DRAFT ARTICLE Forthcoming: 61 BOSTON COLLEGE LAW REVIEW (2020)

HOT BENCH:
A THEORY OF APPELLATE ADJUDICATION

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ABSTRACT:

The Supreme Court Justices are talking. And they are talking more than ever during oral argument. Beginning roughly two decades ago, the dynamics of Supreme Court hearings changed significantly as the Justices evolved into an increasingly hot bench. The term "hot bench" implies that appellate judges engage in vibrant verbal exchanges with the parties during oral hearings. Its rise to prominence has led to a series of changes that scholars refer to as the "new oral argument". As part of the new oral argument, Supreme Court Justices now speak more while the parties speak less, they interrupt both their colleagues and the parties (especially women) more frequently than in the past, and some of their questions advocate for positions rather than seek information. A hot bench raises crucial concerns about the nature of oral argument and appellate judges' role in a constitutional democracy.

This article addresses those concerns and advances a theory about the connection between a hot bench and appellate adjudication. It provides a new account of how active hearings can promote certain functionalist and democratic virtues of oral argument that cold benches and written decisions cannot. A hot bench may afford improved transparency into decision-making, increase judicial accountability, display greater concern for minority interests, and encourage constitutional dialogue between the different branches of government. Active oral arguments also help appellate judges optimize their limited information gathering capacity, prevent errors, and form coalitions around their shared commitment to judicial minimalism. Appealing to asymmetric information theory in economics, this article demonstrates how judges form majorities through signaling and screening.

A more well-rounded account of a hot bench's value, however, requires an examination of its vices as well as its virtues. Active hearings can (and do) undermine some of the justifications for oral argument and place certain democratic values at risk, including political equality, fairness, participation, and respect for public institutions. Thus, a hot bench can result in a paradox: active judges sacrifice some democratic and functionalist values of oral argument in the pursuit of others. This article concludes by demonstrating why appeal judges must avoid particularly costly trade-offs and how they can do so.

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I. INTRODUCTION

Within the past several decades, appeal judges' increased caseload resulted in drastic changes to the appellate adjudicative process.[1] The number

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of cases filed before federal courts of appeal increased eleven-fold within a half-century[2] and rose by over 650% between 1960 and 1983 alone.[3] As caseloads expanded, oral hearings before those courts declined.[4] The time accorded for oral argument also decreased.[5] As the frequency of hearings diminished, so too did reversal rates. [6] Even appeal judges' conduct during oral argument changed significantly.[7] Supreme Court Justices spent more time speaking, asked more questions, and increasingly advocated positions from the bench, while advocates spoke less and had less time to make their case.[8] The era of the "new oral argument" was born as the Supreme Court evolved into an increasingly hot bench.[9] The term "hot bench" implies that appellate judges arrive to hearings prepared, demonstrate awareness of the

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[1] Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 391-414 (1982-1983); Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and the Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 661 (2007).

[2] RICHARD POSNER, THE FEDERAL COURTS 59 (1999) [citing the 686% increase in cases filed before federal appeal courts]. Cited in: JOHATHAN COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 6-7 (2010);

[3] RICHARD POSNER, REFLECTIONS ON JUDGING 37 (2013) [citing the eleven-fold increase in cases filed before appeal courts in fifty years]. For a summary of the reasons for caseload expansion, *see*: David Greenwald; Frederick A. O. Jr. Schwartz, *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1145-7 (2002). Only recently has the volume of appeal court filings began to decline as of 2012. *See:* UNITED STATES COURTS, JUST THE FACTS: U.S. COURTS OF APPEAL (December 20, 2016). Available at: http://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals.

[4] Marin Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals,* 81 GEO. WASH. L. REV. 401, 414 (2013); Joseph Hatchett and Robert Telfer, *The Importance of Appellate Oral Argument,* 33 STETSON L. REV. 139, 139 (2003).

[5] Stephen L. Wasby, *Oral Argument in the Ninth Circuit: The View from Bench and Bar*, 11 GOLDEN GATE U. L. REV. 21, 22-3(1981).

[6] Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 289 (2006); Bert Huang, *Heightened Scutiny,* 124 HARV. L. REV. 1109, 1112-3, 1118 (2011).

[7] Barry Sullivan and Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 UTAH L. REV. 1005, 1019-20 (2015); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 313-4 (2013).

[8] Tonja Jacobi and Matthew Sag, *The New Oral Argument: Justices as Advocates,* 94 NOTRE DAME L. REV. 1, 7-17, 68-9 (2019) (forthcoming). Available at SSRN: https://ssrn.com/abstract=3125357.

[9] *Id.* at 7-17 [using the term "the new oral argument" to describe the evolution in oral hearings before the Supreme Court]; Sullivan and Canty, *supra* note 7, at 1019-20 [using that same term]; *See also:* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 54-5 (2007) [detailing the rise of the hot bench];

record and relevant case law, and engage in active dialogue with the advocates.[10] Not only has the phenomenon of a hot bench become increasingly common, but shows no signs of going away.[11] The new oral argument raises fundamental concerns about appellate judges' evolving role in a constitutional democracy, their legitimacy, and adjudication more generally.[12]

This article explores those concerns and advances a theory about the connection between a hot bench and appellate adjudication.[13] Oral argument remains the most unfiltered, spontaneous, and visible aspect of judicial decision-making; a transparency-promoting practice by which the public can judge its judges.[14] Because many aspects of appellate decision-making are shrouded in secrecy, stakeholders increasingly scrutinize oral hearings to hold judges accountable and determine whether justice is both done and seen to be done.[15] This article builds on existing theories about the functionalist and democratic justifications for oral argument.[16] By combining the insights of emerging empirical research into oral hearings and theories of adjudication, it argues that a hot bench results in serious trade-offs. Appeal judges may promote certain functionalist and democratic values of oral argument while sacrificing others. To legitimize oral argument and judges' role in a democracy, appeal judges must minimize the vices of active oral hearings and avoid costly and unnecessary trade-offs.

This article is structured as follows. Section II sets out the history of oral argument, its evolution, and the rise of the hot bench in appellate adjudication. Section III explores the traditional functionalist and democratic justifications for oral hearings. It critiques those approaches in light of the rise to prominence of a hot bench. Section IV provides a new account of the democratic virtues of active oral hearings that are attributable to greater empirical research into oral argument: transparency, the new judicial accountability, dialogue, and judicial minimalism. Section V describes the functionalist benefits of a hot bench: optimizing the judiciary's limited

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[10] Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 523 (2003).

[11] A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 U. VA. L. REV. 231, 276- (2015).

[12] Aharon Barak, Foreword, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 21 (2002).

[13] Howard, *supra* note 11 at 275.

[14] Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631, 635 (2009)

[15] Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 661 (2001).

[16] Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom,* 72 IOWA L. REV. 1, 11 (1986).

information gathering capacities and assisting in the coalition-building process.[17] Section VI concludes this article. It demonstrates why appeal judges must avoid sacrificing some democratic and functionalist values of oral hearings in the pursuit of others and suggests how they can do so.

II. ORAL ARGUMENT: ITS HISTORY AND EVOLUTION

Historically, oral argument occupied a fundamental role in the common law's evolution.[18] As the common law system developed in England, parties pleaded their case orally and judges rendered their decisions orally as well.[19] There was no formal time limit restricting the duration of hearings before the English Court of Appeals and proposals for such constraints were rejected in the 1950s.[20] Until the late 1900s, the concept of a written brief was completely alien to appellate adjudication in England.[21] Beginning in the 1980s, the English Court of Appeals requested (but did not require) parties to submit a written document outlining the key points of the case prior to the hearing.[22] The primacy of oral argument in English law was justified on the basis of its deep historical roots, cost-effectiveness, better engagement with the parties' arguments, and capacity to promote judicial accountability.[23]

In the United States, the practice of oral hearings before appellate courts was imported from England.[24] The tradition of oral argument, however, developed very differently in the two countries. Written arguments occupied a far more central role in appellate adjudication within the United

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[17] Cass Sunstein, *The Most Knowledgeable Branch,* 164 U. PA. L. REV. 1607, 1608-13, 1616-7 (2015).

[18] 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, 125 (2012).

[19] Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1175-7 (2004); DELMAR KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 93 (1963).

[20] Ehrenberg, *supra* note 19*,* at 1176; Delmar Karlen, *Civil Appeals: English and American Approaches Compared*, 21 WM. & MARY L. REV. 121, 131, 134-5 (1979). On the lack of time limit for oral argument before the English Court of Appeal in the 1980s, see: Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 740 (1983).

[21] Edson Sunderland, *An Appraisal of English Procedure,* 11 AM. BAR ASSN. J. 773, 779 (1925).

[22] ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 121-2 (1990). Cited in: Ehrenberg, *supra* note 19*,* at 1177.

[23] Ehrenberg, *supra* note 19 at 1176-7.

[24] Daniel J. Bussel, *Opinions First - Argument Afterwards*, 61 UCLA L. REV. 1194, 1207 (2014).

States compared to in England.[25] As far back as 1795, the Supreme Court required the parties to submit a written document outlining the key points of the appeal.[26] Short written briefs were required as of 1821.[27] Despite greater emphasis on written arguments, oral hearings still formed a crucial part of the appellate adjudicative process. Until the mid-Nineteenth Century, oral hearings before the Supreme Court resembled the English appellate adjudication model and there was no formal time limit on oral argument.[28] When *Gibbons v. Ogden* was argued before the Supreme Court in 1824, the oral hearing lasted five days long with four hours of oral argument per day.[29] The *Amistad* case argued in 1841 involved eight days of oral argument.[30] Time limits on oral argument were only formally imposed in 1849, when advocates were each accorded two hours to plead their side of the case.[31]

The frequency and duration of oral argument declined most significantly following the "explosion" of filings before federal appellate courts in the 1960s.[32] Today, only one quarter of cases heard by those courts receive an oral hearing.[33] Advocates appearing before federal appellate courts are generally limited to fifteen minutes of pleading.[34] The frequency and duration of oral argument before the Supreme Court has declined in a similar fashion.[35] Since the 1970s, advocates appearing before the Court are each given thirty minutes of pleading time for oral hearings.[36] In recent years, the Court's docket has also shrunk.[37]

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[25] 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, 250 (2009)

[26] *Id.* at 251.

[27] *Id.*

[28] R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEG. HIST. 482, 488 (1994)

[29] Kravitz, *supra* note 25, at 251; William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1016 (1984).

[30] Cleveland and Wisotsky, *supra* note 18, at 128.

[31] Kravitz, *supra* note 25, at 251.

[32] Greenwald and Schwartz, *supra* note 3, at 1145.

[33] Cleveland and Wisotsky, *supra* note 18, at 119-20.

[34] Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 38 (1986); Hatchett and Telfer, *supra* note 4 at 140.

[35] Harlon Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 63 (1985).

[36] Ryan C. Black, Maron W. Sorenson & Timothy R. Johnson, *Toward an Actor-Based Measure of Supreme Court Case Salience: Information-Seeking and Engagement during Oral Arguments*, 66 POL. RES. QTR. 804, 807 (2012)

[37] Ryan J Owens and David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1223-4 (2011).

The dynamics of oral argument and the Justices' conduct during hearings also changed significantly within the past several decades – a shift that was observable due to the rise of empirical studies of oral argument and adjudication.[38] Barry Sullivan and Megan Canty conducted empirical research comparing Supreme Court oral hearings from the October Terms of 1958-1960 and the October Terms of 2010-2012, concluding that the Supreme Court Justices became far more active in that latter period.[39] Their research demonstrates that the number of words spoken by advocates had decreased by 46% while the number of words spoken by the Justices had increased by about 24% during that time.[40]

Tonja Jacobi and Matthew Sag's empirical studies into Supreme Court hearings reveal similar tendencies.[41] They evaluated whether the Justices spoke more during oral argument after the year 1995 – a year marked by growing political partisanship associated with Newt Gingrich's election as speaker of the House of Representatives during the Republican Revolution.[42] Jacobi and Sag concluded that since 1995, the Supreme Court panel as a whole spoke on average for thirteen minutes more per hearing – a shift that reduced advocates' own pleading time.[43] The Justices spent roughly 22% more time speaking during oral argument after 1995 than before that same year, and the dynamics of their interactions changed as well.[44]

Scholars describe contemporary oral hearings as "the new oral argument" whose core characteristic is an increasingly hot bench.[45] Empirical research into the new oral argument demonstrates how the advent of a hot bench has transformed both oral hearings and the nature of the judicial role in significant ways. As part of the new oral argument, advocates speak less while judges speak more,[46] female Justices speak less while male Justices speak more,[47] the Justices and the advocates (especially women) are interrupted more frequently than in the past,[48] and judges' questions more frequently advocate positions than seek information from the parties.[49]

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[38] Lee Epstein, Some *Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2035-40 (2016).

[39] Sullivan and Canty, *supra* note 7, at 1019, 1043.

[40] *Id.*

[41] Tonja Jacobi and Matthew Sag, *The New Oral Argument: Justices as Advocates,* 94 NOTRE DAME L. REV. 1, 68-9 (2019) (forthcoming). Available at SSRN: https://ssrn.com/abstract=3125357

[42] *Id.* at 1-3.

