

## How the California Supreme Court Actually Works: A Reply to Professor Bussel



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## INTRODUCTION

Judges, like all public officials, are used to criticism. The task of resolving important legal controversies seldom pleases all sides, and scholars, pundits, and dissenting colleagues often spare no pains to remind us that we are not “infallible.”<sup>1</sup> On many issues, no matter how we decide, we must take our lumps. That goes with the job. But it is one thing to be told that the outcome of a judicial process is erroneous or ill-reasoned. It is quite another to be told that the judicial process itself perpetrates a fraud on litigants and the public at large.

In his article *Opinions First—Argument Afterwards*, Professor Daniel Bussel claims that “the California Supreme Court drafts and votes on its merits opinions before the case under review is orally argued.”<sup>2</sup> This anomaly, supposedly dictated by the court’s internal operating procedures, makes oral argument “a Theater of the Absurd,”<sup>3</sup> a “faux” process,<sup>4</sup> and “a sham”<sup>5</sup> that “squanders and demeans the parties’ formal opportunity for appellate argument.”<sup>6</sup> According to Professor Bussel, “[v]irtually all” of “the positive institutional value of oral argument depends upon conducting the argument prior to the court reaching a preliminary decision.”<sup>7</sup> Thus, he says, the only possible rationale for post-decision argument must be the court’s “deeply cynical” desire to “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.”<sup>8</sup> “The net result,” he concludes, “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.”<sup>9</sup>

This is quite an indictment. Fortunately, it does not capture how the California Supreme Court actually works.

I joined the California Supreme Court in 2011 after eight years as a law professor teaching and writing on constitutional law. Before becoming a professor, I had the privilege of clerking on two federal appellate courts, and my own conception of the judicial process was much influenced by what I had studied

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1. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).
  2. Daniel J. Bussel, *Opinions First—Argument Afterwards*, 61 UCLA L. REV. 1194, 1196 (2014).
  3. *Id.* at 1196.
  4. *Id.* at 1197.
  5. *Id.* at 1231, 1239.
  6. *Id.* at 1196 (italics omitted).
  7. *Id.* at 1214.
  8. *Id.* at 1215.
  9. *Id.* at 1239.

and observed about federal courts. It is fair to say that I came to my current position without intimate knowledge of, or any prior views on, the California Supreme Court's internal norms and procedures. And I have not hesitated to go against the grain, for example, by hiring talented recent law graduates to serve as one-year clerks instead of maintaining a staff comprised entirely of permanent clerks.<sup>10</sup>

Though lacking the long experience of many of my colleagues, I have seen enough to know that Professor Bussel's account of how the California Supreme Court treats oral argument bears little resemblance to reality. Our decisionmaking process does not deprive litigants of a real opportunity to influence the court through oral argument. If anything, our process enhances the opportunity for attentive litigants to address what the court regards as the true sticking points in a given case. Moreover, although Professor Bussel contends that oral argument plays a greater role in the United States Supreme Court than in the California Supreme Court, there is no reason to think this is so. Whatever the shortcomings of our decisionmaking process, subjecting litigants to oral argument that is "nothing more than the curtain of the Wizard of Oz" is not one of them.<sup>11</sup>

Part I of this Article describes the California Supreme Court's actual decisionmaking process and refutes Professor Bussel's central claim that the court decides its cases before hearing oral argument. Part II draws some comparisons between the decisional processes of the California Supreme Court and the United States Supreme Court. Although our process is not necessarily better, I do not believe it fares worse. Our court achieves a high rate of unanimity to the benefit of the bench and bar, it maintains a high level of productivity, and it continues to be the most influential state high court in the nation, as measured by frequency of out-of-state citations. Part III situates the issues raised by Professor Bussel's article within a body of research on American high courts. In scanning this literature, I note the paucity of, and need for, systematic inquiry into how variations in the decisional process might affect judicial outcomes.

The views expressed here, whether descriptive or normative, are solely my own. I do not speak for any of my judicial colleagues or for the court as an

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10. See Emily Green, *State High Court Justice Hails Short-Term Clerk Experiment*, S.F. DAILY J., Sept. 23, 2013, at 1.

11. Bussel, *supra* note 2, at 1215.

institution.<sup>12</sup> I have taken the initiative to write this response because I fear that Professor Bussel's article does more to deepen than to dispel what he regards as "public ignorance of the reality of the court's decisionmaking process."<sup>13</sup> An accurate account of the process, which I provide here, not only can "withstand serious scrutiny from the public"<sup>14</sup> but may also motivate useful research that compares and contrasts the decisional practices of our nation's appellate courts.

### I. THE DECISIONMAKING PROCESS

Professor Bussel's principal claim is that section VI.D of the California Supreme Court's internal operating procedures<sup>15</sup> "requires majority opinions to be written and agreed to prior to oral argument."<sup>16</sup> He contends that the court comes to oral argument having already "draft[ed] and vote[d] on its merits opinions."<sup>17</sup> This procedure drains oral argument of "[v]irtually all" of its positive institutional value, thereby worsening the quality of judicial outcomes.<sup>18</sup> Moreover, he says, "[e]ven if one were to assume . . . that oral argument fails to add value to the decisionmaking process exceeding its cost," the court's procedure would still be unjustified because it does not dispense with oral argument.<sup>19</sup> Instead, it "eliminat[es] substantially all the value of oral argument while continuing to bear all its costs."<sup>20</sup>

The process Professor Bussel describes is of course indefensible. But it is not the actual decisionmaking process of the California Supreme Court.

At the outset, let me acknowledge that the California Supreme Court's decisionmaking process is unconventional and thus unfamiliar to many lawyers and scholars. Further, I do not fault Professor Bussel for attempting to deduce the court's practice from its published internal operating procedures. Courts are not the most transparent institutions, and the deliberation that informs decisionmaking is, by design, the most opaque facet of the judicial function.

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12. When I use the word "our" in this comment, as in "our process" or "our practice," it is simply shorthand for referring to the court's process or practice. It is not meant to imply that I am speaking for my colleagues or for the court as an institution.

13. Bussel, *supra* note 2, at 1215.

14. *Id.* at 1198.

