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Opinions First—Argument Afterwards

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For twenty-five years, the California Supreme Court has operated under a bizarre internal operating procedure that requires majority opinions to be written and agreed to prior to oral argument. This procedure squanders and demeans the parties' formal opportunity for appellate argument, is inconsistent with traditional common law appellate process, and violates the state and federal Constitutions.

If oral argument is to be more than an empty ritual, it must provide the litigants with an opportunity to persuade those who will actually decide an appeal.

—*Moles v. Regents of University of California*[1]

INTRODUCTION

Channeling the Queen of Hearts,[2] the California Supreme Court drafts and votes on its merits opinions before the case under review is orally argued.[3] The court can, and does, alter those opinions in light of the argument, often sprinkling in citations to oral argument before publishing the decision.[4] Nevertheless, given that a majority has already signed onto a written opinion, oral argument in that court is a theater of the absurd in which one of the appellate litigants (only the justices know which) is in effect arguing for rehearing in an appeal already decided against his client without knowing the result or the reasoning of the decision he is challenging. Petitioning for rehearing from an en banc decision of a court of last instance always carries exceedingly long odds;[5] those odds become vanishingly small if the losing litigant does not

1. 654 P.2d 740, 744 (Cal. 1982).
2. LEWIS CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 161 (1970) ("'No, no!' said the Queen. 'Sentence first—verdict afterwards.' 'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!' 'Hold your tongue!' said the Queen, turning purple.").
3. CAL. SUPREME COURT, INTERNAL OPERATING PRACTICES AND PROCEDURES OF THE CALIFORNIA SUPREME COURT § VI.D (2007).
4. A Westlaw search for references to oral argument in California Supreme Court cases decided 2010–2012 reveals fifty-six cases made such references over this three year period. These cases were found on WESTLAW by searching: (ORAL! /S ARGU!) & PR(SUPREME) & DA(AFT 1/1/2010 & BEF 12/31/2012) (database: ca-orcs). That universe consisted of seventy-eight cases. Of those seventy-eight cases, fifty-six made substantive reference to what transpired at the argument.
5. *See* JUDICIAL COUNCIL OF CAL., 2011 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2000–2001 THROUGH 2009–2010 9 (2011), http://www.courts.ca.gov/documents/2011CourtStatisticsReport.pdf (reporting no petitions for rehearing granted 2008–2011)

know he has lost, or what the premises and reasoning of the adverse decision are. Moreover, the justices have a powerful personal financial incentive not to reconsider the merits following oral argument. The justices' pay is suspended under California's "ninety-day rule" if the court fails to issue a final decision within ninety days of "submission."[6] Since 1989, "submission" has been defined as the conclusion of oral argument.[7]

Still, the court persists in holding faux oral argument in almost all cases decided on the merits, at substantial cost to the state and the litigants.[8] Except in rare circumstances, however, the court bases its decisions solely on the written submissions of the parties, the record made below, and whatever internal research and debate it chooses to undertake.[9]

Nevertheless, oral argument remains an indispensible part of the court's procedure in merits cases, not only because the California Constitution apparently requires it,[10] but because it enables the court to maintain the fiction that

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[hereinafter JUDICIAL COUNCIL OF CAL., 2011]; *see also* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 814–15 (9th ed. 2007) (noting that between 1989 and 1991 the Supreme Court of the United States (SCOTUS) granted only two petitions for rehearing out of 1386 filed, in both cases because of an intervening Supreme Court decision); ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 441–65 (2d ed. 1989).

6. CAL. CONST. art. VI, § 19; CAL. GOV'T CODE § 68210 (West 2009); *see also* Meyers v. Kenfield, 62 Cal. 512, 513–14 (1881) (holding that the ninety-day rule requires suspension, not forfeiture, of pay).

7. *See infra* notes 34–37 and accompanying text.

8. Based on my informal discussions with prominent appellate lawyers, preparation and delivery of a typical appellate argument at the California Supreme Court should involve at least fifty to seventy-five attorney hours for each party. On the additional, conservative, assumptions of only two parties and an average billing rate of $500 per hour per appeal, the attorney time alone in arguing a year's worth of merits cases exceeds $5 million. No doubt any reasonable allocation of court and staff time and expenses would run to many millions more.

9. Gary L. Simms, *You Are in the Supreme Court—Now What?*, 24 CAL. LITIG. 16, 18 (2011) ("Put simply, with rare exceptions, cases are fully decided and prospective opinions are written and ready to file before oral argument."); *id.* at 21 ("[T]he 90-day rule forces the Justices to make up their minds before oral argument. . . . [I]f a Justice is not persuaded by his or her colleagues to rule in your favor, you have virtually no chance of persuading that Justice to do so [at oral argument]. In short, the briefs are your only realistic opportunity to persuade the Justices.") Mr. Simms has the experience to know whereof he speaks: For nine years he worked as a staff attorney at the California Supreme Court for Justices Eagleson and Baxter. *See* Myron Moskovitz, *Abolish Oral Argument?*, DAILY J. (Sept. 9, 2010), http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1106&context=pubs (arguing that oral argument under current California appellate procedure should be abolished because it is meaningless).

10. The Court has long held that oral argument is constitutionally required in the adjudication of its merits cases. *See, e.g.*, Metro. Water Dist. v. Adams, 122 P.2d 257, 259 (Cal. 1942) (noting that the California Constitution confers a "right to oral argument in matters on the calendar in open sessions of the court . . . [that] has always been scrupulously adhered to and enforced"); Robb A. Scott & Karen J. Wegner, *Case Dispositions by the California Supreme Court: Proposed Alternatives,* 67 CALIF. L. REV. 788, 791–92, 792 n.19 (1979) (observing that

it resolves all matters "submitted" to it within ninety days. In truth, the court virtually never resolves a merits matter within ninety days or anything close to it; for opinions issued between 2001–2011, the median duration from the grant of review to the filing of the court's opinion resolving the case ranged from 441 to 618 days, exclusive of automatic death penalty appeals that generally take significantly longer.[11] By deferring oral argument until the written opinions are finished and agreed to, the court prevents the ninety-day clock from running until the court has already decided the case, subject only to minor tweaking of the written opinions. Formal compliance with the ninety-day rule in every single "submitted" case is crucial because if *any* case languishes for more than ninety days from "submission" the State will withhold *all* the justices' pay.

Only California adopts this appellate procedure. It was foisted on the court in a private settlement of a suit by a disgruntled litigant at a time when the court's public standing was at its nadir, three justices having recently been unseated in a bitter statewide election. The thesis of this Article is that the California Supreme Court's appellate process is not due process of law within the American tradition, is not good practice, and cannot withstand serious scrutiny from the public.

Part I tells the sorry tale of how the California Supreme Court fell into this practice. It is depressingly typical of much of what ails twenty-first century California state government: An angry populace frustrated by governmental dysfunction imposes arbitrary and simplistic constitutional rules (for example, legislative term limits or "three strikes" criminal sentencing), inducing nontransparent bureaucratic workarounds and litigation, the net result of which is to compound the original problem with new, worse problems. Part II examines the role of appellate oral argument in the American tradition, using the practice before the Supreme Court of the United States (SCOTUS) as a point of reference, and undertakes a policy analysis of the California practice of postdecision argument. Part III examines the effect of the California procedure on disposition times. Unsurprisingly, the data show that tacking on a meaningless oral argument after forging a consensus written decision does not speed up the appellate process. Part IV undertakes a constitutional analysis of

the California Supreme Court has long recognized the "right to oral argument where an appeal is decided on the merits"). Arguments are regularly held in San Francisco, Sacramento and Los Angeles. CAL. SUPREME COURT, *supra* note 3, § V. But the Court also takes the show on tour on special occasions. Recent field trips for oral argument include Davis, Fresno, Berkeley, Riverside, Santa Rosa, Santa Barbara, and Redding. *Outreach Sessions*, CALIFORNIA COURTS, http://www.courts.ca.gov/2952.htm (last visited July 26, 2013).

11. *See infra* Appendix.

California's "opinion first—argument later" procedure. Part V explores the available reform alternatives.

I. THE NINETY-DAY RULE, *STEVENS V. BROUSSARD*, AND IOP SECTION VI.D

Since 1880, the California Constitution has imposed "the ninety-day rule" on the state judiciary. The California Constitution provides:

> A judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision.[12]

The convention that produced the 1879 constitution included a large Kearneyist delegation from the short-lived Workingmen's Party of California, a California offshoot of larger nationwide socialist movements characterized by an ugly and violent antipathy toward immigrant Chinese labor.[13] The Kearneyists were angry populists. They distrusted California's still-adolescent state government, perceiving a predominant and corrupting influence on it from major business interests. Prime culprits in addition to Chinese immigrants included the legislature, banks, railroads, and the judiciary, all of whom were singled out in the 1879 constitution for retribution.[14]

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12. CAL. CONST. art. VI, § 19. The original provision read:
> No Judge of a Superior Court nor of the Supreme Court shall, after the first day of July, one thousand eight hundred and eighty, be allowed to draw or receive any monthly salary unless he shall take and subscribe an affidavit before an officer entitled to administer oaths, that no cause in his Court remains undecided that has been submitted for decision for the period of ninety days.

CAL. CONST. of 1879, art. VI, § 24. The affidavit requirement once found in the constitution is now imposed by statute. CAL. GOV'T CODE § 68210 (West 2009).

13. ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 113–32 (1971).

14. Theodore H. Hittell characterized the shortcomings of the 1879 constitution as follows:
> There can be no doubt that the constitution of 1879 was framed and adopted at a very unfortunate time and under very unfavorable circumstances. The people were too angry and desperate to make a good constitution. Railroad and labor troubles, worked up by demagogues, had made them mad. An insane desire to 'cinch' capital and expel the Chinese had seized hold of men's minds and driven them into excesses; and the result was a constitution which was intended mainly, in so far as it differed from the constitution of 1849, to accomplish these objects and which, if carried out in these respects as designed, would have made California a sad spectacle to nations. But as it turned out, a conservative supreme court and legislature prevented to a very great extent the intended cinching of capital, and the plain rights of the Chinese under the

Frustration with the courts focused on lengthy delays at all levels and the severe backlog at the California Supreme Court.[15] Those delays, the backlog, and the five-justice court's practice in reaction to the backlog of issuing rulings without written opinions in many cases[16] led to structural reforms. The court was reconfigured as a seven-member court and authorized to sit in two panels.[17] Written reasoned opinions were required in all cases.[18] Complaints about

> Burlingame Treaty were too solidly established to be very much affected by the unconstitutional clauses of the new constitution against them.

4 THEODORE H. HITTELL, HISTORY OF CALIFORNIA 639 (San Francisco, N. J. Stone & Co. 1897).

15. There was also extended carping over judicial salaries and the length of judicial vacations. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 972, 985–91 (Sacramento, J. D. Young, Supt. State Printing 1881).

16. *See* William Wirt Blume, C*alifornia Courts in Historical Perspective*, 22 HASTINGS L.J. 121, 161 (1970) (noting that in the four years prior to the 1878 Constitutional Convention the Supreme Court had decided 2242 cases, of which 559 were decided without written opinion).

17. CAL. CONST. of 1879, art. VI, § 2 ("The Supreme Court shall consist of a Chief Justice and six Associate Justices. The Court may sit in departments and in bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The Chief Justice shall assign three of the Associate Justices to each department, and such assignment may be changed by him from time to time. The Associate Justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves or as ordered by the Chief Justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in bank."). This innovation was connected to similar reforms in the United Kingdom and in the federal system in the United States occurring at the same time. Pursuant to the Supreme Court of Judicature Act, 1875, 38 & 39 Vict. c. 77 (Eng.), *reprinted in* CHARLES BURNEY ET AL., WILSON'S SUPREME COURT OF JUDICATURE ACTS, RULES, AND FORMS (6th ed. 1887), the English Court of Appeal adopted a panel system for appeals. Similar proposals were made in this era to alleviate the backlog at SCOTUS. *See* Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 HARV. L. REV. 35 (1925); Tracey E. George & Chris Guthrie,*"The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1854 n.107 (2008). At the SCOTUS level, however, the issue was effectively mooted by the Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826 (1891), creating the Circuit Courts of Appeals and limiting the mandatory appellate jurisdiction of SCOTUS. Thereafter and throughout the twentieth century SCOTUS's continuing caseload burdens have been dealt with by further limiting its mandatory appellate jurisdiction and, to a lesser extent, by increasing its staff, rather than through structural reform. The federal courts of appeals, of course, ordinarily sit in three-judge panels rather than en banc. To Dean Pound's regret, California ultimately abandoned the panel approach at the state supreme court level. ROSCOE POUND, ORGANIZATION OF COURTS 214 (1940). Since 1922, the California Supreme Court has heard all its merits cases en banc; this practice has been constitutionally required since 1966. *See* Blume, *supra* note 16, at 190.

18. CAL. CONST. art. VI, § 14 ("Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."). The 1879 constitution similarly provided: "In the determination of causes, all decisions of the Court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated." CAL. CONST. of 1879, art. VI, § 2.

lengthy postsubmission delays led to the ninety-day rule.[19] Some cooler heads, while generally supporting the ninety-day rule, sought to exempt the California Supreme Court, arguing that the work of a multimember appellate court of last instance by its nature might require more than ninety days to complete in at least some cases.[20] They failed to persuade.[21]

For most of the twentieth century, the California Supreme Court essentially ignored this one-size-fits-all mandate for prompt judicial decisionmaking regardless of caseloads and resources. In the 1950s, the 1960s, and the 1970s, the court grew in prestige and influence under Chief Justices Gibson, Traynor, and Wright to enjoy a preeminent place among American state courts.[22] During this period, "submission" of a case occurred

19. *See supra* note 12.

20. *See, e.g.*, 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1461 (Sacramento, J. D. Young, Supt. State Printing 1881) (remarks of Mr. Edgerton in support of motion to strike the words "nor of the Supreme Court" from proposed art. VI, § 24) ("Gentlemen must remember that there are hundreds of cases in th[e Supreme] Court to be disposed of, and that it requires great care to fairly consider and digest the character of conclusion reached and put it in proper form."); *id.* (remarks of Mr. Shafter in support of motion to strike the words "nor of the Supreme Court" from proposed art. VI § 24) ("There may be some use in hurrying up the Superior Courts in this way, but it certainly should not apply to the Supreme Court. . . . Many instances could be cited where this rule would not work well by any means.").

21. *Id.* at 1462 (18 ayes, 95 noes, on striking "nor of the Supreme Court" from proposed art. VI, § 24). The remarks of Mr. Herrington reflect the character of the opposition to the failed amendment: "Now, I shall vote against striking it out, because I want not only justice administered at our door, but I want it done speedily and without the circumlocution of appeal after appeal, while the poor are ground to death beneath the heel of oppression." *Id.* at 1461.

22. Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 805 (1981) (citation study showing growing influence of California Supreme Court 1945–1970) ("In 1945–1970, California moved into first place. Thirteen percent of all out-of-state cites in our sample of cases were California cites; this compares to New York's 8%. . . . [I]n 1940–1970, 92% of the California Supreme Court cases in our sample were cited at least three times by out-of-state courts; 26% were cited in more than eight subsequent out-of-state opinions."); *see* Joann S. Lublin, *Trailblazing Bench: California High Court Often Points the Way for Judges Elsewhere*, WALL ST. J. 1 (July 20, 1972) ("[The] state's high court over the past 20 years has won a reputation as perhaps the most innovative of the state judiciaries, setting precedents in areas of criminal justice, civil liberties, racial integration and consumer protection that heavily influence other states and the federal bench. 'The California Supreme Court is to the courts what UCLA is to basketball.'" (quoting Professor Anthony G. Amsterdam)). Chief Justice Traynor, who served on the California Supreme Court from 1940 to 1970 and led the court as its chief from 1964 to 1970, is widely regarded as one of the most influential American jurists of the twentieth century. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 688 (2d ed. 1985); *see also* Edmund G. Brown, In Memoriam, *A Judicial Giant*, 71 CAL. L. REV. 1053 (1983); Warren E. Burger, In Memoriam, *A Tribute*, 71 CAL. L. REV. 1037 (1983); Henry J. Friendly, In Memoriam, *Ablest Judge of His Generation*, 71 CAL. L. REV. 1039 (1983). The reputation of the California Supreme Court (like that of Bruin basketball) has perhaps declined somewhat over the intervening forty years from its superstar status in the 1960s and 1970s, but remains high.

sometime after briefing and argument based on the chief justice's determination that the case was ready for decision. No salaries were withheld; the court issued written opinions after full briefing and argument when it was ready. Operating with a relatively lean staff, the court issued many deeply controversial and path-breaking decisions throughout this period,[23] and no one seemed to care that in some cases more than ninety days might pass between argument and final decision.[24] Nevertheless, the court promptly adjudicated its merits calendar of 130–230 cases per year.[25] In 1967, for example, median disposition time from the grant of review to published opinion was 149 days for that year's 140 merits cases. Only seven cases decided in calendar year

See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* 24 (John M. Olin Law & Econs., Working Paper No. 405 (2d Series), 2008 & Pub. Law & Legal Theory Working Paper No. 217, 2008), *available at* http://www.law.uchicago.edu/files/files/405.pdf ("No state emerges as a clear winner, but a strong case can be made that California has the best high court. It has the most #1 rankings on the triangle chart, and the most #1–3 rankings, and is tied for the most #1–5 rankings. . . . The top contenders are Arkansas, North Dakota, Montana, and Georgia. If one focuses on common law cases, where arguably state-specific factors should play the smallest role, then Mississippi, New York, Rhode Island, and Alabama emerge as the top states.").

23. *See, e.g.*, John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1005–07 (2007); John G. Fleming, *The Supreme Court of California 1974–1975, Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239 (1976); Gerard M. Mackarevich, *Manufacturers' Strict Liability for Injuries From a Well-Made Handgun*, 24 WM. & MARY L. REV. 467, 479–82 (1983); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 642–45, 657–58, 687 (1992); George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203, 233 (2002).

24. William M. Goodman & Thom Greenfield Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CAL. L. REV. 309, 312–16 (1974) (describing, circa 1974, the court's professional staff consisting of thirty research attorneys including several recent law school graduates serving short terms, its "rigorous" internal review process, and its high reputation).

25. *Id.* at 312 n.7 (counting filings and merits appeals from 1961 to 1972). Although the number of petitions for review filed in the California Supreme Court is now more than twice that in the 1970s, in recent years the court has given only about seventy-five cases per year plenary review. *Compare infra* Appendix, *with* Peter L. Shaw et al., *A Statistical Analysis of the Workload of the California Supreme Court*, 64 CAL. L. REV. 663, 663–66 (1976) (citing JUDICIAL COUNCIL OF CAL., ANN. REP. OF THE ADMIN. OFFICE OF THE CAL. COURTS (1965–1975)) (noting 3668 total filings in 1974–1975 and 3513 in 1973–1974, with about 70 percent—approximately 2500 each year—being petitions for review). *See* JUDICIAL COUNCIL OF CAL., 2012 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2001–2002 THROUGH 2010–2011 3, 6 (2012), *available at* http://www.courts.ca.gov/documents/2012-Court-Statistics-Report.pdf (noting total filings increased from 8917 in 2002 to 10,145 in 2011, while petitions for review have kept steady around 5200, with the balance consisting of original proceedings, bar matters, and death penalty matters); *id.* at 8 (noting that in fiscal year 2010–2011 the supreme court granted and held for disposition only sixty-nine petitions for review). More recently, there has been a significant drop in both filings and petitions for review. *See infra* note 85.

1967 had been granted review more than 365 days before.[26] The longest period from grant of review to final disposition was 476 days. By redefining "submission" to mean "when the chief justice says so," the court functioned as a traditional appellate court without regard to an arbitrary ninety-day deadline. Indeed, it so functioned with remarkable efficiency and the greatest distinction.

In the 1980s under Chief Justice Bird, however, the California Supreme Court came under severe attack on multiple fronts. On November 4, 1986, following a bitter political campaign centering on the court's handling of appeals involving capital punishment,[27] Chief Justice Bird and Justices Grodin and Reynoso were removed from the court by the vote of the people.[28] No sitting justice had ever been removed from office in this way before, although in 1978 Chief Justice Bird had only narrowly averted the same fate by a 52 percent to 48 percent margin.[29]

Meanwhile, much below the radar screen, on June 30, 1986, the court decided the otherwise insignificant case of *Stevens v. Geduldig*,[30] a representative taxpayer suit attacking the expenditure of $120,000 by three task forces established by Governor Ronald Reagan to study criminal justice, local government, and taxes. The court reversed the $120,000 disgorgement order entered against task force officials, and vacated and remanded for redetermination the award of $18,750 in attorneys' fees to plaintiff's counsel Stanley Sapiro. Sapiro had argued the case to the California Supreme Court on November 2, 1983.

Sapiro responded to his loss at the California Supreme Court by filing *Stevens v. Broussard*, a civil suit against the justices who had ruled against the *Geduldig* plaintiff alleging violation of the ninety-day rule and seeking disgorgement of their salaries and declaratory relief.[31] The lead defendant was Justice Allen Broussard, the author of the court's opinion reversing *Geduldig*. In addition to the justices who decided *Geduldig*, the California Attorney

26. *See infra* Figure 1.
27. Laura Mecoy, *Bird Says Foes Are Attempting "Judicial Lynching,"* THE MODESTO BEE, Oct. 25, 1986, at B-5; Sylvia Wharton, *Reynoso Warns of a "Politicized" High Court*, MERCED SUN-STAR, Apr. 7, 1986, at 3.
28. Ann Levin, *Rose Bird, Two Others Lose Posts*, SAN DIEGO UNION TRIB., Nov. 5, 1986, at Al; *see also* B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–32 (2001).
29. William Endicott, *Rose Bird Sees Positive Results: Says Voters Don't Want Decisions Based on Threats*, L.A. TIMES, Nov. 9, 1978, at B3; *see also* William Endicott, *Media Blitz Against Chief Justice Bird Planned: Brown Appointee Faces Serious Challenge by Two Groups to Oust Her*, L.A. TIMES, Sept. 15, 1978, at B3.
30. 719 P.2d 1001 (Cal. 1986).
31. Stevens v. Broussard, No. 875390 (Cal. Super. Ct. filed May 11, 1987).

General, the Judicial Conference, the Commission on Judicial Performance, and the Clerk of the California Supreme Court were also named defendants.

On February 4, 1988, the superior court granted the justices' demurrer as to the disgorgement claim, but denied it as to the cause of action for declaratory relief.[32] While Sapiro's petition for interlocutory review of the dismissal of the disgorgement claim was pending, the justices and the other defendants settled. Sapiro dismissed and forwent disgorgement of the justices' salaries in exchange for an award of legal fees paid by the State,[33] and, extraordinarily, the defendants' agreement to "conduct the court's business in accordance with the terms set forth in the settlement agreement in relation to all cases submitted after January 1, 1989."[34] Those terms required deciding all cases within ninety days of the conclusion of oral argument and imposed strict limits on the practice of resubmission. The California Supreme Court's formal adoption of Internal Operating Procedures (IOP) deeming a case submitted upon the conclusion of oral argument was also a condition of the settlement.[35] The Settlement Agreement did not require the settling justices to agree on a written opinion before argument: It required only that the ninety-day clock start upon conclusion of oral argument and limited the grounds for "resubmission" to prevent the court from freely restarting the clock. But the IOP the court adopted, IOP section VI.D, not only changed the court's procedures to deem submission to occur upon the conclusion of oral argument; it also deferred oral argument until after a majority had agreed on a written opinion and any dissenting and concurring views had been circulated among the justices and

32. Order on Demurrer to First Amended Complaint, Stevens v. Broussard, No. 875390 (Cal. Super. Ct. Mar. 9, 1988).

33. Attorneys' fees were awarded under CAL. CIV. PROC. CODE § 1021.5 (West 2013). Although settlements commonly involve a reimbursement of the settling plaintiff's attorneys' fees, it is at least vaguely disturbing that the court's prior determination in *Stevens v. Geduldig* to reverse and remand the award of Sapiro's fees against the State turned out to be only the first step towards a settlement of a collateral suit against the justices personally that resulted in an award of attorneys' fees to Sapiro. But whether Sapiro should have gotten his fees paid by the State notwithstanding the contrary determination of the court in *Stevens v. Geduldig* is so much water over the dam at this point.

34. Notice of Motion for Judgment Dismissing Action; and Awarding Attorney's Fees; and Points and Authorities in Support of Motion, Stevens v. Broussard, No. 875390 (Cal. Super. Ct. Sept. 20, 1988) (Ex. A: Settlement Agreement) ¶ 9, at 3 [hereinafter Settlement Agreement]. I am not aware of any other instance in which members of an American court of last resort have contractually obligated themselves to a private party "to conduct the business of the court" in a particular manner. Any such agreement would seem to be void as against public policy. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 179, 193; Jewel Cos. v. Pay Less Drug Stores Nw., Inc., 741 F.2d 1555, 1563 (9th Cir. 1984).

35. Settlement Agreement, *supra* note 34, ¶ 1b, at 4.

taken into account by the author of the majority opinion.[36] The new IOP became effective in accordance with the settlement's terms on January 1, 1989. The

36. "The court's general procedures for circulation of calendar memoranda, etc., are as follows: 1. The justice to whom a case is assigned prepares and circulates a calendar memorandum within a prescribed time after the filing of the last brief. When the calendar memorandum circulates, the Calendar Coordinator distributes copies of the briefs to each justice. The record remains with the Calendar Coordinator, to be borrowed as needed by a justice or his or her staff. . . . 2. Within a prescribed time after the calendar memorandum circulates, each justice states his or her preliminary response to the calendar memorandum (i.e., that he or she concurs, concurs with reservations, is doubtful, or does not concur). Each justice also indicates whether he or she intends to write a separate concurring or dissenting calendar memorandum in the case. *If it appears from the preliminary responses that a majority of the justices concur in the original calendar memorandum, the Chief Justice places the case on a pre-argument conference (§ VI.D.4, post). If it appears from the preliminary responses that a majority of the justices will probably not concur in the original calendar memorandum or a modified version of that memorandum, the Chief Justice places the matter on a conference for discussion or reassigns the case.* 3. Each justice who wishes to write a concurring or dissenting calendar memorandum does so and circulates that memorandum within a prescribed time after the original calendar memorandum circulates. . . . Soon after any concurring or dissenting calendar memorandum circulates, each justice either confirms his or her agreement with the original calendar memorandum or indicates his or her agreement with the concurring or dissenting calendar memorandum. If the original calendar memorandum thereby loses its tentative majority, the Chief Justice places the matter on a conference for discussion or reassigns the case. 4. The Chief Justice convenes a pre-argument conference at least once each month. The purpose of the conference is to identify those cases that appear ready for oral argument. The Chief Justice constructs the calendars from those cases.

"The Chief Justice places on the agenda of the conference any case in which all concurring or dissenting calendar memoranda have circulated and the 'majority' calendar memorandum has been approved by at least four justices or is likely to be approved by four justices at the conference. The Chief Justice also includes on the agenda any case in which discussion could facilitate resolution of the issues." CAL. SUPREME COURT, *supra* note 3, § VI.D (emphasis added); *see also* CAL. SUPREME COURT, *supra* note 3, § VII.A ("A cause is submitted when the court has heard oral argument or has approved a waiver of argument and the time has passed for filing all briefs and papers, including any supplementary brief permitted by the court.").

It is important to note that these provisions in the court's Internal Operating Procedures (IOP) relating to its calendar memorandum practice represent an extension of the court's prior practice. Calendar memoranda recommending particular dispositions of cases in the form of preliminary opinions and signed by the authoring justice had been routinely prepared and circulated to the court as part of its process of preparing for oral argument for many years prior to 1989. *See* CAL. SUPREME COURT, INTERNAL OPERATING PRACTICES AND PROCEDURES OF THE CALIFORNIA SUPREME COURT § VI (1985). Unlike the more familiar bench memoranda prepared for federal appellate judges by their law clerks, WILLIAM H. REHNQUIST, THE SUPREME COURT 239–40 (2001) ("[s]everal of my colleagues get what are called 'bench memos' from their law clerks on the cases—digests of the arguments contained in the briefs and the clerk's analysis of the various arguments pro and con"), these calendar memoranda did not purport to be only a critical summary of the facts, issues, contentions of the parties and the relevant authorities prepared by staff, but rather preliminary draft opinions prepared by a justice. The California Supreme Court's "calendar memorandum" practice circa 1975 is described at length in JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 81–82 (1980) (noting that the final version of the court's opinion was "sometimes . . . identical" to

superior court found the Settlement Agreement's conditions met, dismissed Sapiro's suit, and awarded him his attorneys' fee.[37] Although none of the justices who were sued and settled still sit on the court, and nothing in the Settlement Agreement prevents the current court and its members from modifying the procedures their predecessors agreed to in settling *Stevens v. Broussard*, California has lived with those procedures ever since.

II. APPELLATE ARGUMENT

A. Historic Role of Argument

Historically, in the common law system, appellate practice was almost entirely oral. In early times, written briefs were neither required nor permitted. Argument was extended for many hours or days and involved an ongoing conversation among counsel and court.[38] Judges rendered their opinions extemporaneously at the conclusion of the oral argument, with each judge making separate remarks in the case of multimember courts. This model persists in significant measure in much of the common law world, including Great Britain, Canada, and Australia.[39]

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the calendar memorandum, or, more commonly, "an edited and slightly revised version"); Goodman & Seaton, *supra* note 24, at 312–16 (discussing the court's decisionmaking process). The innovation in IOP section VI.D was not the preparation and preargument circulation of the calendar memorandum, but the deferral of oral argument until all justices had either agreed to the preliminary opinion or circulated their separate views in writing and given the calendar memorandum author an opportunity to address them. *Compare* CAL. SUPREME COURT, *supra* note 36, § VI, *with* CAL. SUPREME COURT, *supra* note 3, § VI.D.

37. Judgment Dismissing Action and Awarding Attorney's Fees, Stevens v. Broussard, No. 875390 (Cal. Super. Ct. 1988); Settlement Agreement, *supra* note 34, ¶¶ 11–12, at 3.

38. *See* ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 106, 120–33 (1990) [hereinafter MARTINEAU, APPELLATE JUSTICE]; David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 124–25 (2012) ("Traditionally, English barristers . . . orally educated the court on the facts, law, and argument over the course of hours."); *id.* at 132 ("[T]he process of educating the bench was open and interactive."); Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1173–74 (2004); Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 8 (1986) [hereinafter Martineau, *Appellate Oral Argument*].

