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## Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?

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# Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?

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## INTRODUCTION

On March 18, 2008, the United States Supreme Court heard arguments in *District of Columbia v. Heller*.<sup>1</sup> During the proceedings, Tom Goldstein (in his real-time blog) posited that,

Based just on the questioning, which can prove inaccurate, the Court is divided along ideological lines in *Heller*, with Justice Kennedy taking a strong view that the “operative clause” of the Second Amendment protects an individual right unconnected with militia service that guarantees the right to hunt and engage in self-defense.<sup>2</sup>

Specifically, he suggested *Heller* would win the case and the Justices would recognize an individual right to bear arms.<sup>3</sup>

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1. 128 S. Ct. 2783 (2008).

2. Tom Goldstein, SCOTUSBLOG, The Guns Case “Live” Blog (Mar. 18, 2008), <http://www.scotusblog.com/wp/the-guns-case-live-blog/>.

3. *Id.*

Interestingly, Goldstein also suggested Justice Breyer tried to garner a fifth vote by signaling his willingness to read the Second Amendment narrowly.<sup>4</sup> Surely to Breyer's dismay, however, none of the more conservative wing of the Court agreed. The bottom line for Goldstein, and for many who watched the Court that day, was that the Justices would, by the slimmest of margins, vote in favor of Heller's right to bear arms. Time ultimately bore out this prediction. Indeed, the Court ruled 5–4 in favor of Heller.<sup>5</sup>

Like Goldstein's analysis of *Heller*, Chief Justice John Roberts has long thought questions posed by Justices to advocates during Supreme Court oral arguments can be used to predict case outcomes.<sup>6</sup> In fact, before he joined the Court, Roberts tested his hypothesis by tallying the number of questions Justices asked of advocates in a small sample of these proceedings.<sup>7</sup> Specifically, he counted the number of questions in the first and last case from each argument session during the 1980 and 2003 terms (a total of twenty-eight cases) and found that 86% of the time, the party who received the most inquires from the bench ultimately lost the case.<sup>8</sup>

Although we find his hypothesis intriguing, because the Chief Justice's analysis was conducted on such a small number of cases, we re-test his argument on more than two thousand cases argued between the 1979 and 1995 terms. The Article proceeds as follows. In the next part we focus on what Justices and scholars have written and said about oral arguments generally and the role these proceedings play in the Court's decision-making process. In Part II we examine the few existing studies that address the question we pose here. Part III lays out the data we use to test this hypothesis; Part IV presents our methodology; and Part V discusses the results. We conclude with a general discussion and directions for future research.

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4. *Id.*

5. *Heller*, 128 S. Ct. at 2783.

6. See Tony Mauro, *When in Doubt, Look to Roberts for Outcome of Supreme Court Cases*, LEGAL TIMES, July 11, 2007, <http://www.law.com/jsp/article.jsp?id=900005556173>.

7. *Id.*

8. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75 (2005).

## I. THE INFLUENCE OF ORAL ARGUMENTS ON CASE OUTCOMES

Scholars who study the Supreme Court disagree about whether oral arguments actually influence case outcomes. Those who emphasize an attitudinal approach to Justices' decision-making suggest these proceedings provide no real indication of who will win or lose a case.<sup>9</sup> Others posit that oral arguments provide Justices with information and, in some cases, even offer them a “fresh perspective” when it comes to making decisions.<sup>10</sup> On this account, oral arguments affect case outcomes because they give Justices an opportunity to clear up lingering questions and to gauge what their colleagues think about the case.<sup>11</sup> This line of research also demonstrates that the quality of oral argumentation affects Justices' decisions.<sup>12</sup> Indeed, by systematically analyzing notes Justice Harry Blackmun took about the quality of advocates' arguments, scholars found that Justices respond to the strength of the argument before them—and often vote accordingly.<sup>13</sup>

Despite these disparate perspectives, it seems reasonable to assume oral arguments, at the very least, have the potential to reinforce a Justice's views about a case. Existing anecdotal evidence supports this view as Supreme Court opinions often refer to information gleaned during these proceedings. For example, in *Tennessee Valley Authority v. Hill*<sup>14</sup> and *The New York Times Co. v. Sullivan*,<sup>15</sup> Justices Powell, Stevens, and Brennan refer to issues

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9. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 280 (2002).

