

# VIRTUAL BRIEFING AT THE SUPREME COURT

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*The open secret of Supreme Court advocacy in a digital era is that there is a new way to argue to the Justices. Today’s Supreme Court arguments are developed online: they are dissected and explored in blog posts, fleshed out in popular podcasts, and analyzed and re-analyzed by experts who do not represent the parties or have even filed a brief in the case at all. This “virtual briefing” (as we call it) is intended to influence the Justices and their law clerks but exists completely outside of traditional briefing rules. This article describes virtual briefing and makes a case that the key players inside the Court are listening. In particular, we show that the Twitter patterns of law clerks indicate they are paying close attention to producers of virtual briefing, and threads of these arguments (proposed and developed online) are starting to appear in the Court’s decisions.*

*We argue that this “crowdsourcing” dynamic to Supreme Court decision-making is at least worth a serious pause. There is surely merit to enlarging the dialogue around the issues the Supreme Court decides; maybe the best ideas will come from new voices left out of the traditional briefing process. But the confines of the adversarial process have been around for centuries, and there are significant risks that come with operating outside of them, particularly given the unique nature and speed of online discussions. We analyze those risks in this Article and suggest it is time to think hard about embracing virtual briefing, truly assessing what can be gained and what will be lost along the way.*

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## INTRODUCTION

Imagine a Supreme Court advocate at lunch after oral argument thinking of a point she wished she had raised in the courtroom, then picking up her phone to call or text the Justices to add a quick “P.S.” to her answers. Now imagine a company who wants to weigh in on a pending controversy but for whatever reason does not want its name on a brief, so instead it contacts a well-known academic to e-mail the substance of the company’s desired message to the Justices. Or how about an experienced and trusted Supreme Court advocate who thinks a different litigator failed to adequately answer a question at argument and so stops by a Justice’s chambers the next day to offer a different way to resolve the case?

These thought experiments may seem outlandish. Indeed, the Supreme Court has strict rules about supplemental briefing and disclosures, and the Justices do not often make exceptions.<sup>1</sup> But the not-so-secret secret of Supreme Court advocacy is that there is a new way to argue at the Supreme Court through a conversation that exists completely outside of the Court’s briefing rules.

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<sup>1</sup> Supreme Court Rule 25.7 states that after a case has been argued or submitted, “the Clerk will not file any brief, except that of a party filed by leave of the Court.” See also STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 716 (10th ed. 2013) (exceptions to this rule are made only for “late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included,” and these exceptions are only available to parties, not amici); *id.* at 762 (post-argument letters that are “strictly factual” may be addressed to the Clerk by letter). For the Supreme Court rules on disclosure (corporate disclosure rules and amicus disclosure rules generally) see Rules 29.6 and 37.6.

Today's Supreme Court arguments are developed online. They are fleshed out and explored in blog posts;<sup>2</sup> the advocates are invited to elaborate on popular podcasts (sometimes even just days before or after their oral argument);<sup>3</sup> and the Justices' musings at argument are analyzed and re-analyzed publicly and by a wide variety of players at the very same time the law clerks are writing bench memos and the Justices are making their decisions.<sup>4</sup> If indeed law students (and hence recently-graduated law clerks) are now taught to "Google" a case before beginning any assignment,<sup>5</sup> every pending case at the Court will generate a treasure trove of results for them—certainly not restricted to submissions on the docket.

The point of this Article is to describe and evaluate this practice—what we call "virtual briefing"—at the Supreme Court.<sup>6</sup> There are now nearly twenty blogs largely dedicated to covering activity at the Supreme Court<sup>7</sup> and over a dozen pod-

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<sup>2</sup> Of course, SCOTUSblog, <https://scotusblog.com> [<https://perma.cc/84HS-TUX2>], is the oldest and most popular law blog covering the Supreme Court, but there is now a cottage industry of blogs that cover the Court. To name just a few, see ABOVE L., <https://abovethelaw.com> [<https://perma.cc/XQG7-B3F4>]; AM. CONST. SOC'Y: ACS BLOGS, <https://acslaw.org/acsblog/> [<https://perma.cc/T8JP-DNH6>]; FED. SOC'Y: BLOG POSTS, <https://fedsoc.org/commentary/blog-posts>; JOST ON JUSTICE, <https://jostonjustice.com>; JUSTIA: VERDICT, <https://verdict.justia.com>; LAWFARE, <https://lawfareblog.com>; NAT. CONST. DAILY: CONST. DAILY, <https://constitutioncenter.org/blog/> [<https://perma.cc/V9H9-WKE7>]; REASON: VOLOCK CONSPIRACY, <https://reason.com/volokh/> [<https://perma.cc/VV7T-M2ER>]; and TAKE CARE, <https://takecareblog.com> [<https://perma.cc/YRN3-T7LM>].

<sup>3</sup> See e.g., *Amicus*, SLATE, <https://slate.com/podcasts/amicus> [<https://perma.cc/VL2X-SNUF>]; COUNTING TO 5, <https://countingto5.com> [<https://perma.cc/PNN2-H5SS>]; FIRST MONDAYS, <https://firstmondays.fm> [<https://perma.cc/5GTH-4QMU>]; *More Perfect*, WNYC STUDIOS, <https://wnycstudios.org/podcasts/radiolabmoreperfect> [<https://perma.cc/Y8GM-DH63>]; SCOTUScast, FED. SOC'Y, <https://fedsoc.org/commentary/podcasts?category=scotuscast> [<https://perma.cc/42GS-UCTJ>]; SCOTUS 101, HERITAGE FOUND., <https://heritage.org/scotus-101> [<https://perma.cc/V5F6-Y49A>].

<sup>4</sup> See *infra* pp. 91–100.

<sup>5</sup> Stephen Rynkiewicz, *What Bloggers Told Us About the State of the Legal Blogosphere*, ABA J. (Dec. 1, 2016), [http://www.abajournal.com/magazine/article/what\\_bloggers\\_told\\_us\\_about\\_the\\_state\\_of\\_the\\_legal\\_blogosphere](http://www.abajournal.com/magazine/article/what_bloggers_told_us_about_the_state_of_the_legal_blogosphere) [<https://perma.cc/RWL9-JZ9G>] ("For many people, their first step in legal research is to go to Google, not Westlaw or Nexis[.]").

<sup>6</sup> This subject has largely eluded academic attention, but one of our former students wrote an excellent Note on the topic towards the dawn of the Supreme Court blogging era. See generally Rachel C. Lee, Note, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535, 1535–71 (2009) (situating the problem of "ex parte blogging" within ethics rules of the legal profession).

<sup>7</sup> A blog is a website "offering a reverse chronological series of short essays or 'posts' by an author[,] . . . group of member-authors, or posts from guest authors. . . . Some blogs also allow visitors to the site to write comments about posts." *Id.* at n.6. For examples of legal blogs that cover the Court, see ACLU:

casts devoted to the same cause.<sup>8</sup> These blog posts and podcasts are organized on the left and on the right, by Supreme Court insiders and by groups that are more fringe players. They are run by academics, former clerks, current advocates, special interest groups and more.

The “analog” version of “virtual briefing” is likely newspaper op-eds by reporters who cover the Court. But, as we elaborate below, there are features of virtual briefing that make this new communication mode distinct—just as the Supreme Court has already recognized that other forms of digital communication are qualitatively different from their analog precursors.<sup>9</sup> Virtual briefing is a way to argue to the Justices and their law clerks *in real time* about the disputes they are evaluating. It is also a method open to nearly everyone, without required fact-checkers or the same journalistic or other professional reputational interests. Put simply, Supreme Court arguments have never before been crowdsourced. They are now.

Oddly, if there is anyone this new regime leaves out, it is the principal advocates themselves—possibly for fear of transgressing at least the spirit of the Court’s rules governing briefing and oral argument. But even the advocates are now gradually being encouraged to enter the mix: as the hosts of one popular podcast put it, a goal of that oral form of virtual briefing is to allow the advocates time to discuss the “cool

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BLOGS, <https://aclu.org/blog> [<https://perma.cc/7NWU-NBTT>] (covering the Supreme Court, among other subjects); BALKINIZATION, <https://balkin.blogspot.com> [<https://perma.cc/K4NZ-DNC3>]; BRENNAN CTR. FOR JUST., <https://brennancenter.org> [<https://perma.cc/FA6V-VEL4>]; CONST. L. PROFESSOR BLOG, <https://lawprofessors.typepad.com/conlaw/> [<https://perma.cc/6NX9-ENCF>]; CATO INST.: CATO LIBERTY, <https://cato.org/blog> [<https://perma.cc/9Y8R-YBKR>]; JOSH BLACKMAN’S BLOG, <http://www.joshblackman.com/blog/> [<https://perma.cc/TM93-2YVR>]; JOST ON JUSTICE, *supra* note 2; LAWFARE, *supra* note 2; NAT’L CONST. CTR.: CONST. DAILY, *supra* note 2; ORIGINALISM BLOG, <https://originalism-blog.typepad.com> [<https://perma.cc/ALC2-VD2N>]; PRAWFSBLAWG, <https://prawfsblawg.com> [<https://perma.cc/QB3C-9YWT>]; REASON: VOLOKH CONSPIRACY, *supra* note 2; SCOTUSBLOG, *supra* note 2; and TAKE CARE, *supra* note 2.

<sup>8</sup> A podcast is an audio file that can be downloaded to a computer or mobile device, much like a radio show that broadcasts in installments. For examples of legal podcasts, see *Amicus*, SLATE, *supra* note 3; *Cases and Controversies*, BLOOMBERG L. (available on Apple Podcasts); *Cato Daily Podcast*, CATO INST., <https://cato.org/archives/type/multimedia/category/9390> [<https://perma.cc/L38A-K2V8>]; CITIZEN’S GUIDE TO SUP. CT., <https://cgttsc.wordpress.com> [<https://perma.cc/3QFC-BG3X>]; COUNTING TO 5, *supra* note 3; FIRST MONDAYS, *supra* note 3; *More Perfect*, WNYC STUDIOS, *supra* note 3; *NewsHour Supreme Court Podcast*, PBS, <https://pbs.org/newshour/podcasts> [<https://perma.cc/H7Q6-KJ9R>]; REASON PODCAST, <https://reason.com/podcast/> [<https://perma.cc/E55P-H2KZ>]; *SCOTUScast*, FED. SOC’Y, *supra* note 3; *SCOTUS 101*, HERITAGE FOUND., *supra* note 3; and *We The People*, NAT’L CONST. CTR. (available on Apple Podcasts).

<sup>9</sup> See *Riley v. California*, 573 U.S. 373, 393–96 (2014).

stuff”<sup>10</sup> they did not get to in the official argument, with the hope (sometimes said explicitly) that people inside the Court are still listening.<sup>11</sup>

This change is of a piece with a broader evolution of communication in political and other realms. We now have a President whose primary mode of speaking to the people is via *Twitter*. Congresspersons launch and sustain their campaigns on social media. Interest groups mount their public relations efforts online. The days of pamphleteers on street corners are, for the most part, long gone. As our society alters the ways in which we communicate to each other (through comment boxes, “likes,” and retweets), it should come as no surprise that we have also adapted the way we speak to the Justices.

Further, it seems more than likely that key players inside the Court are listening. As we describe in this paper, publicly available records demonstrate that current Supreme Court law clerks are following these commentators, bloggers and podcast hosts on *Twitter*. Justice Kennedy, in fact, candidly said that he asked his law clerks to read the relevant blogs once the Court has granted certiorari on a case.<sup>12</sup> And—although there can never be absolute proof about what influences a Justice and what does not—we also present a series of case examples where arguments made in “virtual briefing,” but absent or downplayed in traditional briefing, have shown up in Supreme Court opinions.

There surely is merit to opening up the dialogue around the issues decided by the Supreme Court. After all, most of the issues on the Court’s docket affect more than just the parties

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<sup>10</sup> See *Who is the River Master?*, FIRST MONDAYS 50:20 (Oct. 9, 2017), <http://www.firstmondays.fm/episodes/2017/10/9/ot2017-2-who-is-the-river-master> [<https://perma.cc/CUG8-2GRH>] (discussing *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and saying *First Mondays* should be the “destination podcast” for Supreme Court advocates who had a lot of “cool stuff in the can” that they did not get to say at oral argument).

<sup>11</sup> The popular podcast *First Mondays* (currently on hiatus) provides a good example. The hosts, Dan Epps and Ian Samuel, often speak as if they are directing their comments to people on the inside. See, e.g., *Cf. Everything*, FIRST MONDAYS 1:12:46 (Apr. 23, 2018), <http://www.firstmondays.fm/episodes/2018/4/23/ot-2017-22-cf-everything> [<https://perma.cc/TY7P-BC3P>] (“Justice Sotomayor, if you’re listening be on the lookout for that petition . . . in the next few months.”); *id.* at 1:17:58 (“To the people I admire on the Court, do better.”).

<sup>12</sup> When asked whether he reads blog posts after certiorari grants, Justice Kennedy responded: “I have my clerks do it, especially with the ones when we’ve granted cert, to see how they think about what the issues are.” See Kevin O’Keefe, *Supreme Court Justice Kennedy on the Value of Law Blogs*, LEXBLOG (Oct. 10, 2013), <https://kevin.lexblog.com/2013/10/10/supreme-court-justice-kennedy-on-the-value-of-law-blogs/> [<https://perma.cc/86B8-ZDQ7>].

before them, and maybe the best ideas will come from new voices in the crowd. Further, as evidenced by the great boom in amicus briefs and the free-for-all culture of Supreme Court arguments generally,<sup>13</sup> perhaps a completely open briefing system is where we have been going all along.

We argue in this Article, however, that this is not a journey to be taken without reflection. The adversarial system has been around for a long time, and there are significant risks that come from operating outside of it. We point out those risks in this Article, and we suggest it is time to take a hard look at “virtual briefing”—assessing truly what can be gained and what will be lost along the way. We also freely acknowledge that we are identifying a line-drawing problem; there is no neat and tidy way to separate unobjectionable commentary from potentially problematic communications. But wrestling with that line is preferable to just passively accepting a new normal without pausing to consider the consequences.

## I

### WHAT IS VIRTUAL BRIEFING?

“Virtual briefing” is the phrase we use to describe online advocacy—written or oral—targeted at particular cases pending at the Supreme Court and outside of the normal briefing process. We thus exclude from our discussion summaries of argument or reporting and commentary on cases after they have been decided. Virtual briefing, as we use the phrase, includes some sort of element of intent to influence case outcomes. Thus, although producers of virtual briefing likely have multiple audiences in mind, we are concerned with online advocacy that at least in part is meant to reach the Justices’ ears.

Of course, in some respects this type of briefing has happened for a long time;<sup>14</sup> for example, almost every *New York Times* Op-Ed advocating the abolition of capital punishment

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<sup>13</sup> One of us has fretted in the past about the “free for all” culture in amicus briefs, at least with respect to factual claims. See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1762–65 (2014).

<sup>14</sup> Indeed, in 1977, long before the blogosphere, John Jeffries and Peter Low, young professors at the University of Virginia, wrote an essay in the student newspaper advancing their views in a pending criminal case. The virtual briefing was intentional and successful (making its way into a footnote in the ultimate decision). Looking back, Peter Low explained their motivation: “We needed to get our views in the public domain quickly if they were ever going to come to the attention of the court while it mattered.” See Mike Fox, *As Virginia Law Weekly Turns 70, Alumni Recall Chronicling Life at UVA Law*, UVA LAWYER (2018), <https://law.virginia.edu/uvalawyer/article/making-headlines> [https://perma.cc/HY22-BJN8].

while *Furman v. Georgia*<sup>15</sup> was pending would fall under our definition. But the phenomenon to which we refer in this Article is newer and different in several important ways, as explored below.

### A. History & Modern Prevalence of Virtual Briefing

Beginning around 2002, lawyers became some of the first consumers and producers of blogs (also called “blawgs” in the earlier years).<sup>16</sup> It is not difficult to understand why. Blogs allow commentators to offer legal arguments with a speed and precision that is dramatically different from writing briefs or even op-eds in traditional newspapers. As well-known scholar and blogger Eugene Volokh explains:

[A blog post is] much easier and quicker to produce than an amicus brief; it’s often all we can do, since in many cases we know that we won’t take the time and trouble to write a brief; and it does double duty as a way of disseminating the blogger’s views to the public as well as to the judges.<sup>17</sup>

Blog posts are also cheaper than filing an amicus brief. Provided the author already has a computer and an internet connection, a post costs nothing to publish. Printing and filing a brief in the Supreme Court costs at least hundreds of dollars—often over \$1000.<sup>18</sup> That may not seem like too much, but for academics on tight professional and personal budgets, it can be quite meaningful.

Moreover, comment threads on a blog allow for a dynamic commonly referred to as “crowdsourcing.” That is, blogs present an interactive medium that allows for “shared information and insight.”<sup>19</sup> And, of course—unlike parties that respond to each other on a forty-five-day briefing schedule—blogging threads can develop within seconds. Indeed, an important value of blogging is that arguments and counterarguments are being lobbed at each other in real time, while the conversation at the Court is pending and ongoing. As one commentator puts

<sup>15</sup> 408 U.S. 238 (1972).

