.”).

³⁵ Mary Wood, *Supreme Court To Hear Law School Clinic Case* Watson, VIRGINIA LAW (Mar. 26, 2007), http://www.law.virginia.edu/html/news/2007_spr/supctclinic.htm; see also *Supreme Court Clinic—Course Description*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, <http://www.law.upenn.edu/clinic/sccl/description.html> (last visited Mar. 1, 2011) (providing that students “will research and identify promising cases for Supreme Court review”).

³⁶ Other scholars have noted how pro bono policies at law firms may be affected by a firm’s financial interests, even in situations in which firms are not competing for a slice of a small docket. See, e.g., Deborah L. Rhode, *Rethinking the Public in Lawyers’ Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 *FORDHAM L. REV.* 1435, 1442–46 (2009) (arguing that self-interest may lead firms to prioritize quantity of work over quality, demand credit for and control of projects undertaken with public interest organizations, and select cases based on firm interest rather than social impact); Deborah L. Rhode & Scott L. Cummings, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2430–31 (2010) (arguing that ranking systems may lead law firms to prioritize quantity of pro bono work over quality, cost effectiveness, and social impact).

³⁷ See Mauro, *supra* note 32 (describing use of trolling to obtain first argument in Supreme Court).

³⁸ See, e.g., Robert A. Long, COVINGTON & BURLING LLP, <http://www.cov.com/rlong/> (last visited Mar. 1, 2011) (stating that Long has argued sixteen cases before Supreme Court); Patricia Ann Millett, AKIN GUMP STRAUSS HAUER & FELD LLP, <http://www.>

example, Mayer Brown handled nine cases in which the Supreme Court granted certiorari and argued seven cases. Four of the seven arguments were handled pro bono. Thus, pro bono cases made up almost half of the firm's merits cases and more than half of the arguments.³⁹ For a firm that advertises that it handles an average of four arguments in the Supreme Court per Term, the pro bono contribution is significant.⁴⁰ Some clinics boast that they rival the results of these private law appellate practices.⁴¹

Not all pro bono cases are potential candidates for representation by specialized Supreme Court practices. Private law firms typically face significant conflicts of interest in cases where one of the parties is

akingump.com/pmillett/ (last visited Mar. 1, 2011) (stating that Millett, co-head of Akin's Supreme Court practice, has argued twenty-eight cases before Supreme Court); *Theodore B. Olson*, GIBSON, DUNN & CRUTCHER LLP, <http://www.gibsondunn.com/lawyers/tolson> (last visited Mar. 1, 2011) (stating that Olson has argued fifty-six cases before Supreme Court); *Carter G. Phillips*, SIDLEY AUSTIN LLP, <http://www.sidley.com/ourpeople/detail.aspx?attorney=123> (last visited Mar. 1, 2011) (stating that Phillips has argued sixty-seven cases before Supreme Court); *Charles A. Rothfeld*, MAYER BROWN LLP, <http://www.mayerbrown.com/lawyers/profile.asp?hubbardid=R714743018> (last visited Mar. 1, 2011) (stating that Rothfeld has argued twenty-five cases before Supreme Court, including three cases in 2008).

³⁹ In the 2008 Term, Mayer Brown handled nine cases in which the Court granted certiorari. *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (representing oil company); *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (representing coal company); *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009) (representing railroad company); *Harbison v. Bell*, 129 S. Ct. 1481 (2009) (representing petitioner on death row); *Philip Morris USA, Inc. v. Williams*, 129 S. Ct. 1436 (2009) (representing Philip Morris); *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (representing asylum applicant); *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009) (representing petitioner seeking remedy for sexual harassment against school); *Arizona v. Johnson*, 129 S. Ct. 781 (2009) (representing criminal defendant); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (representing Philip Morris with case argued by co-counsel Ted Olson of Gibson Dunn). For summaries of Mayer Brown's involvement in 2008 Supreme Court cases, see *Cases Handled by Mayer Brown LLP During the 2008 U.S. Supreme Court Term*, MAYER BROWN LLP, http://www.appellate.net/about/sc2008cases_Final.pdf (last visited Mar. 1, 2011). Two of these cases, *Altria Group* and *CSX Transportation*, did not provide an opportunity for argument by partners at Mayer Brown. *Id.* at 1–2. Four of the remaining seven cases, *Arizona v. Johnson*, *Fitzgerald v. Barnstable School Committee*, *Negusie v. Holder*, and *Harbison v. Bell*, appear to be pro bono cases based on the probable financial inability of the parties to pay for counsel. All four of those cases are listed on the website of the Yale Supreme Court Clinic, which served as co-counsel with Mayer Brown. *Supreme Court Clinic: Cases*, YALE LAW SCHOOL, <http://www.law.yale.edu/academics/10299.htm> (last visited Mar. 1, 2011).

⁴⁰ See MAYER BROWN, *supra* note 18 (“Mayer Brown’s more than 55 appellate lawyers have argued over 200 cases before the United States Supreme Court, representing either parties or *amici* in approximately 15 cases each Term for the past several years, and arguing an average of four per Term.”).

⁴¹ See STANFORD LAW SCHOOL, *supra* note 31 (“The [Stanford Supreme Court Litigation Clinic] has compiled a record at both the certiorari and merits stages that would be the envy of any appellate practice. Over the past six years, the clinic has represented parties as lead counsel in over three dozen cases on the merits, winning a substantial majority of those cases.”).

a private company. For example, private firms that represent employers in employment litigation will not take on a pro bono case that involves an employee.⁴² As a result, the most intense competition centers on cases that do not raise such conflicts. These cases typically involve challenges to government action, for example on issues related to criminal law, immigration, and other matters where the government is one of the parties.⁴³ Many of the law school clinics face the same restrictions because they are taught by adjunct faculty from law firms who handle the arguments arising from the clinic cases.⁴⁴ As a result, the law school clinics, which offer firms resources for tracking down potential cases and have their own need to ensure a sufficient Supreme Court docket, have added to the competition for the kinds of cases that do not create conflicts with paid clients.⁴⁵

As the Supreme Court Pro Bono Bar grows, lawyers are increasingly aware that the Bar offers a route to free representation for clients who have lost below. One private practitioner describes how he received cold calls from multiple Supreme Court Pro Bono practices when certiorari was granted in one of his cases.⁴⁶ A couple of years later, he turned to some of those same firms when he lost a case in the circuit and was able to obtain pro bono assistance for his client.⁴⁷

The bottom line is that the supply of lawyers seeking Supreme Court merits cases is growing and is generating serious competition for cases. These practices constantly scrutinize recent cases to identify

⁴² See Lazarus, *supra* note 1, at 1560.

⁴³ See, e.g., Petition for Writ of Certiorari, Aronov v. Napolitano, 130 S. Ct. 1571 (2010) (No. 09-325) (petitioning on fee issue in naturalization cases); Petition for Writ of Certiorari, Hensley v. United States, 130 S. Ct. 1284 (2010) (No. 09-480) (petitioning on sentencing issue).

⁴⁴ For example, the Northwestern clinic works with Sidley Austin, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, *supra* note 31; the Penn clinic, with Paul Hastings, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, *supra* note 31; the Texas clinic, with Kellogg, Huber, Hansen, Todd, Evans & Figel, *Supreme Court Clinic To Represent Members of South Dakota Tribe at U.S. Supreme Court*, UNIVERSITY OF TEXAS SCHOOL OF LAW (Apr. 10, 2008), http://www.utexas.edu/law/news/2008/041008_plains_bank_vs_long_family.html; and the Yale clinic, with Mayer Brown, *Supreme Court Clinic Faculty*, YALE LAW SCHOOL, <http://www.law.yale.edu/academics/10300.htm> (last visited Mar. 1, 2011).

⁴⁵ Not all clinics are linked to firms with major corporate clients. Goldstein, Howe & Russell is a small practice that handles many cases with Stanford and Harvard. Kevin Russell, SCOTUSBLOG, <http://www.scotusblog.com/author/kevin%20russell> (last visited Mar. 1, 2011). As this Article was going to press, Tom Goldstein, a founder of the firm, has now rejoined it after leaving Akin, Gump, GOLDSTEIN, HOWE & RUSSELL, P.C., <http://www.howerussell.com> (last visited Mar. 1, 2011). Because of the firm's size and client base, it can handle consumer, employment discrimination, and many other issues that other law school clinics and pro bono practices would avoid.

⁴⁶ Telephone Interview with Stephen R. Felson, *supra* note 33.

⁴⁷ *Id.*

possible candidates for Supreme Court review and actively search for and take on Supreme Court clients.⁴⁸ Meanwhile, individual lawyers are increasingly aware that they can access a supply of free resources if they pursue Supreme Court review but not if they seek other remedies for their clients.

II

IMPLICATIONS OF THE COMPETITIVE SUPREME COURT PRO BONO BAR FOR CLIENT-CENTERED REPRESENTATION

The competition for Supreme Court cases has a wide array of implications. Lawyers are more available to take cases to the Supreme Court for free, improving accessibility to that Court for a wide range of litigants. Furthermore, some of these lawyers have special expertise in the Supreme Court.⁴⁹ But the competition for handling cases on the merits also creates problematic incentives. Competing lawyers have an interest in securing representation in a way that will allow the firm both to obtain a grant of certiorari and ultimately receive credit for handling the case on the merits. In addition, they have an incentive to focus on the Supreme Court as a forum for resolving the client's problem. These incentives can have predictable consequences for the litigation choices such lawyers make for clients, the degree to which they work closely with lawyers who have substantive expertise in the areas of the law that are targets for Supreme Court litigation, and the development of the law that is related to Supreme Court pro bono litigation.

A. *Implications for Case Analysis and Strategy*

Competition for cases that may be heard by the Supreme Court on the merits creates a disincentive to the new Supreme Court bar to engage in full case analysis prior to accepting a case for representation. Because of the intense competition for cases, a firm that waits to investigate legal and factual issues related to the wisdom of pursuing Supreme Court review risks losing the case. The result is a truncated process for deciding whether Supreme Court review is the best course of action.

⁴⁸ See *supra* notes 33, 47 and accompanying text (describing solicitation of clients by Supreme Court pro bono lawyers); *supra* note 35 and accompanying text (describing Supreme Court clinics trolling for cases).

⁴⁹ See Lazarus, *supra* note 1, at 1524–25 (describing expertise offered by repeat players in Supreme Court litigation).

Ordinarily, it would seem obvious that a lawyer cannot responsibly counsel a client about a course of legal action without careful assessment of the client's objectives, alternative mechanisms for achieving those objectives, and the likelihood of success in pursuing each mechanism.⁵⁰ But the nature of the competitive certiorari practice discourages full case analysis and counseling at the early stages of Supreme Court representation. At the petition stage, the likelihood of obtaining review in any given case is not great. If the firm is seeking to maximize certiorari grants, it has an incentive to file many plausible petitions, so that there is a better chance of a grant of review. As a result, at the early stage of the representation, the lawyer can be expected to focus on the factors that make a grant of review more likely. These factors include whether there is a genuine split in the circuits and whether there is an important question of federal law.⁵¹

The resulting lack of attention to full case analysis at the petition stage may seem unimportant. Since the firm is offering its services for free, the potential petitioner (and his or her lawyer) may feel that there is nothing to lose. But Supreme Court review often presents risks or little prospect of gain for clients. First, there may be alternative litigation strategies other than Supreme Court review that would better achieve the client's objectives. Second, pursuing Supreme Court review, if unsuccessful, may reduce the likelihood of success under subsequent advocacy options. Third, pro bono attorneys' pursuit of Supreme Court review may lead them to ignore or discount settlement options that would better serve the interests of their clients.

1. *Analysis of Alternative Courses of Action*

In many cases, Supreme Court review is not the only possible advocacy strategy for a client. There may be alternative advocacy strategies within the case, through separate litigation or through non-litigation advocacy.

Within the same litigation, one standard alternative is to seek further review by the lower court. In federal court, for example, one can

⁵⁰ See, e.g., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, at Ch. 5, § 6 (1992) (identifying fundamental lawyering skills, including canvassing options and counseling client about alternative approaches).

⁵¹ See SUP. CT. R. 10 (listing considerations for grant of certiorari, including split among circuit courts, split among state courts of last resort, and presence of important federal question of law); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008) (describing importance of circuit conflicts in determining docket of Supreme Court).

petition for rehearing either by the panel⁵² or by the circuit court en banc.⁵³ Although it might be difficult to persuade a panel to reverse its analysis, it may be possible to identify aspects of the case that would lead the panel to decide, for example, that remand is appropriate under its legal analysis.⁵⁴ As for en banc review, the very fact that there is a split in the circuits might lead the particular circuit to be more willing to hear the case en banc and decide whether the panel came down on the right side of the split.⁵⁵ A rehearing petition in federal court also means greater delay in the case, which might be beneficial for coordination of litigation⁵⁶ and which may otherwise serve client interests.

In addition, there may be alternative forms of litigation available. In a criminal case, the client may be able to seek relief through a writ of habeas corpus or another post-judgment remedy.⁵⁷ In an immigration case, the client might be able to pursue reopening before the agency.⁵⁸ In an injunctive case, a client might be able to seek an injunction at a later stage after there is further evidence on the consequences of not providing injunctive relief.⁵⁹ The pro bono lawyer must weigh the costs and benefits of these alternatives to determine if one of them is more likely to be helpful to the client than seeking Supreme Court review.⁶⁰

⁵² FED. R. APP. P. 40.

⁵³ *Id.* 35(b).

⁵⁴ *See, e.g.,* Manjiyani v. Ashcroft, 343 F.3d 1018, 1020 (9th Cir. 2003) (granting request to supplement record on rehearing, granting panel rehearing, and ordering remand); Mata v. Johnson, 105 F.3d 209, 210 (5th Cir. 1997) (granting panel rehearing, reversing procedural default conclusion in light of government concession, and remanding for further proceedings).

⁵⁵ Under Federal Rule of Appellate Procedure 35(b)(1)(B), litigants can invoke the circuit split as a basis for rehearing en banc. If a circuit chooses to hear an issue en banc, the existence of the circuit split creates a real chance that the en banc court may reverse the panel and decide to follow other circuits or that the petition for rehearing en banc will otherwise provide relief to the party. *See, e.g.,* Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1127–32 (9th Cir. 2006) (rehearing en banc and reversing panel opinion in part based on views of two “sister circuits”); Discipio v. Ashcroft, 417 F.3d 448, 450 (5th Cir. 2005) (reversing panel opinion following change in government’s position prompted by petition for rehearing en banc).

⁵⁶ *See infra* Part II.B (discussing benefits of collaboration).

⁵⁷ *See generally* I RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 2–4 (5th ed. 2005) (providing general overview of habeas actions).

⁵⁸ *See generally* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 1046–49 (11th ed. 2008) (describing reopening procedure).

⁵⁹ *See generally* 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2942 (1995) (describing equitable principles that govern issuance of injunctive relief).

⁶⁰ Non-litigation options may also be available. In a criminal case, there may be a chance at clemency, which, while remote, could be diminished by litigation that yields a

Choosing the best advocacy strategy requires complex analysis of the institutional constraints on each forum and the costs and benefits of different approaches. Some considerations include the standard of review, the set of legal and factual questions that the forum can adjudicate, the factual record that would be before the forum, any predisposition of the court toward the particular type of case, and the power the court would have to shape the rules applicable to the case. In addition, each of these dimensions—the relevant legal and factual issues, the factual record, the predisposition of the court, and the authority of the court—would shape the narratives available to the lawyers litigating the case and the judges issuing a decision. Careful lawyering would counsel in favor of canvassing each of these dimensions before settling on a strategy.

Consider, for example, the options faced by the defendant in *Montejo v. Louisiana* at the time that his lawyers sought a writ of certiorari.⁶¹ Montejo faced the death penalty after losing his direct appeal to the Louisiana Supreme Court.⁶² He could seek relief through Supreme Court review or collateral relief through a habeas action.⁶³ In theory, he could first seek Supreme Court review of some claims, and later seek habeas review of other claims.⁶⁴ Close case analysis, however, would have suggested ways in which a Supreme Court petition could compromise what could later be achieved through habeas.

The principal legal issues in *Montejo* revolved around the police conduct before and after Montejo's first appearance in court, where he was appointed counsel. The police approached Montejo and brought him to a police station. Montejo claimed that he was pulled from his car at gunpoint, thrown to the ground, and handcuffed at this first encounter, whereas the police claimed that the initial trip to the police station was voluntary. Montejo testified that he asked to have a lawyer present and was told that the police "would not recommend

statement of facts from the court that is unfavorable to the client. In an immigration case, there may be administrative options that likewise could be prejudiced by any adverse judgment by a court. *See, e.g., infra* Part III.B.1 (discussing consular processing).

⁶¹ 129 S. Ct. 2079 (2009). Montejo was represented by the Capital Appeals Project in New Orleans and a firm providing pro bono service. *See* Petition for Writ of Certiorari, *Montejo*, 129 S. Ct. 2079 (No. 07-1529) (listing counsel). While there is no reason to think that this particular case resulted from trolling for cases, *see supra* note 35 and accompanying text (discussing trolling), the case serves as a useful vehicle for examining the kind of sophisticated case analysis that is unlikely to happen at an early stage when lawyers are focused on Supreme Court review.

⁶² *State v. Montejo*, 974 So. 2d 1238, 1265 (La. 2008), *vacated sub nom. Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

⁶³ *See* HERTZ & LIEBMAN, *supra* note 57, §§ 2–4 (discussing habeas corpus review).

⁶⁴ *See id.* § 2.4b (discussing similarities and differences between direct appellate review and habeas review).

that.”⁶⁵ The police proceeded to question Montejo for six-and-a-half hours and then again for an hour in the middle of the night. After Montejo invoked the right to counsel on videotape, the officers sought to persuade him to revoke his request for a lawyer. After he agreed to allow the questioning to continue, the video was turned off.⁶⁶ When the taping resumed, Montejo was “visibly upset” according to the Supreme Court of Louisiana.⁶⁷ Montejo offered a new version of the crime, and the police subsequently charged him with first degree murder.⁶⁸

After being held in custody for another three days, Montejo was taken before a Louisiana state court where he was appointed counsel and denied bail.⁶⁹ At the hearing, Montejo remained silent.⁷⁰ Immediately after the court hearing, the police returned to question Montejo. Montejo said that he had a lawyer.⁷¹ The police told him: “No, you don’t . . . I checked, you don’t have a lawyer appointed to you.”⁷² The officers then gave him a new set of *Miranda* warnings and persuaded him to accompany them on a car ride. During the car ride, the officers provided Montejo with pen and paper, and he wrote a letter apologizing to the wife of the victim.⁷³ At trial, Montejo testified that the officers dictated the contents of the letter.⁷⁴

In court, Montejo’s lawyer objected to the introduction of the letter. He argued that the statements that Montejo made to the police following his appearance in court should be suppressed.⁷⁵ The judge denied the motion and admitted the letter into evidence.⁷⁶ Montejo

⁶⁵ Petition for Writ of Certiorari, *supra* note 61, at 3.

⁶⁶ *Id.* at 4–5.

⁶⁷ *Montejo*, 974 So. 2d at 1247.

⁶⁸ Petition for Writ of Certiorari, *supra* note 61, at 6.

⁶⁹ *Id.*

⁷⁰ *Montejo v. Louisiana*, 129 S. Ct. 2079, 2083 (2009).

⁷¹ Petition for Writ of Certiorari, *supra* note 61, at 7. Montejo testified at trial that when the police approached him:

They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don’t, I don’t, I don’t really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me. He said, No, no, you don’t. I said, Yeah, I think I got a lawyer appointed to me, and I guess that’s where I messed up, when I said I think I got a lawyer appointed to me.

Montejo, 974 So. 2d at 1261–62.

⁷² *Id.* at 1262. The Louisiana court did not make factual findings on the reliability of Montejo’s account. *Id.* at 1262 n.69.

⁷³ Petition for Writ of Certiorari, *supra* note 61, at 8.

⁷⁴ *Id.*

⁷⁵ Joint Appendix at 6–7, *Montejo*, 129 S. Ct. 2079 (No. 07-1529) (showing motion to suppress); *id.* at 76–83 (showing transcript of suppression hearing pertaining to Montejo’s letter).