[43] *Id.* at 68-9.

[44] *Id.* at 79.

[45] Jacobi and Sag, *supra* note 41, at 7; Sullivan and Canty, *supra* note 7, at 1038.

[46] *Id.* at 68-9.

[47] *Id.* at 70.

[48] *Id.* at 73.

[49] *Id.* at 73, 78.

Furthermore, the proportion of questions that judges ask a party is a major factor that affects decision-outcomes; the party who is asked the most questions is least likely to win their case.[50] For that reason, Chief Justice Roberts remarked that "the secret to successful advocacy is simply to get the Court to ask your opponent more questions".[51]

III. JUSTIFICATIONS FOR ORAL ARGUMENT

A. Democratic justifications for oral argument

The pervasiveness of a hot bench in appellate adjudication raises crucial questions about the justifications for oral hearings and the role of appeal judges. Traditionally, two principal justifications have been advanced for oral argument: democratic justifications and functional justifications.[52] First, some contend that oral hearings can promote important democratic values such as transparency, participation, and accountability, all of which can instill faith in courts as public institutions.[53] According to that argument, oral hearings can further the appearance of justice and improve the public's confidence in the judiciary.[54] For instance, Lon Fuller and Kenneth Winston suggested that oral hearings are valuable because they demonstrate that parties are given their day in court and can shape outcomes.[55] Judith Resnik makes a similar argument. She explains that historically, public hearings were often "spectacles of public power" that were used to instill fear and "command obedience".[56] The advent of democratic government and constitutionalism altered that dynamic.[57] Those developments helped transform oral hearings into procedures where individuals openly demand that their rights are respected, judges recognize and protect people's interests, and courts check the state's power in a public setting.[58]

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[50] Lee Epstein, William Landes & Richard Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument* 39 J. LEG. STUD. 433, 456, 462, 466 (2010).

[51] John G. Roberts, *Oral Advocacy and the Re-Emergence of a Supreme Court Bar,* 30 J. SUP. CT. HIST. 68, (2005). Cited in: Epstein, *Id.*

[52] Martineau, *supra* note 16, at 11.

[53] *Id.*

[54] Wasby, *supra* note 5, at 68; WILLIAM M. RICHMAN AND WILLIAM L. REYNOLD, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 139 (2012).

[55] Lon Fuller and Kenneth Winston, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353, 364, 372, 383-4 (1978).

[56] Judith Resnick, *Courts, In and Out of Sight, Site and Cite,* 53 VILLANOVA L. REV. 771, 781 (2009).

[57] *Id.* at 786.

[58] *Id.* at 785.

One limitation to those scholars' positions, is that they allude to a bygone era of oral argument that existed prior to the rise of the hot bench in appellate adjudication.[59] A hot bench raises concerns about whether oral hearings advance or hinder certain democratic values. Empirical research demonstrates that appeal judges can conduct themselves more like advocates than adjudicators during oral argument.[60] They may dominate oral hearings, assert positions that are consistent with their ideological views, and answer questions posed by their colleagues.[61] Oral hearings may improve transparency, participation, and accountability in judicial decision-making.[62] But a hot bench also risks jeopardizing other democratic values, such as justice, fairness, participation, independence, political equality, and impartiality.[63]

Some scholars, such as Suzanne Ehrenberg, have a different view. She questions the extent to which oral hearings truly encourage judicial accountability.[64] She observes that the primacy of oral argument in English law is justified on that basis.[65] In her view, the claim that oral hearings promote accountability mistakes accountability in the decision-making process with accountability in the finality of decisions.[66] This leads Ehrenberg to conclude that "It is only when a judicial decision is fully reasoned and widely accessible to the public that the judiciary becomes truly accountable".[67] There are, however, two principal reasons why oral hearings promote judicial accountability despite the apparent legitimacy of judges' written decisions.

First, oral hearings promote a different form of judicial accountability even where judges' written decisions are fully reasoned and accessible to the public. One can imagine a situation where a judge's conduct during oral argument destroys any appearance of impartiality, fairness, or legitimacy of their written decision.[68] Yet in isolation, the publicly accessible written

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[59] ALAN PATERSON, FINAL JUDGMENT: THE LAST LAW LORDS AND THE SUPREME COURT 39 (2013).

[60] Jacobi and Sag, *supra* note 41, at 5.

[61] *Id.* at 7-17; Timothy R. Johnson and Ryan C. Black, *The Roberts Court and Oral Arguments: A First Decade Retrospective*, 54 WASH. U. J. L. & POL'Y 137, 141-8 (2017).

[62] Resnick, *supra* note 56, at 781.

[63] Tonja Jacobi and Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 U. VA. L. REV. 1379, 1483 (2017); JOHN RAWLS, A THEORY OF JUSTICE (REV'D ED.) 213-4 (2009).

[64] Ehrenberg, *supra* note 19, at 1195.

[65] *Id.*

[66] *Id.*

[67] Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1165 (2004).

[68] ELAINE CRAIG, PUTTING TRIALS ON TRIAL: SEXUAL ASSAULT AND THE FAILURE OF THE LEGAL PROFESSION 200 (2018).

decision may be fully reasoned and evince those qualities. The judge would be held accountable primarily through public scrutiny of (and complaints about) their conduct during the hearing and not through the strength of the reasoning contained in their written decision.[69] Much like how judicial recusal rules hold judges accountable for appearances of impropriety, oral hearings hold judges accountable for conduct that puts the legitimacy of their written decisions or judicial role into question.[70]

A second reason why oral hearings hold judges accountable is because of the trouble in assessing judicial candor and judges' true reasoning processes.[71] It is difficult to know whether judges' written decisions truly constitute an honest and sincere account of how the case was decided.[72] For that reason, stakeholders look beyond the substance and appearance of written decisions. They evaluate judges' questions and conduct during oral hearings to determine whether written reasons seem honest and transparent and whether judicial behavior demonstrates fairness and impartiality.[73] Both oral hearings and written decisions play a role in maximizing judges' accountability in different but connected ways.[74]

B. Functionalist justifications for oral argument

The second principal justification for oral argument is that it serves a functional purpose.[75] As Robert Martineau explains, judges use oral hearings to grasp the core issues of a case, clarify ambiguities contained in the written brief, and address new questions that might be necessary to resolve an appeal.[76] He also explains that some judges assimilate verbal information better than written information.[77] Myron Bright points out that oral arguments strengthen judges' confidence in the decision-making process, by allowing

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[69] *Id;* Scott Idleman, *Prudential Theory of Judicial Candor,* 73 TEX. L. REV. 1307, 1321 (1995).

[70] Adam Samaha, *Regulation for the Sake of Appearance,* 125 HARV. L. REV. 1563, 1563, 1576 (2011-2012);

[71] David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737-8 (1987).

[72] Richard Fallon, *A Theory of Judicial Candor*, 117 COLUMBIA L. REV. 2265, 2269, 2281-2 (2017).

[73] David A. Karp, *Why Justice Thomas Should Speak at Oral Argument*, 61 FLA. L. REV. 611, 626 (2009).

[74] Donald P. Lay, *A Proposal for Descretionary Review in Federal Courts of Appeals*, 34 S.W. L.J. 1151, 1154 (1980); Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 766 (2006); Kravitz, *supra* note 25, at 263-4.

[75] Martineau, *supra* note 16, at 13.

[76] *Id.*

[77] *Id.*

them to evaluate the strength of parties' arguments in open court.[78] Justice Stanley Mosk explains how oral argument counteracts cognitive bias, because the parties can influence judges' tentative views about a case – a position with which several former and current Supreme Court Justices agree.[79] Justice Mark Kravitz notes that verbal exchanges may be capable of conveying emotions and the gravity of a case's implications in ways that written decisions cannot.[80] Ryan Black, Timothy Johnson, and Justin Wedeking have demonstrated that appeal judges use oral argument to build coalitions despite their individual disagreements and competing ideologies, as they do not discuss tentative case outcomes prior to oral hearings.[81] David Cleveland and Steven Wisotsky describe how oral argument is capable of engaging decision-makers through the process of dialogue in ways that written reasons cannot.[82] Finally, Jay Tidmarsh contends that oral arguments can produce better law, by orienting judges towards more optimal outcomes and helping them avoid bad decisions.[83]

There are some important limitations to the functionalist argument. It generally assumes that advocates contribute constructively to oral hearings, clarify issues, and improve decision outcomes.[84] But this is not always the case.[85] Judges are candid about advocates' shortcomings during oral hearings: some are unprepared, avoid directly engaging with appellate judges' questions, address too many issues, or focus too much on the periphery.[86] The functionalist claim can overlook both the quality of information that advocates produce during oral hearings and the quality of advocates themselves.[87] Martineau suggests that in some cases, it would be

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[78] Bright, *supra* note 34, at 38.

[79] Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 27-8 (1999). BRIAN LAMB, SUSAN SWAIN & MARK FARKAS, THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 113, 139, and 203 (2011) [interviews with current and former Supreme Court Justices who explain that oral argument can change their tentative view on a case].

[80] Kravitz, *supra* note 25, at 267.

[81] RYAN BLACK, TIMOTHY JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 60 (2012).

[82] Cleveland and Wisotsky, *supra* note 18, at 123.

[83] Jay Tidmarsh, *The Future of Oral Arguments,* 48 LOY. U. CHI. L.J. 475, 479-80 (2016).

[84] Stephen L. Wasby, *The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges*, 65 JUDICATURE 340, 344-5 (1982).

[85] See e.g.: Nina Totenberg, *Chandler v. Miller: Double Indemnity* in Johnson and Goldman (eds.), A GOOD QUARREL: AMERICA'S TOP LEGAL REPORTERS SHARE STORIES FROM INSIDE THE SUPREME COURT 111-3 (2009).

[86] RUGGERO ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT, S. 18.12 and 18.13 (2003).

[87] Ehrenberg, *supra* note 67, at 1164.

better if parties could simply submit supplemental briefs that address judges' initial concerns instead of holding oral hearings.[88]

The functionalist claim also tends to assume that judges will use oral hearings to acquire information and produce better decisions.[89] But what about the reality of cold benches?[90] Judges might arrive at hearings unprepared, ask irrelevant questions, or allow advocates to recite their brief.[91] The functionalist argument also assumes that judges gather accurate information during oral argument. Some researchers have demonstrated that judges can base decision-outcomes on incorrect information contained in *amicus curiae* briefs.[92] It is plausible that flawed information presented in hearings adversely shapes decision-outcomes as well.[93]

One might also question the extent to which functionalism succeeds where judges use oral argument to advocate positions instead of gathering information.[94] For instance, in the recent *Janus* case, the issue before the Supreme Court was whether the mandatory payment of agency fees from non-consenting public sector employees violated the First Amendment.[95] In response to an affirmation by the Solicitor General of Illinois (the respondent) regarding the state's managerial interests with respect to unions, Justice Kennedy interrupted and asserted:

> JUSTICE KENNEDY: [The union] can be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion, against -- for teacher tenure, for higher wages, for massive government,

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[88] Martineau, *supra* note 16, at 29.

[89] Wasby, *supra* note 84, at 344-5.

[90] Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255, 267 (1975); Shirley M. Hufstedler, *The Appellate Process Inside Out*, 50 CAL. ST. B.J. 20, 23-4 (1975).

[91] Jason Vail, *Oral Argument's Big Challenge: Fielding Questions from the Court*, 1 J. APP. PRAC. & PROCESS 401, 407 (1999)

[92] Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find,* (PROPUBLICA: October 17, 2017); John Pfaff, *The Supreme Court Justices Need Fact Checkers,* N.Y TIMES, October 18, 2017.

[93] Matthew C. Stephenson, *Information Acquisition and Institutional Design,* 124 HARV. L. REV. 1422, 1480 (2011); Garrett Epps, *When the Supreme Court Doesn't Care About Facts,* THE ATLANTIC, February 28, 2018.

[94] Jacobi and Sag, *supra* note 41, at 7.

[95] *Janus v. American Federation of State, County, and Municipal Employees, Council 31,* No. 16-1466, 585 U.S. ___ (2018). Cited in Epps, *supra* note 93.

> for increasing bonded indebtedness, for increasing taxes? That's -- that's the interest the state has?[96]

Justice Kennedy later asked whether unions will exert less political influence if the respondents' lost the case.[97] When the respondent confirmed that Justice Kennedy's assertion was correct, Justice Kennedy responded: "Isn't that the end of this case?"[98] Needless to say, he voted against the respondents. The functionalist claim can overstate the virtues of traditional oral hearings while minimizing the vices of a hot bench and the drawbacks of the new oral argument.

Finally, oral argument's function is generally construed as an advocate-centric adversarial process where parties shape outcomes through their arguments.[99] That view tends to discount how judges use oral argument to influence their colleagues through questions posed to the advocates.[100] For instance, Sullivan and Canty point out that judges use advocates as intermediaries to advance their own views.[101] Johnson and Black observe that oral hearings at the Supreme Court have shifted from being a conversation between the advocates mediated by the Justices, to a conversation between the judges mediated by the advocates.[102]

Supreme Court Justices Kennedy, Scalia, and Ginsberg have also remarked on how oral argument serves as a collective conversation between appellate judges where advocates are playing an increasingly minor role.[103] More recently, Justice Kagan explained that "part of what oral argument is about is a little bit of the Justices talking to each other with some helpless person standing at the podium who you're talking through".[104] In a similar

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[96] *Janus v. American Federation of State, County, and Municipal Employees, Council 31,* No. 16-1466, 585 U.S. ___ (2018), transcript of oral argument, at 46. Cited in Epps, *supra* note 93.