15. *See* SUPREME COURT OF CAL., INTERNAL OPERATING PRACTICES AND PROCEDURES OF THE CALIFORNIA SUPREME COURT § VLD (2007) [hereinafter INTERNAL OPERATING PROCEDURES]. The relevant text of this provision is quoted in Bussel, *supra* note 2, at 1205 n.36.

16. Bussel, *supra* note 2, at 1196 (italics omitted).

17. *Id.*

18. *Id.* at 1214; *see id.* at 1212.

19. *Id.* at 1212.

20. *Id.*

So it is understandable that an account of the decisional process by an outside observer may include a measure of speculation and educated guesswork.

What is less understandable is why Professor Bussel would choose the most problematic construction of the court's internal operating procedures instead of considering more reasonable and plausible alternatives. In support of his claim that the court has already made up its mind before it hears oral argument, Professor Bussel cites various commentators, media accounts, and one former justice and one former staff attorney, both of whom worked at the court two decades ago.<sup>21</sup> But he neglects to cite the extensive accounts of the court's decisionmaking process given by former Chief Justice Ronald George in a candid and comprehensive memoir published last year.<sup>22</sup> Chief Justice George provides a very different account of the process than Professor Bussel, and it is an account that largely accords with my description here.

#### A. An Overview of the Decisionmaking Process

In order to understand the role of oral argument in the California Supreme Court, one has to consider it in the context of the entire decisionmaking process from start to finish.

To begin, the California Supreme Court is, for the most part, a court of discretionary review. Apart from death penalty appeals, over which we have mandatory jurisdiction,<sup>23</sup> the court decides which cases it will hear on the merits. Over the past decade, the court each year has received an average of 20 capital appeals and 5,200 petitions for review arising from civil and criminal matters decided by the state courts of appeal, plus an additional 3,400 writ petitions primarily consisting of habeas corpus petitions in noncapital cases.<sup>24</sup> The court employs staff attorneys to review the petitions and to prepare memos and recommendations for the court's review. Every Wednesday morning (except during weeks with oral argument and the first week of July

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21. *See id.* at 1197 n.9, 1205 n.36, 1224 n.95.

22. *See* RONALD M. GEORGE, CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA 340–41, 553–56, 657–58 (2013).

23. *See* CAL. CONST. art. VI, § 11(a); CAL. PEN. CODE § 1239(b) (2004).

24. *See* JUDICIAL COUNCIL OF CAL., 2013 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2002–2003 THROUGH 2011–2012, at 5 (2013) [hereinafter 2013 COURT STATISTICS REPORT] (averages calculated from data in columns (B), (C), and (D) in table labeled “Filings”). In addition, the court each year receives about 40 extensive habeas corpus petitions related to capital appeals. *See id.* (average calculated from data in column (E) in table labeled “Filings”).

and August), the justices meet in conference to discuss and vote on 150 to 300 petitions.<sup>25</sup>

It takes four votes to grant review, and the criteria we use are similar to those used by the United States Supreme Court. We primarily examine whether a case presents an issue that has divided the courts of appeal or an issue of such importance that it merits definitive resolution by our court.<sup>26</sup> We also often grant review of certified questions from the Ninth Circuit.<sup>27</sup> Only in rare circumstances do we grant review solely for the purpose of error correction. Over the past decade, we have granted review in an average of 83 cases per year.<sup>28</sup> When that number is added to the roughly 20 capital cases appealed to our court each year, the number of new merits cases added to our docket annually is just over 100.

When a case is granted review, the Chief Justice immediately assigns it to one of the seven justices. Although I have no direct knowledge of how the current Chief Justice makes assignments, I have not seen much in the way of strategic behavior. For the most part, assignments appear to be driven by the more mundane “purpose of equalizing the workload of the justices.”<sup>29</sup> Occasionally, the Chief Justice will assign a case to a justice who has expressed particular interest in the issue presented or to a justice who has an existing assignment that involves similar issues,<sup>30</sup> although our court has generally avoided cultivating subject-matter experts through assignments. Also, the Chief Justice will sometimes keep a highly visible or important case for herself, which is a legitimate and well-accepted prerogative.

Once the parties have completed their briefing in a case, the assigned justice prepares a “calendar memorandum,” whose purpose is “to present the facts and legal issues, and to propose a resolution of the legal issues.”<sup>31</sup> The calendar memo may resemble a draft opinion, but in the context of the court’s

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25. INTERNAL OPERATING PROCEDURES, *supra* note 15, § III.A. The weekly batch of petitions is divided into an “A” list and a “B” list. *See id.* § IV.D. The “A” list includes cases in which the staff has recommended a grant or some other affirmative action, as well as cases with a dissent in the court of appeal or cases otherwise requiring special attention. The “B” list consists of routine matters. This is similar to the process used by the United States Supreme Court for considering petitions for certiorari, with our “A” list comparable to the Court’s “discuss list.” *See* WILLIAM H. REHNQUIST, *THE SUPREME COURT* 234 (2d ed. 2001).

26. *See* Cal. R. Ct. 8.500(b).

27. *See* Cal. R. Ct. 8.548.

28. *See* 2013 COURT STATISTICS REPORT, *supra* note 24, at 13 (average calculated from data in column (B) of table labeled “Business Transacted”).

29. INTERNAL OPERATING PROCEDURES, *supra* note 15, § VI.C.

30. *Id.* § VI.C.1.

31. *Id.* § VI.A.

decisionmaking process, it is properly viewed as a *preliminary* effort to analyze and resolve the issue presented. This becomes evident in light of what happens next.

After the calendar memo circulates, the court engages in a structured process of written deliberation. Each justice, after reviewing the case, circulates a “preliminary response” to the calendar memo.<sup>32</sup> Preliminary responses vary considerably. Some simply express agreement with the calendar memo. Others express agreement with the calendar memo but suggest refinements to the analysis. Still others agree with the result proposed by the calendar memo but disagree with one or more aspects of the reasoning. And still others express doubt about, or direct disagreement with, the result and reasoning of the calendar memo. It is not unusual to see preliminary responses that run more than 10 or 15 pages in length. The preliminary response process involves a robust and thoughtful exchange of views that thoroughly surfaces and probes the issues in a case. Importantly, like the analysis proposed in the calendar memo, the views expressed in preliminary responses are *preliminary*.