10. *See, e.g.*, David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 223 (1986).

11. TIMOTHY R. JOHNSON, *ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT* 13–17 (2004); Stephen L. Wasby, Anthony A. D'Amato & Rosemary Metrailler, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 412 (1976).

12. Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 100 (2006).

13. *Id.* at 108. Here, the authors deem that, even when controlling for the most compelling alternative explanation—a Justice's ideology—and controlling for other factors affecting outcomes, grades Justice Blackmun assigned advocates before the Court correlate highly with a Justice's final votes on their merits. *Id.*

14. 437 U.S. 153 (1978).

15. 376 U.S. 254 (1964).

discussed at oral arguments in their opinions.<sup>16</sup> Building on this line of work, Benoit finds examples of opinions that refer to issues not mentioned in the litigants' briefs but advanced by the winning party during oral arguments.<sup>17</sup> Finally, Johnson argues that the infamous trimester scheme set in *Roe v. Wade*<sup>18</sup> stems directly from a discussion during oral argument between attorney Sarah Weddington and Justice Byron White.<sup>19</sup> He also provides systematic evidence to explain when Justices are most likely to invoke information from the oral arguments in majority opinions.<sup>20</sup>

Ultimately, there is evidence that oral arguments provide Supreme Court Justices with useful information that influences their final votes on the merits and aids them in the opinion-writing process. These proceedings give Justices the opportunity to obtain information in a less biased manner than what is presented to them in the litigants' or amici briefs.<sup>21</sup> In fact, not only do Justices use oral arguments to confirm or to clarify information presented in the litigants' briefs, but they might also seek new information during these proceedings to help them reach decisions in line with their desired outcomes.<sup>22</sup>

Past and present Justices confirm the important role oral arguments play in the Court's decision-making process. Former Chief Justice Rehnquist states:

Lawyers often ask me whether oral argument “really makes a difference.” Often the question is asked with an undertone of skepticism, if not cynicism, intimating that the judges have really made up their minds before they ever come on the bench and oral argument is pretty much of a formality. Speaking for myself, I think it does make a difference: In a significant

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16. Donald S. Cohen, *Judicial Predictability in United States Supreme Court Advocacy: An Analysis of the Oral Argument in Tennessee Valley Authority v. Hill*, 2 U. PUGET SOUND L. REV. 89, 135 (1978); Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1208 (1975).

17. William L. Benoit, *Attorney Argumentation and Supreme Court Opinions*, 26 ARGUMENTATION & ADVOC. 22, 32–33 (1989).

18. 410 U.S. 113 (1973).

19. JOHNSON, *supra* note 11, at 21–23.

20. *Id.* at 93–123.

21. *Id.* at 11–17.

22. *Id.* at 28.

minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing, and I find that it is most likely to occur in cases involving areas of law with which I am least familiar.<sup>23</sup>

What Rehnquist indicates is that these proceedings offer Justices an opportunity to “come to terms with what are often complex legal and factual issues.”<sup>24</sup> As such, they can be influential, especially when the Justices are less familiar with the legal area of the issue in the case.

Other Justices also recognize the important role oral arguments play in presenting information to the Court. Justice Blackmun argues that “[a] good oralist can add a lot to a case and help [us] in our later analysis of what the case is all about . . . . Many times confusion [in the brief] is clarified by what the lawyers have to say.”<sup>25</sup> Justice Lewis F. Powell reinforces this notion and goes so far as to say, “the fact is, as every judge knows . . . oral argument . . . does contribute significantly to the development of precedents.”<sup>26</sup>

Clearly the Justices believe in, and scholars have demonstrated, the importance of oral arguments for crystallizing Justices’ perspectives or for convincing them to view a case through a different lens. The combination of the Justices’ perspectives and academic accounts establishes a link between these proceedings and Justices’ final votes on the merits.

## II. DO JUSTICES’ QUESTIONS PORTEND CASE OUTCOMES?

Although scholars have analyzed the informational role oral arguments play for the Supreme Court, systematic evidence does not yet exist on whether Justices actually “tip their hands” during these

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23. William H. Rehnquist, *The Supreme Court* 243–44 (2001).

