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A Proposal for Improving Argument Before the United States Supreme Court

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Abstract

With rare exceptions, the U.S. Supreme Court allots thirty minutes to each side for oral argument. A review of transcripts and recordings of oral arguments confirms that the Court poses questions and makes comments with remarkable frequency. When students and lay people listen to the recordings, they may remark on the constant interruptions and view the Justices as rude interrogators.

With the many questions that the Justices have and the limited time available, the advocates have little opportunity to present their arguments fully. The Justices may interrupt counsel with questions concerning the law or the relevant facts of a case. They may wish to pose hypotheticals. They may wish to present direct or indirect arguments in hopes of swaying a fellow member of the bench. With respect to these questions and hypotheticals, the Justices are asking counsel to think on their feet and may catch counsel unprepared to give a full and accurate response.

This Article offers a simple solution for reducing the overload of questions at oral argument. Justices, individually or collectively, could pose written questions on facts and law to the litigants’ counsel before oral argument and expect written responses.

The submitted questions might inquire about the facts of the case, about the litigant’s interpretation of the relevant law, about the response that the litigant would make to a hypothetical scenario, or about the precise holding that the litigant wishes the Court to propound. The responses should allow for more thought-out answers than oral argument can produce and might both reduce the number of questions that the Justices ask during oral

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argument and improve the quality of the answers.

The Article places this proposal in historical context by examining how Supreme Court rules on presenting argument have developed—shifting the emphasis from oral argument to written argument. After explaining the value of oral argument and the ways in which courts have tried to deal with the brevity of oral arguments, the Article illustrates the value of the proposal by closely analyzing the oral argument in Kelo v. City of New London.

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I. INTRODUCTION

When Special Prosecutor Leon Jaworski argued United States v. Nixon,¹ the central Watergate case, he certainly must have expected questions from the Supreme Court bench. Still, the number of questions may have surprised him. According to his recollection, the Justices interrupted him 115 times

during the course of his fifty-six-minute presentation. According to Jaworski, “[t]here was no opportunity for a sustained, orderly presentation.”

Opposing counsel James St. Clair may have been similarly surprised at receiving over 200 questions during the first hour of his argument.

On the other hand, the Watergate lawyers may not have been surprised at all, because constant questioning is the typical practice of today’s Court. For example, in *Kelo v. City of New London*, a case dealing with eminent domain, the petitioner’s attorney spoke for one-half hour while the Justices posed questions and made comments sixty-two times. In the same manner, the respondent’s attorney encountered sixty-four questions and comments.

A review of transcripts and recordings of oral arguments confirms that the Court poses questions and makes comments with remarkable frequency. A study of the 1998 to 2007 Court terms found that the Justices offered questions and comments 87,941 times—an average of 133 questions per case—or more than twice per minute of oral argument.

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3. Jaworski, supra note 2, at 193. Still, Jaworski stated that he was grateful for the interruptions, because “they enabled me to explain more fully salient points, and they allowed the Justices to get a better grasp on the ramifications of the issues.” Id.


8. See Kelo Oral Argument, supra note 7, at 26:45. Oyez.org times the attorney’s presentation at just under thirty minutes. See id.

9. See Ryan C. Black et al., *Oral Arguments and Coalition Formation on the U.S.
lay people listen to the recordings, they may remark on the constant interruptions and view the Justices as rude interrogators.

The Justices might interrupt counsel for several reasons. They may have questions concerning the law or the relevant facts of a case. They may wish to pose hypotheticals. They may wish to present direct or indirect arguments in hopes of swaying a fellow member of the bench. With respect to these questions and hypotheticals, the Justices are asking counsel to think on their feet, and consequently, counsel might be unprepared to give a full and accurate response.

With the Justices’ many questions and the limited time available, the advocates have little opportunity to present their arguments fully. Today, each side typically has only thirty minutes; in significant cases, the Court may, very occasionally, allot more time to the attorneys.

This Article offers a simple solution for reducing the overload of questions at oral argument. The solution invokes the same concept that underlies interrogatories. Interrogatories enable litigants to acquire relevant facts before trial. Without them, trials would be longer and contain more mishaps resulting from witnesses’ failure to recall or document facts on the spot. In the same manner, Justices—individually or collectively—


10. One veteran Supreme Court advocate identifies four categories of questions: (1) “background questions”; (2) “questions about the scope of the rule advocated;” (3) “questions about the implications of the rule advocated;” and (4) “questions reflecting judicial idiosyncrasies.” DAVID C. FREDERICK, SUPREME COURT AND APPELLATE ADVOCACY: MASTERING ORAL ARGUMENT 75–118 (2003).

11. See SUP. CT. R. 28(3) (permitting each side one-half hour of argument and noting that “[a]dditional time is rarely accorded”).

12. An interrogatory is a:

[Written question submitted by one party to another for answer during discovery . . . . The purpose of an interrogatory is the discovery of information related to the factual and legal background of the case then at hand, and . . . some relationship to the allegations of the case or to the development of further evidence is required.


13. See 10A FEDERAL PROCEDURE, LAWYER’S EDITION § 26:524 (West 2014). The specific
could pose written questions on facts and law to the litigants’ counsel before oral argument.

The submitted questions might inquire about the facts of the case, the litigant’s interpretation of the relevant law, the response that the litigant would make to a hypothetical scenario, or the precise holding that the litigant wishes the Court to propound. The written responses should provide more thought-out answers than oral argument could produce, and might both reduce the number of questions that the Justices ask and improve the quality of the answers.

This Article, then, proposes a modest reduction in questions at oral argument and a modest increase in written argument. It begins with a history of how the Court has changed its procedures generally to shift to less oral advocacy and to require more written advocacy.14 The Article’s proposal aligns with this historic trend; however, it would not dramatically disrupt the existing state of affairs.15 The Article then considers the value and functions of oral argument and shows that this proposal offers a desirable way to supplement the current procedures.16 To exemplify the merits of this proposal, the Article then provides an in-depth discussion of the oral arguments in Kelo v. City of New London.17

II. THE HISTORY OF SUPREME COURT RULES18

This narrative of the Supreme Court’s rules on briefs and oral arguments begins in an era when orations were long and briefs were short or nonexistent.19 It shows an evolution toward increasingly shorter oral arguments and toward mandatory briefs that comply with exacting

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purpose of interrogatories includes “highlighting important conversations, communications, and documents; . . . expediting trial; [and] facilitating trial preparation.”  Id. (footnote omitted).

14. See infra Part II.
15. See infra Part II.C.
16. See infra Part III.
17. 545 U.S. 469 (2005) (validating the constitutionality of employing eminent domain for economic development); see also infra Part IV.
19. See infra Part II.A.
specifications. The time demands of a burgeoning caseload propelled the shift to briefs, as did the changing culture that preferred a less flamboyant rhetoric. Together, these factors encouraged less oratory and more precise legal arguments.

A. The Founding Era to the Civil War

Piracy and admiralty law sparked the demand for national courts in the founding era. Initially, the Continental Congress heard appeals from the state admiralty courts. When this system proved unworkable, it created the Court of Appeals in Cases of Capture. Congress then looked to the Articles of Confederation, which was adopted in 1781, for authority to appoint courts “for the trial of piracies and felonies committed on the high seas and [to establish] courts for receiving and determining finally appeals in all cases of captures.” Under that provision, it delegated piracy and felony cases of piracies and felonies on the high seas to special courts composed of state judges. Later, with the ratification of the Constitution, Congress found authority “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” The Constitution, however, fails to define “piracies,” “felonies,” or “the law of nations;” the Framers assumed that the common law and, in the case of “the law of nations,” the common consent of all nations provided a shared definition of the terms.