<sup>16</sup> Tom Mighell, *Blog 2.0*, AM. BAR PUBLICATIONS (April/May 2006) [https://americanbar.org/publications/law\\_practice\\_home/law\\_practice\\_arcarch/lpm\\_magazine\\_articles\\_v32\\_is3\\_an2.html](https://americanbar.org/publications/law_practice_home/law_practice_arcarch/lpm_magazine_articles_v32_is3_an2.html) [<https://perma.cc/7ASW-UPL4>].

<sup>17</sup> Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089, 1096 (2006).

<sup>18</sup> Companies that print Supreme Court briefs do not generally advertise their rates online, but the authors can attest to these figures.

<sup>19</sup> See Kevin O’Keefe, *Law Blogs Ignore the History of Blogging at their Peril*, LEXBLOG (Mar. 18, 2014), <https://kevin.lexblog.com/2014/03/18/law-blogs-ignore-the-history-of-blogging-at-their-peril/> [<https://perma.cc/ZUF9-YZUP>].

it, “legal bloggers serve a valuable role in discerning what is relevant or important, and they often do so nearly simultaneously with the development[.]”<sup>20</sup> Or, put slightly differently, blogging “fill[s] a space in American media somewhere between formal legal publications, mainstream journalism, and water cooler gossip.”<sup>21</sup>

If blogs offer fast and targeted conversations, podcasts—the next frontier of virtual briefing—take up a different space. Podcasts offer a prolonged conversation with an engaged audience. In a relatively short time period, (some trace the popularity of podcasts to the 2014 podcast phenomenon *Serial*)<sup>22</sup> podcasts have skyrocketed in popularity. Most podcast listeners have been listening to podcasts for three years or less.<sup>23</sup> And as of 2018, 50% of all U.S. homes—over sixty million—identify as podcast fans.<sup>24</sup> Today, at least 112 million Americans have listened to podcasts, a figure up 11% from 2016.<sup>25</sup>

Podcasts are valuable precisely because they reach a niche audience and sustain their audience’s attention for a relatively long period of time.<sup>26</sup> Over 80% of podcast listeners listen to all or most of a forty-five to sixty-minute episode.<sup>27</sup> In today’s world of soundbites and clickbait, a podcast consumer—a captured and engaged audience—is a rare bird. There is also a minimal barrier to entry for podcasting (all it takes is a good microphone) and podcasting generally reaches people who are already interested in the subject matter and want to be entertained with a prolonged conversation about issues they care about.

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<sup>20</sup> Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS L.J. 99, 102 (2006).

<sup>21</sup> Justin Krypel, *A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs*, 14 MICH. TELECOMM. & TECH. L. REV. 457, 470 (2008).

<sup>22</sup> SERIAL, <https://serialpodcast.org> [<https://perma.cc/DYV3-CQWZ>].

<sup>23</sup> See *2019 Podcast Stats & Facts*, PODCAST INSIGHTS (Mar. 6, 2019), <https://www.podcastinsights.com/podcast-statistics> [<https://perma.cc/8NXC-55JC>] (65%).

<sup>24</sup> See *id.* For a historical timeline of the “podcast” and an explanation for how it got its name, see *Podcasting Historical Timeline and Milestones*, INT’L PODCAST DAY, <https://internationalpodcastday.com/podcasting-history/> (last visited Aug. 26, 2019) [<https://perma.cc/8KFQ-6AV7>].

<sup>25</sup> Jayson DeMers, *Why Podcasts are Popular*, FORBES (July 11, 2017), <https://www.forbes.com/sites/jaysondemers/2017/07/11/why-podcasts-are-popular-and-4-content-lessons-to-learn-from-them/#4e5784e918f6> [<https://perma.cc/8FFT-76KG>].

<sup>26</sup> *Id.* Podcasts are also very attractive to advertisers because they offer a desirable, highly engaged audience.

<sup>27</sup> See *2019 Podcast Stats & Facts*, *supra* note 23.

Podcast listeners are typically “loyal, affluent and educated,” often commuting and listening in their car.<sup>28</sup> Seen this way, this format is perfect for members (and hopefuls) of the Supreme Court bar—the group of elite highly educated lawyers who argue regularly before the Court, have the trust of the Justices, and increasingly see themselves as helping the Court to take the right issues and reach the right results.<sup>29</sup>

As you might expect, the popularity of virtual briefing for legal arguments has skyrocketed. The *American Bar Association* (ABA) estimates that there were 100 legal blogs in 2002, and 500 by 2005.<sup>30</sup> By December 2016, that number reached more than 4,000, by the ABA’s count.<sup>31</sup>

To take a prominent example, *SCOTUSblog*, the original and most popular blog to cover the Supreme Court (and which one commentator humorously called “the TMZ of the legal world”<sup>32</sup>) has seen a serious growth spurt over the last ten years. By our count, in 2007, the average case on *SCOTUSblog* garnered five posts per case. Ten years later, in the 2017 Term, that number has more than doubled—eleven posts per case. And the numbers are even more dramatic when looking at the closely watched cases. For October Term (OT) 2007, there were four cases that had ten or more posts on *SCOTUSblog*, and for OT 2017, there were twenty-seven cases with ten or more posts.

*SCOTUSblog* took blogging about the Court to a new level. It has “become a mainstay for Washington reporters, legislators and lobbyists.”<sup>33</sup> To take a dramatic example, when the Supreme Court announced its decision in *NFIB v. Sebelius*,<sup>34</sup> the first case about President Obama’s Affordable Care Act in 2012, *SCOTUSblog* had over 100,000 visitors. At least by one account, even the White House was depending on the blog to

<sup>28</sup> *Id.*

<sup>29</sup> Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1916–19 (2016).

<sup>30</sup> Mighell, *supra* note 16.

<sup>31</sup> Rynkiewicz, *supra* note 5.

<sup>32</sup> Jennifer Steinhauer, *Polarized over Health Care, United on Drama of Ruling*, N.Y. TIMES (June 24, 2012), <https://nytimes.com/2012/06/25/us/politics/on-left-and-right-a-frenzy-awaiting-health-care-ruling.html> [<https://perma.cc/44WZ-EBZK>].

<sup>33</sup> Sara Kiff, *For SCOTUS Blog, One Goal: Beat Everybody and Break News of Health Care Ruling*, WASH. POST (June 27, 2012), [https://washingtonpost.com/business/economy/for-scotusblog-one-goal-beat-everybody-and-break-news-of-health-care-ruling/2012/06/27/gJQA1TZp7V\\_story.html](https://washingtonpost.com/business/economy/for-scotusblog-one-goal-beat-everybody-and-break-news-of-health-care-ruling/2012/06/27/gJQA1TZp7V_story.html) [<https://perma.cc/QL59-3PSH>].

<sup>34</sup> 567 U.S. 519 (2012).

deliver the news to the President.<sup>35</sup> *SCOTUSblog* also occupies a prominent place in the production of case-specific legal analysis. *SCOTUSblog*'s practice of hosting online symposia prior to oral arguments in high-profile cases illustrates this phenomenon. For example, in *Janus v. AFSCME*,<sup>36</sup> *SCOTUSblog* hosted a symposium prior to oral argument that allowed scholars and interested parties to elaborate and propose solutions to the various problems the case presented.<sup>37</sup> Such posts are well researched, often with in-text hyperlinks to relevant cases.<sup>38</sup> To the extent these posts are different from sections one might find in legal briefs, it is surely much more in terms of format than in substance.

Legal podcasting, although relatively new to the SCOTUS coverage scene, has also surged in popularity. By our count, there are now a dozen podcasts largely dedicated to covering the Supreme Court.<sup>39</sup> Some are hosted by former law clerks,<sup>40</sup> some by academics,<sup>41</sup> some by special interest groups<sup>42</sup> and some by journalists.<sup>43</sup> Many of these podcasts welcome guests

<sup>35</sup> Kiff, *supra* note 33 (quoting White House spokesman Jay Carney).

<sup>36</sup> 138 S. Ct. 2448 (2018).

<sup>37</sup> *Special Feature: Symposium Before the Oral Argument in Janus v. AFSCME*, SCOTUSBLOG, <http://www.scotusblog.com/category/special-features/symposia-before-oral-arguments-during-october-term-2017/symposium-before-the-oral-argument-in-janus-v-afscme/> [<https://perma.cc/T278-SQXJ>] (last visited Aug. 26, 2019). Interestingly, and as a sign of the influence of *SCOTUSblog*, one post was authored by California Attorney General Xavier Becerra, who also filed an amicus brief in the case on behalf of California. See Brief for the State of California Supporting Affirmance, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466); Xavier Becerra & Aimee Feinberg, *Symposium: Agency Fees Benefit the Workplace—Just Ask the States*, SCOTUSBLOG (Dec. 22, 2017, 1:55 PM), <http://www.scotusblog.com/2017/12/symposium-agency-fees-benefit-workplace-just-ask-states/> [<https://perma.cc/6Q9D-Q3KQ>].

<sup>38</sup> See, e.g., Catherine Fisk, *Symposium: A Ruling for Plaintiffs Would Revive Lochner*, SCOTUSBLOG (Dec. 19, 2017, 2:17 PM), <http://www.scotusblog.com/2017/12/symposium-ruling-plaintiffs-revive-lochner/> [<https://perma.cc/QTW9-6GCM>] (containing in-depth research of labor-related cases).

<sup>39</sup> Those podcasts are: *Amicus*, SLATE, *supra* note 3; *Cases and Controversies*, BLOOMBERG L., *supra* note 8; *Cato Daily Podcast*, CATO INST., *supra* note 8; *CITIZEN'S GUIDE TO SUP. CT.*, *supra* note 8; *COUNTING TO 5*, *supra* note 3; *FIRST MONDAYS*, *supra* note 3; *More Perfect*, WNYC STUDIOS, *supra* note 3; *NewsHour Supreme Court Podcast*, PBS, *supra* note 8; *REASON PODCAST*, *supra* note 8; *SCOTUScast*, FED. SOC'Y, *supra* note 3; *SCOTUS 101*, HERITAGE FOUND., *supra* note 3; *We The People*, NAT'L CONST. CTR., *supra* note 8.

<sup>40</sup> See, e.g., *FIRST MONDAYS*, *supra* note 3 (hosted by former Supreme Court Clerks Dan Epps and Ian Samuel).

<sup>41</sup> See, e.g., *id.*

<sup>42</sup> See, e.g., *Cato Daily Podcast*, CATO INST., *supra* note 8 (hosted by the *Cato Institute* and discussing libertarian thought).

<sup>43</sup> See, e.g., *Amicus*, SLATE, *supra* note 3 (hosted by journalist Dahlia Lithwick); *More Perfect*, WNYC STUDIOS, *supra* note 3 (hosted by journalist Jad Abumrad).

on their shows who have argued, or are about to argue, before the Justices. And all of them discuss arguments in cases pending before the Court. The missions vary somewhat, but almost all legal podcasts are part entertainment and part educational. As one popular podcast covering the Court, *First Mondays*, describes it, the producers' goal is to discuss "upcoming cases, break down the Term's major (and not-so-major) arguments, analyze opinions, gossip about Court intrigue, and make wildly inaccurate predictions."<sup>44</sup>

The power of podcasts and blogs to reach an audience is then amplified by social media. The vast majority of bloggers, podcast hosts, and online magazines also have *Twitter* accounts, *Facebook* pages, and *Instagram* feeds.<sup>45</sup> And—like everyone these days—these commentators use social media to advertise and plug their work products.

Why does this matter? It matters because an entire generation of Americans—particularly young people—get their news through social media. For example, 88% of Millennials report getting their news from *Facebook*; younger Millennials say they "let news find them" on social media like *Twitter* rather than actively seek it out.<sup>46</sup> Twenty years ago, a Court watcher would read traditional newspapers and watch the six o'clock news to learn about Supreme Court arguments; ten years ago, she would load *SCOTUSblog* and read the *New York Times* online; and today, she checks her *Twitter* feed to see what exciting things bloggers and podcasters have to say in real time.

Perhaps for these reasons, virtual briefing at the Court is now quite visible. For example, consider five cases the *New York Times* labeled among "the biggest cases of 2018": *Trump v. Hawaii* (the "travel ban" case);<sup>47</sup> *Janus v. AFSCME* (the public labor unions case);<sup>48</sup> *National Institute of Family and Life Advocates v. Becerra* (the case about crisis pregnancy centers in California);<sup>49</sup> *Gill v. Whitford* (the partisan gerrymandering

<sup>44</sup> *About, FIRST MONDAYS*, <http://firstmondays.fm/about-1> [https://perma.cc/UNT5-44SY].

<sup>45</sup> Rynkiewicz, *supra* note 5 ("Most of the people who would have started a blog 10 years ago are on social media now. The community has gone to Twitter, but it's not the best source for discussion.")

<sup>46</sup> *How Millennials Get News: Inside the Habits of America's First Digital Generation*, AM. PRESS INST. (Mar. 16, 2015), <https://americanpressinstitute.org/publications/reports/survey-research/millennials-news/> [https://perma.cc/R3EE-BN9H].

<sup>47</sup> 138 S. Ct. 2392 (2018).

<sup>48</sup> 138 S. Ct. 2448 (2018).

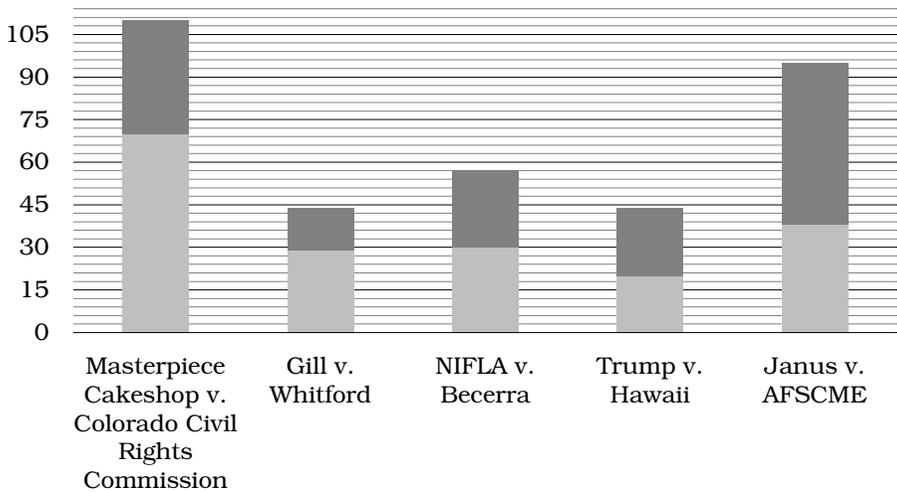
<sup>49</sup> 138 S. Ct. 2361 (2018).

case);<sup>50</sup> and *Masterpiece Cakeshop v. Colorado Commission of Civil Rights*<sup>51</sup> (the case about the baker who refused to bake a cake for a gay couple).<sup>52</sup>

For all five of these cases, a “virtual briefing” docket—if there were such a thing—would be very long. Each case, as the following charts show, generated dozens of qualifying blogposts and podcasts:

FIGURE 1. SAMPLE OF BLOG POSTING IN OT 2017

- Number of blogs that make an argument posted within one week of oral argument
- Number of blogs that make an argument posted at other times

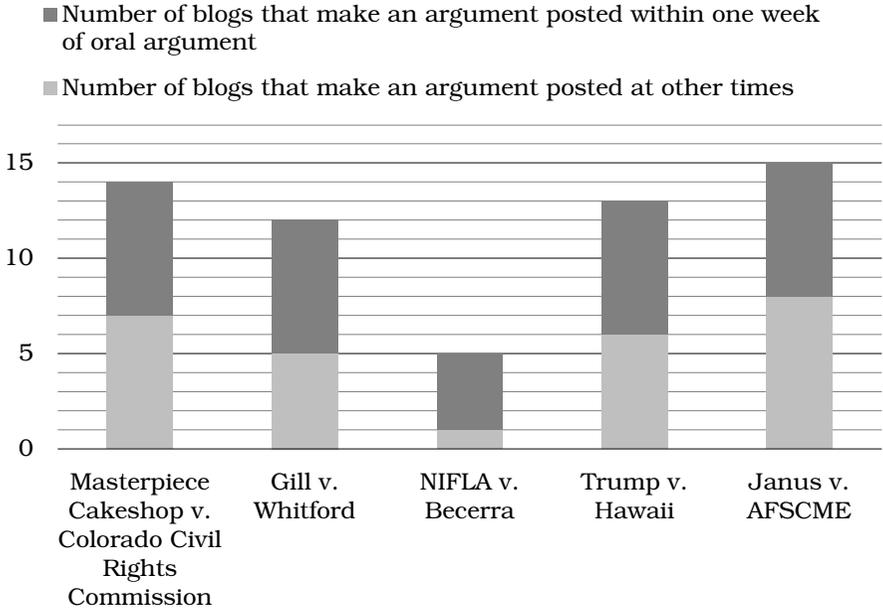


<sup>50</sup> 138 S. Ct. 1916 (2018).

<sup>51</sup> 138 S. Ct. 1719 (2018).