24. Johnson, Wahlbeck & Spriggs, *supra* note 12, at 99.

25. Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 U. RICH. L. REV. 285, 298 (2000) (internal quotations omitted).

26. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 571 (7th ed. 1993). For additional views from the bench, see Johnson, *supra* note 11, at 14–17.

proceedings. A plethora of anecdotal evidence suggests, however, that they use oral arguments as a means to communicate their initial thoughts regarding how they believe the Court should decide a case.<sup>27</sup> In this part we discuss such evidence offered from Court watchers, attorneys, Justices, legal scholars, and psychologists.

Reporters who follow the Supreme Court recognize that, “[a]s the justices fire questions at lawyers at the court’s lectern, they also telegraph their views to one another.”<sup>28</sup> In fact, Greenhouse suggests it may be possible to predict the outcome of cases because the “tenor of the argument” often reveals the Justices’ intentions.<sup>29</sup> For instance, when the Court heard oral arguments in *Crawford v. Marion County Election Board*,<sup>30</sup> she speculated the Justices’ “questioning indicated that a majority did not accept the challengers’ basic argument—that voter-impersonation fraud is not a problem.”<sup>31</sup> For Greenhouse, the Justices’ behavior also meant they wanted to dismiss the case.<sup>32</sup> Finally, she pointed out that Justice Antonin Scalia spoke “with evident disapproval” during his questioning.<sup>33</sup>

Advocates concur with reporters’ accounts that Justices may signal their votes during oral arguments. One past U.S. Solicitor General describes these proceedings as “highly stylized Japanese theater,” whereby “[t]he justices use questions to make points to their colleagues.”<sup>34</sup> David Frederick, who argued four cases during the 2005 term, says he considers oral arguments a “three-way” conversation, including “the lawyer at the lectern,” the Justice asking the question, and “a potentially persuadable justice.”<sup>35</sup>

Even the Justices assert they can determine how their colleagues are going to decide a case based on the type and tone of questions they pose to attorneys during oral arguments. As Rehnquist argued:

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27. See, e.g., Joan Biskupic, *Justices Make Points by Questioning Lawyers*, USA TODAY, Oct. 5, 2006, at 7A; Linda Greenhouse, *Justices Indicate They May Uphold Voter ID Rules*, N.Y. TIMES, Jan. 10, 2008, at A1.

28. Biskupic, *supra* note 27.

29. Greenhouse, *supra* note 27.

30. 128 S. Ct. 1610 (2008).

31. Greenhouse, *supra* note 27.

32. *Id.*

33. *Id.*

34. Biskupic, *supra* note 27 (quoting former Solicitor General Ted Olson).

35. Biskupic, *supra* note 27.

But a second important function of oral argument can be gleaned from the fact that it is the only time before conference discussion of the case later in the week when all of the judges are expected to sit on the bench and concentrate on one particular case. The judges' questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues.<sup>36</sup>

Despite the claims made by the press, advocates, and Justices, we do not know whether their conclusions are based on single cases or whether this behavior is consistent across cases, across Justices, or over time. There is some evidence to support such consistency, however. In her response to the Supreme Court Forecasting Project,<sup>37</sup> Greenhouse re-examined all her oral argument stories from the 2002 Term and reviewed her specific predictions in sixteen cases.<sup>38</sup> What she found was not a surprise to her, but it might have been to the two groups involved in the Project. Specifically, Greenhouse was able to predict the outcomes of more cases and votes of individual Justices, based on her assessment of questions Justices asked during the arguments, than either side of the Forecasting Project.<sup>39</sup> She believes her advantage over the computer-based or expertise approach is that her predictions were "postargument predictions."<sup>40</sup> As one political scientist sees it, this "should cause many of us to reconsider explanations of judicial decisions that fail to take notice of these presentations."<sup>41</sup>

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36. REHNQUIST, *supra* note 23, at 244.

37. Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger & Pauline T. Kim, *Competing Approaches to Predicting Supreme Court Decision Making*, 2 PERSP. ON POL. 761 (2004). In the project, two political scientists (Martin and Quinn) use a computer algorithm to predict the outcome of all cases from the 2002–03 Term. *Id.* at 761. Simultaneously, two law professors (Ruger and Kim) used legal experts to predict the outcomes of the same cases. *Id.*

38. Linda Greenhouse, *Press Room Predictions*, 2 PERSP. ON POL. 781, 782 (2004).

39. *Id.*

40. *Id.* at 782. Greenhouse might have had another advantage, as well: She only made predictions in cases where she was "very sure" of herself. Linda Greenhouse, *Talk to the Newsroom: Supreme Court Reporter*, N.Y. TIMES, July 14, 2008, <http://www.nytimes.com/2008/07/14/business/media/14askthetimes.html>. It remains to be seen how well she could have predicted cases if forced to make *some* prediction in all instances.

41. Lee Epstein, *Introduction to the Symposium*, 2 PERSP. ON POL. 757, 758 (2004).

Shullman extended the studies conducted by Greenhouse and Chief Justice Roberts by counting the number of questions Justices asked in ten oral arguments during the October 2002 Term.<sup>42</sup> She then tallied the questions and divided them into categories: (1) the total number of questions, (2) “questions asked per case,” (3) number of questions asked of the party with whom the Justice voted, and (4) number of questions asked of the party against whom the Justice voted.<sup>43</sup>

Beyond the simple counts, Shullman coded for the tone of voice, when the Justices made jokes, the use of hypotheticals, “and any other potentially relevant or interesting observations that occurred to me during the oral arguments.”<sup>44</sup> More specifically, she scored each question with a one indicating the “most helpful questions” and a five being a “most hostile” question.<sup>45</sup> Ultimately, Shullman was interested in the sheer number of questions posed from the bench as well as in the emotional content of those questions.<sup>46</sup> Her results are clear: oral arguments have predictive power.<sup>47</sup> That is, when the Court asks more questions of a party, and specifically more hostile questions, that party is more likely to lose its case.<sup>48</sup> As this finding is based only on ten cases, it is evidence that calls for a more systematic study.

Wrightsmen goes even further by distinguishing between salient and non-salient cases—what he calls ideological versus non-ideological.<sup>49</sup> He hypothesized the questions asked should be more predictive of outcomes in salient cases.<sup>50</sup> To test this hypothesis he analyzed the degree to which Justices’ questions were sympathetic to one side or not in twenty-four cases (twelve salient and twelve non-

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42. Sarah Levien Shullman, *The Illusion of Devil’s Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 273 (2004).

43. *Id.* at 274.

44. *Id.*

45. *Id.* at 273.

46. *Id.*

47. *Id.* at 278–79.

48. *Id.* at 292–93.

49. Lawrence S. Wrightsmen, *Oral Arguments Before the Supreme Court: An Empirical Approach* 137 (2008).

50. *Id.*

salient) from the 2004 Term.<sup>51</sup> The results are quite similar to Shullman's conclusions.<sup>52</sup>

On the other hand, Wrightsman's findings contradict Greenhouse's, Shullman's, and Roberts' work that demonstrates more questions asked of one party increases the likelihood that side will lose the case.<sup>53</sup> Wrightsman initially chalks up this contradiction to the fact that each study analyzes different terms and each analyzes fewer than twenty-four cases.<sup>54</sup> He then retests each of their findings and concludes that simple question counts are not a reliable way to predict outcomes.<sup>55</sup> Rather, a combination of question counts as well as the number of hostile questions may be the best way to determine winners based on Justices' behavior during oral arguments.<sup>56</sup>

In the end, the works cited here, including Chief Justice Roberts' own analysis, only paint a small picture. Indeed, because of the small-N problem, and because they do not control for alternative explanations, we cannot be confident that the results of any of these studies are fully reliable.<sup>57</sup> Despite this shared shortfall, we believe the combined results are instructive and important for our analysis. Indeed, they show us that Justices may very well tip their hands during oral arguments. As Shullman concludes: "Many of the Justices pose hostile or argumentative questions to both sides, but it seems that more often they go easy on the lawyer for the party they support and only play devil's advocate to the lawyer for the party they oppose."<sup>58</sup>

Based on these anecdotal findings, we seek to test a similar proposition. Specifically, we hypothesize that the amount of attention given by the Court to a particular side is inversely related to the likelihood it will prevail at the merits stage. That is, when the Court focuses more on the petitioner's side, the Justices will be less likely

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51. *Id.* at 138.