When all preliminary responses have circulated, the assigned justice takes stock. Rarely does a calendar memo emerge from the gauntlet of preliminary responses unscathed. The assigned justice typically confronts a diverse and often conflicting mix of suggestions, criticisms, and reservations from his or her colleagues. If there appears to be a tentative majority for the calendar memo’s proposed result and for the outline of a rationale (though not necessarily the rationale proposed by the calendar memo), then the case is set for oral argument. If there is not such a tentative majority, then the assigned justice has basically three options.

First, the assigned justice may “double down” on the position taken in the calendar memo by circulating another memorandum that attempts to address the criticisms raised by his or her skeptical colleagues and calls for another round of preliminary responses. This approach typically elucidates arguments not surfaced or persuasively addressed by the calendar memo, and it occasionally results in a tentative majority in support of a more refined rationale for the result originally proposed by the calendar memo.

Second, the assigned justice may find the views of his or her skeptical colleagues to be persuasive and thus decide to “flip.” When this happens (and it does happen), the assigned justice typically prepares a revised calendar memo with a different approach to the case that will garner a tentative majority.

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32. *Id.* § VI.D.2.



Third, upon considering the preliminary responses, the assigned justice may conclude that his or her own preliminary views of the case are so divergent from those of a tentative majority that the best course is to “give up” the case and ask the Chief Justice to reassign it.

The California Supreme Court holds oral argument during the first week of every month, except during July and August, and also during the last week of May. There is typically one hour of argument for each case, divided equally between the parties; capital cases are sometimes allotted more time at the appellant’s request. At the conclusion of argument, the case is deemed submitted for decision.

Immediately after argument, on the same day, the justices meet alone and deliberate. The assigned justice speaks first, and then the other justices speak in order of seniority except for the Chief Justice, who speaks last. Typically, the discussion moves swiftly; for some cases, the discussion can be quite lengthy and spirited. At the conclusion, if it appears that a majority supports the position urged by the assigned justice, then the assigned justice is tasked with preparing and circulating a draft opinion typically no later than the 30th day after submission. Any concurring or dissenting opinions are expected to circulate by the 60th day after submission. Under the California Constitution, the court must file a decision no later than 90 days after the case has been submitted, or else the salaries of the justices will be suspended.<sup>33</sup>

## B. The Process in Practice

The fact that the court has engaged in substantial written deliberation before oral argument may be thought to support Professor Bussel’s thesis that litigants have essentially no opportunity to influence the views of the justices at oral argument.<sup>34</sup> But this overestimates the rigidity of the justices’ views at

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33. CAL. CONST. art. VI, §19. California is not alone in having such a requirement. See IDAHO CONST. art. V, § 17 (30-day rule); Rev. Code Wash. § 2.04.092 (six-month rule). A number of other states have legislatively enacted similar measures, but many have been struck down under separation of powers principles. See, e.g., *In re Grady*, 348 N.W.2d 559 (Wis. 1984); *Coate v. Omholt*, 662 P.2d 591 (Mont. 1983); *Sands v. Albert Pike Motor Hotel*, 434 S.W.2d 288 (Ark. 1968); *State ex rel. Watson v. Merialdo*, 268 P.2d 922 (Nev. 1954). See generally L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221, 255–69 (2000).

34. See REHNQUIST, *supra* note 25, at 258 (noting that “judges of other courts rely on written presentations circulated by each judge to his colleagues before the conference discussion” but expressing concern that “[t]here is . . . a very human tendency to become more firmly committed to a view that is put in writing than one that is simply expressed orally, and therefore the possibility of adjustment and adaptation might be lessened by this approach”).

the point of oral argument. Although our deliberative process involves a significant amount of give-and-take among the justices before oral argument, it does not come to a sudden halt when the court has formed a tentative majority view and the case is set for argument. Instead, as explained below, oral argument is simply one point along a continuum of deliberation that extends well past the argument itself.

Contrary to Professor Bussel's claim that the effect of the court's intensive deliberation before argument is to "eliminat[e] substantially all the value of oral argument,"<sup>35</sup> the court's preargument preparation often heightens the value of oral argument in the decisionmaking process. That is because the key sticking points in the case have been identified through the preliminary response process, and the justices tend to focus oral argument accordingly. Advocates who pay careful attention to the questions from the bench will be able to seize on the main issues that interest the court and devote their limited time to those issues. For an attentive advocate, this can be a great benefit, especially in complex cases with many interrelated issues. For example, if a government action is being challenged on statutory, public policy, and constitutional grounds, the justices can direct counsel's attention to the aspects that seem most relevant to the court's resolution of the case. Counsel need not guess at the court's real concerns because the justices come to argument with those concerns clearly in mind.

Further, in quite a few cases each year, the court's intensive preargument preparation surfaces important issues, arguments, or authorities bearing on the case that the parties have not addressed. In such situations, we often invite supplement briefing and thereby signal to the parties that they should be prepared to address those issues at oral argument.<sup>36</sup> This is another way in which the court's collective deliberation in advance makes oral argument more productive.

It bears emphasis that in our process, each justice comes to oral argument knowing the preliminary views of his or her colleagues. As a result, oral argument presents an opportunity for the justices to elicit answers or concessions from the parties that address not only their own concerns but also the concerns of their colleagues. This can be especially important in cases where the court appears closely divided. The ability to redirect counsel to the specific concerns of the one or two justices who will likely tip the balance in the case makes oral argument more profitable than allowing the parties to waste time on peripheral issues.

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35. Bussel, *supra* note 2, at 1212.

36. See GEORGE, *supra* note 22, at 598–99 (discussing an example of the court's use of this procedure).

How often does the ultimate outcome of a case change after oral argument? The truth is: not that often. But that is not to say it never happens. In my brief tenure on the court, I have already seen it happen several times. I have even seen cases that ended up being unanimous for a particular result despite going into oral argument headed in the direction of the opposite result.