⁷⁶ *Montejo*, 974 So. 2d at 1249–50.

was convicted of murder and sentenced to death.⁷⁷ On appeal, the Supreme Court of Louisiana affirmed Montejo's conviction and death sentence. It ruled that *Michigan v. Jackson*⁷⁸ barred police contact following appointment of counsel only in cases where the defendant affirmatively acted to accept the appointment. The court concluded that because Montejo had stood silent in court, the assignment of counsel did not bring his case under the purview of *Michigan v. Jackson*.⁷⁹

Following the Louisiana Supreme Court's decision, Montejo had at least two choices. He could petition to the Supreme Court directly or he could pursue a collateral challenge through habeas corpus relief.⁸⁰ His lawyers may or may not have considered these options, but they are worth exploring because they illustrate how the decision to seek certiorari requires a careful review of the record and the practical advantages and disadvantages of alternative strategies.

Pursuing Supreme Court review allowed Montejo to proceed on a standard of review that was more favorable. The Supreme Court would decide whether the Louisiana Court issued a correct ruling as a matter of federal constitutional law.⁸¹ A habeas court, in contrast, would decide whether the Louisiana court's rulings were unreasonable as a matter of clearly established federal law at the time of the state court proceeding.⁸² But the standard of review is only one of many issues that shape the choice of litigation vehicles. For Montejo, what mattered was the overall package of considerations that would determine which forum was more likely to overturn his death sentence.

The Supreme Court offered a constrained forum to address legal and factual issues. The Court selects cases that it considers important and that often involve a well-defined split in lower court authority.⁸³ The issue Montejo's lawyers presented to the Court—and which

⁷⁷ *Id.* at 1250.

⁷⁸ 475 U.S. 625 (1986).

⁷⁹ *Montejo*, 974 So. 2d at 1260–61.

⁸⁰ See Hertz & Liebman, *supra* note 57, § 5.1 (stating that federal habeas corpus petitioner is not required to file petitions for writ of certiorari). Montejo may have also had claims that he had not previously litigated in the state courts, such as ineffective assistance of counsel, which he could bring in a state post-conviction proceeding.

⁸¹ See *id.* § 2.4b (“In conducting independent review on direct appeal, the Supreme Court would rely primarily on its existing constitutional precedents, consistent with the degree of freedom to deviate from those precedents that it exercises under applicable prudential doctrines, mainly *stare decisis*.”).

⁸² See *id.* § 2.4b (citing 28 U.S.C. § 2254(d) (2000)) (discussing habeas review under Antiterrorism and Effective Death Penalty Act of 1996).

⁸³ See *supra* note 51 (listing factors that make Supreme Court grant of review more likely).

resulted in a grant of certiorari—fits that mold. The question was: “When an indigent defendant’s right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to ‘accept’ the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?”⁸⁴ Stripped from this question was any suggestion that Montejo’s statements to the police after he was in court constituted “affirmative steps to ‘accept’ the appointment.” In addition, under the petition’s framing of the question, the pattern of police conduct prior to the court appearance and how it might have affected Montejo’s later interactions with the police were irrelevant to the rule the Court was being asked to adopt. Instead, as presented, the legal question was whether the mere appointment of counsel by the court would trigger the *Jackson* rule irrespective of the nature of the police conduct.

In contrast, in a habeas action, Montejo would have sought to fit his case into the governing precedent in the Fifth Circuit, where his case would be heard. That precedent was *Montoya v. Collins*.⁸⁵ The *Montoya* court rejected the claim that mere appointment of counsel was sufficient to trigger the *Jackson* rule.⁸⁶ In a habeas petition, Montejo could have preserved his argument for a bright line rule against questioning any person for whom a lawyer was appointed,⁸⁷ but he could not win on this argument in either the district or circuit court. Instead, he would have had to make a fact-bound claim in habeas that he had said enough to the police about his interest in counsel to invoke his rights under *Jackson*. There is some reason to think that this effort could have been successful. In *Montoya*, the Fifth Circuit had said that its holding “does not require a defendant to utter

⁸⁴ Petition for Writ of Certiorari, *supra* note 61, at 2.

⁸⁵ 955 F.2d 279 (5th Cir. 1992).

⁸⁶ *Id.* at 283.

⁸⁷ If the habeas action had lost, and Montejo had appealed to the circuit and then the Supreme Court, he would have been able to present the claim that the *Montoya* rule was unjustified under *Jackson*. This claim would have faced all of the same difficulties Montejo faced in taking this issue up on direct review to the Supreme Court. *See infra* notes 94–96 and accompanying text (describing how Supreme Court was hostile environment for this claim). He also would have had to show that the trial court ruling was an “unreasonable application” of a Supreme Court precedent. 28 U.S.C. § 2254(d)(1) (2006). Although this made the habeas action a more difficult path for pursuing the claim, it would have been possible to prevail had the Court agreed with the underlying merits. *See, e.g., Abdul-Kabir v. Quaterman*, 550 U.S. 233, 244–64 (2007) (upholding habeas claim on ground that trial court had not adopted reasonable application of Supreme Court precedent even though trial court had followed rule adopted by at least one circuit court). Had the Court been inclined to uphold *Jackson*, it might well have found that the *Montoya* rule was an unreasonable application of *Jackson*. *See Montejo v. Louisiana*, 129 S. Ct. 2079, 2083–84 (2009) (finding line drawn by Louisiana court in limiting *Jackson* to be “troublesome”).

the magic words ‘I want a lawyer,’ in order to assert his right to counsel” under *Jackson*.⁸⁸ It required only that a defendant act in a way “that informs a reasonable person of the defendant’s ‘desire to deal with the police only through counsel.’”⁸⁹ In a habeas petition, Montejo could have presented facts about how the police had rebuffed his assertions that he had counsel after going to court.⁹⁰ He also could have drawn on the history of police conduct in the case, which involved repeated efforts to get Montejo to waive his right to counsel prior to going to court.⁹¹

In terms of the factual record, both Supreme Court and habeas review would be largely limited to the existing record.⁹² In other cases, however, the possibility of further fact finding through habeas may be an additional consideration in deciding on the best course of action.⁹³

As to the predisposition of the court, Supreme Court review presented serious risks. Justice Kennedy had signaled previously that he believed that the very precedent that Montejo sought to enforce—*Michigan v. Jackson*—had been wrongly decided.⁹⁴ Furthermore, Justice Kennedy had made clear that if he were to support continued application of *Jackson*, it would be under a reading that rejected the legal rule sought by Montejo’s lawyers.⁹⁵ It is hard to see how Montejo’s lawyers expected to get five favorable votes on the merits for the question on which they obtained certiorari.⁹⁶ Although courts

⁸⁸ 955 F.2d at 283.

⁸⁹ *Id.* (quoting *Michigan v. Jackson*, 475 U.S. 625, 626 (1986)).

⁹⁰ See *supra* notes 71–72 and accompanying text.

⁹¹ Reply Supplemental Brief for Petitioner at 11–12, *Montejo*, 129 S. Ct. 2079 (No. 07-1529).

⁹² 28 U.S.C. § 2254(e)(1) (2006) (“In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.”).

⁹³ For example, in *Lee v. Kemna*, 534 U.S. 362 (2002), the defendant sought a continuance because important witnesses had left the courtroom. The trial court denied the continuance and the defendant was convicted. In a subsequent habeas action, counsel submitted affidavits from the missing witnesses explaining that they had been told by a court officer that their testimony would not be needed that day. The federal district court held that these affidavits could not be considered because they had not been presented to the state court. On appeal, the Supreme Court reversed. *Id.* at 368–75. The Court cited the affidavits in its opinion, *id.* at 373 n.6, 387, showing the value of presenting additional facts through a habeas action.

⁹⁴ *Texas v. Cobb*, 532 U.S. 162, 174–77 (2001) (Kennedy, J., concurring).

⁹⁵ *Id.* at 176 (“Even if *Jackson* is to remain good law, its protections should apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel . . .”).

⁹⁶ Justice Kennedy would likely be the swing vote. See Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST, May 13, 2007, at A1 (“Kennedy has been the pivotal vote on every death penalty case decided by the [C]ourt [in the 2006 term].”).

in the Fifth Circuit may not have been the most hospitable forum, it seems plausible that a federal habeas petition would have given Montejo a somewhat better chance for a favorable merits ruling under the existing *Jackson* and *Montoya* precedent than would Supreme Court review.

Turning to the rules of the game, the Supreme Court was a very different forum. It had the power to overturn or greatly curtail *Jackson*. In habeas, in contrast, prior Supreme Court precedent would have been binding.⁹⁷ Montejo would have been able to argue, under *Jackson*, that the facts of his case, including his repeated expressions of interest in counsel,⁹⁸ precluded the police from continuing to seek waivers of the right to counsel after counsel was appointed by the court.

Montejo's lawyers took his case to the Supreme Court. They successfully argued that the Court should take the case because there was a split in the lower courts on how to apply *Michigan v. Jackson*.⁹⁹ At argument, however, it became clear that *Michigan v. Jackson* could not be distinguished.¹⁰⁰ The Court proceeded to order supplemental briefing on the ongoing validity of the *Jackson* precedent.¹⁰¹ That invitation spurred a rash of amicus filings, including one by the United States urging that *Jackson* be overturned.¹⁰² The Court proceeded to overturn it.¹⁰³ Once *Jackson* was overturned, Montejo lost the ability to argue that the facts of his case fit into the *Jackson* precedent.¹⁰⁴

It is of course always hard to say exactly how things would have turned out had Montejo's lawyers not chosen Supreme Court review. But closer case analysis and consideration of the likelihood of success on the claims that the Supreme Court could be expected to hear might

⁹⁷ See *supra* note 81.

⁹⁸ See *supra* notes 65, 71–72 and accompanying text.

⁹⁹ Petition for Writ of Certiorari, *supra* note 61, at 2–3.

¹⁰⁰ See Transcript of Oral Argument at 22–26, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529) (discussing whether *Jackson* should be overruled).

¹⁰¹ See *Docket No. 07-1529*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/07-1529.htm> (last visited Mar. 1, 2011) (providing parties until April 14, 2009 to brief whether *Michigan v. Jackson* should be overruled).

¹⁰² Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson*, *Montejo*, 129 S. Ct. 2079 (No. 07-1529).

¹⁰³ *Montejo*, 129 S. Ct. at 2089–91.

¹⁰⁴ The remand proceedings have been disastrous for Montejo. The Louisiana Supreme Court has concluded that Montejo procedurally defaulted on a claim under *Edwards v. Arizona*, 451 U.S. 477 (1981). *State v. Montejo*, 40 So. 3d 952, 971–73 (La. 2010), *cert. denied*, 131 S. Ct. 656 (2010). The Louisiana Supreme Court further ruled that admission of the letter was harmless error. *Id.* at 975–80. Had Montejo's lawyers proceeded through a habeas action in the first place, there would have been no occasion for these questions to be presented to the Louisiana Supreme Court.

have shown that the cert-worthy issue (namely the split on how far *Jackson* extended) could serve as an invitation to the Supreme Court to think about whether it wished to continue to abide by *Jackson*. The broader point is that the legal issues in cases rarely look the same when they are in front of the Supreme Court in part because the Court is not as concerned as lower courts about the implications of its dicta, and because it has the power to overturn its precedents. Furthermore, the Supreme Court's job is to resolve important issues.¹⁰⁵ It is far less likely to be interested in a fact-bound resolution of an individual case that does not resolve the split that provided the reason why the Court took the case in the first place. As a result, for the individual client who has other options, the Supreme Court frequently will be a risky forum in which to pursue a claim. Other options, which may seem less attractive at first, can become more so when these risks are considered.

The incentive to pursue a grant of certiorari can also lead to truncated analysis of issues that will not be prominent in any Supreme Court litigation. Because Supreme Court litigation will center on the kinds of legal questions that attract grants of certiorari, there may be little consideration of other aspects of the case that would bear on the client's ultimate ability to obtain relief.

In some situations, close case analysis may reveal that resolution of the legal issue underlying the split would be of no benefit to the potential client due to some other legal or factual question that would serve as a bar to relief. To identify such an obstacle requires thinking through what might happen in remanded proceedings and evaluating whether the individual will be able to meet the standards that will apply.

For example, in immigration cases, in response to a charge of removability, an immigrant typically applies for relief from removal. Each form of relief has several eligibility requirements. For example, cancellation of removal for lawful permanent residents is not available to a person who (1) lacks five years in the United States as a lawful permanent resident; (2) lacks continuous presence of seven years in the United States; or (3) has a conviction classified as an aggravated felony.¹⁰⁶ The circuits have diverged significantly on how to interpret the term "aggravated felony."¹⁰⁷ In many of these cases, however, the

¹⁰⁵ SUP. CT. R. 10 (stating grounds for granting writ of certiorari).

¹⁰⁶ 8 U.S.C. § 1229b(a) (2006).

¹⁰⁷ See, e.g., *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (resolving split in circuits regarding whether second drug possession conviction is aggravated felony); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (resolving split in circuits regarding whether conviction for driving under influence is aggravated felony).

courts have not considered whether the person otherwise meets the other qualifications for cancellation of removal. In any remand proceedings, the other criteria can serve as a bar to relief.¹⁰⁸ Litigation that overturns the application of one bar to relief is of cold comfort to the client who faces a separate bar.

Finally, apart from the value of a possible Supreme Court victory, a client may face other consequences that are difficult to quantify. For example, Supreme Court review may draw attention to the client's situation through the intensive media scrutiny that cases receive at the Supreme Court stage. Once such scrutiny is unleashed, its results cannot be buried. Careful attention to these and other client interests allows the client to fully consider the implications of proceeding in the Supreme Court.

All of these aspects of case analysis and consultation are time consuming. It takes time to obtain and review the record, get up to speed on unfamiliar areas of substantive and procedural law, and meet with clients to understand their objectives. One can expect a firm that is rushing to sign on a case to shortchange these forms of analysis in favor of case research that clarifies a cert-worthy split.

2. *Analysis of Risks to Future Advocacy*

In some situations, the institutional framework that sets out the substantive rules and procedures for considering specific questions of law allows the litigator to pursue different advocacy options in sequence. For example, Supreme Court review in a criminal case can be followed by a habeas action. Similarly, Supreme Court review of a legal question in an immigration case can be followed by immigration court proceedings on remand on the same or related forms of relief from deportation.¹⁰⁹ In these sequential situations, it may appear that pursuing Supreme Court review adds another cost-free advocacy option.

Careful case analysis, however, requires considering how pursuit of one option might affect possibilities under subsequent avenues. Some consequences may include: having an issue sent back on remand to a less hospitable forum; having an issue decided in a way that a later court is unlikely or unable to reconsider; or simply having a deci-

¹⁰⁸ For example, if the charging document (the Notice to Appear) was issued within seven years of the person's arrival in the United States, the period of continuous residence is deemed to have ended, and thus the person cannot establish the requirements for cancellation of removal. 8 U.S.C. § 1229b(d)(1) (2006).

¹⁰⁹ See *Ali v. Achim*, 468 F.3d 462, 473 (7th Cir. 2006), *cert. dismissed*, 552 U.S. 1085 (2007) (denying claim for Withholding of Removal and remanding on claim concerning Convention Against Torture).

sion that depicts the facts in a way that prejudices a later court's understanding, even if new evidence is technically admissible in the subsequent proceeding.

Montejo serves as a good example of these risks. Had *Montejo* pursued a habeas action, his case would have been heard in district court with a possible appeal to the court of appeals and the Supreme Court.¹¹⁰ These proceedings would have been based on the rulings initially made by the Louisiana Supreme Court on *Montejo*'s direct appeal. But because his case was heard by the Supreme Court on direct appeal, it was sent back on remand to the Supreme Court of Louisiana, a predictably hostile forum to which it otherwise would not have returned.¹¹¹ Because *Montejo*'s case was remanded to the Louisiana Supreme Court, that court was in a position to determine whether admission of the challenged letter was harmless error. The Court ruled that it was harmless, thereby upholding *Montejo*'s conviction.¹¹² Had *Montejo*'s lawyers first proceeded through a habeas action, there would have been no occasion for the harmless-error question to be presented to the Louisiana Supreme Court.

In some cases, Supreme Court review may restrict or close off options for further litigation. In a criminal case, for example, the decision of whether to seek Supreme Court review or pursue habeas relief should be affected by whether the Supreme Court option will lead to a narrower reading of the issues that were preserved in the state case. If so, pursuit of Supreme Court review will actually constrict the range of arguments that can later be raised on behalf of the defendant. In *Clark v. Arizona*, for example, the defendant petitioned directly to the Supreme Court from the state court judgment rather than pursuing habeas relief.¹¹³ His lawyer raised a series of challenges to the imposition of the death penalty. When his case was considered by the Supreme Court, the majority ruled that some aspects of those challenges were procedurally barred because they were not raised below.¹¹⁴ A district court on habeas would have had to consider this same question of procedural default,¹¹⁵ but the lower federal courts—and particularly the Ninth Circuit—may have been more open to hearing those aspects of claims that the Supreme Court concluded

¹¹⁰ See HERTZ & LIEBMAN, *supra* note 57, § 35 (providing overview of procedure for appeal in habeas corpus proceeding).

¹¹¹ See *supra* note 104 (discussing case on remand).

¹¹² *State v. Montejo*, 40 So. 3d 952, 975–80 (La. 2010).

¹¹³ *Clark v. Arizona*, 548 U.S. 735, 746–47 (2006).

¹¹⁴ *Id.* at 762 (concluding that *Clark*'s lawyers had not adequately presented challenge to trial court's restriction of observation evidence).

¹¹⁵ See HERTZ & LIEBMAN, *supra* note 57, § 23.1–4 (discussing “exhaustion of state remedies” doctrine).

were procedurally barred. That habeas alternative disappeared once the question was presented to the Supreme Court and the Court concluded that parts of Clark's claims were procedurally barred.

3. *Implications for Settlement*

A case taken for the purpose of a merits brief or an argument before the Court also presents tensions with the attorney's duties with respect to settlement. Attorneys have a general duty to seek settlements that are favorable to their clients. This duty clearly prevails over any competing interest that a lawyer might have in obtaining trial experience, oral advocacy experience, or any other form of experience.¹¹⁶ But settlements do not happen unless at least one of the parties evaluates the possibility of settlement and approaches to settlement that may be satisfactory to the other side.

The possibility of settlement can arise at any stage of a case. Settlement may be pursued during the certiorari process, perhaps by seeking settlement before a filing is due. Similarly, settlement may be pursued when the certiorari papers are pending but before the Court rules on the petition. Settlement may also arise at later stages, including after argument.

Consider the case of *Arave v. Hoffman*.¹¹⁷ Hoffman presented the not-unusual situation in which counsel takes an issue before the Supreme Court while other issues in the case remain to be litigated in other courts. In *Hoffman*, the defendant filed a federal habeas corpus petition challenging his state capital conviction and death sentence on numerous grounds. The federal district court rejected some of his claims, left other issues unresolved, and granted relief on two claims, which required a new sentencing trial in the state courts. Both parties appealed to the Ninth Circuit, but the State subsequently withdrew its appeal.¹¹⁸ As a result, Hoffman was due to have a new sentencing hearing regardless of how the court of appeals resolved the issue before it. The Ninth Circuit rejected several of Hoffman's contentions but held that his trial counsel had been ineffective in assuring him that he would not get the death penalty if he went to trial and thus persuading him to reject a life-sentence plea offered by the prosecu-

¹¹⁶ See, e.g., Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 860 (1990) (discussing how interest of young lawyers in obtaining trial experience can interfere with ethical duties to accept good settlement).

¹¹⁷ 455 F.3d 926 (9th Cir. 2006), *vacated as moot*, 552 U.S. 117 (2008).

¹¹⁸ *Id.* at 930–31. The district court heard the habeas petition after initially rejecting it and being overturned by the Ninth Circuit Court of Appeals. *Id.* at 930.

tion.¹¹⁹ As a remedy for this ineffectiveness, the Ninth Circuit held that Hoffman was entitled to have the prosecution's plea offer reinstated.¹²⁰ The State of Idaho sought certiorari, arguing that the Ninth Circuit had required defense counsel to "be prescient" about developments in the law and that Hoffman had not suffered any prejudice.¹²¹ The Court granted certiorari and added one more question for briefing: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargaining negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"¹²² The fact that this question was added indicated that Hoffman's counsel faced the prospect of arguing before a hostile court and that any decision might include highly prejudicial language about the client that could affect later proceedings in the district court and the state courts.

Meanwhile, the pending Supreme Court proceedings had serious ongoing consequences for Hoffman. He was incarcerated under harsh conditions solely as a result of his status as a condemned inmate.¹²³ Had he been back before the trial court for resentencing, he would not have been subject to these conditions.

