



2016

## Infrequently Asked Questions

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### Recommended Citation

Edward T. Swaine, *Infrequently Asked Questions*, 17 J. APP. PRAC. & PROCESS 271 (2016).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol17/iss2/6>

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## INFREQUENTLY ASKED QUESTIONS

Edward T. Swaine\*

### ABSTRACT

*If appellate advocates could hear from courts about topics that might be raised during oral argument—as opposed to relying solely on their ability to anticipate the issues—might their answers be better? That seems likely, but it is unlikely that research could confirm that, as judicial practice overwhelmingly favors impromptu questioning. Spontaneity may be harmless if the question was predictable, or unavoidable if a judge just thought of the question. But sometimes advocates have to answer challenging questions concerning the law, facts, or implications of a position—questions that help decide the case, either due to the quality of the answer or the question’s effect on other judges—and all would be better served by advance notice to advocates that specific issues might come up during oral argument.*

*This article doggedly pursues this simple but important proposition. It explores contemporary conditions that increase the value of preliminary questions, the empirics of their present (and limited) use, and the most compelling circumstances for employing them, illustrated primarily through missed opportunities in recent Supreme Court cases. Preliminary questions interrogate the traditional view of argument—itself fairly recent, and persisting despite erosion of its preconditions. But the potential for preliminary questions to improve judicial communication*

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\*Professor, George Washington University Law School. This article benefited from personal experience in briefing and arguing cases on appeal, but much more from input from current practitioners. Maxwell Weiss provided superb research assistance; save for a few obvious exceptions, research was completed as of February 2016, when the article was submitted for publication.

*and deliberation is too compelling to leave muted. The article concludes with a mooting of the proposal.*

## I. INTRODUCTION

The three wise monkeys—pictured avoiding evil by covering their eyes, ears, and mouths—show the plasticity of symbols. Once the monkeys might really have symbolized rectitude or probity. (Imperfectly, of course, since they shut out virtue along with evil.) Nowadays, they symbolize foolish obliviousness, like ostriches burying their heads in the sand.<sup>1</sup>

Our courts are a little like the three wise monkeys. Courthouse statues are the obvious comparison; perhaps because Lady Justice's self-restraint is more modest—only her eyes are blindfolded, not her mouth or ears—she still connotes impartiality more than its caricature.<sup>2</sup> The comparison gets a bit more pronounced in the Supreme Court and the federal courts of appeals. Proceedings begin with a blinkered view of the world, mostly confined to the record below, and conclude with the delphic pronouncement of opinions. Even the hubbub of oral argument—coincidentally presided over by three or more judges—is somewhat misleading. Judges often (but not always)

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1. See A.W. Smith, *On the Ambiguity of the Three Wise Monkeys*, 104 FOLKLORE 144, 146–48 (1993) (tracing three-monkey symbol across cultures); see also Wolfgang Mieder, *The Proverbial Three Wise Monkeys: Hear No Evil, See No Evil, Speak No Evil*, in TRADITION AND INNOVATION IN FOLK LITERATURE 157, 173 (1987) (attributing negative spin to later-appearing versions of a Japanese proverb and noting frequent use of the monkeys “in political cartoons to express this notion . . . [of] ‘to bury one’s head in the sand’”). To be sure, one should also avoid unfairness toward ostriches, who are more responsible than oblivious: They may look as if they are hiding their heads, but they are in fact tending their nests. See *Frequently Asked Questions*, AM. OSTRICH ASS’N (2015–2016), <https://www.ostriches.org/about-ostrich/faqs> (scroll down to *About the Ostrich*, then click *Why Do Ostriches Bury Their Head in the Sand?*) (noting that sitting ostriches drop their heads when predators approach, letting the rock-like appearance of their bodies camouflage their nests).

2. James Earle Fraser’s sculptures *Authority of Law* and *Contemplation of Justice*, which flank the steps of the Supreme Court Building, hedge even more: Both pieces look out at the world, with the latter holding a blindfolded statue of Justice in her right hand. See also Office of the Curator, Supreme Court of the United States, *About the Court, The Supreme Court Building, Figures of Justice*, SUP. CT. OF THE U.S. (May 22, 2003), <https://www.supremecourt.gov/about/figuresofjustice.pdf> (providing close-up photo showing blindfold detail and text, and explaining that blindfold may initially have been incorporated into depictions of justice “to indicate the tolerance of, or ignorance to, abuse of the law by the judicial system,” but that it is now “generally accepted as a symbol of impartiality”).

interact with counsel,<sup>3</sup> but this is often thought to disguise a conversation among themselves. Some courts even ban cameras because it prevents both counsel and judges from speaking to (and performing for) the public at large.<sup>4</sup> If these norms limit what judges see, hear, and say, it raises the question of whether judges, like the wise monkeys, can appreciate what's being missed.

This article attacks one such norm, that confining oral argument to questions unveiled by the court at argument and addressed impromptu by counsel.<sup>5</sup> That practice makes for better theater, or hazing, but deserves reconsideration. The Supreme Court and the federal courts of appeals should speak more often, and could then listen more constructively, by

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3. Up until last spring, Justice Thomas had been quiet for nearly a decade. See Adam Liptak, *Thomas Ends 10-Year Silence on the Bench*, N.Y. TIMES, Mar. 1, 2016, at A1 (pointing out that “[i]t has been at least 45 years since any other member of the court went even a single term without asking a question”); Adam Liptak, *A Thomas Milestone Likely to Pass Quietly*, N.Y. TIMES, Feb. 2, 2016, at A20 (same); see also *infra* text accompanying notes 102–05. Although his silence was harshly criticized by some, see, e.g., Jeffrey Toobin, *Clarence Thomas’s Disgraceful Silence*, NEW YORKER DAILY CMT. (Feb. 21, 2014), <http://www.newyorker.com/news/daily-comment/clarence-thomass-disgraceful-silence> (characterizing the Thomas silence as having gone “from curious to bizarre to downright embarrassing, for himself and for the institution he represents”), it bears a resemblance to the Court’s original practice. See *infra* Part II.

4. See, e.g., Adam Liptak, *Bucking a Trend, Supreme Court Justices Reject Video Coverage*, N.Y. TIMES, Feb. 19, 2013, at A15 (surveying practice in other countries’ courts, and noting Chief Justice Roberts’s concerns about “the effect that cameras would have on lawyers and, perhaps more important, on the justices, who may have less self-control than their counterparts abroad”); Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1514–15 (2012) (observing that “Supreme Court justices worry about how cameras might affect their exchange with lawyers during oral argument,” and noting Justice Kennedy’s belief that “the absence of cameras . . . keeps the public and legal community appropriately focused on the Supreme Court’s written opinions”). The Ninth Circuit has been more open to experiment, see generally, e.g., Diarmuid O’Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROC. 323 (2007), and started offering public access in selected cases, Bill Mears, *Appeals Court Hearings Now Going Live and Online*, CNN (Dec. 3, 2013, 4:37 p.m. ET), <http://www.cnn.com/2013/12/08/politics/appeals-court-live-online/> (noting that the Ninth Circuit’s first webcast would mark “the first time a federal appeals court . . . use[d] its equipment to offer live streams to the public”).

5. Other aspects of the appellate process may raise related issues of silencing. For example, until relatively recently parties might be prohibited by local rules from citing unpublished opinions, even as these opinions resolved more and more cases. Now parties can cite them, but courts retain discretion as to their release and their effect (and, ultimately, the effect of citing them). See FED. R. APP. P. 32.1.

judiciously informing parties in advance about particular issues the court might raise at oral argument.

While this idea is simple, such preliminary questions are quite unusual, particularly in the Supreme Court, and their potential virtues and the appropriate occasions for their use, have not been assessed. The time is ripe. There is a resurgent academic interest in oral argument, along with other aspects of judicial administration,<sup>6</sup> but analysis is often descriptive or veers toward the despairing or utopian—accepting the slow demise of oral argument or yearning for a return to days of yore.<sup>7</sup> Given the potential (but unfulfilled) centrality of oral argument to judicial decisionmaking, more modest, pragmatic, and incremental change deserves consideration.

Part II provides a brief background on the evolution of oral argument. Part III describes the role preliminary questions might serve, including their present use and contemporary examples of when they might have been consequential. Part IV subjects the proposal to its own mooting. Part V concludes. A quick word on

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6. Oral argument itself is the subject of a newly substantial literature. *E.g.*, RYAN A. MALPHURS, RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS (2103); MATTHEW M.C. ROBERTS, ORAL ARGUMENT AND AMICUS CURIAE (2012); RYAN C. BLACK, TIMOTHY R. JOHNSON, & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE (2012); *see also* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008) [hereinafter Lazarus, *Advocacy Matters*]. Other work explores closely related matters, such as the improvement of judicial opinions and the allocation of scarce judicial resources. *See, e.g.*, Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540 (2014) [hereinafter Lazarus, *(Non)Finality*]; Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011) [hereinafter Levy, *Mechanics*]; Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011); Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965 (2009).

7. Sometimes all at once. In an article that emerged as this article was being submitted, Professors Sullivan and Canty contrast two periods of oral argument in the Supreme Court and find substantial differences. Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958–60 and 2010–12*, 50 UTAH L. REV. 1005 (2015). They recommend, among other things, that the Court consider returning more uninterrupted time to counsel, *id.* at 1020, but they also ask a series of uninterrupted questions about whether oral argument as it is presently practiced is worth it, *id.* at 1016–18, 1077. While sympathetic to their description, this article focuses on a particular technique that might help redeem the exercise.

scope: The focus is on federal appellate practice, particularly in the Supreme Court, where the problem is clearest and a cure most easily implemented, but similar initiatives in state and other courts—which are already more innovative<sup>8</sup>—would also be welcome.

## II. THE EVOLVING NATURE OF ORAL ARGUMENT

Once upon a time, oral argument in the United States was a counsel-driven exercise. Over time, judges seized the reins, and now preside over a bar of extraordinarily talented advocates—including via practices that make advocacy more difficult and less useful.

### A. *The Supreme Court*

American courts initially followed England in eschewing written submissions, making oral argument the mainstay of their decisionmaking.<sup>9</sup> In the Supreme Court, legends like William Pinckney, William Wirt, and Daniel Webster could talk for

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8. See, e.g., Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. APP. PRAC. & PROCESS 159 (2013). Thus, at least one division of California's state appellate court has sent out "focus letters," which describe key issues agreed by the panel members. *Id.* at 164, 181; see also J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT'L L. 187, 201 (2005) (suggesting that "judges may also instruct the parties to come prepared to focus on a particularly troublesome part of the appeal or, perhaps, binding legal authority overlooked in their briefs"). Administrative proceedings have occasionally explored similar techniques. See, e.g., *In re Gen. Motors Corp., Delco Moraine Div.* (N. Plant), 1992 WL 373464 at \*10 (EPA 1992) (also reported at 4 E.A.D. 334) (noting that parties in a comparable case had been directed to brief certain issues and to "be prepared to discuss [those issues] at oral argument," and directing *Delco Moraine* parties to brief same issues).

9. See generally ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* (1990); see also, e.g., *id.* at 108 (noting that "[i]nitially, the arguments made by counsel to American appellate courts were exclusively oral because of the English heritage of the American legal system and the relative difficulty of having materials printed" but also pointing out that oral argument was eventually limited to "true advocacy" as caseloads increased—which resulted in less time for oral argument—and legal printing became more accessible); R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482, 483–84 (1994) (recognizing that "early appellate practice in this country was 'an essentially oral medium,'" and that "[t]he practice of written legal argument . . . is in fact a nineteenth century American innovation in the common law" (citation omitted)).

days,<sup>10</sup> but lawyers could also swap in and out like segments of the Pony Express.<sup>11</sup> Such performances were both marvelous and intolerable. As the Court's caseload increased, lengthy arguments prolonged its term,<sup>12</sup> but little could be done about it; arguments were indispensable for a judiciary without staff or library.<sup>13</sup> This also meant that advocates, whether good or bad, had the Court at their mercy,<sup>14</sup> and Justices sat inert during proceedings over which they lacked meaningful control.<sup>15</sup> (They

10. The burdens of lengthy argument may have hastened the deaths of some Supreme Court advocates. See CLARE CUSHMAN, *COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY* 125 (2011) (referring to Augustus Garland, stricken by apoplexy and dying in the Court); G. EDWARD WHITE, III-IV *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35* at 213-14 (1988) (describing Courtroom collapse from stroke and subsequent death of Thomas Emmet); *id.* at 254 (noting supposed role of overexertion in death of William Pinckney and quoting a contemporary who pointed out that Pinckney "had an influenza for some days, and having last week exerted himself in Court to very high degree . . . probably accelerated a disease to which he was constitutionally inclined").

11. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Court permitted six lawyers to argue. See WHITE, *supra* note 10, at 238. That number is not unimaginable in the modern era—seven different advocates participated in the Obamacare argument, see Tr. of Oral Arg., *Fla. v. Dept. of HHS*, 2012 WL 1031485, at 1 (Mar. 28, 2012) (No. 11-400); Tr. of Oral Arg., *Nat'l Federation of Indep. Bus. v. Sibelius*, 2012 WL 1031484, at 1-2 (Mar. 28, 2012) (Nos. 11-393 & 11-400); Tr. of Oral Arg., *Dept. HHS v. Fla.*, 2012 WL 1017220, at 1 (Mar. 27, 2012) (No. 11-398); Tr. of Oral Arg., *Dept. HHS v. Fla.*, 2012 WL 993811, at 1 (Mar. 26, 2012) (No. 11-398)—but the effects of unleashing multiple attorneys with extended time were much graver. An extreme example, from late in this golden age, was the argument in *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1844), in which Webster and his peers lasted for ten days. See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY 1836-1918*, at 124-33 (1928) (collecting contemporary accounts of the argument). For accounts of early practice by leading advocates of the present day, see DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY* 35-49 (2d ed. 2010); Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, 1985 SUP. CT. HISTORICAL SOC'Y YEARBOOK 22.