Even after the United States Supreme Court first met in 1790, the Capture Court continued to hear a dwindling number of admiralty cases until

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20. See infra Part II.A–B.
21. See infra Part II.A–B.
22. See infra Part II.A–B.
24. See id. at 44–47.
25. See id. at 106–16.
27. See Bourguignon, supra note 23, at 128; Surrency, supra note 18, at 11–17; James Wm. Moore, Conflict of Jurisdiction, 23 La. L. Rev. 29, 30–31 (1962) (recounting this history).
1792.\textsuperscript{30} That court ordinarily reviewed lower courts’ records, depositions, interrogatories, and ship papers.\textsuperscript{31} As for legal analysis, it relied on the oral arguments of counsel.\textsuperscript{32}

At the new Supreme Court’s first meeting, it prescribed rules establishing the Court’s seal and setting the qualifications for attorneys who would practice before it as well as the oath that they would take.\textsuperscript{33} Rules regarding the nature of argument apparently seemed to be of minor importance.\textsuperscript{34} When it began hearing cases in 1791,\textsuperscript{35} the Court did not require any sort of brief or written statement of the legal argument.\textsuperscript{36}

In that era, the Court carried a light appellate load.\textsuperscript{37} Between 1790 and 1801, the Court heard only eighty-seven cases under its appellate jurisdiction and disposed of seventy-nine of those cases.\textsuperscript{38} At the same time, the Justices were riding circuit and presiding over trials in numerous cases.\textsuperscript{39} With appellate cases placing such a limited demand on the Justices’ time, devising procedural rules for briefs and arguments may not have seemed a high priority to them.\textsuperscript{40}

In 1792, the Court stated that it “considers the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.”\textsuperscript{41} If this

\textsuperscript{30} See SURRENCY, supra note 18, at 14–17.
\textsuperscript{31} See BOURGUIGNON, supra note 23, at 209–11 (explaining the court’s procedure).
\textsuperscript{32} See id.
\textsuperscript{33} See Appointment of Justices, 2 U.S. (2 Dall.) 399, 399–400 (1790).
\textsuperscript{34} See generally id. (failing to set forth formal rules for litigation).
\textsuperscript{35} The Court’s first case was West v. Barnes, 2 U.S. (2 Dall.) 401 (1791).
\textsuperscript{36} See Appointment of Justices, 2 U.S. (2 Dall.) at 399–400 (setting forth the rules in place at the time of West, 2 U.S. (2 Dall.) at 401, and failing to require submission of brief or written statement of the legal argument).
\textsuperscript{38} See id. But see 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 569–73 (1973) (noting that these statistics are based on incomplete records).
\textsuperscript{39} See CASPER & POSNER, supra note 37, at 14–15.
\textsuperscript{40} Id. at 11–12.
\textsuperscript{41} Rule. 2 U.S. (2 Dall.) 411, 413–14 (1792). Until 1932, the Court consistently reconfirmed this rule (or variations of it). See SUP. CT. R. 5, 286 U.S. 596 (1932); SUP. CT. R. 5, 275 U.S. 597 (1928); SUP. CT. R. 4, 266 U.S. 655 (1925); SUP. CT. R. 3, 222 U.S. 8 (1911); SUP. CT. R. 3, 108 U.S. 574 (1883); SUP CT. R. 3, 62 U.S. (21 How.) v (1858); SUP CT. R. 7, 26 U.S. (1 Pet.) xxiii (1828); SUP. CT. R. 7, 14 U.S. (1 Wheat) xv (1816); SUP CT. R. 7, 5 U.S. (1 Cranch) xvi (1801).
statement referred to the British courts’ practice of long oral arguments and minimal or nonexistent briefs, it would confirm the Supreme Court’s practice of permitting lawyers to present their arguments at length without interruption from the bench.42 According to British thinking, the judicial process should be open to the public in order to reduce the possibility of outside influence; having judges learn everything about the case in open court would ensure such an open judicial process.43

In 1795, the Court began to place limited constraints on advocates.44 In that year, the Court ordered that “the Gentlemen of the Bar be notified, that the Court will hereafter expect to be furnished with a statement of the material points of the case, from the counsel on each side of a cause.”45 And, in 1812, the Court dismissed an appeal when the appellant’s counsel neglected to furnish the Court with a statement of points.46

Still, oral arguments remained lengthy.47 In major cases, they usually lasted longer than a day.48 For example, in 1808, in Rose v. Himely,49 ten lawyers argued the case for nine days.50 The argument in McCulloch v. Maryland51 lasted six days,52 and the argument in Fletcher v. Peck53 lasted

Although the King’s Bench had appellate jurisdiction over the Court of Common Pleas and inferior courts, both it and the Court of Chancery were primarily trial courts. See 13 James Wm. Moore et al., Moore’s Federal Practice ¶ 800.01 n.3 (2d ed. 1996).


43. See Frederick, supra note 10, at 15–16 (explaining the British theory). An interesting contrast exists with the current Court opposing videos of proceedings, an innovation that would further open deliberations to public scrutiny. See Lisa T. McElroy, Cameras at the Supreme Court: A Rhetorical Analysis, 2012 BYU L. Rev. 1837, 1870–73 (arguing that videos would enhance the democratic nature of the proceedings).


46. See e.g., Schooner Catherine v. United States, 11 U.S. (7 Cranch) 99 (1812).


48. See id.

49. 8 U.S. (4 Cranch) 241 (1808).

50. See Surrency, supra note 18, at 376.


52. See Martin S. Flaherty, John Marshall, McCulloch v. Maryland, and “We the People”: Revisions in Need of Revising, 43 WM. & MARY L. REV. 1339, 1369 (2002).
three days. In *Gibbons v. Ogden*, the argument continued for five days.

In 1812, the Court took its first indirect step in limiting oral arguments when it ruled that it would hear only two counselors on each side of any cause. Lawyers, however, may have attempted to circumvent the ruling. In response to a query, the Court made clear that the lawyers could not divide a cause into distinct points and then have two lawyers argue on each point. Still, lawyers could speak for hours—and often did.

During this era, lawyers like Daniel Webster, Charles Pinkney, and William Wirt displayed their oratorical skills. Consider, for example, Justice Joseph Story’s effusive appraisal of Pinkney’s oral argument in *McCulloch v. Maryland*:

Mr. Pinkney rose on Monday to conclude the argument; he spoke all that day and yesterday, and will probably conclude to-day. I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. . . . Mr. Pinkney possesses, beyond any man I ever saw, the power of elegant and illustrative amplification.

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53. 10 U.S. (6 Cranch) 87 (1810).
54. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 394–95 (rev. ed. 1932) (quoting from the diary of John Adams, who argued on behalf of Peck). The three-day argument took place during the 1809 term. See id. Following it, the Court relied on a defect in the pleadings to decide the case. See id. It heard the case again in 1810 and decided the case on the merits. See id. at 395–97.
55. 22 U.S. (9 Wheat.) 1 (1824).
57. See Hudson & Smith v. Guestier, 11 U.S. (7 Cranch) 1, 1 (1812). The rule itself does not appear in the United States Supreme Court Reports. Presumably, its omission was an inadvertent error. However, it does appear by implication in a reported query about the rule. See id.
58. See id.
59. See id.
60. See, e.g., supra notes 47–56 and accompanying text.
61. See, e.g., Shapiro Address, supra note 18, at 23–25 (discussing the oratory of the era, particularly that of Daniel Webster).
63. See Letter from Joseph Story to Stephen White (March 3, 1819), in 1 LIFE AND LETTERS OF
This was the golden era of American oratory.\textsuperscript{64}

In the ensuing years, the Court also increased its emphasis on written arguments. In 1821, it required a more detailed brief than it had in 1795.\textsuperscript{65}

\textbf{[N]}o cause standing for argument will be heard by the Court, until the parties shall have furnished the Court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents, on which the parties rely, and the points of law and fact intended to be presented at the argument.\textsuperscript{66}

In 1833, the Court gave the parties the option of submitting cases on the briefs alone and forgoing oral argument, stating that the rule was meant to accommodate counsel and reduce the expenses of the parties.\textsuperscript{67} And in 1837, it propounded a clarifying rule: “When a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.”\textsuperscript{68}

The rules also may have been adopted to save the Justices from having to listen to so many long arguments. For example, although Justice Marshall encouraged—and even demanded—extensive arguments,\textsuperscript{69} he allegedly once advised a young judicial hopeful that the “acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says.”\textsuperscript{70}

\footnotesize

\textsuperscript{64}. \textit{See} 4 ALBERT J. BEVERIDGE, \textbf{THE LIFE OF JOHN MARSHALL} 94 (1919) (“No stronger or more brilliant bar ever was arrayed before any bench than that which displayed its wealth of intellect and resources to Marshall and his associates.”).