[97] Transcript of oral argument, *id.* at 54. Cited in Epps, *supra* note 93.

[98] Transcript of oral argument, *id.* at 54. Cited in Epps, *supra* note 93.

[99] William H. Rehnquist, *Oral Advocacy*, 27 S. TEX. L. REV. 289, 300 (1986); Mosk, *supra* note 83, at 27.

[100] Jacobi and Schweers, *supra* note 63 at 1396. James Phillips and Edward Carter, *Source of Information or 'Dog and Pony Show'? Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963-1965 & 2004-2009*, 50 SANTA CLARA L. REV. 101, 115 (2010). Cited in Philips and Carter, *id.*

[101] Sullivan and Canty, *supra* note 7, at 1012.

[102] Johnson and Black, *supra* note 61, at 140. Johnson and Black's actual quote is: "Part of what has led the oral argument conversation from a conversation between Justices and attorneys to a conversation between the Justices themselves is Roberts' leadership style on the bench" (*id*).

[103] Jacobi and Schweers, *supra* note 63, at 1396.

[104] Adam Liptak, *A Most Inquisitive Court? No Argument There,* NEW YORK TIMES, October 7, 2013. Also cited in Johnson and Black, *supra* note 61, at 140.

vein, Justice Roberts stated in a 2008 speech at Columbia Law School that "Quite often the judges are debating among themselves and just using the lawyers as a backboard".[105] The functionalist argument can therefore fail to capture how oral hearings have become increasingly judge-centric and how Justices may shape outcomes through their interventions during oral hearings. These emerging realities in turn generate broader questions about the democratic justifications for oral argument and judges' role in a democracy.

Some scholars and judges are more critical of the functionalist purpose of oral hearings for other reasons. Justice Aldisert contends that written briefs are far more persuasive than oral argument.[106] In his view, it is "self-evident" that ninety-five percent of cases are decided by written briefs rather than oral argument.[107] Interviews with Supreme Court Justices,[108] anecdotal evidence,[109] and the empirical research described above in Section II all contradict his claim.[110]

Martineau asserts that written briefs are better at articulating complex ideas compared to oral arguments.[111] In his words: "It simply flies in the face of common sense that the transitory, spontaneous, and soon forgotten oral statement can communicate an idea better than a carefully prepared brief that can be studied as long as necessary".[112] Like the shortfall to Justice Aldisert's arguments, Martineau's position was advanced before the advent of empirical studies analyzing the information that judges *produce* during oral hearings.[113] Understandably, he does not address how empirical research into oral hearings can promote judicial accountability in ways that written briefs

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[105] Adam Liptak, *Are Oral Arguments Worth Arguing About?* NEW YORK TIMES, May 5, 2012.

[106] Ruggero J. 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, note 25 in the text (1982).

[107] *Id.* at 456.

[108] Lamb, Swain & Farkas, *supra* note 79, at 113, 139, and 203.

[109] Myron H. Bright and Richard S. Arnold, *Oral Argument? It May Be Crucial!* 70 AM. BAR. ASSN. J. 68, 68-70 (1984).

[110] Timothy Johnson, James Spriggs II & Paul Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?* 85 WASH. U. L. REV. 457, 524 (2007); Timothy Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?* 29 WASH. U. J. L. & POL'Y 241, 243-5 (2009); Andrea McAtee and Kevin McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?* 41 L. & SOC'Y REV. 259, 274-5 (2007).

[111] Martineau, *supra* note 16, at 11-20, 26. See the critique of Martineau's view in: Bright, *supra* note 34, at 43-4.

[112] Martineau, *supra* note 16, at 15.

[113] *Supra* note 19; LAWRENCE WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT 74-7; Phillips and Carter, *supra* note 100, at 191-4.

cannot.[114] As the new oral argument continues to evolve, so too does the new judicial accountability.

IV. DEMOCRATIC VIRTUES OF A HOT BENCH

There are, therefore, conflicting views about the democratic and functionalist justifications for oral argument. The new oral argument, the rise of the hot bench, and the dawn of empirical studies into judicial behavior raise new questions about whether oral argument truly furthers democratic and functionalist values. Those questions can only be answered by first exploring the core democratic and functionalist virtues of active oral hearings: the capacity to promote transparency, judicial accountability, dialogue, and judicial minimalism.

A. Transparency

Transparency is generally associated with democracy because the public can evaluate, assess, and criticize political institutions who impact their lives.[115] Greater transparency may also improve the public's understanding of decision-making, reduce arbitrariness, and facilitate the identification of improper motives.[116] Historically, tyrannical state practices – such as those associated with the Star Chamber in Sixteenth Century England – involved a notorious lack of transparency exemplified by *in camera* hearings.[117] Transparency therefore gives outsiders better insight into the conduct, motivations, and practices of institutional insiders.[118] Active oral hearings promote openness and transparency in the following ways.

First, the more judges speak, the more unfiltered and candid insight they provide into their own thought processes, constitutional vision, grasp of the case at hand, knowledge of precedent, and understanding of their role in a democracy.[119] Because so many aspects of judges' decisional processes are

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[114] Cleveland and Wisotsky, *supra* note 18, at 138-9.

[115] Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2008-2009); Alfred C. Jr. Aman, *Globalization, Democracy, and the Need for a New Administrative Law,* 49 UCLA L. REV. 1687, 1708 (2002).

[116] Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State,* 78 NYU L. Rev. 461, 506 (2003); ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 183-4 (2004).

[117] DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY 131 (2014); FREDERIC WILLIAM MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 263 (1904).

[118] Ann Florini, *Introduction: The Battle Over Transparency, in* THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 5 (Ann Florini ed., 2007).

[119] David Strauss, *Bush v. Gore: What Were They Thinking?* 68 U. CHI. L. REV. 737, 737 (2001); Neil D. McFeeley and Richard Ault, *Supreme Court Oral Argument: An Exploratory Analysis,* 20 JURIMETRICS 52, 54 (1979).

shrouded in secrecy, their conduct and questions during oral argument are crucial to the appearance of justice and public confidence in courts.[120] Appellate judges deliberate in private to insulate themselves from external influence and pressure.[121] Their memoranda, draft decisions, and preliminary views about cases are confidential.[122] Law clerks may have a sense of their judge's evolving view of a case, but the clerks are sworn to secrecy.[123] Though judges' written decisions are public, they render decisions collectively and their drafts are refined over time, both of which reduce transparency to some degree.[124]

Second, oral hearings provide transparency into appeal judges' thought processes that other accountability mechanisms, such as confirmation hearings, simply cannot.[125] If judges communicated their actual views during the confirmation process, it may jeopardize their appointment and raise concerns of bias in future cases.[126] Justice Richard Posner puts it more bluntly: "Judicial confirmation hearings have become a farce in which a display of candor would be suicide".[127]

Third, the greater transparency afforded by a hot bench is important because many parts of the adjudication process are delegated to court staff and law clerks.[128] Staff attorneys screen appeal briefs, comment on their substantive merits, and draft memorandum opinions.[129] Supreme Court Justices used to each have one law clerk.[130] Now, the Justices have four law clerks each and many law clerks draft decisions.[131] As Artemus Ward and David Weiden observe, Supreme Court Justices sometimes accept law clerks' draft opinions without any changes, and the decision is then released under

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[120] Irving Kaufman, *The Essence of Judicial Independence*, 80 COLUMBIA L. REV. 671, 696 (1980).

[121] Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1100 (2004).

[122] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making,* 151 U. PA. L. REV. 1639, 1643 (2003).

[123] ARTEMUS WARD AND DAVID WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 11 (2006).

[124] Shapiro, *supra* note 71, at 734.

[125] Richard A. Posner, *Response, Some Realism about Judges: A Reply to Edwards and Livermore,* 59 DUKE L.J. 1177, 1181 (2010).

[126] *Id.*

[127] *Id.*

[128] Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937. 941 (1980); Judith Resnik, *Di using Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2829 (2015).

[129] Chad Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 770 (2006).

[130] Ward and Weiden, *supra* note 123, at 146.

[131] *Id.* at 212-26.

the Justice's name.[132] In many contexts, the extent of staff attorneys and law clerks' involvement in the drafting process varies per judge and is not revealed to the public.[133]

Fourth, the transparency inherent to a hot bench allows stakeholders to assess whether active judges are competent, because judges provide a public account of their understanding of legal norms and the case at hand.[134] Unlike silent judges, active judges engage in a spontaneous exchange of ideas where they put their thinking, experience, and engagement on display for all to evaluate.[135] The way that judges speak during oral argument also allows the public to evaluate their perceived impartiality, fairness, and independence – all of which affect faith in courts as public institutions.[136]

Lastly, a hot bench is also vital because a range of constraints limit transparency in other parts of the adjudicative process. As the Supreme Court recognized in *United States v. Nixon,* deliberative secrecy is integral to judicial independence and the separation of powers.[137] The private nature of judicial deliberations allows judges to candidly explore different avenues to resolve disputes immune from external pressure and scrutiny from the other branches of government.[138] Deliberative secrecy also fosters candid debate, because judges' discussions are protected from public scrutiny and external judgment that can influence decision-making.[139] Similar rationales justify the confidentiality afforded to jury deliberations.[140] A hot bench therefore grants greater transparency into judges' reasoning processes without sacrificing the more confidential aspects of adjudication that promote judicial independence.

The fact that a hot bench provides greater transparency into judges' thought processes, however, does not mean that transparency should be promoted more than other democratic values. One can imagine a situation where a hot bench completely monopolizes a hearing to the point that the parties cannot make their case. Though such a hearing would provide greater transparency into judicial reasoning, it would undermine other equally important democratic values, such as fairness and participation in the

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[132] *Id.* at 225-6.

[133] *Id*. at 201.

[134] Chad Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 766 (2006).

[135] Karp, *supra* note 73, at 625.

[136] Hellman, *supra* note 15, at 653.

[137] *United States v. Nixon*, 418 US 683, 708 (1974).

[138] *Id;* Scott C. Idleman, *Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1373 (1995).

[139] Idleman, *supra* note 138, at 1373.

[140] Allison Markovitz, *Jury Secrecy During Deliberations,* 110 YALE L.J. 1493, 1500 (2001).

decision-making process.[141] A hot bench can therefore sacrifice some democratic values in the pursuit of others.

B. The new accountability

Second, a hot bench also has the capacity to promote appeal judges' accountability.[142] The concept of accountability is crucial in a democracy.[143] Because members of the different branches of government exercise power over the polity, democracy requires oversight and control over their decisions, conduct, and reasons for action.[144] Accountability measures therefore aim to provide a check on the different branches of government in order to prevent abuses, impropriety, and actions that are contrary to the public interest and the common good.[145]

Appeal judges exercise a unique form of power in a democracy. They perform more than an error-correcting function – they create and develop the law.[146] Their rulings generate profound impacts on the most politically divisive matters that shape everyday society: reproductive rights,[147] affirmative action policies,[148] gun rights,[149] and even presidential nominations, to name a few.[150] Appeal courts' power also stems from their countermajoritarian power and ability to overrule the majority-will of democratically elected representatives of the people.[151] Appellate judges protect vulnerable minorities against the tyranny of the majority and act as a

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[141] Fuller and Winston, *supra* note 55, at 364.

[142] Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in Federal Courts of Appeals,* 51 OHIO ST. L.J. 1386, 1389 (1990).

[143] LEIF LEWIN, DEMOCRATIC ACCOUNTABILITY: WHY CHOICE IN POLITICS IS BOTH POSSIBLE AND NECESSARY 3-4 (2007).

[144] *Id.*

[145] Adam Przeworski, *Minimalist Conception of Democracy: A Defense, in* DEMOCRACY'S VALUES 36 (Ian Shapiro and Casiano Hacker-Cordón, eds., 1999)

[146] Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 712 (2001).

[147] *Roe v. Wade,* 410 U.S. 113 (1973). *See also: Harris v. McRae*, 448 US 297 (1980) [denying a positive constitutional right to state-funded abortions].

[148] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. University of Texas*, 579 U.S. ____ (2016).

[149] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[150] *Bush v. Gore*, 531 U.S. 98 (2000).