12. Shapiro, *supra* note 11, at 25 (noting that "the tradition of unlimited argument placed a growing strain on the justices" and "the length of the Supreme Court's term rose from 43 days in 1825 to 99 days by 1845").

13. G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 1, 35 (1984).

14. One contemporary reported that "[i]t mattered not by whom the Court was addressed," since any of the age's luminaries "received the same and no greater attention than any second or third rate lawyer arguing his first case." WARREN, *supra* note 11, at 470-71 (quoting observer).

15. Chief Justice Marshall is supposed to have said that "the acme of judicial distinction" was "the ability to look a lawyer straight in the eye for two hours and not hear a damned word he says," and Justice Story to have found arguments "excessively prolix and tedious." Shapiro, *supra* note 11, at 25 (footnote omitted); see also *id.* at 26 (noting one lawyer's estimation that judicial attention to arguments actually declined after the Civil

snuck away in shifts to take lunch, but stayed within earshot of counsel, who kept talking, sometimes over the audible clatter of forks and knives from behind the curtain.<sup>16</sup>) The Court's passivity even gave one Golden Age advocate the perceived license to approach the bench, mid-argument, and take a pinch out of a startled Justice's snuff-box.<sup>17</sup>

As the judiciary's stature, and workload, increased, it encouraged briefing and clamped down on the monologues. The Supreme Court, like some state courts, had long required some kind of written submission; changes adopted in the 1830s actually encouraged parties to submit cases on the pleadings, which suggested that oral argument was not sacrosanct.<sup>18</sup> Other reforms followed. During the nineteenth century, the Court adopted rules that limited each side to four hours of argument, and after that two hours; by the early twentieth century this had dropped to an hour, and the Court created a summary docket that capped less challenging cases at thirty minutes per side; since 1970, that has been the default across the board.<sup>19</sup> With occasional exceptions,<sup>20</sup> today's counsel get only the time

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War, with a fair amount of napping involved, "[p]articularly during the lunch hour"); CUSHMAN, *supra* note 10, at 24–25 (quoting early media accounts).

16. CUSHMAN, *supra* note 10, at 123–24, 281 n.123.

17. *Id.* at 22–23. The advocate was Henry Clay, who appears to have known the Justice, Bushrod Washington. Albert P. Blaustein & Roy M. Mersky, *Bushrod Washington*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, THEIR LIVES AND MAJOR OPINIONS at 247, 250 (Leon Friedman & Fred L. Israel eds. 1969) (indicating that Clay had while a law student trained in Washington's law office); *see also* WARREN, *supra* note 11, at 470 n.1 ("'Sir,' said Mr. Justice Story, in relating the circumstances to a friend, 'I do not believe there is a man in the United States who could have done that, but Mr. Clay'").

18. Cozine, *supra* note 9, at 486–88. Supreme Court Rule 44, as adopted in 1837, assured counsel that cases submitted based on writings would "stand on the same footing as if there were an appearance by counsel." *Id.* at 487–88, 488 n.30 (citing rule and its adoption).

19. CUSHMAN, *supra* note 10, at 124–27; Shapiro, *supra* note 11, at 24–27.

20. The Court may spontaneously grant a party a few extra minutes if circumstances warrant. More exceptionally, it sometimes allocates additional time in advance to combined or particularly complex arguments. *See, e.g.*, Order Pertaining to the Allocation of Oral Arg. Time, *Nat'l Fed. of Indep. Bus. v. Sebelius*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2566, Feb. 21, 2012, Nos. 11-393, 11-398, & 11-400 (allocating six hours of argument time among counsel for parties and amici).



allotted the easiest cases of a hundred years ago—about the time that it took Daniel Webster to clear his throat.<sup>21</sup>

More written submissions, and less air time, naturally affected oral argument's character. Counsel spent less time educating courts on the basics, and a better-prepared bench asked that counsel accommodate questions too.<sup>22</sup> Reports of Justices interrupting argument increased after the Civil War.<sup>23</sup> By the mid-twentieth century, modern argument had more or less arrived, and it was not universally acclaimed. Argument before Chief Justice Hughes (rumored to have cut off one attorney in the middle of "if"), Justice Frankfurter (credited with squeezing ninety-three questions into one case), and their contemporaries was criticized as being closer "to the quiz programs on television than to the magnificent speeches" of yesteryear.<sup>24</sup>

This evolution was hardly limited to the Supreme Court, but two of its features deserve special mention. The first is how questions are put to, and by, the Court. As oral argument was cut to one hour per side, the docket shifted to certiorari jurisdiction, giving the Court tremendous discretion as to which cases and issues it entertained.<sup>25</sup> While the certiorari process enhanced the role of the parties in framing the issues for possible review,<sup>26</sup> it

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21. Modern observers have said that "[t]he modern practitioner bears the same relationship to Daniel Webster as an airline pilot bears to Ponce de Leon." Seth P. Waxman, *In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century*, 3 J. APP. PRAC. & PROCESS 521, 526 (2001) (quoting Steven D. Merryday, *Oral Argument*, in FLA. APP. PRAC. HANDBOOK §17.9, at 16–17 (1998)).

22. CUSHMAN, *supra* note 10, at 124 (drawing connection between Justices' familiarity with cases through review of briefs and penchant for aggressive questioning).

23. Shapiro, *supra* note 11, at 26; *but see id.* (noting that oral argument in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), spanned twelve hours over four days, apparently without a peep from the Court). The theatrics and flights of oratory generally continued, however, with the bar being dominated by U.S. Senators—at least one of whom drew praise despite (or perhaps because of) his eloquence when arguing while drunk. CUSHMAN, *supra* note 10, at 121–22.

24. Shapiro, *supra* note 11, at 27 (quoting an advocate cited in JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 102 (1958)).

25. *See* Shapiro, *supra* note 11, at 26 (noting jurisdictional revisions in the Judiciary Act of 1925, and reduction in argument time via changes to the Supreme Court's rules that same year); *see also* Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008) (describing beginnings of Court's discretionary jurisdiction).

26. *See generally* R. S. Ct. U.S. 14(1)(a) (directing that questions be expressed "concisely" and "without unnecessary detail" and providing that "[t]he statement of any

simultaneously provided peeks into the issues in which the Court was interested: ordinarily, those proposed by a successful petitioner, but sometimes issues that the Court culled from the petition or decided to reframe for itself.<sup>27</sup>

A second noteworthy feature of the Supreme Court is, once again, its bar. In the popular account, the Court's early indulgence of oral argument was encouraged by the preternaturally gifted lawyers of the day,<sup>28</sup> though others stress the small size and uneven quality of that era's bar,<sup>29</sup> and complaints about quality did eventually become commonplace.<sup>30</sup> Today, at any rate, elite Supreme Court specialists ensure that many cases are briefed and argued to the highest professional standards.<sup>31</sup> Their proficiency has enabled the Justices to adopt a demanding, even dizzying, style of inquiry that puts non-specialists at a definite disadvantage.<sup>32</sup>

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question presented is deemed to comprise every subsidiary question fairly included therein," but also noting that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, *SUPREME COURT PRACTICE* 452–64 (10th ed. 2013).

27. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (noting that "[a] litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below," and emphasizing that "[t]he petitioner can generally frame the question as broadly or as narrowly as he sees fit"); *see also id.* at 535–36 (explaining that this allows the respondent notice of the grounds on which the case is to be argued and sharpens discussion). As the *Yee* Court recognized, there are exceptions to this principle, such as the Court's capacity to rephrase petitioner's questions and, exceptionally, to consider questions not presented. *Id.*; *see also* text accompanying note 52, *infra*.

28. *See, e.g.*, Shapiro, *supra* note 11, at 28 (referring to "high quality and specialization" of Supreme Court bar in "the days of Marshall and Taney").

29. To some, this is what made courts in the United States prone to diverge from the English oral tradition. *See* Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1179–80 (2004) (noting, additionally, the greater distances faced by lawyers practicing in the colonies and suggesting that those distances might also have played a role the ascendancy of briefing).

30. FREDERICK, *supra* note 11, at 3, 39 (citing complaints).

31. John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 78–79 (2005); *see also* Tom Goldstein, *The Expansion of the "Supreme Court Bar"*, SCOTUSBLOG (Mar. 2, 2006), <http://www.scotusblog.com/2006/03/the-expansion-of-the-supreme-court-bar/>.

32. Serious inequities between the parties may result. Lazarus, *Advocacy Matters*, *supra* note 6, at 1554, 1557 (citing an "advocacy advantage" that goes to clients who can pay for experienced Supreme Court counsel, but concluding that "to some extent, market forces, the significant professional prestige closely associated with Supreme Court advocacy, and

Even for regulars, the limits may be glimpsed—counsel can find it difficult to respond to torrential questioning<sup>33</sup>—and Justices, too, have complained about the difficulty in getting questions in edgewise.<sup>34</sup> Justice Thomas, among others, has suggested that advocates are left with ever-dwindling scraps of time in which to present their own arguments,<sup>35</sup> although his long stretches of silence have drawn criticism,<sup>36</sup> they have the virtue of preventing a graver shortage of airtime.

### *B. The Federal Courts of Appeals*

Trends in the federal courts of appeals are similar but more daunting. The length of time allowed counsel at argument now averages fifteen minutes or less.<sup>37</sup> Even that number is largely hypothetical: By 2013, not even twenty percent of the cases resolved on the merits by the federal courts of appeals received

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the personal commitment of some attorneys to provide able representation to under-represented interests” may help close the gap).

33. Robert Barnes, *Supreme Court Justices Are Talking More*, WASHINGTONPOST.COM (Mar. 2, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030104697.html> (quoting one experienced advocate to the effect that, as to questions, “it would be hard to ask too many more”).

34. See, e.g., THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 138 (Brian Lamb, Susan Swain & Mark Farkas eds., 2010) [hereinafter THEIR OWN WORDS] (quoting Justice Alito: “[I]t’s a lot harder to get in a question on a bench of nine than it is on a bench of three. . . . [I]f you wait until the end of the sentence, you will never get a question in. You have to interrupt to make your voice heard.”); Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES, Oct. 8, 2013, at A14 (reviewing assessments by several members of the Court to the effect that “things had gotten out of hand in their courtroom, with their barrage of questions sometimes leaving the lawyers arguing before them as bystanders in their own cases”); Tony Mauro, *Alito Reflects on His Role on the High Court*, NAT’L L.J., Aug. 9, 2007 (quoting Justice Alito as stating that “it’s extremely difficult to get a question in,” and reporting the need to find “a strategic opportunity to get a word in edgewise”).

35. E.g., THEIR OWN WORDS, *supra* note 34, at 71, 75 (quoting Justice Thomas: “I don’t find [oral argument] as useful now, because I think there are far too many questions.” . . . “I don’t see how you can learn a whole lot when there are fifty questions in an hour.”); Bryan A. Garner, *Justice Clarence Thomas*, 13 SCRIBES J. LEG. WRITING 99, 103–05 (2010) (expanding on Justice Thomas’s reasons for not interrupting advocates at oral argument).

36. See note 3, *supra*.

37. David R. Cleveland & Stephen Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 120 (2013).

any oral argument at all.<sup>38</sup> Unlike in the Supreme Court—which could accommodate longer arguments by hearing (still) fewer cases, or putting additional argument days on its calendar—the federal courts of appeals have capacity constraints that are beyond their control.<sup>39</sup>

Other contrasts are worth noting. As with the Supreme Court, appellate litigators—often individuals handling both Supreme Court cases and lower-court matters—are highly experienced and exceptionally talented. Their impact, though, is diluted across higher-volume, geographically diverse circuits; the uncertain availability of oral arguments also puts greater emphasis on briefing.<sup>40</sup> And because the federal courts of appeals exercise appellate, rather than certiorari, jurisdiction, advocates suffer a relative handicap in preparing for argument. Appellants may pursue any properly preserved error, and appellees have latitude in defending the judgment, so many more issues are potentially up for discussion.

Briefing crystallizes the issues on appeal and reduces the potential range of discussion at argument—and, by the same token, some differences between the Supreme Court and lower

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38. Administrative Office of the U.S. Courts, *2013 Annual Report of the Director: Judicial Business of the United States*, Table B-1, <http://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2013/12/31> (showing 37,517 terminations on the merits in the federal courts of appeals, only 6867 of them after oral hearing, which amounts to 18.3 percent); see *Oral Argument Task Force Report* at 2–3, AM. ACAD. APP. LAWYERS (Oct. 15, 2015), [https://www.appellateacademy.org/publications/oa\\_final\\_report\\_10\\_15\\_15.pdf](https://www.appellateacademy.org/publications/oa_final_report_10_15_15.pdf) (noting methodological issues associated with tracking statistics over time, but concluding that “oral argument has become the exception”); see generally Cleveland & Wisotsky, *supra* note 37. There remains variation among the courts. The Second Circuit, for example, was formerly known for hearing argument in virtually all cases, but adopted a non-argument calendar intended for immigration cases and other matters (such as those involving pro se litigants). See 2d Cir. R. 34.2 (describing non-argument calendar); see also 2d Cir. R. 33.1 (describing exception from Civil Appeals Management Plan for cases placed on non-argument calendar).

39. See, e.g., Roger J. Miner, “*Dealing with the Appellate Caseload Crisis*”: *The Report of the Federal Courts Study Committee Revisited*, 57 N.Y.L. SCH. L. REV. 517 (2012/2013) (discussing longstanding concerns about “congestion, delay, expense, and expansion” in federal courts of appeals).