<sup>52</sup> See Adam Liptak & Alicia Parlapiano, *The Supreme Court’s Biggest Decisions of 2018*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/18/us/politics/supreme-court-decisions.html> [<https://perma.cc/QJA4-JJAP>].

FIGURE 2. SAMPLE OF PODCASTS IN OT 2017



To take some highlights, the *Janus* case about public unions inspired ninety-five blog posts and fifteen podcasts that all presented advocacy—meaning case-related arguments—before the case was decided. This included an interview on the *Reason* podcast with the plaintiff, Mark Janus, and another one with his attorney, William Messenger, on the *Federalist Society Podcast*.<sup>53</sup> The numbers are even more dramatic for the *Masterpiece Cakeshop* case. For that case, we found 110 blog posts and fourteen podcasts making an argument about the case before it was decided. Jack Phillips, the owner of Masterpiece, really made the rounds, giving interviews on a Christian podcast the week of argument in addition to making an appearance on *The View*.

Most of those advocacy pieces—typically more than half—were written in the seven days surrounding oral argument, a time when the Justices are likely most engaged with the issues.<sup>54</sup> And within that sensitive week, we also found instances where attorneys in the case actually appeared on

<sup>53</sup> *Reason Podcast: Mark Janus Doesn't Want to Join a Union*, REASON (May 31, 2018), <http://reason.com/archives/2018/05/31/mark-janus-doesnt-want-to-join> [<https://perma.cc/S65Q-ZN8V>]; *Janus in the Court*, FED. SOC'Y (Sept. 19, 2017), <https://fedsoc.org/commentary/podcasts/janus-in-the-court-podcast> [<https://perma.cc/KNR4-K7Ky>].

<sup>54</sup> For *Janus*, 60% of the blogs and 47% of the podcasts appeared the week of oral argument. For *Masterpiece*, those numbers were 36% and 50%. For *Trump v. Hawaii*, 55% of the blogs and 54% of the podcasts appeared within seven days of

podcasts to expand on material they left out of their official argument in the courtroom.<sup>55</sup>

But it is certainly more than the actual advocates who use virtual briefing to target the Justices. The blogs and podcasts also feature prominent academics,<sup>56</sup> Supreme Court advocates who are well known to the Court but were not otherwise involved in the case,<sup>57</sup> guests who filed amicus briefs in the case,<sup>58</sup> and those who have no official connection but championed the cause for a political party or other interest group.<sup>59</sup>

Further, although not exactly a space for refined argument, *Twitter* is used significantly in high-profile cases such as these—particularly during the week the case is argued. Sometimes the podcast and blogger hosts will tweet to advertise recent posts or episodes, and sometimes the advocacy will just appear in the Tweet itself. Tweets from prominent bloggers

argument. For *Gill v. Whitford*, the numbers were 34% and 58%, respectively. And for *Becerra*, they were 47% and 80%.

<sup>55</sup> See generally *Who is the River Master?*, FIRST MONDAYS, *supra* note 10 (discussing *Gill v. Whitford* and featuring Misha Tseytlin, who argued for the state).

<sup>56</sup> See generally Michael Dorf, *SCOTUS Travel Ban Post Mortem*, DORF ON L. (Apr. 25, 2018), <https://www.dorfonlaw.org/2018/04/scotus-travel-argument-post-mortem.html> [<https://perma.cc/3WGW-ETXX>] (pointing out where he thought the advocate in the case missed opportunities).

<sup>57</sup> See, e.g., *Amicus: Don't Call it an Abortion Case, with Guests Walter Dellinger and Priscilla Smith*, SLATE (Mar. 31 2018), [http://www.slate.com/articles/podcasts/amicus/2018/03/crisis\\_pregnancy\\_centers\\_and\\_why\\_liars\\_need\\_lawyers\\_too.html](http://www.slate.com/articles/podcasts/amicus/2018/03/crisis_pregnancy_centers_and_why_liars_need_lawyers_too.html) [<https://perma.cc/LL55-N6RQ>] (discussing *NIFLA v. Becerra*); *Courthouse Steps: National Institute of Family and Life Advocates v. Becerra, with Guest Michael Moreland*, FED. SOC'Y (Mar. 20, 2018), <https://fedsoc.org/events/courthouse-steps-national-institute-of-family-and-life-advocates-v-becerra> [<https://perma.cc/3QWZ-2CCY>]; *Should Public-Sector Workers Be Forced to Pay Union Fees? A Preview of Janus v. American, with Guests Raymond LaJeunesse Jr., Donald B. Verrilli Jr., and Ilya Shapiro*, CATO INST. (Feb. 15, 2018), <https://www.cato.org/events/should-public-sector-workers-be-forced-pay-union-fees-preview-janus-v-american-federation> [<https://perma.cc/UD89-597F>] (discussing *Janus v. AFSCME*).

<sup>58</sup> See, e.g., *National Security Council Official, Joshua Geltzer on Supreme Court Travel Ban*, JUST SECURITY (Apr. 20, 2018), <https://www.justsecurity.org/55176/security-podcast-national-security-council-hawaii-travel-ban-josh-geltzer-discusses-trump-hawaii/> [<https://perma.cc/WKC3-U8T7>] (featuring Josh Geltzer, one of fifty-two former national security officials who submitted an amicus brief in the travel ban case).

<sup>59</sup> The aforementioned VOLOKH CONSPIRACY, *supra* note 2, is a well-trafficked blog advancing conservative and libertarian causes. BALKINIZATION, *supra* note 7, on the other end of the spectrum, is a liberal blog. Both blogs have been credited with “influenc[ing] the business of the Court”—from the challenges to the Affordable Care Act (*Volokh Conspiracy*) to the government’s treatment of suspected terrorists (*Balkinization*). See Vincent James Strickler, *The Supreme Court and New Media Technologies*, in *COVERING THE UNITED STATES SUPREME COURT IN THE DIGITAL AGE* 61, 73–74 (Richard Davis ed., 2014).

around the time of oral argument in the travel ban case, for example, included phrases like “not the next Korematsu”<sup>60</sup> or “POTUS can’t act with anti-Muslim animus.”<sup>61</sup> It is even becoming more common to engage in a sort of “supplemental tweeting” shortly after oral argument—offering online answers to the Justices’ questions during the “sweet spot” of their consideration of the case (as they head back to chambers reflecting on the argument and deciding how to vote a day or two later in conference).<sup>62</sup>

Interestingly, it is not unusual for those who engage in virtual briefing to then be recruited to write official briefs as well. The “Dellinger brief,” as the Justices called it in the case about California’s same-sex marriage ban in 2013, originated as a piece by Walter Dellinger in *Slate* that was then turned into an amicus brief—a brief many credit with changing the result in the case.<sup>63</sup> As Dick Howard has explained, the first constitutional challenge to the Affordable Care Act in 2012 was not taken seriously until bloggers on the *Volokh Conspiracy* began fleshing out the argument that the law’s individual mandate exceeded Congress’ power.<sup>64</sup> These bloggers then filed an amicus brief to the Court repeating these claims—claims that

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<sup>60</sup> @BzationBlog, TWITTER (Apr. 22, 2018, 5:46 PM), <https://twitter.com/BzationBlog/status/988217600499994630> [<https://perma.cc/3S42-4WDX>].

<sup>61</sup> @ShallTakeCare, TWITTER (Apr. 17, 2018, 10:05 AM), <https://twitter.com/ShallTakeCare/status/986289460122996736> [<https://perma.cc/USM8-56XF>].

<sup>62</sup> See, e.g., @katie\_eyer, TWITTER (Oct. 9, 2019, 1:43 PM), [https://twitter.com/katie\\_eyer/status/1182033896319459328](https://twitter.com/katie_eyer/status/1182033896319459328) [<https://perma.cc/G4ZA-75GW>] (“The Supreme Court heard the LGBT Title VII cases yesterday, asking the question of whether anti-LGBT discrimination is necessarily also ‘because of sex.’ Here are my thoughts on oral argument . . .”).

<sup>63</sup> See Transcript of Oral Argument at 10–11, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144); Walter Dellinger, *No Harm, No Standing*, SLATE (Dec. 11, 2012) <https://slate.com/news-and-politics/2012/12/the-california-gay-marriage-case-no-one-has-standing-to-appeal.html> [<https://perma.cc/BBQ2-3UV2>]; see also Adam Liptak, *Justices Say Time May Be Wrong for Gay Marriage Case*, N.Y. TIMES (Mar. 26, 2013), <http://www.nytimes.com/2013/03/27/us/supreme-court-same-sex-marriage-case.html> [<https://perma.cc/5QWW-9HLY>] (discussing the Justices’ concerns about standing during oral argument). In that brief and *Slate* piece, Dellinger (a prominent Supreme Court litigator) argued that there was no standing in the case, which of course is the ultimate resolution the Court reached.

<sup>64</sup> A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 282–83 (2015) (“As challenges to the Affordable Care Act’s individual mandate began to work their way through the federal courts, most legal professionals and academics considered arguments against the mandate to be ‘simply crazy.’ The *Volokh Conspiracy*, however, provided a forum for conservative legal scholars to develop arguments against the individual mandate, helping to break down the perception of expert consensus on the constitutional issues in play.” (footnote omitted)).

played a large role at oral argument and, according to some, strongly influenced how the Chief Justice saw the case.<sup>65</sup>

In both of those examples, of course, the questions from the Justices at oral argument came from an official brief, not the online version of the argument. This seems to imply that the Justices are still hesitant to actually cite blogs and podcasts as their source of information (an interesting observation in and of itself that we will explore below).<sup>66</sup> But regardless of the form the argument took at the end of the day, the momentum for those claims came by way of advocacy outside of the traditional briefing process—part of the crowdsourcing dynamic of virtual briefing.

## B. The Virtual Briefing Spectrum

Of course, not all blogs and podcasts are the same. And one's normative assessment of virtual briefing might well vary with the level of detail and analysis each piece of advocacy presents, as well as the degree to which any given virtual brief might serve worthwhile purposes other than attempting to influence the Court. It is perhaps helpful, therefore, to imagine a virtual briefing spectrum.

On one end of the spectrum is what one might call a “deep dive” legal blog post—a written piece of advocacy that walks the walk and talks the talk of legal analysis. These blog pieces are much the same as traditional briefs or even law review articles (with running citations instead of detailed footnotes). They are long; they anticipate counterarguments; they back up claims with empirical support; and they unpack a complex legal argument in a careful way. A good modern example of a “deep dive” version of virtual briefing would be the commentary on *Lawfare* analyzing controversies surrounding the Mueller investigation or the series of historical “deep dive podcasts” on the same site tracking the Supreme Court's decisions on military commissions.<sup>67</sup> Indeed, these posts or podcasts appear on websites

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<sup>65</sup> *Id.* at 283.

<sup>66</sup> Indeed, a quick Westlaw search reveals only one citation to a blog in a majority opinion—a citation to a White House blog for stories of those who won the Medal of Honor. See *United States v. Alvarez*, 567 U.S. 709, 725 (2012).

<sup>67</sup> See, e.g., blog posts by Ryan Goodman, Alex Whiting, Marty Lederman, Walter Dellinger, and Bob Bauer at *Lawfare*, *Take Care*, and *Just Security*. See also Robert Chesney & Steve Vladeck, *The National Security Law Podcast: A Deep Dive Into the History of Military Commissions*, *LAWFARE* (Sept. 19, 2018), <https://www.lawfareblog.com/national-security-law-podcast-deep-dive-history-military-commissions> [<https://perma.cc/GEB2-FUDY>] (featuring a series of conversations which they call “deep dive” and “the deepest dive”).

proclaiming their purposes: they are often labeled as “in depth analysis”<sup>68</sup> or “deep dives,” distinguishing them from other labels on the site such as “quick reactions.”<sup>69</sup>

A few features about deep dive blog posts are worth noting. First, the arguments they put forward could easily be turned into legal briefs or scholarship (and, indeed, some of them actually are transformed into law review articles without much effort).<sup>70</sup> Second, even if these posts are not destined for formal filing or publication, these arguments are cited as authorities in other legal briefs and law reviews.<sup>71</sup> Third, these longer posts are often written as a series—reflecting deliberation that occurs over time—or as a “conversation” between two commentators with differing views.<sup>72</sup> And finally, many of these “deep dives” are inspired by issues that will reach the Supreme Court, but are not posted simultaneously with a pending case. Of course, it is important to remember that even if these “deep dive” blog posts feel reminiscent of evidence and arguments put through the regular adversarial system, they still differ from traditional briefing in that they are originating outside of the parties before the Court and subject to different incentives (i.e., prestige, the fun of participation in Supreme Court decision-making) along the way.

At the other end of the spectrum are what might be called “hot takes.” A “hot take” is a journalistic term to describe “a quickly produced, strongly worded, and often deliberately provocative or sensational opinion or reaction.”<sup>73</sup> It is of immediate interest (generally concerning current headlines) and often

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<sup>68</sup> See generally Recent Posts on *Take Care Blog*, TAKE CARE, <https://takecareblog.com/recent?blogCategory=326F1DC5-79D0-4FA6-BDB321E97604D75D> [https://perma.cc/R3BF-B5BE] (last accessed Aug. 17, 2019) (sorting blog posts by “In-Depth Analysis”).

<sup>69</sup> See generally Recent Posts on *Take Care Blog*, TAKE CARE <https://takecareblog.com/recent?blogCategory=37B8A539-4C8A-41AD-9684625B7874BD46> [https://perma.cc/UU28-7P2R] (last accessed Aug. 17, 2019) (sorting blog posts by “Quick Reactions”).

<sup>70</sup> See, e.g., Andrew Crespo, *Impeachment as Punishment*, 13 HARV. L. & POL'Y REV. 101 579 (2019) (originally published as a blog post and transformed into an article).

<sup>71</sup> For discussion of this phenomenon in courts generally, see Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 TUL. J. TECH. & INTELL. PROP. 39 (2010). For discussion of specific examples, see *infra* subpart II.C.

<sup>72</sup> See, e.g., Richard Primus, *More on the Unprincipled Nature of the Senate, Further Conversation with Professor Dorf*, TAKE CARE (Nov. 28, 2018), <https://takecareblog.com/blog/more-on-the-unprincipled-nature-of-the-senate-further-conversation-with-professor-dorf> [https://perma.cc/8EDY-DY5E] (conversation between Richard Primus and Mike Dorf about the nature of the Senate).

<sup>73</sup> See *Hot Take*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/hot%20take> [https://perma.cc/N9UY-RYMD].

deliberately provocative and designed to attract attention. *Twitter*—with its character limitation and vast distribution potential—is a perfect home for “hot take” legal analysis, although it is not necessarily the only home.

A “hot take” is not typically a term of endearment; it is seen as a by-product of economic incentives that drive online journalism and it is certainly a form of “journalistic slur.”<sup>74</sup> But those who defend “hot take journalism” do so for reasons similar to the ones that make “virtual briefing” so attractive. There is so much information out there on the Internet now, the argument goes, that the need for commentators to sift through it is critical. The digital reader needs a translator—someone to “mak[e] arguments about what matters, [and] how to understand it[.]”<sup>75</sup> The “hot take” form of virtual briefing, therefore, can be seen as a convenient sorting device—leading consumers to arguments they will likely find compelling from voices they have heard before (and thus exacerbating confirmation bias).

The middle of the virtual briefing spectrum is where things get especially tricky. Many blog posts or podcasts do not fit either the “deep dive” or “hot take” molds; they tend to share features of both. These arguments prize cleverness over thoroughness and speed over deliberation, but that may be because they are targeted at a different audience. For example, Orin Kerr—a well-respected criminal procedure scholar—has regularly produced “quick takes” in the form of blogs and podcasts issued from “the courthouse steps” that react immediately to claims made in oral argument (and are then tweeted and posted on Facebook within seconds).<sup>76</sup>

Podcasts perhaps also fall in this middle area of the spectrum and are worth considering separately. Unlike blogging, podcasts involve oral communication—part legal advocacy mixed with entertainment and story-telling. This is a valuable service, to be sure, but there is also a generally accepted value to legal analysis that comes when one sits down to write.<sup>77</sup>

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<sup>74</sup> Julia Turner, *In Defense of the Take*, SLATE (Apr. 10, 2015), <https://slate.com/news-and-politics/2015/04/buzzfeed-dove-ad-post-ben-smith-doesnt-like-hot-takes-but-are-takes-really-all-that-bad.html> [https://perma.cc/6VMZ-NCHT].

<sup>75</sup> *Id.*

<sup>76</sup> See Orin Kerr, *The Carpenter Argument: Quick Video Reactions on Twitter and on Facebook Live*, LAWFARE BLOG (Nov. 29, 2017), <https://www.lawfareblog.com/carpenter-argument-quick-video-reactions-twitter-and-facebook-live> [https://perma.cc/UPM2-P8EV].