39. Canada, Great Britain, and Australia maintain this oral appellate tradition to differing degrees. *See* DELMAR KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 138 (1963); MARTINEAU, APPELLATE JUSTICE, *supra* note 38, at 106 ("[I]n the Court of Appeal most judgments are delivered *ex tempore*, that is orally from the bench immediately following the conclusion of the arguments of counsel."); Carl Baar et al., *The Ontario Court of Appeal and Speedy Justice*, 30 OSGOODE HALL L.J. 261, 266 (1992) (showing that in the mid-1980s, 85 percent of judgments were given orally on the same day

This oral tradition was transplanted to the United States along with the rest of the received common law in the colonial period and continued during the early years of the Republic. Under Chief Justice John Marshall, no rule limited the duration of oral argument in SCOTUS. Argument in a seminal Commerce Clause case, *Gibbons v. Ogden*,[40] famously absorbed twenty hours over five days.[41]

In the United States, however, even in early times, the common law's oral tradition was never slavishly followed.[42] Moreover, the importance of oral argument in American appellate practice has steadily diminished over the centuries.[43] Ap-

argument ended in the Ontario Court of Appeal); J.E. Côté, *The Oral Judgment Practice in the Canadian Appellate Courts*, 5 J. APP. PRAC. & PROCESS 435, 437–38 n.10 (2003) (noting that 66 percent of appeals in Québec and 65 to 75 percent of appeals in 1990s Great Britain ended in an immediate oral judgment); Michael Kirby, *Ex Tempore Judgments: Reasons on the Run*, 25 U.W. AUSTL. L. REV. 213, 229 (1995) ("A proportion of the cases [heard by the New South Wales Court of Appeals] are determined by the president to be apparently suitable for ex tempore judgment. These are indicated. The judges assigned to such cases must prepare them upon an assumption that the decision will be given ex tempore at, or soon after, the conclusion of argument on the day of the hearing. A larger proportion of the cases listed are designated as probably appropriate for a reserved judgment."). Canadian and British appellate practice has shifted significantly over the past ten to fifteen years toward the written model followed in the United States, with Australia following at a slower pace. *See* Louis Blom-Cooper, *Style of Judgments*, *in* THE JUDICIAL HOUSE OF LORDS 1876–2009 145, 162 (Louis Blom-Cooper et al. eds., 2009); Ehrenberg, *supra* note 38, at 1169 (footnote omitted) ("Over the course of the past ten years, the Court of Appeal has moved away from the tradition of ex tempore judgments and will generally 'reserve judgment,' i.e. delay making a decision and articulating reasons for it. In the House of Lords, all judgments are now reserved and are never given until the law lords (the House of Lords judges) have had a chance to consider the case more thoroughly."); David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1170 (2002) ("Last year, the Federal Court of Australia (an intermediate federal appellate court, roughly analogous to a federal circuit court) resolved 700 of its 1,897 appeals [almost thirty-seven percent] through *ex tempore* opinions."); JD Heydon, *Varieties of Judicial Method in the Late 20th Century*, 34 SYDNEY L. REV. 219, 228 (2012); Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247 (2009) (noting that in the mid-1990s Australian courts were increasing their emphasis on written appellate processes, while Canada had started this process in the mid-1980s).

40. 22 U.S. 1 (1824).

41. REHNQUIST, *supra* note 36, at 242–43.

42. *See* Ehrenberg, *supra* note 38, at 1180 (noting practice before SCOTUS as early as 1795).

43. Thus, in 1849, SCOTUS first limited each lawyer to two hours of argument. In 1858, it limited each side to two oral advocates for a maximum of eight hours per case. In 1870 the allocation was further reduced to two hours per side. In the twentieth century, the duration of oral argument was further reduced: in 1911 to ninety minutes for each side; then to one hour per side; and finally, in 1984, to thirty minutes per side, today's standard allotment. SUP. CT. R. 28(3) (2013). Of course, in exceptional matters, the Court still entertains more extended argument, *id.*, the most notable recent example being the arguments in the "Patient Protection and Affordable Care Act" matters, which ran six hours over March 26–28, 2012.

pellate practice today in the United States is primarily written.[44] Briefs are the principal means available to a party to persuade an appellate court. Courts often omit oral argument altogether in less important matters.[45] When it is available, it is severely time constrained and formal. American appellate courts rarely, if ever, rule orally from the bench.[46] In modern American appellate courts, motion

Order Allocating Oral Argument Time at 1 (U.S. S. Ct. *entered* Feb. 21, 2012): Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (No. 11-393), Florida v. Dep't of Health & Human Servs., 132 S. Ct. 604 (No. 11-400) and Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 1133 (No. 11-398).

44. *See* KARLEN, *supra* note 39, at 149; Ehrenberg, *supra* note 38, at 1180. In American appellate practice oral argument never takes place until the parties have submitted written briefs first, and many cases are decided on the basis of written briefs alone. *See, e.g.*, SUP. CT. R. 28(6) (2013) ("Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.").

45. Carl West Anderson, *Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?*, 27 U.S.F. L. REV. 301, 345–46 (1993) (footnote omitted) ("In granting counsel the right to argue, California is in the minority. The majority of state and federal courts assign the determination of whether a case will be scheduled for oral argument to the panel . . . ."); *id.* at 345 n.177 ("In 31 states, oral argument is within the discretion of the court. Of these, five states have adopted the language of Federal Rule of Appellate Procedure 34(a) . . . which dispenses with oral argument when a unanimous three-judge panel is of the opinion that: (a) the appeal is frivolous; or (b) the dispositive issue or set of issues has been recently authoritatively decided; or (c) 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. . . . In the other 26 states where oral argument is discretionary, a court may dispense with argument on its own motion, by placing the appeal on a summary calendar, or by summarily disposing of the appeal . . . . In addition to California, 16 states allow oral argument on appeal from a final judgment to any party desiring it. In seven of these states (and California), a case will be placed on the calendar for oral argument only if requested . . . . In nine states, the clerk places the case on calendar but parties can stipulate to no oral argument . . . . Missouri and Rhode Island court rules, constitutions, and case law appear to neither limit nor confer a right to oral argument."); *see also, e.g.*, Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1388–89 (1990) [hereinafter Merritt, *The Decision Making Process*] (finding that some federal circuits allow oral argument in only 30 percent of cases. "[T]he Fifth Circuit began eliminating cases from its oral argument calendar through a screening process in the 1970s. Other circuits have gradually adopted the practice. The Third Circuit has extended the practice so that only slightly more than a quarter of its cases are actually heard, and most of the unargued cases are decided with a one-line order without further comment.").

46. *See* MARTINEAU, APPELLATE JUSTICE, *supra* note 38, at 110; Côté, *supra* note 39, at 436 (footnote omitted) ("Early American law reports contain oral appellate judgments. . . . Eventually, however, American appeal courts began to offer more and more written judgments, until oral judgments became almost extinct. Isolated modern attempts to reintroduce oral judgments into a few American appellate courts have not taken root."); Ehrenberg, *supra* note 38, at 1184 ("Along with the rejection of the oral tradition in appellate argument, came a rejection of the oral tradition in rendering judicial opinions."); *U.S. Courts of Appeals: Opinions and Orders Filed, by Type, in Cases Terminated on the Merits After Oral Hearing or Submission on Briefs,* U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2011/Table205.pdf (last accessed July 15, 2013) (showing that a small percentage of cases in the 1990s were resolved in oral opinions, but that no cases after 2008 have had opinions thus delivered).

practice and the consideration of petitions for discretionary review are entirely written processes.[47] The unified structure of the American legal profession no doubt facilitated the decline of oral argument in this country. English barristers were and are specialists in oral advocacy, with a legal monopoly on its practice, and as such were both interested and well situated to assert its primacy. In America, the absence of the barrister class and its monopoly on courtroom advocacy surely lowered the institutional barriers to reducing the importance of oral argument.[48]

Nevertheless, still even in modern American appellate practice, in courts of last resort, the parties are presumptively afforded an opportunity to orally argue matters receiving full merits review.[49] Indeed in California that presumption has long been thought to be a state constitutional right.[50] Outside California, argument invariably comes before the court's preliminary determination of the matter. Confidential memoranda and preliminary drafts may circulate among the judges before argument, and there may be informal discussions among them as well (although this is surprisingly uncommon in many appellate courts),[51] but neither other American supreme courts, nor the

47. Martineau, *Appellate Oral Argument*, *supra* note 38, at 5–8. The West Virginia Supreme Court of Appeals used to be an exception. Historically, it allowed oral argument on petitions for review. Since 2010, however, this court also decides whether to grant discretionary review solely on written briefs. *Compare* W. VA. R.APP.P. 5(h), *with* W. VA. R.APP.P. 5(a) (1997) (repealed 2010).

48. *See* MARTINEAU, APPELLATE JUSTICE, *supra* note 38, at 130, 132; Ehrenberg, *supra* note 38, at 1174; Martineau, *Appellate Oral Argument*, *supra* note 38, at 7–9; *see generally* 6 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 431–57 (2d ed. 1937) (discussing how the historical distinctions between barristers and solicitors influenced modern differences in practice); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 204–18 (4th ed. 1948) (tracing the development of distinctions within the legal profession, including those between solicitors and barristers); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 211–17 (2d ed. 1968) (noting the different origins of the two branches of the legal profession in England); Robert J. Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown Off the Bar*, 35 S.C. L. REV. 541, 543–48 (1984) (discussing the historical significance of "officer of court" status and title in England and its absence in the American legal tradition).

49. *See infra* note 63. *But see* notes 91–92 and accompanying text. The Oklahoma Supreme Court, which very rarely hears oral argument, is an outlier in this regard. In Oklahoma, parties must set forth "exceptional reason" as to why oral argument is necessary. *See* OKLA. SUP. CT. R. 1.9. But this practice, which began in 1933 to alleviate docket pressure, has been criticized. *See* Joseph T. Thai & Andrew M. Coats, *The Case for Oral Argument in the Supreme Court of Oklahoma*, 61 OKLA. L. REV. 695 (2008).

50. *See supra* notes 10, 45.

51. REHNQUIST, *supra* note 36, at 254–55 (noting the importance of argument as an opportunity for the justices to communicate with one another regarding the case and the absence of interplay among the justices otherwise even in Conference); John G. Roberts, Jr., *Oral*

federal appellate courts, defer argument (if argument there is to be) until after a consensus has been formed around a particular written opinion.[52]

B. Policy Analysis of Postdecision Argument

Prior to the twentieth century, the centrality of oral argument to the appellate process, even as it declined in relative importance, went essentially unquestioned. In the twentieth century, however, as the time allotted for oral argument dramatically shrank in the face of exploding dockets, scholars, judges, and advocates began to debate the function and importance of argument.

Karl Llewellyn was an early entrant in that debate. His classic, *The Common Law Tradition: Deciding Appeals*, is, among other things, a paean to oral argument, concluding that "[i]n any but freak situations, oral argument is a must."[53] Llewellyn believed oral argument is essential to the appellate process because it is the only time the litigant could confront his appellate judges face-to-face and focus those judges on the key issues before the decision is made.[54] Perhaps with the midcentury California Supreme Court in mind, Llewellyn asserted that oral argument is most critical if the "court has the practice of leaning heavily on either the reporting judge, or the chief, or both, or on the court's expert in the field, in that same measure the oral argument gives you your one direct access to the whole team together."[55] The current practice of the California Supreme Court would be anathema to Llewellyn as the litigant's "one direct access to the whole team together" comes only after that team has come to a decision.

Llewellyn's view remained the conventional one for a generation[56] even as docket pressures further eroded the availability and the relative importance of oral argument. In 1986, Robert Martineau took the then avant-garde position that the trend towards limiting access to, and the duration of, oral argument was desirable given available alternatives and ever-increasing appellate workloads.[57] Martineau suggested that something had to give in light of docket pressures,

Advocacy and the Re-emergence of a Supreme Court Bar, 30 J. SUP. CT. HIST. 68, 70 (2004) (referring to the practice of the U.S. Court of Appeals for the District of Columbia where "judges do not discuss the cases before oral argument except in unusual situations").

52. *But cf. infra* notes 113–118 and accompanying text.

53. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 240 (1960) (footnote omitted).

54. *Id.*

55. *Id.* (footnote omitted).

56. *See also* FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 277–80 (1967).

57. Martineau, *Appellate Oral Argument*, *supra* note 38, at 29–33.

and that something should be argument rather than of-right access to an appeal, written reasoned decisions from the appellate court, written briefs, or personal attention from judges rather than staff.[58] He made the empirical claim that oral argument did not alter results in most appeals brought on an of-right basis given the American practices of extensive written briefing, pre-argument preparation, and the quite truncated oral arguments that followed.[59] Yet oral argument still consumed an inordinate share of judicial and staff resources: It required large blocs of court time preparing for, traveling to, and listening to the arguments.[60] Eliminating, or further reducing, the time allotted for argument would free up judicial resources the courts could redeploy to significantly speed up case processing with little cost in terms of outcomes.[61]

Martineau's premise that oral argument altered few results, at least in the intermediate appellate courts, was, and is, contested. Respected appellate judges and scholars have weighed in on both sides of that empirical question.[62] But even granting Martineau's empirical premise, his utilitarian argument provides no support for the current practice of the California Supreme Court. Martineau was talking about intermediate appellate courts faced with large numbers of relatively routine of-right appeals. He argued that foregoing oral argument was a reasonable tradeoff in that context.

58. *Id.* at 21–22.
59. *Id.* at 21 n.127, 22, 22 n.135.
60. *Id.* at 21.
61. *Id.* at 32–33.
62. *Compare* Ruggero Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence – A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445, 455 n.25, 456 (1982) ("The appellate brief is far more important than oral argument."), Robert E. Holmes, Justice of the Supreme Court of Ohio, Remarks at the Ohio State Bar Association Annual Meeting: In Support of Appellate Briefing (May 11, 1985), *in* 58 OHIO STATE BAR ASSOCIATION REPORT 1016, 1020 (1985) ("[I]t has been my view that . . . the case is either won or lost in the written argument."), Philip B. Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court, O.T. 1982*, 50 U. CHI. L. REV. 628, 647 (1983) (arguing that oral argument is an "anachronism" and a waste of time), *and* Jack Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures*, 4 PAC. L.J. 1, 18–22 (1973) (advocating for an extremely limited use of oral argument), *with* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 119–20 (1985) (remarking that oral argument is highly valuable, especially to judges), John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L. Q. 6 (1955) [hereinafter Harlan, *What Part Does Argument Play*] ("I should like to leave with you . . . the thought that your oral argument on an appeal is perhaps the most effective weapon you have got . . . ."), *and* Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J. 68, 68–69 (1984), http://www.jstor.org/stable/20757343.

Martineau assumed that in appellate courts of last resort affording discretionary review, oral argument would and should remain the norm.[63] Limiting discretionary review to only the most important cases, not truncating the traditional decisionmaking process for those relatively few cases, was the appropriate response to docket pressures at that level; the greater importance and complexity of matters accepted for discretionary review by such a court warranted the additional cost associated with deciding each case.[64] For example, in today's California Supreme Court, about 2 percent of the petitions for review are deemed to raise issues of sufficient importance to warrant full merits review. Those few cases (about seventy-five per year) typically involve issues that have divided lower courts and that are of interest not only to the parties but to the greater public. In such matters the stakes are presumptively high enough, and the matters sufficiently few in number, that oral argument remains both feasible and cost justified. And that is so whether or not oral argument changes the disposition of cases commonly, rarely, or very rarely. The cost of an hour of oral argument is essentially fixed; even a small chance of improving the quality of the decisionmaking in matters of great importance passes cost-benefit review.

Even if one were to assume (unlike Martineau himself) that Martineau's reasoning applies at the high court level, and that oral argument fails to add value to the decisionmaking process exceeding its cost even in matters warranting discretionary review, one could not justify IOP section VI.D. That section does not economize by dispensing with oral argument or reducing caseload. IOP section VI.D saves neither resources nor time. Argument is still held; the justices and the litigants must still prepare and argue in formal public session. The system still bears all those incremental costs. No utilitarian analysis can justify eliminating substantially all the value of oral argument while continuing to bear all its costs.

Finally, a common view from the bench is that oral argument does improve the quality of judicial decisionmaking and does affect the court's reasoning and decisions in at least some significant number of cases accepted for discretionary merits review.[65] Chief Justices Rehnquist and Roberts are among the

63. *Cf.* Martineau, *Appellate Oral Argument, supra* note 38, at 5 n.15 ("The nature of [the [U.S. Supreme Court or supreme courts in states with an intermediate appellate court] and the limited number of cases they decide on the merits suggest that oral argument is appropriate in most, if not all of these cases.").

64. *Id.*; *see also* William H. Rehnquist, *Oral Advocacy*, 27 S. TEX. L. REV. 289, 303 (1986).

65. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 325 (2011) (citing a 2008 nationwide judicial survey showing that over 40 percent of state appellate judges perceived written and oral argument as equally important to a party's legal representation, with 6 percent identifying oral argument as more important). Though this study

many prominent modern American appellate judges who have offered extensive disquisitions on the importance of oral argument to their own and their court's decisionmaking processes.

Rehnquist claimed that argument at SCOTUS affected his analysis in a "significant minority of the cases."[66] Rehnquist further observed that oral argument was the only time before deciding the case that all the Justices were together and focused on the matter. Argument thus was a forum for the Justices to influence each other through their questions, and served as the focal point for the collective decisionmaking process of the Court.[67] Indeed, Rehnquist readily acknowledged that in his experience there was little chance of otherwise influencing the vote of a colleague in Conference.[68] Finally, implicit in Rehnquist's endorsement of Justice Potter Stewart's observation that he never knew more about a case than when he left the bench after argument[69] is the assumption that, as is the practice at SCOTUS, judges should vote on a matter after, not before, argument. Rehnquist noted that "some courts" might circulate internally prepared written memoranda regarding the case before voting, but he did not think the practice suitable for SCOTUS precisely because it lessened the possibility of adjustment and adaptation.[70]

Chief Justice Roberts, as befits one of the great oral advocates of his generation, is even more emphatic about the importance of argument.[71] Like Rehnquist, Roberts noted that in each judge's decisional process a point comes when "the luxury of skepticism . . . [must] yield to the necessity of decision," and he reported that in his experience those doors begin to close at

showed that state appellate judges find oral argument more important than federal judges do, many federal judges also find oral argument important if not indispensable. *See, e.g.*, Bright & Arnold, *supra* note 62, at 68–70 (observing that for the authors, two Eighth Circuit judges, oral argument changed their minds over 15 percent of the time; for one judge it was over 30 percent); Merritt, *The Decision Making Process*, *supra* note 45 at 1387 ("Oral argument keeps judges from unreflectively adopting their law clerks' view rather than developing their own view through reflection. Judges in conference after oral argument are much more likely to follow their own assessment of the arguments, as influenced by their colleagues' questions and opinions, than their law clerks' bench memos. . . . Instead of a bureaucratic workplace, the chambers are more likely to become a small laboratory for reflection and research."); Howard J. Bashman, *20 Questions for Circuit Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit*, HOW APPEALING (Feb. 28, 2003), http://howappealing.law.com/20q/2003_02_01_20q-appellate blog_archive.html#90388248 (estimating that oral argument is decisive in about 10 percent of cases and affects the court's reasoning and opinion details in a much greater percentage of cases).

66. REHNQUIST, *supra* note 36, at 243.
67. *See id.* at 244.
68. *Id.* at 254–55.
69. *Id.* at 252.
70. *Id.* at 257–58.
71. *See* Roberts, *supra* note 51, at 69 ("[O]ral argument is terribly, terribly important.").

oral argument.[72] Roberts, as well as Rehnquist, noted the importance of argument in providing focus for the collective decisionmaking process of a multimember court and a first and perhaps only predecision opportunity for the judges of such a court to gather a sense of their colleagues' thoughts and concerns regarding the case.[73] And finally Roberts noted the apparent long and deep consensus among U.S. Supreme Court Justices, who otherwise notoriously disagree on all manner of issues, on the importance of oral argument to their decisionmaking process.[74]

How much of the positive institutional value of oral argument depends upon conducting the argument prior to the court reaching a preliminary decision? Virtually all of it. Whatever the case with predecision argument, postdecision argument can affect results in only a negligible number of cases.[75] Nor can the deadline of the looming argument affect results or precipitate decisions: Argument is deferred as a matter of course until after a decision has already been made and reduced to writing.[76] Nor does the holding of postdecision argument advance the legitimacy of the court process in the eyes of the litigants, at least litigants who have read and understand the court's rules and procedures. Argument is irrelevant unless, serendipitously, one of the lawyers somehow identifies a fatal flaw or factual error in the undisclosed draft majority opinion that causes one or more of the precommitted justices to rethink their decision, even though doing so might risk a violation of the ninety-day rule and result in suspending all the justices' pay.

So the rationale for postdecision argument must rest on the degree to which it enhances public legitimacy and acceptance of the court's decisions. The American public has traditionally evinced great respect for its courts.[77]

72. *Id.* at 70.
73. *Id.*
74. *Id.* (citing Chief Justice Marshall, Justice Story, Chief Justice Hughes, Justice Jackson, the second Justice Harlan, and Chief Justice Rehnquist); *see also* Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 216 (1957) (suggesting that while the heart of counsel's argument should be in the briefs, oral argument affords the opportunity to respond to well-reflected questions). Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 39 (1986); Rehnquist, *Oral Advocacy*, *supra* note 62, at 300; Merritt, *supra* note 45, at 1386; Thai & Coats, *supra* note 47, at 705; Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 53–56 (1986).
75. *See supra* notes 5–6 and accompanying text.
76. *See supra* notes 51, 66–68, 73 and accompanying text.
77. The Gallup Poll has consistently found that approximately 50 percent of Americans rate judges high or very high in honesty and integrity. Other state officeholders regularly poll in

The public standing of the judiciary depends upon a social consensus that our courts operate within traditional understandings of due process and the rule of law. Those traditional understandings certainly encompass an opportunity for oral argument of an appeal upon plenary review at a state supreme court. Perhaps if the public observes the California Supreme Court conducting many hours of en banc oral argument all over the State at significant expense it will perpetuate a false impression in the public mind that litigants before the court have an opportunity to orally argue their cases before they are decided. But this is a deeply cynical justification for the court's current practice. Oral argument is justified on this basis as nothing more than the curtain of the Wizard of Oz. Its value depends entirely on continuing public ignorance of the reality of the court's decisionmaking process.

III. DISPOSITION TIMES

The ninety-day rule, suspending the pay of judges whose matters pend for more than ninety days from submission, is obviously a crude attempt to speed up judicial decisionmaking.[78] The gist of the rule is the expectation that following the parties' presentation of all their evidence and argument, no California judge should take more than ninety days to render a decision. Before *Stevens v. Broussard,* the court had effectively gutted the rule through its pre–1988 practice of manipulating the time of submission.[79] The settlement in *Stevens v. Broussard* seemed to require the California Supreme Court to actually comply with the spirit of the ninety-day rule by prohibiting the court from manipulating submission dates. IOP section VI.D, nevertheless, has managed to allow the court to take as long as it wants to decide a case by manipulating the date of *argument* rather than the date of *submission.* The court thereby manages to comply with the letter of the *Stevens v. Broussard* settlement while taking longer than ever to adjudicate the cases on its docket.

In every respect other than successfully evading the ninety-day rule, IOP section VI.D is a failure. It has drained oral argument of any substantive meaning without saving any of the resources expended on oral argument or speeding up the decisionmaking process at the court. Today, the court takes far longer to decide far fewer merits appeals than it ever did in the pre–*Stevens v. Broussard* era, not to mention during the Traynor Court era.

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the teens on this question. *Honesty/Ethics in Professions*, GALLUP (Nov. 26–29, 2012), http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx#3.

78. *See supra* notes 12–21 and accompanying text.

79. *See supra* notes 22–26 and accompanying text.

Two simple tables and a bar graph make the point. I selected 1967 (the end of the Traynor Court era) and 1984 (the end of the Bird Court era) as baseline years. For each of these years, I, or a research assistant, noted: the author, the vote, the number of opinions, whether the matter was civil or criminal, the date of the decision below (where available), the date review was granted, the date the matter was argued, and the date of the published opinion deciding the case.[80] Table 1 shows disposition times for merits cases in 1967 and Table 2 shows the same variables for 1984. The data in the columns represent for each category of case the number of cases in that category, the median disposition time in days, and the disposition times in days in the twenty-fifth and seventy-fifth percentile, respectively.

TABLE 1. Disposition Times 1967
(Days From Grant of Review to Final Decision)

	N	Median	25%	75%
All Cases	140	149	118	204
Civil	85	150	117	191
Criminal	55	145	118	259
Unanimous	89	146	110	190
Non-Unanimous	51	163	133	240
4-3/ Plurality	9	259	146	411
Published Below	98	160	121	205
Fastest Author (Traynor)	28	135	98	190
Slowest Author[81] (Tobriner)	18	172	143	343

TABLE 2. Disposition Times 1984
(Days From Grant of Review to Final Decision)

	N	Median	25%	75%
All Cases	93	386	273	498

80. Dates not available in the reporters—such as date of argument or date of unpublished decision below—were found in the Minutes of the California Supreme Court. For cases decided in 1967, see ADVANCE CALIFORNIA REPORTS: OFFICIAL ADVANCE SHEETS OF THE SUPREME COURT 63 A.C. 1–67 A.C. 20 (1965–1967). For cases decided in 1984, see CALIFORNIA OFFICIAL REPORTS: OFFICIAL ADVANCE SHEETS OF THE SUPREME COURT, COURTS OF APPEAL, AND APPELLATE DEPARTMENT OF THE SUPERIOR COURT (Oct. 11, 1983–Jan. 24, 1985).

81. Justice Peek, who retired in December 1966 and filed three opinions in 1967, actually had the highest median duration from grant to final decision. His three postretirement opinions were filed 205, 237, and 268 days respectively from the grant of review.

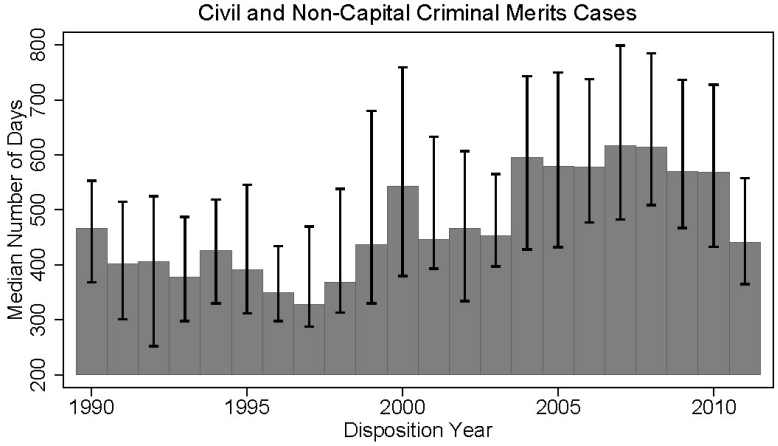
	N	Median	25%	75%
Civil	67	365	263	460
Criminal	26	470	291	607
Unanimous	24	298	265	392
Non-Unanimous	69	409	284	559
4-3/Plurality	12	410	384	524
Published Below	56	388	284	468
Fastest Author (Bird)	17	292	239	442
Slowest Author[82] (Kaus)	13	434	390	505

Figure 3, the bar graph below, summarizes a comprehensive data set drawn from the court's electronic docket and furnished by the court pursuant to my public records request. It shows median, twenty-fifth percentile, and seventy-fifth percentile disposition times for all merits cases from 1990–2011.[83]

82. Justice Richardson, who retired in December 1983 and filed four postretirement opinions in 1984, actually had the highest median duration from grant to final decision at 588 days. Justice Sonenshine of the California Court of Appeal, sitting by designation, authored a single California Supreme Court opinion in 1984, *In re Baby Girl M.*, 37 Cal.3d 65, which was filed on October 22, 1984, 466 days after the court granted review.

83. The last full year for which the court provided data is 2011. I picked 1990 as the start date even though the court supplied data going back to 1988 (when the court's docket system was converted into electronic form). I found the pre–1990 data to contain significant anomalies that appear to be the result of the transition of then-active cases from paper to computerized docketing. Those anomalies limited the usefulness of the pre–1990 data for comparative and statistical purposes. In addition, I excluded from the analysis the twenty to thirty capital cases that arrive at the court annually. These capital cases generally involve lengthy records and are subject to comprehensive automatic review on direct appeal to the court under applicable law without intervening review by the Court of Appeal. *See* JUDICIAL COUNCIL OF CALIFORNIA, 2013 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS 4 fig. 5; *available at* http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf. California provides for automatic appeals to the California Supreme Court in all capital cases. CAL. PENAL CODE § 1239(b) (West 2004) ("When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel."). Further, the California Constitution gives the California Supreme Court exclusive jurisdiction over these appeals. Article 6, Section 11(a) states that, "[t]he Supreme Court has appellate jurisdiction when judgment of death has been pronounced." Section 12(d) provides that the Supreme Court may not transfer such appeals to the lower courts. These cases pend for many years, consume inordinate resources, and are handled on a separate track subject to specialized procedures. *See* RONALD M. GEORGE, CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA 528 (2013) (capital cases consume 20–25% of the court's time and resources). The effect of the exclusion of the capital cases is to somewhat lower the reported median, twenty-fifth percentile, and seventy-fifth percentile disposition times. I also excluded State Bar matters and certain writ proceedings because of the qualitatively distinct nature of those matters. Finally, I also excluded cases with multiple dispositions reflected on the California Supreme Court docket. Multiple dispositions occur for a variety of reasons including further substantive California Supreme Court review

Figure 3. Median Number of Days from Grant to Disposition, by Disposition Year
Civil and Non-Capital Criminal Merits Cases



Source: California Supreme Court Case Management System Database.
Each vertical bar represents the 25th and 75th percentiles.

following remand from SCOTUS or to the California Courts of Appeal, subsequent related case litigation (during the pre–2001 period), or nonsubstantive intermediate or subsequent dispositions involving the case at the California Supreme Court itself. Analysis of the universe revealed that including the multiple disposition cases had no statistically significant effect on reported disposition time medians and ranges so long as time is calculated in reference to the initial substantive disposition in the California Supreme Court. Accordingly, for the sake of simplicity and clarity of presentation, it made the most sense to exclude the multiple disposition cases from the figures reported in the text. For similar reasons, I used calendar years rather than the state's fiscal year to report results, even though the court reports its own data (not including disposition times) on a fiscal year basis.

The 1967 and 1984 base year data, and the observed subsequent deterioration in the court's ability to timely manage the rest of its docket, underscores the debilitating effect of capital punishment on California's court system. Automatic appeal of capital cases has been a feature of California law since 1935 growing out of an unfortunate episode in which clerical errors in the court system led to the "mistake hanging" of Rush Griffin pursuant to his unreviewed death sentence. Cecilia Rasmussen, *Oversight Led to Automatic Appeals in Death Row Cases*, L.A. TIMES, June 17, 2007. But until 1985, the California Constitution permitted the court to transfer those automatic appeals to the intermediate courts of appeal. That safety valve was removed through the initiative process in 1984. *See* CAL. CONST. art. VI, § 12(d) (as amended effective May 6, 1985). The result has been that automatic appeals of capital cases languish at the California Supreme Court and divert resources from its many other important duties including, as noted here, the efficient processing of its merits non-capital docket. California's administration of its death penalty has been (generously) labeled as a "debacle" and "dysfunctional." Arthur L. Alarcón and Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. 41, 109–11 (2011) (observing that over the last twenty-five years California has expended $4 billion to administer capital punishment to thirteen persons decades after the crimes for which they are being punished were committed). This wasted $4 billion is many times the total budget of the California Supreme Court over the same period.