40. See THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 117 (1994) (noting that, since “the federal courts have reduced oral argument dramatically . . . judges have necessarily afforded greater emphasis and importance to the written presentation to the court”); but see, e.g., Thomas G. Hungar & Nikesh Jindal, *Some Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 533–36 (2010) (emphasizing both briefwriting and oral argument skills for those in general appellate practice).

courts—but the playing field between bench and bar remains far from level. In assessing whether oral argument is unnecessary, an assigned panel has to consider whether the appeal is frivolous, whether the issues have been authoritatively settled or whether the briefs and record are adequate.<sup>41</sup> Initial screenings by staff, evaluating these questions, often identify challenging factual or procedural issues that favor argument, at least in those cases ultimately heard.<sup>42</sup> The result is that the panel convening to hear a case often has—and might relay—a decent understanding of why oral argument is being held, and what has yet to be resolved, but this remains guesswork for the parties.

In sum, the federal courts of appeals hear a smaller proportion of cases, for less time, with greater variation among advocates, and with fewer conspicuous warnings as to what is on the judges' minds; far from reversing course, suggested reforms typically focus on how to conserve further the time for argument.<sup>43</sup> Sometimes the Supreme Court has seemed at risk of following suit. Shortly after her appointment, Justice O'Connor tried to persuade her colleagues that the Supreme Court follow its lower-court brethren in bypassing argument in some cases.<sup>44</sup>

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41. Fed. R. App. P. 34(a)(2). Because the rule anticipates that oral argument might be unnecessary if “the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument,” *id.*, it implies that better briefing diminishes the likelihood of oral argument—but some judges view inferior briefing and legal representation as reason to conclude that oral argument would serve little purpose. Stephen L. Wasby, *As Seen From Behind the Bench: Judges' Commentary on Lawyers' Competence*, 38 J. LEGAL PROF. 47, 64–65 (2013) (discussing judges' assessments of briefs and reasons for holding or dispensing with oral argument).

42. LAUREL HOOPER, DEAN MILBACH & ANGELIA LEVY, *CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS* 16–18 (2d ed. 2011) (describing case screening, and concluding that “[c]ase characteristics that are likely to favor oral argument include presence of counsel, novel issues, complex issues, extensive records, and numerous parties”); see also Edith H. Jones, *A Snapshot of a Fifth Circuit Judge's Work: Boutique Justice*, 33 TEX. TECH. L. REV. 529, 535–36 (2002) (discussing differences in appellate judge's time and attention required to decide cases screened into “Light,” “Medium” and “Heavy” categories). Depending on the particular court's practices, and whether the case was initially proposed for summary disposition, the panel may have received a written memorandum from a staff attorney or questioned the staff attorney, and the judges on the panel might even have exchanged views among themselves. See Levy, *Mechanics*, *supra* note 6, at 344–54.

43. For discussion and criticism of this tendency, see BAKER, *supra* note 40, at 108–17; see also Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913 (1995).

44. CUSHMAN, *supra* note 10, at 225 (indicating that Justice Powell was wary of the change and that Justice Brennan was strongly opposed).

It seems unlikely that the present Court—with accomplished Supreme Court advocates in its ranks, including Chief Justice Roberts and Justices Alito, Ginsburg, and Kagan—would encourage that substantial a retreat,<sup>45</sup> but it raises the question whether there would be any point to resisting.

### C. *The Value of Oral Argument*

The erosion of oral argument may be read as a verdict on its value, so a word on that score is appropriate.<sup>46</sup> At least two views of its potential seem admissible. On a naive view, oral argument allows advocates the chance to persuade judges and address their concerns, and thus betters decisions and opinions. Judges have said that argument sometimes changes how they resolve cases.<sup>47</sup> On a more sophisticated view, argument is

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45. *But see* FREDERICK, *supra* note 11, at 2 (cautioning that if “that trend [of reducing the time allotted for oral argument] continues, by later in the twenty-first century, the Supreme Court may eliminate oral argument altogether except in the most important cases, thereby following the trend of courts of appeals that are deciding an ever-larger percentage of cases solely on the basis of written submissions”).

46. *See generally, e.g.*, MALPHURS, *supra* note 6, at 18 (noting widespread scholarly concern about whether oral arguments matter and describing that concern as “the driving question surrounding most academic research on the [Supreme] Court”).

47. A number of current Justices have suggested as much. *E.g.*, MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 169–70* (2013) (quoting statements by Chief Justice Roberts and Justice Kennedy about the importance of oral argument in the decisionmaking process); *THEIR OWN WORDS*, *supra* note 34, at 21–22 (quoting Chief Justice Roberts, stating that he changes his mind “[a]ll the time” while listening to argument, and that you “go into argument with not a totally blank slate . . . but you’ve got all these questions”); *id.* at 113 (reporting Justice Breyer’s estimate that he changes his mind about which side should prevail after argument in only five to ten percent of cases, but that he “think[s] differently about a case” about one-third of the time); *id.* at 139–40 (quoting Justice Alito, stating that he “certainly” changes his mind after oral argument, though less frequently about the “bottom line,” and that oral argument “tends to crystallize things” for him). Justice Thomas, in contrast, has expressed doubt about the influence of oral argument. *See, e.g.*, *THEIR OWN WORDS*, *supra* note 34, at 71, 75; Garner, *supra* note 35, at 104 (noting Justice Thomas’s conviction that the questioning at oral argument is “just too much”). Among former members of the Court, Justice Scalia reported that it is “probably quite rare, although not unheard of, that oral argument will change [his] mind,” *THEIR OWN WORDS*, *supra* note 34, at 42, and that “very often you come in on the knife’s edge, quite undecided,” and “oral argument can turn the corner,” Antonin Scalia, *A Voice for the Write*, A.B.A. J., May 2008, at 36, 38. Justices Brennan and White, in contrast, often spoke to the significance of oral argument, as did Chief Justice Rehnquist, *see* Shapiro, *supra* note 11, at 29–30 (quoting remarks), the last estimating that it had, in between twenty-five and fifty percent of the cases argued, affected his views somewhat.

predominantly a means for judges to lobby each other, using counsel as though they were ventriloquist dummies.<sup>48</sup> Because argument may be the last (and perhaps the first) real opportunity for judges to interact on a case before voting—Supreme Court Justices typically confer later that same week,<sup>49</sup> and lower court panels may even vote later that same day<sup>50</sup>—it is a critical opportunity to learn what others think and to persuade them.<sup>51</sup>

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Countless other judges have opined about the question, but non-impressionistic data are harder to find. Two Eighth Circuit judges reported that, according to notes taken during oral argument, it changed their views in between seventeen and thirty-seven percent of cases. Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!* 70 A.B.A. J. 68 (Sept. 1984) (displaying data in table). In another study, one of those judges reported results ranging from thirteen to twenty-one percent. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 39–40 (1986); see also Timothy R. Johnson, James F. Spriggs II, and Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justice's Decisions?* 85 WASH. U. L. REV. 457 (2007) (suggesting, based on review of notes taken during oral argument by Justice Blackmun, that the quality of oral advocacy may influence outcomes).

48. Former Solicitor General Drew Days described occasions on which Justices “are talking to a fellow justice through you,” but allowed that there are also “some questions that are real questions” in that “Justices want to know the answer to the question, something that’s been [preying] on their minds.” THEIR OWN WORDS, *supra* note 34, at 249.

49. COYLE, *supra* note 47, at 169 (referring to “closed door conference” held “after each week’s arguments”); see also THEIR OWN WORDS, *supra* note 34, at 71 (quoting Justice Thomas: “[T]he cases that we hear on Mondays . . . are decided on Wednesday afternoons. The cases that are argued on Tuesday and Wednesday are decided on Friday morning.”).

50. See, e.g., Bright & Arnold, *supra* note 47, at 68–69 (indicating that Eighth Circuit judges vote soon after daily arguments are complete).

51. Chief Justice Roberts has explained that the Justices “come to [oral argument] cold as far as knowing what everybody thinks. So through the questioning we’re learning for the first time what other justices’ views are of the case. And that can alter how you view it, right on the spot.” THEIR OWN WORDS, *supra* note 34, at 18–19. Justice Douglas reported, less enthusiastically, that he “soon learned that . . . questioning from the bench was . . . a form of lobbying for votes.” PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT 72 (1995); see also FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 110 (1980) (stating that “[o]ften when a judge addresses questions to an advocate, he is really communicating with his brethren, and that “[i]n a sense, therefore, the conference of the judges begins during argument”); COYLE, *supra* note 47, at 169 (claiming that “[t]he justices learn for the first time what their colleagues are thinking about a case during oral arguments in that case,” stressing the limited interactions among Justices beforehand, and noting the formal announcement of individual Justices’ views at conference held within a week of oral argument); *Panel Discussion: The Women at the United States Supreme Court*, 42 SW. L. REV. 503, 522 (2013) (reporting that Justice Powell, when asked about the value of oral argument, replied that “It’s the first time that I get to hear what my colleagues are

Neither view, unfortunately, resolves whether oral argument should be maintained or changed. Either way, argument is consequential, albeit for different reasons, and it undoubtedly matters in subtler ways as well—disciplining written submissions by forcing counsel to anticipate the possibility of being chewed out, promoting judicial engagement, and so forth. Equally important, the payoffs plausibly depend on how courts actually conduct argument, which has changed dramatically over time. Even if one doubts, for example, that arguments today change the outcome of many decisions, that says little definitive about their potential impact. Refining how judges pose questions might improve the payoff on either the naive or sophisticated views. If not, certainly, the entire exercise needs reconsideration.

### III. QUESTIONS SELDOM POSED

While modern oral argument often looks like a free-for-all, courts can vary and discipline how they tender questions. The easiest technique—sending counsel questions that might be posed in the actual argument, to facilitate their preparation—is rarely employed, despite the abundance of opportunities.

#### *A. Other Ways to Ask Questions*

Although counsel establish, at least initially, the roster of potential questions before the Supreme Court, the Court sometimes shows its hand. When granting certiorari, it sometimes asks the parties to brief and argue an additional question. Such intervention, even if otherwise unwelcome, gives counsel maximum notice, allowing them to adjust both their written and oral presentations. (It also resolves a distinct kind of problem for the Court—anticipating a potential dilemma it might otherwise face between ducking an issue or deciding a question never properly put before it—and remains reserved for important and substantially distinct questions of law.<sup>52</sup>)

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thinking,” which reflected Justice O’Connor’s observation that some Justices use the opportunity to ask questions that will “educate their colleagues”).

52. See *Yee*, 503 U.S. at 535–36. It goes further, of course, if the Court adds a question not resolved below. See, e.g., *United States v. Tex.*, 2016 WL 207257 (2016) (No. 15-674)



On other, equally rare occasions, the Court, having uncovered an issue not adequately addressed by the principal briefs, has asked that the parties file supplemental briefs—usually on threshold jurisdictional questions.<sup>53</sup> If the request comes prior to oral argument, it suggests a possible topic for live discussion, but the primary or even exclusive emphasis is on briefing.<sup>54</sup>

Apart from these unusual requests, the Court's practice is to hold fire until oral argument. Once in a while, the Court asks counsel to be prepared to discuss matters not set for

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(granting certiorari and adding question relating to President's Take Care authority). The practice of adding to the parties' questions was more common when the Court exercised other forms of appellate jurisdiction. *See, e.g.*, *Julian Messner, Inc. v. Spahn*, 393 U.S. 818 (1968) (noting probable jurisdiction and requesting counsel to "discuss in their briefs and oral arguments, in addition to the other questions present," the question of whether injunctive relief granted below was unconstitutional prior restraint), *appeal dismissed*, 393 U.S. 1046 (1969); *cf.* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979) (discussing evolution of Supreme Court's jurisdiction).

53. *But cf., e.g.*, Order, *Zubik v. Burwell*, [https://www.supremecourt.gov/orders/courtorders/032916zr\\_3d9g.pdf](https://www.supremecourt.gov/orders/courtorders/032916zr_3d9g.pdf) (U.S. Mar. 29, 2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191) (post-argument order directing the filing of supplemental briefs on the topic of "whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees," and adding additional background and exemplary situations that might be addressed).

54. Ten days before argument in a *qui tam* case, the Supreme Court issued a request for supplemental briefs on Article III standing, with the briefs to be due the day after argument. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 528 U.S. 1015 (1999) (mem.) ("Parties are directed to file supplemental briefs addressing the following question: 'Does a private person have standing under Article III to litigate claims of fraud upon the government?'"). When petitioner's counsel began oral argument with that issue, *Tr. of Oral Arg., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 1999 WL 1134650, at 3 (Nov. 29, 1999) (No. 98-1828) (indicating that counsel's substantive opening was "This Court has asked us, of course, to brief and argue an additional issue"), a Justice advised him that he was "perfectly free" to do so, but that it was not required, as "[w]e asked you to brief the additional issue. . . . [w]e didn't ask you to argue it," *id.* A substantial portion of the *Stevens* argument was devoted to standing, propelled by questions from the Court, to the point that counsel was eventually advised by a questioner that "you only have half an hour to argue," *id.* at 15, but ultimately the Court did not resolve the case on that ground. *Stevens*, 529 U.S. at 787–88 (holding that "a private individual has standing to bring suit in federal court on behalf of the United States under the False Claims Act . . . but that the . . . Act does not subject a State (or state agency) to liability in such actions"); *but see* Docket Entry, *Sell v. United States*, 539 U.S. 166 (Feb. 28, 2003) (advising counsel that they "should be prepared to discuss the jurisdiction of this Court and of the Court of Appeals in this case, see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)," but also advising them to file and serve supplemental briefs on the question).

supplemental briefing. The circumstances tend, unsurprisingly, to the unusual and compelling. For example, in early October 2015, the Court appointed counsel to represent the petitioner in a case to be argued at the beginning of November. A few days before argument, it asked counsel to be prepared to discuss which court a writ of certiorari should be directed toward, and that topic indeed consumed a fair amount of time at the argument.<sup>55</sup> Revealingly, the Court's notice was unusual enough that it attracted media attention.<sup>56</sup>

The federal courts of appeals, likewise, have used preliminary questions only sporadically, making the surprise of a pre-argument inquiry rival any averted surprise at oral argument. Jurisdictional issues, or at least a fraction of them, are favorites,<sup>57</sup> but as described more fully below, courts sometimes raise others.<sup>58</sup> Recently, for example, the D.C. Circuit issued a per curiam order “that the Government be prepared to discuss at oral argument whether the evidence on which the Committee on Foreign Investment in the United States and the President of the

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55. *Foster v. Chatman*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 290 (Oct. 5, 2015) (mem.) (appointing counsel for petitioner); Docket Entry, *Foster v. Chatman*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1737 (Oct. 30, 2015) (advising counsel, via letter from Clerk of Court, to be “prepared to discuss at oral argument whether certiorari in this case should be directed to the Supreme Court of Georgia or the Superior Court of Butts County, Georgia, and what significance, if any, that determination may have on the Court’s resolution of the case”); Tr. of Oral Arg., *Foster v. Chatman*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1737, at 3 (Nov. 2, 2015) (No. 14-8349) (directing counsel to “address first the . . . question we raised on Friday”); see also Docket Entry, *Commonwealth of P.R. v. Valle* \_\_\_ U.S. \_\_\_, 136 S. Ct. 1863 (Jan. 8, 2016) (advising counsel, via letter from Clerk of Court, to “be prepared to discuss at oral argument whether this Court has jurisdiction to review the ruling of the Supreme Court of Puerto Rico”); Docket Entry, *Alvarez v. Smith*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 576 (Oct. 2, 2009) (advising counsel, via letter from Clerk of Court, to “be prepared to discuss at oral argument whether respondents have had forfeiture hearings or otherwise had their property returned, and, if they have, the potential significance of those facts with respect to questions of mootness”).