<sup>77</sup> There is a rich literature on the virtues and philosophical underpinnings of the practice of giving reasons in judicial opinions. See Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179; see also Mathilde Cohen, *The*

Perhaps this is why the Justices say that arguments are generally won or lost on the briefs (indeed, Justice Thomas says oral argument is not “the real meat” of a case),<sup>78</sup> and why empiricists have shown that “highly charged emotional language” in a brief is less likely to win a Justice’s vote.<sup>79</sup> Sitting down to back up one’s thoughts on paper is a different exercise than orally presenting those views in an entertaining way for a podcast audience.<sup>80</sup> This claim is not to denigrate podcasts, but just to establish when it comes to producing hard-core legal analysis—the type of work that is valued within the adversary system—the pen (or keyboard) may be mightier than the microphone.

## II

### IS ANYBODY AT THE COURT LISTENING?

None of this should raise any alarm bells unless there is reason to suspect that the key players are paying attention and allowing virtual briefing to affect their decision-making. But, as it turns out, there *are* reasons to suspect that the Justices—and their law clerks—are listening, and it is that connection to the Court that makes virtual briefing worthy of careful consideration.

#### A. Law Clerks on *Twitter*

No Justice of the U.S. Supreme Court has an official *Facebook* page or *Twitter* presence or blogging persona. Moreover, the Chief Justice has explained that he advises the law clerks to “put all that on hold” when they start to clerk at the Court.<sup>81</sup> But even if the law clerks take a break from updating their *Facebook* statuses, they are still paying attention to the

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*Rule of Law as the Rule of Reasons*, 96 ARCHIVES FOR PHIL. L. & SOCIAL PHIL. 1 (2010); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

<sup>78</sup> Tony Mauro, *Courtside: When Planets Collide*, LEG. TIMES, Mar. 29, 2004, at 10.

<sup>79</sup> Sarah Escalante et al., *An Empirical Analysis of Emotional Language in Legal Briefs Before the Supreme Court*, SCOTUSBLOG (Dec. 22, 2015, 1:52 PM), <http://www.scotusblog.com/2015/12/an-empirical-analysis-of-emotional-language-in-legal-briefs-before-the-supreme-court/> [https://perma.cc/K8JQ-FTDY].

<sup>80</sup> See Stephen Stark, *Law Schools Must Teach Writing as Discrete Skill*, LEG. TIMES, Sept. 19, 1983, at 14.

<sup>81</sup> Strickler, *supra* note 59, at 70 (quoting Chief Justice Roberts: “I sit down with incoming clerks at the beginning of the year, as soon as we get back, and go through a number of things they have to be aware of. . . . I tell them that they obviously shouldn’t be tweeting about what they’re doing[.]”).

online briefing and advocacy that surrounds the cases on the docket.

This should not come as a surprise. For one thing, a typical law clerk is about twenty-six years old and very used to getting his or her information from social media. For another thing, law students are now taught in their legal writing classes to “Google” cases before beginning their briefs. And particularly at the certiorari stage when a law clerk is authoring a memo for multiple Justices of the Supreme Court and tasked with determining whether an issue is of national importance, canvassing the blogs and the podcasts seems like a natural first step. And one place where all of this activity is open to the public . . . is *Twitter*.

Because *Twitter* accounts are publicly available—meaning it is easy to see who is following whom on *Twitter*—we were able to document *Twitter* traffic from Supreme Court law clerks (whose names we could identify through the website *Above the Law*).<sup>82</sup> We looked for *Twitter* accounts of the law clerks serving in the 2017–18 Term and the 2018–19 Term. This means we tracked *Twitter* traffic from law clerks from June 2017–December 2018, but only while the law clerks were serving as clerks.

Not all of the law clerks had identifiable *Twitter* accounts. But a surprising number were active on *Twitter* during the time they clerked at the Court. Twenty-five law clerks (out of sixty-seven total law clerks for the two Terms, so 37%) had *Twitter* accounts we could verify. And, out of those twenty-five identifiable law clerk *Twitter* accounts, twenty-one of them (84%) follow legal podcasts, blogs, and other sources of “virtual briefing” at the Court.<sup>83</sup> These numbers are conservative estimates

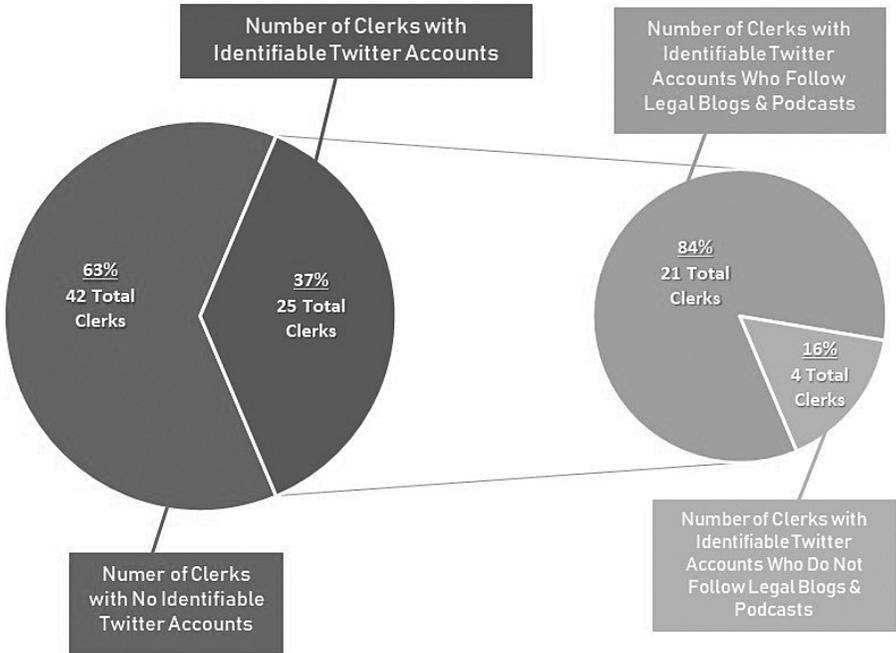
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<sup>82</sup> See David Lat, *Supreme Court Clerk Hiring Watch*, ABOVE L. (Jan. 11, 2017), <https://abovethelaw.com/2017/01/supreme-court-clerk-hiring-watch-october-term-2017-is-done-lets-turn-to-2018> [https://perma.cc/R2PF-GMNS].

<sup>83</sup> A few words on our “twitter methodology,” which is surprisingly straightforward. After obtaining the law clerk names from the *Above the Law* website, we typed the names into the “search” bar on *Twitter*. At the same time, we typed the clerk’s name into *Google* to obtain a picture of the clerk. Most of the time, *Google* linked us to the clerk’s *LinkedIn* profile, or an article from the clerk’s law school congratulating the clerk for their Supreme Court clerkship, that contained a picture of the clerk. Once searching via name on *Twitter*, we scrolled through the suggestions under the “People” tab. We clicked on every account that looked like the photo acquired from *Google*. Once selecting a specific account, we clicked the “Following” tab to see what accounts the clerk was following. We looked to the clerk’s profile picture, location, and followers (whether the clerk follows his or her law school) to verify that the account belongs to the Supreme Court clerk. After confirming that we had the right account, we could document which people, podcasts, and blogs the law clerks were following.

about law clerk *Twitter* patterns because we can only track the law clerks (and Justices) who have *Twitter* accounts they own up to. But even using this conservative estimate, over a third of the law clerks are consuming virtual briefing during the Term in which they clerked.

FIGURE 3. SUPREME COURT CLERKS WITH AN IDENTIFIABLE TWITTER PRESENCE OT 17 & OT 18

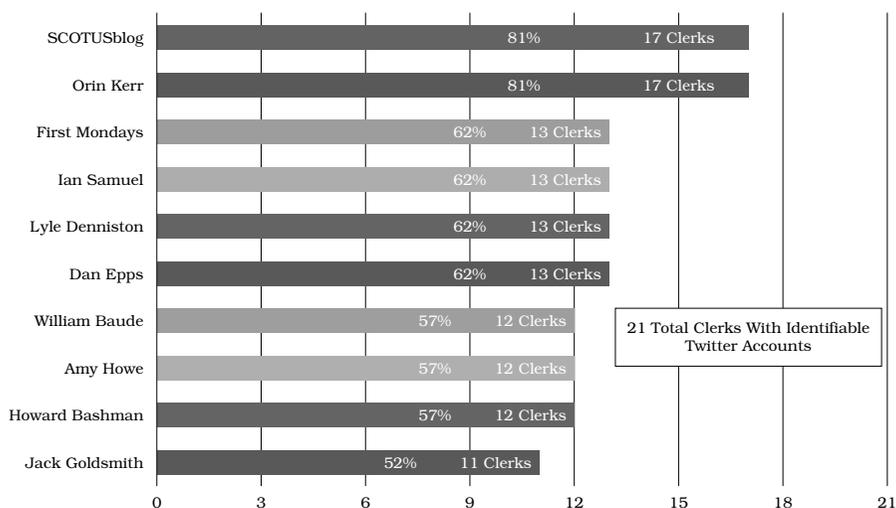


The list of the bloggers and podcast hosts followed by the law clerks is long. But below is a chart reflecting the “top ten” producers of virtual briefing ranked by how many law clerks follow them on *Twitter*.

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Some of the clerks, who we verified via their *Twitter* profile pictures, had their accounts set to “private mode.” Because of this, we could not select the “following” tab to search the accounts that the clerk follows. However, it is still possible to determine if the private-mode clerk follows an account by doing a “reverse search”—selecting one of the blog or podcasts accounts (let’s choose *First Mondays*) and viewing who follows that account. *Twitter* makes all of this information publicly available and relatively easy to find, even for those in private mode. The popular accounts we viewed for this “reverse search” were the accounts of *First Mondays*, Ian Samuel, Leah Litman, *SCOTUSblog*, Orin Kerr, Lyle Denniston, Marty Lederman, Howard Bashman, Dan Epps, Amy Howe, William Baude, and Jack Goldsmith.

FIGURE 4. MOST POPULAR LEGAL BLOGGERS & PODCASTS FOLLOWED BY CLERKS WITH AN IDENTIFIABLE TWITTER PRESENCE OT 17 & OT 18



A few other interesting observations emerged from the *Twitter* patterns. On a few occasions, it seems likely that a law clerk was tracking not just bloggers and podcasters who follow the Supreme Court generally, but also specific entities or people relating directly to pending cases. One law clerk, for example (whose name and chambers we will protect) began to follow *Al Jazeera News*, *Checkpoint* (a military blog), and *Yemen Updates* all while the Court was actively considering the travel ban case, *Trump v. Hawaii*, which involved a specific allegation with respect to Yemen that the waivers for “hardship” were not really being used.<sup>84</sup> Another law clerk started following *On Labor*—“a blog devoted to workers, unions, and . . . politics”<sup>85</sup>—right around the time *Janus v. AFSCME*, the public unions case, was briefed and argued.

Further, many law clerk *Twitter* habits fell into the partisan patterns one might expect. Podcasts and blogs thought of as liberal like *Slate* or *Pod Save America*—a podcast run by four former Obama staffers and journalists committed to covering “challenges posed by the Trump Administration”—are followed by law clerks who work for Justices who are also classified as

<sup>84</sup> 138 S. Ct. 2392, 2433 (2018) (Breyer, J., dissenting) (describing reports that the U.S. embassy consular officials tasked with processing visa applications for citizens of Yemen received instructions not to grant waivers).

<sup>85</sup> ON LABOR, <http://www.onlabor.org> [<https://perma.cc/TV5S-S69A>].

on the left. And podcasts and bloggers considered conservative—like the *Federalist Society* podcast or *Reason* (a libertarian online magazine and blog)—are likewise followed by law clerks who work in conservative chambers.<sup>86</sup>

To be sure, the fact that law clerks are listening to virtual briefing on *Twitter* does not prove that their bosses are also paying attention.<sup>87</sup> And yet there are separate reasons to suspect the Justices themselves are consuming this online dialogue. It is to that indirect evidence that we now turn.

## B. The Power of Elite Opinion

According to Dahlia Lithwick, the “Justices are really grappling with the Internet right now. . . . [.] There’s a sense of being instantly judged. . . . [.] They all have their clerks print out the blogs.”<sup>88</sup> Justice Kennedy, at least, is actually on record saying that he directs his clerks to follow the blogs.<sup>89</sup> In an interview with the *Wall Street Journal*, Justice Kennedy gave a little insight as to why. He explained that law professors are more relevant to him now in an age of blogging:

Professors are back in the act with the blogs. Orin Kerr, one of my former clerks, with criminal procedure [and] the internet area, Mike Dorf, Jack Goldsmith. So the professors within 72 hours have a comment on the court opinion, which is helpful, and they are beginning to comment on when the certs are granted. And I like that.<sup>90</sup>

It seems there is a growing sense that the Justices are keenly aware of the input and judgments coming instantaneously from blogs and other legal commentators.

Once again, this stands to reason. While Justices come to the Court as seasoned lawyers and from the top of the profes-

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<sup>86</sup> All of our *Twitter* data is on file with the authors and has been verified by the editors of the *Cornell Law Review*. Although it was all obtained through publicly available sources, we declined to publish the details in order to respect the privacy of the law clerks.

<sup>87</sup> Of course, this *Twitter* research indicates only that the law clerks are following legal commentators; we cannot definitely prove the clerks are reading the commentators’ posts.

<sup>88</sup> Strickler, *supra* note 59, at 74 (quoting Dahlia Lithwick, *Journalists Greenhouse and Lithwick Discuss How the Internet has Affected Supreme Court Reporting*, YALE L. SCHOOL (Oct. 27, 2010), [www.yale.edu/news/12392](http://www.yale.edu/news/12392) [<https://perma.cc/D249-KU52>]).

<sup>89</sup> Jess Bravin, *Justice Kennedy on Law School, Blogging, and Popular Culture*, WALL ST. J. (Oct. 10, 2013), <https://blogs.wsj.com/law/2013/10/10/justice-kennedy-on-law-school-blogging-and-popular-culture/> [<https://perma.cc/CD6D-ALBU>].

<sup>90</sup> *Id.*

sion, they have more substantive expertise in certain areas compared to others. Some have little to no experience with certain fields—say, criminal law or bankruptcy—outside wearing a robe and hearing appellate arguments. If someone whom the Justice knows, or at least is inclined to trust, offers views, identifies pitfalls, or suggests how to resolve a case, it is hard for the Justices not to at least listen. (All the more so for the young clerks pondering how to advise their bosses.)

Furthermore, as scholars like Neal Devins and Larry Baum have persuasively demonstrated, elite opinion matters a great deal to the Justices.<sup>91</sup> Chief Justice Rehnquist once remarked that he and his colleagues “go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events” and, consequently, cannot “escape being influenced by public opinion.”<sup>92</sup>

According to Devins and Baum, the “public opinion” to which Rehnquist refers is not “average Joe public opinion,” but the opinion of the Justices’ peer groups—law professors, members of the Supreme Court bar, former clerks, and the like.<sup>93</sup> And this emphasis on what Baum and Devins call “elite opinion” is easy to explain: “Like others, Supreme Court Justices want most to be liked and respected by people to whom they are personally close and people with whom they identify. For the Justices, those people are overwhelmingly part of elite groups,” including certain public interest groups and law schools.<sup>94</sup>

It is not a large leap from that conclusion to predict that the Justices are paying keen attention to what these elite audi-

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<sup>91</sup> See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1555–60, 1566–74 (2010); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 649–50, 655–58, 660–61 (1992); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 627–30 (2000).

<sup>92</sup> Baum & Devins, *supra* note 91, at 1520.

<sup>93</sup> *Id.* at 1537–38 (“Beyond their close personal circles, the Justices interact with people who are part of specific elite groups in American society. On the whole, the most salient group—more accurately, a set of interconnected groups—is the legal profession. Justices were trained in the law, and most spent a high proportion of their pre-appointment careers working in the law. As Justices, they work most closely with other lawyers. Thus, the Justices have good reason to care about how they are regarded by other lawyers. Further, those legal professionals—especially fellow judges and legal academics—perform the most intensive evaluations of the Justices’ voting behaviors and judicial opinions. This attentiveness to the Justices’ work, combined with the salience of the legal profession to the Justices, makes members of that profession an important audience for members of the Supreme Court.” (footnote omitted)).

<sup>94</sup> *Id.* at 1537, 1580.

ences think about the pending cases. Such monitoring allows the Justices to make themselves as fully informed as possible about pending cases. It also allows them to forecast their coming evaluation in the blogosphere.

There is certainly an upside to this—one explored more thoroughly below. There is value in exchanging ideas with others, particularly friends and peers. Put differently, the Justices may look to their peers not just for approval, but also for help in answering tricky questions. There is comfort in the familiar. And, like the rest of us, the Justices may be turning to sources they trust for help in answering the most difficult questions they must address. We do not mean to scorn that dynamic. To the extent we fear the Justices are captured in a bubble and cut off from the real world, perhaps we want them to have an avenue—a publicly accessible avenue—to explore their questions and concerns.

But the point for now is a descriptive one: that the Justices' questions and concerns—once focused exclusively on the advocates or maybe amici—are now being crowdsourced to a wider group, an elite group of legal professionals, in a context completely outside the traditional briefing rules.