These numbers speak for themselves. IOP section VI.D not only undermines the value of oral argument to the court, it also fails to advance the central goal of the *Stevens v. Broussard* settlement and the ninety-day rule it supposedly implements. Median disposition time increased from 149 days in 1967 to 386 days in 1984, where it more or less held steady until 2000 notwithstanding the adoption of IOP section VI.D. Over the next ten years, median disposition times surged to a peak of 618 days in 2007, then fell slowly to 568 days over the next several years before appearing to drop rather suddenly to 441 days in 2011.[84] Strikingly, these data show that median disposition times rose dramatically from the heyday of the Traynor Court in 1967, notwithstanding caseload reduction from 140 merits dispositions in 1967 to ninety-three in 1984 and to about seventy-five per year over the last twenty years.[85] These

84. I say "appearing" because the 2011 data show only fifty-four dispositions, as opposed to the range of sixty-seven to eighty-three merits dispositions per year over the preceding decade. Moreover, Chief Justice Cantil-Sakauye assumed her office on January 3, 2011. It is unclear whether there is a causal relationship among the transition in the office of chief justice, the fall in the number of merits dispositions, and the sudden 127 day decrease in median disposition time, all of which are coincident in 2011. Nor is it clear that the changes in caseload and median disposition time observed in 2011, to the extent those changes are not due to a timing issue or other statistical anomaly, will persist in future years. Recently released data shows that the number of cases decided on the merits in the 2011–2012 court year did increase to ninety-seven cases. But the next court year, 2012–2013, total merits cases declined to eighty-seven, including thirty-four civil cases as of October 2013. Press Release, Supreme Court of Cal., Supreme Court Issues Annual Report on Workload Statistics for 2012–2013 (Oct. 2, 2013) [hereinafter Supreme Court, Annual Report], *available at* http://www.courts.ca.gov/documents/oc13-Oct_2.pdf.

85. The court's workload in screening cases has increased steadily, and in the aggregate dramatically, over time as population and litigation have increased. In the early 1960s about one thousand petitions for review were filed annually. Goodman & Seaton, *supra* note 24, at 312 n.7. By the early 1970s filings had doubled to about two thousand per year. *Id.* Over the next ten years the court has averaged a bit more than five thousand petitions for review annually. JUDICIAL COUNCIL OF CAL., 2011, *supra* note 5, at xiii, 4 fig.4. More recently the number of petitions for review declined to 4570 in fiscal year 2011 and 4130 in fiscal year 2012. Supreme Court, Annual Report, *supra* note 84. Some portion of the growth of court staff can be attributed to the increased volume of filings. Moreover, the justices themselves undoubtedly also spend an increased portion of their time on screening. In addition to screening petitions for review, the court handles applications for writs (primarily, though not exclusively, in criminal matters), State Bar disciplinary matters, and automatic appeals in death penalty cases, all of which have increased over the years and consume additional staff and judicial resources. JUDICIAL COUNCIL OF CAL., 2011, *supra* note 5, at xiii, 4 fig.4. Most significant is the heavy burden imposed by capital appeals, discussed *supra* note 83. Another change in appellate practice that may have increased the court's burdens over this period is the large increase in amicus curiae brief filings over the last thirty-five years. Between 1969 and 1986, the number of amicus briefs filed with SCOTUS nearly doubled. *See* MATTHEW M.C. ROBERTS, ORAL ARGUMENT AND AMICUS CURIAE 7–10 (2012) (discussing the rise of the amici brief during the Warren Court era). By the end of the century, the rate of filing amici briefs had increased by 800 percent over the previous fifty years. *See* Sarah F. Corbally

increases in median disposition time occurred without regard to either the ninety-day rule or the *Stevens v. Broussard* settlement as implemented through IOP section VI.D. Moreover, over this period, the court's staff has ballooned from thirty to 107 research attorneys,[86] and since 1960 the nominal dollar annual budget has increased from about $1 million to over $40 million.[87] The inevitable conclusion is that the ninety-day rule as implemented

et al., *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960–2000*, 25 JUST. SYS. J. 39, 42 (2004). While the readily available data on the volume of amicus filings at the California Supreme Court is limited, the California Supreme Court seems to have experienced a similar increase in amicus filings. *See id.* at 44–45 (graph showing rise in *amicus* filings). To determine the current extent of this incremental burden, I searched the dockets of California Supreme Court cases decided on the merits in 2011 and noted the existence and number of amicus filings. In criminal cases amici rarely appear before the California Supreme Court, but in 91 percent of civil cases decided in 2011 at least one amicus brief was filed, and the average civil case generated three amicus briefs. One case, *Perry v. Brown*, involving the standing of parties to defend the California initiative purporting to limit the right of homosexuals to marry under California law, generated eight amicus briefs. In total, 106 amicus briefs were filed in merits cases that year. But these increases in filing rates for petitions for review and amicus briefs cannot plausibly explain the large increases in disposition times in the face of declining numbers of merits appeals. Finally, in recent years budget cuts periodically forced one-day-a-month furloughs for all court staff, which could not have helped disposition times. Notwithstanding these factors, it is striking that the modern California Supreme Court, with three times the professional staff and with modern computer technology to facilitate the researching and drafting of its opinions, takes more than three times longer to adjudicate about half as many merits cases.

86. The nationwide average ratio of law clerks (defined as "an individual who has passed the bar exam and works under a judge, assisting with case research and analysis") to state supreme court justices rose from 1.8 in 1987 to 2.3 in 2004. LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, NCJ-217996, STATE COURT ORGANIZATION, 1987–2004, 3 tbl.2 (2007). But California's supreme court justices have historically enjoyed considerably more support than the national average, and the court's relative advantage in staff support has further increased over time. In the mid-1970s, the professional staff of the California Supreme Court consisted of thirty research attorneys, with three allocated to each associate justice and a dozen allocated to the chief justice. Goodman & Seaton, *supra* note 24, at 312. In 1993, the California Supreme Court had twenty-nine central law staff, while the chief justice received eight clerks and each associate justice received five. DAVID B. ROTTMAN ET AL., BUREAU OF JUSTICE STATISTICS, NCJ-148346, STATE COURT ORGANIZATION: 1993, 187 tbl.22 (1995). By 2004, the central law staff had increased to forty-three research attorneys, though the justices' individual research attorney allotment remained the same. DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, BUREAU OF JUSTICE STATISTICS, NCJ-212351, STATE COURT ORGANIZATION: 2004, 224 (2006). Thus, over the 2011–2012 fiscal year, the California Supreme Court employed over one hundred attorneys. *Schedule 7A: Salary and Position Worksheet*, CAL. COURTS, http://www.courts.ca.gov/documents/12-13-SC-Sch-7A.pdf (last visited July 16, 2013) (Supreme Court Financial Information for Fiscal Year 2012–2013).

87. It is difficult to fairly compare the California Supreme Court's current budget with its budget in earlier times. In gross (but inflation adjusted) dollars, the court's budget is flat over the period 1960–1980 and then begins increasing at a constant rate until falling off in the most recent, heavily budget-constrained, years. In nominal terms, the growth from 1980 forward is a staggering ten times over. Even adjusted for general inflation, the increase is fourfold.

through IOP section VI.D does not speed appellate adjudication at the California Supreme Court. In short, there is nothing efficient about deferring oral argument until after the case is decided and the opinions written.[88]

But at least two important factors overstate the apparent increase in budget. Adjusting for legal services inflation over 1990–2012 (with the caveat that no separate legal services index is available for 1998–2000 or before 1990) reveals that the court's budget has increased more or less in line with the cost of legal services over the last twenty years, even as it has significantly outpaced general inflation. Still, the 1990–2012 budget level appears to be about twice the 1980 level, even taking into account the extraordinary increase in the cost of legal services generally over the relevant period. But even adjusting for legal services inflation is insufficient. According to the Clerk's Office, nearly $14.5 million (approximately 34 percent) of the court's current budget is simply a "pass-through" of funds used to pay for appointed defense counsel's fees and expenses in capital appeals and related habeas corpus proceedings. Direct comparison of the current level of State support for the court and its staff to that which existed in the 1980s and 1970s would require decomposing the current and historical budgets and removing pass-through items as well as accounting for legal services inflation. This information like pre-1990 legal services inflation data, is not presently available.

The budget of the California Supreme Court, albeit subject to the qualifications stated above, can be found in each year's Budget Act. *See, e.g.*, Budget Act of 2000, ch. 52, Cal. Stat. 311, *available at* http://heinonline.org/HOL/Index?index=ssl/ssca&collection=ssl (1849–2010) and http://www.dof.ca.gov/budget/historical (2000–2013). In making the comparisons above, inflation was calculated using several indices from the Bureau of Labor Statistics: the CPI-U, which is used to measure the overall change in price of major goods and services, and two inflation indices calibrated specifically to legal services. Bureau of Labor Statistics, CPI-U *Series CUUR0000SA0*, BLS.GOV, ftp://ftp.bls.gov/pub/time.series/cu/cu.data.1.AllItems. From 1986 to 1997, the Legal Fees series provides an index for legal services inflation. Bureau of Labor Statistics, *Legal Fees Series MUUR0000SE6801*, BLS.GOV, ftp://ftp.bls.gov/pub/time.series/mu/mu.data.17.USOtherGoodsServices. From 2001 to the present, the Legal Services series performs this function. BLS, *Legal Services Series CUSR0000SEGD01*, BLS.GOV, ftp://ftp.bls.gov/pub/time.series/cu/cu.data.18.USOtherGoodsAndServices. For a definition of the CPI-U and the Legal Fees series, see ftp://ftp.bls.gov/pub/doc/cu.txt. For the Legal Services series, see ftp://ftp.bls.gov/pub/doc/mu.txt.

As a very general point of comparison, in recent years the total annual appropriation to fund SCOTUS has been approximately $75 million. PUB. INFO. OFFICE, 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8 (2012), http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf.

88. There are a number of other interesting nuggets in the data:

- The court has consistently taken somewhat more time to decide nonunanimous cases than unanimous ones, but the difference is perhaps less than one might imagine. In 1967, a little more than one-third of the merits cases were disposed of by a divided court. At the median these cases took only about seventeen more days to dispose of than the unanimous ones; at the seventy-fifth percentile the gap widened to fifty days. Four of the nine 4-3 or plurality decisions that year, however, were sub judice for more than 350 days, more than twice the overall median disposition time in 1967. In 1984, 74 percent of the court's (admittedly substantially smaller) merits caseload was determined by nonunanimous votes and the differences in disposition time for these cases had widened at the median to 111 days and at the seventy-fifth percentile to 167 days. Interestingly, the twelve 4–3 and plurality decisions in 1984 (with the exception of one outlier plurality decision sub judice for 1192 days) did not seem to take longer to dispose of than other nonunanimous cases. In the 1990s, about two-thirds of the court's merits caseload was determined by nonunanimous votes. The median

IV. THE DUE PROCESS OBJECTION

The constitutional guarantee of due process of law looks both forward and backward. Its meaning is understood to be rooted in historical practice.[89] Yet doctrinally due process is held to be "flexible and calls for such procedural protections as the particular situation demands."[90] Although an extensive op-

disposition time for these nonunanimous cases (406 days) was sixty-two days longer than for the unanimous ones. The difference widened to seventy-four days at the seventy-fifth percentile. In the 2000s, however, the proportion of nonunanimous cases fell back to 54 percent of the cases, and the difference in relative disposition times between unanimous and nonunanimous cases shrank. Over the period 2000–2011, the median nonunanimous case (at 553 days) took only eighteen days longer to resolve than the median unanimous case; at the seventy-fifth percentile the difference was still only thirty-nine days.

- In 1967, 1984, and 1990–2011, about 30 percent of the court's caseload has consisted of criminal matters. In 1967, there does not appear to have been any meaningful difference in disposition times between civil and criminal matters at the twenty-fifth percentile or the median, but at the seventy-fifth percentile a small difference emerges, with the criminal cases at the seventy-fifth percentile taking about seventy days longer than civil cases at the seventy-fifth percentile. In 1984, there appears to be no meaningful difference at the twenty-fifth percentile, but disposition times of criminal matters lag at the median and seventy-fifth percentile by 105 days and 147 days respectively. Moreover, in both years a small number of criminal appeals languished for much longer than the typical appeal. In the period 1990–2011, on the other hand, there is no statistically significant difference in disposition times for civil cases and non-death penalty criminal cases at the court. (Mann-Whitney test p=.69).
- The difference in disposition time between cases authored by the fastest writing and the slowest writing justices on the court has increased dramatically since 1967 when the difference in median times between Chief Justice Traynor (135 days) and Justice Tobriner (172 days) was only thirty-seven days and the medians for all the other justices clustered narrowly within a month of each other. By 1984, 142 days separated the median disposition time of the fastest and slowest writing justices. On the modern court, for the eight justices authoring more than fifty majority opinions over the last ten years the difference in median disposition time between the fastest and slowest justice was 275 days, and the range of medians for the remaining six justices serving during this period spanned 143 days. To whom an opinion is assigned matters far more today than in 1967 in terms of disposition time, notwithstanding the creation of centralized staffs and the greater staffing levels overall.
- There appears to be no correlation between a justice's ideology or the quality of his legal craft and median disposition time. That is, the justices the quality of whose legal craft I admire most are found equally among the ranks of both the fastest and the slowest justices. And justices who are ideologically conservative, moderate, and liberal are also found in both camps in comparable proportions. The small number of justices and the great difficulty in reliably sorting them by craftsmanship and ideology preclude statistical validation of these impressions of mine, but I offer them for what they are worth.

89. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994) ("traditional practice provides a touchstone for constitutional analysis"); Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. 272, 277 (1856) ("[The Court] must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the migration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.").

90. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

portunity to orally argue merits appeals in courts of last resort was standard appellate practice at the ratification of both the Fifth and Fourteenth Amendments, it is far too late in the day to suggest that due process requires oral argument in all merits dispositions, even in courts of last resort. Due process does not even require merits *consideration* in courts of last resort; overwhelming numbers of discretionary appeals are denied summarily in such courts on a routine basis, and have been for generations.[91] Summary disposition on the merits without argument has long been an accepted practice at every level of the judiciary.[92]

But even if the flexible concept of due process does not require that cases be accepted for review or orally argued, if such processes are employed, they must be conducted in accordance with established norms of fairness before unbiased decisionmakers.[93] The current oral argument practice of the Cali-

91. From 1999 to 2009, SCOTUS granted full review to between 3 percent and 4 percent of paid cases and between 0.1 percent and 0.2 percent of in forma pauperis cases. In 2009, a typical year, it granted full review to only 0.8 percent of total petitions. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 83 (5th ed. 2012); *see also The Justices' Caseload*, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/justicecaseload.aspx (last visited Aug. 1, 2013) ("The Court's caseload has increased steadily to a current total of more than 10,000 cases on the docket per Term. The increase has been rapid in recent years. In 1960, only 2,313 cases were on the docket, and in 1945, only 1,460. Plenary review, with oral arguments by attorneys, is granted in about 100 cases per Term. . . . Approximately 50 to 60 additional cases are disposed of without granting plenary review.") The trends are similar at the California Supreme Court. *See* JUDICIAL COUNCIL OF CAL., 2011, *supra* note 5, at xiii, 4, fig.4.

92. For example, the U.S. Courts of Appeals dispose of about 75 percent of all cases without oral argument, with the Ninth Circuit just above this average. *Table S-1, U.S. Courts of Appeals – Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2012*, U. S. COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S01Sep12.pdf (last visited July 15, 2013). SCOTUS has to varying degrees over time resorted to correcting what it perceives to be clear legal error below by "summary reversal"—that is, reversal of the judgment below on the merits through an unsigned opinion based on review of the petition for certiorari and brief in opposition thereto, without either merits briefing or oral argument. This practice is especially controversial given the absence of merits briefing. *See* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197 (2012); EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 5.12(c), at 349–50 (9th ed. 2007) (noting controversy over dispositions in which the Court grants certiorari, addresses the merits and facts of the case, and then either reverses or affirms the lower court's judgment without allowing the parties to file briefs or present oral arguments). In recent terms, approximately 10 percent of SCOTUS's merits dispositions have been handled in this summary fashion. *Id.* at 350 n.106 (noting changes in the volume of summary reversals over the last fifty years) (9th ed. 2007); *see also Stat Pack Archive*, SCOTUSBLOG, http://www.scotusblog.com/reference/stat-pack, (noting that there were ten summary reversals of seventy-five total merits decisions in October Term (OT) 2011, five of eighty-two in OT 2010, fourteen of eighty-six in OT 2009, and four of seventy-nine in OT 2008).