56. See, e.g., Tony Mauro, *Advocates Must Switch Gears for Last-Minute Issue Raised by Justices*, PALM BEACH DAILY BUS. REV., Nov. 4, 2015, at A4; Tony Mauro, *Justices’ Eleventh-Hour Queries Scramble Oral Arguments*, LAW.COM (Nov. 16, 2015), <http://www.law.com/sites/articles/2015/11/16/justices-eleventh-hour-queries-scramble-oral-arguments>.

57. See, e.g., Pet. for Writ of Cert., *ProtectMarriage.com—Yes on 8 v. Bowen*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1523 (Oct. 10, 2014) at 5–6 (recounting order by Ninth Circuit that parties be prepared to discuss mootness of campaign-finance-disclosure question in light of rule that “once a fact is widely available to the public, a court cannot grant any ‘effective relief’ to a person seeking to keep that fact a secret” (quoting *Doe v. Reed*, 697 F.3d 1235, 1240 (9th Cir. 2012))).

58. See text accompanying notes 70–71, *infra*.

United States relied in issuing their mitigation orders is classified, unclassified or both.”<sup>59</sup>

Occasionally, the lower courts have attempted to routinize this practice. Panels of the Fifth Circuit used to instruct counsel to be ready to discuss certain topics via a courtly letter explaining that the notice was designed to promote reflection, did not reveal the interest or predisposition of the court as a whole, and was simply part of what the court might wish to discuss with counsel.<sup>60</sup> In 1995, the Third Circuit amended its local rule concerning oral argument to provide that “[i]n certain

59. Per Curiam Order of Apr. 30, 2014, *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296 (D.C. Cir. 2014); see *Ralls*, 758 F.3d at 320 n.19 (relying on government’s reply at oral argument and indicating that desired preparation for oral argument was conveyed to counsel in “an order before oral argument requesting that the Government be prepared to discuss the nature of the evidence reviewed by CFIUS and the President,” and that “[r]esponding to . . . [the court’s] inquiry at oral argument, the Appellees’ counsel stated that CFIUS and the President relied on both classified and unclassified evidence”). That particular question could only be directed to one side, but ordinarily, preliminary questions may be efficiently and reliably posed to both parties—a substantial advantage over live questioning at oral argument. See, e.g., Tr. of Oral Arg., *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng’rs and Trainmen Gen. Comm. of Adjustment*, 2009 WL 3229082, at 46–47 (Dec. 8, 2009) (No. 08-604) (posing question to respondent’s counsel and noting that “the same question is really addressed to your fellow counsel”); *id.* at 55–59 (indicating that question was not posed anew to petitioner’s counsel on rebuttal).

60. See BAKER, *supra* note 40, at 112 n.20 (noting experiments by federal courts of appeals, “most notably the Fifth Circuit,” with “the judges on the hearing panel providing counsel with written questions before oral argument”). The late Judge Alvin Rubin of the Fifth Circuit would sometimes draft letters along the following lines, which the clerk’s office would then send to counsel on behalf of the court as a whole:

After reviewing the briefs in this matter, the court had a few questions that at least one of the judges who will hear your argument knows in advance he would like to have answered or commented on in oral argument. Knowing that interruption of counsel to put these questions may interfere with counsel’s train of thought, and desiring also to give counsel at least some opportunity to reflect on the questions, we are submitting them to you. We suggest that you try to answer them as directly as possible during the course of your argument.

Of course, the fact that the court desires to know your answers to these questions must not be taken as an indication of the direction of the court’s thoughts or of the issues that the court considers decisive. Instead, they are part of the court’s effort to understand the case as completely as possible.

You will likely be asked to answer other questions from members of the court as your argument proceeds. These, too, are designed merely to enable the court to understand your position. We hope that you will welcome the opportunity to give us as much information as possible.

The questions that we know at this time are the following . . .

Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 31 n.182 (1986) (quoting Rubin letter).

appeals, the clerk will inform the parties by letter of a particular issue(s) that the panel wishes the parties to address.”<sup>61</sup> The rule might have memorialized a practice, rather than changing one, since (by one crude measure) the number of inquiries dropped following adoption.<sup>62</sup> The number of such questions, while fluctuating wildly, has never been substantial, amounting to an average of about six inquiries per year over a twenty-five year period and dropping to less than two per year over the last ten years<sup>63</sup>—this in a court that still resolves well over 200 cases per year after oral argument.<sup>64</sup> The only other court to formalize its practice, the D.C. Circuit,<sup>65</sup> averaged below one inquiry per

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61. 3D CIR. LOCAL APP. R. 34.1(c); *cf.* 3D CIR. INTERNAL OPERATING P.—2015 at 2.4.2 (noting that “judges usually vote for oral argument when . . . [a] judge has questions to ask counsel to clarify an important legal, factual, or procedural point”). 28 U.S.C. appx.

62. To get a sense of this volume, I used the Bloomberg electronic database to survey PACER docket information from 1990 to February 2016. The Third Circuit clerk’s office does not ordinarily invoke Local Rule 34.1(c) in issuing preliminary questions, but it is possible to search Bloomberg for key phrases (particularly a proximity search for “discuss” and “oral argument”) in order to identify potential inquiries of the kind considered here. For sake of potential comparability, the same method was applied to review the other federal courts of appeals and the Supreme Court.

The substantial limits of this survey—for purposes of reference, the Docket Survey, on file with author—deserve emphasis. It unavoidably misses some inquiries, due to varying phrasing and deficiencies in the docket entries, while turning up others of a materially different nature, such as denials of dispositive motions (the questions posed by the parties being slated for argument instead) or orders derived from the parties’ requests for oral argument. Plainly duplicative inquiries—for example, asking the parties in cases posing similar issues a question concerning the effect of a recent decision—were excluded as necessary to avoid double-counting identical questions to related parties in appeals with different docket numbers. This approach had a disproportionate effect in the D.C. Circuit, which one year posed the same question (concerning the potential impact of pending telecommunications legislation) in seven docketed appeals scheduled for argument in one brief span. *Id.*

For related reasons, comparisons among the courts are certainly problematic. For example, some courts more readily included the text of actual opinions in the database. In the case of the Ninth and Federal Circuits, the Bloomberg search also produced thousands of false positives due to the framing of attorney-appearance and argument-related orders in those courts; because manual review of the dockets would have been required to eliminate all of these false positives, no conclusions were drawn about either court. Judges with particular predilections for pre-argument questions also appeared to have an outsized influence on their courts’ totals (even, potentially, elsewhere, if they sit by designation).

63. *Id.*

64. *Statistical Tables for the Federal Judiciary—Table B-1*, U.S. CTS. (June 30, 2015), <http://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2015/06/30> (showing 229 terminations on the merits after oral argument in the Third Circuit).

65. HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 49–50 (Internal Operating P. XI(C)(1),

year, with three-fifths issued in a mid-1990s burst—about the same overall total as the Sixth Circuit,<sup>66</sup> which had no stated practice at all. In sum, inquiries by ten other circuits combined were but two-thirds of the Third Circuit's total, with many circuits racing the Supreme Court to the bottom.<sup>67</sup>

### *B. Questions That Deserve Asking*

While small as a fraction of arguments, preliminary questioning in the federal courts of appeals to date illustrates when it may be useful. The most obvious subjects of inquiry involve jurisdictional and other threshold issues like standing or mootness.<sup>68</sup> Such questions are especially strong candidates for advance notice, insofar as they are fundamental and nondiscretionary in character; perhaps because they are such an obvious candidate for inquiry, however, advance warning may not be as necessary.<sup>69</sup> In any event, lower courts have also found it fruitful to raise non-threshold legal issues, likely on the supposition that these too may dominate oral argument and deserve the fullest possible preparation.<sup>70</sup> Thus, for example,

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discussing responsibilities of screening judge and providing that “argument may be limited to certain issues” and that “counsel may be advised that the panel wishes additional questions to be addressed at oral argument”).

66. Docket Survey, *supra* note 62.

67. *Id.* (indicating 102 inquiries in ten circuits, as compared to 148 in Third Circuit alone); *see also* text accompanying note 55, *supra* (noting handful of jurisdictional inquiries in the Supreme Court). But the reader should bear in mind, again, the substantial limitations of the data and the exclusion of the Ninth and Federal circuits. *See* note 62, *supra*.

68. *See supra* text accompanying notes 54–55.

69. *Cf.* *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 99 (1998) (discussing significance of briefing and argument of jurisdictional questions); *id.* at 122 n.15 (Stevens & Souter, JJ., concurring) (same).

70. In the Third Circuit, these appeared to outnumber more threshold questions: Less than one-quarter of the legal issues highlighted for counsel concerned what was manifestly a jurisdictional or other threshold question. (That said, the nature of many inquiries was at least somewhat obscure—either because an underlying letter to counsel was only partly summarized, or because the inquiry referred to cases without disclosing the nature of the issue to which the cases referred.) *See* Docket Survey, *supra* note 62. Matters were different in the D.C. Circuit, where the overwhelming majority of legal issues posed to parties concerned threshold matters. *Id.* One might suppose that in any court, when a potential jurisdictional question was spotted, it was much more likely to be posed to counsel before argument; in any case, it is likely that the number of non-threshold questions uncovered by the *Docket Survey* is just the tip of the iceberg.

they have on numerous occasions called on counsel to prepare to discuss particular cases, statutes, or other legal materials not adequately addressed in the briefs, either because they are new or just overlooked.<sup>71</sup>

The Supreme Court's practice has been a little different, and in part reflects its different circumstances. The number of potential issues has tapered off by the time a case reaches the Court; given the additional rounds of briefing by that point, the intensity of preparation, and the few decisions in which the Court is actively interested (other than its own), overlooked case law and other legal authority are also less of a concern. These differences, however, are far from categorical. For example, though raising at argument cases not mentioned in the briefs may be entirely within bounds, mentioning them earlier can be mutually beneficial if it is a prelude to further discussion,<sup>72</sup>

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71. In the Third Circuit, approximately half the inquiries flagged legal authority like cases or statutes, while a slightly smaller number (sixty-five, as opposed to seventy-five) alluded to preparing to discuss legal issues without directly advertent to particular authority. Docket Survey, *supra* note 62; *but see id.* (showing that fewer than one-quarter of D.C. Circuit inquiries related to legal authority). Queries as to whether there was any precedent for a particular proposition were uncommon among the posed questions, though those arose often at oral argument; perhaps such questions were hard to frame in advance, or it seemed doubtful that any such precedent could exist, and perhaps the use of that question at oral argument was essentially rhetorical. For unrequited requests for a "single case" at oral argument, see *United States v. Fisher*, 624 F.3d 713, 720 (5th Cir. 2010); *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 634 (6th Cir. 2007); *United States v. Askew*, 482 F.3d 532, 550–51 (D.C. Cir. 2007) (Edwards, J., dissenting), *reversed*, 529 F.3d 1119 (D.C. Cir. 2008) (en banc); *Dean v. Byerley*, 354 F.3d 540, 564 (6th Cir. 2004) (Sutton, J., dissenting); *N.L.R.B. v. Omnix Int'l Corp.*, 1992 WL 209504 (1st Cir. 1992) at \*6 (unpublished); *United States v. Anderson*, 2000 WL 770556 (A.F. Ct. Crim. App. Apr. 6, 2000) at \*3, *vacated*, 55 M.J. 198 (C.A.A.F. 2001).

72. See Tr. of Oral Arg., *Barber v. Thomas*, 2010 WL 1285402, at 39–41 (Mar. 30, 2010) (No. 09-5201) (indicating, in respondent's counsel's answer to a question by Justice Kennedy, lack of familiarity with Supreme Court rule-of-lenity precedent cited in amicus brief); see *Barber*, 560 U.S. at 500–01 (Kennedy, J., with Stevens & Ginsburg, JJ., dissenting) (citing *United States v. Granderson*, 511 U.S. 39 (1994), the case mentioned at oral argument). In another example, then-Solicitor General Kagan was asked about a case that had not been cited in the briefs, and she indicated that she was not familiar with the case, but recovered when its core holding was described. Tr. of Oral Arg., *Robertson v. United States*, 2010 WL 1285397, at 62 (Mar. 31, 2010) (No. 08-6261) (referring to *Bartkus v. Ill.*, 359 U.S. 121 (1959)); see also *id.* at 63–64 (showing Solicitor General's forthright acknowledgement that she had "not thought about" a different question).