[151] ALEXANDER BICKEL, LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 NYU L. REV. 333, 335 (1998).

bulwark against arbitrary decision-making.[152] Appeal judges also benefit from a unique form of independence. They are nominated and cannot be held accountable through the electoral process.[153] They can only be removed from office through impeachment for severe impropriety or criminal conviction.[154] Their decisional independence is safeguarded by security of tenure, salary, and confidential deliberations, while their institutional independence is protected by their freedom in agenda-setting and budgetary allocation.[155] Appeal judges must be held democratically accountable while holding the other branches of government accountable.[156]

Scholars observe that judicial accountability is not limited to formal oversight measures, such as judicial codes of conduct,[157] judicial councils that investigate and sanction unethical behavior,[158] financial disclosure statutes,[159] statutes restricting judges' out-of-court activities and remuneration,[160] and the duty to provide publicly available reasoned decisions.[161] As Gavison argues, accountability also extends to informal mechanisms that shape judicial conduct, the judiciary's status, and judges' decision-making processes.[162] Informal accountability measures include public scrutiny and criticism of courts by stakeholders – measures that can affect public confidence in the judiciary and negatively impact its perceived legitimacy.[163] Public confidence in courts is crucial, because judges cannot impose their will on others through decree – judges require support from the public and the other branches of government to ensure compliance with

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[152] Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 NYU L. REV. 461, 471 (2003); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 76-7 (1989).

[153] Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 592 (2004-2005).

[154] Geoffrey Miller, *Bad Judges*, 83 TEX. L. REV. 431, 458-9 (2004).

[155] Charles Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts,* 78 INDIANA L.J. 153, 159-61 (2003).

[156] Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1621 (1988).

[157] Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric,* 56 CASE W. RES. L. REV. 911, 921 (2006).

[158] Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism,* 26 GEO. J. LEGAL ETHICS 443, 452 (2013).

[159] ETHICS IN GOVERNMENT ACT OF 1978, 5 U.S.C., app 4. Cited in Frost, *id.* at 451.

[160] ETHICS REFORM ACT OF 1989*,* 5 U.S.C., app. 7. Cited in Frost, *id.* at 451.

[161] David Dyzenhaus and Michael Taggart, *Reasoned Decisions and Legal Theory, in* COMMON LAW THEORY, 148-9 (Douglas Edlin, ed., 2007).

[162] Gavison, *supra* note 156, at 1619-20. Frances Kahn Zemans*, The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 644-5 (1999).

[163] Geyh, *supra* note 155, at 164.

judicial decisions.[164] As Charles Geyh observes, courts are also held accountable through the court of public opinion.[165]

A hot bench furthers accountability by exposing negative or questionable judicial conduct and incentivizing judges to change it.[166] Jacobi and Sag's research analyzed the evolution of Supreme Court Justices' interactions during oral argument.[167] They noted a shift in the type of dialogue since the Republican Revolution: judges increasingly make comments or statements that stake out their positions as opposed to asking questions with the goal of gathering information.[168] Jacobi and Sag's research shows that judges who are opposed to a party's position is more likely to ask them harder questions.[169] Judges also generally ask more questions to parties whom they disfavor and will eventually vote against.[170] Studies have also shown that judges tend to interrupt colleagues when they are ideologically opposed to their colleagues' views.[171] Lastly, Jacobi and Schweer's research demonstrates the following trends: (1) conservative Justices tend to interrupt liberal Justices more often than the reverse,[172] (2) male Justices tend to interrupt female Justices more often than the reverse,[173] and (3) conservative male Justices tend to interrupt liberal female Justices more often than the reverse.[174] Though individually problematic, the aggregate effect of these changes raise fundamental questions about the nature of Supreme Court judges in a democracy and whether oral argument furthers democratic values.[175] For instance, gendered interruptions undermine political equality.[176] Fairness and impartiality are put into question when judges only interrupt and grill parties with whom they are ideologically opposed.[177] The democratic value of participation is hindered when judges monopolize oral hearings.[178]

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[164] *Planned Parenthood of Southeastern Pa. v. Casey,* 505 US 833, 865 (1992). Kevin McGuire and James Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,* 66 J. POL. 1018, 1019 (2004).

[165] Geyh, *supra* note 155, at 164.

[166] Gavison, *supra* note 156 at 1619-20.

[167] Jacobi and Sag, *supra* note 41, at 43.

[168] *Id.* at 43-4.

[169] *Id.* at 10-1.

[170] *Id;* Philips and Carter, *supra* note 100, at 118-9.

[171] Jacobi and Sag, *supra* note 41, at 43-4.

[172] Jacobi and Schweers, *supra* note 63, at 1472.

[173] *Id.* at 1458.

[174] *Id.* at 1478.

[175] Jacobi and Sag, *supra* note 41, at 4-5.

[176] Jacobi and Schweers, *supra* note 63, at 1483.

[177] *Id.*

[178] Fuller and Winston, *supra* note 55, at 364, 372, 383-4.

The study and broad dissemination of empirical research into oral argument can hold judges accountable for their conduct in two principal ways. First, empirical studies reveal anti-democratic tendencies or biases of which judges themselves may be unaware, allow for public scrutiny of those tendencies, and ultimately, require judges to provide a public account of their behavior. Different stakeholders –academics, lawyers, the media, and even Supreme Court Justices – have drawn attention to these shifts in the dynamics of oral argument.[179] Studies demonstrating judicial monopolization of oral hearings and the rise of gendered interruptions have garnered substantial media attention and public criticism of the new oral argument.[180] During recent public appearances, Supreme Court Justices have been asked to explain how the Court is addressing gendered interruptions that were revealed by Jacobi and Schweer's empirical research of oral arguments.[181] Associate Supreme Court Justices Sotomayor and Ginsburg have also acknowledged that they are aware of that research.[182] Similarly, in an interview during the 2018 Federal Judicial Conference, Justice Roberts acknowledged that he read the results of those studies and explained that he is attempting to address that problem.[183]

Second, recent empirical research allows stakeholders to evaluate whether judges are actually responding to the democratic problems revealed by studies of oral argument. For instance, Justice Sotomayor remarked that Jacobi and Sag's research has led male Justices to apologize to their female colleagues and has generated a positive change in court dynamics.[184] Justice Roberts, for his part, explained that he is attempting to act as a better referee, reduce interruptions, and ensure that advocates answer questions asked by Justices who were interrupted.[185] It remains to be seen whether those measures will prove successful in counteracting judicial behavior that goes against certain values that are important to democracies. Scholars, however, are watching. Jacobi and Adam Feldman's ongoing empirical research

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[179] *See e.g.:* Adam Liptak, *Nice argument, counselor, but let's hear mine,* NEW YORK TIMES, April 4, 2011; Tonja Jacobi and Matthew Sag, *Supreme court Justices are speaking up more because they're not afraid to be partisan,* WASHINGTON POST, April 6, 2018; Tonja Jacobi and Dylan Schweers, Female Supreme Court Justices are interrupted more than their male colleagues, HARVARD BUSINESS REVIEW, April 11, 2017.

[180] Adam Liptak, *Why Gorsuch May Not Be So Genteel on the Bench,* NEW YORK TIMES, April 17, 2017.

[181] *Supreme Court Chief Justice John Roberts on 2017-18 Term,* Federal Judicial Conference of the Fourth Circuit, C-SPAN, June 29, 2018.

[182] Adam Hamm, *Sotomayor promotes new law clerk hiring plan at ACS convention,* SCOTUS BLOG, June 8, 2018; Adam Liptak, *On tour with notorious RBG,* NEW YORK TIMES, Feb 8, 2018.

[183] C-SPAN, *supra* note 181.

[184] Hamm, *supra* note 182.

[185] C-SPAN, *supra* note 181.

projects examine whether judges are effectively addressing negative tendencies that arise during oral argument.[186] As part of the new judicial accountability, it is plausible that judges will increasingly be required to provide public accounts of their undesirable conduct and their efforts to correct it.

C. Dialogue

A hot bench also has the capacity to promote dialogue between the different branches of government, allowing them to collectively develop the law and interpret the scope of the constitution. Many scholars have drawn a connection between dialogic conceptions of judicial review and democracy.[187] "Dialogue theory" (or dialogic theory) provides a metaphor that describes the institutional dynamic between the distinct branches of government in the process of judicial and constitutional review.[188] It alludes to how the branches of government develop the law through interactive processes that aim to respect the separation of powers despite the countermajoritarian difficulty.[189] Within the past half-century, dialogue theory – and its different conceptions – have gained popularity within the United States and abroad.[190] As described more below, however, dialogue theorists generally tend to overlook the role of oral argument in promoting certain democratic values and developing the law.

i. Partnership conceptions of dialogue

Scholars such as Kent Roach, Peter Hogg, and Allison Bushell have advanced a "partnership" theory of dialogue premised on the rejection of both

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[186] See e.g.: Adam Feldman, *Empirical SCOTUS: A little change will do you good — oral argument interruptions* OT2017, Scotus Blog, August 1, 2018; Tonja Jacobi, *Gendered interruptions at the Court: Looking forward and backward,* SCOTUS OA, August 2, 2018.

[187] Peter Hogg and Allison Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All),* 35 OSGOODE HALL L.J 75, 80-1 (1997); Barak, supra note 12, at 163-5; KENT ROACH, THE SUPREME COURT ON TRIAL 239-50 (2001); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 37-8 (2003-2004); JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 93, 96-7 (1984); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 4-7, 255-9 (1988).

[188] Yasmine Dawood, *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review,* 62 U. TORONTO L.J. 499*,* 550-1 (2012).

[189] Barry Friedman*, Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655-8 (1993).

[190] Christine Bateup, *The Dialogic Promise - Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 Brook. L. Rev. 1109, 1109-11 (2006).

judicial and legislative supremacy.[191] According to that theory, courts retain significant countermajoritarian power, yet the legislature can "limit, modify, or override" certain constitutional rights or judicial interpretations of those rights.[192] Certain provisions of Canada's constitutionally entrenched bill of rights – the *Canadian Charter of Rights and Freedoms* (hereafter, the *Canadian Charter*) – are said to promote partnership dialogue between the three branches of government.[193] Section 33 of the *Canadian Charter* provides the renowned "Notwithstanding Clause", where the legislator can enact a statute that expressly overrides or limits the normal application of certain constitutional rights or courts' interpretation of those rights for a five year period.[194] Dialogue also takes place where courts provide delayed declarations of constitutional invalidity that suspend the law's application for a period of time, allowing lawmakers time to fashion reactive legislation that observes the *Charter*'s requirements.[195]

The Supreme Court of Canada has expressly endorsed the partnership conception of dialogue as a core aspect of the country's constitutional structure and as a viable account of the interaction between the branches of government.[196] In *Vriend v. Alberta,* the Supreme Court of Canada remarked that democracy necessarily extends beyond democratically elected popular will.[197] The Court ruled that dialogue allows different branches of government to hold one another accountable and protect democratic values that are placed at risk in the majoritarian process.[198] As the majority of the Court explained, dialogue promotes democracy by ensuring that lawmakers respect constitutional rights and the underlying democratic values that are

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[191] Hogg and Bushell, *supra* note 187, at 73-83; Kent Roach, *Dialogic Judicial Review and its Critics,* 23 S.C.L.R. (2D) 49, 555 (2004). The term "partnership theory" is used by Bateup, *supra* note 190, at 1168-72.

[192] Peter Hogg, Allison Bushell Thornton & Wade Wright, *Charter Dialogue Revisited - or Much Ado about Metaphors*, 45 OSGOODE HALL L.J. 1, 2-4 (2007)

[193] Lorraine Weinrib, *Learning to Live with the Override,* 35 MCGILL L.J. 541, 564-5 (1990).

[194] Kent Roach, *Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures*, 80 CAN. BAR REV. 481, 483 (2001). Section 33 of the *Canadian Charter* reads, "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter".

[195] Kent Roach, *Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity*, 35 U. BRIT. COLUM. L. REV. 211, 212 (2002).

[196] *Vriend v. Alberta,* [1998] 1 S.C.R. 493, 565-7; *R. v. Mills*, [1999] 3 S.C.R. 668, 711.

[197] *Vriend, supra* note 197, at 565

[198] *Vriend, supra* note 196 at 565-7. Citing: *R. v. Oakes*, [1986] 1 S.C.R. 103, 136.

tied to those rights: human dignity, political equality, respect for individuals and groups, and public confidence in institutions.[199]

Some, such as Guido Calabresi and Michael Perry have suggested that judicial supremacy and the countermajoritarian difficulty could be mitigated if the U.S. Constitution contained something similar to the *Canadian Charter*'s Notwithstanding Clause.[200] Without such an amendment though, scholars have argued that a strong application of the partnership theory of dialogue is less plausible in American law for two reasons.[201] First, instead of rejecting both legislative and judicial supremacy, American law has expressly recognized judicial supremacy as far back as *Marbury v. Madison* and in subsequent cases.[202] Second, the U.S. Constitution lacks a constitutionally entrenched override clause.[203] The closest thing that Congress has to an override clause is the power to restrict the jurisdiction of the federal courts.[204] Though Congress can restrict that jurisdiction, it cannot restrict the scope of constitutionally entrenched rights or judicial interpretations of those rights.[205]

ii. Deliberative conceptions of dialogue

Others advance a deliberative conception of dialogic theory. According to "deliberative" dialogic theories, judicial supremacy does not undermine a meaningful dialogue between the three branches of government and the public at large.[206] Barry Friedman argues that the focus on judicial

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[199] *R. v. Oakes, supra* note 198, at 136.

[200] Guido Calabresi, Foreword*, Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), The Supreme Court 1990 Term,* 105 HARV. L. REV. 80, 124-5 (1991); Michael J. Perry*, Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 156, 159 (1993). Both sources cited in: Kent Roach, *Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 543 (2005).