93. *See, e.g.*, State v. Emery, 642 P.2d 838, 851 (Ariz. 1982) ("If a state resorts to the grand jury procedure, the due process and equal protection clauses of the fourteenth amendment require

fornia Supreme Court fails this fundamental test. The justices do not remain unbiased decisionmakers at the time of argument. Each of them has a direct financial interest in seeing that the preliminary opinion that a majority committed to pre-argument becomes the final disposition of the matter. Revisiting the case after argument carries a significant risk of a suspension of their pay under the ninety-day rule.

It is no answer to say that the justices should be presumed to be of such integrity that the looming suspension of their pay would not influence them. For one thing, any such presumption would be counterfactual. In every walk of life we accept that people, even fiduciaries like the officers and directors of corporations, respond powerfully to pay incentives and disincentives.[94] Indeed, history shows that California judges in particular are heavily influenced by the threat of pay suspension. The justices, in manipulating submission dates, went to significant lengths to avoid the pay suspension mandated by the ninety-day rule. The *Stevens v. Broussard* settlement, and accompanying public statements of then-incumbent Chief Justice Lucas, amount to implicit admissions that the court manipulated submission dates to avoid the ninety-day rule.[95]

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utilization of an unbiased grand jury and the presentation of evidence in a fair and impartial manner.") (citing Corbin v. Broadman, 433 P.2d 289 (Ariz. Ct. App. 1967)).

94. *See, e.g.*, Kevin J. Murphy, *Executive Compensation*, *in* 3B HANDBOOK OF LABOR ECONOMICS 2485, 2555 (Orley Ashenfelter & David Card eds., 1999) ("[T]here is ample evidence that CEOs (and other employees) respond predictably to dysfunctional compensation arrangements . . . ."); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 566 (2006) ("Incentive compensation contracts can induce managers to act more closely in line with the interests of shareholders as a class."); Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 30 J. CORP. L. 647, 669–70 (2005) ("Well-designed executive compensation can provide executives with cost-effective incentives to generate shareholder value . . . . Rewarding executives for short-term improvements is not an effective way to provide beneficial incentives and indeed might create incentives to manipulate short-term accounting results."); Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 249 (2010) ("[P]ay arrangements have provided executives with incentives to focus excessively on short-term results and give insufficient weight to the consequences that risk-taking would have for long-term shareholder value."); Stephen M. Bainbridge, *Executive Compensation: Who Decides?*, 83 TEX. L. REV. 1615, 1637 (2005) ("It seems implausible that there is no motivational link between pay and performance.").

95. *See* Defendants' Reply Brief in Support of Demurrer to First Amended Complaint at 2-3, Stevens v. Broussard, No. 875390 (Cal. Super. Ct. Feb. 4, 1988) ("The definition of 'submitted for decision' must necessarily be established by the judiciary itself and must be tailored to the particular exigencies of each judicial body. . . . [O]rders of submission were issued by the Chief Justice to determine submission in that tribunal."); Declaration of Malcolm M. Lucas at 2, Ex. B, Stevens v. Broussard, No. 875390 (Cal. Super. Ct. Feb. 4, 1988) ("The [new internal] procedures adopted in relation to the date of submission of matters argued before the court . . . provided that . . . [t]he Supreme Court will treat a case as submitted for decision when a waiver of oral argument has been approved or oral argument

The shift to manipulating argument dates rather than submission dates after the *Stevens v. Broussard* settlement further illustrates the compulsive effect of pay suspension. IOP section VI.D's frontloading of the court's decisionmaking process can reasonably be understood only as the introduction of a new mechanism to extend the court's decisionmaking timeline beyond ninety days notwithstanding its agreement in the settlement to limit its manipulation of submission dates. Even judges of otherwise unquestioned integrity play games with court procedures to avoid pay suspension.

For another thing, a judge's financial interest in a matter sub judice is disqualifying regardless of whether that interest actually influences his decision. It is unnecessary to establish a causal link between the threat of pay suspension and the merits disposition of particular cases to find a due process

has been completed and the time granted for filing of any supplementary briefs has passed . . . ."). Contemporaneous news accounts were blunter. *See, e.g.*, Philip Hager, *Justices Agree to Decide All Cases Within 90 Days*, L.A. TIMES, Sept. 21, 1988, at B1 ("For more than 30 years, the high court had sidestepped the deadline by determining that a case was not actually 'submitted' until it was virtually ready for a decision."); William Carlsen, *State Supreme Court Acts to Speed Rulings - Decisions to be Made in 90 Days*, S.F. CHRON., Sept. 21, 1988, at A1 ("Over the past 30 years, the Supreme Court has interpreted the constitutional provision as allowing the court itself to decide when it has submitted a case."); Assoc. Press, *Supreme Court Reducing Its Decision Time to 90 Days*, SAN JOSE MERCURY NEWS, Sept. 21, 1988, at 4B ("The state's high court has gotten around that policy for more than 30 years by defining cases as 'submitted' when a ruling is ready."); Philip Hager, *State High Court, in Move to Trim Backlog, Curtails Oral Arguments*, L.A. TIMES, Sept. 17, 1988, at 22 ("Lower courts in California ordinarily abide by the rule, issuing decisions within 90 days after a case is argued and final briefs are filed. But the justices, because of the size and complexity of their workload, have sidestepped the rule by determining that a case has not been 'submitted' until they are virtually ready to issue a decision."). Chief Justice Lucas expressed support for the change, saying there was "'a real possibility' that the new approach would shorten the overall [decision] time" and that he did "not expect that [the] new procedures will diminish the importance of oral argument." Claire Cooper, *Lucas Defends Plan to Speed up Rulings New Supreme Court System Starts Jan. 1*, SACRAMENTO BEE, Sept. 26, 1988, at A3. He noted that "[o]ur pre-argument positions will be tentative and subject to change after counsel make their oral presentations." *Id.* Some, however, were still skeptical. "Stephen Barnett, a University of California, Berkeley law professor and commentator on the court, said the policy would diminish the role of oral argument . . . and would likely hurt the quality of decisions. 'It smacks of assembly-line justice,' he said." Assoc. Press, *supra*. Professor Barnett accurately predicted: "They'll write the opinion first, then hear oral argument." Carlsen, *supra*. A few years later, Justice Broussard laid out the change more clearly in an interview: "[F]or much of the time that I was on the court, we did not really formally submit a matter for decision until the case had been argued and the opinion was virtually ready to be filed. That's how we really avoided or got around the constitutional requirement that no matter remain submitted for more than ninety days." Allen E. Broussard et al., *A California Supreme Court Justice Looks at Law and Society, 1964–1996* (interview conducted by Gabrielle Morris in 1991, 1992, and 1996), 113 (Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1997), *available at* http://www.oac.cdlib.org/view?docId=hb0z09n78f&brand=oac4&doc.view=entire_text.

violation.[96] Subject only to inapplicable de minimis[97] or necessity exceptions,[98] the existence of any financial interest in the outcome of the litigation

96. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 825 (1985) (observing that in finding a due process violation the court was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true") (internal quotations and citations omitted).

97. MODEL CODE OF JUDICIAL CONDUCT CANON 2, R. 2.11 (2011). In this context, de minimis is defined as "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." MODEL CODE OF JUDICIAL CONDUCT Terminology (2011). California provides that a judge is disqualified when he or she "has a financial interest in the subject matter in a proceeding or in a party to the proceeding . . . [t]he judge believes there is a substantial doubt as to his or her capacity to be impartial[or a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." CAL. CIV. PROC. CODE § 170.1. While California does not in so many words provide a de minimis exception, it defines "financial interest" as "ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding $1,500." CAL. CODE OF JUDICIAL ETHICS Canon 3(E)(5)(d). Obviously, no reasonable view of what might be de minimis would encompass a judge's financial interest in timely payment of his full judicial salary.

98. California explicitly provides for a necessity exception to its impartiality requirement. CAL. CODE OF JUDICIAL ETHICS Canon 3(E)(5)(j), cmt. at 28 ("[T]he rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must promptly disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable."). The California rule is modeled on the ABA necessity exception. MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.11, Comment 3 (2011). But the only basis for a necessity exception permitting precommitted justices to adjudicate a matter on pain of financial loss in this context is the court's own decision to adopt Internal Operating Procedures requiring that precommitment. Necessity defenses do not permit bootstrapping of this sort. *See generally* United States v. Bailey, 444 U.S. 394, 410 (1980) (describing traditional criminal necessity defense as limited to "the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils"); 2 CAL. AFFIRMATIVE DEF. § 49:8 (2013 ed.) (noting that the criminal and civil defenses of necessity are parallel and are meant to preclude use in situations in which someone is manufacturing his or her own necessity, such as with civil disobedience); Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 601 (2009) (footnote omitted) (explaining and defending "the nearly universal intuition that the necessity defense should be barred in cases where the actor was consciously and criminally culpable (that is, when he acted purposely, knowingly, or recklessly) with respect to engaging in the conduct that directly caused the necessity"). Similarly, in the judicial recusal context, a party may not through its own misconduct create the grounds for recusal and bootstrap itself into a position to disqualify the judge. *Ex parte Bentley*, 849 So. 2d 997, 1000 (Ala. Crim. App. 2002) (following other courts in "refus[ing] to allow a defendant to manipulate the system by his own misconduct" and concluding "that Judge Thomas acted within his discretion in denying [a] motion to recuse"). The answer to the dilemma caused by IOP section VI.D is not to simply ignore the conflicting financial interest of each precommitted justice because it affects all the justices, but for the justices to repeal or change IOP section VI.D so that none of them suffer from the conflict.

at any stage of the litigation disqualifies a judge. This has been the rule from the earliest days of the common law,[99] that rule has long been of constitutional dimension under a long line of SCOTUS decisions,[100] and it continues to be applied by modern courts.[101]

Moreover, California judges must avoid even the appearance of bias. *See* CAL. CODE OF JUDICIAL ETHICS Canon 2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."); MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.3, Comment 2 ("Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased."). Crystallization of written opinions before argument lessens the public confidence in a judge's objectivity and openness. Richard C. Braman, *Prehearing Tentative Rulings Promote Intellectual Integrity in Judicial Opinions and Respect for the System*, 49 FED. LAW. 50 (2002) (defending tentative written opinions as consistent with the more general California practice of "front-loaded" decisionmaking, while acknowledging that some criticize the practice because it gives the appearance of "pre-judging" or "being locked in").

99. *See* Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1609) (ruling that a panel of judges could not impose fines that they themselves profited from); Between the Parishes of Great Charte & Kennington, 93 Eng. Rep. 1107, 1108 (K.B.1726) (ruling "that a party interested could not be a Judge"); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947) ("English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted . . . ."); Note, *Disqualification of a Judge on Ground of Bias*, 41 HARV. L. REV. 78 (1927) ("By the common law the slightest pecuniary interest would disqualify a judge . . . ."). *Cf.* Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1371 (7th Cir.1994) (noting that "the appearance of justice is important in our system and the due process clause sometimes requires a judge to recuse himself without a showing of actual bias").

100. *See In re* Murchison, 349 U.S. 133, 136 (1955) ("[T]o prevent even the probability of unfairness . . . . no man is permitted to try cases where he has an interest in the outcome."); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (finding that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true" denies due process to the defendant). The principle also appears in James Madison's revered essay, Federalist No. 10: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST NO. 10, at 131 (James Madison) (Benjamin Fletcher Wright ed., 1961).

101. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (holding that the Due Process Clause requires a judge to recuse himself when he has a financial interest in the case); *see also* CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge knows that the judge, individually or as a fiduciary . . . has a financial interest [however small] in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding [including appellate review] . . . ."); MODEL CODE OF JUDICIAL CONDUCT Canon 2 r.2.11(A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned, including but not limited to the following circumstances: . . . The judge knows[] that the judge . . . has more than a de minimis[] interest that could be substantially affected by the proceeding.").

Tumey v. Ohio,[102] recently and ringingly reaffirmed (and extended) in *Caperton v. A.T. Massey Coal Co.*,[103] is the leading case making clear that the federal Constitution incorporates the common law's absolute disqualification of judges holding competing financial interests in a matter sub judice. In *Tumey*, Ohio's statutory process for the adjudication of the crime of illegal possession of liquor was found to violate the constitutional guarantee of due process. Ohio statutes authorized the mayor of a village to sit as a judge without jury and finally determine such matters. The mayor received a salary supplement of $696 out of the fines assessed upon conviction and the rest of the fines went to reimburse other law enforcement officers, the village treasury, and the State. The *Tumey* Court held that these arrangements violated due process "both because of the [mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village."[104] The absolute prohibition on financial interest applied even though "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it."[105] The *Tumey* Court acknowledged that all questions of disqualification did not necessarily implicate constitutional values, "[b]ut it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of

102. 273 U.S. 510 (1927).

103. 556 U.S. 868, 876–77, 883–84 (2009) ("The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case. . . . As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' . . . In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" (internal citations omitted) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975))). Even the otherwise vigorous dissents in *Caperton* rely on the traditional rule disqualifying judges on grounds of financial interest and specifically reaffirm *Tumey* and *Murchison*. *See id.* at 890–902 (Roberts, C.J., dissenting); *id.* at 902–03 (Scalia, J., dissenting).

104. *Tumey*, 273 U.S. at 535.

105. *Id.* at 532; *see also* Ward v. Monroeville, 409 U.S. 57, 60–62 (1972) (extending *Tumey* in a case in which the mayor-judge did not receive a direct salary supplement but fines from the mayor's court went to the village treasury); Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (holding that a board consisting of professional optometrists could not constitutionally preside over an administrative matter involving competing optometrists); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824–25 (1986) (determining that a judge's financial interest as a plaintiff in a different suit raising the same punitive damage issue as the case before him was disqualifying).

a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."[106]

It is true that IOP section VI.D creates no competing financial interest for or against any party at the time of the court's initial decision and the formation of consensus around the preargument calendar memoranda, and, moreover, neither party can know until final decision whether the argument panel was stacked against him or his opponent. Nevertheless, so long as a case remains under submission, a direct competing financial interest is disqualifying whenever it arises, and whether or not it is known to the parties, so long as it is known to the judge.[107] At each stage of the judicial process, the judge's decisionmaking should not be clouded by any personal financial interest that he may have in one outcome or another. California may, consistent with due process (though perhaps not with the terms of the California Constitution),[108] require or dispense with oral argument in some or all appellate matters. It may require that cases be disposed of within ninety days of "submission" and that its high court issue its merits decisions in writing. It may not, however, create a system in which the judges have a personal financial interest in sticking with their preliminary decisions while a matter remains sub judice.

Even if due process does not require oral argument, it does require that any oral argument, or other decisionmaking process, a court employs, be administered by judges without respect to any of their personal financial interests. Withholding judicial pay as a stick to ensure judicial compliance in its decisionmaking process with a state-created performance metric violates the federal guarantee of due process by impermissibly influencing the decisionmaking process. Due process constrains the tools that the state may employ to move cases more quickly through the court system. Constitutional guarantees of fairness, like all legal process, involve some compromise of speed and efficiency.

V. MOVING FORWARD

IOP section VI.D violates both the California constitutional guarantee of oral argument[109] and the federal constitutional (and ancient common law) guarantee of an appellate court free of conflicting financial interests in matters sub judice.[110] Even if IOP section VI.D did not violate litigants' constitutional

106. *Tumey*, 273 U.S. at 523.
107. *See supra* notes 102–105 and accompanying text.
108. *See supra* note 10 and accompanying text.
109. *Id.*
110. *See supra* notes 89–106 and accompanying text.

rights, by at once requiring oral argument and then draining that process of any substantive role in the court's decisionmaking process, IOP section VI.D disserves the goal of sound adjudication without saving time or costs. So where should the court go from here? I identify three options below in (what appears to me to be) decreasing order of attractiveness.[111]

A. Reform Options

1. Repeal or Invalidate the Ninety-Day Rule

The ninety-day rule, at least as applied to the California Supreme Court, has never made any sense. It is far more important in the few cases heard at the California Supreme Court that the court make a sound decision than that its judgment issue within ninety days of submission. The court is not a court of error correcting misapplication of the law in particular cases for the benefit of the parties. It establishes the law in areas of broad importance to California society and resolves disputed questions of law that have divided the lower state courts. The parties' interest in a prompt resolution of their dispute (which is given a hearing at this level only by leave of the court itself precisely because of the broader social interest the dispute implicates) is properly subordinated to ensuring sound and well-reasoned development and clarification of California law. The best answer, therefore, would be to amend the California Constitution to, at a minimum, remove the California Supreme Court from the rule's coverage.