What is more common is a shift in the vote of one or more justices after oral argument, which underscores the fluidity of the court's decisionmaking process. As every justice has learned through experience, the preliminary responses of one's colleagues are indeed preliminary and subject to change. After oral argument, the ironing out of the details and nuances of an opinion can win or lose votes. Cases that appeared to be split 6–1 going into oral argument can end up narrowing to 5–2 or 4–3. And cases that appeared to be split 5–2 or 6–1 can end up being unanimous. The percentage of cases in which the vote of at least one justice changes after oral argument is significantly higher than the percentage of cases in which the ultimate outcome changes.

In particular, cases that go into oral argument divided but turn out unanimous are not uncommon in our court for two reasons. First, the culture of our court places a high premium on collegiality and unanimity. For the benefit of lower courts, lawyers, and the public, we try to speak in one voice whenever possible. The justice authoring a majority opinion will typically seek to address and accommodate, to the greatest extent possible, the concerns of wavering colleagues in order to secure a fifth, sixth, or even seventh vote.<sup>37</sup> Second, the fact that a justice has expressed doubt about the majority position going into oral argument does not mean that the justice is committed to writing separately. Concerns expressed in a preliminary response may turn out to form the nucleus of a concurrence or dissent. But in most cases, a justice does not reach a final decision on whether to write separately until after oral argument, and draft concurrences or dissents do not circulate until quite late in the post-submission period, well after the majority opinion has circulated. Whether to write separately is not a small decision,<sup>38</sup> and a justice confronting that decision, like the justice authoring the majority opinion, will typically seek as much common ground as possible before splintering the court.

Finally, in close cases, individual justices often do not finalize their views until they have had a chance to consider both the majority opinion and any separate writings. The 90-day deadline imposes a certain discipline on the

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37. *See id.* at 200–01.

38. *See generally* Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445 (2012).

decisionmaking process, but I have never found it to unduly constrain the options for revising or refining my views during the post-argument period.

In light of the dynamics described above, it is simply wrong to say that oral argument in the California Supreme Court “is in effect [an argument] for rehearing in an appeal already decided.”<sup>39</sup> As the decisionmaking process moves from start to finish, each justice’s initial views must eventually crystallize into an actual vote. But Professor Bussel misapprehends the point at which this must occur. As is evident to any justice who has negotiated with colleagues to achieve unanimity or to maintain a fragile majority, our decisionmaking process contemplates a significant degree of play in the joints beyond oral argument.

In offering this account, I do not claim that shifts in votes or outcomes that occur after oral argument are necessarily *the result of* oral argument. My point is to make clear, contrary to what Professor Bussel contends, that the court’s procedures do not require the justices to come to oral argument with their minds made up. Whether oral argument makes a difference to ensuing deliberations is a separate question.

As to that question, I suspect virtually all appellate judges would agree that the impact of oral argument turns mainly on the quality of advocacy and the nature of the issues in a given case. A court is naturally unmoved by advocates who come ill-prepared or evade the court’s questions,<sup>40</sup> and there are cases where the legal merits are sufficiently lopsided that even a skilled advocate cannot turn straw into gold. To the extent that oral argument has little or no impact on a case, it is usually because of these considerations, which are familiar to all appellate courts, and not because the California Supreme Court’s procedures peculiarly foreclose the justices’ receptivity to oral argument.

In my limited experience, there have been many instances where oral argument has changed my preliminary views about a case. Sometimes I realize that a concern I initially thought to be peripheral is actually quite central to the case, or I discover that I have paid insufficient attention to aspects of the record bearing on the question presented. Back-and-forth conversation with counsel can be helpful in clarifying such matters. I would estimate that in roughly 20 to 25 percent of cases, I leave oral argument feeling that an issue is closer than it first appeared. In a greater share of cases, perhaps as many as half, oral argument leaves me feeling more convinced of my initial position. Either way, oral argument has an impact on my thinking about the case.

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39. Bussel, *supra* note 2, at 1196.

40. See REHNQUIST, *supra* note 25, at 245–48 (describing various ways in which oral advocacy can be ineffective).

It is understandable that litigants and observers take great interest in oral argument because it is the only opportunity for the parties to interact directly with the justices and the only publicly visible part of the court's decisionmaking process. From the court's perspective, however, oral argument is only one input into the process. As Professor Bussel notes, "the importance of oral argument in American appellate practice has steadily diminished over the centuries. Appellate practice today in the United States is primarily written."<sup>41</sup> Because appellate courts rely heavily on the parties' briefs and on the independent research done by judges and their law clerks, it is not surprising that the judges whom Professor Bussel cites to vouch for the importance of oral argument report that it does not change votes or outcomes anywhere close to half of the time.<sup>42</sup> For most appellate courts, including the California Supreme Court, the impact of oral argument is more modest but nonetheless significant. It can often affect the reasoning of an opinion, especially how broadly or narrowly an opinion is written, even when it does not change any votes. But it must be acknowledged that in contemporary appellate practice, oral argument does not change the ultimate outcome in most cases.

## II. COMPARISON WITH THE UNITED STATES SUPREME COURT

Professor Bussel contends that unlike the California Supreme Court, the United States Supreme Court gives oral argument its due as an important component of appellate decisionmaking. The core of his claim is that because the United States Supreme Court does not reach any tentative majority view about a case before it is argued, the justices are more open-minded and thus more receptive to oral argument than the justices of the California Supreme Court.<sup>43</sup>

But the fact the justices of the United States Supreme Court do not confer or deliberate on a case before oral argument does not mean that they have formed no tentative views about the case.

Most judges have tentative views of a case when they come on the bench, and it would be strange if they did not. A judge will have read the briefs filed by the parties, and probably will have talked to one of his law clerks about the case, or have received a written memorandum from the clerk. A judge who has not prepared at all

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41. Bussel, *supra* note 2, at 1208.

42. *Id.* at 1212 n.65, 1213.

43. *Id.* at 1212–14.

for oral argument might be more ‘open-minded,’ but it would be the open-mindedness of ignorance, not of impartiality.<sup>44</sup>

The most important difference in oral argument practice between the United States Supreme Court and the California Supreme Court is that the justices of the state high court know their colleagues’ preliminary views *before* oral argument, whereas the justices of the federal high court typically learn their colleagues’ preliminary views *at* oral argument.<sup>45</sup> This difference has implications for the value and conduct of oral argument in each court.