52. Shullman, *supra* note 42, at 278–79.

53. WRIGHTSMAN, *supra* note 49, at 140–41.

54. *Id.* at 141.

55. *Id.* at 145.

56. *Id.*

57. We do note that this problem is not the fault of those who have studied this phenomenon prior to us. Indeed, gathering data on oral arguments has not been an easy task. Thus, we view these analyses as path breaking for us.

58. Shullman, *supra* note 42, at 292.

to vote to reverse than to affirm. We tested our hypothesis using a large-N statistical analysis that is more generalizable than previous studies and also controls for potentially confounding factors related to the Court's decision to reverse or affirm a lower court decision.

### III. DESCRIPTIVE ANALYSIS OF ORAL ARGUMENT QUESTIONS 1979–1995

Our research extends previous findings by using the transcripts of oral arguments for all cases from 1979–1995.<sup>59</sup> Where these studies analyze only a handful of cases, our data allow us to systematically examine more than 2,000 hours of argument and nearly 340,000 unique questions asked by the Justices.<sup>60</sup> That is, rather than focus on a small subset of cases within a term or across only a few terms, our comprehensive dataset allows us to make a generalizable evaluation of how questioning affects Court decisions.

To gather data on these questions, we downloaded all available oral argument transcripts from the 1979 through 1995 Terms of the Court.<sup>61</sup> We then used a basic computer script to isolate Justices' questions as well as to collect additional information such as the length (in words) of each question. We merged these data with a

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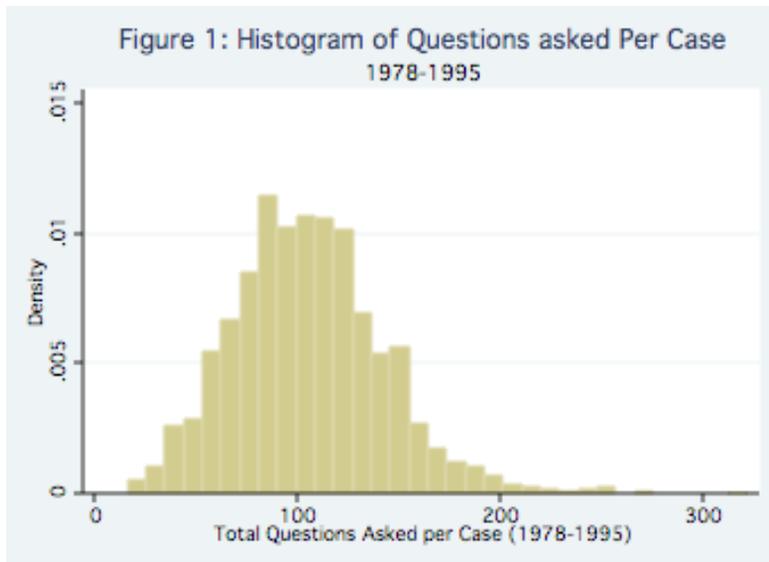
59. We have data for all cases through the 2006 Term but limit ourselves because of the data available for other key variables in the model. As we suggest in the discussion section, we will extend our analysis in a number of ways in future analyses. First, we will extend the data through the 2007 Term when we have data on the other covariates used in our statistical models. Additionally, we will conduct an individual level analysis for all cases beginning with the 1998 Term. That is, we will analyze the behavior of all Justices at oral arguments (even Justice Thomas, who rarely speaks) to determine whether there is variation in how they act during these proceedings and how they actually decide a case.

60. The term "question" might be misleading. In the transcripts, every utterance by a Justice is preceded by "QUESTION," regardless of whether it is a question or not. In a case decided during the 2006 term, for example, Justice Breyer offered this gem: "Sorry, I have laryngitis. Can you hear me all right?" Transcript of Oral Argument at 14, *Hudson v. Michigan*, 547 U.S. 586 (2006) (No. 04-1360). Our argument, of course, is that these non-substantive statements and questions made by the Justice simply constitute random noise in our data.