This is a change from the days when Chief Justice Rehnquist went home to watch the six o'clock news coverage of his Court. Now the feedback from the audience the Court cares most about is accessible instantly, can be tailor-made to the issue and the case at hand, and comes from an almost endless supply of interested and familiar parties. It is for this reason that the "crowdsourcing" analogy seems apt. Crowdsourcing is a modern way to solve problems by asking one's peers on social media to weigh in with their opinions (How to get a crayon stain out of a couch? Where is the best Mexican restaurant in town?).<sup>95</sup> With the rise of virtual briefing, pending Supreme Court decisions, we think, are being crowdsourced among the Justice's peer group—the "elite opinion" that matters most to them.

### C. Cases in which Virtual Briefing at Least Arguably Made a Difference

Does any of this actually matter at the end of the day? While we obviously cannot prove virtual briefing changes outcomes at the Court (and thus we make no causation claims),

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<sup>95</sup> See *Crowdsourcing*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/crowdsourcing> [<https://perma.cc/P46B-QGW5>] (last accessed Aug. 17, 2019).

we do offer below some anecdotal examples where advocacy outside the traditional briefing process seemed to make a difference in the questions asked by the Justices at oral argument or answered in their opinions.

Perhaps the most familiar example of virtual briefing is the “broccoli horrible” from *NFIB v. Sebelius*, the case involving the Commerce Clause challenge to the Affordable Care Act’s individual mandate to buy health insurance.<sup>96</sup> The now well-known argument goes like this: if Congress could force us to buy health insurance because it is good for us, they could also force us to eat broccoli, which would be a liberty crisis. The analogy gained popularity from conservative legal bloggers on the *Volokh Conspiracy* blog. In the words of Dick Howard, the *Volokh* blog “provided a forum for conservative legal scholars to develop arguments against the individual mandate, helping to break down the perception of expert consensus on the constitutional issues in play.”<sup>97</sup>

The broccoli horrible, in other words, was an important part of “virtual briefing” for the first ACA challenge; it came largely from outside the traditional adversarial process. The word “broccoli” does not appear in any of the party briefs in the *Sebelius* case or in the Eleventh Circuit opinion being reviewed by the Court. It is indeed only mentioned in one sentence on one page by one amicus brief filed by the Michigan Legal Services.<sup>98</sup> And yet, the analogy made quite an impact on the case. Justice Scalia specifically invoked the analogy at oral argument,<sup>99</sup> the word “broccoli” was used twelve times in the Supreme Court opinions, and the analogy made an appearance in each of the three main opinions addressing Congress’s power under the Commerce Clause.<sup>100</sup>

According to many observers, in fact, the broccoli horrible analogy was a game-changer in the litigation.<sup>101</sup> In the words of Jack Balkin, the challenge went from “off the wall” (meaning most legal commentators thought it was flatly wrong) to “on the wall” (capable of causing legal change).<sup>102</sup> Indeed, Orin Kerr

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<sup>96</sup> 567 U.S. 519 (2012).

<sup>97</sup> Howard, *supra* note 63, at 283.

<sup>98</sup> Brief of Michigan Legal Services, Inc., et al. as Amicus Curiae Supporting Respondents at 37, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (No. 11-393).

<sup>99</sup> Transcript of Oral Argument at 13, *NFIB v. Sebelius*, 567 U.S. 519 (No. 11-393).

<sup>100</sup> See generally *NFIB v. Sebelius*, 567 U.S. at 558, 608, 615, 617, 660 (mentioning “broccoli”).

<sup>101</sup> See Howard, *supra* note 64, at 282–83.

<sup>102</sup> Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <http://www.theatlantic.com/>

predicted in 2010 that there was “a less than one-per-cent chance that the courts will invalidate the individual mandate.”<sup>103</sup> But he changed his tune by the time of the argument—estimating the chances at “fifty-fifty” on the eve of the Supreme Court decision.<sup>104</sup>

A similar “virtual briefing” success story—or *almost* success story—concerns the federalism argument in *United States v. Windsor*.<sup>105</sup> At issue in that case was the Defense of Marriage Act—a law that defined “marriage” as being between a man and a woman for the purposes of federal law. The case was principally briefed as a case about equality and gay rights. An alternative argument—that the law was an overreach by the federal government into the sovereign power of the states—was a late-breaking claim championed by outsiders.

By our assessment, the federalism arguments were originally found only in the appendix attached to the certiorari petition filed at the Court; they were absent entirely from the opening briefs in the case.<sup>106</sup> The federalism argument did not actually make its way into the party briefing until the Bipartisan Legal Advisory Group filed its supplemental brief on January 23, 2013—and even then it was only mentioned in ten of the fifty-nine pages and did not generate a response from either the United States or Windsor in the reply briefs.<sup>107</sup> The main advocates for a federalism outcome in *Windsor* were not the government or the parties to the lawsuit (both of whom were represented by top-notch, extremely experienced Supreme Court advocates),<sup>108</sup> but rather by academics Ernie Young, Randy Barnett, and Jonathan Adler, who consistently blogged about this theory and filed an amicus brief making the same argument.<sup>109</sup>

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national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/ [https://perma.cc/KWV3-9APJ].

<sup>103</sup> Ezra Klein, *Unpopular Mandate*, NEW YORKER (June 25, 2012), <http://www.newyorker.com/magazine/2012/06/25/unpopular-mandate> [https://perma.cc/P8ST-T2UJ].

<sup>104</sup> *Id.*

<sup>105</sup> 570 U.S. 744 (2013).

<sup>106</sup> The only mention of “federalism” in the early party briefs appears in the appendix attached to the petition for cert and the opening briefs.

<sup>107</sup> See Brief on the Merits for Respondent Bipartisan Legal Advisory Group of the United States House of Representatives, *Windsor*, 570 U.S. 744 (No. 12-307).

<sup>108</sup> Don Verrilli represented the United States and Paul Clement represented the parties defending the law. Verrilli and Clement are hardly rookie lawyers likely to miss an obvious way to resolve the case.

<sup>109</sup> See Jeffrey Rosen, *Flip-Flopping Federalists*, NEW REPUBLIC (Mar. 29, 2013), <https://newrepublic.com/article/112800/supreme-court-doma-case-federalism-comes-back-haunt-conservatives> [https://perma.cc/7TRT-KMWT] (attribut-

Yet, despite not being featured in the main briefs, the federalism argument made a prominent appearance both when the case was argued and in the final opinion. Chief Justice Roberts, Justice Kennedy, and Justice Scalia all asked pointed questions about whether the law violated states' rights.<sup>110</sup> Indeed, at least one observer after oral argument noted that the advocates seemed ambushed by the states-rights angle—despite its prominence in arguments from conservative scholars on blogs.<sup>111</sup> As Dale Carpenter recounted later:

Overnight, it seems, federalism has become a major ground on which the Defense of Marriage Act is being contested. This is surprising because, as we saw Wednesday . . . there were no real advocates for federalism as an issue during the oral argument in *United States v. Windsor*. No advocates, that is, except for five of the nine people sitting behind the bench.<sup>112</sup>

A more recent example of briefing from outside players that seemed to make an impact on the final result comes from the

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ing the federalism argument to Ernie Young); George F. Will, *DOMA Infringes on States' Rights*, WASH. POST (Mar. 20, 2013), [https://www.washingtonpost.com/opinions/george-f-will-doma-infringes-on-states-rights/2013/03/20/fa845348-90bb-11e2-bdea-e32ad90da239\\_story.html?utm\\_term=.91fd5ef545aa](https://www.washingtonpost.com/opinions/george-f-will-doma-infringes-on-states-rights/2013/03/20/fa845348-90bb-11e2-bdea-e32ad90da239_story.html?utm_term=.91fd5ef545aa) [https://perma.cc/PT9A-E5YU] (same). For examples of the blogging efforts that accompanied the amicus brief, see Michael Ramsey, *Federalism and the Defense of Marriage Act*, ORIGINALISM BLOG (Mar. 11, 2013, 6:25 AM), <https://originalismblog.typepad.com/the-originalism-blog/2013/03/federalism-and-the-defense-of-marriage-act-michael-ramsey.html> [https://perma.cc/J4KV-S4E7] and Ilya Shapiro, *Supreme Court Could Also Strike Down DOMA on Federalism Grounds*, CATO INST. (Mar. 5, 2013, 11:05 AM), <https://www.cato.org/blog/supreme-court-could-also-strike-down-doma-federalism-grounds> [https://perma.cc/8UQZ-TPAY].

<sup>110</sup> See Transcript of Oral Argument at 76, 81–82, 97–98, *Windsor*, 570 U.S. 744 (No. 12-307).

<sup>111</sup> See Rosen, *supra* note 109 (“The fact that the conservative justices would be interested in the argument that DOMA violates states’ rights shouldn’t have come as a surprise. Last week, George F. Will wrote a column in the *Washington Post* concluding that ‘DOMA is an abuse of federalism’ because it is not “‘necessary and proper” for the exercise of a constitutionally enumerated congressional power.’ Will cited an amicus brief filed by federalism scholars, including Randy Barnett, the intellectual architect of the constitutional challenge to Obamacare, that made an argument similar to the one Barnett had made in the health care case: There is a ‘difference between a government with a general police power and a government of limited and enumerated powers,’ the scholars write. In the Supreme Court oral argument, Justices Kennedy, Roberts, and Scalia, seemed to be asking questions directly from the federalism scholars’ brief.”).

<sup>112</sup> Dale Carpenter, *Three Senses in Which DOMA Implicates Federalism*, VOLOKH CONSPIRACY (Mar. 29, 2013, 10:54 AM), <http://volokh.com/2013/03/29/three-senses-in-which-doma-implicates-federalism/> [https://perma.cc/FMZZ-BBJ6]. Only four of the Justices signed on to the federalism argument, but five expressed interest in it at oral argument.

*Masterpiece Cakeshop* decision announced in June 2018.<sup>113</sup> The result in the case was not a shock; most court watchers had predicted a win for the cake-baker and not for the gay couple who sued alleging discrimination. But the argument at the heart of the majority opinion was a bit of a dark horse in a horse race of Supreme Court briefing. Although the case had been briefed as a case about the freedom of expression in cake-baking and the boundaries of that expression as it bumps into antidiscrimination laws, Justice Kennedy's opinion focused instead on the narrow issue of the hostility towards religion shown by this particular administrator in this particular case.

This religious hostility argument did not appear anywhere in the lower court opinion other than a single footnote, and it played a very minor role in the party briefs (totaling less than five pages across all the briefs).<sup>114</sup> Indeed, out of the ninety-five amicus briefs filed in the case, the hostility argument can be found in just four—for a total of twenty-nine pages of the approximately 2,500 pages of amicus briefing.<sup>115</sup>

Where did Justice Kennedy find this religious hostility argument? It is possible, of course, that the Justice or a resourceful, dedicated law clerk found the needle of this argument in the haystack of other arguments before the court. We think it more likely, however, that the religious hostility argument was brought to Justice Kennedy's attention through virtual briefing. Specifically, twenty-four hours before oral argument in *Masterpiece*, the *Heritage Foundation*—a conservative think tank—posted a report about the religious hostility from the state agency on its website.<sup>116</sup>

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<sup>113</sup> *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

<sup>114</sup> See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015); Brief for Petitioners at 39–44, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>115</sup> Brief of Church-State Scholars as Amici Curiae in Support of Respondents at 12–18, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Brief of Amicus Curiae Liberty Counsel in Support of Petitioner at 13–16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Brief of North Carolina Values Coalition & the Family Research Council as Amici Curiae in Support of Petitioners at 29, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Brief of William Jack & the National Center for Law and Policy as Amici Curiae in Support of Petitioners at 1–15, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>116</sup> John Malcolm & Emilie Kao, *Enforcing Tolerance Through Intolerance: Masterpiece Cakeshop, Free Speech, and Religious Liberty*, HERITAGE FOUND. (Dec. 4, 2017), <https://www.heritage.org/religious-liberty/report/enforcing-tolerance-through-intolerance-masterpiece-cakeshop-free-speech> [<https://perma.cc/K36D-FH2C>] (“Similarly, during a public hearing, a Colorado Civil Rights Commissioner told Jack Phillips, ‘Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery,

In its post, the *Heritage Foundation* specifically highlighted what it called hostile language the baker faced from one particular Colorado agency office—language that makes the point that freedom of religion arguments had been used to justify all kinds of historical discrimination in the past, including the Holocaust.<sup>117</sup> Justice Kennedy asked specifically about this claim at oral argument—quoting the same record source the *Heritage Foundation* quoted and focusing on the same language from one of the seven state actors.<sup>118</sup>

Certain patterns about virtual briefing begin to emerge as one continues to dig. The Justices tend to look to friendly voices for virtual briefing—particularly their former law clerks. As noted, Justice Kennedy has said publicly that he looks to blogging from his former clerks Mike Dorf, Orin Kerr, and Jack Goldsmith.<sup>119</sup> Justice Thomas, too, seems to emphasize arguments that come from kindred spirits. His concurrence in *Trump v. Hawaii*, for example, borrowed heavily from arguments made by conservative scholar Sam Bray against national injunctions. Indeed, Bray had blogged specifically at *Volokh* about how that argument related to the entry ban case in a way that tracks the logic laid out in Justice Thomas' concurrence.<sup>120</sup> Similarly, in *Lucia v. SEC*, Justice Thomas wrote sep-

whether it be the [H]olocaust. . . . [W]e can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.' The State's hostility toward Jack Phillips' religious beliefs is undeniable." (alteration in original) (footnote omitted)).

<sup>117</sup> See *id.*

<sup>118</sup> See Transcript of Oral Argument at 52–53, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>119</sup> Bravin, *supra* note 89.

<sup>120</sup> On the *Volokh Conspiracy*, Bray wrote that “the Constitution gives the federal courts ‘the judicial Power’—that is a power to decide ‘cases’ for particular litigants.” Samuel Bray, *Whose Case? Whose Remedy? Thoughts on the Travel Ban Injunctions*, VOLOKH CONSPIRACY (June 5, 2017, 11:58 AM), <https://reason.com/volokh/2017/06/05/whose-case-whose-remedy-though> [<https://perma.cc/HHR4-FTQX>]. In Justice Thomas' concurrence: “For most of our history, courts understood judicial power as ‘fundamentall[y] the power to render judgments in individual cases.’” *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

Bray also wrote, “And for the first 170 years of the federal courts there was apparently an unbroken practice of not giving national injunctions. (Yup, the national injunction ‘began / In nineteen sixty-three.’)” Bray, *supra*. Compare to Thomas: “These injunctions are a recent development, emerging for the first time in the 1960s . . . .” *Trump*, 138 S. Ct. at 2426.

Bray further wrote, “But, for various technical reasons, national injunctions accelerate the pace of decisionmaking and reduce the number of different judicial perspectives. . . . [W]hen a single court can give a national injunction, it strongly encourages forum-shopping.” Bray, *supra*. Compare to Thomas' concurrence: “These injunctions are beginning to take a toll on the federal court system—

arately to endorse a theory that Jenn Mascott originally developed in an article, and that she later blogged about on the *Yale Journal on Regulation* about how the theory related to the question in *Lucia*.<sup>121</sup>

One final point needs to be made about the rise of virtual briefing. Although, as we demonstrate above, available evidence seems to indicate the Justices and the law clerks are listening to virtual briefing, there are still almost zero citations to blogs or podcasts in Supreme Court opinions.<sup>122</sup> When citations to outside arguments do appear, it is when the initial blogged argument is turned into an amicus brief and filed with the Court. This observation is worth contemplating. Particularly when seen in juxtaposition to the increase in citations to amicus briefs in recent years,<sup>123</sup> for some reason the Justices seem to shy away from citing the inputs they receive from vir-

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preventing legal questions from percolating through the federal courts, encouraging forum shopping . . . .” *Trump*, 138 S. Ct. at 2425.

Bray made similar points in an article published with the *Harvard Law Review*. Although Justice Thomas cites Bray’s article in his Concurrence, Justice Thomas did not specifically cite to Bray’s article for any of these particular points. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (suggesting that the national injunction is a recent development and arguing that federal courts should never award such injunctions).

<sup>121</sup> Justice Thomas wrote “[T]he administrative law judges of the Securities and Exchange Commission easily qualify as ‘Officers of the United States.’ These judges exercise many of the agency’s statutory duties, including issuing initial decisions in adversarial proceedings. See 15 U.S.C. § 78d-1(a); 17 C.F.R. §§ 200.14, 200.30-9 (2017). . . . All that matters is that the judges are continuously responsible for performing [these statutory duties].” *Lucia v. SEC*, 138 S. Ct. 2044, 2057 (2018) (Thomas, J., concurring).

In Mascott’s blog post, she wrote, “Significant historical evidence suggests that the original public meaning of the Appointments Clause encompassed every federal executive official with ongoing responsibility to carry out a statutory duty. SEC ALJs perform tasks that Congress assigned to the Securities and Exchange Commission. See 15 U.S.C. § 78d-1(a); 17 C.F.R. §§ 200.14, 200.30-9. So the SEC’s ALJs would be ‘officers’ under this test.” Jennifer Mascott, *Missing History in the Court-Appointed Amicus Brief in Lucia v. SEC*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 28, 2018), <http://yalejreg.com/nc/missing-history-in-the-court-appointed-amicus-brief-in-lucia-v-sec/> [<https://perma.cc/Y8DT-58KV>].