After considering the totality of his situation and consulting with counsel, Hoffman agreed that his best course of action was to proceed promptly with the resentencing proceedings in the trial court and not to pursue the more extensive relief that the Ninth Circuit had given him.¹²⁴ Hoffman's federal habeas counsel withdrew the claim for reinstatement of the original plea offer and moved the Supreme Court to vacate the decision of the Ninth Circuit and dismiss the case as moot. The State of Idaho joined the motion, and it was granted.¹²⁵ In subsequent proceedings before the trial court, the prosecution dropped its request for the death penalty.¹²⁶

¹¹⁹ *Id.* at 939–41.

¹²⁰ *Id.* at 945.

¹²¹ Petition for Writ of Certiorari at i–ii, *Arave v. Hoffman*, 552 U.S. 117 (2008) (No. 07-110) (describing question presented as requiring prescience on part of defense counsel).

¹²² *Arave*, 552 U.S. at 1008.

¹²³ Respondent's Motion To Vacate Decision Below and Dismiss the Cause as Moot at 3, *Arave*, 552 U.S. 117 (No. 07-110).

¹²⁴ Telephone Interview with Joan M. Fisher, Counsel to Maxwell Hoffman before the Supreme Court, Assistant Fed. Defender, Fed. Defender's Office for the E. Dist. of Cal. (July 13, 2010).

¹²⁵ *Arave*, 552 U.S. at 117.

¹²⁶ Withdrawal of Notice of Intent To Seek Death Penalty, *State v. Hoffman*, No. CR-4843 (Idaho 3d Jud. Dist. Ct. Apr. 17, 2008) (on file with the *New York University Law Review*). Joan Fisher, Maxwell Hoffman's Supreme Court counsel, noted that local prosecutors made the prosecution decisions at the trial court level. Telephone Interview with Joan M. Fisher, *supra* note 124.

The *Hoffman* case illustrates how settlement options may remain available even after a grant of certiorari. In *Hoffman*, counsel worked with experts from around the country to explore her client's options. She understood her responsibility to be solely to her client but benefitted from the insights and suggestions of other experts whose judgment she trusted.¹²⁷

It is impossible to say whether the same outcome would have happened with counsel that had an incentive to prioritize arguments before the Supreme Court. Given the high intensity of the competition for arguments,¹²⁸ there is good reason to fear that, once a firm or an attorney gets a case, it will be loathe to invest in the pursuit of settlement options that, if successful, would require the firm to give up what it tried so hard to secure. This may be especially true before merits briefing since the firm cannot claim a litigation success. That is not to say that these tensions cannot be overcome, but that they are powerful forces that can shape behavior.¹²⁹

B. *Implications for Collaboration To Identify Best Vehicles and Arguments*

Just as a client benefits from careful consideration of non-Supreme Court approaches, a client can benefit from the collaborative process of consulting with other attorneys to identify better vehicles and arguments. The competition for Supreme Court cases, however, can strain these forms of collaboration. Firms seeking merits cases may be reluctant to coordinate to find the best vehicle for an issue since they risk losing the chance at handling the case on the merits. They may also avoid investing in a merits strategy until a grant of certiorari in a case they can call their own.

When lawyers coordinate, they can evaluate different vehicles for advancing a legal claim while preserving the rights of each litigant. Because the Court typically takes cases that are likely to recur,¹³⁰ it is

¹²⁷ Telephone Interview with Joan M. Fisher, *supra* note 124.

¹²⁸ See *supra* Part I (discussing competition for Supreme Court pro bono cases).

¹²⁹ Despite the pressures to show experience before the Court, settlements are possible. The first possible merits case for the University of Texas's Supreme Court Clinic was settled. *Capital Punishment Clinic Assists in Panetti Case Before U.S. Supreme Court*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW (Apr. 18, 2007), http://www.utexas.edu/law/news/2007/041807_panetti.html; *Newly Formed Supreme Court Clinic Persuades U.S. Supreme Court To Hear Case*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW (Jan. 10, 2007), http://www.utexas.edu/law/news/2007/011007_supremecourt.html.

¹³⁰ See Brief for Respondent in Opposition at 15–18, *Ferguson v. Holder*, 130 S. Ct. 1735 (2010) (No. 09-263) (arguing that diminishing frequency of issue is grounds for denial of writ of certiorari); see also SUP. CT. R. 10 (indicating Court should accept certiorari on “important” issues of law).

common for there to be many possible vehicles. While one case takes the lead, others that raise similar issues can be held either at the Supreme Court or in lower courts to be disposed of in light of the Supreme Court's decision.¹³¹ In these situations, it is possible to protect the interests of all individual litigants. Lawyers who coordinate do not care whether *their* case goes forward as the lead case. Instead, they are concerned about the case going forward that presents the issue in the best possible context.

A particular vehicle may be better suited for Supreme Court consideration for a variety of reasons. A case may have more sympathetic facts, have facts that are better tied to the legal issues, or present the issues in a way that allows for a better story of the implications of the proposed legal rule. Lawyers who coordinate will try to learn what other cases are available as potential vehicles; they will assess the relative merits of having one of these cases presented as the front-runner for Supreme Court review; and they will adjust their strategies in order to advance that goal. Although hardly an exact science, lawyers can hope to maximize their chances of a favorable outcome by anticipating the strengths and weaknesses of different vehicles.

But collaboration takes time and requires an interest in investing in the case regardless of which case is ultimately granted certiorari and who will argue it. If a firm is focused on having a writ of certiorari granted in its case, it may have less interest in canvassing other possible vehicles or working with other lawyers at an early stage. Indeed, coordination is in direct tension with the dynamics of the market for pro bono Supreme Court cases. Coordination requires subordination of one's interest in a merits argument if the alternative vehicles will be handled by another firm. As a result, law firms that are competing for cases may actually disserve their clients, who are best served by assuring that there is sufficient time to identify the best vehicle to present their common claim, regardless of who gets the glory of the merits case and the argument.

¹³¹ For example, one week after the Court's decision this Term in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), the Court remanded eighteen cases to be disposed of in light of that decision. *See, e.g.*, *Alexis v. Holder*, 130 S. Ct. 3462 (2010); *Alvarez v. Holder*, 130 S. Ct. 3461 (2010); *Beckford v. Holder*, 130 S. Ct. 3463 (2010); *Cardona-Lopez v. Holder*, 130 S. Ct. 3452 (2010); *Escobar v. Holder*, 130 S. Ct. 3451 (2010); *Fernandez v. Holder*, 130 S. Ct. 3451 (2010); *Garbutt v. Holder*, 130 S. Ct. 3460 (2010); *Garza-Gonzalez v. United States*, 130 S. Ct. 3456 (2010); *Lopez-Mendoza v. Holder*, 130 S. Ct. 3463 (2010); *Ramirez-Solis v. Holder*, 130 S. Ct. 3463 (2010); *Reyes-Hobbs v. United States*, 130 S. Ct. 3467 (2010); *Rodriguez v. United States*, 130 S. Ct. 3457 (2010); *Rodriguez-Diaz v. Holder*, 130 S. Ct. 3463 (2010); *Simmons v. United States*, 130 S. Ct. 3455 (2010); *Smith v. United States*, 130 S. Ct. 3466 (2010); *Watson v. United States*, 130 S. Ct. 3455 (2010); *Williams v. United States*, 130 S. Ct. 3464 (2010); *Young v. Holder*, 130 S. Ct. 3455 (2010).

Consider the choices faced by the petitioner in *Dolan v. United States*.¹³² *Dolan* concerned a provision of the Mandatory Victim's Restitution Act of 1996¹³³ that required that restitution be set within ninety days of sentencing in a federal criminal case.¹³⁴ The question in *Dolan* was whether this statutory language prohibited courts from setting restitution after the expiration of the ninety-day statute of limitations.¹³⁵ The Court decided the case 5-4, with an unusual line-up of Justices. Justice Breyer, writing for the majority, ruled against the defendant and was joined by Justices Alito, Ginsburg, Sotomayor, and Thomas. Justice Breyer rooted his decision in the overall objectives of the statute and the Court's conclusion that mandatory statutory language may be overridden in other contexts.¹³⁶ Chief Justice Roberts wrote the dissenting opinion, joined by Justices Kennedy, Scalia, and Stevens. Chief Justice Roberts argued that the statute provided very limited authority for awarding restitution beyond the sentencing date.¹³⁷ The unusual arrangement of Justices suggests that it may have been possible to tip the case in favor of the defendant.

At the time *Dolan*'s lawyers were drafting their petition for writ of certiorari, there was at least one other similar case, *United States v. Balentine*,¹³⁸ that fell within the time limit for petitioning for a writ of certiorari. Had the lawyers collaborated, they could have evaluated which one of these cases was likely to present a better context in which to consider whether the congressional policy objectives of the MVRA should override the apparently mandatory nature of the statute's language.

Comparing the underlying facts in each case, *Balentine* presented a less horrific crime scene. In *Balentine*, the defendant was a teller who went to the bank after hours, stole money from the bank, and drove off with her boyfriend. According to the criminal complaint, she was arrested within two weeks of the crime with most of the money.¹³⁹ The facts in *Dolan* were more gruesome. As the government later stated in its opposition to *Dolan*'s petition for writ of certiorari: "[P]etitioner picked up a hitchhiker The two men began to argue, and petitioner assaulted the hitchhiker, leaving him on the side of the

¹³² 130 S. Ct. 2533 (2010).

¹³³ Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended in scattered sections of 18 U.S.C.).

¹³⁴ 18 U.S.C. § 3664(d)(5) (2006).

¹³⁵ Petition for Writ of Certiorari at i, *Dolan*, 130 S. Ct. 2533 (No. 09-367).

¹³⁶ *Dolan*, 130 S. Ct. at 2539-41.

¹³⁷ *Id.* at 2545-46 (Roberts, C.J., dissenting).

¹³⁸ 569 F.3d 801 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 3452 (2010).

¹³⁹ Criminal Complaint, *United States v. Balentine*, No. 4:05-CR-00122-WRW-01, 2008 WL 1699225 (E.D. Ark. Apr. 9, 2008).

road, bleeding and unconscious, where a police officer discovered him. The victim sustained serious injuries, including a broken nose, wrist, leg, and ribs.”¹⁴⁰

Turning to the role of restitution in compensating for losses, the story becomes more complicated. In *Balentine*, the bank was a clear victim. However, it was an institutional victim, which had recouped most, although not all, of its losses by the time of the restitution order.¹⁴¹ In *Dolan*, there was a very needy and injured victim,¹⁴² but there was no proof that that victim had suffered monetarily. In the later restitution proceedings, the government argued instead for restitution for an unpaid hospital bill that would otherwise be paid for by the government.¹⁴³ Nonetheless, the facts in *Dolan* served as a reminder of needy victims for whom the legal issue presented a stark choice. As the circuit court stated, in a critical summary of Dolan’s argument, if he were to prevail “[b]ecause the district court failed to carry out its mandatory duty by the deadline, [Dolan’s] victim (and the victim’s third party insurer) [would] get nothing.”¹⁴⁴

The two cases also presented a somewhat different picture of district court procedures in the absence of time limits. In *Dolan*, the sentencing hearing was conducted on July 30, 2007, but because the court did not yet have the information on the medical expenses, it left the amount of the restitution to be calculated at a later date. The probation office provided the calculations within the ninety-day deadline, but the court did not hold the hearing until more than three months after the statutory deadline.¹⁴⁵ In *Balentine*, the court considered the issue of restitution at the time of sentencing. There was a dispute about one aspect of the restitution award, which led the court to ask the government to submit invoices to support that aspect of the award. The court also told the defendant that it would order the restitution at a later time but never did so.¹⁴⁶ Meanwhile, Balentine filed an unsuccessful appeal of her sentence and served her complete sentence in prison.¹⁴⁷ After her release, the probation office required her

¹⁴⁰ Brief for United States in Opposition at 2, *Dolan*, 130 S. Ct. 2533 (No. 09-367).

¹⁴¹ *Balentine*, 569 F.3d at 802 n.2.

¹⁴² See Brief for United States at 3, *Dolan*, 130 S. Ct. 2533 (No. 09-367) (describing injuries, need for future surgery, possible lost wages, and unpaid hospital bills).

¹⁴³ Petition for Writ of Certiorari, *supra* note 135, at 4.

¹⁴⁴ *United States v. Dolan*, 571 F.3d 1022, 1025 (10th Cir. 2009), *aff’d*, 130 S. Ct. 2533 (2010).

¹⁴⁵ *Dolan*, 571 F.3d at 1024–25.

¹⁴⁶ *Balentine*, 569 F.3d at 802.

¹⁴⁷ Petition for Writ of Certiorari at 3, *Balentine v. United States*, 130 S. Ct. 3452 (2010) (No. 09-6760) (on file with the *New York University Law Review*).

to pay restitution. She objected to being asked to pay restitution without a restitution order.¹⁴⁸

Reasonable lawyers might have disagreed about which of these cases provided a better vehicle to present the issues to the Court. Dolan's lawyers were of the view that the extreme nature of the circuit court's ruling in their case made it a good candidate for a grant of certiorari.¹⁴⁹ But looking ahead to the case on the merits, *Balentine* offered several advantages. The delay was very extreme; the crime, although serious, was not gruesome; and the victim was a bank that was well situated to pursue an alternative civil remedy.

It appears that there never was a collaborative effort to evaluate whether one case was a better vehicle. Dolan's pro bono lawyers called the federal defender who represented *Balentine* to find out whether she would keep the case and when she planned to file her petition.¹⁵⁰ The federal defender also received calls from three other lawyers interested in taking over *Balentine*'s case.¹⁵¹ In the call with one of Dolan's lawyers, the federal defender representing *Balentine* recalls briefly discussing the merits of the two cases. Once it was clear that she would not give up the case, however, the federal defender reports that Dolan's lawyers did not appear to have any further interest in discussing the case with her, and she did not hear from Dolan's lawyers again.¹⁵² Meanwhile, as an institutional matter, the federal defenders have a history of working with other lawyers but not giving up control of their Supreme Court cases.¹⁵³ Rather than working together for the benefit of both clients, the pro bono lawyers in *Dolan* and the federal defender in *Balentine* went their separate ways.¹⁵⁴

¹⁴⁸ *Balentine*, 569 F.3d at 802.

¹⁴⁹ Telephone Interview with Jeffrey L. Fisher, Assoc. Professor of Law & Co-Dir. of the Supreme Court Litig. Clinic, Stanford Law Sch. (July 13, 2010).

¹⁵⁰ *Id.*; Telephone Interview with Angela L. Pitts, *supra* note 33.

¹⁵¹ Telephone Interview with Angela L. Pitts, *supra* note 33. In addition to her conversation with the Stanford Supreme Court Litigation Clinic, which represented Dolan, *Balentine*'s lawyer remembers offers to handle the case from two Washington, D.C., firms, as well as the Virginia Supreme Court Clinic. *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ This lack of coordination is similar to what happened in a case the previous year. In the 2008 Term, the Supreme Court considered and decided a case concerning the reach of the criminal sentencing enhancement for aggravated identity theft. When the Court took the case, it was presented with two possible vehicles, both from the Eighth Circuit. The first was a precedent decision. *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), *rev'd*, 129 S. Ct. 2377 (2009). The second was a subsequent unpublished decision. *United States v. Flores-Figueroa*, 274 F. App'x 501 (8th Cir. 2008), *rev'd*, 129 S. Ct. 1886 (2009). The litigation had a happy ending from the standpoint of the defense community, with a 9-0 victory for the petitioners. But the process of seeking certiorari shows a lack of

Furthermore, the decision on when and how to file a petition for writ of certiorari in *Dolan* limited the ongoing opportunity to work collaboratively with other lawyers. Dolan's lawyers filed the petition in *Dolan* within ninety days without any extensions.¹⁵⁵ That decision meant that the lawyers had less time to seek out other possible vehicles.¹⁵⁶ If other vehicles would have presented a more advantageous context for deciding the issues from a defendant standpoint, that choice may have prejudiced Dolan's interests. In addition, because the petition was filed in late September, it became subject to speedier docket practices.¹⁵⁷ Certiorari in the case was granted on January 8,

coordination in seeking a best vehicle for Supreme Court review. The first petition was filed by a federal defender in Iowa. Petition for Writ of Certiorari at 11, *Mendoza-Gonzales*, 129 S. Ct. 2377 (No. 08-5316). The second petition was filed by a Supreme Court Pro Bono practice. Petition for Writ of Certiorari at 28, *Flores-Figueroa*, 129 S. Ct. 1886 (No. 08-108). The government agreed that certiorari should be granted in *Mendoza-Gonzalez*, leaving little to be done in reply. Brief for United States at 13, *Mendoza-Gonzalez*, 129 S. Ct. 2377 (No. 08-5136) (on file with the *New York University Law Review*). In *Flores-Figueroa*, the government argued for holding the petition in light of *Mendoza-Gonzalez*. Brief for United States at 4–5, *Flores-Figueroa*, 129 S. Ct. 1886 (No. 08-108). Ironically, because the government took its position about better vehicles in the second case, only Flores-Figueroa had the advantage in making the argument for why his was the better vehicle. From a client welfare standpoint, what mattered was not which case was taken but which was more likely to be successful. It is perfectly possible that *Flores-Figueroa* was the better vehicle. But if that in fact were clear, one would hope that the lawyers for both clients would have wanted the Court to grant certiorari in that case. Had they coordinated and been able to agree, the Court would not have faced the dispute over vehicles.

¹⁵⁵ The Tenth Circuit denied rehearing on July 6, 2009, Docket, *United States v. Dolan*, 571 F.3d 1022 (10th Cir. 2009) (No. 08-2104), and Dolan filed a petition for certiorari on September 23, 2009, *Docket No. 09-367*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-367.htm> (last visited Mar. 1, 2011). See generally SUP. CT. R. 13.1 (“Unless otherwise provided by law a petition for a writ of certiorari to review a judgment . . . entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.”).

¹⁵⁶ Both *Balentine* and *Dolan* concerned restitution orders that were tied to the crime of conviction. See *supra* notes 141–43 and accompanying text (discussing restitution orders in both cases). In other cases, however, restitution orders can include losses for conduct that is beyond the scope of the conviction. See, e.g., *Knutsen v. Gonzales*, 429 F.3d 733, 735 (7th Cir. 2005) (reporting restitution order that included sum for charge that was dismissed pursuant to plea agreement); *United States v. Lawrence*, 189 F.3d 838, 846–48 (9th Cir. 1999) (upholding restitution order which included “losses caused by acts for which the jury did not reach a verdict”). Restitution orders may reach victims not listed in the indictment, *United States v. Dickerson*, 370 F.3d 1330, 1339 (11th Cir. 2004), and may even reach beyond the statute of limitations of the criminal statute, *id.* at 1341–43.

¹⁵⁷ Supreme Court Rule 25.1 provides that the petitioner's brief is due forty-five days after the granting of certiorari. The Court can shorten or extend that time. SUP. CT. R. 25.5. The Court often shortens schedules when cases are to be heard the same Term as the grant. See Ben Winograd, *On the Docket and Briefing Schedules*, SCOTUSblog (Jan. 31, 2008, 12:30 PM), <http://www.scotusblog.com/blog/2008/01/31/on-the-docket-and-briefing-schedules/#more-6537> (“[T]he briefing schedules in nearly half the oral arguments [for the year

2010, with briefs due on February 23. As a result, there was less time after the grant to work with and consult lawyers working in the relevant substantive and procedural areas of law.¹⁵⁸ There was also less time to share drafts of the brief with such lawyers. It is of course also possible to develop arguments and collaborate in advance of a grant of certiorari. But for firms that file numerous petitions and handle multiple Supreme Court arguments, this work may be put to one side in favor of other Supreme Court work while waiting to see whether the Court takes the case.¹⁵⁹

C. *Implications for the Development of the Law*

By taking cases to the highest court in the land, the Supreme Court Pro Bono Bar has an enormous influence on the development of the law in substantive areas that are rarely the expertise of individual Supreme Court practitioners. As a result, the Supreme Court Pro Bono Bar presents a challenge for practice communities that seek to influence the law and its interpretation. Although practice communities might prefer to pursue non-litigation solutions or to delay litiga-

studied] were shorter than envisioned by the Court's own rules."'). The practical problem for the Court is that it operates on a seasonal schedule with a three-month recess, and all arguments are conducted by the end of April. As a result, cases heard in the spring are likely to have the shortest schedules. *See id.* ("[I]t is almost inevitable that attorneys arguing in the winter and spring will enjoy less preparation time than those arguing in the fall."'). In *Dolan*, the briefing schedule following any grant of certiorari depended on when the case would be conferenced by the Court, which in turn depended on when the opposing party filed its response to the petition. *See* SUP. CT. R. 15.3 (stating any brief in opposition must be filed, absent extensions, within thirty days of case being placed on docket); SUP. CT. R. 15.5 (stating Clerk must distribute petition to Court for consideration within ten days after brief in opposition is filed). The timing would have been more relaxed had the opposing party sought additional time and pushed the case over to the following Term of the Court. But the timing also would have been more relaxed had the petition been filed later so that the response was due even later; in that case, there would have been no possibility of a certiorari grant for that Term and the corresponding short briefing schedule to accommodate the Court's calendar.