\textsuperscript{65}. \textit{See} supra text accompanying notes 44–45.

\textsuperscript{66}. \textit{REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES: FEBRUARY TERM, 1821} v, Rule XXX, 19 U.S. (6 Wheat.) v (1821).

\textsuperscript{67}. \textit{REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES: JANUARY TERM, 1833} iv, Rule No. 40, 32 U.S. (7 Pet.) iv (1833). The court ordered:

Whereas, it has been represented to the court, that it would in many cases accommodate counsel, and save expense to parties, to submit causes upon printed arguments[;] it is therefore ordered that in all cases brought here on appeal, writ of error or otherwise, the court will receive printed arguments, if the counsel on either or both sides shall choose so to submit the same.

\textit{Id.}

\textsuperscript{68}. \textit{REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES: JANUARY TERM, 1837} vii, Rule No. 44; 36 U.S. (11 Pet.) vii (1837).

\textsuperscript{69}. \textit{See} BEVERIDGE supra note 64, at 94 n.1.

\textsuperscript{70}. \textit{Id.} at 83.
Not until 1844 did the Court begin taking direct steps to limit the length of oral arguments. Justice Joseph Story, speaking at the direction of the Court, noted the size of the docket “arising from the great increase of the business of the country, and the magnitude and importance of the interests involved in it” and encouraged the members of the bar to condense their arguments and not to repeat arguments made by their co-counsel.

Five years later, the Court took the more serious step of limiting the length of oral argument when it ordered “that no counsel will be permitted to speak, in the argument of any case in this court, more than two hours, without the special leave of the court, granted before the argument begins.” By today’s standards, however, an argument still could be quite long: if two lawyers argued for two hours for each side, it would last eight hours. In highly significant cases, the Court waived the time limit. For example, in In re McCardle, the Court allotted six hours for each side. And in the Dred Scott case, the Court gave each counsel three hours; on reargument, it heard twelve hours of oral argument.

In its 1849 rules, the Court also placed a greater emphasis on written argument. It required counsel to file a detailed printed abstract of a case.

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72. Id.; see also 5 Carl B. Swisher, History of the Supreme Court of the United States: The Taney Period, 1836–64, at 275–92 (1974) (discussing the expanding workload of the Court in the 1830s and 1840s and efforts to solve the problem by reorganizing the judicial system).
75. 73 U.S. (96 Wall.) 318 (1867).
76. See Fairman, supra note 74, at 451. The Court apparently did not interrupt the advocates with questions. See id. at 456.
78. See Swisher, supra note 72, at 605.
79. See Fehrenbacher, supra note 74, at 294.
80. See Reports of Cases Argued and Adjudged in the Supreme Court of the United States: January Term, 1849 v, Rule of Court No. 53. 48 U.S. (7 How.) v (1849).
81. Id. The court ordered in part: Counsel will not be heard, unless a printed abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points. And no other book or case can be referred to in the argument.

Id.
and warned that absent such a document, the party’s counsel could not present an oral argument. Still, the briefs were not necessarily detailed. In the Dred Scott case, for example, the initial brief for Scott was only ten pages. When the case was reargued, one brief for Scott was eight pages, and the second was forty pages.

Perhaps the energy required for the oral colloquies and their preparation as well as the Court’s growing docket encouraged it to further regularize its procedures. In 1858, it produced a new, revised compilation of its rules. The compilation included the rules of 1849 concerning oral arguments and briefs; however, it added a significant restriction on oral argument. It limited each side to two attorneys and restricted each side to an argument totaling two hours, with the proviso that the Court could give special permission for longer arguments.

B. Post-Civil War to the Present

In the years following the Civil War, the Court apparently began the practice of closely questioning lawyers during oral argument. During that era, the Court’s docket grew to barely manageable proportions. Until Congress established the Circuit Courts of Appeals in 1891, it was not uncommon for two or three years to pass between docketing a case and oral argument.

82. Id. The court further ordered: “If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard ex parte, upon the argument of the party by whom the statement is filed.” Id.
84. See Frederick, supra note 10, at 26.
86. See id. at xii–xiii.
87. See id. at xii.
88. See id.
89. See Shapiro Address, supra note 18, at 26.
90. See Frederick, supra note 10, at 24 (noting that the Supreme Court’s calendar for oral argument more than doubled between 1825 and 1845). Another problem slowing down the Court was frequent illnesses of the Justices. See id. If one or more Justices were too ill to hear a case, the remaining Justices might divide equally and schedule a reargument. Id.
91. See Fairman, supra note 74, at 69.
In 1872, the Court developed its rules in greater detail. Its rules on oral argument remained essentially the same. As for briefs, it specified that a brief should contain a concise statement of the case, an assignment of errors that the party relied upon, a brief of the argument containing a clear statement of the points of law and fact to be discussed, a summary of the charge of a court when that charge is to be discussed, and a quotation of the full substance of any evidence that was admitted or rejected. In 1884, the Court delineated its general rules in greater detail; however, its rules on briefs and oral arguments remained essentially the same. It made clear that cross appeals would be argued as one case, thus thwarting lawyers who might wish to make two full oral arguments to the Court.

By the early 1900s, the Court’s docket had become extremely congested. At the end of the 1910 October term, it had failed to dispose of 650 cases; at the end of the following term, it had left undisposed 680 cases.

In 1911, the Court published a new comprehensive statement of its rules. It limited oral argument to one and one-half hours for each side, with additional time possible only with special leave of the Court. For arguments on questions of the jurisdiction of the court below and in appeals in certain criminal cases, it allotted forty-five minutes for each side.

With the 1911 rules, the Court’s procedures for briefing and oral argument were largely set. In those rules, the Court revised its requirements for the required contents of briefs and set them out in detail. In addition, it limited oral argument to thirty minutes for each side for the

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92. See Cases Argued and Adjudicated in the Supreme Court of the United States, December Term, 1871 xi (1890) General Rules, 81 U.S. (14 Wall.) xi (1872).
93. See id.
94. See id. at xi–xii.
96. See id. Rule 21, at 584.
98. Id.
99. See Rules of the Supreme Court of the United States, 222 U.S. 1 (1911).
100. See id. Rule 22(3), at 28.
101. See id.
103. Id. Rule 21, at 26.
summary docket, forty-five minutes for each side in certified cases, and one and a half hours for each side in other cases on the regular docket. Over time, the majority of cases scheduled for oral argument fell into the summary docket calendar so that half-hour arguments became the norm. Today, the Court appears to require oral argument in all cases in which it has noted jurisdiction or granted certiorari. In high profile cases, the Court sometimes extends the time for oral argument. For example, it granted a total of three hours for the argument in Department of Health and Human Services v. Florida, and four hours for Chamber of Commerce v. FEC.

Not until 1925 did these rules change. In that year, largely owing to the efforts of Chief Justice William Howard Taft, Congress granted the overwhelmed Court its greatest relief since the establishment of the Circuit Courts of Appeals in 1891. It enacted the “Judges Bill,” which greatly reduced the types of cases that the Court had to take and gave it broad discretion to use certiorari to choose the cases that it thought significant.

In 1928, the Court reissued its rules, but made no changes with respect to the prescribed lengths of oral argument or the contents of briefs. Then, in 1970, the Court significantly changed its rules on oral argument. It allowed one-half hour for oral argument on each side, unless it otherwise directed. The Court also limited each side to one oralist unless it granted additional time or gave special permission when there were several parties present.