[201] Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators,* 23 S.C.L.R. (2d) 7, ¶73-6 (2004).

[202] *Id*. at ¶73-6; *Marbury v. Madison,* 5 US 137 (1803); Waldron cites the *City of Boerne v. Flores*, 521 U.S. 507 (1997). As Kennedy J. explained in *Flores, id.* at 519*: "*Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'"

[203] Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty,* 94 MICH. L. REV. 245, 285 (1995).

[204] *Id.*

[205] *Id;* Waldron, *supra* note 201, at ¶73-6.

[206] Friedman, *supra* note 189, at 585.

supremacy obscures how the enforcement of court decisions requires public support and cooperation from the legislative and executive branches.[207] Even if the judiciary is supreme, dialogue is both necessary and inevitable to ensure that judicial decisions are enforced, respected, and legitimized.[208] Neal Devins and Louis Fisher share that view, noting that courts lack the power to secure obedience through the power of the purse and command of the military.[209] Because judicial decisions are often politically controversial, courts are required to adjudicate in a fashion that minimizes the risk of political and societal instability.[210] For this reason, scholars and courts have observed that the judiciary must secure obedience to its decisions through reason and explanation, not through fiat or decree.[211]

The deliberative conception of dialogue theory aims to promote democracy through the judiciary's communication, engagement, and involvement with a broad range of stakeholders with shared and conflicting interests.[212] To paraphrase Friedman's dialogic account, the deliberative process looks something like this.[213] First, some form of governmental action – usually the enactment of a law or some administrative agency's decision – impacts one or many individuals' rights and interests.[214] Those individuals then challenge the law or the decision through judicial or constitutional review.[215] The parties to the dispute advance their adversarial understanding of the law, the constitution, the scope of certain rights, and the limit of state power.[216]

As the dispute winds its way up the court system, different actors become involved in the judicial process.[217] Civil society groups, experts, and *amicus curiae* contribute their knowledge about how the decision risks

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[207] *Id.* at 671-4, 680.

[208] *Id.* at 680.

[209] NEAL DEVINS AND LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 231-2 (2015).

[210] *Id.*

[211] Henry M. Hart, Jr., *The Supreme Court, 1958 Term-Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 99 (1959). Cited in: Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 970 (2008); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833, 865 (1992): "As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands".

[212] Friedman, *supra* note 189, at 585.

[213] *Id.* at 655-8. The description detailed in footnotes 213 to 226 and the accompanying text paraphrase and summarize Friedman's account.

[214] *Id.* at 655.

[215] *Id.*

[216] *Id.* at. 656.

[217] *Id.*

impacting a broad range of interests.[218] The media becomes involved and explains the stakes of the case to the general public.[219] Individuals debate the potential impact of the court's decision and what it means for society at townhall meetings, around the nation's watercoolers, over dinner, and on social media.[220] Because courts are attentive to public opinion, they too are concerned with the scope of their decisions and the need for input from diverse stakeholders.[221]

The dialogic process intensifies once the Court renders its decision.[222] At that point, the societal, institutional, and political responses to the Court's ruling are put into motion.[223] Some of those responses aim to clarify, limit, or defy the court's holding.[224] This leads to new legal disputes which, down the road, require renewed judicial intervention.[225] Over time, the deliberative democratic process repeats itself over and over again.[226]

Deliberative dialogic theory therefore captures how dialogue is not merely a collaborative institutional interaction between representatives of the different branches of government.[227] Allison Young argues that individuals and groups become involved within the broader conversation between courts and lawmakers in a manner similar to what Friedman describes.[228] By communicating interests and concerns that risk being overlooked in the majoritarian process, individuals and groups exert pressure on the different branches of government to take minority interests into account when making decisions.[229] In Young's view, that process shapes institutional behavior, as public institutions aim to anticipate and avoid negative reactions from the other branches of government and society at large.[230]

iii. Oral argument and dialogue theory

Though there are exceptions, both partnership and deliberative dialogue theorists tend to overlook the role of oral hearings in the dialogic process. That oversight is natural for some partnership theorists who are

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[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id;* Richard Fallon, *Legitimacy and the Constitution,* 118 HARV. L. REV. 1833, 1832-3 (2005).
[222] Friedman, *supra* note 189, at 657.
[223] *Id.*
[224] *Id.*
[225] *Id.* at 657-8.
[226] *Id.*
[227] ALISON YOUNG, DIALOGUE AND THE CONSTITUTION 152 (2017).
[228] *Id.* at 143.
[229] *Id.*
[230] *Id.*

primarily concerned with the interaction between courts and legislatures, responses to one another's decisions, and the law's incremental development as a result of inter-institutional dialogue.[231] The *Canadian Charter's* Notwithstanding Clause and delayed declarations of invalidity are both macro-level institutional processes.

Deliberative dialogue theorists, on the other hand, are generally concerned with the diffuse involvement and input of stakeholders with different interests throughout the adjudicative process.[232] Yet they do not generally consider how oral argument involves an important degree of dialogue and democratic deliberation that cannot take place in other parts of the adjudicative process. Kent Roach explains that a key aspect of constitutional dialogue occurs during hearings.[233] As a form of active constitutional dialogue, a hot bench can promote certain democratic virtues that cold benches generally cannot.

First, active oral hearings allow judges to publicly demonstrate recognition and respect for the core values that partnership dialogic theories recognize as fundamental to a democracy.[234] For instance, as Fuller and Winston argued, active oral hearings can foster respect for persons, human dignity, and trust in courts as institutions, because public deliberation shows that courts take individuals' interests seriously and that parties can shape decision-outcomes.[235]

Active oral arguments allow judges to publicly demonstrate that they are taking into account minority interests that risk being overlooked in the majoritarian legislative process. For instance, during the oral argument in *Obergefell v. Hodges* – where the Supreme Court recognized the right to same-sex marriage – the respondents on behalf of the State of Michigan argued that lawmakers should decide the definition of marriage instead of courts.[236] At that hearing, counsel for the respondents contended that there were serious consequences to delinking the connection between procreation and marriage and extending its scope to same-sex couples.[237] In response to

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[231] Hogg and Bushell, *supra* note 187, at 79; Hogg, Bushell & Wright, *supra* note 192, at 4-5: Barry Friedman, *Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 49, 51-4 (1990-1991) [describing the institutional dialogue between courts and legislatures in shaping the scope of federal courts' jurisdiction]; Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000). Note that Lawrence Friedman also explores the role of informal dialogue between citizens within a constitutional order (*id.* at 116).

[232] Friedman, *supra* note 189, at 655-8.

[233] Roach, *supra* note 195, at 240.

[234] *Vriend v. Alberta,* [1998] 1 S.C.R. 493, 565-7.

[235] Fuller and Winston, *supra* note 55, at 364, 372, 383-4 (1978).

[236] *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), transcript of oral argument, at 41 (April 28, 2015).

[237] *Id.* at 43-9.

a statement by the respondent's advocate about the importance of procreation to marriage, Justice Kennedy interjected:

> JUSTICE KENNEDY: But that -- that assumes that same--sex couples could not have the more noble purpose, and that's the whole point. Same-sex couples say, of course, we understand the nobility and the sacredness of the marriage. We know we can't procreate, but we want the other attributes of it in order to show that we, too, have a dignity that can be fulfilled.[238]

During the oral argument in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* the Justices also publicly demonstrated that they were taking minority interests into account.[239] In that case, Colorado's Civil Rights Commission ruled that a cake-maker discriminated against a same-sex couple by refusing to make them a custom wedding cake.[240] The cake-maker argued that being required to produce the cake violated his right to free speech and the Free Exercise Clause, because it constituted a form of compelled speech that went against his religious beliefs.[241] During oral argument before the Supreme Court, the Justices were visibly concerned about the implications of recognizing the creation of a cake as a form of constitutionally protected speech.[242] The Justices voiced their concerns that doing so might allow individuals to refuse to serve minority groups on the grounds that it amounted to compelled speech or infringed the Free Exercise Clause.[243] During the hearing, Justice Breyer highlighted the potential impact of such recognition on marginalized individuals and groups, stating:

> JUSTICE BREYER: All right. Now, the reason we're asking these questions is because obviously we would want some kind of distinction that will not undermine every civil rights law from the -- from -- from the year two -- including the African Americans, including the Hispanic Americans, including everybody who has been discriminated against in very basic things of life, food, design of furniture, homes, and buildings.[244]

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[238] *Id.* at 48-9.

[239] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission 138* S. Ct. 1719 (2018). [*Masterpiece Cakeshop* decision].

[240] *Id.* at 1722-4.

[241] *Id.* at 1726.

[242] *Masterpiece Cakeshop,* transcript of oral argument, at 11-3.

[243] *Id.* at 18-9.

[244] *Id.*

The second way that a hot bench can promote certain democratic values through dialogue is by publicly engaging with opposing viewpoints about how statutes and the constitution should be interpreted. During oral hearings, judges take part in a dialogue with advocates representing the executive or legislative branches. Appellate judges inquire about the scope of each branch's power and seek input about whether courts should defer to their will.[245] Such interactions can further democracy for several reasons.

For one, judges can demonstrate fidelity to the separation of powers, recognize the role and expertise of the other branches of government, and show that they strive to exercise their counter-majoritarian power judiciously.[246] Judges take part in democratic deliberation at oral argument, by stating their understanding of precedent, the constitution, and their own power, while allowing advocates representing the other branches of government to challenge or refute those conceptions.[247]

During oral argument, appellate judges ask representatives of the different branches of government to provide an account of the legitimate scope of their powers or the extent of their constitutional duties. In *Citizens United v. Federal Exchange Commission,* Justice Alito asked counsel representing the Commission about how far the Government could go in limiting speech and inquired:

> JUSTICE ALITO: Do you think the Constitution required Congress to draw the line where it did, limiting this to broadcast and cable and so forth? What's your answer to Mr. Olson's point that there isn't any constitutional difference between the distribution of this movie on video demand and providing access on the Internet, providing

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[245] See e.g.: *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), transcript of oral argument, at 4-5 (April 25, 2015) [Justice Ginsburg: "What do you do with the *Windsor* case where the court stressed the Federal government's historic deference to States when it comes to matters of domestic relations"?]; *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), transcript of oral argument, at 56-7 [Justice Kennedy: "And your argument is that courts have the – the duty to review whether or not there is such a national exigency; that's for the courts to do, not the President?"]

[246] Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters,* 112 COLUMBIA L. REV. 665, p. 691 (2012).

[247] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), transcript of oral argument (re-argument), at 65 [Justice Scalia: "What happened to the overbreadth doctrine? I mean, I thought our doctrine in the Fourth Amendment is if you write it too broadly, we are not going to pare it back to the point where it's constitutional. If it's overbroad, it's invalid. What happened to that?" General Kagan: "I don't think that it would be substantially overbroad, Justice Scalia, if I tell you that the FEC has never applied this statute to a book"].

> DVDs, either through a commercial service or maybe in a public library, providing the same thing in a book? Would the Constitution permit the restriction of all of those as well? [248]

A hot bench also allows representatives of public institutions and individuals to collectively attempt to resolve tensions about the legitimate scope of state power and the breadth of constitutional rights. During the oral hearing in *Masterpiece Cakeshop,* Justice Kagan asked the Solicitor General about where the Court should draw different constitutional lines in an effort to balance free speech, freedom of religion, and equal protection.[249] The following exchange took place:

> JUSTICE KAGAN: General, it – it seems as though there are kind of three axes on which people are asking you what's the line? How do we draw the line? So one axis is what we started with, like what about the chef, and the florist --
>
> GENERAL FRANCISCO: Speech, non-speech.
> […]
>
> JUSTICE KAGAN: A second axis is, well, why is why is this only about gay people? Why isn't it about race? Why isn't it about gender? Why isn't it about people of different religions? So that's a second axis.[…] And there's a third axis, which is why is it just about weddings? You say ceremonies, events. What else counts? Is it the funeral? Is it the Bar Mitzvah or the communion? Is it the anniversary celebration? Is it the birthday celebration?

No public dialogue takes place between individuals and the different branches of government when the bench is cold or judges are silent during oral argument. Though a cold bench might engage in metaphorical conversation with the other branches of government in their written decisions, a hot bench can engage in actual public dialogue – and public deliberation – with the other branches.[250]

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[248] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), transcript of oral argument, at 26-7.

[249] *Masterpiece Cakeshop,* transcript of oral argument, at 33-5.

[250] Roach, *supra* note 194, at 240.