¹⁵⁸ One of Dolan's lawyers reports that the team worked with a national federal defender back-up group. Telephone Interview with Jeffrey L. Fisher, *supra* note 149.

¹⁵⁹ For example, Akin Gump served as one of the co-counsel in *Dolan*. Akin Gump is listed as counsel on ten petitions for writ of certiorari between July and October of 2009. Petition for Writ of Certiorari, *Dolan v. United States*, 130 S. Ct. 2533 (2010) (No. 09-367); Petition for Writ of Certiorari, *People of Bikini v. United States*, 130 S. Ct. 2340 (2010) (No. 09-499); Petition for Writ of Certiorari, *Ferguson v. Holder*, 130 S. Ct. 1735 (2010) (No. 09-263); Petition for Writ of Certiorari, *Unus v. Aarons*, 130 S. Ct. 1137 (2010) (No. 09-294); Petition for Writ of Certiorari, *Office of Alaska Governor v. EEOC*, 130 S. Ct. 1054 (2010) (No. 09-384); Petition for Writ of Certiorari, *Phengsengkham v. United States*, 130 S. Ct. 810 (2009) (No. 09-526); Petition for Writ of Certiorari, *Magwood v. Culliver*, 130 S. Ct. 624 (2009) (No. 09-158); Petition for Writ of Certiorari, *Cardinal v. Metrish*, 130 S. Ct. 534 (2009) (No. 09-109); Petition for Writ of Certiorari, *USI MidAtlantic, Inc. v. William A. Graham Co.*, 130 S. Ct. 503 (2009) (No. 09-262); Petition for Writ of Certiorari, *Kelley v. Florida*, 130 S. Ct. 397 (2009) (No. 09-53).

tion on particular issues, they cannot afford to ignore the ways in which the Supreme Court Pro Bono Bar may set the agenda and shape the law in their fields.

1. *Implications for Timing and the Balance Between Litigation and Non-litigation Forms of Advocacy*

The Supreme Court Pro Bono Bar, like any lawyer who takes a client's case to the Supreme Court, can affect when an issue is presented to the Court. Practice communities that have a strategy for slower reform that is less reliant on the courts may have their plans upended by individual Supreme Court advocates. While this has always been true to some extent, the participation of many highly credentialed lawyers and law firms in this process makes the prospects for earlier Supreme Court review more likely.¹⁶⁰

Consider the highly publicized case of *Perry v. Schwarzenegger*, challenging Proposition 8, which bars California from recognizing same-sex marriages.¹⁶¹ *Perry* was taken on by a powerhouse team of Supreme Court litigators—David Boies and Ted Olson¹⁶²—against the wishes of the major gay rights advocacy groups.¹⁶³ These groups favored a strategy of building the case for gay marriage state-by-state through a combination of public education, legislative efforts, and targeted litigation.¹⁶⁴ Their approach has now been superseded by the Boies-Olson litigation. Indeed, because this case is being handled by Boies and Olson, it is more likely to lead to Supreme Court review.¹⁶⁵

By bringing suit in *Perry*, the Boies-Olson team preempted discussion of the best timing for broad constitutional litigation. If the case reaches the Supreme Court, the Court will consider the constitu-

¹⁶⁰ See Lazarus, *supra* note 1, at 1516 tbl.2, 1522–32 (arguing Court is more likely to accept certiorari on petitions prepared by experienced Supreme Court advocates and showing that increasing percentage of granted certiorari petitions are prepared by experienced Supreme Court advocates).

¹⁶¹ 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

¹⁶² *Id.* at 926.

¹⁶³ See, e.g., Michael A. Lindenberger, *Olson's Gay-Marriage Gambit: Powerful, but Risky*, TIME (June 4, 2009), <http://www.time.com/time/nation/article/0,8599,1902556,00.html> (reporting that gay rights advocates are apprehensive about testing conservative-dominated judiciary on issue of same-sex marriage); Stephanie Mencimer, *Gay Rights Groups to Ted Olson: Thanks, but No Thanks*, MOTHERJONES (May 28, 2009, 9:21 AM), <http://www.motherjones.com/politics/2009/05/gay-rights-groups-ted-olson-thanks-no-thanks> (reporting that gay rights organizations fear that *Perry* loss could be “a major setback not just to the gay marriage movement but to other established gay rights governing adoption and foster care, employment discrimination, and other matters.”).

¹⁶⁴ Cummings & NeJaime, *supra* note 8, at 1251–69 (describing preferred strategy of gay rights advocates).

¹⁶⁵ See Lazarus, *supra* note 1, at 1516 tbl.2, 1522–32 (arguing Court is more likely to accept certiorari on petitions prepared by experienced Supreme Court advocates).

tionality of a ban on gay marriage against the backdrop of the law and conditions as they exist at the time the case is decided and not at a future date when more states may embrace gay marriage in the courts and at the ballot box.

In *Perry*, as of the time of this writing, there is a sweeping district court decision upholding the right of gay couples to marry.¹⁶⁶ As this case proceeds on appeal, the court of appeals will face the choice of whether to uphold that decision, and if so, on what grounds. Litigators can influence the Ninth Circuit decision by the way they draft their briefs and argue the case. Commentators who favor a state-by-state approach¹⁶⁷ have suggested that the best outcome would be for the court of appeals to decide the case on narrower grounds that are limited to the State of California.¹⁶⁸ However, a litigator who wants the case to reach the Supreme Court might prefer a strategy that encourages the court of appeals to decide the case on broader grounds.¹⁶⁹

This kind of debate about when and whether to pursue Supreme Court review is hardly new. William Rubinstein has written about the fascinating struggles of Thurgood Marshall to control lawyers who wanted to go to the Supreme Court earlier and on different theories than he thought were best.¹⁷⁰ In light of the recognized shortcomings of litigation, many practice communities and public interest organizations have worked hard to develop mechanisms to achieve consensus on advocacy strategies.¹⁷¹ Through practice-based meetings, lawyers gather to discuss legal theories and the context in which they might

¹⁶⁶ *Perry*, 704 F. Supp. 2d at 991 (“Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.”).

¹⁶⁷ See Cummings & NeJaime, *supra* note 8, at 1251–69 (describing state-by-state approach of gay rights advocates).

¹⁶⁸ See Kenji Yoshino *Examines Proposition 8 Case in NYU Law Podcast Interview*, NYU LAW (Aug. 17, 2010), http://www.law.nyu.edu/news/YOSHINO_PROP8_PODCAST (advocating that Ninth Circuit decide issue on narrow grounds that California cannot discriminate between those who married before and after Proposition 8, but agreeing with interviewer that “Boies and Olson are raring for a fight” at Supreme Court). Whatever happens in *Perry*, the decision to pursue a strategy geared to the Supreme Court was a serious gamble that had the potential to cause long-term damage to the interests of the plaintiffs and those similarly situated.

¹⁶⁹ Cf. SUP. CT. R. 10 (stating that in deciding whether to accept certiorari, Court should consider whether case presents important issue of federal law).

¹⁷⁰ See William Rubinstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Litigation*, 106 YALE L.J. 1623, 1627–31 (1997) (discussing Marshall’s attempts to find best theory and case to challenge racially restrictive covenants, efforts to coordinate other attorneys through collaborative conferences, and need to adapt to attorney who refused to follow strategy).

¹⁷¹ See *id.* (discussing Marshall’s efforts); see also *infra* notes 338–42 and accompanying text (describing collaborative efforts by practice communities).

have the best chance of influencing legal developments in a way that they see as advantageous.

These broader practice area concerns may not match the individual interests of a litigant who is being offered pro bono services. But even in these situations, the client can benefit from a lawyer who works with the practice community. Consider *Montejo*¹⁷²: Close case analysis may have suggested that *Montejo*'s interest converged with the broader interests of the criminal defense practice community. The potential (and later realized) consequence of overturning *Jackson* was bad for *Montejo* and bad for other defendants.

More generally, thinking about the potential adverse consequences of a Supreme Court ruling for the client and others similarly situated can affect a client's initial choices about a case. These risks include not only losing the relief that the individual is seeking, but also being responsible for a decision that could set back the law on an issue that the client cares about. In *Perry*, for example, potential plaintiffs considering all of the potential risks of litigation undertaken with an eye to the Supreme Court might choose not to participate despite their powerful interest in marrying in their own state. They might, for example, have decided that they can take the less desirable route of marrying in a state that recognizes gay marriage while advocates pursue the state-by-state approach.¹⁷³ This solution, while less desirable than the outcome sought through litigation, might be more desirable to potential plaintiffs who are presented with the risks of an adverse result and the strong views of the community of advocates devoted to achieving long-term success on these issues. At the very least, one would presume that a lawyer pursuing a litigation route would have provided the clients with an opportunity to meet with gay rights advocates so that they could better understand the competing strategic analyses of how to secure a right to gay marriage.¹⁷⁴

¹⁷² See *supra* notes 61–79 and accompanying text (explaining facts and procedural posture of *Montejo*).

¹⁷³ See Cummings & NeJaime, *supra* note 8, at 1251–69 (describing state-by-state approach of gay rights advocates).

¹⁷⁴ In an article in the *New Yorker*, Margaret Talbot discusses the decisionmaking leading up to the *Perry* lawsuit. She describes Olson discussing the case with his wife, mother, son, and daughter, but not with seasoned gay rights organizations. See Margaret Talbot, *A Risky Proposal*, THE NEW YORKER, Jan. 18, 2010, at 40, 44. Olson determined that he was on the “right side” and that the case was “an intellectually challenging venture.” *Id.* In a forum at New York University School of Law, David Boies stated that the *Perry* lawyers discussed the litigation with gay rights groups that were opposed to the lawsuit. David Boies, Chairman, Boies, Shiller & Flexner LLP, *The Forum at N.Y.U. School of Law: Same-Sex Marriage: Whether, When and How*, NYU SCHOOL OF LAW (Apr. 21, 2010), http://law.nyu.edu/news/FORUM_LGBT (responding to question asked by Author). But it remains unclear whether the individual litigants had a full sense of the degree to

As another example, consider the recently-decided case of *Jerman v. Carlisle*.¹⁷⁵ In hindsight, this case was a great success for the practice community. It achieved a 7-2 victory for the rights of consumers in debt collection actions.¹⁷⁶ But the decision of whether to pursue Supreme Court review should be evaluated from the standpoint of the time when the decision was made to file the petition to the Court. *Jerman* involved debt collection practices and the availability of statutory damages. Based on the summary judgment papers, it appears that the defendants sent a foreclosure notice that improperly suggested that Jerman was required to file written objections to the debt.¹⁷⁷ Jerman hired a lawyer who informed the defendants that the debt was paid in full.¹⁷⁸ The foreclosure action was then dismissed.¹⁷⁹ Jerman filed suit under the Federal Fair Debt Collection Practices Act (FDCPA),¹⁸⁰ challenging the notice that had been used to start the foreclosure proceeding.¹⁸¹ She charged that the notice improperly stated that objections had to be made in writing,¹⁸² which violates the FDCPA.¹⁸³ Under the federal statute, if she showed that the debt practice was illegal, she would be able to seek \$1000 in statutory damages even if she failed to sustain any specific damages.¹⁸⁴ Jerman originally filed as a class representative, but the district court dismissed the class allegations, finding that the defendants could raise a defense that they made a bona fide error on an issue of law in requiring written objections.¹⁸⁵ Jerman filed an appeal, which lost, demonstrating a clear split in the circuits.¹⁸⁶ Her lawyer then contacted a Supreme Court Pro Bono practice that had approached him

which gay rights groups objected to the lawsuit or the risks that their names would be forever attached to a case with the potential to set back the rights of gays.

¹⁷⁵ 130 S. Ct. 1605 (2010).

¹⁷⁶ *Id.* at 1608.

¹⁷⁷ Motion for Summary Judgment at 2, *Jerman v. Carlisle*, 502 F. Supp. 2d 686 (N.D. Ohio 2007) (No. 06-cv-01397); Plaintiff's Opposition to Motion for Summary Judgment at 10, *Jerman*, 502 F. Supp. 2d 686 (No. 06-cv-01397).

¹⁷⁸ *Jerman v. Carlisle*, 538 F.3d 469, 471 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1605 (2010).

¹⁷⁹ *Id.*

¹⁸⁰ 15 U.S.C. § 1692 (2006).

¹⁸¹ *See id.* § 1692k(a) (detailing liability of debt collectors).

¹⁸² Plaintiff's Opposition to Motion for Summary Judgment, *supra* note 177, at 10.

¹⁸³ *Id.* at 10–11. Because this question was not raised on appeal, the Supreme Court expressed no view, *Jerman*, 130 S. Ct. at 1610 & n.3, and instead addressed the question of whether the FDCPA's bona fide error defense, § 1692k(c), applies to mistakes of law, 130 S. Ct. at 1624.

¹⁸⁴ § 1692k(a)(2)(A) (setting debt collector liability as sum of actual damages and "such additional damages as the court may allow, but not exceeding \$1,000").

¹⁸⁵ *Jerman v. Carlisle*, 502 F. Supp. 2d 686, 694 (N.D. Ohio 2007), *aff'd*, 538 F.3d 469 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1605 (2010).

¹⁸⁶ *See Jerman*, 130 S. Ct. at 1610 (acknowledging circuit split).

on an earlier case.¹⁸⁷ The Court granted certiorari at the end of the 2008 Term.¹⁸⁸

The issues in *Jerman* are important, especially in light of the current massive wave of foreclosures.¹⁸⁹ Foreclosure actions that ignore proper procedures have devastating consequences, especially for those who are unrepresented. While the foreclosure action against Jerman was dismissed, the ability of law firms to hide behind a bona fide legal error defense could have significant implications for homeowners who do not hire lawyers in time to contest illegal practices. Assuming that there were no other obvious vehicles with which to take the same issue to the Supreme Court, the question for Ms. Jerman was whether to pursue her chance at a Supreme Court resolution or allow her claim to expire while the issue continued to percolate in the lower courts.

It is very possible that in contrast to Ms. Jerman, other potential petitioners in future cases would be able to show tangible harm. If that is true, then Ms. Jerman's case may not have been the most favorable vehicle for presenting the issues to the Court. In counseling Ms. Jerman about these issues, a lawyer could explain that Ms. Jerman's case is not the best for a victory in the Supreme Court. Ms. Jerman would then have to decide how to balance her possible gain of \$1,000 and the chance of a timely and successful vindication of consumer rights against the risk of making bad law on consumer protections that might otherwise reach the Court in a more favorable context. Ms. Jerman might or might not agree to go ahead with the case, but she would be more fully informed about the implications of seeking Supreme Court review.

The attorney who referred Jerman's case for Supreme Court representation believes it would have been inappropriate to have such a discussion with the client.¹⁹⁰ As he points out, there is a duty to provide advice to a client that is not influenced by the interests of third parties.¹⁹¹ But keeping the client from understanding the broader context of the case prevents her from weighing the significance of those

¹⁸⁷ Telephone Interview with Stephen R. Felson, *supra* note 33.

¹⁸⁸ See *Jerman v. Carlisle*, 129 S. Ct. 2863 (2009) (granting certiorari on June 29, 2009).

¹⁸⁹ See David Streitfeld, *Number of Home Foreclosures Drops, but Risk of Delinquency Deepens*, N.Y. TIMES, Aug. 27, 2010, at B3 (describing mortgage delinquency and foreclosure rates and stating that even with drop in foreclosures in second quarter of 2010, up to four million households could lose their homes).

¹⁹⁰ Telephone Interview with Stephen R. Felson, *supra* note 33.

¹⁹¹ See, e.g., OHIO R. PROF'L CONDUCT 1.7(a) (2010) (stating that lawyer creates conflict of interest when there is substantial risk that lawyer's ability to carry out appropriate course of action for current client will be materially limited by lawyer's responsibilities to third party).

interests in deciding how to proceed. Client-centered representation depends on providing the client with this choice and not assuming that the client prefers a chance at a personal victory in court even if that victory is likely to harm others.¹⁹² In the end, the gamble in *Jerman* was a success, and the Court ruled that the bona fide error defense does not apply to legal errors.¹⁹³ However, the question remains whether it was the right gamble to take at the outset.

Moreover, one can also ask whether it made sense to offer free pro bono resources in this particular case. If the risks are substantial, maybe the potential gain from the litigation is insufficient. When lawyers consult with each other in advance of taking on representation, these issues can be analyzed before the firm assumes representation of the client and the choice to proceed with the litigation becomes the client's. Otherwise, the decision to take on the case serves to shape the development of the law without any input from those who practice regularly in that field.

2. *Implications for Post-Supreme Court Advocacy*

In most areas of the law, the final judicial determination on an issue of law does not close the question. In any statutory case, the Court's resolution of the legal issue is subject to override by Congress. Furthermore, when a case involves administrative regulations, the agency may simply change them. These possibilities mean that practice communities have substantial work to do regardless of the outcome in the Supreme Court.

The Supreme Court Pro Bono Bar, however, does not sign up for the full complement of post-decision advocacy. Its job is generally over when the case is decided. If a claim wins and generates political heat, who will stop a legislative overruling? If the claim loses, who will turn to Congress? Unlike a situation in which the agenda for resolution of legal claims is set by an advocacy community, which hopefully is thinking about the issue in broader terms and is prepared for such follow-through, it is not part of the job definition of the Supreme Court Pro Bono Bar to undertake this follow-up work.

¹⁹² Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 710–23 (2007) (describing empirical study where clients defined their interests in part in terms of ensuring that misconduct never happened again, while lawyers described clients' interests in monetary terms).

¹⁹³ 130 S. Ct. 1605, 1624 (2010). Although six Justices joined the opinion and another joined the judgment, *id.* at 1608, the dissenters made powerful arguments that show the riskiness of the Supreme Court venture. Justice Kennedy, in a dissent joined by Justice Alito, argued that the Court had adopted a questionable interpretation of the statute that aligned the law with those who would enrich themselves through litigation at the expense of lawyers who followed ethical standards. *Id.* at 1628 (Kennedy, J., dissenting).

The Lilly Ledbetter case illustrates the demands of post-Supreme Court advocacy.¹⁹⁴ Ledbetter sought and obtained certiorari on tolling rules for an Equal Pay Act claim. She lost 5-4.¹⁹⁵ After this loss, there was substantial advocacy to reverse the decision, which ultimately led to passage of the Lilly Ledbetter Fair Pay Act of 2009.¹⁹⁶ Although the legislative change did nothing for Ms. Ledbetter, it partially overturned the rule that the Court had adopted. It did so, however, through the deployment of substantial advocacy resources.

The *Ledbetter* case became a cause célèbre and led to relatively quick congressional action.¹⁹⁷ The case was highly sympathetic, attracted substantial media attention,¹⁹⁸ and ultimately became a priority for legislative action. This end result required a great deal of effort on the part of many people who made the issue a priority.¹⁹⁹ But none of the qualities that were necessary for obtaining a legislative override can be expected to be prominent in the initial selection of cases under the competitive Supreme Court Pro Bono model.

The post-*Ledbetter* advocacy campaign is not a likely result for other statutory issues. With criminal law, for example, studies show that congressional overruling is one-sided. Congress will overturn

¹⁹⁴ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). This case was handled by the Stanford Supreme Court Clinic and Howe and Russell. *Id.* at 620.

¹⁹⁵ *Id.* at 620.

¹⁹⁶ 42 U.S.C. § 2000e-5 (Supp. 2010).

¹⁹⁷ The Lilly Ledbetter Fair Pay Act of 2007 was introduced on June 22, 2007, H.R. 2831, 110th Cong. (2007), was reported out of committee on July 18, 2007, H.R. REP. NO. 110-237 (2007), and passed the House on July 31, 2007, 110 CONG. REC. H9226 (daily ed. July 31, 2007). The bill was the first piece of legislation signed into law by President Obama. See Laura Meckler, *Obama To Reverse Bush Labor Policies*, WALL ST. J., Jan. 30, 2009, at A3 (describing signing ceremony as “high-profile”).