According to Chief Justice Rehnquist, because “oral argument was the only time prior to deciding the case that all the Justices were together and focused on the matter,” and because “there was little chance of otherwise influencing the vote of a colleague in Conference,” oral argument “served as the focal point for the collective decisionmaking process of the Court.”<sup>46</sup> This explains why many commentators, as well as several current justices, have described oral argument as a conversation among the justices in which they are making their points to each other, with the lawyers often relegated to an intermediary role.<sup>47</sup> As Chief Justice Roberts has said, “Quite often the judges are debating among themselves and just using the lawyers as a backboard.”<sup>48</sup> The reason, he explains, is that:

We don’t talk about cases before the argument[.] . . . When we get out on the bench, it’s really the first time we start to get some clues about what our colleagues think. So we often are using questions to bring out points that we think our colleagues ought to know about.<sup>49</sup>

As a result, oral argument often involves a barrage of disjointed questions and interruptions as the justices argue with one another, and it can be difficult for the advocates to get a word in edgewise.<sup>50</sup>

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44. REHNQUIST, *supra* note 25, at 244.

45. Bussel, *supra* note 2, at 1214 (oral argument provides “a first and perhaps only predecision opportunity for the judges of [the United States Supreme Court] to gather a sense of their colleagues’ thoughts and concerns regarding the case”).

46. *Id.* at 22 (citing REHNQUIST, *supra* note 25, at 244, 254–55).

47. See RYAN C. BLACK ET AL., ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 7–11 (2012); Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES, Oct. 7, 2013, at A14 (quoting Chief Justice Roberts, Justice Ginsburg, and Justice Kagan on this point).

48. Adam Liptak, *Are Oral Arguments Worth Arguing About?*, N.Y. TIMES, May 6, 2012, at SR5.

49. Liptak, *supra* note 47, at A14.

50. See BLACK ET AL., *supra* note 47, at 20 (reporting that “the justices collectively ask[ed] an average of 133 questions per case, or more than two per minute,” over the 1998 to 2007 Terms). One prominent example was the oral argument in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, during which the Solicitor General “was interrupted mercilessly. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). He was cut off 180 times or, on average, every 22

It is hardly clear that this practice makes oral argument more valuable than a practice in which the justices, knowing in advance each other's preliminary views, ask questions of counsel that aim to illuminate what the court has come to regard as the major sticking points in the case. I would not say that one practice is necessarily better than the other. Oral argument simply serves a different purpose in each court. In the California Supreme Court, oral argument is not principally a forum for collective deliberation among the justices. It is an opportunity to elicit answers from counsel that address concerns identified through prior deliberation.

Does oral argument have a greater impact on actual decisionmaking at the United States Supreme Court than at the California Supreme Court? There is no reason to think it does. Although oral argument at the United States Supreme Court is the first (and perhaps last) real opportunity for collective deliberation among the justices, it is hardly the first moment at which each justice begins to develop his or her views about a case. Indeed, the Court's practice is to vote on the merits of a case two or three days after it is argued.<sup>51</sup> This means that almost all of the analytical work informing a justice's vote has occurred before oral argument. Like the practice of the California Supreme Court and all appellate courts of which I am aware, oral argument at the United States Supreme Court comes at the tail end of extensive research and consideration of the case by each justice.<sup>52</sup>

Of course, the justices of the United States Supreme Court, like the justices of our court, occasionally revise or refine their views after oral argument. But if one were to poll the justices before oral argument in each case and compare the results to the final outcomes, I doubt one would find much difference between the United States Supreme Court and the California Supreme Court in terms of the frequency of changed votes. Justice Thomas has said that his mind "[a]lmost never" changes as a result of oral argument and that his colleagues change their minds "in 5 or 10 percent of the cases, maybe, and I'm being generous there."<sup>53</sup> Justice Ginsburg has said that as between brief-writing

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seconds. He was interrupted after speaking for 10 or fewer seconds more than 40 percent of the time." Adam Liptak, *A Look Back at Court's Arguments on Health Care, Laugh Count Included*, N.Y. TIMES, June 26, 2012, at A14 ("The lawyers who argue before the court can seem incidental to the main purpose of the occasion, which the justices often say is mostly an opportunity to address one another.").

51. REHNQUIST, *supra* note 25, at 252 (explaining that votes are taken on Wednesday for cases argued on Monday and that votes are taken on Friday for cases argued on Tuesday and Wednesday).

52. *See id.* at 258–59 (explaining that postargument conference is "the penultimate stage in our decision-making process, and we have all been dealing with much the same arguments on both sides of the case since first we began to consider it").

53. *Justice Clarence Thomas*, 13 THE SCRIBESJ. OF LEGAL WRITING 99, 105 (2010).

and oral advocacy, “the brief is ever so much more important.”<sup>54</sup> Chief Justice Roberts concurs.<sup>55</sup>

Taking a step back from the role of oral argument and considering the decisionmaking process as a whole, I do not believe the California Supreme Court’s process fares worse than the United States Supreme Court’s. Consider three common judicial outcome measures.

First, our court achieves a far higher rate of unanimity. Over the past eight years, the California Supreme Court issued unanimous opinions in 77 percent of its cases, compared to 43 percent in the United States Supreme Court.<sup>56</sup> To be sure, it is easier to get agreement among seven judges than among nine, and our docket likely has a smaller share of potentially divisive cases. In addition, our court probably has greater agreement on basic methodological issues; for example, we have no self-avowed textualists or originalists comparable to Justice Scalia or Justice Thomas, respectively. But even accounting for these factors, I find it remarkable that our court speaks in one voice so often.

This high rate of unanimity is due in no small part to the design of our decisionmaking process. Our practice of assigning cases immediately upon granting review gives the assigned justice a strong incentive to find common ground. Each justice wants to be known for being able to garner a majority for whatever case he or she is assigned, not for having to give up cases and asking for them to be reassigned. In addition, the preliminary response process reveals each justice’s key concerns in a given case; the transparency of the process enables the court as a whole to think together about possible accommodations and solutions. And oral argument provides an opportunity to zero in on issues that appear to divide the court. Because the justices know in advance what those

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54. *Id.* at 136.