Lastly, a hot bench can impose strong informal norms on judges that serve to promote democracy. Alexander Bickel famously argued that different *formal* norms constrain the judicial role and restrict the issues that courts can decide, such as standing, ripeness, and the political question doctrine.[251] As Sunstein points out, *informal* norms – such as the need to reduce error, ensure obedience to judicial decisions, and avoid unnecessary political controversy – also limit the role of courts and the issues that judges decide.[252]

As different scholars note, written submissions and oral hearings ensure that judges do not decide issues spontaneously but rather limit themselves to issues advanced by the parties.[253] Empirical research also demonstrates that roughly 80% of Supreme Court decisions reflect arguments advanced by the parties in their written briefs and during oral hearings.[254]

Active oral argument help ensure that judges do not take adjudicative paths or adopt theories never advanced by or presented to the parties.[255] As David Karp explains, where silent judges adopt untested theories that parties did not have the opportunity to confront, it can suggest that judges are using the case before them as an excuse to impose their constitutional vision on society.[256] Karp points out that Justice Thomas has issued a series of dissenting opinions that would undo established case law principles despite not having asked the parties questions that would allow them to challenge his views.[257] Active oral hearings thus create an additional normative link between the arguments advanced by the parties and judicial decisions – a connection that aims to ensure that judges do not overstep their role within a constitutional democracy or act as policy-makers in robes.

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[251] Alexander Bickel, Foreword, *The Passive Virtues,* 75 HARV. L. REV. 40, 42 (1961).

[252] Cass Sunstein, Foreword, *Leaving Things Undecided,* 110 HARV. L. REV 4, 6-7 (1996).

[253] Timothy R. Johnson; James F. Spriggs II & Paul J. Wahlbeck*, Passing and Strategic Voting on the U. S. Supreme Court*, 39 LAW & SOC'Y REV. 349, 353 (2005). Citing: LEE EPSTEIN AND JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Karp, *supra* note 73, at 626.

[254] TIMOTHY JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 127 (2004). Cited in Johnson, Spriggs II & Wahlbeck, *supra* note 253.

[255] Johnson, Spriggs II & Wahlbeck, *supra* note 253, at 353; Karp, *supra* note 73, at 614.

[256] Karp, *supra* note 73, at 614.

[257] *Id.* at 622-4. Karp cites: *Hudson v. McMillian* 503 U.S. 1, 4, 17-8 (1992) [Justice Thomas' dissenting opinion concluded that shackling, handcuffing, and beating a prisoner that resulted in minor bruising and facial swelling did not constitute a cruel and unusual punishment]; *Gonzalez v. Carhart* 127 S.Ct. 1610, 1639-40 (2007) [Justice Thomas' dissenting opinion concluded that the Court's jurisprudence on abortion had no constitutional basis].

D. Judicial minimalism

Finally, a hot bench has the capacity to promote the democratic virtues of judicial minimalism – a theory of adjudication advanced by Cass Sunstein that implies that judges "decide no more than they have to decide".[258] Judicial minimalism offers an account of how judges adjudicate complex and politically divisive matters despite not being democratically accountable like other branches of government.[259] Sunstein contends that appeal judges who must decide controversial cases aim to respect the separation of powers by issuing narrow rather than broad holdings and appealing to shallow rather than deep principles.[260] He posits that judicial minimalism promotes democracy by ensuring that the democratically accountable branches of government make certain types of decisions because those branches possess expertise and resources that courts lack.[261] Other branches of government can then respond to those decisions and resolve complex political issues through the democratic process.[262] Judicial minimalism is said to foster the separation of powers by allowing the different branches of government to incrementally and collectively develop the law through a dialogic process.[263]

As Sunstein explains, judicial minimalism is valuable because it can help judges reduce the risks of error attributable to more ambitious theories of adjudication. [264] In his view, maximalist theories of adjudication can misfire due to judges' inability to anticipate new facts and foresee the unintended consequences of their decisions.[265] Judicial minimalism also promotes coalition-building by allowing judges with ideologically and politically diverse views to agree on low level theories that are less likely to produce serious errors.[266]

One of the most significant ways that a hot bench promotes judicial minimalism and democracy is through hypothetical questions posed to the advocates.[267] Judges ask advocates hypothetical questions that test out

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[258] Sunstein, *supra* note 252, at 6.

[259] *Id.* at 7-8.

[260] *Id.* at 15-21; Cass Sunstein, *Minimalism at War,* SUP. CT. REV. 47, 48-9 (2004).

[261] *Sunstein, supra* note 252*,* at 7-8, 47-8, 98; CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 27-30 (2001).

[262] Sunstein, *supra* note 252, at 47-8.

[263] *Id*. at 7-8.

[264] CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 57 (1998).

[265] *Id.*

[266] Sunstein, *supra* note 252, at 20-1.

[267] E. Barrett Prettyman Jr., *The Supreme Court's Use of Hypothetical Questions at Oral Argument*, 33 CATH. U. L. REV. 555, 557 (1984).

tentative legal theories and limiting principles.[268] Through that process, appellate judges are reminded of what they do not know and cannot predict. They become aware of how ambitious theories of adjudication and broad holdings might open the floodgates to a range of unexpected consequences.[269] For instance, in *Masterpiece Cakeshop,* the Justices asked a series of hypothetical questions to test the potential consequences of recognizing the provision of certain goods or services as a form of protected speech.[270] During the following exchange, Justice Ginsburg asked about where the line between conduct and expression should be drawn:

> MS. WAGGONER: The artist speaks, Justice Ginsburg. It's as much Mr. Phillips's speech as it would be the couples'. And in *Hurley*, the Court found a violation of the compelled speech doctrine.
>
> JUSTICE GINSBURG: Who else then? Who else as an artist? Say the -- the person who does floral arranging, owns a floral shop. Would that person also be speaking at the wedding?[271]

Justice Kennedy, for his part, asked hypothetical questions about the discriminatory consequences of refusing to provide same-sex individuals with certain services on the ground that it amounted to compelled speech:

> JUSTICE KENNEDY: If you prevail, could the baker put a sign in his window, we do not bake cakes for gay weddings?[272]

Responses to hypothetical questions can lead to two types of responses that are at the core of judicial minimalism: narrowing and levelling-down.[273] Recognizing that expansive holdings can result in major errors and unforeseen consequences, appellate judges are pushed towards crafting decisions with narrower rulings.[274] Cognizant of the perils of committing to high-level theorization and abstract principles upon which

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[268] *Id.*

[269] Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1046-7 (2003); Eric Lode, *Slippery Slope Arguments and Legal Reasoning,* 87 CAL. L. REV. 1469, 1495-6 (1999).

[270] *Masterpiece Cakeshop,* transcript of oral argument, at 11-2.

[271] *Id.* at 11.

[272] *Id.* at 27.

[273] CASS SUNSTEIN, CONSTITUTIONAL PERSONAE 74-6 (2015).

[274] *Id;* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 382 (1999).

judges and society reasonably disagree, they level-down their theorization and abstraction to avoid unnecessary political controversy and needless mistakes.[275]

V. FUNCTIONALIST VIRTUES OF A HOT BENCH

A. Gathering information

The previous section discussed how a hot bench can advance certain values that are important to democracy. This section shows how active oral hearings can also promote certain functionalist values that cold benches and silent judges cannot. It argues that a hot bench allows appeal judges to optimally exercise their limited information gathering capacity that characteristically restricts the quantity and quality of information they can use to decide cases.

i. Appeal courts' limited information gathering capacity

The three branches of government each have to make decisions. And they have to make different types of decisions. The legislator decides which laws to pass. The executive branch decides how laws and policies are applied. Judges decide legal disputes between parties that arise from the application and interpretation of laws and policies. There are many salient features that distinguish the three branches of government from one another and limit their respective powers. This section focuses on one such distinctive feature recently highlighted by Sunstein: the legislative, executive, and judicial branches' different information gathering capacities.[276]

As Sunstein points out, the legislative and executive branches of government have the latitude and freedom to acquire data and expertise from many different sources and can do so over an extended period of time.[277] In a bicameral system, both legislative chambers gain knowledge and information through the use of specialized committees and subcommittees.[278] Prior to enacting legislation, lawmakers consult with legal drafting professionals, policy experts, analysts, agencies, regulators, and other

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[275] Sunstein, *supra* note 252, at 20-1.

[276] *Id.*

[277] *Id.*

[278] *Id;* Ernest Young, *The Constitution outside the Constitution*, 117 YALE L.J. 408, 419 (2007).

specialists.[279] They attempt to gain better insight about the risks and potential consequences of legislation by appealing to those who possess relevant expertise and knowhow that they themselves lack.[280] Through this process, lawmakers are better able to ensure that the diversity of the population's interests and needs are taken into account in the legislative process.[281]

In terms of information gathering abilities and means, the executive branch operates differently. It has the greatest proximity to, and familiarity with, the daily application of laws and policies.[282] Agencies and regulators' staff are comprised of highly specialized and knowledgeable bureaucrats and technocrats.[283] They are insiders. They are most acquainted with the agency's inner workings and amass information by interacting frequently with the general public and relevant stakeholders.[284] For example, bureaucrats at a worker's compensation board read countless reports about workplace injuries and communicate with those who suffer those injuries on a daily basis. Bureaucrats rely on internal policies and guidelines about how to interpret and implement particular policies and they use those guides on a frequent basis. They are well-apprised of the general public's confusion about particular laws, policies, and procedures. They consult with colleagues and managers who share similar expertise and experience.[285] They understand how certain laws or policies may impact the agency's daily functioning and the interests of the general public.

The executive branch has access to a broad wealth of information from both the public and private sectors.[286] Agencies and regulators often enlist the assistance of those that they regulate as a means to amass more information and gain a diversity of perspectives.[287] The legislative and executive branches of government also benefit from a particular luxury that the judiciary lacks. Not only can lawmakers and agencies amass a tremendous amount of knowledge and information, but they are not required to act on it

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[279] See e.g.: Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting,* 114 COLUMBIA L. REV. 807, 834, 841 (2014); Christopher J. Walker, *Legislating in the Shadows,* 165 U. PA. L. REV. 1377, 1378-9 (2017).

[280] Matthew Stepenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts,* 119 HARV. L. REV. 1035, 1042 (2016).

[281] JEREMY WALDRON, LAW AND DISAGREEMENT 72-73 (2004).

[282] Sunstein, *supra* note 17, at 1620-1; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, DUKE L.J. 511, 514 (1989).

[283] Sunstein, *supra* note 17, at 1620-1.

[284] *Id.* at 1608-9.

[285] *Id.* at 1609.

[286] Kenneth Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 386-7 (2006); Daniel A. Farber, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1138 (2014).

[287] Bamburger, *supra* note 286, at 380; Robert Stewart, *Administrative Law in the Twenty First Century,* 78 NYU L. REV. 437, 448 (2003).

– they can avoid enacting some law or proceed with some policy if the risks are unclear or excessive.[288] Judges must decide the cases that they hear.

ii. Optimizing the use of limited information

As Sunstein remarks, the judiciary's information gathering capacities – and appeal judges' information gathering capacities in particular – is far more limited both in time and scope compared to other branches of government.[289] Appeal judges can only rely on certain sources of information when deciding a case. And the information they have access to is incomplete, imperfect, and prone to error.[290]

Because of the adversarial nature of an appeal, the parties present incomplete or limited information that will persuade judges to arrive at the outcome that the parties desire.[291] Information that weakens a party's argument or that is fatal to their position, is often omitted or downplayed as irrelevant, unimportant, or inconsequential by that party.[292] The advocate's mantra is simple: *Justices, this is what actually matters*; *this is what you must focus on.*[293] A party frames their appeal in a manner that attempts to control and mitigate a judge's reliance on information that is harmful to that party's position.[294]

Appellate judges also sometimes rely on inaccurate or flawed information when deciding a case.[295] If parties seek to adduce certain types of information at trial (e.g.: data, statistics, or studies), that evidence is generally subject to an adversarial debate that attempts to ensure its accuracy, relevance, and probative value. Because the parties are motivated by specific outcomes, they have the incentive to challenge the admission of certain evidence that is adduced by the opposing party.[296] That process supports the admission of more accurate, relevant, and probative evidence. But that process is still prone to error.[297] Parties might not object to inaccurate or

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[288] Sunstein, *supra* note 17, at 1609.

[289] *Id.*

[290] *Id;* Barak, *supra* note 12, at 19, 32.

[291] Sunstein, *supra* note 17*,* at 1614.

[292] *Id.*

[293] *Id;* BRYAN GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS 55-56 (2004).

[294] Sunstein, *supra* note 17*,* at 1614.

[295] John Pfaff, *The Supreme Court Justices Need Fact Checkers,* NEWYORK TIMES, October 18, 2017; Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find,* PROPUBLICA, October 17, 2017.

[296] Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STANFORD L. REV. 1477, 1488 (1999).

[297] Richard Lazarus, *The (Non) Finality of Supreme Court Decisions*, 128 HARV. L. REV. 540, 566-7 (2014).

flawed information when they should. Experts make mistakes. New studies or information might disprove a theory or hypothesis that judges initially accepted as correct. In other cases, *amicus curiae* present information that judges rely on and that turn out to be flawed, inaccurate, or false.[298]

Judges must not only rely on imperfect and incomplete information to render decisions, but there are few sources of information that they can consult in the process.[299] In addition to the tools discussed above, judges can examine the factual matrix of the case before them, the material contained in the parties' briefs, available doctrine and precedent, points raised by other members of the appeal panel, *amicus curiae* briefs, their law clerks' opinions, and the arguments advanced by the parties at oral argument.[300] A hot bench allows judges to optimally exploit the few sources of information that are most responsive to their concerns.

iii. Counteracting the effects of time constraints

Active oral arguments aim to counteract two types of time constraints that appellate judges face: a limited window of opportunity to gather new information and restrictions on self-correction. Appellate judges are only able to gather information from the parties within a certain time period. A hot bench reads the party's written submissions before the hearing and drills the parties with questions during oral argument. Once it ends and the case is reserved for judgment, the judges can no longer acquire new information from the parties through direct questioning – the ship has sailed.