104. Id. Rule 22, at 28. (The Court also ruled that it would hear only one counsel for each party in cases on the summary docket and no more than two counsel in all other cases. See id. Rule 26(3), at 33.)

105. Id. Rule 21, at 26.

106. Id. Rule 22(3), at 28.


108. Id. at 769 (suggesting that this is the current practice).


112. See Judiciary Act of 1925.

113. See Rules of the Supreme Court of the United States, Rules 27(2) & 28(2)–(6), 275 U.S. at 614–16 (1928).

on a side. It also revised its rule on the contents of briefs, but still prescribed detailed requirements.

Until 1980, the Court had not imposed a page limit on briefs. In that year, it limited parties’ briefs to fifty pages, reply briefs to twenty pages.

115. See id. Rule 44(4). The Court’s current rule on oral argument is as follows:

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to argue shall be presented by motion under Rule 21 in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent’s or appellee’s brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent’s or appellee’s brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an amicus curiae whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an amicus curiae may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

8. Oral arguments may be presented only by members of the Bar of this Court. Attorneys who are not members of the Bar of this Court may make a motion to argue pro hac vice under the provisions of Rule 6.


and amicus briefs to thirty pages. In 2007, presumably in step with digital advances, the Court modified its rules using word count limits for the length of briefs: 15,000 words maximum for the briefs of the parties, 7,500 words for reply briefs, and 9,000 words for amicus briefs. In 2010, it limited reply briefs to 6,000 words and amicus briefs to 9,000 words. On occasion, the Court has submitted questions to counsel after oral argument and permitted supplemental briefs.

C. Lessons from the Narrative

This narrative charts the Court’s move to a lesser reliance on oral argument and a greater reliance on written briefs. Today, oral argument supplements the briefs. Judge Ruggero Aldisert of the Third Circuit observed: “[T]he purpose of oral argument is to clarify and emphasize what has been written.” The narrative also advances two generalizations that encourage today’s Court to remain open to new procedures.

First, this study of the past shows that the rules on argument are not written in stone; over the years, they have changed many times. This proposal for an incremental innovation would contribute to the continuing development of the Court’s procedures.

Second, in the shift from the earlier era of expansive rhetoric to increasingly shorter oral arguments, the Court may have suffered a loss of assistance in its decision-making. The half-hour arguments and heavy questioning may hamper the quality of oralists’ presentations and the Court’s ability to gain the assistance it desires. This proposal would aid the Court in regaining some of that lost assistance.

125. See supra Part II.A–B.
126. See supra Part II.A–B.
III. THE VALUE OF ORAL ARGUMENT AND THE NEED TO ENHANCE IT

A. Does Oral Argument Influence the Outcome of a Case?

The initial question must be—in light of the extensive factual analysis, legal analysis, and argument in the briefs—whether oral argument makes a difference. Some Justices give oral argument minimal weight. Justice Oliver Wendell Holmes, for example, said that he had hardly ever been influenced by oral argument. Justice Clarence Thomas, noted for his silence at oral argument, has stated: “I don’t see the need for all these questions. I think Justices, 99 percent of the time, have their minds made up when they go to the bench.” Similarly, former Chief Justice William Rehnquist wrote: “In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench.”

But most Justices who have addressed the issue have disagreed with Justices Thomas and Rehnquist. Justice William Brennan stated: “[O]ften my whole notion of what a case is about crystallizes at oral argument.” Chief Justice John Roberts, then on the United States Court of Appeals for the D.C. Circuit, approvingly quoted Justice John Marshall Harlan II: “[Y]our oral argument on appeal is perhaps the most effective weapon you have got.” Since joining the Supreme Court, Chief Justice Roberts has characterized oral argument as an important early step in the decision-making process—the step at which the Justices begin to share their individual views on the case:

131. SHAPIRO ET AL., supra note 107, at 766 (quoting Justice Brennan in Harvard Law School Occasional Pamphlet No. 9, 22–23 (1967)) (alteration in original).
132. Roberts, supra note 130, at 68.
It’s the first time we learn what our colleagues think about a case. We don’t sit down before argument and say, ‘This is what we think’ or, ‘This is how I view the case.’ We come to it cold as far as knowing what everybody thinks, and so through the questioning we’re learning for the first time what the other Justices view—how they view—the case. And that can alter how you view it right on the spot. And if they’re raising questions about an issue that you hadn’t thought was important, you can start looking into that issue during the questioning a little bit. So it’s a very dynamic and very exciting part of the job.\textsuperscript{133}

Justices Anthony Kennedy, John Paul Stevens, and Antonin Scalia have also emphasized the role of oral argument as a vehicle for a dialogue among the Justices.\textsuperscript{134}

Significant social science studies confirm the importance of oral argument.\textsuperscript{135} For the evidentiary basis of one study, researchers analyzed the oral argument transcripts of every Supreme Court case from 1972 through 2007, as well as the notes that Justices Lewis Powell and Harry Blackmun kept during oral argument.\textsuperscript{136} They found that oral argument is “one of the important venues in which Justices converse with each other about the case, determine their concerns about particular issues, and begin learning how eventual coalitions might form.”\textsuperscript{137} Given that oral argument is the first opportunity for the Justices to discuss a case,\textsuperscript{138} it is significant that when Justice Blackmun included his prediction on how his colleagues would vote in his oral argument notes, he was correct nearly seventy-six percent of the time.\textsuperscript{139}

Another study evaluated the importance of oral argument by counting

\textsuperscript{133} Interview with John Roberts, \textit{supra} note 130.
\textsuperscript{134} See BLACK ET AL., \textit{supra} note 9, at 7–8 (quoting Justices Kennedy, Stevens, and Scalia). For an extensive bibliography on the subject, see SHAPIRO ET AL., \textit{supra} note 107, at 764 n.1.
\textsuperscript{135} See BLACK ET AL., \textit{supra} note 9, at 112–14.
\textsuperscript{136} See \textit{id.} at 113–15.
\textsuperscript{137} Id. at 114.
\textsuperscript{138} See Adam Liptak, \textit{No Vote-Trading Here}, N.Y. TIMES, May 16, 2010, at WK1 (quoting Justice Kennedy), \textit{available at} http://www.nytimes.com/2010/05/16/weekinreview/16liptak.html?_r=0 (“Before the case is heard, we have an unwritten rule: We don’t talk about it with each other . . . ”).
\textsuperscript{139} See BLACK ET AL., \textit{supra} note 9, at 112–13. The more Justice Blackmun commented on a specific Justice, the more likely he was to predict that Justice’s vote. See \textit{id.} at 112.
citations to oral arguments in case opinions.\footnote{140} It studied approximately 2,600 opinions and found 787 citations to oral argument transcripts.\footnote{141} It further found a prevalence of citations relating to a concession that an attorney made during an argument.\footnote{142} This prevalence indicates the significant role that the arguments play in the ultimate decision-making.\footnote{143}

A study by two Eighth Circuit judges further supports the importance of oral argument.\footnote{144} In the 1980s, Judges Myron Bright and Richard Arnold, jurists with very different judicial philosophies, kept track of how oral arguments influenced their thinking.\footnote{145} Out of 163 recorded cases, Judge Bright found oral argument necessary in 85\% of cases and helpful in 82\%.\footnote{146} He found that oral argument changed his mind in 31\% of cases and 37\% of the time in cases in which he thought oral argument was necessary.\footnote{147}

Out of 157 recorded cases, Judge Arnold found oral argument necessary in 75\% of the cases and helpful in 80\%.\footnote{148} He found that oral argument changed his mind in 17\% of the cases and 22\% of the time in cases in which he thought oral argument was necessary.\footnote{149} Judge George Fagg later conducted a similar study and found that oral argument changed his mind in 13\% of all cases argued and in 21\% of cases in which he thought oral


\footnote{141} See id. at 33.

\footnote{142} See id. at 36.

\footnote{143} See id. at 37.


\footnote{145} Id. at 70.

\footnote{146} Id.

\footnote{147} Id.

\footnote{148} Id.