111. Eliminating oral argument altogether is not on the list. *But see* Moskovitz, *supra* note 9 (arguing that oral argument under current California appellate procedure should be abolished as meaningless). Doing so would imply finally determining in written opinions all merits matters in the court within ninety days of the completion of briefing unless the court concurrently adopted either option one (striking down the ninety-day rule) or option two (restoring the court's pre-1989 practice of unilaterally declaring the time of submission), in which case eliminating oral argument becomes a solution in search of a problem. Eliminating oral argument without concurrently adopting option one or option two would be impractical and undesirable. Experience has shown that more than ninety days may be required in many matters before the court to reach a fully reasoned written decision that is satisfactory to a majority of the justices. And it seems virtually impossible to get from where we are today to the point where all merits matters are decided within ninety days of the close of briefing. Under current circumstances, about 370 days pass in the median case from the close of briefing to decision, while a case at the seventy-fifth percentile takes 479 days. The average case takes 323 days. Moreover, even if it were possible, and even if doing so did "solve" the ninety-day problem, eliminating oral argument in the limited number of matters warranting discretionary review in the court would deny the litigants, the court, and the public the benefits of oral argument, and would violate the historical and current understanding of the California Constitution. *See supra*, note 10.

If amendment is not feasible, then, given how poorly the ninety-day rule has served California, I am naturally sympathetic to declaring the ninety-day rule unconstitutional on due process grounds even without regard to its implementation by IOP section VI.D. I acknowledge, however, that doing so would require a significant extension of the *Tumey-Caperton* line of decisions discussed in Part IV well beyond that necessary to invalidate IOP section VI.D.[112] IOP section VI.D violates the Due Process Clause under *Tumey-Caperton* because the justices have a monetary incentive to stick with a particular decision while the case remains sub judice. Moreover, it has turned an otherwise central part of the appellate decisionmaking process, oral argument, into a sham.

The ninety-day rule on its face, however, neither creates an improper monetary incentive to stick with a decision nor drains oral argument of its meaning. If it were ever actually implemented at the court, it would only create a monetary incentive to render a quick decision, without necessarily predisposing the justices to any particular decision. Nevertheless, due process, as well as good sense, may in some cases require a multimember appellate court of last instance to take more than ninety days to resolve a difficult, important, and contested issue of law. Imposing an arbitrary and inflexible one-size-fits-all "solution" to the problem of the law's delay arguably violates the Fourteenth Amendment's guarantee of due process of law. Perhaps this stretches the meaning of due process, but it does so in a manner that is far more transparent and forthright than manipulating submission and argument dates, and is closer to historical common law and constitutional traditions. Certainly, there is no basis in the broader American legal tradition for imposing strict time limits like the ninety-day rule on appellate decisionmaking.

2. Reinstate Pre–1989 Submission Practices

Unless the ninety-day rule is abrogated by state constitutional amendment or as a matter of federal law, the easiest path of reform for restoring oral argument to an appropriate place in the court's decisionmaking process is to simply reinstate its pre–1989 operating procedures allowing the chief justice to determine when "submission" occurs. Under this well-worn procedure the court conferred and reached consensus on a written opinion after argument. The existence of this procedure throughout the Gibson, Traynor and Wright Court eras provides ample precedent for this approach to dealing with the pe-

112. *See supra* notes 89–106 and accompanying text.

culiar due process problems posed by the ninety-day rule. Under this approach, the due process objection to the California Supreme Court's current decisionmaking process that I have made would dissolve. The court would no longer be constrained by either an arbitrary deadline or the threat of personal financial consequences to the justices if they chose, because they honestly believed it is the right thing to do, to reconsider a preliminary decision after hearing argument from the parties.

3. Release Written Tentative Decisions Before Argument

A third possible path, and the least desirable in my view, would be to forthrightly acknowledge that the role of oral argument has fundamentally shifted to providing a final procedural check on a decision reached on written submissions alone. One division of the California Court of Appeal has explicitly moved in this direction by releasing to the parties its calendar memoranda as tentative opinions prior to oral argument.[113] Similarly, some courts in Arizona, Texas, and New Mexico have experimented with internally circulating tentative opinions before argument, but do not require consensus on a tentative opinion before scheduling oral argument.[114] Neither approach meaningfully restores oral argument to its traditional role, but releasing a tentative opinion at least makes the process transparent and gives the party on the losing side of the tentative ruling a fair shot of pointing out the deficiencies and the adverse implications of the preliminary decision reached by the court majority. It is a

113. *See* Misc. Order No. 11-6, Cal. App. 2d. Supp. (Jan. 12, 2011) (reducing argument time to fifteen minutes for each side in light of the tentative ruling practice); People v. Pena, 32 Cal.4th 389, 399–400 (2004) (describing and approving the tentative ruling practice). Apparently only one other appellate court (in Arizona) has adopted this practice of California's Fourth Court of Appeal. *See* Mark Hummels, *Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination*, 46 ARIZ. L. REV. 317, 320 n.24 (2004).

114. *See generally* Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 SANTA CLARA L. REV. 1, 14–20 (1995) (analyzing the effects of the Tentative Opinion Program in a California court of appeal); Hummels, *supra* note 113, at 320 (discussing draft opinion circulation in Arizona, California, and New Mexico intermediate appellate courts); TEX. PRAC. GUIDE CIVIL APPEALS § 12:19 (West 2013) ("Frequently, the panel has reached a tentative decision before oral argument. Oral argument rarely changes that decision, although it may motivate a change in the text of the court's opinion. A change in the tentative decision itself is likely to occur only where the applicable law is truly unclear or counsel can muster persuasive policy and fairness arguments that are most effectively presented orally. On rare occasions, where the case is extremely close, the justices may come to argument without having arrived at a tentative decision; here, oral argument takes on far greater importance, and may actually sway the final outcome." (discussing practice before Texas's intermediate appellate courts and court of last resort)).

different kind of process, one that openly acknowledges that decisions are reached on the written record, subject only to being revisited for cause based on unforeseen issues that arise at oral argument. But it is honest, and it should fall within the broad parameters of a flexible concept of due process.[115]

Although there may be some merit to this practice at the California Court of Appeal level,[116] the practice remains deeply controversial and non-mainstream. A 2006 proposal of the Los Angeles County Bar Association to extend and require it more generally throughout California appellate courts foundered on the opposition of representatives of court staff, the State Bar's Committee on Appellate Courts, and other local bar organizations.[117] At the California Supreme Court, where the issues are more politically charged and contentious, and much more visible, the predecision public release of a full written tentative opinion seems fraught with peril. It would be especially difficult for the court to alter its position after publicly releasing a full set of opinions. Moreover, the practice would institutionalize and aggressively highlight the very diminished role that oral argument plays in the court's decisionmaking process. From a public relations and political standpoint, as well as from the perspective of making the best use of oral argument in adjudication, this seems to be the least desirable alternative and is ill suited to the needs of the court given its role in the state's constitutional system.[118]

B. The Problem of Delay

Although the three reform alternatives described above would relegitimize the court's use of oral argument, none of them would meaningfully address another kind of due process problem that also afflicts and confounds

115. Pena, 32 Cal.4th at 399–400.

116. *See* Hollenhorst, *supra* note 114; Hummels, *supra* note 113.

117. RESOLUTION 03-05-06, *Rules of Court: Tentative Rulings Before Oral Argument on Appeal,* CONFERENCE OF CALIFORNIA BAR ASSOCIATIONS (Mar. 5, 2006), http://calconference.org/html/wp-content/Archives/R2006/03-05-06.pdf (expressing concern that "once a panel makes its tentative opinion available to the parties, it may be more difficult than ever to effect a change through oral argument").

118. My skepticism of preargument tentative opinions should not be seen as a criticism of appellate courts issuing so-called "focus letters" before oral argument. These communications advise counsel of the primary issues that the court would like to consider at oral argument. This practice would appear to enhance the value and role of oral argument, rather than undermine it. Focus letters are occasionally used in California state courts, as well as in the federal judiciary, in particular by the U.S. Court of Appeals for the Second Circuit. *See, e.g.*, Laraway v. Pasadena Unified Sch. Dist., 98 Cal. App. 4th 579, 582 n.5 (2002); Robin Meadow, *Oral Argument* et al*: An Interview With Justice Norman Epstein*, 19 ASS'N OF BUS. TRIAL LAW. REPORT 1, 2 (1997).

many other appellate courts: delay.[119] Of course, the ninety-day rule, as applied in the court in light of IOP section VI.D, does nothing to alleviate delay either. The delay that really matters is the period from the time review is sought, or granted, to the time the court issues its decision. As we have seen under the current practice, the California Supreme Court routinely takes over one year to decide merits cases after it grants review and, in some cases, takes substantially longer. It processes its merits cases more slowly than it did historically and more slowly than most other appellate courts, including

119. *See* APPELLATE JUDGES CONF., LAWYERS CONF. TASK FORCE ON THE REDUCTION OF LITIG. COST AND DELAY, JUDICIAL ADMIN. DIV. OF THE AM. BAR ASSOC., STANDARDS RELATING TO APPELLATE DELAY REDUCTION, Appendix (1988) (setting appellate guidelines of 280 days with specific goals for each step of the process; the guidelines include timelines for writing opinions, but do not suggest writing opinions before oral argument); AM. BAR ASSOC., JUDICIAL ADMIN. DIV., STANDARDS RELATING TO APPELLATE COURTS (1994) (issuing similar standards advising that 50 percent of cases in courts of last resort should be resolved within 290 days and 90 percent should be resolved within one year).

In 1993, state appellate courts and courts of last resort were surveyed in an effort to determine what factors affected disposition time. *See* ROGER A. HANSON, NAT'L CENTER FOR STATE COURTS, TIME ON APPEAL (1996). The California Supreme Court refused to participate in the study. Although many other state supreme courts did participate, the study was inconclusive with respect to the factors that caused certain courts of last resort to suffer from longer delays than others. Nevertheless, this detailed analysis of other state supreme courts revealed that "[t]he most important case characteristics in explaining overall case processing time [include] . . . whether the decision is unanimous, the length of the court's opinion, whether concurring opinions are issued, and the length of concurring opinions." *Id.* at 83; *see generally* RITA M. NOVAK & DOUGLAS. K. SOMERLOT, DELAY ON APPEAL: A PROCESS FOR IDENTIFYING CAUSES AND CURES 114 (1990) (discussing the significant role opinion preparation plays in case resolution time); Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 IND. L. REV. 467, 489–90 (2002) (emphasizing the role of chief justices in court efficiency and noting that decision speed can be improved through "clear policies providing for expeditious scheduling of dates for oral argument or submission of the case without argument" and "mechanisms for managing the decision-making process and holding individual judges accountable for the prompt preparation of opinions for which they are responsible").

One of the courts with the lowest overall processing time in the 1993 TIME ON APPEAL study was the Supreme Court of Georgia, which—like the California Supreme Court—operates under a constitutional time limitation: Georgia's "two-term rule." *See* GA. CONST. art. VI, § 9 (cases must be disposed of in the term docketed for hearing or at the next term). The Georgia court has three terms annually. If the two-term limit is violated, the decision below is affirmed by operation of law. "This two-term rule has never been violated, as far as anyone knows . . . . Everyone works together to meet the deadline. Cases that are in their second term are labeled 'Distress' and the judges aim to dispose of every such case one month before the end of its second term, at the latest." Dorothy Toth Beasley et al., *Time On Appeal In State Intermediate Appellate Courts*, 37 JUDGES J. 12, 17 (1998). Georgia requires oral argument in all cases granted certiorari (unless disposed of summarily) and in death penalty cases; in all other cases, oral argument must be requested, and can be limited or denied at the court's discretion. GA. SUP. CT. R. 50.

SCOTUS, which almost always resolves its merits cases within a year of the grant of certiorari.

The most useful first step in dealing with this issue would be for the court to regularly publish the range and distribution of actual current disposition times from the time the case is filed or review granted.[120] Publishing this very basic data would cost virtually nothing since the court for its own internal purposes compiles and tracks this information electronically anyway. Justice Brandeis famously stated, "[s]unlight is said to be the best of disinfectants";[121] if the California Supreme Court were aware that the public could easily track its disposition times and compare them to those of other courts, its disposition times would probably shorten. If disclosure alone does not sufficiently mitigate undue delay, at least disclosure will allow the court, the relevant professional community, and the public to gain a better understanding of the scope and nature of delay occurring at the California Supreme Court level, a necessary first step in any sensible effort to speed up the court's processes.

A more fundamental solution might be to reform the highly bureaucratic internal structure of the California Supreme Court. Justice Brandeis is also famously remembered for his explanation for the high esteem in which the American public held his Court: "[The Justices] do their own work."[122] No justice of the current California Supreme Court could credibly make the same claim. The California Supreme Court employs distinct central staffs for criminal, civil, and death penalty matters.[123] There are forty-four staff attor-

120. The Supreme Court of Canada presents a refreshing contrast to the California Supreme Court in this regard. If one is interested in learning about that court's mean disposition time, one need only visit its website: The relevant information is presented in three simple graphs and a summary table, in English or French. *Category 5: Average Time Lapses*, SUPREME COURT OF CANADA, http://www.scc-csc.gc.ca/case-dossier/stat/cat5-eng.aspx (last modified Feb. 28, 2013).

121. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

122. ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO WARREN 201 (1958).

123. THE SUPREME COURT OF CALIFORNIA, CALIFORNIA COURTS 4 (2007), http://www.courts.ca.gov/documents/2007_Supreme_Court_Booklet_withInserts.pdf ("Each justice is supported by a judicial assistant and five staff attorneys. Some justices augment their staffs with law student externs. The Chief Justice has additional attorney staff positions to assist with administrative and related legal work. . . . The court has three 'central staffs.' The criminal central staff is composed of a director and 20 attorneys who prepare conference memoranda in all criminal matters except capital appeals, writs, and motions. The civil central staff is composed of a director and 15 attorneys who prepare conference memoranda in civil matters and State Bar proceedings. The capital central staff consists of a director and 9 attorneys who provide support and assistance to the court in matters pertaining to death penalty appeals and related habeas corpus proceedings. All three central staffs are composed of career attorneys, and the criminal and civil staffs are assisted by law student externs.").

neys and three directors assigned to these units.[124] In addition, each justice is assigned five more permanent legal staff. In total, the California Supreme Court employs more than one hundred lawyers to support the seven justices in deciding approximately seventy-five merits cases annually; in screening petitions, motions, and applications arising out of the six California Courts of Appeal; and in performing automatic capital sentence review, and adjudicating State Bar and writ matters. This represents a more than three-fold increase in professional staff since 1975, notwithstanding the court's use of modern laborsaving technologies, such as computerized docketing and research, and the decline in the court's merits caseload.