55. *Id.* at 6 (“The oral argument is the tip of the iceberg—the most visible part of the process—but the briefs are more important.”) (quoting Chief Justice Roberts).

56. Statistics for the United States Supreme Court were obtained from SCOTUSBlog.com’s annual “Final State Pack.” See SCOTUSblog.com, Stat Pack Archive, <http://www.scotusblog.com/reference/stat-pack> (click on each year to view statistics for the relevant October Term). Statistics for the California Supreme Court were compiled by the court’s Calendar Coordinator’s Office. In this comparison, the definition of “unanimous” includes cases where all justices agreed on the judgment but disagreed on the rationale. For example, SCOTUSblog counts *United States v. Jones*, 132 S. Ct. 945 (2012), as a unanimous decision, even though the justices divided 5–4 on the reasoning. Compare *id.* at 949 (2012) (finding police installation of GPS on a car to constitute a “search” under the Fourth Amendment because “[t]he Government physically occupied private property for the purpose of obtaining information”), with *id.* at 958 (Alito, J., concurring) (reaching the same conclusion on the ground that GPS device interfered with the defendant’s “reasonable expectations of privacy”).



issues are, the bench can quickly focus counsel's arguments on addressing the specific concerns on one side or the other.

To be sure, unanimity is not a good thing if it involves unprincipled compromise or if it reduces the law to a muddled least common denominator. Negotiation and accommodation certainly have their limits. But the fact that the California Supreme Court has long led all other state high courts in out-of-state citations provides some indication that our tendency toward unanimity has not diminished the quality of opinions.<sup>57</sup> Nor is unanimity a good thing if it results from a lack of independent analysis by each justice. This is a risk inherent to our process insofar as it assigns each case to an individual justice immediately upon a grant of review. The calendar memo circulated by the assigned justice frames the issues and evaluates the arguments before the other justices have examined the case. In practice, however, it is a clear internal norm that the initial views of the assigned justice command no deference from his or her colleagues. The preliminary response process often involves a robust exchange of ideas, revealing disagreement on matters big and small. Indeed, the fact that our process gives every justice a real opportunity early on to shape the court's thinking about a case provides a strong incentive for each justice to take an independent "hard look." It is not obvious that a harder look by each justice is achieved through a process in which the justices, with no prior written exchange of views, declare "the broad outlines" of their respective positions in post-argument conference and defer negotiation over the details until after a draft opinion has been circulated.<sup>58</sup>

Second, in terms of productivity, the California Supreme Court issued an average of 103 published opinions per year, or roughly 14 or 15 majority opinions per justice, for the five years from 2008 to 2012, compared to 82 published opinions per year by the United States Supreme Court, or roughly 9 majority opinions per Justice, during the same period.<sup>59</sup> On one hand, the justices of the California Supreme Court have more staff support. Each justice

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57. See *infra* notes 69–71 and accompanying text. I say "some indication" because I do not know from existing studies whether there is any relationship between the unanimity of an opinion from our court and its frequency of out-of-state citation.

58. REHNQUIST, *supra* note 25, at 257; see *id.* at 264–65 (describing negotiations at the opinion-writing stage).

59. Compare 2013 COURT STATISTICS REPORT, *supra* note 24, at 13, with ADMIN. OFFICE OF THE U.S. COURTS, TABLE A1: SUPREME COURT OF THE UNITED STATES—CASES ON DOCKET, DISPOSED OF, AND REMAINING ON DOCKET AT CONCLUSION OF OCTOBER TERMS, 2008 THROUGH 2012, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/A01Sep13.pdf> (last visited Mar. 24, 2014).

has five law clerks instead of four,<sup>60</sup> and the court employs additional staff attorneys to help analyze petitions for review. On the other hand, our yearly docket includes 25 to 30 capital cases on direct appeal,<sup>61</sup> each of which involves hundreds of pages of briefing and tens of thousands of pages of record material. Our decisions in these cases routinely run longer than 100 pages each. In addition, we annually resolve more than 30 exhaustive habeas corpus petitions related to capital appeals.<sup>62</sup> A recent comparative study of state high courts found that the California Supreme Court ranks within the top third in terms of productivity.<sup>63</sup>

Professor Bussel observes that since 1989, when our court adopted its current decisionmaking process, median disposition times have increased.<sup>64</sup> This observation, without more, may leave the impression that the current process is inefficient. But Professor Bussel is careful to say only that the decisionmaking process has not sped up the resolution of merits cases, not that the process itself has caused or contributed to any slowdown. He does not make the latter claim because, as he acknowledges, the primary explanation for increasing disposition times over the past three decades is “the debilitating effect of capital punishment on California’s court system.”<sup>65</sup> For many decades, all death judgments have been automatically appealed to the California Supreme Court, “divert[ing] resources from its many other important duties including . . . the efficient processing of its merits non-capital docket.”<sup>66</sup> In one recent year, the resolution of capital appeals accounted for more than half of the total volume

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60. The Chief Justice has eight positions in light of his or her heavy administrative responsibilities as head of the court and the entire state judiciary.

61. See 2013 COURT STATISTICS REPORT, *supra* note 24, at 5 (data from column (D) in table labeled “Dispositions”).

62. See *id.* (data from column (E) in table labeled “Dispositions”). Like direct capital appeals, each of these capital-related habeas corpus petitions typically involves hundreds of pages of briefing and voluminous exhibits and other record material. The internal memoranda analyzing these petitions routinely exceed 100 pages, and some lead to reference hearings that are followed by briefing, oral argument, and a written opinion. Professor Bussel’s assertion that “[t]he nine-member [Supreme Court of the United States] . . . issues as many merits decisions annually as the California Supreme Court” is simply incorrect. Bussel, *supra* note 2, at 1238. It ignores our capital cases, which annually account for roughly a quarter of our docket and an even greater share of the court’s adjudicative resources given the sheer enormity of the briefing and record in each case.