¹⁹⁸ See, e.g., Editorial, *Clueless Court: Bias Ruling Out of Touch with Workplace*, LEXINGTON HERALD-LEADER, May 31, 2007, at A10 (“Ledbetter must live in a different world from the five Supreme Court justices who ruled against her, if not a different dimension.”); Editorial, *Restoring Civil Rights*, N.Y. TIMES, Jan. 30, 2008, at A22 (describing *Ledbetter* case as “one of the most troubling” recent Supreme Court rulings that has “gutt[ed]” equal rights laws).

¹⁹⁹ See, e.g., *Legal Community—Sign On in Support: Ledbetter Fair Pay Act*, NAT’L WOMEN’S LAW CTR., http://action.nwlc.org/site/Survey?SURVEY_ID=2240&ACTION_REQUIRED=URI_ACTION_USER_REQUESTS (last visited Mar. 1, 2011) (urging readers to sign action letter in support of Lilly Ledbetter Act); *Success Stories: Lilly Ledbetter Fair Pay Act*, NAT’L P’SHIP FOR WOMEN & FAMILIES, http://www.nationalpartnership.org/site/PageServer?pagename=impact_story_fairpay (last visited Mar. 1, 2011) (celebrating passage of Act after year-long campaign). For those who work on pay equity issues, it is not clear how the *Ledbetter* case and its partial legislative fix fit into their broader campaign for pay equity. E-Mail from Sarah E. Burns, Professor of Clinical Law, N.Y. Univ. Sch. of Law and former Legal Dir. of the NOW Legal Def. & Educ. Fund, to author (Oct. 30, 2010, 18:30 EST) (on file with the *New York University Law Review*); see also *The Paycheck Fairness Act*, NAT’L WOMEN’S LAW CTR., http://www.nationalpartnership.org/site/PageServer?pagename=issues_fairness_fairpay_PFA (last visited Mar. 1, 2011) (describing ongoing advocacy for pay equity through Paycheck Fairness Act).

decisions that are favorable to defendants but not those that are unfavorable.²⁰⁰ One can expect the same with many areas of law where interest groups are unlikely to be able to mobilize to overturn unfavorable rulings or to protect against reversal of good rulings. In addition, if the initial decision to take a case to the Supreme Court does not anticipate this process, the petitioner might not serve as the kind of “poster child” that Ledbetter became. Legislation is difficult, and by definition, political. What could be accomplished in the name of Lilly Ledbetter probably could not have been accomplished for just any failed Equal Pay petitioner whose case might have been pursued to resolve a circuit split.

Furthermore, even if it is possible to rally congressional attention to override or protect a Supreme Court decision, the very existence of the decision requires that someone be prepared to do the rallying. Absent coordination with the advocacy community in advance of seeking certiorari, it is impossible to know whether there will be someone there to defend a victory or pick up the pieces after a loss. A Supreme Court practice that is seeking to maximize merits cases is unlikely to play that role. It is instead likely to be on its way to the next issue when the follow-up advocacy on its past cases needs to be done.

III

A CLOSER LOOK AT A SUPREME COURT PRO BONO CASE: *FERNANDEZ-VARGAS V. GONZALES*

The previous sections of this Article separately examined the implications of a race for merits cases on how Supreme Court Pro Bono Practices choose cases and whether and how they assess alternative advocacy options. This section brings that discussion together by looking at a single case that was identified by a law firm and litigated in the Supreme Court. In this case, *Fernandez-Vargas v. Gonzales*,²⁰¹ both the private counsel and the practice community missed opportunities to achieve a better result for the client and others similarly situated. Seizing these opportunities might not have made a difference.

²⁰⁰ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 352 (1991) (“[C]riminal defendants and suspects, as well as the poor, have had virtually no success in obtaining overrides.”); see also Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1720 (2006) (noting that intervention by Congress on sentencing issues is likely to yield results that are even harsher than those in state political processes); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 565 (2001) (noting that in criminal law, interest groups are all on one side).

²⁰¹ 548 U.S. 30 (2006).

But it is nonetheless valuable to consider the choices that the lawyers faced. In the spirit of reflective practice, this section looks back at what was done at various stages of the representation and asks whether there are lessons that can be drawn about how the firms and advocacy organizations could have acted differently.²⁰²

A. Background

Immigration law has long been constructed around rules that subject individuals to deportation and systems for granting relief from deportation.²⁰³ Prior to 1996, this combination of deportability and relief provisions extended to people who had been ordered deported in the past and had since reentered the country.²⁰⁴ In these situations, the immigrant could seek various forms of relief. One such form was adjustment of status to lawful permanent residence based on marriage to a United States citizen.²⁰⁵

In 1996, Congress dramatically changed the law governing removal.²⁰⁶ I have elsewhere chronicled the coordinated advocacy in response to the elimination of a form of relief from removal for lawful permanent residents with past convictions.²⁰⁷ Alongside and somewhat after this initial litigation, advocates challenged a provision in the 1996 law that changed the rules that applied when a prior deportation order was reinstated following reentry into the United States.²⁰⁸ These new rules eliminated review by an immigration judge and any relief for those who had previously been deported and had reentered the United States.²⁰⁹ Typically, these cases involved people who had been deported because they lacked immigration status, had subse-

²⁰² See Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195, 213 (2007) (describing pedagogy for learning from experience in practice).

²⁰³ See generally *INS v. St. Cyr*, 533 U.S. 289, 293–97 (2001) (describing evolution of forms of discretionary relief from deportation).

²⁰⁴ See 8 U.S.C. §§ 1252(f), 1254 (1994) (repealed 1996) (allowing for reinstatement of only some deportation orders and permitting those whose orders were reinstated to seek discretionary relief).

²⁰⁵ 8 U.S.C. § 1255(e) (1994) (repealed 1996).

²⁰⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18 U.S.C.) [hereinafter IIRIRA].

²⁰⁷ Nancy Morawetz, *INS v. St. Cyr: The Campaign To Preserve Court Review and Stop Retroactive Deportation Laws*, in IMMIGRATION STORIES 279 (David A. Martin & Peter H. Schuck eds., 2005) (describing litigation campaign leading up to *INS v. St. Cyr*).

²⁰⁸ See *infra* note 216 (identifying circuit court cases that challenged retroactivity of deportation reinstatement provision).

²⁰⁹ See 8 U.S.C. § 1231(a)(5) (2006) (providing that when order is reinstated, it "is not subject to being reopened or reviewed" and "the alien is not eligible and may not apply for any relief under this Chapter").

quently reentered, and would have been eligible for relief under pre-1996 law either because of marriage to a United States citizen²¹⁰ or because they had resided in the United States for a sufficient length of time after their reentry and would suffer hardship if deported.²¹¹

There was considerable litigation about the scope of the new law eliminating both immigration court review and forms of relief for persons whose deportation orders were reinstated.²¹² National advocates followed this litigation and provided support to some of the lawyers.²¹³ The Ninth Circuit, in which almost half of reinstatement orders occurred,²¹⁴ held that the new rules could not be applied to those who reentered the country prior to 1996.²¹⁵ Other circuits split, some agreeing with the Ninth Circuit, concluding that the new rules could not be applied to those with pre-1996 reentries, and some finding that the new rules applied so long as the individual did not have certain vested interests as of 1996 (such as an interest in “adjustment” relief due to marriage to a citizen and an application for adjustment of status to lawful permanent residence).²¹⁶

²¹⁰ 8 U.S.C. § 1255(e) (1994) (amended 2000) (providing for adjustment of status based on marriage).

²¹¹ See 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996) (providing for suspension of deportation for those with seven years of residence who could show that deportation would cause extreme hardship).

²¹² See *infra* note 216 (identifying circuit splits regarding scope of new law).

²¹³ Telephone Interview with Trina A. Realmuto, Co-Counsel for Petitioners in *Castro-Cortez v. INS*, Attorney, Nat’l Immigration Project of the Nat’l Lawyers Guild (Mar. 4, 2010).

²¹⁴ *Id.*

²¹⁵ *Castro-Cortez v. INS*, 239 F.3d 1040 (9th Cir. 2001) (holding that Congress did not intend for reinstatement provision to apply to individuals whose reentry occurred prior to its enactment).

²¹⁶ In addition to the Ninth Circuit, the Third, Sixth, and Eighth Circuits did not require a showing of a pre-enactment application for relief. See *Dinnall v. Gonzales*, 421 F.3d 247, 250–51, 262 (3d Cir. 2005) (barring application of statute to person who married and sought adjustment after April 1, 1997, effective date of statute); *Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001) (barring application of statute to those who reentered prior to April 1, 1997); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 866–67 (8th Cir. 2002) (barring application of statute to person who married United States citizen before 1996 but did not apply for adjustment until after April 1, 1997).

The First, Seventh, and Eleventh Circuits required evidence of a pending application. Compare *Arevalo v. Ashcroft*, 344 F.3d 1, 4 (1st Cir. 2003) (barring application of statute to person whose reentry and application for relief occurred prior to April 1, 1997), with *Lattab v. Ashcroft*, 384 F.3d 8, 13, 17 (1st Cir. 2004) (allowing application of statute to person who reentered prior to April 1, 1997, but did not file application for relief until two years later); compare *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799, 809–10 (7th Cir. 2005) (barring application of statute to person who had both reentered United States and applied for adjustment of status prior to April 1, 1997), with *Labojewski v. Gonzales*, 407 F.3d 814, 823 (7th Cir. 2005) (finding statute can be applied to individuals who reentered United States before IIRIRA’s effective date but did not apply for adjustment of status until after effective date); see *Sarmiento Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004)

The case that ultimately reached the Supreme Court concerned Humberto Fernandez-Vargas. Fernandez-Vargas first entered the United States in the 1970s. He was deported on more than one occasion, the latest of which was in 1981.²¹⁷ He reentered in 1982 and remained in the United States, where he owned his own trucking company, fathered a child who was a U.S. citizen, and married the child's mother.²¹⁸ Fernandez-Vargas's wife applied for her husband to become a lawful permanent resident based on their marriage.²¹⁹ The couple paid the required \$1000 fee for adjusting status after having lacked legal status.²²⁰ Fernandez-Vargas was then called to the immigration agency office for an interview. Instead of obtaining lawful permanent residency, however, Fernandez-Vargas was arrested.²²¹ The immigration agency reinstated his 1981 deportation order.²²²

Fernandez-Vargas's lawyer, Chris Keen, filed a petition for review to the Tenth Circuit challenging application of the reinstatement procedure to Fernandez-Vargas on the ground that he had reentered before 1996, when the reinstatement law was enacted.²²³ In September 2004, while his petition was pending, Fernandez-Vargas was deported.²²⁴ On January 12, 2005, the Tenth Circuit ruled that the 1996 change in the law applied regardless of the date of reentry.²²⁵

Sometime after the Tenth Circuit's decision, David Gossett at Mayer Brown contacted Chris Keen to offer to handle the case at the Supreme Court level.²²⁶ As reported by Keen, the offer was condi-

(finding that statute cannot be applied to individual who reentered United States and applied for adjustment of status prior to April 1, 1997).

The Fourth and Fifth Circuits rejected retroactivity arguments where there was no showing of pre-1996 eligibility for relief, but had not reached the question whether such a showing would be sufficient to demonstrate retroactive effect. *See Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 110 (4th Cir. 2001) (allowing application of statute to person who had not applied for relief prior to April 1, 1997); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 294, 302 (5th Cir. 2002) (allowing application of statute to person who had not applied for any form of relief prior to April 1, 1997, and did not appear to be eligible for any relief).

²¹⁷ *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006).

²¹⁸ Brief for Petitioner at 5, *Fernandez-Vargas*, 548 U.S. 30 (No. 04-1376).

²¹⁹ *Id.*

²²⁰ *Id.* at 5–6. A person who has resided in the United States unlawfully but who is otherwise eligible to adjust status can pay a special \$1000 fee and avoid bars to admission based on past unlawful presence, provided the application for adjustment was filed before April 30, 2001. 8 U.S.C. § 1255(i) (2006).

²²¹ Brief for Petitioner, *supra* note 218, at 6.

²²² *Id.*

²²³ *Id.* at 7; Telephone Interview with J. Christopher Keen, Counsel for Fernandez-Vargas, Managing Attorney, Keen Law Offices, LLC (July 6, 2009).

²²⁴ Brief for Petitioner, *supra* note 218, at 6.

²²⁵ *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 891 (10th Cir. 2005), *aff'd sub nom. Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422 (2006).

²²⁶ Telephone Interview with J. Christopher Keen, *supra* note 223.

tioned on Mayer Brown arguing the case. Keen saw this as an easy decision for his client. He saw a possibility for Supreme Court victory and no downside to agreeing to free representation.²²⁷

Gossett proceeded to prepare the petition. The petition was filed without any extensions.²²⁸ Gossett does not recall reaching out to learn about other cases but remembers considering that Fernandez-Vargas's case was a good vehicle for testing the issues²²⁹: Gossett reasoned that Fernandez-Vargas had reentered long ago when there was more of a revolving border, he had established a business, married a U.S. citizen, and fathered a U.S. citizen.²³⁰ Looking back, Gossett doubted that it would have been appropriate to search for another vehicle.²³¹

The lawyers do not recall why there was no petition for rehearing or rehearing en banc made to the Tenth Circuit.²³² Various issues, such as timing, likelihood of success, and the views of the local lawyer could have played a role.²³³

Once the petition was filed, Gossett reached out to lawyers affiliated with advocacy groups to seek amicus support for the petition.²³⁴ No group was interested in filing an amicus brief.²³⁵ Instead, immigration advocates tried to persuade Gossett that the case should not be brought before the Court.²³⁶

Following the petition for certiorari, the government sought four extensions.²³⁷ At first, the Solicitor General's office had not assigned a lawyer to the case. Later there was some indication that the government might acquiesce in an award of certiorari.²³⁸ Ultimately, on September 27, 2005, the government filed its brief agreeing that it

²²⁷ *Id.*

²²⁸ The petition was filed on April 12, 2005. *Fernandez-Vargas*, 394 F.3d 881, *petition for cert. filed*, 73 U.S.L.W. 3632 (U.S. Apr. 12, 2005) (No. 04-1376). An examination of the docket reveals no extensions were requested by Fernandez-Vargas's counsel. *See Docket No. 04-1376*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/04-1376.htm> (last visited Mar. 1, 2011).

²²⁹ Telephone Interview with David M. Gossett, Partner, Mayer Brown (July 14, 2009).

²³⁰ *See supra* note 218 and accompanying text.

²³¹ Telephone Interview with David M. Gossett, *supra* note 229.

²³² *See supra* notes 52–56 and accompanying text (discussing petitions for rehearing).

²³³ Telephone Interview with David M. Gossett, *supra* note 229.

²³⁴ *Id.*

²³⁵ Telephone Interview with Trina A. Realmuto, *supra* note 213.

²³⁶ *Id.*

²³⁷ The government's response originally was due on May 16, 2005. Extensions moved the time to reply to June 15, July 15, September 6, and finally September 27. *See Docket No. 04-1376*, *supra* note 228.

²³⁸ Telephone Interview with David M. Gossett, *supra* note 229.

would be appropriate to grant certiorari.²³⁹ In the interim, it appears that Fernandez-Vargas's lawyers made no efforts to seek alternative forms of relief, such as the filing of a new application for a visa to return to the United States. In addition, advocacy groups did not prepare for the possibility of a grant of certiorari. Although Supreme Court counsel notified other advocates after the government's reply brief that the Solicitor General's acquiescence in an award of merits review increased the chances of a grant of certiorari, neither that counsel nor the immigration advocates began the process of notifying interested groups and identifying possible authors of amicus briefs.²⁴⁰

After certiorari was granted, immigration advocates convened to discuss possible amicus briefs. The American Immigration Law Foundation agreed to take the lead on preparing an amicus brief.²⁴¹ Other advocates sought authors for an amicus brief that would provide a better sense of the people affected by the issues. The timing, however, was very tight. Because the case had been granted at the end of October, the parties were operating on a briefing schedule that could not be significantly extended.²⁴² They very quickly faced the difficulty of recruiting authors for briefs during the holiday season.²⁴³ As a result only one amicus brief was filed, and no brief presented actual examples of the range of people affected by the legal issues in the case.²⁴⁴

The Court heard argument on March 22, 2006.²⁴⁵ At the argument, Justice Breyer probed the attorneys about the practical implications of the 1996 law for the choices available to Fernandez-Vargas just after the law was enacted. Justice Breyer pondered what would

²³⁹ Brief for the Respondent at 23, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (No. 04-1376).

²⁴⁰ Telephone Interview with Trina A. Realmuto, *supra* note 213.

²⁴¹ *Id.*; *see also* Brief of American Immigration Law Foundation et al. as Amici Curiae Supporting Petitioner, *Fernandez-Vargas*, 548 U.S. 30 (No. 04-1376) (listing American Immigration Law Foundation as lead counsel).

²⁴² The Court granted certiorari on October 31, 2005. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881 (10th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3272 (U.S. Oct. 31, 2005) (No. 04-1376). The amicus briefs were originally due by December 15. *See* SUP. CT. R. 25.1 (providing petitioner with forty-five days after granting of certiorari to submit brief). It is difficult to obtain an extension of the briefing schedule on a case granted in the fall. *See supra* note 157 (explaining Supreme Court briefing schedules). Fernandez-Vargas received an extension of less than a week. *See Docket No. 04-1376, supra* note 228 (providing extension until December 22). The clinic that I teach, the Immigrant Rights Clinic at New York University School of Law, was approached about writing a brief that would provide a broader context. We were not in a position to do so, given the timing of the case.

²⁴³ Telephone Interview with Trina A. Realmuto, *supra* note 213.

²⁴⁴ Brief of American Immigration Law Foundation et al., *supra* note 241 (presenting legal arguments in support of petitioner and presenting immigration law context of case).

²⁴⁵ *See Docket No. 04-1376, supra* note 228.

have happened if Fernandez-Vargas had gone to a lawyer in 1996 and asked for advice in light of the new law. He then asked whether the best advice would have been to tell Fernandez-Vargas to return to Mexico and pursue legal options for immigrating.²⁴⁶ If, in fact, Fernandez-Vargas could have pursued such options, then, Justice Breyer suggested, the legal question was whether it was fair for him to face the consequences that the 1996 law imposed on his choice to stay in the United States rather than pursue a visa to return to the United States from his country of origin.²⁴⁷

The Court devoted quite a bit of time to Justice Breyer's question. At argument, Gossett explained that Fernandez-Vargas would have faced a five-year bar to return had he left the country in 1996.²⁴⁸ The government debated this claim, but there was no question that Fernandez-Vargas could have eventually returned on a visa once he married the mother of his child.²⁴⁹

On June 22, 2006, the Court issued its opinion, authored by Justice Souter. The opinion was joined by seven Justices. Only Justice Stevens dissented. The Court found that Fernandez-Vargas was sub-

²⁴⁶ Transcript of Oral Argument at 19–23, 38–42, *Fernandez-Vargas*, 548 U.S. 30 (No. 04-1376), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-1376.pdf (last visited Mar. 1, 2011).

²⁴⁷ *Id.* at 39–40 (suggesting impermissibility of retroactive effect might be determined, in part, by harshness of consequences).

²⁴⁸ Gossett at first stated that the bar would have been ten to twenty years, *id.* at 22, but revised his comments during rebuttal to say that there would be a five-year bar, *id.* at 54. The five-year bar was the correct time period had Fernandez-Vargas left prior to the effective date of IIRIRA. Under pre-IIRIRA law, Fernandez-Vargas would have been inadmissible because of his prior deportation. 8 U.S.C. § 1182(a)(6)(B)(i) (1994) (repealed 1996) (stating that alien who has been deported and seeks admission within five years is excludable); 8 C.F.R. § 212.2(a) (1997) (requiring person who has been deported to stay outside country for five consecutive years); see also Letter from David M. Gossett, Esq., Mayer, Brown, Rowe & Maw LLP, to William K. Suter, Clerk, U.S. Supreme Court (Mar. 30, 2006) (on file with the *New York University Law Review*) (writing to correct government's interpretation of law and reiterating Fernandez-Vargas would be deemed inadmissible for five years).