It is the rare case in which counsel is unaware of a case central to resolution of a matter, but even momentary error may be consequential. In one argument, counsel was asked by Justice O'Connor whether the Supreme Court had ever "applied [Village of]

particularly if the case is not widely reported or obviously germane.<sup>73</sup>

It takes only a moment's reflection to think of other questions—rarely, if ever, reflected in existing inquiries—for which more than a moment's reflection would be useful; at least some of these conjectures find support by seeing what happened when preliminary questions were not tendered.<sup>74</sup> One broad category involves questions best answered after further research, which can make demands beyond anything answered by assiduous use of Westlaw and Lexis. For example, factual questions may warrant advance inquiry when the record is particularly voluminous, as may be the case following agency rulemaking, or when the court is interested in minutiae.<sup>75</sup>

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Arlington Heights [v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977)] to a Section 5 determination,” and then she added, “I thought we had not, but what do you rely on for that?” Tr. of Oral Arg., *Reno v. Bossier Parish Sch. Bd.*, 1996 WL 718469, at 9 (Dec. 9, 1996) (Nos. 95-1455 & 95-1508). Counsel responded that he relied on *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); in rebuttal, he apologized for not “answer[ing] very well” and stated that the Supreme Court had “reflected its respect” for the standard’s application in other cases cited in his brief. *Id.* at 9, 54. The brief actually indicated that only two Supreme Court cases other than *Rogers*, a plurality opinion, had done so, although the Court had affirmed similar lower court judgments. Brief for Federal Appellant at 17–19, *Reno v. Bossier Parish Sch. Bd.*, 1999 WL 133834 (U.S. Aug. 1, 1996) (Nos. 95-1455 & 95-1508). Justice O’Connor’s question was not difficult to forecast, and only the fortuity of rebuttal time—which would not have been available to a respondent—allowed counsel to address it again. But by then, the Court was less interested in examining the precise character of the authority, and the opportunity for respondent to challenge the later depiction had been lost.

73. See, e.g., Tr. of Oral Arg., *Hibbs v. Winn*, 2004 WL 193039, at 3–9 (Jan. 20, 2004) (No. 02-1809) (questioning counsel as to meaning of “assessment” under Tax Injunction Act, in light of case argued the preceding week, *United States v. Galletti*, 541 U.S. 114 (2004), of which counsel was evidently unaware); Terry Goddard, *Expect the Unexpected*, ARIZ. ATT’Y, April 2006, at 31 (explaining that “[i]n an instant, the good Justice upended my weeks of preparation and sent me scrambling,” given that “I had no clue in what context the case she referred to had used the term,” and that “I managed to hide most of my astonishment, but at the time I felt like a prizefighter who had just been knocked over the ropes”); cf. FLOYD ABRAMS, SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT 72 (2013) (noting, in argument of *Landmark Commc’ns v. Va.*, 435 U.S. 829 (1978), “a question from Justice Rehnquist for which I was totally unprepared” concerning the First Amendment rights of corporations, relating to a different but contemporary case, which the Justice proceeded to suggest might be equivalent to those of individuals in press matters).

74. As is evident below, this is easiest to substantiate in the Supreme Court, for which transcripts of oral argument are reliably available; for the federal courts of appeals, some evidence may also be divined from accounts of oral argument in published opinions.

75. In a number of opinions, the federal courts of appeals have complained about the inability of counsel to point to relevant portions of the record, though it is rarely clear whether the record would ever have resolved the questions at hand. See, e.g., *United States*

Sometimes judges ask about obscure or peripheral matters that may not even be part of the formal record,<sup>76</sup> or raise subjects that test the depth of a typical lawyer's (or judge's) expertise—

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v. Parker, 716 F.3d 999, 1012 (7th Cir. 2013) (noting that the court “asked government counsel at oral argument to identify the judge’s statement that most clearly indicates a finding of willful falsity,” but that “[c]ounsel could not point to any such statement”); Everitt v. Pneumo Abex, L.L.C., 411 F. App’x 726, 729–30 (5th Cir. 2011) (pointing out that “[w]hen questioned directly at oral argument, Pneumo’s counsel never denied the fact of that cooperation, and was unable to pinpoint any date in this record before the bankruptcy court’s January 2006 determination that the parties’ cooperative paths diverged”); Cmty. House, Inc. v. City of Boise, 623 F.3d 945, 966 (9th Cir. 2010) (setting out verbatim an exchange between court and counsel at oral argument, and concluding that the court “simply cannot find anything in the record that suggests that either the parties or the district court appreciate the difference between personal and official capacity § 1983 lawsuits”); United Ins. Co. v. Unisys Corp., 68 F. App’x 269, 270 (3d Cir. 2003) (noting that “[a]t oral argument, we pressed counsel for Unisys to show where the protection was acquired, but counsel could not cite any record evidence of such a purchase”); King v. Va. Emp’t Comm’n, 33 F.3d 51 (tbl.), 1994 WL 416439, at \*6 (4th Cir. 1994) (“[D]espite repeated questions from the bench during oral argument as to where any such evidence might be found in the record, plaintiff’s counsel could not locate any, and the court’s review of the record discloses none”).

By way of contrast, in the Third Circuit, counsel have been constructively asked in advance to address the facts and circumstances relating to a party’s prior conviction. Clerk’s Letter to Counsel (May 7, 2002), *United States v. Rosario-Moya*, No. 01-3977 (36 Fed. App’x 506 (3d Cir. 2002)); see 36 Fed. App’x at 506 (thanking counsel for ordering transcript and indicating that oral argument had been “particularly helpful for us in ferreting out the facts relating to the 1986 conviction”). It was also successful in eliciting the precise location of a party’s manufacturing facility, the driveway leading into it, and the adjacent public right of way. Clerk’s Letter to Counsel (Mar. 1, 2002), *Snyder’s of Hanover v. NLRB*, No. 010-3201 (39 Fed. App’x 730 (3d Cr. 2002)); see 39 Fed. App’x at 734–35 & n.2 (relying on location details).

76. In *Grupo Dataflux v. Atlas Global Group*, lawyers were vague about when the defendant/counter-claimant first had cause to understand that diversity was incomplete, as well as in regards to case law regarding collateral attacks and the chronology relating to refiling. Tr. of Oral Arg., *Grupo Dataflux v. Atlas Global Group*, 2004 WL 526928 at 3–5, 18–19, 23, 30 (Mar. 3, 2004) (No. 02-1689). Neither counsel seemed prepared to discuss a related question on the choice of law as to limitations and savings provisions, which bore on the practical consequences of permitting post-filing changes, *id.* at 22–24, 30–31, although these proved relevant to the dissent. 541 U.S. at 595 n.11 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting). See also ABRAMS, *supra* note 73, at 68–69 (noting ruefully a question concerning the record in a First Amendment case that he was able to answer, but which he had not anticipated, and its potential consequences for his argument even as answered (quoting Tr. of Oral Arg., *Landmark Commc’ns Inc. v. Va.*, 435 U.S. 829 (Jan. 11, 1978) (No. 76-1450)). For a near miss, see William J. Schafer III, *Not So Certain*, ARIZ. ATT’Y, Mar. 2006, at 22 (describing how, a week before argument, counsel had—purely by happenstance—called every county attorney in Arizona to see if a statute had ever been employed, only to be asked that precise question at argument). Mr. Schafer’s case was *Cassius v. Arizona*, 420 U.S. 514 (1975) (dismissing writ as improvidently granted).



such as technology<sup>77</sup> or math.<sup>78</sup> A court may also pick a needle from the amici haystack, requiring instant expertise with matters at a remove from those in the principal briefs.<sup>79</sup>

A second broad category involves issues that require reflection as much as research. The archetypal question is the hypothetical, and at the Supreme Court, the leading practitioner is Justice Breyer, who specializes in posing professorial, head-scratching scenarios. While their last-minute unveiling adds drama, and offers a greater test of counsel, hypotheticals need not necessarily be sprung like pop quizzes, and there is reason to rethink their delivery. Even if the hypotheticals' particulars (about aspirin fingers, anti-raccoon patents, tomato children threatening Boston, and pet oysters in parks) are only

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77. See, e.g., Joe Silver, *Supreme Court Struggles With E-mail But Will Shape Technology's Future*, *Ars Technica*, May 6, 2014 (noting acknowledgment by Justice Kagan that the Supreme Court as a whole has not adopted e-mail, and citing examples of confusion in technology cases); e.g., Tr. of Oral Arg., *City of Ontario v. Quon*, 2010 WL 1540005 at 29, 43–44 (Apr. 19, 2010) (No. 08-1332) (showing, inter alia, questions concerning “the difference between the pager and the e-mail,” and “[w]hat happens . . . if . . . he is on the pager and sending a message and they are trying to reach him for . . . a SWAT team crisis? Does . . . the one kind of trump the other, or do they get a busy signal?”). Judges uncertain about their expertise, and even embarrassed about it, might particularly welcome the opportunity to pose clarifying questions anonymously via the clerk’s office; counsel would probably benefit in any event from the opportunity to confirm the answers. See *id.* at 50, 52 (showing that counsel at first indicated that text messages could be deleted from pagers, but then reflecting counsel’s uncertainty concerning whether text messages to pagers could be wholly deleted).

78. See, e.g., *Mo. Pub. Serv. Comm’n v. FERC*, 234 F.3d 36, 42 (D.C. Cir. 2000) (complaining that “FERC counsel could not even assure this court that the Commission’s arithmetical in calculating the adjusted hypothetical cost of service was correct”).

79. See, e.g., Tr. of Oral Arg., *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2107 at 38–40, 47, 48 (Apr. 15, 2013) (No. 12-398) (showing extensive questioning from Justice Breyer, Justice Ginsburg, and Justice Alito based on amicus brief filed in case on patent-eligible subject matter by scientist involved in Human Genome Project); Tr. of Oral Arg., *Grutter v. Bollinger*, 539 U.S. 306 at 19 (Apr. 1, 2003) (No. 02-241) (showing question from Justice Stevens soliciting counsel’s “view of the strength” of argument in amicus brief by former high-ranking officers and top civilian leaders of the Army, Navy, Air Force, and Marines); BARBARA A. PERRY, *THE MICHIGAN AFFIRMATIVE ACTION CASES* 114 (2007) (characterizing counsel as being “momentarily thrown,” and noting significance of amicus brief’s “taking center stage at the Court”); see also *Teague v. Lane*, 489 U.S. 288, 300 (1989) (relying on amicus brief alone in raising the retroactivity of one of petitioner’s claims, pointing out that “[t]he question of retroactivity with regard to petitioner’s fair cross section claim has been raised only in an amicus brief,” but noting that the “question is not foreign to the parties,” and characterizing the Court’s “*sua sponte* consideration of retroactivity” as “far from novel” (citations omitted)).

temporarily baffling,<sup>80</sup> they probably reward more careful consideration, at least if they might decide a case or change an opinion.<sup>81</sup> Hypotheticals asked at the beginning of argument (which are less likely to be spontaneous reactions to the proceedings)<sup>82</sup> or posed to more than one advocate (which seem

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80. Mark Sherman, *Breyer, Court Master of the “What If?”* WASH. POST, Mar. 2, 2008 (mentioning raccoons that destroy door-opening sensors, tomatoes grown as hosts for human genetic material, and pet oysters); see Tr. of Oral Arg., *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 2011 WL 6077582 at 12–18, (Dec. 7, 2011) (No. 10-1150) (hypothesizing potentially patentable invention consisting of mere observation that a person’s little finger indicates whether aspirin is needed, and ultimately sparing counsel “15 fancy hypotheticals”); Tr. of Oral Arg., *KSR Intern. Co. v. Teleflex, Inc.*, 2006 WL 3422210 at 35–36 (Nov. 28, 2006) (No. 04-1350) (imagining “I have a sensor on my garage door at the lower hinge for when the car is coming in and out, and the raccoons are eating it,” then suggesting “the brainstorm of putting it on the upper hinge” and that it would be “naive” to expect placement of sensor on upper hinge to be patentable); Tr. of Oral Arg., *Gonzalez v. Raich*, 2004 WL 2845980 at 30 (Nov. 29, 2004) (No. 03-1454) (stating, in response to counsel’s articulation of proposition that Congress might be able to regulate purely intrastate conduct like marijuana cultivation if it was essential to a “larger regulatory scheme”: “You know, he grows heroin, cocaine, tomatoes that are going to have genomes in them that could, at some point, lead to tomato children that will eventually affect Boston”); Tr. of Oral Arg., *FCC v. Nextwave Personal Comm’n*, 2002 WL 31309185 at 28 (Oct. 8, 2002) (Nos. 01–653, 01–657) (stating that “[n]o animals in the park doesn’t necessarily apply to a pet oyster,” prompting discussion of whether an oyster was an animal); see also *Nextwave*, 537 U.S. 293, 311 (2003) (Breyer, J., dissenting) (adopting more traditional example of an ordinance proscribing all vehicles in a park, which would nonetheless not apply “to baby strollers or even to tanks used as part of a war memorial”); see also Tr. of Oral Arg., *Loughrin v. United States*, 2014 WL 1293242 at 22–27, 31–35 (Apr. 1, 2014) (No. 13-316) (unfurling bank-fraud hypothetical and variants thereupon involving Crook, Smith, and—fleetinglly—Jones). Justice Breyer was joined by colleagues in discussing a poisoned potato given to a racehorse, vinegar poured into a goldfish bowl (citing a question posed by Justice Alito in the previous oral argument in the case that suggested vinegar was poisonous to goldfish, Tr. of Oral Arg., *Bond v. United States*, 2011 WL 601690 at 29 (Feb. 22, 2011) (No. 09-1227)), and chocolate candy bars as containing a chemical poisonous to dogs, all in a case involving violations of the Chemical Weapons Convention Implementation Act, which eventually provoked the Solicitor General to remind the Court that the case was a serious matter. Tr. of Oral Arg., *Bond v. United States*, 2013 WL 6908184 at 35–38 (Nov. 5, 2013) (No. 12-158).