63. See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1335–36, 1337 tbl.3 (2009).

64. See Bussel, *supra* note 2, at 1218 fig.3, 1218–24.

65. *Id.* at 1217 n.83.

66. *Id.*

of writing in the court's published opinions.<sup>67</sup> Absent capital cases, our disposition times would be substantially shorter.

Finally, the court's decisionmaking process does not appear to have affected the historically high quality of the court's output. As Professor Bussel recognizes,<sup>68</sup> a sophisticated study of all state high court decisions in the three years from 1998 to 2000 found that the California Supreme Court ranked at or near the top on multiple indicators of quality, productivity, and independence.<sup>69</sup> Consistent with other recent research, the study found that "California is far ahead of the other states" in terms of out-of-state citations, a direct measure of influence and "a proxy for the intrinsic quality of the reasoning in the opinion."<sup>70</sup> The authors concluded that "a strong case can be made that California has the best high court."<sup>71</sup> Such evidence belies Professor Bussel's suggestion that the court's oral argument practice has impaired the quality of its decisionmaking.<sup>72</sup> Indeed, for all of his criticisms, Professor Bussel fails to cite even one example of an opinion he finds deficient because of the court's supposed disregard for oral argument.

### III. DIRECTIONS FOR FURTHER RESEARCH

Professor Bussel's article, though inaccurate in many respects, serves as a useful springboard for inquiry into a host of interesting questions concerning how the internal decisionmaking processes of appellate courts shape judicial outcomes. One reason that scholars, lawyers, and the public continue to be fascinated with how courts decide cases is that we expect the decisional process to involve more than simply voting and then counting up the votes. We expect multimember appellate courts to reach their decisions through a deliberative process, on the premise that collective debate and discussion, as opposed to isolated voting by each judge, will generally produce better outcomes. As first-year law students learn, matters of procedure and substance are deeply intertwined in the law. So it seems plausible that judicial outcomes—and by

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67. See Gerald F. Uelmen, *Dealing with Death*, CAL. LAWYER, Sept. 2012 (reviewing all California Supreme Court opinions from July 1, 2011 to June 30, 2012, and finding that "[t]his year's 29 death penalty opinions took up 2,102 pages, well over half of the year's total").

68. See Bussel, *supra* note 2, at 1201 n.22.

69. See Choi et al., *supra* note 63, at 1345–49.

70. *Id.* at 1321, 1337; see also Jake Dear & Edward W. Jessen, "Followed Rates" and Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683, 710 (2007) ("[O]ver the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues.").

71. Choi et al., *supra* note 63, at 1349.

72. See Bussel, *supra* note 2, at 1216.

outcomes, I mean not only the results of cases but also features such as the quality of reasoning and degree of unanimity—may exhibit some degree of path dependence traceable to characteristics of the decisional process.

Yet this hypothesis, despite its direct relevance to questions of judicial behavior, has not been the subject of much systematic investigation. Apart from information provided in judicial memoirs or journalistic accounts (most of which have focused on the United States Supreme Court),<sup>73</sup> we know little about the extent to which such deliberation actually occurs in appellate courts, how it is structured, what procedures tend to promote or inhibit deliberation, and what role oral argument plays in the process. Nor do we have much empirical insight into how different decisional processes channel disagreement, foster consensus, or otherwise influence outcomes. These questions are worthy of serious study, and the varied practices of state high courts are a natural place to look.

Although there is a substantial literature on state high courts, it has largely focused on other topics. One strand of research has been devoted to ranking state high courts on various outcome measures.<sup>74</sup> Another has examined the nature, volume, and outcome of cases decided by state high courts and the ramifications for their role in state governance and the federal system.<sup>75</sup> These studies have examined the degree and direction of judicial responsiveness to societal change, tracing the evolution of how state courts are organized, what cases they hear, and how they conceive of their institutional identity in relation to other branches and levels of government. Another body of work has examined the extent and legitimacy of state constitutionalism as a source of doctrine independent of, and often more protective than, federal constitutional law.<sup>76</sup>

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73. See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005); REHNQUIST, *supra* note 25, at 224–266; JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (2011); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

74. See *supra* notes 63, 69–71 (citing sources).

75. See, e.g., G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988); Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978); Robert A. Kagan et al., *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121, 121 (1977).

76. See, e.g., ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); James A. Gardner & Jim Rossi, *Foreword: The New Frontier of State Constitutional Law*, 46 WM. & MARY. L. REV. 1231 (2005); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

Some of this literature has focused on specific substantive areas, such as criminal law and social and economic rights.<sup>77</sup>

More recently, perhaps the most interesting work on state supreme courts has highlighted their largely unspoken role in fundamental interpretive debates over statutory construction and the implementation of cooperative federalism.<sup>78</sup> And much of the ongoing comparative scholarship on state high courts has addressed the relationship between courts and public opinion,<sup>79</sup> complementing similar studies on the federal courts.<sup>80</sup> Capitalizing on variation in state judicial appointment, election, and retention procedures, the studies find evidence that judges who are subject to less stringent democratic controls are more apt to make decisions that affirm individual rights and probe the boundaries of the law,<sup>81</sup> although some evidence indicates that appointed judges are not more independent or less likely to engage in strategic behavior than elected judges.<sup>82</sup>

Almost no research has systematically examined how the design of the decisionmaking process affects judicial outcomes. Perhaps the closest effort is a 1976 study that collected information from the chief justices of 49 states on four areas of the decisional process: the use of oral argument, the order in which justices speak at conference, the order in which justices vote, and the

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77. See, e.g., Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301 (2011); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

78. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1150 (2010).

79. See, e.g., Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360 (2008); Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455 (2010); Melinda G. Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485 (1995).