²⁴⁹ At argument, the government asserted that Fernandez-Vargas would not have faced any presumptive bar to his return had he left the United States in 1996. Transcript of Oral Argument, *supra* note 246, at 40–42. The government later submitted a letter restating this view. Letter from Paul D. Clement, Solicitor General, U.S. Dep't of Justice, to William K. Suter, Clerk, U.S. Supreme Court (Mar. 29, 2006) (on file with the *New York University Law Review*). But after a letter from Fernandez-Vargas's lawyer explaining that there was a statutory bar to return for those who had previously been deported, see Letter from David M. Gossett to William K. Suter, *supra* note 248, the government conceded that Fernandez-Vargas would have faced a presumptive five-year bar to his return. Letter from Paul D. Clement, Solicitor General, U.S. Dep't of Justice, to William K. Suter, Clerk, U.S. Supreme Court (Apr. 17, 2006) (on file with the *New York University Law Review*). The government argued, however, that he would have faced fewer consequences had he left and reapplied for admission in 1996 rather than waiting to be arrested and deported under the reinstatement rule. *Id.*

ject to the 1996 law because he made the choice to continue to remain in the United States after its enactment.²⁵⁰

Prior to and during the Supreme Court litigation, neither Supreme Court counsel nor local counsel pursued any alternative mechanisms (besides a victory in the Supreme Court) to allow Fernandez-Vargas to rejoin his family in the United States. In particular, no one began the process of obtaining the necessary waivers to allow Fernandez-Vargas to seek a visa at the consulate.²⁵¹ Supreme Court counsel recalls that this was to be handled by the local counsel,²⁵² and local counsel recalls that he was waiting for the outcome of the Supreme Court litigation.²⁵³ In any event, it appears that such alternatives were not part of the scope of the representation taken on by Supreme Court counsel.

B. What Could Have Been Achieved Through Attention to Alternative Remedies and Coordination?

It is always easier to look back than to look forward. But it is nonetheless useful to ask what might have happened had lawyers approached the case from the perspectives discussed in this Article.²⁵⁴ In this case, with the goal of reuniting Fernandez-Vargas in the United States with his wife and son, the question is not whether Fernandez-Vargas should have abandoned his claim, but whether there were other ways of approaching his representation that might have led to a better result for both him and others affected by the reinstatement law. The observations suggested below might have been considered and rejected. They are offered here as illustrations of the types of approaches that should be considered.

²⁵⁰ Fernandez-Vargas v. Gonzales, 548 U.S. 30, 32, 42–43 (2006).

²⁵¹ As a person married to a U.S. citizen, Fernandez-Vargas was eligible for an immigrant visa. 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (stating that spouses of U.S. citizens are not subject to numerical immigration limitations). He faced two potential bars to admission. The first was the five-year bar to admission for a person who has been deported. *Id.* § 1182(a)(9)(A). This bar could be waived by the Attorney General. *Id.* § 1182(a)(9)(A)(iii). The second was the bar for remaining in the United States for more than a year after the effective date of the 1996 laws. *Id.* § 1182(a)(9)(B)(i)(II). This bar could also be waived. *Id.* § 1182(a)(9)(B)(v). *See generally* Jan M. Pederson, *Strategic Lawyering at Consular Posts*, in *VISA PROCESSING GUIDE AND CONSULAR POSTS HANDBOOK: PROCESS AND PROCEDURE AT U.S. CONSULATES AND EMBASSIES 3* (Charles M. Miller, Jan M. Pederson & Douglas S. Weigle eds., 2009–10), <http://www.aila.com/content/fileviewer.aspx?docid=30547&linkid=215126> (reviewing procedures for applying for visas).

²⁵² Telephone Interview with David M. Gossett, *supra* note 229.

²⁵³ Telephone Interview with J. Christopher Keen, *supra* note 223.

²⁵⁴ *See supra* Part II.A (presenting analyses that lawyer should conduct before seeking Supreme Court review).

1. Pursuit of Waivers and Consular Processing

Before his case was decided by the Tenth Circuit, Fernandez-Vargas had already been deported. He was free, however, to petition to re-immigrate as the spouse of a U.S. citizen. To do that, he required two waivers: One to waive his past unlawful presence, and one to waive his removal order.²⁵⁵ Both waivers would have been challenging, but not impossible, to obtain.²⁵⁶ Fernandez-Vargas could have benefited from the fact of his long residence, his business, his marriage to a citizen, and his effort to rejoin his U.S citizen son.²⁵⁷ In addition, over time, his case gathered news attention that could have been helpful in achieving a positive resolution.²⁵⁸

Fernandez-Vargas's lawyers may have been skeptical about these alternatives. They require an exercise of discretion and are not easy to obtain. Furthermore, Fernandez-Vargas would not have had the opportunity to go before an immigration judge and show why discretion should be exercised, nor could he have sought judicial review.²⁵⁹ Nonetheless, consular processing provided a route to full relief for Fernandez-Vargas and could have allowed him to return to the United

²⁵⁵ Under the "unlawful presence" bar, a person who is present for a year without authorization faces a ten-year bar to readmission. 8 U.S.C. § 1182(a)(9)(B)(i) (2006). A person who has been deported faces a separate bar to readmission, which varies from five years to, if the person was convicted of an "aggravated felony," a lifetime bar. *Id.* § 1182(a)(9)(A). Fernandez-Vargas faced a ten-year bar due to his removal and a ten-year bar due to his unlawful presence. Both bars are subject to waivers. *Id.* § 1182(a)(9)(A)(iii) (providing for waiver of bar based on removal); *Id.* § 1182(a)(9)(B)(v) (providing for waiver of bar based on unlawful presence).

²⁵⁶ Data from the State Department indicates that in 2005, there were 452 cases in which a person was found ineligible to immigrate based on a prior removal order and that in 101 (over one-fifth) of the cases the person received a waiver. Similarly, there were 6747 cases where the individual was ineligible to immigrate due to the unlawful presence bar, and in 1973 (over one-quarter) of the cases the person received a waiver. *Immigrant and Nonimmigrant Visa Ineligibilities*, U.S. DEPARTMENT OF STATE, <http://www.travel.state.gov/pdf/FY05tableXX.pdf> (last visited Mar. 1, 2011) (reporting preliminary data for 2005 fiscal year).

²⁵⁷ See *supra* notes 218–20 and accompanying text (explaining facts of case).

²⁵⁸ The first article about Fernandez-Vargas's case predated the grant of certiorari. See Dennis Romboy, *Outcast in Mexico, Outlaw in Utah*, DESERET NEWS, Oct. 9, 2005, at A01, available at <http://www.deseretnews.com/article/615152228/Outcast-in-Mexico-outlaw-in-Utah.html> (last visited Mar. 1, 2011). Coverage continued after the grant of certiorari. See, e.g., Dennis Romboy, *No Home for the Holidays*, DESERET NEWS, Dec. 17, 2005, at A01, available at <http://www.deseretnews.com/article/635169430/No-home-for-the-holidays.html> (last visited Mar. 1, 2011).

²⁵⁹ See Deborah J. Notkin, *Immigrant Visa Processing and Adjustment of Status*, in BASIC IMMIGRATION LAW 137, 144–45 (Cyrus D. Mehta ed., 2010) (explaining that consulate visa refusals are grounded in statutes and regulations and that visa denial is "generally non-reviewable in an appellate body").

States.²⁶⁰ Consular processing could have been pursued from the start of the case, throughout the many extensions sought by the government, and during the merits phase of the case. It also might have provided a method for settling the case in a way that was advantageous to Fernandez-Vargas. Furthermore, had it failed, by demonstrating the difficulty of obtaining a visa after leaving the United States, the failure could have been used to show the real consequences of applying the reinstatement rule retroactively.²⁶¹ The market dynamics of Supreme Court Pro Bono practice raise the possibility that the lawyers were inattentive to these alternatives because they did not fit with their firm's objectives in taking on the case. It is also possible that the issues were not explored fully because they involved technical aspects of immigration practice with which the lawyers were unfamiliar.

2. *Pursuit of Rehearing and Rehearing En Banc*

Counsel also could have sought rehearing or rehearing en banc before the court of appeals.²⁶² This strategy would have had several advantages. First, it would have presented the Tenth Circuit with the sophisticated arguments that would later be made to the Supreme Court. In addition, it would have provided more time to pursue consular processing²⁶³ and more time to identify additional similar cases and develop a strategy for deciding which case to forward as the best vehicle.²⁶⁴

It is possible that there were disadvantages to rehearing or rehearing en banc. Rehearing can lead a court to bolster a past opinion. It will also cause delay. If Supreme Court litigation was Fernandez-Vargas's best chance at rejoining his family, then he may well have opted against rehearing. But the choice was complicated

²⁶⁰ See, e.g., Nancy Morawetz, Book Review, 58 J. LEGAL EDUC. 587, 592 (2008) (describing immigration case where consulate, not federal court, granted relief and concluding that "the fact that lawyers must pursue all fora and that the one that is least hospitable may prove to be the one that provides a route to the client's success, is a lesson that is valuable for all law students").

²⁶¹ Other forms of relief were also possible. Although rarely granted, Congress sometimes passes private bills for individual immigrants. See, e.g., Priv. L. No. 108-4, 118 Stat. 4028-29 (2004) (providing permanent resident status for Durrreshahwar Durrreshahwar, Nida Hasan, Asna Hasan, Anum Hasan, and Iqra Hasan); Priv. L. No. 108-3, 118 Stat. 4026-27 (2004) (providing permanent resident status to Richi James Lesley). See generally Kati L. Griffith, *Perfecting Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273 (2004) (describing historical role of private bills and recent limitations due to congressional rules for handling such bills).

²⁶² See *supra* notes 52-56 and accompanying text (discussing petitions for rehearing).

²⁶³ See *supra* Part III.B.1 (discussing consular processing).

²⁶⁴ See *supra* Part II.B (discussing how collaboration amongst firms with similar cases can identify which case presents most strategically advantageous context for litigation).

and required an assessment of the likelihood of success in obtaining different remedies and the risks of proceeding more swiftly at the Supreme Court.

The market dynamics of the Supreme Court Pro Bono practice could have played a role in discouraging exploration of these options. If the firm wanted to assure that its case would be the lead case if certiorari was granted, it may not have wanted to wait for an en banc ruling.

3. *Pursuit of an Extension of Time To Seek Certiorari*

Like a rehearing petition, an application to extend the time to seek certiorari has advantages and disadvantages. It creates some level of delay. At the same time, it allows for further case analysis, further development of the legal arguments, and inquiry into other cases that might better present the legal issues. Once again, if the firm wanted to position its case as a lead case before the Court, it may not want to delay filing for a writ of certiorari.

4. *Coordination*

Through coordination with other lawyers and advocacy groups,²⁶⁵ Fernandez-Vargas's lawyers could have learned about other cases raising the same legal issues before filing the petition for certiorari. Such coordination could have allowed the lawyers to find a better vehicle while they protected their client's rights through rehearing requests and a petition to hold the case for another disposition. In addition, coordination may have helped in understanding alternative strategies being used by other practitioners. Finally, coordination would place counsel in touch with the community of lawyers working on the issues. This could have been helpful for drafting amicus briefs when the case was ultimately granted or providing case stories for those working on such briefs.

Coordination would have required time and resources. The fact that some circuits had barred the use of reinstatement for those with pre-1996 reentries limited the pool of available cases that could serve as vehicles.²⁶⁶ In the circuits where similar issues were raised, all of the relevant cases may not have been accessible through standard computerized research tools, but it would have been possible to learn about specific cases through case research and networking. In similar situations, lawyers might work with advocacy groups or inquire about cases on listservs. They might also contact key litigators in specific

²⁶⁵ See *supra* Part II.B (presenting benefits of collaboration).

²⁶⁶ See *supra* note 216 (describing circuit split).

jurisdictions who have a reputation for handling more complex immigration law cases. In this way, it could have been possible to better understand the alternative vehicles. In addition, such networking could help to develop a deeper understanding of the real world effects of the rule so as to assist in amicus efforts and better answer questions at any eventual argument.²⁶⁷

But for a firm seeking to take the lead, such coordination with other lawyers and consideration of cases that would be handled by other firms could defeat the chance of handling the main case before the Court on the merits. The firm therefore might not have been interested in such alternatives.

Had there been greater efforts at coordination, what might the lawyers have found? Not surprisingly, they would have found more cases, which could have been analyzed to evaluate whether they better presented the key legal issues in the case. If they did, the lawyers could have provided Fernandez-Vargas the choice to have his case lag behind these other cases.

One case that raised the same issues as *Fernandez-Vargas* was *Gehring v. Gonzales*.²⁶⁸ *Gehring* trailed *Fernandez-Vargas* in the court system, but had *Fernandez-Vargas* been delayed through a rehearing petition or extensions of the time to seek certiorari,²⁶⁹ the cases could have been more closely aligned. In addition, regardless of which case went forward first, *Gehring* could have provided a valuable lens through which the Court might have better understood the real consequences of retroactive application of the 1996 reinstatement law.

Gehring first arrived in the United States in 1983.²⁷⁰ A year later she began living with a man with whom she had four children.²⁷¹ In 1994 she was deported. She returned immediately so that she could be with her four U.S. citizen children, who were then aged, approximately, two, four, eight, and ten.²⁷² In 2001, she married Herman Gehring, a U.S. citizen, who petitioned for his wife to start the process for lawful permanent residency.²⁷³ The agency approved the marriage petition.²⁷⁴ At the final interview for awarding lawful permanent resi-

²⁶⁷ In *Fernandez-Vargas*, this effort was limited to some extent by the fact that many immigration advocates were unenthusiastic about the prospect of Supreme Court review. See *supra* note 236 and accompanying text.

²⁶⁸ 235 F. App'x 998 (5th Cir. 2007).

²⁶⁹ See *supra* Part III.B.2–3 (presenting strategies available to Fernandez-Vargas).

²⁷⁰ Brief of Petitioner at 5, *Gehring*, 235 F. App'x 998 (No. 05-60124) (on file with the *New York University Law Review*).

²⁷¹ *Id.*

²⁷² *Id.* at 5, 7–8.

²⁷³ *Id.* at 5, 8–9.

²⁷⁴ *Id.* at 9.

gency status, however, the agency reinstated the old removal order and arrested Gehring.²⁷⁵ Gehring's lawyer filed both a petition for review and a habeas petition. These filings were made a month after the court of appeals decision in Fernandez-Vargas's case.²⁷⁶

In her brief to the court of appeals, Gehring provided a sympathetic story about her original removal order.²⁷⁷ After her arrest in 1993, she reported to the immigration office and was assigned a date to appear before an immigration judge.²⁷⁸ As a person with seven years of residence, she was eligible to apply for suspension of deportation, which would have permitted her to obtain permanent residency if she showed that her deportation would cause extreme hardship.²⁷⁹

Gehring did not drive. She therefore arranged with the father of her children to drive her to the hearing.²⁸⁰ He failed to do so, however, apparently because they were estranged and because he was hoping that she would be deported so that he and his new girlfriend could get custody of Gehring's older children.²⁸¹ Gehring sought assistance from a lawyer but was told (erroneously) that there was nothing that could be done.²⁸² Thus, the deportation order that later served as the basis for reinstatement remained unchallenged. When the order was reinstated many years later under the post-1996 law, Gehring was barred from going to immigration court to challenge the legality of her old order or otherwise seek relief.²⁸³

The Fifth Circuit held Gehring's case pending the decision of *Fernandez-Vargas* by the Supreme Court.²⁸⁴ But had *Fernandez-Vargas* proceeded more slowly, it is possible that *Gehring* would have

²⁷⁵ *Id.* at 10.

²⁷⁶ *Id.* at 3 (stating habeas corpus action was filed on January 27, 2005, and petition for review to court of appeals was filed on February 24, 2005). The Tenth Circuit issued its decision in *Fernandez-Vargas* on January 12, 2005. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881 (10th Cir. 2005), *aff'd sub nom.* *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

²⁷⁷ The brief explains that some of these facts were not in the administrative record because of the statutory limitation on that record but were included in the habeas petition. Brief of Petitioner, *supra* note 270, at 4 n.2.

²⁷⁸ *Id.* at 6.

²⁷⁹ See 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996) (providing for suspension of deportation for those with seven years of residence who can show that deportation would cause extreme hardship).

²⁸⁰ Brief of Petitioner, *supra* note 270, at 6–7.

²⁸¹ *Id.* at 7.

²⁸² *Id.* Gehring received an in absentia order because she failed to attend her hearing. *Id.* She could have filed a motion to reopen this order on the ground that she was not at fault in failing to appear for her hearing. See 8 C.F.R. § 3.23 (1994) (providing authority for reopening decisions).

²⁸³ See 8 U.S.C. § 1231(a)(5) (2006) (barring relief for those whose removal orders are reinstated).

²⁸⁴ Docket, *Gehring*, 235 F. App'x 998 (No. 05-60124) (suspending briefing in light of grant of certiorari in *Fernandez-Vargas v. Gonzales*).

caught up and served as a vehicle for Supreme Court review, which might have been better for her and better for Fernandez-Vargas.

5. *Planning Amicus Filings*

Fernandez-Vargas also appears to be a case in which the lawyers missed opportunities to plan early for amicus briefs. By the time certiorari was granted, the lawyers faced a tight fall briefing schedule that left little time to identify interested amici, locate illustrative cases, and identify authors for amicus briefs.

This amicus situation was avoidable. Any case in which a party seeks certiorari ought to involve a strategy for taking the next steps if certiorari is granted. This is all the more true when a case is pushed into the fall and is subject to the shorter briefing schedules that the Court issues at that time.²⁸⁵

Certainly, by the time the government acquiesced in certiorari, it was highly likely that the Court would grant merits review.²⁸⁶ At that time, it would have made sense to begin immediately to work on briefs that could explain how the laws operated retroactively in practice.²⁸⁷ Had advocates started their work at that time, they would have had four additional weeks to plan for amicus briefs, and Fernandez-Vargas's counsel would have avoided the difficulty of recruiting authors close to the holidays. For this purpose, a case such as *Gehring's* could have served as a valuable portrait of the consequences of retroactive application of the law. Unlike Fernandez-Vargas, *Gehring* had young children to raise when she reentered the United States. Furthermore, as a woman who was estranged from the father of her children, she had no way to maintain or reestablish a relationship with them if she were in Mexico. While her return to the United States in the face of a deportation order might not be condoned, her case would illustrate why Congress might not have chosen to require the immediate departure of those who had previously reentered the United States to be with their U.S. citizen children.

²⁸⁵ See *supra* note 157 (discussing Supreme Court briefing schedules).

²⁸⁶ The Solicitor General's office has an extraordinary track record in obtaining a grant of certiorari when it supports review. Statistics compiled over five terms indicate that it had a ninety-seven percent success rate when it offered an opinion supporting review. *SCOTUSblog FINAL Stats OT 09*, SCOTUSBLOG, 23 (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf>.

²⁸⁷ See, e.g., Brief for Florida Immigrant Advocacy Center et al. as Amici Curiae Supporting Respondent, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (presenting stories of individuals affected by issue in case).

C. *Consequences of the Decision for the Development of the Law*

With *Fernandez-Vargas*, the rule in the Ninth Circuit,²⁸⁸ which had governed almost half of reinstatement cases,²⁸⁹ was reversed. The government, which had never sought Supreme Court review of any reinstatement case, had achieved a victory.

Unlike the Lilly Ledbetter case,²⁹⁰ Congress did not move into the breach. Reinstatement is one of a long list of concerns for immigration advocates, and retroactivity, by its nature, involves a diminishing set of people. Even if case stories are compelling and become increasingly so with time, the fact that the group is diminishing in size means that the issue may lack the numerical importance to policy advocates that would bring it to the top of their list of concerns. More importantly, affirmative legislation for immigrants is difficult to achieve²⁹¹ and a technical reinstatement issue is unlikely to be one for which affirmative legislative correction would be achievable. On issues such as these, the Supreme Court serves as the last stop. The litigation choices in *Fernandez-Vargas* therefore live on as the law that affects the entire class of persons facing reinstatement.

D. *Reflections on Market Pressures and Advocacy Community Responses*

It is impossible to know how the market pressures of Supreme Court practice have affected any one case. But nonetheless, one can speculate about how they might have played out.

Following the pattern of the competitive Supreme Court Pro Bono Bar, the pro bono offer in *Fernandez-Vargas* came from the firm that first identified the circuit split and then reached out to the lawyer to offer free services. The offer was conditioned on the very factor that makes Supreme Court pro bono work attractive to many firms: A guarantee that the firm could handle the argument.²⁹² It is unclear why the case moved forward quickly, but doing so fit the firm's interest in bringing the lead case, which would mean handling the merits briefs and the argument. Nothing was done to advance alternative remedies for *Fernandez-Vargas*.