81. Sometimes they actually feature in the ensuing opinions. See, e.g., Seal v. Morgan, 229 F.3d 567, 576 (6th Cir. 2000) (concluding, after discussing counsel’s conflicting responses to a hypothetical posed at oral argument, that a board of education’s position was irreconcilable with the rational pursuit of a legitimate state interest); *United States v. Ramirez-Ferrer*, 1995 WL 237041, \*12–\*13 (1st Cir. Apr. 27, 1995) (quoting colloquy from oral argument, and citing the failure of counsel for the government to satisfactorily distinguish between a hypothetical and the case at hand, as critical to the court’s conclusion that a statutory interpretation would lead to absurd results), *aff’d in part, remanded in part, rev’d in part on other grounds*, 82 F.3d 1131 (1st Cir. 1996).

82. In one recent case, for example, the first question—from Justice Kagan—was a hypothetical that appeared to confound one of the Court’s finest advocates, in part because

more central)<sup>83</sup> are particularly appealing candidates for posing preliminarily, but any imagined in advance may be proffered—and developing a practice that actually prompts them to be imagined in advance, and worked out in writing, might do wonders to reduce the confusion they can cause.<sup>84</sup>

Hypotheticals simply illustrate the general point that foundational issues may, in a judge's own judgment, deserve careful contemplation.<sup>85</sup> Justice Blackmun, for example, would

it might have required a different answer under the governing statute; the hypothetical was then reinterpreted by Justices Scalia and Kennedy, to no clearer end, though counsel did make progress during rebuttal. Tr. of Oral Arg., *Integrity Staffing Solutions, Inc. v. Busk*, 2014 WL 7661627 at 3–7, 58–59 (Oct. 8, 2014) (No. 13-433); see also Tr. of Oral Arg., *Md. v. Shatzer*, 2009 WL 3169420 at 31–37 (Oct. 5, 2012) (No. 08-680) (reflecting that argument began with a hypothetical from Justice Alito, one that counsel confessed later in the argument that she had not answered appropriately, later attracting the interest of the Chief Justice, Justice Breyer, and Justice Sotomayor).

83. See, e.g., Tr. of Oral Arg., *Hill v. McDonough*, 2006 WL 1194528 at 31–35, 43–44 (Apr. 26, 2006) (No. 05-8794) (asking respondent's counsel and counsel for amicus arguing in support of respondent whether defendant subject to capital sentence would be required, if he could show prospect that means of execution would cause excruciating pain, to suggest an alternative means); Tr. of Oral Arg., *Stogner v. Cal.*, 2003 WL 1798530 at 17–19, 27–28 (Mar. 31, 2003) (No. 01-1757) (posing hypothetical to both respondent's counsel and counsel for amicus arguing in support of respondent).

84. As Justice Breyer once allowed, “this is pretty tough, we try to construct some hypotheticals, and—and the counsel says, oh, I've got this part wrong or that part wrong or the other one, and they may be right. And we can't do this, figuring out all these factual things in an hour, frankly.” Tr. of Oral Arg., *McCutcheon v. FEC*, at 41, 2013 WL 5845702 (Oct. 8, 2013) (No. 12-536). And regarding oysters in the park, Justice Breyer said “[t]he result [of asking that question] was unfortunate.” Sherman, *supra* note 80. In particular, to the extent hypotheticals (and—often analog—analogies) are ventured on technological matters, they might benefit from refinement and articulation prior to argument—and from giving counsel additional time to digest their meaning and correct any mistaken assumptions underlying them. Selina MacLaren, *The Supreme Court's Baffling Tech Illiteracy is Becoming a Problem*, SALON (June 28, 2014), [http://www.salon.com/2014/06/28/the\\_supreme\\_courts\\_baffling\\_tech\\_illiteracy\\_is\\_becoming\\_a\\_big\\_problem/](http://www.salon.com/2014/06/28/the_supreme_courts_baffling_tech_illiteracy_is_becoming_a_big_problem/) (“[A]nalogies were critical in [a group of recent] cases . . . In past arguments, computers were analogized to typewriters, phone books and calculators. Video games were compared to films, comic books and Grimm's fairy tales. Text messages were analogized to letters to the editor. A risk-hedging method was compared to horse-training and the alphabet. EBay was likened to a Ferris wheel, and also to the process of introducing a baker to a grocer. The list goes on.”).

85. In a case concerning gay marriage, for example, Justice Sotomayor asked: “Outside of . . . the marriage context, can you think of any other rational basis, reason, for a State using sexual orientation as a factor in denying homosexuals benefits or imposing burdens on them? Is there any other rational decision-making that the Government could make? Denying them a job, not granting them benefits of some sort, any other decision?” Counsel responded, before later recovering somewhat, “Your Honor, I cannot. I do not have any—anything to offer you in that regard.” Tr. of Oral Arg., *Hollingsworth v. Perry*, 2013 WL

sometimes urge that a party reflect on its litigating position, including in light of considerations not apparent prior to argument.<sup>86</sup> Promoting the use of preliminary questions might even liberate Justices to advance questions they might withhold

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6908183 at 14 (Mar. 26, 2013) (No. 12-144); *see also* Tr. of Oral Arg., *Demore v. Kim*, 2003 WL 147701 at 62–63 (Jan. 15, 2003) (No. 01-1491) (showing that counsel answered Justice’s query—“one question that’s very important for me and you can answer it yes or no”—in the negative, with caveat that “we haven’t briefed and studied that”).

Not every issue that later appears foundational will have occurred to counsel. For example, the Supreme Court granted certiorari on the question whether due process permitted the exercise of general jurisdiction over a foreign corporation based solely on acts by an indirect corporate subsidiary on behalf of the defendant. At oral argument, Justice Ginsburg and Justice Kagan directed discussion away from agency and toward the point that—even if the subsidiary’s acts were entirely imputable—there would still not be enough for general jurisdiction over the parent. Tr. of Oral Arg., *Daimler AG v. Bauman*, 2013 WL 5629592 at 7–8, 22–23, 30–31, 48–52 (Oct. 15, 2014) (No. 11-965) [hereinafter *Bauman* Transcript]. Later resolving the case on that basis, the Court noted that this was “fairly encompassed” within the question on which certiorari was granted, and that amici had focused on the question. *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 761 n.16. Justice Sotomayor, however, observed that the court of appeals had not addressed the question, and that the parties had neither devoted attention to it nor been asked to brief it. *Id.* at 765–66 (Sotomayor, J., concurring in the judgment). It might have improved matters to pose the issue before oral argument. *See Bauman* Transcript, *supra* this note, at 52 (reporting respondent’s counsel stating that “this is an important question that hasn’t been briefed in this case, it wasn’t preserved below, and I think that you ought to decide the case on the grounds, on the premises on which it has been litigated for eight years,” and suggesting that “if you can’t do that you ought to dismiss the case as improvidently granted or at least remand the case to allow a full airing of these issues in an appropriate forum”).

86. FREDERICK, *supra* note 11, at 82–83 (quoting argument in *Lee v. Weisman*, including inability of counsel to answer questions about precise ages, with estimate supplied by Justice Blackmun); *id.* at 122–24 (noting that in *RAV v. St. Paul*, counsel for St. Paul could not identify a particular cross-street, apparently near a poorly maintained public park); *id.* at 124 (noting that though latter exchange “did not contribute to the court’s understanding of the issues,” counsel had handled it appropriately). Sometimes Justice Blackmun was pursuing a larger point. In a case involving the return of Haitian refugees, the only questions he asked of government counsel were whether she had been to Haiti, and after learning she had not, whether she was familiar with Graham Greene’s *The Comedians*, which she also answered in the negative, prompting him to state simply “I recommend it to you.” Tr. of Oral Arg., *Sale v. Haitian Ctrs. Council, Inc.*, 1993 WL 754941 at 25 (Mar. 2, 1993) (No. 92-344). The point, presumably, concerned the sobering history of political violence in Haiti—and while posing such questions before argument would have spoiled their dramatic impact, it might have inspired more constructive reflection, particularly given the uncertainty as to whether U.S. policy would be continued or defended as before. *But see* Transcript, *Rex E. Lee Conference on the Office of the Solicitor General of the United States—Bush Panel*, 2003 B.Y.U. L. Rev. 1, 68 (remarks of Maureen Mahoney) (noting that, while one of Mahoney’s colleagues had predicted that Justice Blackmun would ask whether she had ever been to Haiti, “the moral of the story . . . is really that if you want to be really prepared for arguments in the Supreme Court, you have got to read a lot of fiction”).

at oral argument because they are too complex or distracting, or—if more dramatic solutions, like dismissal or reargument, appear belatedly to the Court to be in the offing—even help enlist counsel in evaluating those options.<sup>87</sup>

The primary goal of pre-argument notice, obviously, is to help counsel prepare, particularly for inquiries that are less predictable or more consequential. This is a marginal, but not trivial, objective. Even if the best counsel are fully prepared, or experienced and quick-witted enough, to answer serviceably, not every counsel is among the bar's elite; the best, in any case, are likely to answer a fully anticipated question yet more accurately and persuasively. (That answers could be extracted on the spot is no better defense of present practices than, say, the possibility of writing briefs overnight is a warrant for making that the convention, and while briefing is more important than oral argument, there is no reason to inflate the difference.<sup>88</sup>) Among possible reforms, moreover, preliminary questioning rivals any

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87. A few years ago, the Supreme Court granted certiorari to consider the question of corporate liability under the Alien Tort Statute, and after initial argument, directed reargument with supplemental briefing on the issue of the statute's extraterritoriality. See *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1738 (2012) (restoring case to argument calendar and directing counsel "to file supplemental briefs addressing the following question: 'Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States'"); *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 472 (2011) (granting certiorari). Supplemental briefing, and not merely a pre-argument question, was probably required. Even so, it was clear at the first argument that several Justices arrived intent on engaging petitioner's counsel (and, to a lesser degree, counsel for the United States as amicus) on extraterritoriality and its compatibility with international law, and advance notice would have generated a sounder preview of the considerations bearing on reargument—including by respondent's counsel. Tr. of Oral Arg., *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 628670 at 7–9, 11–14, 22 (Feb. 28, 2012) (No. 10-1491). Perhaps alarmingly, on reargument, personal jurisdiction was the first topic of conversation, notwithstanding the new (and different) focus of the reargument order. Tr. of Oral Arg., *Kiobel v. Royal Dutch Petroleum Co.*, 2012 WL 4486095 at 3–4, 22 (Oct. 10, 2012) (No. 10-1491).

88. It is at least possible, the Supreme Court has shown, to require briefing over a weekend (as opposed to within thirty or more days), and to arrange simultaneous filing (rather than allowing each side to react to the other)—but it is indicated only in what the Court perceives to be exigent circumstances. *Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (staying action below, treating application for stay as application for writ of certiorari, granting writ, and establishing accelerated schedule); see Tr. of Oral Arg., *Bush v. Gore* 2000 WL 1804429 at 3 (Dec. 11, 2000) (No. 00-949) [hereinafter *Bush v. Gore* Transcript] (indicating that the Chief Justice began by "commend[ing] all of the parties to this case on their exemplary briefing under very trying circumstances").

return from giving more time to counsel—assuming that is realistically on the table. Counsel notified of certain issues are likely to be better prepared to deal appropriately with others as well, to the extent they adjust their agenda. Moreover, unlike tweaking time limits, preliminary questions enable consulting others not at the podium. Given a heads-up, clients may provide information or indicate a definitive position, which can be wanting at oral argument.<sup>89</sup> Other lawyers can provide input—just as with moot courts<sup>90</sup>—and the broader public may even be crowd-sourced; the same counsel would be responsible for answering at oral argument, but without artificial self-reliance.

Ultimately, this serves the judiciary as well. On a naive view of oral argument, capably addressing issues that judges deem relevant improves judicial decisionmaking—and avoids inadvertent error.<sup>91</sup> The same holds even on a more sophisticated view, insofar as better answers to a judge's questions are a more reliable means of persuading other judges. Even if one thinks that answers would largely be unaffected, notice may help courts resolve the weight to place on ensuing exchanges. For example, judges pursue concessions at oral argument, which often prove to be decisive.<sup>92</sup> A core objection

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89. See, e.g., *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1155, 1155 n.6 (Fed. Cir. 2011) (objecting that “[d]uring a lengthy discussion at oral argument on this issue, Pylon’s counsel, when asked directly, could not offer express assurances that Pylon could satisfy a damages judgment and a prospective royalty payment.”); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 595–96 (7th Cir. 2010) (ordering remand after counsel for the government could not answer at oral argument whether the Board of Immigration Appeals had changed its mind concerning its jurisdiction); cf. *Mot. for Leave to File Supp. Br. after Arg. and Supp. Br. after Arg. for Pet’rs* (March 18, 2005), *McCreary Cnty. v. ACLU of Ky.*, 2005 WL 1397050 (Mar. 18, 2005) (No. 03–1693) (attempting to reinforce assertion, made at oral argument in response to questioning, that religious resolution adopted by county government was no longer effective, citing resolutions enacted by county after its officials witnessed the oral argument and adopted repealing resolutions); Tony Mauro, *Supreme Court Monitor: Passing the “Lemon” Test*, NAT’L L.J., June 10, 2005 (discussing post-argument supplemental briefs filed in *McCreary*).

90. For a much more ambitious vision of how this might be facilitated with draft opinions, see *Abramowicz & Colby*, *supra* note 6.