\footnote{149} Id.
argument was necessary. In a study at the state court level, then-Justice Warren Wolfson of the Illinois Appellate Court surveyed sixteen judges on that court and reached similar findings. As to whether oral argument affected their decisions concerning the outcome of a case, six judges stated that it affected their decisions 50% or more of the time, and four stated that oral argument affected their decisions 20% to 40% of the time. As to whether oral argument caused the judges to change their minds, two judges stated that they changed their minds in 20% of the cases in which oral argument had some effect, one judge set the percentage at 15%, one judge set it at 12.5%, two judges set it at 10%, and ten judges set the percentage at 5% or less.

Although these latter two studies are of interest, their value is limited because unlike these courts, which must decide a variety of cases, the Supreme Court is almost entirely a discretionary court. It selects the cases that it wishes to hear and must necessarily resolve issues in which great uncertainty lurks. Resolving these murkier issues requires greater dialogue among the Justices and lawyers and, consequently, makes oral argument an even more significant part of the process.

As many experienced jurists have noted, then, oral argument does make a difference. However, a jurist may need to spend time on the bench before realizing its value. Before Justice Scalia joined the Court, he described oral argument as “a dog and pony show.” But it is no wonder that as he gained experience he became a frequent participant in the dialogue and observed, “things can be put in perspective during oral argument in a way that they can’t in a written brief.”

152. Id.
153. Id.
154. See SHAPIRO ET AL., supra note 107, at 76.
155. See id.
156. See id. at 764–67.
157. BLACK ET AL., supra note 9, at 8. Justice Scalia did not recognize the significance of oral argument until joining the Supreme Court. Id.
159. Id. at 258 (quoting Justice Scalia).
B. The Functions of Oral Argument

An examination of the functions of oral argument demonstrates how our proposal would serve these functions. From the judicial viewpoint, oral argument has at least three general functions and four specific functions; this proposal would assist with the latter.

As for the general functions, oral argument (1) plays a ceremonial role; (2) makes the deliberations more real by bringing real people—that is, the representatives of the parties—into the deliberations; and (3) offers a forum in which the Justices can communicate with one another about the case.

With respect to the general functions, oral argument first helps legitimize the judicial function by providing a public ceremony as part of the decision-making process. The proceedings take place in a “temple” and still are theoretically open to the public, although not available by video. The Court thereby links oral arguments to a classical heritage while exemplifying the democratic nature of American justice.

Second, oral argument permits the Justices to dialogue with “real people,” the oralists, making the conflict in the case less of an abstraction and more of a concrete reality that affects people, public and private entities, and society.

Third, oral argument offers an opportunity for the Justices to

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161. See Shapiro Article, supra note 160, at 530 (discussing four specific functions, which include assisting the Court in clarifying the facts of cases, the nature of legal claims, the logic of legal claims, and the practical impact of legal claims); Stephen L. Wasby, The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges, 65 JUDICATURE 340, 344 (1982) (discussing judicial communication and public ceremony); Wasby et al., supra note 7, at 418 (discussing the presence of party representatives in deliberations).

162. See Wasby, supra note 161, at 344; Wasby et al., supra note 7, at 418.

163. See Wasby, supra note 161, at 344; Wasby et al., supra note 7, at 418.

164. See McElroy, supra note 43, at 1838–40. For further references to the building being a temple, see id. at 1858 n.123.

165. See id. at 1854–57 (discussing the Court’s rituals, including oral argument). Professor McElroy also argues that permitting videos of oral argument would enhance the democratic nature of the proceedings. See id. at 1870–73.

166. See Wasby et al., supra note 7, at 418 (“[O]ral argument serves as a uniquely helpful and encouraging part of the communications process between counsel and the court, in which both sides can feel that their case was heard by real people.”).
communicate among themselves.\textsuperscript{167} Former Solicitor General Theodore Olson once described oral argument as “like a highly stylized Japanese theater. . . . The [J]ustices use questions to make points to their colleagues.”\textsuperscript{168} Burt Neuborne, a frequent oralist, stated: “Sometimes I think I am a post office. I think that one of the [J]ustices wants to send a message to another [J]ustice and they are essentially arguing through me.”\textsuperscript{169} Social scientists use a different conceptual terminology: they see oral argument as a critical step for the Justices in establishing coalitions for purposes of voting on cases.\textsuperscript{170}

In addition to these general functions, oral argument aids the Court in its central function of deciding cases and controversies in four specific ways.\textsuperscript{171} It assists the court in clarifying (1) the facts of the case; (2) the precise nature of the legal claim; (3) the logic of the legal claim; and (4) how a decision would affect other laws and the outcomes of future cases.\textsuperscript{172} It is in fulfilling these functions that this proposal offers significant assistance.

First, oral argument can clarify the facts of a case.\textsuperscript{173} Given the workload of the Justices, it is easy to imagine how difficult it must be to retain a grasp on the intricacies of every case.\textsuperscript{174} As Chief Justice Rehnquist wrote: “One can do his level best to digest from the briefs . . . what he believes necessary to decide the case, and still find himself falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings.”\textsuperscript{175}

Second, although it may seem surprising, advocates do not always state their claims as clearly as possible in written briefs.\textsuperscript{176} As one veteran of

\begin{itemize}
  \item \textsuperscript{167} Id. at 418.
  \item \textsuperscript{169} BLACK ET AL., supra note 9, at 9 (citing THE HONORABLE COURT (PBS Video 1988)).
  \item \textsuperscript{170} See id. at 11–14, 48–84. Perhaps some evidence for this dialogic function is the statistic that, on average, the Justices interrupt one another eight times in a given case, indicating that they are talking to one another. See id. at 25.
  \item \textsuperscript{171} See Shapiro Article, supra note 160, at 530.
  \item \textsuperscript{172} See id.
  \item \textsuperscript{173} See id.
  \item \textsuperscript{174} See generally supra Part II.B. (chronicling the historically increasing strain on the Court’s docket).
  \item \textsuperscript{175} REHNQUIST, supra note 56, at 245.
  \item \textsuperscript{176} See generally Daniel J. Meador, \textit{Toward Orality and Visibility in the Appellate Process}, 42 MD. L. REV. 732, 750 (1983) (describing as a frequent obstacle to greater emphasis on oral argument
\end{itemize}
Court arguments wrote: “Despite the best efforts of the brief writer, it is common for the Justices to insist upon a further explanation concerning the precise nature of the claims presented to the Court.”

Third, legal analysis, of course, is at the heart of the Court’s deliberative program. The notes that Justice Blackmun took during oral arguments confirm the focus on the logic of the legal arguments. A study of his notes shows that 95% of his sentences discuss substantive argument, while only 5% discuss the attorneys’ styles and general comments.

Fourth, the Justices have always shown a concern over the practical impact of a holding on future cases. This concern has led the Court to pose an increasing number of hypothetical questions. These questions can consume extensive amounts of the time reserved for argument and may entail complex issues that the attorney had not previously considered fully, if at all. The attorney, then, may give a less than satisfactory response.

Expecting oral argument, as it is currently employed, to contribute fully
to fulfilling these four functions places a heavy demand on a half-hour. This proposal for inviting the Court or individual Justices to submit questions before argument would lessen that burden.185

The proposal also would enhance an important, overarching feature of oral argument. When attorneys draft briefs, they are presenting the Court with filtered information—information that places their arguments in the best light.186 Bias and preferential treatment of favorable information are inevitable and expected.187 The Court’s questions during oral argument permit it to gain additional information that it wants to consider.188 The opportunity to ask supplementary questions prior to oral argument would enhance the Court’s ability to gather that information.189

The importance of questions grows when the quality of the advocates is unexceptional. Although the quality has improved over the years with some lawyers specializing in Supreme Court advocacy,190 Justices often have noted the inadequacy of some oralists. Justice Douglas wrote that during his years on the Court, 40% of the advocates were incompetent and only a few were excellent.191 Justice Rehnquist even joked that many advocates believed that oral argument was the place for rehashing their briefs with hand gestures.192

Judge Bright recounted that he once attempted a procedure somewhat similar to this proposed innovation of supplementing oral argument with written requests at the Eighth Circuit.193 Prior to oral argument, the judges...