Mascott made similar arguments in an article published in the *Stanford Law Review*, Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 564 (2018), and she also submitted an Amicus Brief to the Court making these arguments, Brief of Professor Jennifer L. Mascott as Amicus Curiae in Support of Petitioners, *Lucia*, 138 S. Ct. 2044 (No. 17-130). Although Justice Thomas cites Mascott’s article in his opinion, he does not cite it for this particular point, and he does not reference her amicus brief.

<sup>122</sup> We could find only one citation to a blog in a majority opinion—a citation to a White House blog for stories of those who won the Medal of Honor. See *United States v. Alvarez*, 567 U.S. 709, 725 (2012). There were no citations to podcasts.

<sup>123</sup> See Anthony J. Franze & R. Reeves Anderson, *Supreme Court Amicus Curiae Review: ‘Friends of the Court’ Roared Back in 2017-18 Term*, NAT’L L.J., Oct.

tual briefing. There is a feeling perhaps—reflected in the citation practices—that it is improper to use the product of virtual briefing as actual authorities in Supreme Court opinions. And that queasiness is perhaps telling.

### III

#### IS THERE ANYTHING WRONG WITH CROWDSOURCING SUPREME COURT DECISION-MAKING?

All of this raises the question of whether there is anything wrong with virtual briefing. One might reasonably question whether there is. After all, the ultimate goal of virtual briefing (at least in its most benign form) is to provide information and arguments to the Court. One might assume, therefore, that *more* grist for the mill cannot be bad—that the Court cannot possibly be worse off by hearing from a wider variety of voices before deciding momentous and consequential issues of law.

But this viewpoint seems to us oversimplistic. For over one hundred years, Supreme Court litigation—and appellate decision-making in general—has been done according to a particular process: the advocates file briefs; amici are allowed to weigh in with briefs of their own; and the Justices hear oral argument. Any additional filing or argumentation is strictly circumscribed. Virtual briefing threatens to undermine—indeed, to circumvent—this time-tested adversarial process. It also poses serious challenges in terms of confirmation bias, accountability and transparency. Finally, we note the ethical quandaries it poses for advocates.

#### A. Circumventing the Adversarial Process

Over a century ago, Justice Holmes explained that “[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”<sup>124</sup> This theory applies not only to jurors, but to judges as well. As to private talk, *ex parte* contact with Supreme Court Justices is generally agreed to be forbidden.<sup>125</sup>

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16, 2018, (noting an increase not just in the number of amicus briefs filed but also in the number of amicus briefs cited in Supreme Court opinions).

<sup>124</sup> *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

<sup>125</sup> The Code of Conduct for United States Judges, promulgated by the Judicial Conference, provides that a judge generally “should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending matter that are made outside the presence of the parties or their lawyers.” CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(4) (Judicial Conference of the U.S. 2019). To be sure, the Code does not formally apply to Supreme Court

And as to public print, the Justices are supposed to decide cases based on the arguments the advocates make, not those that nonparticipating third parties may espouse in nonjudicial settings.

As the Court put it recently, “we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”<sup>126</sup> “[O]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”<sup>127</sup> Old-fashioned or not, there is real value to this system: much can be gained by forcing oneself to wrestle with two sides locked into debate on an issue—literally reading two briefs and listening to both sides. The adversarial system is built on this foundation.

Virtual briefing does not respect this model. When an interested observer issues a blogpost designed in part to influence the Court, the post floats outside of the Court’s rules—and thus outside of the adversarial system. Of course, the same might be said of other commentary that has long appeared in traditional media. But virtual briefing is different in terms of sheer volume and the opportunity for precision. There is only so much ground a newspaper story or op-ed can cover. And such pieces typically need to be pitched to a generalist audience, further limiting the effect they might have on a clerk or Justice. The blogosphere, by contrast, allows virtually limit-

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Justices. But, as Chief Justice Roberts has acknowledged, “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. . . . Each does so for the same compelling practical reason: Every Justice seeks to follow high ethical standards, and the Judicial Conference’s Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.” JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–5 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [https://perma.cc/YK3R-ZBCT]. Indeed, the Chief Justice made clear that “as a practical matter, the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues.” *Id.* at 5. The consensus among commentators and other court-watchers, therefore, is that *ex parte* contacts with Supreme Court Justices are inappropriate. See Jim Zirin, *A Matter of Ethics*, FORBES (Feb. 4, 2015, 4:25 PM), <https://www.forbes.com/sites/jameszirin/2015/02/04/a-matter-of-ethics/#1d2747c62db0> [https://perma.cc/2CS9-7PFX]; Professor Kaufman Sheds Light on Ethical Codes for Justices, HARV. L. TODAY (Feb. 24, 2005), <https://today.law.harvard.edu/professor-kaufman-sheds-light-on-ethical-codes-for-justices/> [https://perma.cc/S7V2-UHL7] (“Presumably, Supreme Court Justices would acknowledge that in addition to matters covered by statutes, they are governed by some common law of judicial ethics.”).

<sup>126</sup> *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

<sup>127</sup> *Id.* at 244 (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)).

less content. Equally important, it lends itself to targeted and highly detailed essays. As noted above, a writer can take a deep dive into one particular sub-issue in a case—a much deeper dive than perhaps even the advocates, saddled with page limits, can afford to take.<sup>128</sup> And the posting can include details like legal citations and endnotes that are unheard of in traditional media—and often absent from even brick-and-mortar legal publications—but are extremely useful for law clerks and Justices. Other commentators can then elaborate further or respond, sometimes generating a sort of online oral argument.<sup>129</sup>

Indeed, such back-and-forths often immediately follow the real oral argument of a case, after the Justices have revealed their concerns or expressed tentative views about how to decide the case, and are mulling over how to vote at conference. Advocates have no real way at that point of communicating with the Court, yet that pivotal window of time often produces a flurry of virtual briefing.

This extracurricular activity—all conducted in plain view and at least sometimes for advocacy-related reasons—poses genuine risks. For one thing, there may be reasons a lawyer for a party does not want to make a given argument. If litigation that reaches the Court is really a test case for an issue an interest group cares about, the group may care more about procuring the Court's views on a particular issue—for political or other purposes—than generating any particular result. Even in ordinary cases, it may not do a petitioner much good, for example, to procure a reversal establishing a legal test that, once discovery unfolds on remand, will be impossible to sat-

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<sup>128</sup> See, e.g., Marty Lederman, *Compendium of Posts of Hobby Lobby, Zubik, and Related Cases*, BALKINIZATION (Nov. 8, 2015), <https://balkin.blogspot.com/2014/02/compendium-of-posts-on-hobby-lobby-and-html> [<https://perma.cc/65M2-R5MF>] (collecting over a dozen essays about *Hobby Lobby* and its various legal dimensions); Marty Lederman, *Is the Trinity Lutheran Church Case Moot?*, TAKE CARE (Apr. 18, 2017), <https://takecareblog.com/blog/is-the-trinity-lutheran-church-case-moot> [<https://perma.cc/4HL3-VA9G>] (exploring the jurisdictional ramifications of a then-recent Facebook announcement by the Governor of Missouri about the state program in question in the case, an illustration of the benefits of real-time blogging in contrast to the limitations of the Court's briefing schedules).

<sup>129</sup> See, e.g., Rick Hills, *Why Masterpiece Cakeshop Is a Harder Case Than You Think (And Why Federalism Can Help Resolve It with a Meta-Accommodation of Religious Disagreement)*, PRAWFSBLAWG (Aug. 31, 2017), <https://prawfsblawg.blogs.com/prawfsblawg/2017/08/why-masterpiece-cakeshop-is-a-harder-case-than-you-think-and-why-federalism-can-help-resolve-it.html> [<https://perma.cc/6JWB-H5QG>] (comments offered by respected commentators Marty Lederman and Mark Tushnet).

isfy.<sup>130</sup> Or it might not be in the interest of an institutional litigant—say, the government or a *Fortune 500* business—to have a case decided on narrow, alternative grounds that leave it still wondering what its legal obligations are going forward.

Consider, for example, the case of *Frank v. Gaos*.<sup>131</sup> After granting certiorari to address a question of class action procedure and hearing oral argument, the Court directed the parties to file supplemental briefs on the issue whether the plaintiffs had suffered an Article III injury-in-fact sufficient to allow them to sue *Google* for disclosing their search terms to third parties. Shortly after those briefs were filed (and presumably just as the Court was turning its attention back to the case), Orin Kerr—an expert in the legal ramifications of digital malfeasance whose scholarship the Court repeatedly has cited—published an eleven-paragraph blog post, as he put it, to “add my own thoughts on why [I] think there is standing.”<sup>132</sup> Kerr then sketched out a property-rights theory of standing, asserting that “[t]he parties have mostly missed this because they (and some Justices at argument) seem to be thinking about this as a privacy case.”<sup>133</sup>

But do we really think *Google* and the plaintiffs missed this argument? Both were represented by former assistants to the Solicitor General now working at law firms with active Supreme Court practices, and both had sophisticated clients and presumably other experts at their fingertips. Did they miss it? Or is it more likely that these seasoned and knowledgeable actors had other reasons for framing their arguments as they did?

Of course, even when advocates consciously omit an argument from their submissions—instead of simply missing it—we might be glad to have the argument brought to the attention of the Justices. Indeed, in some of those instances, we might be *particularly* happy to see a virtual brief point out something the advocates preferred to keep under the rug. If the “right” legal solution to a case is one the advocates choose not to advance, that should not necessarily stop the Court from adopting that solution.

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<sup>130</sup> See Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 148 (2013).

<sup>131</sup> 138 S. Ct. 1697 (2018) (granting certiorari).

<sup>132</sup> Orin S. Kerr, *Article III Standing in Frank v. Gaos*, VOLOKH CONSPIRACY (Jan. 2, 2019, 5:34 AM), <https://reason.com/volokh/2019/01/02/is-there-article-iii-standing-in-frank-v> [<https://perma.cc/RHR2-7HHF>]. The post also linked to other virtual briefing on the case from Professor William Baude.

<sup>133</sup> *Id.*

But there is a flip side: when a virtual brief raises a new argument outside of the regular process, it introduces problems of confirmation bias and the prospect of legal error. Temptation is already strong for the Justices to credit arguments that align with their pre-existing world views. Echo chambers and confirmation bias are dramatic in a digital age.<sup>134</sup> We all look for sources to confirm what we already believe anyway, and our information cocoons mean that we can select news stories and factual accounts that convince us we were right all along.<sup>135</sup>

Virtual briefing exacerbates this dynamic. Recall that the law clerks on *Twitter* followed partisan and predictable commentators (clerks in chambers on the left follow bloggers on the left and clerks in chambers on the right follow bloggers on the right). Perhaps this is an inevitable sign of our times, but it is important to at least acknowledge the confirmation-bias cost of wide-open briefing avenues. Our legal system is built on the requirement of a neutral arbiter to hear all sides of a debate in a courtroom (and on the briefs) as the advocates confront each other's arguments and expose weaknesses. That value is undercut when the Justices and their clerks turn to other, more familiar voices outside the arena who are providing arguments that seem right because they confirm pre-existing views and need not acknowledge weakness. Indeed, it must be quite tempting to reach for the opinion of a famous and familiar voice who says the advocates have missed something.

Granted, a closed market of ideas from advocates is not perfect and can lead to some inequities and missed opportunities. But we are skeptical that virtual briefing results in the triumph of the "best arguments" on a truly open market—that is, that the Justices are taking in all possible arguments and crediting the best ones. Instead it seems likely that with more voices to turn to, the Justices go to the familiar and confirming, not the unfamiliar and challenging. Under the banner of free and more speech, in other words, virtual briefing could mean that the Justices are only hearing the same voices on repeat.

Moreover, because virtual briefing is exempt from the adversarial system, it also increases the risk of error. Consider the case of *Kennedy v. Louisiana*, decided in 2008.<sup>136</sup> The

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<sup>134</sup> For elaboration on this point, see Dan Kahan, *Fixing the Communications Failure*, 463 *NATURE* 296, 296 (2010); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 *N.Y.U. L. REV.* 175, 191 (2018).

<sup>135</sup> Kahan, *supra* note 134, at 296.

<sup>136</sup> 554 U.S. 407 (2008).

issue there was whether the Eighth Amendment allows the crime of child rape to be punished by death. The question whether a certain punishment is “cruel and unusual,” in violation of that constitutional guarantee, turns in part on how many other jurisdictions would allow it. Consequently, the parties in *Kennedy* each briefed the Court on how many other jurisdictions allowed child rape to be punished by death, explaining that only a small handful of states permitted such punishment. Months later, the Court issued a 5-4 decision holding that Louisiana’s law violated the Eighth Amendment. One of the reasons the Court gave was because the “Federal Government” did not allow capital punishment for “child rape of any kind.”<sup>137</sup>

Within days of that decision, a lawyer who had not been involved with the case asserted on a military law blog that, in addition to state laws the Court had recognized, military law (a species of federal law) also allowed child rape to be punished by death.<sup>138</sup> In support of this assertion, the lawyer quoted a 2006 statute providing that “[u]ntil the President otherwise provides,” the punishment for child rape is “death or such other punishment as a court-martial may direct.”<sup>139</sup>

From the text of the military statute the lawyer cited, it certainly sounded like the Court had made an error—at least in its multijurisdictional analysis, if not in its ultimate decision. Breathless commentators speculated over whether the Court would have to reverse itself.<sup>140</sup> The Court itself was concerned enough, after the State of Louisiana sought rehearing, to order supplemental briefing on the issue (which was accompanied, naturally enough, by more virtual briefing from the military lawyer and others).<sup>141</sup> In that briefing, *Kennedy*’s lawyers (who

<sup>137</sup> *Id.* at 426.

<sup>138</sup> Dwight Sullivan, *The Supremes Dis the Military Justice System*, CAAFLOG (June 28, 2008), <https://www.caaflog.com/2008/06/28/the-supremes-dis-the-military-justice-system/> [<https://perma.cc/YH6B-9FH3>].

<sup>139</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(b)(1), 119 Stat. 3136, 3263 (2006).

<sup>140</sup> See Linda Greenhouse, *Justice Dept. Admits Error in Not Briefing Court*, N.Y. TIMES (July 3, 2008), <https://www.nytimes.com/2008/07/03/us/03scotus.html> [<https://perma.cc/7LS6-QSGU>] (laying out the process by which the losing party would ask for a reconsideration of the decision and the Department of Justice might then weigh in); Orin Kerr, *Question about Rehearing in Kennedy v. Louisiana, VOLOKH CONSPIRACY* (July 31, 2008, 12:14 PM), <http://volokh.com/2008/07/31/question-about-rehearing-in-kennedy-v-louisiana/> [<https://perma.cc/NKJ7-ETGH>].

<sup>141</sup> See Douglas A. Berman, *Add Prof. Tribe to Those Urging Rehearing in Kennedy*, SENT’G L. & POLY (July 31, 2008), [https://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/07/add-prof-tribe.html](https://sentencing.typepad.com/sentencing_law_and_policy/2008/07/add-prof-tribe.html) [<https://perma.cc/2TB2->

included one of the authors here) pointed out that the statute the blog cited was simply an “interim” measure, which gave the President the authority to set the maximum punishment for child rape at whatever level he saw fit.<sup>142</sup> The President later set the maximum at death. But, Kennedy’s lawyers continued, that executive order was seemingly insufficient to establish that maximum penalty because the Uniform Code of Military Justice (UCMJ) provides that a court-martial may impose capital punishment only when “specifically authorized by this chapter”—that is, by the Code itself.<sup>143</sup> The Code itself did not do that; it provided, instead, simply that a person convicted of child rape “shall be punished as a court-martial may direct.”<sup>144</sup>

The Court ultimately denied rehearing. In a footnote amending the opinion, the majority was careful not to take any position on whether military law allowed capital punishment for child rape.<sup>145</sup> The majority stated simply that military law did not affect its “reasoning or conclusions.”<sup>146</sup>

One might think this an odd example to illustrate the risks of virtual briefing. After all, the Court took the step of inviting supplemental briefs from the parties (and the Solicitor General) before relying on a legal argument advanced for the first time in a blogpost. And that within-the-rules briefing seemingly prevented the Court from relying on a potentially mistaken legal assertion—namely, that military law allowed the death penalty for child rape.

But we prefer to think of this as a cautionary tale—and a warning that has not been heeded. The episode shows that blogposts have for some time now had the capability of swaying Supreme Court decision-making. It demonstrates that such virtual briefing sometimes makes debatable—even sometimes explosive—assertions that require adversarial testing. But in the decade since the Court denied rehearing in *Kennedy*, it has

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XKEM]; Corey Rayburn Yung, *My New Article on SSRN*, SEX CRIMES (Sept. 12, 2008, 10:28 PM), [https://sexcrimes.typepad.com/sex\\_crimes/2008/09/my-new-article.html](https://sexcrimes.typepad.com/sex_crimes/2008/09/my-new-article.html) [<https://perma.cc/ZN4B-NX86>] (summarizing and linking to a brief article posted to SSRN); see also Corey Rayburn Yung, *Is Military Law Relevant to the “Evolving Standards of Decency” Embodied in the Eighth Amendment?*, 103 NW. U. L. REV. COLLOQUY 140, 140–41 (2008) (concluding that military law was irrelevant to the Court’s “evolving standards of decency” test, and therefore that the Court should not grant Louisiana’s petition for rehearing).