91. Cf. *Lazarus*, (*Non*)*Finality*, *supra* note 6.

92. Either in terms of a particular issue or an entire appeal. See, e.g., *D.C. v. Heller*, 554 U.S. 570, 631 (2008) (referring to a concession made at oral argument); *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 509 (2004) (Kennedy, J., Rehnquist, CJ, Scalia & Thomas, JJ, dissenting) (“Counsel for respondents were unable to identify, either in their briefs or at oral argument, a single State that ‘does not have in its law the requirement that its own agencies . . . act rationally.’”); *Fowler v. R.I.*, 345 U.S. 67, 67 (1953) (referring to a

concerns the legitimacy of depending on “relatively spontaneous”—perhaps browbeaten—“responses of counsel to equally spontaneous questioning from the Court during oral argument.”<sup>93</sup> That objection loses force if the question has been previewed. Conversely, if a preliminary question is eschewed, as it may well be, there is still less reason to credit the reply.

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Because oral argument, at least as it is presently practiced, seems to be of secondary importance in most cases, it is worth recalling that it is one of the few practices—like briefing, or the selection of judges—that potentially affects the gamut of cases, on all legal subjects, heard by appellate courts. This suggests the potential for incremental, subtle payoffs from preliminary questions, but more pointed illustrations may be available.

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concession made at oral argument); *T-Mobile N.E. LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 272 n.\* (4th Cir. 2012) (Agee, J., concurring) (same); *United Steelworkers of Am., Local No. 185 v. Herman*, 216 F.3d 1095, 1096 (D.C. Cir. 2000) (noting that counsel for the union “effectively conceded” a point during oral argument); *Tenacre Found. v. INS*, 78 F.3d 693, 694 (D.C. Cir. 1996) (noting that INS conceded “principal points” on a particular issue at oral argument); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (noting that counsel “admitted” certain point at oral argument); *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 420 (D.C. Cir. 1991) (describing two concessions made at oral argument); *see also Gratz v. Bollinger*, 539 U.S. 244, 286 (2003) (Stevens & Souter, JJ., dissenting) (noting concession at oral argument that specific policy was not before the Court). In one unfortunate episode, counsel conceded a proposition at oral argument that deprived their clients of standing, though after argument they submitted an (untimely) affidavit that might, at least had it first been presented to the agency, have warranted a contrary conclusion. *Iowans for WOI-TV, Inc. v. FCC*, 1995 WL 116251 at \*1 (D.C. Cir. 1995) (unpublished).

93. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972) (stating that “[w]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument,” but noting arguments in briefing consistent with answer at oral argument, and acknowledging potential tactical nature of position); *compare* *Republican Party of Minn. v. White*, 536 U.S. 765, 772 (2002) (attaching significance to concession), *with id.* at 810 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting) (discounting “apparent concession” as “on the spot answers to fast-paced hypothetical questions at oral argument” (citing *Moose Lodge*)); *compare also* *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 104 (2010) (citing “necessary” concession at oral argument), *with id.* at 120, 120 n.4 (Sotomayor, Stevens & Ginsburg, JJ., dissenting) (disputing apparent concession and emphasizing that Court was not bound by concessions relating to statutory interpretation); *compare also* *In re Cao*, 619 F.3d 410, 424 (5th Cir. 2010) (citing concession at oral argument and in letter to en banc court), *with id.* at 439 n.8 (Jones, Smith, Clement, Elrod, & Haynes, JJ., concurring in part and dissenting in part) (disputing supposed waiver via oral argument).

Perhaps the most important case in recent history, *Bush v. Gore*,<sup>94</sup> could be pressed into service as an example of a missed opportunity. Insider accounts, if credited, suggest that Justices had circulated internal memoranda on topics that might have been of considerable interest to counsel,<sup>95</sup> and the ensuing argument reinforced the possible utility of advance notice,<sup>96</sup> the circumstances were unrepresentative, but advance notice might have been the more appropriate course in light of the extraordinarily limited time for preparation.

Another recent example was *Michigan v. EPA*,<sup>97</sup> an important environmental argument in which Justice Breyer's description of a legitimate means for the EPA to consider regulatory costs caught counsel, and the other Justices, unawares.<sup>98</sup> After Justice Breyer suggested that the approach might be purely hypothetical, a characterization on which other Justices pounced,<sup>99</sup> it was reconciled with how the agency

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94. 531 U.S. 98 (2000).

95. David Margolick, Evgenia Peretz & Michael Shnayerson *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 355–56 (recounting how Justice O'Connor and Justice Kennedy had circulated memoranda before argument, with the latter forecasting a decisive shift from jurisdictional arguments emphasized in the briefing to equal protection arguments that had received much less emphasis).

96. There was extensive discussion concerning, for example, an inquiry initiated by Justice Kennedy as to whether the federal question involved was different from that emphasized by counsel for Bush. *Bush v. Gore* Transcript, *supra* note 88, at 4–7. Later, Justice Kennedy asked counsel for Gore a hypothetical as to whether the Florida legislature might have, by statute, done what the Florida Supreme Court had attempted, to which counsel replied—"I think that it would be unusual. I haven't really thought about that question. I think they probably could not"—without successfully defusing the issue. *Id.* at 40–41; *see also id.* at 18 (showing counsel for Bush indicating that he did not "know the complete answer" to a legal entailment of a hypothetical); *id.* at 20 (showing counsel for Bush saying, "I haven't thought about [a different hypothetical]").

97. \_\_\_ U.S. \_\_\_, 135 S. Ct. 2699 (2015).

98. Tr. of Oral Arg., *Mich. v. EPA*, 2015 WL 1387860 at 22–26 (Mar. 25, 2015) (Nos. 14-46, 14-47, 14-49) (showing Breyer hypothetical, counsel's response, and other Justices' reactions), 49–58 (same), 76–79 (showing Justices Scalia, Kagan, Alito, and Breyer all asking follow-up questions); *see id.* at 24–25 (showing suggestion by counsel that no one had made the argument in question); *id.* at 25 (showing statement by Justice Scalia that "I never heard of this argument").

99. *Id.* at 50 (showing suggestion by Justice Breyer attributing possibility to "discussion and thought in my chambers"). Justice Breyer added, however, that "maybe it came out of the briefs, too." *Id.* at 51; *see id.* at 55 (showing question by Chief Justice Roberts to the Solicitor General as to "where [in the record] this argument was made or considered by the agency," "[a]s opposed to Justice Breyer's chambers," which was not directly answered); *id.* at 58 (showing similar unanswered question from Justice Scalia).



actually proceeded by the close of argument.<sup>100</sup> By that point, however, the approach's appeal had been compromised, and it featured prominently only in a dissent for four Justices;<sup>101</sup> prior disclosure might have led to its clarification and a more ringing endorsement—with record citations—by counsel for the EPA, along with any appropriate rejoinders.

Still more recently, Justice Thomas broke his decade-long silence by posing “one question” (which morphed into at least eight more),<sup>102</sup> at the close of respondent's argument, concerning whether there was any other area in which a misdemeanor conviction could support an indefinite suspension of constitutional rights.<sup>103</sup> Counsel was unable to think of examples on the spot, and the question clearly engaged others on the Court, with Justice Breyer expressing the view that it was a “major question.”<sup>104</sup> Unfortunately, it was also a question that neither counsel had benefit of beforehand, and oral argument was probably the last opportunity for substantive discussion among the Justices before they gathered to vote.<sup>105</sup>

*Citizens United v. FEC*<sup>106</sup> may be the litmus test, given breathless accounts that “a single question changed the case, and perhaps American history.”<sup>107</sup> The case involved a nonprofit corporation concerned about penalties for making available a film criticizing a presidential candidate. The corporation's objection focused on whether the FEC was applying the federal campaign-finance statute properly, in light of constitutional

100. *Id.* at 76–79. Justice Breyer was quick to concur that “it was not made up in my chambers,” to which counsel graciously replied, “Although they did a wonderful job figuring it out again, Your Honor.” *Id.* at 78.

101. *Mich. v. EPA*, 135 S. Ct. at 2718–19 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting) (addressing EPA commitment “to account for costs [a]s a part of developing a regulation”).

102. Tr. of Oral Arg., *Voisine v. U.S.*, 2016 WL 1028386 at 35–40 (Feb. 29, 2016) (No. 14-10154) [hereinafter *Voisine Transcript*].

103. *Voisine v. United States*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2272 (2016).

104. *Voisine Transcript*, *supra* note 102, at 41.

105. In her brief rebuttal, counsel for the opposing party simply alluded to the issue of indefinite abrogation, rather than more directly capitalizing on the question that was troubling at least some members of the Court. *Id.* at 43–44.

106. 558 U.S. 310 (2010).

107. Jeffrey Toobin, *Money Unlimited*, NEW YORKER, May 21, 2012, at 36, 40 (referring to hypothetical about governmental banning of books that Justice Alito posed at oral argument).

concerns,<sup>108</sup> but oral argument was more freewheeling. Most notably, the Justices questioned government counsel as to whether Congress could constitutionally prohibit the use of corporate funds to publish *books* engaged in similar advocacy. The government’s position that Congress might be able to do so—perhaps not with respect to media corporations, and perhaps bearing medium-specific considerations in mind, among other things—sounded consistent with the Court’s precedent. Justice Alito, however, reacted as though this was “incredible,” and others likewise.<sup>109</sup> The Court conducted reargument and held the statute unconstitutional, in part given concerns about the slippery slope toward regulating all forms of political advocacy.<sup>110</sup>

It is impossible to show that a preliminary question would have changed the outcome in *Citizens United*, and there is room for doubt. The basic inquiry was not a bolt from the blue—a facial challenge not being wholly alien to the as-applied issues before the Court<sup>111</sup>—and experienced counsel took it in stride. The Court’s order of re-argument on the facial question, moreover, allowed the government to change its answer, which

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108. See *Citizens United*, 558 U.S. at 318–22; Tr. of Oral Arg., *Citizens United v. FEC.*, 2009 WL 760811 at 35–40 (Mar. 24, 2009) (No. 08-205) [hereinafter *Citizens United* March Transcript] (showing attempt by counsel to distinguish type of communication at issue from that which Congress intended to regulate); *id.* at 16–17, 23 (emphasizing statutory question, as construed in light of constitutional avoidance principles, before acceding to Justice Scalia’s emphasis on constitutional question). Compare Appellate Pet., Mot. & Filing at i, *Citizens United v. FEC.*, 2008 WL 3851546 (Aug. 14, 2008) (No. 08-205) (stating broad as-applied constitutional challenges in jurisdictional statement), with Br. for Appellant at i, *Citizens United v. FEC.*, 2009 WL 61467 (Jan. 8, 2009) (No. 08-205) (stating more circumscribed, fact-specific challenges following change in counsel).

109. *Citizens United* March Transcript, *supra* note 108, at 26–38.

110. *Citizens United*, 558 U.S. at 333 (deeming it “necessary . . . to consider the facial validity” of the act, because “[a]ny other course of decision would prolong the substantial, nationwide chilling effect caused by [the act’s] prohibitions on corporate expenditures”), 355–56 (discussing corruption and appearance of corruption), 361–62 (discussing quid pro quo corruption, foreign influence on elections, and the like); see *id.* at 365 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), and holding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity” because “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations”).

111. Compare *Citizens United*, 558 U.S. at 331 (explaining that “the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge”), with *id.* at 398–405 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (stressing significance of distinction).

limited any downside.<sup>112</sup> Even so, this was a defective (and avoidable) way of inviting reflective advocacy. Book-related questions were hypothetical in a very strong sense, since before argument they looked to have been excluded from consideration; as Justice Stevens insisted, facial validity was “relinquished below, not included in the questions presented to us by the litigants, and argued”—*after* the first go-round—“only in response to the Court’s invitation.”<sup>113</sup> The Justices also formulated their inquiries inexactly, necessitating distracting corrections.<sup>114</sup> Finally, the fact that the government later reversed its position actually suggests that, had the Court posed the question before argument, counsel and its client might have deliberated and settled on a different initial answer, mollifying some of the Justices and changing the case’s later direction.<sup>115</sup> The Court’s complaints about the government’s answers—that it had not successfully distinguished the regulation of books,<sup>116</sup>

112. Tr. of Oral Arg., *Citizens United v. FEC.*, 2009 WL 6325467 at 64 (Sept. 9, 2009) (No. 08-205) [hereinafter *Citizens United* September Transcript] (showing counsel’s statement, in response to question concerning constitutionality of regulating at least some printed materials, including books, that “[t]he government’s answer has changed”); *but see Citizens United*, at 558 U.S. at 398 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (“Setting the case for reargument was a constructive step, but it did not cure th[e] fundamental problem. Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”).

113. *Citizens United*, 558 U.S. at 396 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).

114. *See, e.g., Citizens United* March Transcript, *supra* note 108, at 27, 29–30 (showing counsel’s reaction to concerns expressed by Justices Alito and Kennedy and Chief Justice Roberts that the FEC could ban certain publications outright, as opposed to restricting the use of corporate treasury funds toward that end); *cf.* 558 U.S. at 415 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (objecting, after subsequent second argument, to the Court’s “ominous image of a ‘categorical ba[n]’ on corporate speech,” which “is highly misleading, and needs to be corrected”).

115. For discussion of the Court’s dynamics following initial argument, *see generally* Toobin, *supra* note 107. The counterfactual is complicated, of course: Justice Kagan, whose first argument as Solicitor General was the re-argument of *Citizens United*, was confirmed as Solicitor General only five days before the initial argument. Whether she would at that point have anticipated such a question from the Court and mooted an answer, let alone favored a different position without first having seen the Court’s reaction to discussion of the issue, is simply guesswork.

116. The Court attributed to the government the position that it was permitted to “ban corporate expenditures for almost all forms of communication stemming from a corporation,” and represented that its precedent might permit application of the act to “printing books,” but cited without clear effect the government’s response that it had not applied and probably could not constitutionally apply the existing statute to a book.

and that the Court was somehow obliged to consider facial validity because of “the uncertainty caused by the litigating position of the Government”<sup>117</sup>—were, at least in part, a complaint about the Court’s own choice as to how and when to pose its inquiries.<sup>118</sup>

Other examples could be cited, but the basic point is the same. If a question deserves a considered answer, as opposed to the best spontaneous answer, it is better tendered beforehand. The commitment to oral argument, even if waning, requires taking seriously the resources it entails. Having established an expert appellate bar, in part through vigorous inquiry, courts should strive to extract better advice from its members—not treat the challenge of argument as an end in itself.