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185. See infra Part IV.C.4.
186. See Shapiro Article, supra note 160, at 531 (describing advocates as “salesperson[s]” whose object is to persuade the Justices to view the case in their favor).
188. See Johnson, supra note 187, at 333–34. “Oral arguments provide a plethora of information about policy issues and external actors’ preferences that the justices did not, or could not, attain from the litigant or amicus curiae briefs.” Id. at 343.
189. See id.
190. See Roberts, supra note 130, at 68–81 (noting this development).
193. Bright, supra note 150, at 44.
would confer and try to identify the issues on which they thought the oral argument should focus. The judges, however, rarely could agree. The difficulty faced by the Eighth Circuit judges, I believe, lay in the effort to find a consensus on questions. Under this proposal, however, the Justices could submit questions individually as well as collectively.

Judge Bright also believed that submitting questions beforehand could cause time delays. To avoid too many questions under our proposal, some restraint by the Court and counsel will be necessary. In addition, the Court must direct attorneys to keep their responses as brief as possible. With these restraints, pre-argument questions can efficiently enable oral argument to fulfill its functions.

IV. HOW THE PROPOSAL WOULD HELP IN ACTUAL CASES: THE KELO EXAMPLE

To illustrate how our proposal could assist the Court, this Article examines the oral arguments in Kelo v. City of New London. It points out three parts of the dialogue in which the attorneys could have better dealt with challenging questions if they had been given a prior opportunity to consider them and supply responses in writing.

194. Id.
195. See id. Professor Martineau has suggested a similar format in which attorneys would receive advanced notice of questions and issues that judges wish to discuss. See Robert J. Martineau, The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom, 72 IOWA L. REV. 1, 31 (1986). Judge Alvin Rubin of the Fifth Circuit used this procedure for his individual questions. See id. at 31 n.182. In one instance, the New Jersey Supreme Court proffered questions before oral argument. See DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 95–98 (1997). After Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975), the landmark case on exclusionary zoning, six related cases worked their way up to the state supreme court. KIRP ET AL., supra, at 95. Departing from standard practice, the court sent the lawyers twenty-four questions for which the justices wished responses. Id. at 95–96. During three days of hearings, each of thirty lawyers received ten minutes to discuss the issues with the court. See id. at 96.
196. See infra Part IV.C.
197. See infra Part IV.C.
198. See Bright, supra note 150, at 44.
199. See generally id.
201. See infra Part IV.C.
A. The Case

In *Kelo*, the Court upheld the authority of a regional agency to condemn property for purposes of redevelopment. For many years, New London, Connecticut had been a distressed city with high unemployment rates and insufficient municipal revenues. In 2000, the city authorized the New London Development Corporation, a private nonprofit entity, to serve as its agent in implementing an ambitious development plan that would create corporate, leisure, and recreational opportunities in a ninety-acre area. The city council also authorized the redevelopment corporation to exercise eminent domain in the city’s name to purchase or acquire property. Sparking the plan was the announcement that Pfizer, Inc., the pharmaceutical company, would be building a $300 million research site adjacent to that area.

Located in the development area were the homes of plaintiff Suzette Kelo and others whose properties were not blighted or in poor condition. Nevertheless, the development corporation condemned the properties. Kelo contested the exercise of eminent domain by invoking the federal Constitution’s Fifth Amendment, which states, “nor shall private property be taken for public use, without just compensation.” The issue before the Supreme Court was whether the decision to take the unblighted properties for the purpose of economic development—an increased tax base and the promise of more jobs—satisfied the Constitution’s public use requirement. In a 5–4 decision, the Court upheld the exercise of eminent domain.

202. See 545 U.S. at 472–77.
203. Id. at 473.
204. Id. at 474–75.
205. Id. at 475.
206. Id. at 473.
207. Id. at 475.
208. Id.
209. Id.
210. U.S. CONST. amend. V.
211. *Kelo*, 545 U.S. at 477.
212. Justice Stevens wrote the majority opinion and was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. See id. at 472–90. Justice Kennedy wrote a concurring opinion in which he stated that he would apply a more demanding level of scrutiny when “the risk of undetected impermissible favoritism of private parties is so acute that a presumption . . . of invalidity is warranted.” Id. at 493. Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented and held that takings for economic development fail to satisfy the “public use”
B. The Opinion

Writing for the majority, Justice Stevens relied heavily on *Berman v. Parker*[^213] and *Hawaii Housing Authority v. Midkiff*[^214], the leading cases on eminent domain.[^215] In *Berman*, the Court upheld a redevelopment plan that included the condemnation of a large blighted area in Washington, D.C.[^216] Although Berman’s department store was not blighted, the redevelopment agency determined that it had to condemn the entire area because it could not effectively redevelop by taking properties piecemeal.[^217] The Court upheld the taking by giving the government extensive discretion in determining what constitutes a “public use”:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[^218]

In *Midkiff*, the state legislature concluded that land ownership in Hawaii was so concentrated that it amounted to an oligopoly and inflated land prices, thus injuring the public welfare.[^219] It established the Hawaii Housing Authority, which, upon the request of certain tenants, could condemn the leasehold property and transfer ownership to the tenant.[^220] Through an indirect process, the tenant would pay compensation to the original owner.[^221] Without a dissenting vote, the Supreme Court found no violation of the

[^215]: *Kelo*, 545 U.S. at 481–82.
[^216]: *Berman*, 348 U.S. at 34–35.
[^217]: See *id*.
[^218]: *Id*. at 33.
[^220]: *Id*. at 233.
[^221]: *Id*. at 234.
The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.” She further wrote: “There is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in [Berman] made clear that it is ‘an extremely narrow’ one.”

In Kelo, Justice Stevens reaffirmed the constitutional interpretation of “public use” that those cases offered and applied them to the New London case: (1) The state may transfer property from one private party to another if the purpose is to benefit the public as opposed to conferring a private benefit on a particular private party; and (2) The Court has defined “public use” broadly, reflecting a longstanding policy of deference to legislative judgments in this field.

The Kelo Court rejected the petitioners’ proposed bright-line rule that economic development does not qualify as a public use. In the words of Justice Stevens: “Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.” He further stated that the Court would not question whether a reasonable certainty existed that the city’s plan would succeed or whether the city had properly chosen the particular property that was necessary for the project.

In their brief to the Supreme Court, the petitioners’ attorneys distinguished Berman and Midkiff by arguing that in both of those cases the governmental purpose was to end conditions detrimental to society—blight in the case of Berman, and oligopoly in the case of Midkiff. In New
London’s case, they argued that the government was promoting private economic development—a purpose that could not constitute a public use: “If all private business development is a ‘public use,’ it will be virtually impossible to distinguish between a public use and a private one.”

The petitioners called for “a clear, bright-line rule that the trickle-down benefits of successful business do not make private business a public use.” Under their proposed rule, they argued that economic development does not qualify as a public use. Justice Stevens rejected this proposed rule, holding that there was “no principled way of distinguishing economic development from the other public purposes that we have recognized.”

C. The Oral Argument

1. The Petitioners’ Test

At oral argument, the Justices made clear that they wanted the petitioners to provide a more precise test for distinguishing between a public and private use, but the petitioners’ advocate’s responses failed to satisfy them.

Early in the argument, Justice O’Connor referred to Berman and asked Scott Bullock, the petitioners’ attorney, for his proposed test:

JUSTICE O’CONNOR: Oh, but [Berman] spoke, in the opinion, said that the determination of the legislature about these things is virtually conclusive, that there is only the narrowest, narrowest role for the judiciary. What kind of standard are you proposing we should get into here to second-guess the public use aspect?