<sup>142</sup> Brief for Petitioner in Opposition to Rehearing at 3 & n.1, *Kennedy*, 554 U.S. 407 (No. 07-343) (quoting National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(b)(1), 119 Stat. 3136, 3263 (2006)).

<sup>143</sup> *Id.* at 9 & n.5 (quoting 10 U.S.C. § 818) (2018).

<sup>144</sup> 10 U.S.C. § 920b(a) (2015).

<sup>145</sup> 554 U.S. 945, 945 (2008).

<sup>146</sup> *Id.*

never again ordered parties in any procedural setting to respond to assertions made in virtual briefing.

As explained in Part II, the reason for this dearth of orders cannot be that the Justices and clerks are no longer reading blogs (or listening to podcasts). On the contrary, all indications suggest they are following them now more than ever. The Court seems to have decided it may do so without looping this activity into the adversarial process. We think the Court is proceeding at its peril.

## B. Accountability and Transparency

Virtual briefing does not just threaten the procedural integrity of the adversarial process; it also presents serious questions regarding accountability and transparency. The Supreme Court Rules require amici to abide by demanding directives in this regard. Specifically, the Rules (1) forbid anyone other than amici from providing financial support for the filing, and (2) require amici to disclose on the first page of any filing whether anyone other than amici authored the brief in whole or in part.<sup>147</sup> The perceived potency of these two prescriptions is reflected in the fact that, even though the second one is phrased in terms of merely a disclosure requirement, it is treated in practice as an outright prohibition. The accepted wisdom is that any brief that told the Court in footnote 1 that it was authored in part by a lawyer for a party would not even be worth filing.<sup>148</sup> To our knowledge, no such brief has been filed in years, if not decades.

Yet, virtual briefing comes with no such restrictions—at least not in terms of the Court’s rules or any other positive law.

Does this matter? An anecdote from a Supreme Court case, *Exxon Shipping v. Baker*, which was litigated before the

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<sup>147</sup> Rule 37.6, LEGAL INFO. INST., [https://www.lawcornell.edu/rules/supct/rule\\_37](https://www.lawcornell.edu/rules/supct/rule_37) [<https://perma.cc/EV55-B7RK>].

<sup>148</sup> The leading treatise on Supreme Court practice underscores that Rule 37.6 “reflects the Court’s perception that some parties to a case had silently been authoring or financing amicus curiae briefs in support of their positions[.]” which would effectively help parties expand the word limits imposed on merits briefs. SHAPIRO, *supra* note 1, at 755; *see also* Eugene Volokh, *Should U.S. Supreme Court Litigants Decline Consent for Filing of Amicus Briefs?*, VOLOKH CONSPIRACY (Apr. 28, 2018, 1:33 AM), <https://reason.com/volokh/2018/04/28/should-us-supreme-court-litigants-declin> [<https://perma.cc/V4KH-JL4D>] (noting that in *Butler v. FAA* the petitioner’s lawyer acted as counsel of record because he was a member of the Supreme Court bar on an amicus prepared by a different lawyer, but that the Court, in a rare move, denied leave to file, most likely because “the Court did not approve of a party providing even that sort of help to the amicus”).

explosion of virtual briefing, suggests it might.<sup>149</sup> About twenty years ago, when Exxon Corporation was formulating its strategy for challenging a jury's \$5 billion punitive damages verdict for its role in the Exxon Valdez oil spill, one thing the company did was pay various academics to write articles questioning the legitimacy of punitive damages. As an Exxon representative explained to a potential author, "it's . . . helpful" to a litigant "to have people working on [favorable] articles that come out in academic publications" or "things placed into major, policy-related newspapers[.]"<sup>150</sup> Supreme Court Justices may read the pieces, and even more often, "their clerks will read them[.]"<sup>151</sup> Furthermore, the company's lawyers themselves can "cite the article" or refer to it at oral argument.<sup>152</sup>

Much has been written about this episode of funding academic work to aid in a Supreme Court appeal, partly with respect to whether the academics who accepted Exxon's money had any obligation to disclose that fact in their work.<sup>153</sup> There is no need to rehash all of that here. Instead, we will make three points. First, this episode demonstrates that litigants who have a lot to win or lose will sometimes seek to enlist academics and others perceived as learned commentators, with the explicit aim of influencing Supreme Court Justices. Litigants will even go so far as to pay them to generate writings or to publish their opinions.

Second, the Court does not believe it is appropriate to rely on such publications. Upon learning in *Exxon Shipping* that certain literature cited in the briefs was "funded in part by Exxon," the Court went out of its way to note that it "decline[d] to rely on it."<sup>154</sup> The Court did not fully spell out its reasoning in the now-infamous footnote 17. But, as Thomas McGarity has observed, the clear implication of the footnote is that the Court was acting "out of a legitimate concern for the integrity of the appellate process," trying to ensure the Justices were "not swayed by extrajudicial attempts by the parties to influence their thinking."<sup>155</sup> That is, the Supreme Court Rules would not

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<sup>149</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2007).

<sup>150</sup> William R. Freudenburg, *Seeding Science, Courting Conclusions: Reexamining the Intersection of Science, Corporate Cash, and the Law*, 20 Soc. F. 3, 14, 17 (2005).

<sup>151</sup> *Id.* at 16.

<sup>152</sup> *Id.* at 14, 16.

<sup>153</sup> See, e.g., Thomas O. McGarity, *A Movement, a Lawsuit, and the Integrity of Sponsored Law and Economics Research*, 21 STAN. L. & POL'Y REV. 51, 51-53 (2010) (examining the integrity of privately sponsored academic research).

<sup>154</sup> See *Exxon Shipping*, 554 U.S. at 501 n.17.

<sup>155</sup> McGarity, *supra* note 152, at 76.

allow the articles that Exxon funded to be submitted as amicus briefs, so the Court thought it inappropriate to rely on them in the same way it would rely on amicus filings.

Third, Exxon's effort was perceived as largely successful. No one other than the Exxon representative referenced above "expressed satisfaction" to the *New York Times* regarding his efforts.<sup>156</sup> He noted that "the arguments the justices used in part reflected the conclusions of the studies."<sup>157</sup> Others agree. In the aftermath of *Exxon Shipping*, some commentators suggested that despite the Court's disclaimer in footnote 17, the Court's opinion tracked the reasoning of the disclaimed studies.<sup>158</sup> The Court itself in *Exxon Shipping* cited repeatedly to *Cooper Industries v. Leatherman Tool Group, Inc.*, which in turn freely cited to one of the studies.<sup>159</sup>

Which brings us back to the risks of virtual briefing. No longer must a litigant or other individual seeking to influence the Court reach out months or years in advance to would-be authors, much less depend on the slow-churning wheels of academic publishing. Now such persons can generate blog posts and the like within days—they can pinpoint their issuances to exactly the time at which they have the maximum chance of being read inside the Court. And, if the author of any such post decides to keep such sponsorship to herself, the odds that the Court will learn of it seems fairly remote.

Of course, one might still respond to all of this with a shrug. After all, litigants have long used friends and contacts in the media to generate favorable stories about their cases.

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<sup>156</sup> Adam Liptak, *From One Footnote, a Debate over the Tangles of Law, Science, and Money*, N.Y. TIMES (Nov. 24, 2008), <https://www.nytimes.com/2008/11/25/washington/125bar.html> [<https://perma.cc/5U4D-4FJL>].

<sup>157</sup> *Id.*

<sup>158</sup> See Lee Epstein & Charles E. Clarke, Jr., *Academic Integrity and Legal Scholarship in the Wake of Exxon Shipping*, *Footnote 17*, 21 STAN. L. & POL'Y REV. 33, 35 (2010) ("The Justices say they did not rely on the studies Exxon funded, even though it is actually very good work AND they seem to have been affected by it.") (quotation marks and brackets omitted) (quoting email from Jeffrey J. Rachlinski, Professor of Law, Cornell Law School, to Lee Epstein, Professor of Law, Northwestern University School of Law (Aug. 1, 2008) (on file with authors Epstein and Clarke)); *Conflicts of Interest, Footnote 17, and Scientific McCarthyism*, NATHAN A. SCHACHTMAN (June 12, 2011, 7:14 AM), <http://schachtmanlaw.com/conflicts-of-interest-footnote-17-and-scientific-mccarthyism/> [<https://perma.cc/3MUW-4S6E>] ("The footnote was curious in large part because Exxon won the case, which leaves open why Justice Souter went out of his way to call into question research that supported his concern about the vagaries of punitive damage awards.").

<sup>159</sup> *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 n.5 (2001) (citing Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998), one of the studies disclaimed in *Exxon Shipping*).

Litigants not only commonly pitch news stories by supplying proposed content in press releases,<sup>160</sup> but they also sometimes coordinate the drafting of op-eds by ostensibly neutral experts.<sup>161</sup> No one has seriously suggested these practices are unseemly or particularly harmful. On the contrary, “working the press” has come to be accepted as a critical component of at least those Supreme Court cases dealing with high profile public policy issues.<sup>162</sup>

But virtual briefing might be different. The kinds of traditional media that have been thought over the years (and to some extent are still thought) to influence the Court tend to have rigorous gatekeepers. Certainly not every groundless assertion or conflict of interest is uncovered. But many are. The reader of a piece in the *New York Times* or the *Wall Street*

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<sup>160</sup> See, e.g., News Release, *ADF to Take Stand for Artistic Freedom at US Supreme Court Tuesday*, ALLIANCE DEFENDING FREEDOM (Dec. 4, 2017), <http://www.adflegal.org/detailspages/press-release-details/adf-to-take-stand-for-artistic-freedom-at-us-supreme-court-tuesday> [https://perma.cc/WT37-5NNN] (spelling out the party’s basic arguments and announcing a news conference to take place immediately following oral argument on the Supreme Court steps); Press Release, John Kramer, *Supreme Court Will Hear Case on Whether the 50 States Must Comply with U.S. Constitution’s Excessive Fines Clause*, INST. FOR JUSTICE (June 18, 2018), <https://ij.org/press-release/supreme-court-will-hear-case-on-whether-the-50-states-must-comply-with-u-s-constitutions-excessive-fines-clause/> [https://perma.cc/4DTQ-3L35] (press release immediately after the Court granted certiorari); Press Release, *Today in the U.S. Supreme Court: Is the World Bank Group Above the Law?*, EARTHRIGHTS INT’L (Oct. 31, 2018), <https://earthrights.org/media/today-in-the-u-s-supreme-court-is-the-world-bank-group-above-the-law/> [https://perma.cc/5Z4H-2VEK] (press release immediately after oral argument).

<sup>161</sup> Coordinating on the publishing of op-eds is a frequent practice. See, e.g., Nicholas Bagley, *Hello Justices? It’s Reality Calling*, N.Y. TIMES (Mar. 2, 2015), <https://www.nytimes.com/2015/03/02/opinion/in-king-v-burwell-the-plaintiffs-misread-obamacare.html> [https://perma.cc/MKC6-ANMT] (op-ed published days before argument in *King v. Burwell*, making both legal and policy arguments about why the Court should side with the Government’s interpretation of the Affordable Care Act); Lina Khan, *The Supreme Court Case That Could Give Tech Giants More Power*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/opinion/the-supreme-court-case-that-could-give-tech-giants-more-power.html> [https://perma.cc/2KY2-F4PH] (op-ed published days after oral argument in *Ohio v. American Express*, a case in which Lina Khan also helped draft an amicus brief); Stephen H. Sachs, *The Supreme Court’s Privacy Precedent Is Outdated*, WASH. POST (Nov. 26, 2017), [https://www.washingtonpost.com/opinions/the-supreme-courts-privacy-precedent-is-outdated/2017/11/26/fe9d1dd0-cfb2-11e7-81bc-c55a220c8cbe\\_story.html?utm\\_term=.082d130ae512](https://www.washingtonpost.com/opinions/the-supreme-courts-privacy-precedent-is-outdated/2017/11/26/fe9d1dd0-cfb2-11e7-81bc-c55a220c8cbe_story.html?utm_term=.082d130ae512) [https://perma.cc/2LJ4-M6NC] (prior to argument in *Carpenter*, former Maryland Attorney General who had argued *Smith v. Maryland* suggesting that *Smith* should be limited).

<sup>162</sup> See SCOTUSblog on Camera—Adam Liptak Interview Part Two, YOUTUBE (Jan. 30, 2013), <https://www.youtube.com/watch?v=0aiSb4X207k> [https://perma.cc/BJA6-V48U] (discussing the relative closeness among and between members of the press corps and Supreme Court bar).

*Journal* can take some level of comfort in knowing that at least foundational problems with submissions will prevent their publication, or at a bare minimum be disclosed. The same cannot necessarily be said for the blogosphere. Even assuming many websites apply similar journalistic practices to their own publications, even the most conscientious, such as *SCOTUSblog*, typically link to other pieces of interest posted on other sites. We know of no indication that such blogs somehow vet the pieces to which they link—and yet, those stories are just a click away for the curious law clerk or Justice.

### C. Ethical Quandaries for Advocates

The discussion thus far has proceeded based on an unspoken assumption—namely, that attorneys representing parties in Supreme Court cases cannot simply post detailed essays on *SCOTUSblog* and the like. If they could, then all of the concerns explored above might not vanish, but they would surely dissipate. Virtual briefing that was potentially misleading or otherwise problematic could be met directly with responses by the advocates. Litigants themselves would be less tempted to feed material to others to post or even to urge others to post things themselves. After the reply brief is filed, for example, an attorney for the respondent might post a long essay entitled, “Reactions to the Reply Brief and Thoughts Looking Ahead to Oral Argument.” Or the day after oral argument (and a day or two before the Court votes in conference), an advocate could post a 3,000-word memo entitled, “My Reflections on Oral Argument,” addressing in detail—after research and consultation—the questions that the apparent swing Justice asked the day before.

Would it be okay for an advocate to do this? Nothing in the Court’s rules expressly prevents it. Furthermore, it has long been accepted that lawyers can give radio interviews previewing or summarizing their arguments for radio journalists, which are typically aired the hours before or after oral arguments.<sup>163</sup> As we noted above, one podcast run by former Su-

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<sup>163</sup> See, e.g., Nina Totenberg, *Justices Hear ‘Bong Hits’ Free-Speech Case*, NPR (Mar. 19, 2007), <https://www.npr.org/templates/story/story.php?storyId=8989554> [<https://perma.cc/XA3B-RFZU>] (radio segment released the day of oral argument in *Morse v. Frederick*, including brief statements by Kenneth Starr and Jay Sekulow, the advocates in the case); Nina Totenberg, *Supreme Court Considers Cellphones and Digital Privacy*, NPR (Nov. 29, 2017), <https://www.npr.org/2017/11/29/567133874/supreme-court-considers-cellphones-and-digital-privacy> [<https://perma.cc/5LBH-66LJ>] (radio segment released the day of oral argument in *Carpenter v. United States*, including parts of interview with Nate Wessler,

preme Court clerks has already taken this practice one step further, encouraging advocates (successfully, in at least a couple of instances) to engage in detailed discussions right after oral argument with the goal of digging deeper into the potentially key issues that emerged at argument.<sup>164</sup>

Yet, to our knowledge, no advocate has gone so far as to post a virtual brief online. Why not? Probably because people have an instinct—one we share—that it would violate the spirit, if not the letter, of the Supreme Court’s Rules. At some point, a blog post or other virtual writing starts to resemble a brief so closely that it becomes an end-run around the Court’s rules and fair process.

Therein lies the difficulty. Until the Court identifies the line (if any) that advocates may not cross, lawyers will be caught between a rock and a hard place. The Rules of Professional Responsibility impose a duty of zealous advocacy.<sup>165</sup> And the Rules expressly permit lawyers to make public statements about a case when the “information [is] contained in a public record”—as all legal arguments are—or when “necessary to mitigate . . . recent adverse publicity” from a third party.<sup>166</sup> So if some or all forms of virtual briefing are acceptable, then their potential effectiveness would seem to compel lawyers to engage in them at least sometimes. On the other hand, if some or all forms of virtual briefing transgress the permissible boundaries of advocacy, then lawyers had better steer clear. Until the Court provides some form of guidance, we will continue to inhabit a world in which virtual briefing flourishes, but that is implicitly off-limits to the people who are often best positioned to contribute: the lawyers for the parties.

#### IV

#### POSSIBLE PATHS FORWARD

What, if anything, is to be done? We are frank to say we are not sure. Our primary goal here is to lay out the problem and

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the ACLU lawyer on the case); *Bryan Stevenson’s Statement After Sullivan v. Florida Argument*, YOUTUBE (Dec. 4, 2009), <https://www.youtube.com/watch?v=eh0qtJ3FonA> [<https://perma.cc/W7ZY-HDRR>] (post-argument statement and questions from various journalists on the steps of the Supreme Court).