Admittedly, in many appeals, judges have a sense of how the case will be decided prior to oral argument.[301] In those contexts, there may be less of a need to acquire information from the parties since the appeal is dead on arrival. Other cases are different. The cases that make their way to apex courts tend to be notoriously complex. Consider, for instance, a complicated case that raises questions of administrative law, constitutional law, and statutory interpretation. At the close of oral argument, the judges may be unsure about which approach is necessary to best decide the case. It may be unclear which legal principles will prevail, and furthermore, which information will eventually support their reasoning. During oral argument, appeal judges harvest information that can support diverse means of resolving the case and

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[298] Pfaff, *supra* note 295; Gabrielson, *supra* note 295. Both authors citing: *National Aero. and Space Admin. v. Nelson,* 131 S. Ct. 746 (2011) and *Shelby County v. Holder* 570 U.S. 2 (2013) as examples.

[299] Sunstein, *supra* note 17, at 1616-8.

[300] *Id.*

[301] *See e.g.*: *Court of Appeal President: An Interview with Rt. Hon. Sir Robin Cooke*, NEW ZEALAND L.J. 170, 179 (1986).

justify a range of outcomes. A hot bench allows the judiciary to remedy a particular knowledge-deficit: the uncertainty about which information and legal approaches will be employed to resolve a complex case.

Appeal judges also use active oral hearings to probe prospective legal tests, principles, or potential outcomes in ways that generate few costs and require little commitment. The importance of a hot bench's capacity to gather information is illustrated by the second type of time-limitation that constrains the judiciary: restrictions on self-correction.[302]

Lawmakers and members of the executive branch have a broad power of self-correction. They possess greater control over when and how to fix laws and policies that misfire. An appeal court's opportunity for self-correction, however, is far more limited. Like everyone else, appellate judges make mistakes. They elaborate tests or principles that are unworkable, and they must rectify them at some later time.[303] But for at least two reasons, judges cannot fix their own errors like other branches of government.

First, appellate judges only decide the cases that wind their way through the judicial system and end up before their courts.[304] It may take years before an appeal court is given the opportunity to rectify whatever unworkable tests or principles it previously established. Unlike other branches of government, judges' opportunity for self-correction is far less proactive in nature.

Second, even when courts have the opportunity to modify some legal test or principle that has generated unexpected problems, appellate judges' face constraints that limit that opportunity for self-correction. Those constraints are imposed by the unique nature of the judiciary as a branch of government, commitment to values that underlie the common law, and respect for core adjudicative principles. Ronald Dworkin alluded to similar constraints in his theory of adjudicative integrity.[305] "Adjudicative integrity" implies that judicial decisions can be understood as part of an intelligible unfolding narrative.[306] According to Dworkin, judicial decisions should embody a rational enterprise that reflects the "best view of what the legal standards of the community required or permitted" and those legal standards should be "seen as coherent, as the state speaking with a single voice".[307] As part of that narrative, judicial decisions that respect adjudicative integrity unite backwards-looking concerns about continuity with history and

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[302] Frederick Schauer, *Do Cases Make Bad Law?* 73 U. CHI. L. REV. 883, 908-9 (2006).

[303] Sunstein, *supra* note 264, at 45.

[304] Arthur D. *Hellman, Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 861 (1983).

[305] RONALD DWORKIN, LAW'S EMPIRE, 217 (1986).

[306] *Id.* at 225.

[307] *Id.* at 218.

precedent, and forward-looking considerations regarding the judge's role in shaping the law within a democracy.[308]

The concept of adjudicative integrity is exemplified by judges' commitment to crucial values and principles that promote stability in the legal system, protect expectations, and form the bedrock of common law adjudication. Those values and principles include *stare decisis, res judicata,* hierarchy between courts, treating like cases alike, *functus officio,* and the rule of law. True, one might reject the theory of adjudicative integrity espoused by Dworkin. Yet judges, scholars, and lawyers still accept the overarching role of those values and principles discussed above.[309] In contexts where appellate judges are presented with an opportunity to correct or modify some recently developed legal test or holding, fidelity towards those principles and values militate towards a meaningful degree of judicial self-restrain.[310] Save for exceptional cases, judges are reluctant to fix their past errors if it comes at the expense of sacrificing important values, bedrock principles, or their own legitimacy.[311]

Appellate courts rely heavily on oral argument to reduce the risk that their legal tests or principles will generate sweeping consequences or necessitate frequent revision.[312] In cases that are inextricably intertwined with policy considerations, some research demonstrates that appellate judges resolve those cases by according significant importance to information that emerges during the hearing.[313] Johnson's research demonstrates that in nearly all Supreme Court cases involving policy considerations, the Justices' post-hearing conference focuses primarily on issues that arose during oral argument.[314] Conversely, in cases involving policy considerations, less than 1 percent of post-hearing conferences rely exclusively on the parties' written submissions.[315]

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[308] *Id.* at 225.

[309] Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory,* 60 WILL. & MARY L. REV. 68, 83-5 (1991).; MICHAEL GERHARDT, THE POWER OF PRECEDENT 14-6 (2008); Earl Maltz, *The Nature of Precedent,* 66 N.C. L. REV. 367, 368-70(1988); RANDY KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 36-7 (2017).

[310] Geoffrey Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine,* 11 HARV. J. L. & PUB. POL'Y 67, 70 (1988).

[311] James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986); Pintip Hompluem Dun, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis,* 113 YALE L.J. 493, 505 (2003).

[312] TIMOTHY JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 81 (2004).

[313] *Id.*

[314] *Id.*

[315] *Id.* Johnson's direct quote is: "Even more striking, is that less than 1 percent of the [Supreme Court's] policy discussion during conference focus on issues that are found

B. Building coalitions

i. Avoiding plurality opinions

There are further advantages to a hot bench. Notably, it assists appellate judges in building coalitions, drafting more intelligible decisions, and developing general principles upon which they can agree despite their ideological differences.[316] Consensus-building is important because appeal judges can avoid the problems associated with plurality opinions, meaning that their decision lacks a clear majority.[317] Plurality decisions may fail to give lower courts guidance about applicable legal principles or how future cases should be decided.[318] Lawyers and the general public may be confused about the decision's outcome and holding.[319] Plurality decisions may draw criticisms that appeal courts are abdicating their duty to decide cases, by issuing decisions with no clear conclusion or discernible test.[320] Plurality decisions can also undermine *stare decisis,* by generating uncertainty about whether the court has established, abandoned, or modified some legal principle.[321] For reasons like these, Frank Easterbrook remarks that "plurality decisions are subject to special scorn".[322]

Oral argument is an important part of the coalition-building process because Supreme Court Justices generally do not know their colleagues' views about a case prior to the hearing.[323] Chief Justice Roberts and Justice Elena Kagan have observed that oral argument is the first time that individual Justices are exposed to their colleagues' views about a case.[324] Some Justices

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exclusively in the legal briefs or in neither the briefs nor the oral argument transcripts. In other words, almost 100 percent of conference discussion about policy focuses on issues addressed by the Court during oral arguments" (*id*).

[316] RYAN BLACK, TIMOTHY JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 60 (2012).

[317] Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1128 (1981); Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change,* 103 CORNELL L. REV. 817, 841 (2018).

[318] PAMELA CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 54 (2010); Melvin Urofsky, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 43 (2015).

[319] Corley, *supra* note 318*,* at 54.

[320] Lewis Powell Jr., *Stare Decisis And Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289 (1990).

[321] *Id.* at. 288-9.

[322] Frank Easterbrook, *Ways of Criticizing the Court,* 95 HARV. L. REV. 802, 804 (1982).

[323] Black, Johnson & Wedeking, *supra* note 316, at 7.

[324] Black, Johnson & Wedeking, *supra* note 316, at 7-8; C-SPAN, *Supreme Court Justice Elana Kagan Interview,* December 9, 2010 ["We do not talk about the cases together beforehand"].

have confirmed in interviews that there is an unwritten rule prohibiting them from discussing their views and tentative case outcomes with their colleagues before the hearing.[325] Justice Kennedy has explained that the prohibition exists to prevent the Justices from lobbying one another without having first been exposed to the parties' oral arguments.[326]

There may be several advantages for appeal judges to use oral argument as the starting point in the coalition-building process instead of waiting until the post-hearing conference. For one, parties are afforded a public opportunity to address judges' most pressing concerns and directly influence how majorities are formed. If a cold bench does not alert the parties to judicial concerns, the parties lack a comparable opportunity. Furthermore, because judges' time to deliberate in post-hearing conferences is already restricted, active oral hearings may be a more efficient avenue for judges to begin reaching majorities.[327] They can use oral argument to rally around decision-outcomes, and then, use post-hearing conferences to candidly discuss issues that are less amenable to public debate or scrutiny.[328] By using oral hearings to reach consensus on issues and case outcomes, judges offer a more candid display of their deliberative processes and disagreements that would otherwise be hidden from examination.[329]

ii. Signaling and screening

Active oral hearings may help judges develop majorities in several ways that cold benches or silent judges may not.[330] First, a hot bench can build consensus by mitigating asymmetric information problems.[331] Before the hearing, each Justice naturally knows more about their own views of the case than about those of their colleagues – there is an information asymmetry affecting the Justices.[332] But they cannot share their views with colleagues before the hearing because of the unwritten rule that prevents such

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[325] Black, Johnson & Wedeking, *supra* note 316, at 7-8.

[326] *Id.* Citing: Adam Liptak, *No Vote-Trading Here,* NEW YORK TIMES, May 15, 2010 [Justice Kennedy explained during an interview with C-SPAN in 2009: "Before the case is heard, we have an unwritten rule: We don't talk about it with each other. […] The first time we know what our colleagues are thinking is in oral arguments"].

[327] Black, Johnson & Wedeking, *supra* note 316, at 13-4.

[328] *Id.*

[329] *See:* Kevin M. Stack, *The Practice of Dissents in the Supreme Court,* 105 YALE L.J. 2235, 2256-7 (1996).

[330] Johnson, *supra* note 312, at 57-9.

[331] George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 QTR. J. ECON. 488 (1970) [the canonical text on asymmetrical information problems].

[332] Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 7 (1993).

communication.[333] Furthermore, Supreme Court protocol also forbids the Justices from asking one another questions during oral hearings.[334] The problem is that the Justices must render decisions collectively despite information asymmetries and being unable to directly communicate their views to colleagues prior to the post-hearing conference.[335]

During active oral hearings, judges reduce information asymmetries and build coalitions through signaling.[336] According to "signaling" theory in economics, when an individual possesses information that others lack yet direct communication between them is impossible, the individual can telegraph that information to others.[337] When individuals signal, they make the first move in remedying others' information deficits.[338] Judges engage in signaling by asking questions that telegraph issues they deem important, arguments they reject, policy preferences, and preferred outcomes.[339] Through signaling, the Justices learn which colleagues share similar views and can begin to reach consensus about the core issues of a case and potential avenues to resolve legal disputes.[340]

Second, judges build coalitions by using oral argument as a screening device that helps judges avoid bad decisions and outcomes.[341] The economic theory of "screening" aims to mitigate the costs of decisions that are made on the basis of imperfect data.[342] Screening implies that individuals who lack information and wish to reduce error-costs make the first move in seeking out more information from others.[343] For instance, employers require applicants to submit their resume and then use that information as a screening device to filter out less than ideal candidates.[344]

Appellate judges use oral argument as a screening device precisely because they lack relevant information about the future impact of their

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[333] Black, Johnson & Wedeking, *supra* note 316, at 7.

[334] *Id.* at 8. Citing: Linda Greenhouse, *Oblique Clash Between 2 Justices Mirrors Tensions About Abortion,* NEW YORK TIMES, November 30, 1989.

[335] Kornhauser and Sager, *supra* note 332, at 7.

[336] Black, Johnson & Wedeking, *supra* note 316, at 11-2, 19-20; Philips and Carter, *supra* note 100, at 171; Epstein, Landes & Posner, *supra* note 7, at 309.

[337] David M. Kreps and Joel Sobel, *Signaling, in* HANDBOOK OF GAME THEORY VOL II 850 (R.J. Auman and S. Hart eds., 1994). Michael Spence, *Job Market Signaling,* 87 QTR. J. ECON. 355, 355-7 (1973).

[338] Kreps and Sobel, *supra* note 337, at 861.

[339] Black, Johnson & Wedeking, *supra* note 316, at 11-2, 19-20

[340] *Id.*

[341] Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L.J. 1478, 1484 (1983).

[342] Kreps and Sobel, *supra* note 337, at 862.