One wonders whether a smaller staff might process cases more efficiently and, not incidentally, draft shorter opinions, without compromising the quality of the decisionmaking. Though there is no direct evidence bearing on the question of how much professional staff optimizes court processing time, in general overstaffing matters with lawyers may slow things down, not speed them up.[125]

Moreover, California's choice to employ permanent professional staff rather than rely on the traditional practice of hiring recent top law school graduates for short-term appointments tends to increase the relative weight of staff in the appellate process. The court's staff is long-term and in many cases

124. Schedule 7A, *supra* note 86.

125. *See* Peter L. Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME. L. REV. 43, 59 (2000) ("Up to a certain point, providing judges with more law clerks adds to the thoroughness of the research, therefore possibly adding to quality, but does not increase the court's capacity to hear more cases."); STANDARDS RELATING TO APPELLATE COURTS, *supra* note 113, § 3.62 at 119–22 (suggesting an upper limit of three law clerks per judge, with no limit given for central office research staff); *cf.* Gustavo Nombela, *Effects of Public Ownership Over Firms' Size and Overstaffing Problems*, 108 PUB. CHOICE 1, 26 (2001) (noting that government operations sometimes focus on the number of employees to the detriment of efficiency, which can result in overstaffing: "[L]arger than optimal project sizes are implemented . . . . In those cases . . . the government may not eventually require the firm to produce the maximum output, as long as employment is kept at the desired level. In those conditions, it would be observed that firms do not obtain maximum productivity levels from employees, or equivalently, that firms would be inefficiently overstaffed."). Turning back to appellate courts specifically, some have expressed concern that more staff leads to longer opinions, but not better or faster ones. Certainly opinions are getting longer. *See e.g.*, POSNER, *supra* note 62 at 114–18, 156 (presenting data on the increasing length of SCOTUS opinions and suggesting law clerks are the culprits); Ryan C. Black & James F. Spriggs II, *An Empirical Study of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 634–35, 642–44 (2008) (noting that the median SCOTUS majority opinion length increased from 2530 words in 1969 to 4656 words in 1974 and remains in the 4000 word range through the early Roberts Court period, but casting doubt on the role of law clerks in contributing to the change).

has more experience in appellate adjudication than the justices it serves.[126] In such circumstances power naturally flows to staff.[127] Diminishing the role of

126. *See* Itir Yakar, *Unseen Staff Attorneys Anchor State's Top Court: Institution's System of Permanent Employees Means Workers Can Outlast the Justices*, S.F. DAILY J., May 30, 2006 ("Justices come and go, but the attorneys tend to stay. The longest serving justice on the high court's current roster, Joyce L. Kennard, has been with the court for 17 years. In turn, two of the longest serving staff attorneys, Hal Cohen and Graham Campbell, have served the court for 37 years and have worked for 11 different justices.").

127. Many commentators have more generally expressed concern over the increasingly important role that law clerks play in the current system. *See, e.g.*, TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006); ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006); William H. Pryor, Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1024–25 (2008) (arguing that a policy limiting every federal judge to no more than one career law clerk promotes judicial modesty on the administrative front); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007) (reviewing PEPPERS, *supra*; WARD & WEIDEN, *supra*) (discussing the law clerk's increasingly large role in virtually every aspect of the Supreme Court's business, particularly in the certiorari process); *see generally*, RICHARD A. POSNER, HOW JUDGES THINK 221, 285–86 (2008) (discussing the increasing use of law clerks); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 943–49 (1995) (analyzing judicial staffing arrangements, particularly the increase in number and use of law clerks); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 785–87 (1981) (questioning the increasing reliance on law clerks in the judicial process); *see also* Board of Educ. of Rogers, Ark. v. McCluskey, 458 U.S. 966, 972 (1982) ("The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system is far more serious than is generally recognized."); POSNER, *supra* note 62, at 97–119; *id.* at 103 ("[A] relationship between caseload growth and law-clerk growth seems plain."); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983) ("The proliferation of staff and subjudges and the delegation of power to them weaken the judge's individual sense of responsibility."); 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, 528 (2013) (reviewing THE FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990)) (footnote omitted) ("It cannot be denied that appellate judges, although they still retain the power to decide, serve more and more as managers and editors in response to the demands for productivity in the face of the expanding volume of cases. But laying out the path to a decision is often the most important part of the decisional process. Rather than playing an adjunctive role in this regard, staff increasingly provides the path. And therein lies the erosion of the hallmark that judges do 'their own work.' The increased use of staff itself has consequences. The majority of staff is fresh out of law school and anxious to display their vast legal knowledge. The result is opinions that are overly lengthy and replete with basic legal precedent that every opinion reader should be familiar with. One need not rehearse all the elements of a contract in every opinion resolving a breach of contract claim. While it is true that the judge is the ultimate decisionmaker, the system suffers when staff provides a longer path when a shorter one will do. The result may be an opinion not only much longer than necessary but also broader than necessary to resolve the issue before the court."); Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 526–27 (2012) (alteration and omission in original) (footnotes omitted) ("In the final two decades of the twentieth century, a

oral argument, the litigants' only opportunity to have a direct exchange with the court without the intermediation of the court's staff, only aggravates these concerns.

To be fair, the California Supreme Court is hardly alone in tending to bureaucratize. The size and role of staffs have generally grown over the last generation in the federal court system, and in other state courts, as well.[128] But the California Supreme Court has led the way in this area. The nine-member SCOTUS has jurisdiction over final determinations of federal questions by the highest court in which a decision may be had in all fifty states and U.S. territories,[129] and the decisions of thirteen U.S. Courts of Appeals, and other specialized federal tribunals.[130] Yet SCOTUS issues as many merits decisions annually as the California Supreme Court, and faces little backlog and disposes of its merits cases within one year of granting review.[131] It relies on thirty-six law clerks[132] appointed for annual terms and working under their respective

significant number of lawyers came to express concern about what they called the 'bureaucratization' of the judiciary. These lawyers worried, in the words of one of their number, that the expansion of judicial support staff from law clerks to magistrate judges had 'subtly alter[ed] . . . the "personal" character of the judicial office.' Now members of the legal profession almost uniformly expressed the view that the 'personal' quality of judging was central to judicial legitimacy. Even those skeptical about the extent to which the judiciary had actually been 'bureaucratized' affirmed the importance of 'maintaining a personalized judiciary' that employed the 'personalized decision-making that is the historic strength of our judiciary.'").

Whatever the issues raised by the use of temporary staff in the form of recent law graduates, it seems to me to be inevitable that employing large permanent professional staffs leads to devolution of authority and decisionmaking power to those staffs. An analogous change in the relationship in California between elected officials and the legislative staff that serve them has received some critical comment. The enactment of legislative term limits in 1990 has led to an increase in responsibility and tenure for certain high ranking staff. *See generally* Katerina L. Robinson, *Shifting Power in Sacramento: The Effects of Term Limits on Legislative Staff*, 3 CAL. J. OF POL. & POL'Y 1, 8–10 (2011) (observing that after term limits, legislative staff went from serving as "information gatherers" to advising legislators on policy issues and legislative procedures).

Who is really deciding the cases, judges or staff, is at the core of what Justice Brandeis was getting at when he proudly asserted that the Justices did their own work; it is a powerful point that goes to the core of the legitimacy of the decisions of a court of last resort.

128. *See* POSNER, THE FEDERAL COURTS, *supra* note 62, at 139–59; *see also supra* note 88.

129. 28 U.S.C. §§ 1257–1258, 1260 (2012).

130. 28 U.S.C. §§ 1253–1254, 1259 (2012).

131. From 2010 to 2012, merits disposition times at SCOTUS averaged 248 days, less than nine months, from grant of review to decision. *Stat Pack Archive*, SCOTUSBLOG, http://www.scotusblog.com/reference/stat-pack (last visited July 18, 2013). From 2007 to 2011, it disposed of over 85 percent of its cases docketed within the same year. *Table A-1: Cases on Docket, Disposed of, and Remaining on Docket, 2007 Through 2011*, USCOURTS.GOV, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/A01Sep12.pdf (last visited July 15, 2013).

132. In 1974, Congress increased the standard allotment of law clerks from three per Associate Justice to four per Associate Justice, at which level it still remains. Chief Justice Roberts is entitled to, but chooses not to employ, a fifth clerk. *See* WARD & WEIDEN, *supra* note 127,

Justice's direct supervision to substantively screen petitions and applications, prepare cases for argument and conference, and research and draft merits opinions supporting its decisions.[133] Maintaining a large permanent professional staff of lawyers is not inevitable under the circumstances of a modern court of last resort. Whatever other advantages or disadvantages doing so might have, the California Supreme Court's choice to employ a large permanent staff has not led to faster disposition times notwithstanding the state constitution's ninety-day rule.

CONCLUSION

For too many years the California Supreme Court has used oral argument not as a tool to assist in the decision of cases, but as a means of evading California's constitutional ninety-day rule. The ninety-day rule as applied to the California Supreme Court is terrible public policy. As currently enforced it does nothing to speed up the decision of cases or reduce appellate backlog. Worse, it has turned appellate argument in the California Supreme Court into a sham. The net result is that California's highest court—unnecessarily—disrespects the ideal of due process of law systematically and in every case it hears on the merits. It is time for the California Supreme Court to rethink the wisdom and the constitutionality of "Opinions First—Argument Afterwards" in its decisionmaking process.

at 45. Additionally, retired Justices may hire one law clerk whose primary role is to assist the retired Justice when he or she is designated to sit on lower courts. *Id.* at 48. In recent years SCOTUS's standard allotment of thirty-six law clerks has been augmented by the practice of retired Justices O'Connor, Souter, and Stevens of allowing their one allotted law clerk to assist the chambers of the active Justices on an as-available basis.

133. In addition to its law clerks, SCOTUS also has the assistance of a small Legal Office, established in the 1972 term by Chief Justice Warren Burger, which consists of two permanent attorneys and supporting staff. *See* John W. Winkle III & Martha B. Swann, *When Justices Need Lawyers: The U.S. Supreme Court's Legal Office*, 76 JUDICATURE 244 (1993). The Legal Office was primarily set up to serve as a kind of in-house counsel, particularly when SCOTUS or its Justices are named as defendants in litigation, but apparently these attorneys also assist SCOTUS and provide recommendations with respect to some kinds of petitions and motions filed in the Court. *Id.*

APPENDIX

CALIFORNIA SUPREME COURT DISPOSITION TIMES BY YEAR, 1990–2011

1990				
Category	**N**	**Median**	**25th%**	**75th%**
All	42	466	368	553
Civil	34	473	368	574
Criminal	8	466	371	499
Unanimous	12	455.5	359	502.5
Divided	18	459	364	529
4-3/Plurality	12	520	392.5	579.5

1991				
Category	**N**	**Median**	**25th%**	**75th%**
All	50	401.5	301	515
Civil	35	414	319	515
Criminal	15	334	284	539
Unanimous	15	385	305	501
Divided	26	368	297	515
4-3/Plurality	9	452	400	576

1992				
Category	**N**	**Median**	**25th%**	**75th%**
All	63	406	252	525
Civil	43	448	249	623
Criminal	20	395.5	257.5	443
Unanimous	21	256	232	385
Divided	34	427	315	518
4-3/Plurality	8	800.5	613	852

1993				
Category	**N**	**Median**	**25th%**	**75th%**
All	69	378	298	487
Civil	45	388	294	490
Criminal	24	345	299.5	424
Unanimous	23	398	266	480
Divided	36	374.5	301	506
4-3/Plurality	10	357.5	287	487

1994				
Category	**N**	**Median**	**25th%**	**75th%**
All	73	426	330	519
Civil	49	424	342	503
Criminal	24	458	327.5	573.5
Unanimous	24	437	326	513
Divided	36	424	344.5	517
4-3/Plurality	13	399	330	529

1995				
Category	**N**	**Median**	**25th%**	**75th%**
All	75	391	312	546
Civil	52	379.5	309	527.5
Criminal	23	417	329	592
Unanimous	20	332.5	305	428
Divided	45	391	316	592
4-3/Plurality	10	443	347	518

1996				
Category	**N**	**Median**	**25th%**	**75th%**
All	58	349	298	434
Civil	33	340	294	406
Criminal	25	378	301	434
Unanimous	24	340	296	395.5
Divided	20	340	301	418.5
4-3/Plurality	14	429	280	559

1997				
Category	**N**	**Median**	**25th%**	**75th%**
All	72	327.5	288	469.5
Civil	50	336.5	306	512
Criminal	22	305	274	351
Unanimous	22	291.5	229	323
Divided	32	343.5	312.5	499
4-3/Plurality	18	398	308	539

1998				
Category	**N**	**Median**	**25th%**	**75th%**
All	64	368.5	313	538.5
Civil	43	351	299	488
Criminal	21	449	358	672
Unanimous	18	367.5	313	554
Divided	33	355	316	498
4-3/Plurality	13	425	299	537

1999				
Category	**N**	**Median**	**25th%**	**75th%**
All	78	437.5	330	680
Civil	46	414.5	330	729
Criminal	32	458	336	655.5
Unanimous	28	359	297	587.5
Divided	33	400	342	621
4-3/Plurality	17	652	470	827

2000				
Category	**N**	**Median**	**25th%**	**75th%**
All	76	542.5	379.5	759
Civil	42	482.5	397	771
Criminal	34	566.5	351	747
Unanimous	24	458	350	752
Divided	33	565	401	747
4-3/Plurality	19	533	440	832

2001				
Category	**N**	**Median**	**25th%**	**75th%**
All	80	446	393	633
Civil	44	428.5	391.5	605
Criminal	36	482.5	398.5	659.5
Unanimous	23	559	432	677
Divided	42	414	344	547
4-3/Plurality	15	484	421	656

2002				
Category	**N**	**Median**	**25th%**	**75th%**
All	83	467	334	607
Civil	45	468	379	637
Criminal	38	386.5	316	586
Unanimous	30	377.5	295	600
Divided	38	481	386	631
4-3/Plurality	15	467	316	670

2003				
Category	**N**	**Median**	**25th%**	**75th%**
All	69	453	397	565
Civil	42	507	386	614
Criminal	27	427	397	537
Unanimous	32	451	395	580.5
Divided	25	442	362	565
4-3/Plurality	12	517.5	424.5	681

2004				
Category	**N**	**Median**	**25th%**	**75th%**
All	83	596	428	743
Civil	48	605	437	745
Criminal	35	572	418	736
Unanimous	44	570	416	713.5
Divided	26	603	446	782
4-3/Plurality	13	624	488	652

2005				
Category	**N**	**Median**	**25th%**	**75th%**
All	67	579	432	750
Civil	47	579	428	750
Criminal	20	573.5	493	720.5
Unanimous	25	559	436	719
Divided	27	568	432	733
4-3/Plurality	15	582	405	803

2006				
Category	**N**	**Median**	**25th%**	**75th%**
All	64	578.5	477	738
Civil	41	589	449	729
Criminal	23	568	495	754
Unanimous	29	516	449	645
Divided	26	680	547	799
4-3/Plurality	9	589	488	750

2007				
Category	**N**	**Median**	**25th%**	**75th%**
All	80	617.5	482.5	799
Civil	54	596	491	761
Criminal	26	675	474	908
Unanimous	46	559.5	439	792
Divided	23	691	572	817
4-3/Plurality	11	761	645	873

2008				
Category	**N**	**Median**	**25th%**	**75th%**
All	67	614	509	785
Civil	36	615.5	510.5	808
Criminal	31	579	509	750
Unanimous	47	603	509	771
Divided	15	649	495	789
4-3/Plurality	5	554	512	939

2009				
Category	**N**	**Median**	**25th%**	**75th%**
All	70	570	467	736
Civil	46	596	474	803
Criminal	24	538	439	617
Unanimous	42	536.5	435	642
Divided	23	628	481	803
4-3/Plurality	5	736	600	929

2010				
Category	**N**	**Median**	**25th%**	**75th%**
All	72	568	433	727.5
Civil	39	596	467	733
Criminal	33	524	418	712
Unanimous	43	524	418	778
Divided	21	575	407	684
4-3/Plurality	8	715	624	757.5

2011				
Category	**N**	**Median**	**25th%**	**75th%**
All	53	441	365	558
Civil	33	439	357	551
Criminal	20	483	405.5	577
Unanimous	13	418	365	554
Divided	34	439	357	558
4-3/Plurality	6	533	501	652