Bullock’s response was not a direct one:

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233. Id. at 26.
234. Id. at 27.
235. Id. at 10.
238. Id. at 5.
MR. BULLOCK: Your Honor, it is clear that eminent domain power is broad, but there has to be limits, and that’s what we are really talking about here.239

He then encountered a series of questions on whether the Court should defer to governmental findings that a taking has a constitutionally public benefit.240 Bullock replied by insisting that there had to be limits on the exercise of eminent domain and referred to Berman and Midkiff as “really at the outer limits of government’s eminent domain.”241 His answer amounted to an assertion that New London had exceeded the Constitution’s outer limit by condemning his clients’ property; however, he failed to define what that outer limit was.242

Justice O’Connor then tested him on his proposition:

JUSTICE O’CONNOR: But you take the position that a city that is suffering from enormous lack of jobs and depression, economic depression, that there is no public use purpose for taking land to enable the creation of jobs?243

Bullock agreed: “That is correct, Your Honor.”244

Later, Justice Kennedy also questioned Bullock on his proposed test to determine what bright line he was proposing:

JUSTICE KENNEDY: As I understand, [your] test then—you want me to make a distinction between blight[,] which is a permissible governmental use, governmental objective[,] and economic revival, which isn’t?245

Bullock agreed.246 In response to further questioning, he praised a finding of “blight” as a clear standard:

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239. Id. at 5–6.
240. Id. at 6–8.
241. Id. at 8.
242. Id. at 6–8, 16.
243. Id. at 8.
244. Id.
245. Id. at 12–13.
246. See id. at 13.
MR. BULLOCK: Under the blight statutes, they actually have to—governments have to meet a certain objective criteria to satisfy that this is actually a blighted area.\textsuperscript{247}

In response, Justice Kennedy asked:

JUSTICE KENNEDY: Why isn’t it an objective criteri[on] to say that we are going to have economic revival, avoid economic downturns?\textsuperscript{248}

In the ensuing dialogue, Bullock argued that in cases like \textit{Berman} and \textit{Midkiff}, “the public use or the public purpose was direct and immediate,” while in the case of economic development, public benefits “are completely dependent upon private parties actually making a profit.”\textsuperscript{249} Justice Kennedy appeared unsatisfied by that distinction.\textsuperscript{250}

Within a few minutes, Justice O’Connor again pressed Bullock to define his test:

JUSTICE O’CONNOR: Mr. Bullock, would you articulate the test that you would propose the Court adopt. Some amici and others have argued that we should use the substantially advances test, so-called test from regulatory takings. What tests do you articulate?\textsuperscript{251}

Bullock responded with a general test:

MR. BULLOCK: The test should be that the government cannot take property simply so that the new owners can put it to ordinary private uses of land. That’s really the test.\textsuperscript{252}

Justice O’Connor reminded Bullock of the city’s argument that it was taking property to enhance economic development, not to transfer it to new owners for private use.\textsuperscript{253} Then she again asked Bullock for his test.\textsuperscript{254} At

\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id. at 14.
\textsuperscript{250} See id. at 14–15.
\textsuperscript{251} Id. at 16.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Id.
her prompting, he replied that a taking was unconstitutional when it was not for an economic development purpose:

MR. BULLOCK: ... When it’s only justified in order to gain the secondary benefits from ordinary private uses of land, and the way that businesses always make use of their land to try to make money or to try to make a profit. That’s our bright line rule.\(^{255}\)

As the Court’s opinion in \textit{Kelo} suggests, the majority of the Justices did not find that “bright line” to be sufficiently distinct.\(^{256}\)

2. A Hypothetical

In addition to struggling to explain the specifics of his proposed test to the Justices, Bullock had to tackle a troublesome hypothetical that Justice Souter posed.\(^{257}\) The Justice asked whether the city would have been acting within its proper authority if it had simply purchased the property as opposed to condemning it:

JUSTICE SOUTER: Well, let’s assume that the city instead of taking the property by eminent domain simply used its, its own—some of its own regular tax income to buy up the property, and assembled parcels of land with the purpose of selling them to an industrial developer to raise the tax base and hence ultimately to raise taxes.

Would you say just within the meaning of general understanding of proper governmental purposes that the city was acting in a way that had no legitimate public purpose?\(^{258}\)

Bullock attempted to cabin that hypothetical as an illustration of a city’s exercise of its police power.\(^{259}\) Justice Souter, however, was pointing to a different issue: If purchasing property is an exercise of a proper public purpose, why is condemning property not also a proper exercise?\(^{260}\) The

\(^{255}\) Id. at 17.
\(^{257}\) See \textit{Kelo} Transcript, \textit{supra} note 237, at 8–9.
\(^{258}\) Id. at 8–9.
\(^{259}\) Id. at 9.
\(^{260}\) Id. at 10.
ensuing dialogue between Justice Souter and Bullock suggests that they were talking past one another.\textsuperscript{261} Justice Souter was attempting to explore a theoretical issue, while Bullock was attempting to respond by relying on black letter law\textsuperscript{262}:

\begin{quote}
MR. BULLOCK: Well, Your Honor, I think the question goes to whether or not the government could use its police power to acquire property and then sell it to a private developer.

JUSTICE SOUTER: Well, I’m not interested in the label. I’m just saying if the government says we need to increase the tax base because we have a depressed city, so we are going to take some of our tax money now, and we are just going to buy up property that people are willing to sell to us, and we are going to assemble parcels. And when we get a big enough one, we are going to sell it to a developer for industrial purposes. And that will, that will raise the tax base. Is there anything illegitimate as a purpose for governmental spending in doing that?

MR. BULLOCK: No, Your Honor. We do not believe that that would be some legitimate [sic] because it’s not a public use.

JUSTICE SOUTER: Why isn’t there a public purpose here?

MR. BULLOCK: Well, Your Honor, because this case affects the eminent domain power, which is regulated by the Fifth Amendment—

JUSTICE SOUTER: No, but we are talking about—I mean, I realize that, but I mean, I thought your point was that it was use of eminent domain power for an improper purpose. And you characterize that purpose as conveying property to private owners. Well, in my example, the same thing is going on except that it’s not using the eminent domain power. If the purpose in my example is a proper public purpose, why isn’t it a proper public purpose when the government does it by eminent domain? What changes
\end{quote}

\textsuperscript{261} Id. at 10–14.
\textsuperscript{262} Id. at 9–10.
about the purpose?

MR. BULLOCK: Your Honor, because of the public use restriction of the Amendment. That’s what we really — 263

At this point, Justice Scalia attempted to throw Bullock an intellectual life preserver. 264 He suggested that if the government were to buy property for eventual redevelopment, it would be acting for a permissible public use, but if government were to condemn property for these purposes, it would be acting for an impermissible public purpose. 265 Justice Scalia’s question presumably was designed to support an argument for narrowing the constitutional authority for eminent domain and raise the issue with his judicial colleagues. However, many years ago, the Court accepted “public purpose” as the equivalent of “public use” and thus a valid goal of eminent domain. 266 Nevertheless, Justice Scalia tried to resurrect the distinction:

JUSTICE SCALIA: Mr. Bullock, do you equate purpose with use? Are the two terms the same? Does the public use requirement mean nothing more than that it have a public purpose?

MR. BULLOCK: No, Your Honor.

JUSTICE SCALIA: That’s your answer to Justice Souter. 267

Justice Souter quickly attempted to save Bullock from pursuing that failed argument and pointed out that line of reasoning would reject the holdings in Berman and Midkiff. 268 Bullock, however, seemed unable to fully reject Scalia’s argument, which had long been a favorite one in conservative circles. 269

JUSTICE SOUTER: But if that is your answer then the slum

263. Id.
264. See id. at 10.
265. See id.
268. See id. at 11.
269. See id. at 11–12.
clearance cases have got to go the other way.

MR. BULLOCK: I’m sorry–

JUSTICE SOUTER: If that is your answer, then I suppose the slum clearance cases were wrongly decided.

MR. BULLOCK: Well, your Honor, this Court did hold in [Berman] and [Midkiff] that the police power and eminent domain power are coterminous. That was a holding especially of this Court’s opinion in [Midkiff]. And there are certain amici that have been filed in this case, amicus briefs filed in this case that have called upon this Court to re-examine that. And of course, this Court is free to do so.