## VI. SOME PRELIMINARY QUESTIONS (AND ANSWERS)

Courthouse statues notwithstanding, oral argument has not been cast in stone. The drift of innovation has been toward limiting its availability and duration, but the Supreme Court has shown some flexibility in complex cases,<sup>119</sup> and some Justices

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*Citizens United* at 349. The Court’s conclusion—that “[t]his troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure,” *id.*—is impenetrable.

117. *Citizens United*, 558 U.S. at 333. *But see id.* at 402 n.7 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (“Our colleagues have apparently never heard of an alternative argument.”).

118. To be sure, this was accentuated by the corporate petitioner, which provoked clarification of its rights by filing the case in advance of any evident interest by the FEC in regulating its conduct.

119. Mainly in terms of adding more time, ranging from the five and a half hours allotted to argument on the constitutionality of the Affordable Care Act to an additional thirty minutes per side for an important case involving EPA air pollution standards. *See* Tony Mauro, *Justices Warm to EPA Air Pollution Standards*, NAT’L L.J. (online edition), Dec. 10, 2013 (noting order in *EPA v. EME Homer City Generation*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1584 (2014) that increased argument time to ninety minutes from sixty). The Court has on occasion also been more flexible in letting oral argument spill over the normal allotments. *See, e.g.,* Tony Mauro, *High Court Justices Question Power of Bush Order in “Medellin” Case*, NAT’L L.J. (online edition), Oct. 11, 2007 (noting that argument in *Medellin v. Tex.*, 552 U.S. 491 (2008), ran twenty-six minutes over its limit, featured 176 questions, and caused one Justice to ask “meekly” if counsel could be permitted to answer “without interruption by all of my colleagues”).

have acknowledged the need to manage arguments differently— if only to avoid a free-for-all.<sup>120</sup>

Even so, the idea that preliminary questions could be used more routinely may be viewed skeptically by some judges, so it might be best to preview some of the likely questions, with the hope of provoking satisfactory answers.

COURT: Counsel, we barely had time to get through the briefs. What makes you think we have time to think up questions in advance, let alone agree on which to issue?

COUNSEL: Your honor, sometimes preliminary questions will be impracticable. Courts of appeals, though, often cull cases for argument, which might generate possible questions,<sup>121</sup> and so might bench memos prepared by clerks.<sup>122</sup> As to agreeing in advance, individual judges could nominate questions, subject to veto by the other judges hearing an argument, before the clerk's office issues them. The Third Circuit, among other courts of appeals, has made this work, and best practices might be developed.

The Supreme Court will do things somewhat differently, of course, but this should be even easier for it to manage. It has a smaller docket and greater capacity. Preparation by the Justices and their clerks before argument—even reaching back to certiorari—may already have generated questions, and could be used to create more.<sup>123</sup> Any Justice

120. Liptak, *supra* note 34 (noting recent concessions by Chief Justice Roberts and Justice Ginsburg that oral argument may require greater management); *see also supra* notes 35, 47 (noting Justice Thomas's views).

121. *See* text accompanying note 42, *supra*.

122. *See, e.g.*, Stephen Louis A. Dillard, *Open Chambers Revisited: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals*, 68 MERCER L. REV. 1, 12–14 (2016) (reporting observations by a state court of appeals judge contrasting time pressures on preparation for oral argument on that court with his experience as a clerk on a federal court of appeals, during which clerks and their judge spent extensive time preparing and reviewing cases prior to argument).

123. *See, e.g.*, Garner, *supra* note 35, at 123 (reporting on Justice Thomas's explanation of how his decisionmaking process begins at the certiorari stage, and how he and his clerks already "have an outline form of the disposition of the case . . . when we go on the bench"); Bryan A. Garner, *Justice John Paul Stevens*, 13 SCRIBES J. LEG. WRITING 41, 47 (2010) (discussing review of cases with clerks before and after oral argument); Bryan A. Garner, *Justice Antonin Scalia*, 13 SCRIBES J. LEG. WRITING 51, 67 (2010) (noting reliance on discussions with law clerks); Bryan A. Garner, *Chief Justice John G. Roberts, Jr.*, 13

could circulate a question directly to the clerk, perhaps for transmission to counsel after approval by at least one other Justice. The Court could even hold pre-argument conferences, but that does not seem essential.

Undoubtedly this takes time and effort. But respectfully, if the questions help with issues that are hard to resolve in the short time allotted for argument, investing time up front may save more time in the long run.

COURT: Isn't this just a way of making our jobs harder, and yours easier? It lets you wait to get our questions, rather than preparing on your own.

COUNSEL: It's unlikely that preliminary questions would be so frequent or comprehensive—or timely—as to obviate other preparation. Counsel will know that other questions are likely to develop during argument and will want to develop their own arguments. But if this is a real concern, the clerk could communicate any preliminary questions only shortly before argument. Any advance notice, however short, would reduce surprise, permit some contemplation and consultation, and make for better answers.

COURT: Won't questions just excite the media? We have issues with the media.

COUNSEL: It's true that, no matter how many caveats you give, questions may be pored over to see if they reveal the court's disposition. Interest may wane if such questions become routine. Naturally, if a particular question has the potential to cause dramatic effect, like a huge swing in the stock market, it could be held back until oral argument or never posed at all.

Preliminary questions will probably attract the same kind of attention as questions posed at argument, and to that extent, may moderate reaction to the argument itself. There's one

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SCRIBES J. LEG. WRITING 5, 7 (2010) (discussing need for Justices to prepare for oral argument by contemplating questions and the rationale behind each, while allowing for spur-of-the-moment questions as well).

potential difference, however. While preliminary questions can be issued for the court as a whole, via the clerk<sup>124</sup>—and then raised at argument by counsel, the presiding judge, or any judge at all—questioning now is unavoidably associated with a particular judge, personalizing the inquiry and fueling speculation about that judge’s vote.<sup>125</sup> The relative anonymity of preliminary questions might reduce media sensationalism and even coax reluctant questioners off the back bench.

COURT: Some of you—some of us, even—think we ask too many questions as it is, to the point where counsel can’t answer them all. Wouldn’t this just make things worse?

COUNSEL: Just as you say, your honor, self-restraint may be necessary. It’s not clear, though, that preliminary questions would hurt. Circulating good questions might cause other judges to bely their own. And preliminary questions need not be discussed if other questions are more pressing—counsel will have to react to the questions actually posed during the allotted time, just as before. Naturally, if this results in a surplus of quality questions, the court can always allow additional time to answer them.

COURT: Well that’s the key right there. Extra time makes preliminary questions unnecessary. Or we can order supplemental briefs or post-argument submissions,<sup>126</sup> or even order re-argument.<sup>127</sup> No need to mess around with how we question.

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124. Any court could, if preferred, choose to dispense with anonymity. Judge Selya, for example, had the First Circuit issue pre-argument inquiries by his order. Docket Survey, *supra* note 62.

125. Not entirely without reason. See Sarah Levien Shullman, *The Illusion of Devil’s Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271 (2004).

126. See, e.g., *United States v. Askew*, 529 F.3d 1119, 1122 (D.C. Cir. 2008) (noting that en banc court had directed parties to submit supplemental briefs on three specific questions following oral argument); *St. Luke’s Hosp. Ass’n of Cleveland v. United States*, 1 Ohio Misc. 89, 163–64 (6th Cir. 1964) (acknowledging request by judge at oral argument that counsel submit post-argument letters responding to hypothetical fact patterns).

127. See, e.g., text accompanying notes 87, 112, 113, *supra*. Or the initial argument may be postponed. See, e.g., *Gustafson v. Alloyd Co.*, 512 U.S. 1280 (1994) (directing

COUNSEL: No one option does everything, so it's better to add to the judicial toolkit. Additional argument time may not improve the quality of an impromptu answer; it doesn't allow for research or reflection, let alone enable counsel to confer with colleagues or clients not sitting at counsel table (and courts of appeals, at least, do not have lots of extra time lying around). Supplemental briefing requires time and resources, and may be unworkable if questions surface only shortly before argument; post-argument submissions are certainly a great option, and should be encouraged, but they may also be too little too late.<sup>128</sup> Re-argument is the most substantial undertaking, usually saved for the most significant type of reorientation, and ordering it can be divisive.<sup>129</sup> It seems better to try hard to get argument right the first time.

COURT: Supposing this helps counsel advocate more effectively, so what? If you haven't noticed, we're really arguing among ourselves.

COUNSEL: Duly noted. Some judges have suggested that courts should focus on enhancing advocacy instead, since you can lobby each other off the clock.<sup>130</sup> But—and this is to answer you more directly, your honor, even if the real argument is being conducted among the judges, preliminary questions can help. A judge interested in jump-starting consideration by her colleagues might propose a

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parties to address a question in supplemental briefs due on the day originally set for argument, which was postponed).

128. That is not necessarily a deterrent. *See, e.g.,* Mot. to File Supp. Br. after Arg. & Mot. to File Supp. Br. after Arg. for Pet'rs, *McCreary Cnty. v. ACLU*, 2005 WL 1361016 (Apr. 22, 2005) (No. 03-1693) (filing second supplemental brief that addresses hypothetical posed at oral argument by Justice Kennedy).

129. *See* *Crist v. Cline*, 434 U.S. 980 (1977) (Marshall, J., dissenting from order restoring case for oral argument, citing "violence to . . . assumptions underlying Article III of the Constitution"); *see also* text accompanying notes 112–13, *supra* (noting Justice Stevens's criticism of reargument in *Citizens United*).

130. Josh Gerstein, *Clarence Thomas Defends Silence in Supreme Court Health Care Arguments*, POLITICO—UNDER THE RADAR (Apr. 6, 2012, 11:29 a.m. EDT), <http://www.politico.com/blogs/under-the-radar/2012/04/clarence-thomas-defends-silence-in-supreme-court-health-119823.html> (quoting Justice Thomas: "'We have a lifetime to go back in chambers and to argue with each other,' he said. 'They have 30, 40 minutes per side for cases that are important to them and to the country. They should argue. That's a part of the process.'").



preliminary question, before views become too fixed. (She could also hold back a hostile question, the better to surprise counsel, but then any judge more friendly to counsel's position could offer it instead.) Basically, preliminary questions offer new options without killing off any old ones.

COURT: We already do this when we want to, which is almost never. Deciding what to ask at oral argument is so much easier. I can withhold questions if things are going fine, or throw a monkey-wrench at counsel if they are making their positions sound better than they are. If I lob a question that isn't great, at least it looks ad-libbed; if it is brilliant, I get all the credit.

COUNSEL: Naturally, your honor, most questions will still await oral argument. But there's value in rethinking this practice. Judges may not have internalized all the potential virtues or opportunities, or how things are done in other courts; most judges have likely never even tried to issue preliminary questions to see whether it works for them. Courts could also initiate broader experiments in their use, such as through their local rules and practices, and clerks of court could routinely ask judges their own preliminary question as to whether there are any preliminary questions for counsel.

If I may, your honor, this is not just about choosing when to pose preliminary questions yourself, but also about how judges might react when they are not posed. Judges, perhaps, can be faulted when they fail to give adequate opportunity to answer. If you ask an unexpected and important question at argument, your colleagues might legitimately discount the answer. They might even say that you could have spent the time to hone the question and provide it in advance, if it seemed important to you at argument but a bit convoluted or confusing.

COURT: [Unintelligible]

COUNSEL: All I really mean, your honor, is that judges who try this more often may become convinced of its

value, as they get better answers that produce better decisions.

COURT: Suppose you're right, counsel. If this makes so much sense, how is it possible that courts don't do it already?

COUNSEL: I see that I am out of time.

#### IV. CONCLUSION

Nothing can supplant counsel's obligation to anticipate the countless directions the argument might take, and to distinguish themselves by preparing accordingly.<sup>131</sup> Nor will anything—even collegiality—prevent a judge from asking whatever comes to mind. Discussion at oral argument will inevitably, and appropriately, remain unscripted and unpredictable. Referring to his time as Solicitor General, Justice Jackson used to say that he always made three arguments in every case:

First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.<sup>132</sup>

Regardless of preliminary questions, substantial differences between the argument as planned and the argument actually presented—not to mention the one perfected afterward—will

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131. See LAWRENCE S. WRIGHTSMAN, *ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH* 51 (2008) (citing estimate by one leading advocate that for each argument, he prepares as many as 300 questions and develops answers to them); see also FREDERICK, *supra* note 11, at 202–83 (cataloging examples of mistakes and successes at oral argument). The risk of distinguishing oneself in a bad way is also a powerful deterrent. E.g., Lyle Denniston, *Argument Recap: Disaster at the Lectern*, SCOTUSBLOG (Nov. 8, 2011, 4:51 p.m.), <http://www.scotusblog.com/2011/11/argument-recap-disaster-at-the-lectern/> (describing one counsel's difficulties at oral argument); Tr. of Oral Arg., *Waters v. Churchill*, 1993 WL 757641 at 47–48 (Dec. 1, 1993) (No. 92-1450) (reporting Justice's observation that fact-related argument had been made "for 25 minutes," and querying whether counsel was "going to address the question of law that's presented in the Petition for Certiorari at all," followed later by comment that "we didn't take this case to determine who said what in the cafeteria").

132. Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (Nov. 1951).

persist. Counsel and courts benefit, though, if these gaps narrow. Counsel can plan a superior argument, and one better aligned with the perfect argument imagined afterward, if they anticipate a key question that might be raised during the actual presentation. Admittedly, what Jackson regarded as “utterly devastating arguments” will remain a rare commodity, even with the greatest notice. But isn’t it wiser to ask first?