Meanwhile, the advocacy community was unhappy about the efforts of the Supreme Court practitioners to seek Supreme Court

²⁸⁸ See *supra* note 215.

²⁸⁹ See *supra* note 214 and accompanying text.

²⁹⁰ See *supra* notes 194–99 and accompanying text (discussing Lilly Ledbetter case).

²⁹¹ Marisa Silenzi Cianciarulo, *Can't Live With 'Em, Can't Deport 'Em, Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13, 22–25 (2008) (tracing immigration reform failures in 2004, 2005, 2006, and 2007).

²⁹² See *supra* note 227 and accompanying text.

review on a pro bono basis, largely because they believed there was far more to lose than to gain.²⁹³ Although advocates sought to persuade lawyers in individual cases to pursue alternative remedies for their clients, the advocates did not begin in advance to prepare for the likelihood of a grant of review, even after the Solicitor General acquiesced.²⁹⁴ The advocacy community was also spread thin with limited resources.²⁹⁵ As a result, amicus efforts were delayed, and the Court lacked the kind of briefing that could have provided a better context for deciding the issues.

Had things proceeded differently, there might have been more attention paid to alternative solutions for Fernandez-Vargas. He may have proceeded with consular processing, obtained a waiver, and been readmitted to the United States.²⁹⁶ Even if Fernandez-Vargas had been denied consular processing, he would have better shown the direct impact of the new law. His efforts at consular processing might also have created a basis for seeking some sort of settlement.

There may also have been better coordination and more attention paid to identifying cases that would best illustrate the legal issues from the standpoint of those affected by the application of the new reinstatement rules to persons who entered the country before the change in the law. This may have led to a slower litigation process and identification of cases such as *Gehring*.

It is foolhardy to try to predict whether specific differences in advocacy would have led to a favorable or a closer result. But it is an interesting thought experiment to think about how presentation of Gehring's case (through main or amicus filings) might have affected the kinds of answers available at argument and the stories that could have been told about the landscape against which Congress legislated.

Consider Justice Breyer's question to counsel: Namely, what would a lawyer have told an affected person who asked, "What do I do now?" at the time of the revision of the reinstatement law in 1996. In Fernandez-Vargas's case, Justice Breyer thought the answer was straightforward: The lawyer would have told Fernandez-Vargas to leave immediately and apply for a visa as soon as he and the mother of his child were married.²⁹⁷ This was not as easy a route as Justice

²⁹³ Telephone Interview with Trina A. Realmuto, *supra* note 213.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See *supra* Part III.B.1 (discussing consular processing).

²⁹⁷ Transcript of Oral Argument, *supra* note 246, at 19–20.

Breyer thought,²⁹⁸ but it did provide a path to reuniting Fernandez-Vargas with his family.

But what would a lawyer have told Gehring? In 1996, several years after her deportation order and reentry, Gehring was taking care of her very young children and was estranged from their father.²⁹⁹ Had she left for Mexico, she had no available route to re-immigrate.³⁰⁰ Would a lawyer have told her that she should leave for Mexico and abandon her young children to her estranged partner? Would a lawyer have instructed her to take her children with her over the father's objections? It seems far more likely that a lawyer would have informed her that the law had changed and that she could either abandon her children or wait and hope that a court would agree that this new law did not apply to her.

More importantly, regardless of this particular colloquy, the facts of Gehring's case may have made the consequences of retroactive reinstatement rules more palpable. Perhaps her case could have helped the Court understand that she would face a new "disability"—in retroactivity jurisprudence jargon³⁰¹—if she were subjected to the new reinstatement rule. In her case, that disability was that she would have been stripped of her only route to relief that would allow her to remain with her children in the United States.

Fernandez-Vargas similarly had a U.S. citizen child³⁰² and also would have faced separation from his child if he had left in 1996. But the government was able to present a far more sunny view of what would have happened had he left: Because he later married the mother of his child, the government could argue (as it did in its post-argument letters) that all Fernandez-Vargas had to do was marry his wife sooner and complete some paperwork from Mexico.³⁰³ Although that was far easier said than done, it left the impression that Fernandez-Vargas had not suffered much and that retroactive applica-

²⁹⁸ See *supra* note 248 (discussing five-year bar to reentry that Fernandez-Vargas would have faced).

²⁹⁹ Brief for Petitioner, *supra* note 270, at 7–8.

³⁰⁰ A citizen child cannot petition for a parent until the child is twenty-one. 8 U.S.C. § 1151(b)(2) (1994). Gehring was estranged from her spouse; even if the spouse were a citizen, she would not have been able to obtain relief that was contingent on him filing a petition for her.

³⁰¹ Traditionally, retroactivity analysis looks at whether a new law serves to attach a new disability, disrupt settled expectations, or otherwise impose a new legal consequence. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (citing *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156)) (stating standard for evaluating retroactive effect).

³⁰² *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006).

³⁰³ Letter from Paul D. Clement to William K. Suter, *supra* note 249.

tion of the reinstatement rules only hurt those who willingly flouted the law without good reason.

In addition, attention to Gehring's case would have demonstrated in very concrete terms why people reenter after removal and why they might be afforded some procedural protection. Justice Scalia called Fernandez-Vargas a "two-time loser[]" due to his prior deportation order.³⁰⁴ Would he have said the same thing about Gehring? In Gehring's case, she should never have been removed in the first place. But lacking an attorney and having been tricked by the father of her children, she was deported.³⁰⁵ At that stage she faced an impossible choice: abandon her children or return and care for them. Her reentry, while illegal, would have illustrated how reentry has long served as a self-help remedy for immigrants with legitimate defenses to their original deportation, but who lack the lawyers to present these defenses effectively. These facts could have been helpful to the Court as it considered the 1996 law. The legal question was whether Congress meant to distinguish between those who reentered prior to the new law and those who reentered afterward. Gehring's facts would have presented a reason why Congress might not have intended to reach those with prior reentries.

Fernandez-Vargas serves as a model of what not to do. It does not make sense to seek certiorari first without looking at alternatives for the client or the variety of vehicles that might best present the issues. Lawyers should not wait to plan amicus filings. Practice communities should not wait until certiorari is granted to plan necessary briefing. Both Supreme Court Pro Bono attorneys and practice communities can do better.

IV

COUNTERBALANCING DISTORTED INCENTIVES

The market forces that drive Supreme Court Pro Bono practices are powerful, making it difficult to prescribe a solution to their potential consequences. But that does not mean that nothing can be done to mitigate their harmful effects. This section considers two groups that could play a significant role: The Supreme Court Pro Bono Bar and organized practice communities.

A. *Proposed Principles for Law Firm Supreme Court Practices*

This Article proposes that Supreme Court Pro Bono practices adopt protocols to counterbalance the market forces that influence

³⁰⁴ Transcript of Oral Argument, *supra* note 246, at 19.

³⁰⁵ See *supra* notes 280–82 and accompanying text.

their practices. Some might presume that this is a fruitless effort due to the market interest in securing merits opportunities before the Supreme Court. But there are several reasons to believe that responsible principles can prevail. First, the Supreme Court Bar is a close community that has a significant interest in its overall reputation. There are reports of unease about the nature of the “ambulance chasing” that underlies some current practices.³⁰⁶ Second, because firms increasingly compete against each other for cases, they are more likely to have to convince potential clients that they will be a better choice as counsel. And being a better choice will mean, for example, looking at all advocacy strategies and consulting with substantive experts rather than offering a single, Supreme Court–centered approach. Finally, much of the surge in Supreme Court work is connected to law school clinics.³⁰⁷ While these clinics like to trumpet their victories as a way to advance their schools’ profiles,³⁰⁸ they may also be open to thinking critically about the model of lawyering that they are advancing. With these considerations in mind, this section proposes principles that Supreme Court Pro Bono practices could adopt to mitigate the influence of their business interest in handling cases that provide merits opportunities.

1. *Principles for Case Selection*

Lawyers engaged in pro bono practice enjoy considerable discretion in their choice of clients. The mere fact that someone could benefit from pro bono service does not mean that the firm must take the case. The question is what standard firms use in deciding which cases to handle. In the context of the race for merits cases, it appears that a primary criterion is the likelihood that a case will yield an opportunity to brief a case on the merits before the Supreme Court or, even better, provide an opportunity for a merits argument before the Court.³⁰⁹

If firms instead were to evaluate the broader implications of a case, perhaps through investing resources to identify other cases and consulting with experts in the area of practice, they would approach their cases differently. The judgment about the wisdom of taking a case before the Supreme Court would require a balancing of the likelihood of success, the potential consequences of a bad outcome for the client and others similarly situated, and an evaluation of alternative remedies. One would expect that firms are familiar with this calculus

³⁰⁶ Telephone Interview with Richard J. Lazarus, *supra* note 32.

³⁰⁷ See *supra* notes 31–35 and accompanying text (discussing Supreme Court clinics).

³⁰⁸ See *supra* note 34.

³⁰⁹ See *supra* Part I (presenting competition for Supreme Court pro bono cases).

in other areas of practice where their clients weigh the benefits and costs of Supreme Court review not just for a particular case, but for the legal climate that will govern other similar matters.

a. Assessment of the Likelihood of a Successful Outcome, as Opposed to the Likelihood of Obtaining Review on the Merits

While the certiorari process focuses on a grant of review, the client and the affected community will be most interested in the likelihood of a successful outcome. A case granted that leads to an argument but a bad outcome or bad dicta might be good for the lawyers—who still have had the opportunity to handle a case before the Supreme Court—but it is surely not good for the client or others similarly situated.

Defenders of taking any case that can be granted might argue that the person who lost below is always better off with some small chance of success rather than leaving a bad judgment intact. But that might not be the case. As discussed in Parts II and III, pursuit of Supreme Court review could serve to harm the individual client.

b. Assessment of the Potential Consequences of Supreme Court Litigation

The consequences of an unsuccessful outcome can also vary from case to case. Almost all cases involving circuit splits will threaten existing doctrine for people in some parts of the country. But the nature of the risk will vary.

In litigation against government entities, one important question is the degree to which the government can alter the legal landscape during the course of the litigation in order to shore up its litigation position. For example, in any challenge to agency action, the agency can alter its policies either during a pending petition for certiorari or after certiorari has been granted in a case. Given general principles of *Chevron* deference,³¹⁰ this will tend to make the case more difficult to litigate. In immigration cases, for example, it is common for certiorari petitions to spur changes in agency policy. For example, after the petition for certiorari in *Ali v. Achim*,³¹¹ the Board of Immigration Appeals issued a new precedent ruling that adopted the position of

³¹⁰ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984) (setting out steps for deciding whether to defer to agency interpretation).

³¹¹ 468 F.3d 462 (7th Cir. 2006), *cert. granted*, 551 U.S. 1188 (2006), and *cert. dismissed*, 552 U.S. 1085 (2007).

the circuit court.³¹² Sometimes, the individual petitioner may still be able to benefit from the petition filed before the change in policy, but for a firm deciding whether to devote its pro bono resources to a case, it is appropriate to consider these broader risks.³¹³

Similarly, some circuit splits that might justify Supreme Court review are likely to be resolved in ways that make the law worse both for the petitioner and those in the petitioner's position throughout the country. As illustrated by the discussion of *Montejo*, the Court can resolve a circuit split by overturning a precedent.³¹⁴ In that case, both the petitioner and others lost the ability to argue that their cases fit within that prior precedent.

c. Assessment of the Record and the Alternatives Available to the Client

The preceding discussion goes beyond the individual case in which the firm offers representation. But there is the separate question of the proper counseling of the individual client who is approached about representation. A client who is offered free representation deserves a lawyer who fully assesses his or her options and evaluates a proper course of action. This process begins with proper case assessment, including a careful review of the record and of the alternatives available to the client.

As the discussion in Part II demonstrates, careful case analysis includes serious consideration of options other than Supreme Court review. In a criminal case, those options might include state or federal habeas proceedings and clemency proceedings. In an immigration

³¹² N-A-M-, 24 I. & N. Dec. 336, 338 (BIA 2007) (stating agreement with position of Seventh Circuit). Although there is no way to be certain of what prompted the Board to issue a precedent decision, the timing strongly suggests that the precedent decision was designed to provide support for the government's litigation position in *Ali*. Similarly, the litigation in *Dada v. Mukasey*, 554 U.S. 1 (2008), led the agency to adopt a regulation, 8 C.F.R. § 1240.26(b)(1)(D) (2010), that in effect requires immigrants to forfeit a grant of voluntary departure if they appeal any other issue in their case, such as a denial of asylum. 73 Fed. Reg. 76,927, 76,929 (Dec. 18, 2008) (to be codified at 8 C.F.R. pts. 1240-41). These regulations were proposed shortly after the filing of the petitioner's brief in *Dada*. See *id.* at 76,927 (reporting that rule was proposed on November 30, 2007); Brief for Petitioner, *Dada*, 554 U.S. 1 (No. 06-1181) (stating filing date as November 5, 2007). The regulations were used by the government in its briefs to defend its legal position. See Supplemental Brief for the Respondent at 7, 9, *Dada*, 554 U.S. 1 (No. 06-1181) (citing 8 C.F.R. § 1240.26); Brief for the Respondent, *Dada*, 554 U.S. 1 (No. 06-1181) (citing 8 C.F.R. § 1240.26).

³¹³ In *Ali v. Achim*, for example, the petitioner was later able to obtain a settlement of the case. Press Release, Nat'l Immigrant Justice Ctr., NIJC and Solicitor General Reach Settlement in U.S. Supreme Court Case (Dec. 28, 2007) (on file with the *New York University Law Review*).

³¹⁴ See *supra* notes 103-04 and accompanying text.

case, attorneys might pursue an alternative route to a visa or other forms of relief from removal.³¹⁵ In an injunctive case, subsequent efforts at injunctive relief may be beneficial.³¹⁶ These options might reveal avenues that better serve the interests of the client than pursuit of Supreme Court review.³¹⁷

Just as it would be wrong to offer to take a case only if it leads to trial experience (and therefore refuse to engage seriously in settlement talks),³¹⁸ it is wrong to condition representation on appearance before a particular forum where the lawyer would prefer to practice.³¹⁹ Thus a lawyer accepting a case is obligated to pursue all appropriate avenues of relief, regardless of their implications for Supreme Court review. A lawyer who is not prepared to take on this responsibility should not undertake the representation.

2. *Principles for Represented Clients*

Once the firm has determined that it should extend its pro bono resources, the rules change. At that stage, the firm has a duty of loyalty to the client.³²⁰ That duty does not, however, mean that it is always wise and appropriate to forge ahead in pursuit of Supreme Court review in the client's case or that it is permissible to focus solely on what can be obtained through merits review in the Supreme Court.

- a. Full Case Analysis, Including an Assessment of Alternative Routes for Serving the Client's Interests and an Assessment of the Potential Consequences of Seeking Supreme Court Review

The duty to engage in full case review is even more acute once a firm takes on a case. Just because the case was taken with an expectation of seeking Supreme Court merits review does not relieve the firm

³¹⁵ See *supra* note 58 and accompanying text.

³¹⁶ See *supra* note 59 and accompanying text.

³¹⁷ Some might argue that these remedies are difficult to obtain, but success in the Supreme Court is often difficult to obtain as well. The important point is that they should be considered. See, e.g., Nina Bernstein, *Paterson Rewards Redemption With a Pardon*, N.Y. TIMES, Mar. 7, 2010, at A29 (describing pardon provided to man who lacked relief from removal); Nina Bernstein, *After Governor's Pardon, Citizenship for Chinese Immigrant*, N.Y. TIMES CITY ROOM (May 28, 2010, 2:50 PM), <http://cityroom.blogs.nytimes.com/2010/05/28/after-governors-pardon-citizenship-for-chinese-immigrant/> (describing how, following pardon, man who had been subject to removal was awarded citizenship).

³¹⁸ See *supra* note 116 and accompanying text.

³¹⁹ See *supra* notes 226–27 and accompanying text (stating lawyer offered to take Fernandez-Vargas's case pro bono on condition that firm would handle Supreme Court argument).

³²⁰ MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010) (requiring lawyer to abide by client's decisions).

of its obligation to continually assess the best interests of the client. The possibility that Supreme Court review is less advantageous for the client than alternative remedies may become apparent after commencing representation.³²¹ For example, in a criminal case, if closer case analysis reveals that a state post-conviction motion or a habeas petition would be a better remedy than Supreme Court review, it could be filed in lieu of a petition to the Supreme Court. Similarly, the option of consular processing may have become more apparent after taking on representation in *Fernandez-Vargas* and after closer analysis of the case.³²² The fact that the case was taken with an eye to Supreme Court review is not a reason to forego pursuit of these other remedies. Although this ongoing assessment of the client's interests may be difficult after a firm has won the competition for a case, it nonetheless remains the obligation of counsel.

b. Coordination, Including Efforts To Learn of Other Cases Raising Similar Issues for the Purpose of Identifying Best Vehicles

While the client's interest may be best served by a favorable resolution of the legal issue at the Supreme Court, the client rarely has reason to prefer that his or her case be the case that the Court hears on the merits. What matters to the client is a favorable outcome. Coordination with other attorneys allows for a better assessment of different vehicles for review and for an approach to amicus briefing that provides a richer context in which the Court can decide the case.

Coordination can be achieved through collaboration with centralized advocacy organizations that practice in the relevant area. These organizations may be connected to listservs or other means by which lawyers communicate. If such coordination can be beneficial to the client, there is no excuse for ignoring these mechanisms in the hope that no case will emerge that would serve as a better frontrunner for Supreme Court review and thereby deprive the firm of a choice opportunity for a merits argument.

c. Counseling, Including Providing the Client with an Assessment of the Potential Advantages and Disadvantages of Different Strategies

Client counseling requires a deep understanding of the interests of the client and the concerns that might animate litigation choices. Clients may have a wide range of concerns regarding their cases being

³²¹ See *supra* Part II.A.1 for a discussion of the litigation choices in *Montejo*.

³²² See *supra* Part III.B.1 (discussing consular processing).

center stage. For example, as discussed in reference to *Jerman*, clients may have differing views on how much they care about the statutory damages when assessed against the broader risks of Supreme Court intervention.³²³ It is only through a commitment to understanding these concerns that counsel can make proper choices about how to proceed in any given case.

d. Working with Experts in Substance and Practice

Specialized Supreme Court practices tend to work on a wide range of substantive issues. They are therefore likely to take on cases for which they do not have a deep familiarity with substantive trends, procedural context, or the hurdles that commonly arise in any particular area of law. In *Fernandez-Vargas*,³²⁴ for example, the fact that the Court was considering retroactivity issues in the context of an immigration case meant that it was important to understand how the Court approaches immigration issues and the danger that it would not follow the analysis set forth in other types of retroactivity cases.³²⁵ Similarly, it was important to understand how various bars to immigration operate and why alternative remedies were or were not available to the petitioner.³²⁶ In a death penalty case, it would be important to understand the technical substance of the case law, the practical realities of the complex procedural scheme faced by those on death row, and the hurdles that litigators have faced in the Supreme Court in that area of law.³²⁷ No specialized Supreme Court practice that operates across substantive areas can hope to develop this expertise in the few months that it works on any particular Supreme Court case. It is therefore essential to involve those who can offer that expertise in a timely way.

For example, in *Carachuri-Rosendo v. Holder*,³²⁸ Supreme Court Pro Bono counsel and local counsel worked with national advocates before they filed the petition for writ of certiorari.³²⁹ By the time the

³²³ See *supra* Part II.C.1.

³²⁴ See *supra* Part III for a discussion of *Fernandez-Vargas*.

³²⁵ Cf. Juliet P. Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231, 242–47 (2010) (arguing Iqbal's immigration status may have increased judicial deference to government).

³²⁶ Cf. *supra* notes 248–49 (discussing confusion during and after argument on bars to readmission for *Fernandez-Vargas*).

³²⁷ See *supra* text accompanying notes 110–12 (discussing practical choices for Montejo in deciding between habeas action or direct appeal).

³²⁸ 130 S. Ct. 2577 (2010).