<sup>164</sup> See *FIRST MONDAYS*, *supra* note 8.

<sup>165</sup> MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2018) (“A lawyer must also act . . . with zeal in advocacy upon the client’s behalf.”).

<sup>166</sup> MODEL RULES OF PROF’L CONDUCT r. 3.6 (AM. BAR ASS’N 2018). For a more robust discussion of why this rule is “unlikely” to prohibit “shadow-briefing by a blog post[.]” see Lee, *supra* note 6, at 1551–53.

to trigger a conversation. But we will offer a few thoughts about possible paths forward.

### A. No Restrictions

Perhaps the best response to the phenomenon of virtual briefing is to do nothing at all. The First Amendment looms large over this debate. One possibility is that the First Amendment simply ties the Court's (and the law's) hands. All Supreme Court cases are matters of public concern. The First Amendment, therefore, surely gives interested persons the general right to speak and write about pending cases. This is all the more true when persons wish to speak at "crucial time[s],"<sup>167</sup> such as right before a vote on whether to grant review or right after oral argument. The Court has recently stressed that Internet websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."<sup>168</sup> Perhaps this right runs all the way from journalists, through academics and other experts, through amici to the parties' advocates themselves and guarantees them the right to post whatever they like, in whatever form they like, on *SCOTUSblog* or any other online forum.

We are hardly certain, however, that the First Amendment offers such absolute protection. For one thing, as we have explained, it seems overly simplistic to say that traditional media coverage of the Court cannot meaningfully be distinguished from virtual briefing. To borrow the Court's reasoning from *Riley v. California*, saying traditional media is materially indistinguishable from virtual briefing may be "like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together."<sup>169</sup>

Furthermore, the Court has suggested that ABA Model Rule of Professional Conduct 3.6—which, under some circumstances, prohibits lawyers participating in a proceeding from making public comments posing a "substantial likelihood of material prejudice" to the proceeding—likely passes First Amendment muster.<sup>170</sup> That being so, one commentator has suggested that the Rules of Professional Conduct could be

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<sup>167</sup> *Bridges v. California*, 314 U.S. 252, 268 (1941).

<sup>168</sup> *Packingham v. North Carolina*, 138 S. Ct. 1730, 1737 (2017). The Court was speaking specifically about "social media" websites, but the point applies equally to blogs and the like.

<sup>169</sup> 573 U.S. 373, 393 (2014).

<sup>170</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1036 (1991).

amended to prohibit lawyers representing parties or amici from making “online statement[s] . . . intended to influence the Justices” or other Court personnel involved in the decision-making process.<sup>171</sup> And while more speculative, it may be that a similar law or rule could be applied to the public at large.<sup>172</sup> If that is true, then it is hard to imagine a similar rule at the Supreme Court failing First Amendment scrutiny.

But even putting First Amendment concerns aside, the costs of regulation on the producers of virtual briefing may still outweigh its benefits. For one thing, any regulation would present serious administrative difficulties.<sup>173</sup> A speaker’s “intent” is a notoriously difficult thing to pin down—even using objective markers.<sup>174</sup> “Influence” is a similarly slippery concept. Would an online publication simply urging careful consideration of the competing arguments be covered, or would the author need to advocate a particular outcome?<sup>175</sup> Last but not least, would the very existence of such a rule produce a harmful chilling effect? The Court is already the most cloistered and least understood of the three branches. The notion of deterring speech discussing its cases seems, at the very least, at cross purposes with the goal of increasing public comprehension and scrutiny of the Court’s work.

One might even go a step further and argue that unfettered online discussion of the Court’s cases would *enhance* the per-

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<sup>171</sup> Lee, *supra* note 6, at 1562.

<sup>172</sup> See *id.* at 1564–66 (reserving the question of whether lawyers participating in a proceeding may be regulated more aggressively than the press or general public).

<sup>173</sup> Lee acknowledges this point. See *id.* at 1562 (recognizing “several line-drawing problems” that proposed regulation would present).

<sup>174</sup> See, e.g., *Knauer v. United States*, 328 U.S. 654, 659 (1946) (“Intent is a subjective state, illusory and difficult to establish” through circumstantial evidence). Indeed, “discerning a speaker’s subjective intent is particularly difficult based on just an electronic communication.” Enrique A. Monagas & Carlos E. Monagas, *Prosecuting Threats in an Age of Social Media*, 36 N. ILL. U. L. REV. 57, 69 (2015).

<sup>175</sup> An analogy, showing how difficult this question is, can be drawn to the Court’s campaign finance cases drawing a line between “issue advocacy” and “express advocacy.” The First Amendment fully protects the former as part of safeguarding free speech in the marketplace of ideas. But the Court has said the latter—which it has defined as statements expressly advocating the election or defeat of a particular candidate—is more susceptible to regulation. See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476–81 (2007). This line has proved slippery and unsatisfactory, to say the least. See *id.* (struggling to discern whether certain issue advocacy is the “functional equivalent” of express advocacy); *id.* at 483–84 (Scalia, J., concurring in part and concurring in the judgment) (suggesting that the Court “reconsider the decision that sets us the unsavory task of separating issue-speech from election-speech with no clear criterion”).

ceived legitimacy of its decisions. When Congress or administrative agencies consider making new law, there are various avenues for public participation, from town meetings to the submission of formal written comments. Even if the lawmaking bodies do not always seriously consider public comments—indeed, even if people think corporations, interest groups, and the like dominate the decision-making process in reality—there is still value in providing an opportunity for people to express their views. Yet, there are various barriers—financial and otherwise—to getting one’s views in front of the Justices in the form of legal briefs. Openly embracing the notion of wide-open, online exchanges of ideas might mitigate this problem, making the Court seem like a less remote and elite institution. The Court could even go a step further and host its own online bulletin board.

## B. Restrictions on Posting Virtual Briefing

Now consider the opposite path forward. Let us imagine the Court decides to promulgate a rule forbidding the posting of online material that serves the same function as briefs. Even if such a prohibition could survive the constitutional scrutiny outlined above, it would still raise a multitude of practical problems, among them:

- *To whom, exactly, would the rule apply?* As noted above, the Court quite possibly has the power to restrict the online activities of advocates directly involved in cases—and maybe even members of the bar more generally. But it seems highly unlikely that the Court has the power to prohibit nonlawyers from commenting online about pending cases. If that is correct, then the effectiveness of any restriction on virtual briefing would be limited at best. Remember that many law professors are not members of the bar, nor are other potentially informed commentators. That is to say nothing of the irony inherent in forbidding those most likely to have expertise on a subject from speaking, while allowing all others to offer their views.
- *How, exactly, would the Court distinguish between virtual briefing and ordinary, traditional commentary?* The premise of this paper is that there is a qualitative difference between virtual briefing and ordinary, traditional commentary on pending cases. But we also acknowledge that this distinction involves line-drawing. How is the Court (or whoever else would administer a prohibition on virtual briefing) to enforce that rule? Certainly, the First Amendment would not tolerate

a system of preclearance and prior restraints.<sup>176</sup> Any enforcement system would have to operate on a *post hoc* basis. Once that concession is made, we already have the problem that “illicit” material will still sometimes be published and made available to Justices and their clerks.

- *How would restrictions be monitored and enforced?* Once potentially objectionable pieces are posted, one wonders how complaints would be registered. Litigants might be loath to file motions or otherwise bring particular virtual briefs to the Court’s attention, simply for fear of highlighting them (even if they are ultimately taken down). Others may lack any real incentive to call out questionable posts. Furthermore, what kind of sanction for violating the rule would be appropriate? Simply taking down the post? A fine? Revocation of membership in the Supreme Court bar? Each potential remedy raises its own thorny constitutional and ethical issues.

### C. Internal Restrictions on the Court Itself

Given the obstacles to restricting the producers of virtual briefing, perhaps the smarter solution is to regulate the consumption of virtual briefing. In other words, perhaps the Court could institute an internal restriction barring law clerks (and themselves?) from reading posts on the internet about a case while it is pending. As noted above, the Court already bars law clerks from engaging in certain social media activities.<sup>177</sup> And the general notion of a court’s restricting its own participants in the adversarial process from reading outside material of any kind is hardly a novel concept.

Consider, for example, how we treat jurors. The ABA’s Standards for balancing fair trial rights against the rights of the press advise that, in all cases “likely to be of significant public interest,” jurors should be admonished as follows:

During the time you serve on this jury, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain Standards; for example, a witness may testify about events personally seen or heard but not about matters told to the witness by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination.

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<sup>176</sup> See, e.g., *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 557 (1976) (“[T]he main purpose of [the First Amendment] is ‘to prevent all such *previous restraints* upon publications.’”) (alterations in original) (quoting *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907)).

<sup>177</sup> See Strickler, *supra* note 59, at 70.

News reports about the case are not subject to these Standards, and if you read, listen to, or watch these reports, you may be exposed to information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction.<sup>178</sup>

It is not hard to imagine adapting this instruction to deal with virtual briefing; indeed, much of the reasoning maps directly onto the challenges that virtual briefing raises.<sup>179</sup>

A prohibition along these lines with respect to virtual briefing would have the virtue of regulating only internal actors, leaving the blogosphere free to host the exchange of whatever ideas about pending cases advocates and other interested parties might like to publish. There is thus no First Amendment problem at all. An age-old remedy for objectionable speech, after all, is simply to avert our eyes.<sup>180</sup>

The first question that arises here, of course, is whether the Court would really be willing to lay down such a rule. The Justices have never been willing to formalize *any* rules of ethics for themselves, instead leading each chambers to police itself.<sup>181</sup> An internal rule forbidding all Justices and clerks from consuming material on the internet as they see fit would be a sharp break from tradition.

Even if the Court were willing to impose restrictions on itself, there would also be another difficulty in terms of enforcement. Advocates are already deeply in the habit of citing sources on the internet in their briefs. Assuming virtual briefing would continue at least to some degree on its own terms (and assuming the Court's internal rule meant advocates should not cite virtual briefs), then advocates would be right back in the position of having to decide what postings are so

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<sup>178</sup> STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL & FREE PRESS 8-3.6(d) (AM. BAR ASS'N 1988), [https://www.americanbar.org/content/dam/aba/publishing/abanews/1273614736\\_20\\_1\\_1\\_7\\_upload\\_file.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/abanews/1273614736_20_1_1_7_upload_file.authcheckdam.pdf) [<https://perma.cc/P5SL-Y6F6>]; see also WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §23.3(g), at 1128–29 (5th ed. 2009) (discussing this proposed admonition and noting that the judge generally may sequester the jury if this mere instruction might be ineffective).

<sup>179</sup> We acknowledge of course that similar virtual-briefing temptations face jurors and trial judges. Like it or not, the googling juror and googling trial judge are likely part of our current reality. See generally Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137 (2014) (discussing the access of information on the internet by judges, jurors, and litigants).

<sup>180</sup> See *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000); *Cohen v. California*, 403 U.S. 15, 21 (1971).

<sup>181</sup> See ROBERTS, *supra* note 125, at 4–5.

much like a brief that they implicate the Court's rule—and the Court would be right back in the position of having to enforce its rule against lawyers.

A related restriction the Court could impose internally would be not to avert their eyes completely, but at least to insist on some quality control. As explained above, there is a spectrum of virtual briefing—some more sophisticated than others. If the Justices and their clerks are going to consume legal blogposts and podcasts, they could ostensibly limit themselves to those that pass some sort of internally agreed-upon, quasi-objective standards of excellence (e.g., only deep dive posts, only arguments that have been explored fully in scholarship elsewhere, only claims that wrestle with counterarguments).

Consider an analogy to Wikipedia. Wikipedia is the ultimate product of information crowdsourcing—anyone can update it at any time. For that reason, it is in many circles still considered out of bounds to cite Wikipedia as an authority, despite the fact that almost everybody uses the site to answer their questions and recent studies indicate it is no less reliable than *Encyclopedia Britannica* (a claim *Britannica* disputes). As one scientist explains, “Academics use Wikipedia all the time because we're human. It's something everyone is doing.”<sup>182</sup> The go-to move—even for scientists—seems to be to use Wikipedia, but not to rely on Wikipedia. Supreme Court consumers of virtual briefing could adopt the same strategy, perhaps using the mechanisms of the adversarial system to quality check arguments that are found outside of it.

#### D. Transparency

Finally, this leads us to what is perhaps the most sensible and realistic way forward—to promote transparency. The Court could, in other words, reach out to the virtual briefing world and bring it into the fold of traditional briefing. For example, when a Justice sees a new argument online, he or she could ask for supplemental briefing on the issue or appoint an amicus if it is not an argument the parties are willing to adopt.

This strategy would bring several advantages. For one, it would leave control over virtual briefing with the Justices who—after all—are in the best position to know when they are being influenced by the crowdsourcing dynamic of virtual brief-

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<sup>182</sup> See Bethany Brookshire, *Wikipedia Has Become a Science Reference Source Even Though Scientists Don't Cite It*, SCICURIUS (Feb. 5, 2018, 7:00 AM), <https://www.sciencenews.org/blog/scicurious/wikipedia-science-reference-citations> [<https://perma.cc/XG52-TB2V>].

ing and when they are not. Similarly, promoting transparency falls right in line with other case management strategies the Justices are familiar with, such as appointing amici to argue in front of them when the parties have taken positions that are not adverse.<sup>183</sup> It is likewise consistent with tools (like special masters or court-appointed experts) that federal courts generally have before them when they find themselves grappling for more information or arguments on an aspect of the case that have not been adequately briefed.<sup>184</sup>

Further, requiring disclosure captures one of the principal benefits of virtual briefing—i.e. its public nature. If the Justices are troubled by an issue or an argument to the extent that they feel they need more information from outside the briefs, disclosing this fact *while the case is pending* will generate more voices to weigh in at critical moments—and importantly will give the parties a chance to weigh in with their own views on the supposedly overlooked issue or argument. It will also mean that these views will be sharpened to address precisely the issues for which they can make the greatest impact.

In this way, borrowing an analogy that one of us has used in the past, the Court would operate like an administrative agency in notice and comment rule-making—notifying interest parties about potential rule changes and then digesting the “comments” before making a final decision.<sup>185</sup> It is worth noting that in the agency context, disclosure is a very important normative value promoted by courts enforcing the APA: an agency must, for example, disclose all data and studies that animate its thinking before the final rule is released, and it

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<sup>183</sup> See Kate Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1585–92 (2016).

<sup>184</sup> See JOE S. CECIL & THOMAS E. WILLGING, FED. JUDICIAL CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 at 44 (1993); Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 479–80 (2009) (explaining that after a 2003 amendment, “courts expanded special masters’ roles to include supervising pre-trial discovery disputes, conducting settlement negotiations in complex cases, implementing and enforcing post-judgment orders and decrees, and administering and distributing limited settlement funds”).

<sup>185</sup> Larsen, *supra* note 13, at 1804. Of course, it is important to remember objections that the Court should not be acting like an administrative agency. (Some understandably may find the analogy to be unflattering.) Our point is merely that once one accepts the premise the Court will look outside of the adversarial process for information (like an administrative agency does in notice and comment) perhaps the Court should also adopt safeguards that surround agency decision-making in this context.

cannot make a final rule that is not “adequately flagged” by the notice.<sup>186</sup>

The point of these safeguards, of course, is to make sure that the notice and comment procedure is an informed one—that all voices know where the conversation is headed and what matters the most to the decision-makers.<sup>187</sup> The same normative justification accompanies our virtual briefing discussion. If “crowdsourcing” is where the Justices want to go, then perhaps we should take efforts to ensure that all members of the crowd (including, importantly, the advocates themselves) are on notice as to what is influencing the decision-maker before the decision comes down; only in this way will the conversation be targeted and sophisticated. Put differently, disclosure will encourage “deep dive” virtual briefing and discount “hot takes.”

Finally, requiring disclosure in this way would alleviate the costs outlined above that come with short-circuiting the adversarial process. If the parties are on notice that the Justices need more information, they can weigh in themselves—marshalling their own experts, making their own strategic choices, and addressing arguments from the crowd they think are wrong. This can help prevent mistakes, promote transparency and accountability, and solve the ethical quandary that currently afflicts Supreme Court advocates in a virtual briefing world.

#### CONCLUSION

In the end, there may be no perfect tonic for the modern phenomenon of virtual briefing and the problems it poses. But the phenomenon seems here to stay; indeed, it is becoming more prevalent and aggressive each year. We are convinced that the current response—allowing virtual briefing to occur unrecognized and without evaluation—is unwise. Crowdsourcing Supreme Court decisions may be the wave of the future, but it is not a future we should enter without discussion and critical thought.

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<sup>186</sup> See, e.g., *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1245–46 (D.C. Cir. 2001) (noting that the agency relied on one particular environmental study and explaining that “[t]he APA generally obliges an agency to publish for comment the technical studies and data on which it relies”).

<sup>187</sup> Larsen, *supra* note 13, at 1813 (“After the notice, interested parties are given a chance to comment on the agency’s proposal. If the notice fails to provide an accurate picture of the reasoning motivating the agency’s thinking—including the factual basis for its proposal—the comment period will become meaningless.”)