[343] *Id.*

[344] Joseph Stiglitz, *Information and the Change in the Paradigm in Economics,* 92 AM. ECON. REV. 460, 463, 470-1 (2002).

decisions.[345] They generally cannot assess which factual situations will arise in the future, how their decisions will stand up against the evolution of technology or morality, how lower court judges will interpret their decisions, and how colleagues will apply their decisions in the future.[346] Appeal judges resort to hypothetical questions as a screening device that mitigates those risks.[347] Those questions give judges insight into how tentative outcomes risk being interpreted in the future, the dangers of committing to some approaches versus others, and the likelihood that their decisions may backfire.[348]

iii. Judicial minimalism and coalition formation

Through signaling and screening, judges can build majorities around a shared acceptance of the need for judicial minimalism in certain cases. Even if appellate judges can't initially agree about which approaches and outcomes are best, they can far more easily agree about those that are very bad.[349] They can reach consensus around a shared recognition that some adjudicative paths generate too much unpredictability, political controversy, and risks of error.[350] Judges reach majorities in part through a preliminary consensus about what not to do and how not to decide.[351] Having screened out the most costly, divisive, and error-prone adjudicative paths, judges reach consensus by signaling their commitment to more minimalist approaches and outcomes.

To illustrate this point, consider the Justices' line of questioning during oral argument in the *Masterpiece Cakeshop* case and its impact on the Supreme Court's decision. Throughout the first half of the hearing, the Justices asked hypothetical questions screening the costs of recognizing the provision of certain services as a form of constitutionally protected speech.[352] Those risks included the constitutional demise of public accommodation laws that historically protected marginalized groups against discrimination.[353] Through hypothetical questions, judges explored the unpredictability associated with drawing a line between conduct and speech, as well as the

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[345] Sunstein, *supra* note 264, at 53-4.

[346] *Id.*

[347] Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U. L. REV. 529, 547 (1984).

[348] *Id;* Prettyman Jr., *supra* note 267, at 557.

[349] ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 176-177 (2006).

[350] Sunstein, *supra* note 252, at 99.

[351] *Id;* Aspasia Tsaoussi and Eleni Zervogiann, Judges as Satisficers: *A Law and Economics Perspective on Judicial Liability*, 29 EUR. J. LAW ECON. 333, 337-339 (2010).

[352] *Masterpiece Cakeshop,* transcript of oral argument, at 33-4 [summarizing the line of questioning that the Justices have made until that point in the hearing].

[353] *Id.*

complexity of reconciling religious freedom, free speech, and equal protection.[354]

Mid-way through oral argument, Justice Kennedy signaled an alternate way of deciding the case to his colleagues.[355] During an exchange with counsel for the respondent on behalf of the State of Colorado, Justice Kennedy asked about a statement by one of the commissioners of the Colorado Civil Rights Commission that suggested bias against religion.[356] Justice Kennedy signaled how the case could be resolved on the basis of the Commission's lack of neutrality that vitiated the integrity of its decision:

> JUSTICE KENNEDY: Suppose we thought that in significant part at least one member of the Commission based the commissioner's on -- on -- on the grounds that – of hostility to religion. Can -- can your -- could your judgment then stand?[357]

That intervention proved to be a crucial turning point. The Justices began to reach consensus by signaling their agreement with Justice Kennedy's suggestion. When counsel explained that the whole panel must be biased to delegitimize the decision, Chief Justice Roberts challenged that claim.[358] He stated that a biased decision-maker can vitiate the Commission's verdict by improperly influencing a panel member's colleagues.[359] Justice Gorsuch asked whether a second commissioner was also biased by suggesting that individuals providing certain services should compromise their religious belief system.[360] Justice Breyer inquired how the judiciary should craft a principled exception into the public accommodation law that both respects sincere religious beliefs and prevents discrimination – ultimately conceding that he himself did not know where to draw such a line.[361] Justice Alito asked a series of questions about the Colorado Civil Rights Commission's history of opposing certain religious viewpoints but not others.[362]

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[354] *Id.*

[355] *Id.* at 51-2.

[356] *Id.*

[357] *Id.* at 54; *Masterpiece Cakeshop* decision, at 1729-34.

[358] *Masterpiece Cakeshop,* transcript of oral argument, at 55-6.

[359] *Id.*

[360] *Id.* at 56-7. The actual words of the Commissioner were: "a businessman wants to do business in the state and he's got an issue with the — the law's impacting his personal belief system, he needs to look at being able to compromise". *Masterpiece Cakeshop* decision at 1729.

[361] *Masterpiece Cakeshop,* transcript of oral argument, at 58-9.

[362] *Id.* at 59-60.

Though the entire duration of those exchanges between the Justices and the advocates lasted less than five minutes, it formed the basis of the majority's opinion.[363] Chief Justice Roberts and Justices Kennedy, Kagan, Breyer, Alito, Gorsuch, Thomas concluded that the Commission's decision could not stand because its decision-makers demonstrated hostility towards religion. [364] Despite their vast disagreements about the scope of free speech, freedom of religion, and equal protection, the Justices reached a 7-2 majority.

The *Masterpiece Cakeshop* decision and the Justices' approach in that case have both garnered criticism on various grounds that fall outside of the intended scope of this article.[365] Yet their questions during the hearing and their decision illustrate how judges screen and signal to form judicially minimalist coalitions in hard cases – especially those involving complex and divisive issues presenting heightened risks of judicial mistakes and political instability.

VI. CONCLUSION:
OPTIMIZING DEMOCRATIC AND FUNCTIONALIST VALUES OF ORAL ARGUMENT

This article advanced a theory about the connection between oral argument and appellate adjudication. Building on emerging empirical research, it demonstrated how the changing nature of those hearings raise concerns about the justifications for oral argument and judges' evolving role

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[363] The beginning of Justice Kennedy's question at note 350 was asked at 42:00 in the hearing and the end of Justice Alito's question at note 357 was asked at 47:58 in the hearing. The audio of the oral argument for *Masterpiece Cakeshop is* provided by Oyez.com and is available at: https://www.oyez.org/cases/2017/16-111

[364] *Masterpiece Cakeshop* decision at 1732 [Justices Kagan and Breyer, concurring: "I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding"]. *Id.* at 1734 [Justices Alito and Gorsuch, concurring: "Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full"]. *Id.* at 1740 [Justice Thomas concurring: "The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See *ante,* at 1728-1731. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion"].

[365] For examples of critiques of the *Masterpiece Cakeshop* decision, *see:* Douglas NeJaime & Reva Siegel, Religious Exemptions and Antidiscrimination Law in *Masterpiece Cakeshop,* 128 YALE L.J. FORUM 201, 204 (2018); Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?* 2018 CATO SUP. CT. REV. 139 (2018); Linda Greenhouse, *How the Supreme Court Avoided the Cake Case's Tough Issues,* NEW YORK TIMES, June 7, 2018; Richard Epstein, *Symposium: The worst form of judicial minimalism — Masterpiece Cakeshop deserved a full vindication for its claims of religious liberty and free speech,* SCOTUSBLOG, June 4, 2018.

within a constitutional democracy. As Jacobi and Sag point out, judges are speaking more during oral hearings while advocates speak less, judges interrupt their colleagues and the advocates more than ever, and judges increasingly ask questions that resemble a form of advocacy rather than a form of inquiry.[366] This article also showed how those changes put into question the traditional democratic and functionalist justifications for oral argument. Instead of satisfying those justifications, appellate judges may place those values and their own political legitimacy at risk.

Despite the drawbacks to more active oral hearings, this article explained why there are some important democratic virtues inherent to the new oral argument and empirical studies into its evolution. Those democratic virtues include greater transparency into judicial decision-making, improved judicial accountability, dialogue between different branches of government and stakeholders, and judicial minimalism. Moreover, the functionalist benefits of a hot bench show why active oral hearings carry some benefits that cold benches and silent judges do not. Those benefits include information-gathering that is more responsive to judicial concerns, coalition-building through signaling and screening, and the formation of majorities around shared agreements about the need for judicial minimalism.

It is, however, a mistake to conclude that active hearings will further some democratic and functionalist values simply because they have the capacity to do so. Indeed, this article demonstrates why a hot bench results in a form of paradox. In contrast to cold benches or adjudication based solely on written submissions, active oral hearings foster some democratic and functionalist values while undermining others.

For instance, the greater transparency afforded by the new oral argument undercuts the democratic value of participation by those most affected by the case.[367] The rise of empirical research into oral argument provides a new form of judicial accountability that silent judges and cold benches escape. Yet increased accountability has come at the price of sacrificing other values that are important to democracy. Judicial advocacy puts into question the appearance of fairness and impartiality and generates deeper preoccupations about judges and judging.[368] A hot bench also trades off certain democratic values against some functionalist values. Though judges may interrupt parties to gather information that is most responsive to their concerns, Jacobi and Schweers accurately point out that gendered interruptions undercut the democratic value of political equality.[369]

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[366] Jacobi and Sag, *supra* note 41, at 79.
[367] *Id;* Dalton, *supra* note 35, at 100.
[368] Jacobi and Sag, *supra* note 41, at 5.
[369] Jacobi and Schweers, *supra* note 63, at 1483.

If judges wish to optimally satisfy the justifications for oral argument and maintain their legitimate role within a constitutional democracy, they must avoid the vices of the new oral argument and strive to uphold the core democratic and functionalist values inherent to appellate hearings. Achieving those ends requires both structural changes to oral argument and modifications to individual judges' conduct.

In addition to lengthening the duration of hearings (even marginally), Sullivan and Canty suggest that judges could provide advocates with a period of uninterrupted pleading time, perhaps at the onset and conclusion of their arguments.[370] This would allow advocates to "shape the narrative" of oral argument and summarily address judges' most pressing concerns.[371] By insulating a portion of advocates' participation from judges' questions and interruptions, it decreases the incidence of democratic and functionalist trade-offs that are the product of greater judicial activity.

Despite the potential benefits of such changes, appellate judges should go even further. They should ensure that they neither act like advocates nor exemplify the very adversarial qualities that are inimical to the sanctity of the judicial function, especially in the Nation's highest courts of law. If judges truly seek to maximize some of the benefits of more active hearings without sacrificing their perceived fairness and impartiality in the process, their interventions must remain both judicious and judicial in nature. As much as judicial restraint constitutes a passive virtue in the process of adjudicating complex cases, it remains as important in the very hearings that serve as means to that end.[372]

How could appellate judges maximize the functionalist and democratic values of oral argument in a manner that is consistent with greater judicial restraint? In addition to Sullivan and Canty's suggestion described above, the Associate Justices of the Supreme Court could communicate their most pressing concerns about the case in writing to the Chief Justice prior to the hearing. The Chief Justice could then inform the advocates about the issues that the panel cares most about, allowing the parties to directly address those issues during oral argument. One advantage of such an approach is that it respects the convention that the Justices do not discuss the case amongst themselves prior to the hearing. The proposal would also ensure that advocates' arguments are most responsive to the Justices' core preoccupations. If implemented, it would not prevent the Justices from asking the parties about new concerns that arise in the course of oral argument.

On a more individual level, appeal judges must become aware of their own negative tendencies that are revealed by scholars' empirical research.

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[370] Sullivan and Canty, *supra* note 7, at 1078.
[371] *Id.* 1017, 1078.
[372] Bickel, *supra* note 251, at 40.

This can help them take the first steps to avoid acting in ways that are most at odds with the justifications for oral hearings and the judicial role.[373] Like everyone else, judges have cognitive biases and engrained behaviors of which they are unaware.[374] The pioneering work of David Guthrie, Jeffrey Rachlinski, and Andrew Wistrick demonstrates that exposing judges to certain information can help them override subconscious negative tendencies.[375] Although more research is necessary, it is plausible that alerting judges to their predispositions might influence their conduct in future hearings. It remains to be seen whether the new judicial accountability results in positive changes to oral hearings and a reduction in individual judges' respective contributions to the vices of the new oral argument.[376]

Despite the competing advantages and drawbacks of a hot bench, one thing is certain. Active oral hearings and ongoing empirical research will continue to empower stakeholders to judge its judges in ways that written decisions and cold benches cannot. The new oral argument provides unparalleled information – for better or for worse – about the evolving nature of oral argument and appeal judges' role in a democracy. To the extent that a hot bench's pursuit of certain goals seriously imperils judges' perceived impartiality or the advocates' participation during the hearing, members of the judiciary must avoid such unnecessary and harmful trade-offs. The path towards improving oral argument resides – as it always has – in the passive virtues of appellate judges and their commitment towards the core values that underpin democracy and justice.

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[373] Jacobi and Sag, *supra* note 41, at 79.

[374] Chris Guthrie; Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

[375] Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 29-33 (2007) [highlighting how confronting judges with certain information can help them avoid intuitive decision-making by fostering greater deliberation] . *See also:* Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 20-2, 27-8 (2011); Emily Sherwin, *Features of Judicial Reasoning, in* THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING 127-8 (David E. Klien and Gregory Mitchell, eds., 2010).

[376] It is important to note that Jacobi has taken the first steps in that endeavor. For instance, she has recently examined the extent to which gendered interruptions have declined since Supreme Court Justices' awareness of their existence. *See:* Tonja Jacobi, *Gendered interruptions at the Court: Looking forward and backward,* SCOTUS OA, August 2, 2018.