³²⁹ After the decision of the circuit court, Carachuri's lawyers at the University of Houston Clinic worked with lawyers from the Immigrant Defense Project, the Immigrant Rights Clinic at New York University School of Law, the National Immigrant Justice Center, and the National Immigration Project of the National Lawyers Guild. The work

Court granted the case, the lawyers had planned out a full series of amicus filings and had lined up lawyers to write the briefs. Lawyers who had worked on the legal issues for over five years were able to share arguments as well as knowledge of the different positions that the government put forward in the agency and the lower courts.³³⁰ They were also able to coordinate with other interested advocates. Meanwhile, the Supreme Court lawyers offered a fresh perspective and the critical eyes of professionals with extensive experience with the Court. This arrangement allowed for a merger of the skills and resources of the Supreme Court practitioners with the deep substantive expertise of lawyers familiar with the issues.

B. Proposed Strategies for Practice Communities

While there is reason to hope that reflective Supreme Court practices will take steps to better protect clients from market pressures, practice communities that are affected by the new Supreme Court Pro Bono Bar need to develop strategies that account for the effects of this new Bar. Some practice communities have already undertaken these efforts. Others are just beginning to do so. But with education, there is reason to hope that practitioners in different communities can work together to take advantage of the resources of the new Supreme Court Pro Bono Bar to positively shape development of the law in their respective fields.

One limitation on the ability of practice communities to monitor Supreme Court work in their fields has been a lack of resources. With firms trolling for every possible split that might justify review, practice communities may lack the capacity to analyze and keep up with all of the possible issues before the Court. Ironically, this mismatch provides a potential role for either the Supreme Court Pro Bono practices or law school clinics. Instead of joining the competition, they could align themselves with underserved practice communities that are trying to manage the surge in interest in Supreme Court resolution of splits in their field.

was coordinated by the Immigrant Defense Project, which had argued as amicus in Carachuri's case before the Board of Immigration Appeals and before the Fifth Circuit. These lawyers assisted in selecting a Supreme Court expert as pro bono counsel for the Supreme Court litigation. I participated in this advocacy.

³³⁰ *Carachuri* reached the Supreme Court after many years of litigation on the same and related issues. The Immigrant Defense Project had submitted briefs in many of these cases and was deeply familiar with the positions that the government had taken at various stages. See *Drug Litigation Initiative: Challenging Mandatory Deportation for Low-Level Drug Offenses*, IMMIGRANT DEFENSE PROJECT, <http://www.immigrantdefenseproject.org/web/Pages/drugLitigationInit.htm> (last visited Mar. 1, 2011) (listing briefs submitted by Immigrant Defense Project).

1. *The Strategic Challenge Posed by the Competitive Supreme Court Pro Bono Bar*

The phenomenon of the competitive Supreme Court Pro Bono Bar has dramatic implications for public interest practice communities. First, it is simply more likely that cases of interest to these communities will be offered to the Court for review. They are also far more likely to be presented by Supreme Court experts who understand how to shape a petition for writ of certiorari so that it will be attractive to the Court.³³¹ And because the firms that are seeking certiorari are not part of a broader litigation effort, the cases are more likely to be pursued at the Supreme Court at an earlier stage in the litigation over any particular issue.³³²

Second, when cases reach the Supreme Court, there is a significant likelihood that they will be handled by lawyers who lack expertise in the substantive field and with little understanding of strategic issues faced by litigators in that field. Instead of substantive knowledge, the lawyers are likely to have general Supreme Court expertise, which, despite its value, means that there may be a reduced sense of the context in which the issues arise.³³³

Third, the cases selected for Supreme Court review may not have been chosen with any serious case analysis to determine whether they are appropriate choices for pro bono resources or whether Supreme Court litigation is in the best interests of the individual client.³³⁴

Fourth, there is a danger that representation by Supreme Court Pro Bono practices will not be coordinated with other strategies, such as administrative advocacy, legislative advocacy, or media work on the issue. Once a Supreme Court decision is issued in the case, the lawyers are likely to move on to their next Supreme Court matter.³³⁵

Fifth, the competitive nature of the race for cases means that practice communities may have many choices about who will handle the case before the Supreme Court but may lack the expertise necessary to select among potential counsel.

³³¹ See *supra* note 160 (citing argument that Court is more likely to accept certiorari on petitions prepared by Court experts).

³³² See *supra* notes 161–68 and accompanying text for a discussion of the *Perry v. Schwarzenegger* example.

³³³ See *supra* Part IV.A.2.d (urging Supreme Court practitioners to collaborate with relevant experts).

³³⁴ See *supra* Part II.A (discussing options available to lawyers).

³³⁵ See *supra* Part II.C.2 (arguing Supreme Court Bar is often not prepared to advocate for issue after it is decided by Court).

Sixth, Supreme Court pro bono resources may not be offered in a way that allows them to be converted for use in other forms of advocacy or even for litigation other than before the Supreme Court.³³⁶

Finally, the challenge of managing the implications of the race to the Supreme Court will typically be placed on resource-strapped practice communities. Whereas the business community can rely on an organization such as the U.S. Chamber of Commerce, with its Litigation Center, to look out for the broader interests of that community,³³⁷ the Supreme Court Pro Bono Bar tends to work on cases where both the individual clients and the broader practice community rely on public interest organizations with limited budgets to track broader trends and coordinate litigation.

2. *Strategic Intervention To Offset the Predictable Consequences of the Race for Supreme Court Merits Cases*

Practice communities cannot stop the race to file petitions for writ of certiorari. But to the extent that they have the resources, they can seek to offset the predictable consequences of that race.

a. Offsetting Constricted Case Analysis

The systemic tendency of the race to the Supreme Court to constrict case analysis when petitioning for certiorari can be offset by establishing practice-area based institutions to assist local counsel in case analysis. A group dedicated to a practice area could identify the crucial questions that an attorney would have to ask to decide whether Supreme Court review is desirable in the particular case. In a criminal case, for example, practice communities can assist in evaluating whether the client would be best served by a petition for writ of certiorari or by post-conviction proceedings in a lower court. In an immigration case, the group could help analyze alternative remedies and the potential consequences of review. The individual attorney or the firm that was offering its pro bono services could then investigate these questions. Although the pro bono firm's original interest in the case may have been prompted by an interest in handling a Supreme Court case, responsible counsel should consider reasonable alternatives and pursue the path that best serves the interests of the client.

³³⁶ See *supra* notes 226–27 and accompanying text (stating lawyer offered to take Fernandez-Vargas's case pro bono on condition that firm would handle Supreme Court argument).

³³⁷ See *About NCLC*, U.S. CHAMBER OF COMMERCE, <http://www.chamberlitigation.com/about> (last visited Mar. 1, 2011) (describing work of National Chamber Litigation Center).

Several practice communities have established such practice-based Supreme Court programs. For example, the Tribal Supreme Court Project, established in 2001, focuses on Supreme Court issues related to Native American Rights.³³⁸ Established in response to negative decisions from the Supreme Court in this area,³³⁹ the Project has staff attorneys devoted specifically to Supreme Court Native American issues.³⁴⁰ Similarly, in 1990, the Public Citizen Litigation Group established a Supreme Court project geared in part to identifying public interest victories in the lower courts and protecting them from being overturned by the Supreme Court.³⁴¹ More recently, immigration advocacy organizations joined together in the wake of *Fernandez-Vargas* to monitor Supreme Court activity, give substantive advice when there is a grant of certiorari, and advise individual practitioners whose cases might be pursued by the Supreme Court Pro Bono Bar.³⁴²

The resources for case analysis, of course, are only useful if local counsel is aware of them and uses them. It is therefore important for any such group to reach out broadly in the practice community and encourage attorneys handling circuit level cases to make use of these resources.³⁴³

³³⁸ *Tribal Supreme Court Project*, NATIVE AM. RIGHTS FUND, <http://www.narf.org/sct/suptproject.html> (last visited Mar. 1, 2011) (“The Project . . . consists of a Working Group of over 200 attorneys and academics from around the nation who specialize in Indian law and other areas of law that impact Indian cases . . .”).

³³⁹ *Id.* (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), and *Nevada v. Hicks*, 533 U.S. 353 (2001)).

³⁴⁰ A Native American Rights Foundation attorney who works on the Tribal Supreme Court Project estimates that his work with the project occupies about seventy-five to eighty percent of his time. The project also works with a group of former Supreme Court clerks who have advised about the preparation of briefs in opposition. Telephone Interview with Richard A. Guest, Staff Attorney, Native Am. Rights Fund (June 22, 2009).

³⁴¹ *The Alan Morrison Supreme Court Assistance Project*, PUB. CITIZEN, <http://www.citizen.org/litigation/supremecourt/articles.cfm?ID=5818> (last visited Mar. 1, 2011).

³⁴² The group, known as the Supreme Court Immigration Law Working Group, is made up of representatives of the following organizations: American Immigration Lawyers Association Amicus Committee; American Immigration Lawyers Foundation; Immigrant Defense Project; Immigrant Rights Project of the ACLU; Immigrant Rights Clinic at New York University School of Law; Immigrant Rights Clinic at Stanford Law School; Immigrant Justice Clinic at Cardozo School of Law; National Immigrant Justice Center; National Immigration Law Center; National Immigration Project of the National Lawyers Guild; and the Northwest Immigrant Rights Project. I serve as chair of the group.

³⁴³ See, e.g., Nancy Morawetz, *What To Do When a Supreme Court Expert Calls?*, AM. IMMIGRATION LAWYERS ASS'N: IMMIGRATION SLIP OP. (Feb. 22, 2010), <http://immigrationslipopinion.blogspot.com/2010/02/what-to-do-when-supreme-court-expert.html> (encouraging attorneys who may be headed to Supreme Court to reach out for help from advocacy organizations).

b. Enhancing Collaboration

The race to the Supreme Court can be expected to lead to earlier review of issues. Despite the fact that a group's longer term objectives could be best served by delaying Supreme Court review, practice communities cannot afford to sit back and assume that issues will only get to the Court when they believe that the time is ripe.³⁴⁴ Instead they must be proactive and plan for the inevitable petitions for writ of certiorari that will be filed by those engaged in the competitive quest for merits arguments.

One approach is for practice communities to engage in techniques similar to the new Supreme Court Pro Bono Bar. This new Bar has developed mechanisms to track cases and follow splits in the circuits carefully with an eye to being counsel on the case most likely to garner a grant of certiorari.³⁴⁵ The practice communities can likewise track cases for the purpose of identifying issues that are likely to be targets in the race for merits cases. They can identify cases that could be good vehicles and vet the factual and procedural posture of those cases and the alternative approaches that might be available for potential petitioners. If they are able to engage in such tracking, the practice community is more likely to succeed in identifying a case like *Gehring* that could have served as an alternative vehicle for presenting the issues in *Fernandez-Vargas*.³⁴⁶ If such vehicles are identified, it would be far easier to have a conversation with potential counsel in a Supreme Court case about the concrete alternatives that might better serve both individual clients and the broader community affected by an issue. This type of tracking is time-intensive but could be supported by institutions, such as law school clinics, that are currently engaged in the rush for cases.³⁴⁷

Practice communities have opinions about issues that they consider important and priorities for which of those issues deserve an allocation of resources. It would be a remarkable coincidence for these priorities to coincide with the issues on which there is a possibility of Supreme Court review. As a result, a tracking program that seeks to anticipate possible Supreme Court grants of certiorari is likely to require the devotion of resources to issues that would otherwise be of a lower priority for the practice communities.

³⁴⁴ See *supra* notes 161–68 and accompanying text for a discussion of the *Perry v. Schwarzenegger* example.

³⁴⁵ See *supra* notes 32–35 and accompanying text.

³⁴⁶ See *supra* Part III.B.4.

³⁴⁷ See *supra* notes 31–35 and accompanying text (discussing competition for merits cases provided by law school clinics).

Budget constraints will mean that in some circumstances, the effort to track cases is simply too costly. But practice communities may be required to divert their resources to matters that they could have ignored before the advent of the current competitive Supreme Court Pro Bono Bar. In most areas of law, Supreme Court consideration of a seemingly unimportant issue has potentially major implications for other cases because, once considered on a plenary basis, every case is an opportunity for broader statements about interpretive rules, institutional roles, the ongoing validity of established precedent, or other questions. In this setting, every case is potentially extremely important.

The many resources now being devoted by law school clinics to the race for merits cases could be of assistance. If these resources were redeployed to assist practice communities in their efforts to monitor and manage the race to the Court, practice communities would be in a better position to take on their many roles.

c. Achieving High Quality Representation

Practice communities face several challenges in achieving the best quality representation in cases that are pursued before the Supreme Court. One is to create mechanisms for ensuring that a case benefits from both substantive expertise in the area and expertise in issues that are specific to Supreme Court practice. In addition, the best representation requires attorneys who will seriously consider approaches that will not lead to a merits argument before the Court.

The Supreme Court Pro Bono Bar has perhaps enhanced the availability of Supreme Court-specific expertise, but at times has done so at the cost of familiarity with the substantive legal terrain. Supreme Court experts may lack an understanding of problematic presumptions made by the Court in certain kinds of cases.³⁴⁸ They might also lack an understanding of the procedural issues that arise with a particular subject of litigation.³⁴⁹ They may be unable to answer questions from the Court about how things really work in an area of practice.³⁵⁰

³⁴⁸ See, e.g., Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE* 148 (Austin Sarat ed., 1999) (describing Supreme Court attitude in death penalty cases).

³⁴⁹ See, e.g., Transcript of Oral Argument at 19, *Dada v. Mukasey*, 554 U.S. 1 (2008) (No. 06-1181) (recording question to counsel asking for estimate based on “[his] experience”).

³⁵⁰ For example, in *Fernandez-Vargas*, Justice Breyer asked questions relating to consular processing. See *supra* notes 246–49 and accompanying text (discussing Justice Breyer’s suggestion that *Fernandez-Vargas* could have returned to Mexico and pursued legal options for reentry).

Practice communities can help bridge the substantive expertise gap by working together with the Supreme Court Pro Bono Bar on briefs and overall litigation strategy or by establishing their own specialized Supreme Court Practice Bar. Practice communities can only contribute, however, if the lawyers who have ultimate responsibility for the case make it possible through strategy sessions, early sharing of drafts, and other collaborative procedures.

High quality representation also requires attention to remedies that do not follow from an argument on the merits. In some cases, it might be strategically wise to seek a remand from the Court without merits briefing and argument. In others, there may be opportunities for administrative or legislative solutions. Practice communities can assist local counsel in selecting Supreme Court counsel who will take these options seriously.

In *Robinson v. Napolitano*, for example, the petition for certiorari was ultimately dismissed because the client obtained full relief through an act of Congress.³⁵¹ In selecting among potential Supreme Court counsel, the local counsel considered whether they were open to handling the petition for writ of certiorari with an eye to both Supreme Court and legislative solutions. Local counsel also considered the degree to which the various potential Supreme Court counsel would work with national advocates who had a deep familiarity with the issues and the multiple strategies in play to change the rule applied in these cases.³⁵²

d. Anticipating and Identifying Resources in the Event of Supreme Court Plenary Review

Much as some practice communities will loathe Supreme Court review, they cannot afford to ignore the real possibility that the Court will take issues about which they are concerned. In addition, practice communities must acknowledge that at some times of the year, particularly the fall or early winter, there is little or no prospect of adjournments that would allow time to identify resources for amicus filings.³⁵³

³⁵¹ See *Robinson v. Napolitano*, cert. dismissed, 130 S. Ct. 826 (2009) (dismissing certiorari pursuant to Supreme Court Rule 46.1, which permits parties to agree to dismiss case); see also Kirk Semple, *A Stamp in a Passport Ends a Long Struggle for Residency*, N.Y. TIMES CITY ROOM (Dec. 22, 2009, 12:47 PM), <http://cityroom.blogs.nytimes.com/tag/osserritta-robinson/> (discussing Osserritta Robinson's lawsuit and its resolution by change in federal law).

³⁵² Telephone Interview with Jeffrey Feinbloom, Partner, Feinbloom Bertisch LLP (June 30, 2010). Local counsel also considered the willingness of Supreme Court counsel to postpone the decision whether to have the case argued by someone with substantive or Supreme Court expertise. *Id.*

³⁵³ See *supra* note 157 (discussing Supreme Court briefing schedules).

Thus it is essential, to the extent resources are available, to engage in advance preparation to develop a plan in the event that certiorari is granted. No matter how unwise it might be for a firm to have taken a case, or for the lawyer to have agreed to any given arrangement, once certiorari is granted the stakes are simply too high to ignore the contribution that interested groups can make through consultation on the main briefs and the amicus process.

e. Negotiating Differences Between Group and Individual Interests

While the principal challenge facing the Supreme Court Pro Bono Bar is developing ways to curb any inappropriate influence from a firm's private interest in obtaining merits arguments, the principal challenge for practice communities is negotiating the tension between group interests in the development of the law and the individual interests of particular litigants. Although it is certainly possible that these interests will sometimes merge, they may also diverge.³⁵⁴ Any effort by a practice community to influence Supreme Court activity must identify and take seriously these potentially differing interests.

Because the easiest system for reconciling individual and group interests is to identify good vehicles for presenting issues, practice communities are well served by developing systems that can identify common issues in cases at the earliest possible opportunity. This underlying knowledge provides a base for assessing which cases might serve well as vehicles and for intervention at the circuit stage to prevent problematic splits from emerging in the first place.

In addition, because Supreme Court working groups that are organized by practice communities enjoy substantive expertise that will often be absent with the Supreme Court Bar, they likely will be in a position to offer advice that is geared to individual, rather than group, interest. For example, the criminal defense practice community would be best able to assess the choice between direct review in the Supreme Court and state or federal post-conviction proceedings. The immigration practice community is best positioned to evaluate alternative immigration remedies. This consultative role can allow for expert advice geared to the individual litigant's interest. Of course, since practice community organizations have an independent interest in how the law develops, they must be upfront with litigants about the role that they play.

³⁵⁴ See *supra* notes 175–93 and accompanying text for discussion of this issue in *Jerman v. Carlisle*.

f. Developing Expertise About the Supreme Court and Supreme Court Practitioners

The very fact that there are many firms seeking pro bono opportunities at the Supreme Court means that there is room for circuit court lawyers to negotiate for the best arrangement for their clients. Working with national groups, they can learn which firms will provide a real opportunity for input from substantive experts. They can find out which firms will devote the resources necessary to present the best possible case, and they can learn about the relative expertise of different practitioners who offer free services. They can also be cognizant of the rudimentary aspects of Supreme Court litigation, such as the timing of consideration of petitions and the ways in which efforts to obtain certiorari can narrow the issues in the case.

None of these proposals is presented as a panacea. Despite their best efforts, practice communities cannot avoid the possibility that pro bono counsel (or private counsel) may choose to litigate in a way that the relevant practice community deems unwise. The unfolding drama of *Perry v. Schwarzenegger* illustrates this point.³⁵⁵ The advocacy community working on same-sex marriage issues is well coordinated and very sophisticated,³⁵⁶ but ultimately can only hope to influence this litigation as it progresses.³⁵⁷ It could not stop the filing of the case or, perhaps, even speak with the plaintiffs to discuss its concerns.³⁵⁸ But through the involvement of the advocacy community, one can at least be assured that the lawyers in *Perry* are constantly reminded of alternatives to the litigation choices they are making in the case.

V

MOVING FORWARD

Just as the genie cannot be put back in the bottle, it is hard to imagine that the Supreme Court Pro Bono Bar will disappear. Instead, it is likely that the forces that have led to the competition for merits cases will continue. The dynamics of this new Bar require close attention both from the Bar itself and from the practice communities affected by its presence.

³⁵⁵ See *supra* notes 161–69 and accompanying text.

³⁵⁶ See Cummings & NeJaime, *supra* note 8, at 1269–70 (describing California meeting that “was attended by all of the major LGBT rights lawyers” that resulted in a decision to “avoid litigation”).

³⁵⁷ See *supra* note 164 and accompanying text (indicating that gay-marriage advocates generally prefer state-by-state approach).

³⁵⁸ See *supra* note 174 (describing article which reported that Ted Olson discussed litigation with his family but not with established gay rights organizations).

Law firms and Supreme Court clinics must think about safeguards against the ways that a competitive search for cases may disserve clients and the development of the law. These practices should step back from their sheer competition for merits opportunities and develop alliances with practice communities. These alliances could help defend lower court victories, support certiorari where requested, and assist the practice communities in developing strategies that resolve issues in the lower courts rather than just in the Supreme Court. Meanwhile, practice communities should move away from antipathy to the new Supreme Court Pro Bono Bar and identify ways of collaborating that will better serve the interests of potential clients and those affected more generally by matters that reach the high court. Combined with careful monitoring of cases, these efforts could serve to produce a more thoughtful approach to the role of the Supreme Court in shaping the law affecting the rights of those with limited resources.