JUSTICE SOUTER: But you are saying we don’t have to re-examine it, but I think your adoption of Justice Scalia’s approach puts you in a difficult—I think you’re moving in the direction of saying we really have got to overrule the prior cases.

MR. BULLOCK: Your Honor, I think under a—perhaps an original understanding of the takings clause, there was a difference between public use and public domain.

JUSTICE SOUTER: Just for the moment, what about my question? And you can get into history, if you want to, and I tend to be interested in that, but my immediate concern is, if you give the answer that you have just given, doesn’t it jeopardize the precedent of the slum clearance cases?

MR. BULLOCK: Your Honor, I don’t think so, because of the caveat in [Berman] and [Midkiff] that eminent domain cannot be used for private uses. And that is what is really at issue here. What I think was the focus of—

At this point, Justice Kennedy intervened, and Bullock was finally able to offer an answer that would not require challenging Supreme Court

270. Id. at 11–12.
precedent on the purported distinction between public purpose and private use:

JUSTICE KENNEDY: But that’s what they were being used for in [Berman] and—everybody knows that private developers were the beneficiaries in [Berman].

MR. BULLOCK: Your Honor, I believe the justifications focused upon the removal of the offensive conditions in [Berman], that the public purpose, if you want to call it that, was served once the blight was removed, the public purpose was served once the oligopoly was broken up.

Justice Souter, then, failed to receive a satisfactory answer to his hypothetical. His query, intertwined with Justice Scalia’s attempt to guide Bullock’s response and Justice Kennedy’s intervention, resulted in a confusing tangle and consumed precious time.

3. An Unexpected Question

Wesley Horton, the attorney speaking for the City of New London, also confronted a difficult question when the discussion turned to whether, as a practical matter, a condemnee would receive compensation to make him whole. Justice Breyer presented the issue this way:

JUSTICE BREYER: But now, put yourself in the position of the homeowner. I take it, if it’s a forced sale, it’s at the market value, the individual, let’s say it’s someone who has lived in his house his whole life. He bought the house for $50,000. It’s worth half a million. He has [$]450,000 profit. He pays [thirty] percent to the Government and the state in taxes, and then he has to live somewhere. Well, I mean, what’s he supposed to do? He now has probably [$]350,000 to pay for a

271. See id. at 12.
272. Id.
273. Due to Justice Kennedy’s question, Bullock moved on without answering Justice Souter’s initial question. See id.
274. See id. at 48–49.
house. He gets half a house because that’s all he is going to do, all he is going to get for that money after he paid the taxes, or whatever.

And I mean, there are a lot of—and he has to move and so forth. So going back to Justice Kennedy’s point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn’t have to sell his house? Or is he inevitably worse off?\textsuperscript{275}

At first, Horton pointed to a Connecticut program that provided relocation loans; however, he admitted his lack of familiarity with the program and conceded that the loans would not make the condemnee whole.\textsuperscript{276} After more discussion, Justice Breyer rephrased his question:

JUSTICE BREYER: What is the remedy? Let’s repose the problem to which I want to remedy then. And maybe this isn’t the right remedy.

But the remedy that they are saying, and I’m really repeating it, is an individual has a house and they want to be really not made a lot worse off, at least not made a lot worse off just so some other people can get a lot more money. Now what, what is the right—is there no constitutional protection? If this isn’t the right case, what is?\textsuperscript{277}

In response, Horton attempted to rely on the constitutional requirement of just compensation, but then had to admit that he was confused about the law:

MR. HORTON: Well, the right case is in the just compensation concept, but going to your, your point, if this were here as just compensation, I would say in terms of just compensation, in deciding what the fair market value is today, you can certainly take into account the economic plan that’s going into effect. You know—

\textsuperscript{275} Id. at 48.  
\textsuperscript{276} See id. at 48–49.  
\textsuperscript{277} Id. at 50.
JUSTICE KENNEDY: Really? I thought that that was a fundamental of condemnation law that you [cannot] value the property being taken based on what it’s going to be worth after the project. That’s just—

MR. HORTON: Well—

JUSTICE KENNEDY: Unless Connecticut law is much different from any other state.

MR. HORTON: I may have misspoken on that subject, Your Honor.278

After further discussion, Horton again attempted to satisfy the Justices by suggesting that compensation could include the social costs of the condemnee, but admitted that he was unprepared to address the issue.

MR. HORTON: . . . . But the—I guess the best answer I have, Justice Breyer, to your question, after I, after I misspoke is simply to go back to the point that the time at which you consider what just compensation is, is in the just compensation proceedings.

And while I misspoke about what the test was, and I apologize for that, certainly this Court can consider if social costs should be taken into account at that time. I’m not saying they should. I haven’t thought that through as can you [sic] obviously see by my misanswering the question, but it seems to me because my primary answer is that you don’t look at that now.279

As was the case with Bullock, Horton was compelled to spend time on an issue for which he was admittedly unprepared.280 In fact, the issue was not one that the Court had certified.281 If he had received the question in writing beforehand, he might have composed an informed answer on paper or prepared to present it at oral argument.282

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278. Id. at 50–51.
279. Id. at 52–53.
280. See id. at 51.
4. Analysis

In Kelo, the Justices repeatedly tried to elicit a statement of the petitioner’s proposed test for eminent domain, a test that neither the brief nor the reply brief had satisfactorily articulated.\(^{283}\) (Admittedly, attempting to define the outer limits of governmental authority would be a daunting task.) They further posed a hypothetical to the petitioner’s lawyer that he likely had not considered beforehand.\(^{284}\) And his opposing counsel was also compelled to consider a question that concerned the Justices, but one that strictly was beyond the scope of the case.\(^ {285}\)

Yet, each side enjoyed the benefit of experienced legal teams.\(^ {286}\) The teams’ respective failures stemmed not from inadequate professional competence, but from understandable miscalculations. In the petitioners’ case, the legal team miscalculated how precise a constitutional test the Justices were seeking. And both the petitioners’ and respondents’ legal teams miscalculated how far the concerns of the Justices would extend.

The arguments in the briefs should have signaled to the Justices counsel needed some guidance on which matters concerned them and what they would have liked to pursue at oral argument. By submitting written questions to the lawyers and receiving written replies beforehand, the Justices could have elicited answers that would have aided in the attorneys’ preparation, permitting the Court to engage in a more productive oral argument.

V. Conclusion

By increasing their emphasis on briefs, the Court has historically gained the advantage of receiving analytical arguments that lawyers have closely considered and refined. The Court’s rules on briefs, however, result from a history that subjected the briefs to increasingly detailed requirements—suggesting that the shift away from oral arguments was not entirely smooth. Briefs are one-directional: the writer presents an argument, and the Justices receive it. In this one-sided communication, there is no interplay between

\(^{283}\) See supra Part IV.C.1.

\(^{284}\) See supra Part IV.C.2.

\(^{285}\) See supra Part IV.C.3.

the lawyers and the Court. Oral argument, then, provides the only opportunity for interplay.

With the historic shift from rhetorical oratory to dialogue, oral argument could better perform its functions. But by placing ever-tightening time limits on the arguments, the Court limited their potential. The shortness of time allotted presents a particularly difficult obstacle to substantial discussion especially when, as in *Kelo*, the lawyers do not anticipate being questioned about arguments covered in the brief that the Justices still believe call for extensive clarification, hypotheticals, and novel questions.

In light of this cramped interplay between bench and bar, our proposal offers promise. It would enable the Justices, individually or collectively, to submit questions to the attorneys beforehand and enable the attorneys to construct thoughtful answers. For the proposal to prove successful, of course, the Justices would have to limit themselves to a reasonable number of questions and attorneys would have to show restraint in controlling the length of their answers.

The proposal affords a way to supplement oral argument with the written word. It blends the two methods of communication—print and speech—enabling the Court to fully consider the parties’ arguments.