80. See, e.g., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds. 2008); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

81. See, e.g., Brace & Boyea, *supra* note 79; Devins & Mansker, *supra* note 79; Hall, *supra* note 79.

82. See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2008); Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009).

method of assigning opinions.<sup>83</sup> As to oral argument, the study reported that 25 state high courts hear argument in 90 percent or more of their cases, whereas six states hear argument in less than half of their cases.<sup>84</sup> As to conference procedures, the study identified “[s]ome eleven different procedures.”<sup>85</sup> In some courts (as in the United States Supreme Court<sup>86</sup>), the chief justice speaks first, followed by the other justices in order of seniority; in others, the discussion proceeds in reverse order of seniority; and some courts designate a “reporting judge” who speaks first, while others use no set order at all.<sup>87</sup> The study observed similar variations in voting procedures.<sup>88</sup> As to opinion assignments, “the chief justice plays an important role” in 15 states, and assignments are “made on some type of rotating basis” in 20 states.<sup>89</sup> As to whether these differences in procedure affect judicial outcomes, the study said “the answer appears to be no” but did not explain the basis for this assertion.<sup>90</sup> The study summarized its main finding as follows: “A review of the decision-making procedures of state supreme courts reveals the single most notable factor to be the wide diversity of their operations. No two state courts of last resort appear to follow a common pattern in arriving at decisions.”<sup>91</sup>

The 1976 study is now out-of-date; a follow-up study in 1990 found that the 1970s data “no longer portray an accurate portrait of the operational practices of state supreme courts.”<sup>92</sup> Upon collecting new data on methods of opinion assignment and conference procedures, the 1990 study reported “continued diversity” in decisional practices but drew no conclusions with respect to impact on court decisions.<sup>93</sup> “Also noteworthy,” the study said, “is the fact that the rules used in the U.S. Supreme Court have not been adopted by the

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83. See Stanford S. McConkie, *Decision-Making in State Supreme Courts*, 59 JUDICATURE 337, 338 (1976).

84. See *id.* “[S]ome state supreme courts have essentially done away with oral argument. This strongly suggests that these courts do not see it as an essential part of the appellate process.” *Id.* at 339.

85. *Id.* at 339.

86. See REHNQUIST, *supra* note 25, at 254.

87. McConkie, *supra* note 83, at 339.

88. *Id.* at 342.

89. *Id.* at 342, 343. For a more in-depth examination of opinion assignment methods used by state high courts, see Elliot E. Slotnick, *Who Speaks for the Court?: The View From the States*, 26 EMORY L.J. 107 (1977). Based on information reported by state chief justices, the study found that “while nondiscretionary systems may best maintain harmonious relationships and optimum social cohesion on the court, the court is best able to complete its task when the chief justice employs his discretion in assigning opinions.” *Id.* at 137–38.

90. McConkie, *supra* note 83, at 343.

91. *Id.*

92. Melinda G. Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 209–10 (1990).

93. *Id.* at 214.

states. On the contrary, the states appear to prefer a more informal and flexible operating environment in which norms of professionalism and collegiality structure behavior.”<sup>94</sup>

As the studies above suggest, “[t]he variations in rules and procedures among state supreme courts provide an outstanding opportunity for researchers to estimate the impact of [alternative] institutional arrangements on judicial decisionmaking.”<sup>95</sup> At the same time, the paucity of research in this area is perhaps unsurprising given the extensive data collection required.<sup>96</sup> Many state high courts do not have published internal operating procedures, so the information must be collected through interviews or questionnaires. In addition, it may be difficult to categorize the information, given the high degree of variability. And for some courts, certain features of the decisional process might not be public information. More broadly, in order to discern the impact of one or another procedural feature, it is necessary to control for other key determinants of judicial decisionmaking. It may be that other variables, such as the nature of the case, the background of the justices, or the basic norms of appellate judging, are so significant as to render insignificant the potential influence of the design of the decisionmaking process.

On the other hand, given the substantial evidence from other settings that decisionmaking processes can affect substantive outcomes,<sup>97</sup> it seems quite plausible that the rules and procedures that structure decisionmaking by multimember courts matter a great deal. Indeed, based on my own exploration of this topic with judicial colleagues throughout the country, I have found

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94. *Id.*

95. *Id.*

96. A major resource for scholars interested in the comparative study of state high courts is the State Supreme Court Data Project, which contains information on all 21,000 decisions reached by the 400 justices of the high courts of all 50 states between 1995 and 1998. *See Project Overview*, STATE SUPREME COURT DATA PROJECT, <http://www.ruf.rice.edu/~pbrace/statecourt> (last visited Apr. 5, 2014). The database includes information about the size and composition of state high court dockets, characteristics of decided cases, court size and composition, method of assigning opinions, method of judicial appointment or election, biographical information about individual justices, data on voting behavior, and more. *See id.*; Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 JUST. SYS. J. 243 (2001). The project is intended to facilitate study of the key determinants of judicial behavior and outcomes, although it is unclear how much information it contains about the structure of the decisionmaking process itself.

97. *See, e.g.*, George Wright & Paul Goodwin, *Structuring the Decision Process: An Evaluation of Methods*, in THE OXFORD HANDBOOK OF ORGANIZATIONAL DECISION MAKING 534 (Gerard P. Hodgkinson & William H. Starbuck eds., 2008); James W. Dean, Jr. & Mark P. Sharfman, *Does Decision Process Matter? A Study of Strategic Decision-Making Effectiveness*, 39 ACAD. MGMT. J. 368 (1996); David A. Garvin & Michael A. Roberto, *What You Don't Know About Making Decisions*, 79 HARV. BUS. REV. 108 (2001).

that many appellate judges have strong feelings about the proper way to structure the decisionmaking process, which in turn reflect their views about what makes for better or worse judicial outcomes.

As an aid to future research, I would suggest data collection on the method of assigning opinions; the use and timing of oral argument; the timing, extent, and frequency of collective deliberation in the decision path; the timing and frequency of noncollective deliberation (i.e., side conversations between justices); the role of law clerks or other court staff in the deliberative process; the extent of oral versus written deliberation; and time constraints on reaching a final judgment. These variables may be examined for their possible correlation with various outcomes, including the efficacy of the judicial process in channeling disagreement as demonstrated by the degree of consensus or polarization, the frequency of separate writing, and perceptions of collegiality; efficiency measures, such as productivity and disposition times; and measures of quality, such as the influence of a court's opinions beyond its jurisdiction.

Quantitative study in this area may prove challenging for the reasons stated above. But as a starting point, it would help to have better qualitative accounts of the decisionmaking process. Professor Bussel's article has provided an occasion for me to offer such an account about the California Supreme Court.