61. Transcripts from the 1979 Term onward are available through LEXIS, though coverage in the early terms of the online series has some unexplained gaps. Transcripts covering the Terms from 1969 (beginning of the Burger Court) through 1979 are available on microfiche, although there are gaps in these data as well. As part of a related project, we ultimately plan to gather and process these data. Prior to the Court's 1969 Term, no systematic transcription exists.

database used by Paul Collins in a recent article.<sup>62</sup> The unit of analysis is case citation, and we include all orally argued, signed, and per curiam opinions.

We initially explore several descriptive aspects of the questions Supreme Court Justices asked during oral arguments. The histogram in Figure 1 demonstrates that the data take on the familiar bell shape with a mean centered at 105 questions per oral argument session and a standard deviation of approximately 38.<sup>63</sup>



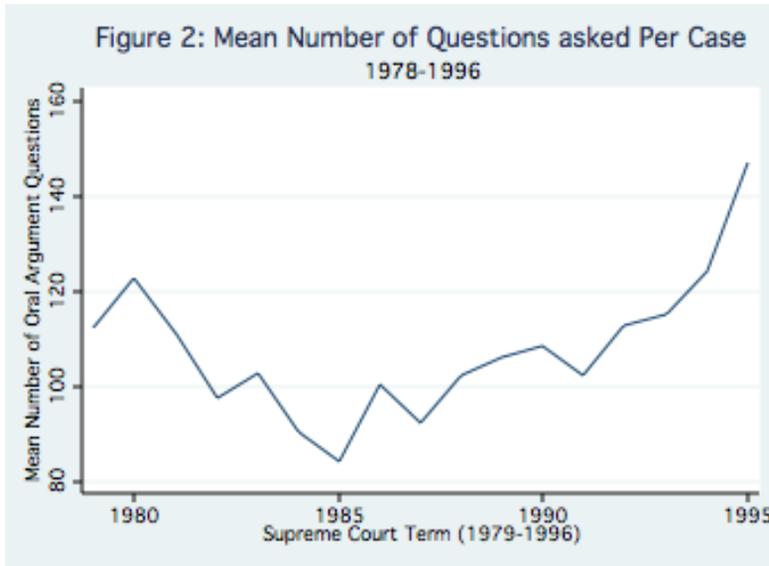
† Figures 1–5 do not conform to *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

We provide an additional snapshot of Justices' questions over time in Figure 2. This figure shows the mean number of questions asked by the Court in each case within the sample. This time series reveals several interesting features about the data. First, note that the

62. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *LAW & SOC'Y REV.* 807, 807–32 (2004).

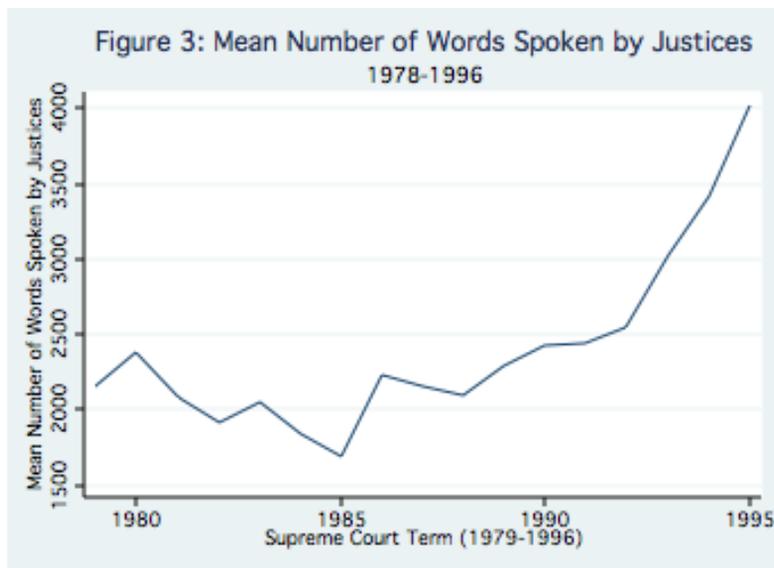
63. This figure should be of some interest to readers. Indeed, for the vast majority of cases during this era, the Court only held one hour of arguments. Thus, it is clear that on average more than one question was asked per minute of argument.

minimum of the series never drops below eighty. This indicates that oral arguments are clearly as much about what Justices want to ask as they are about the arguments litigants hope to make.



Given our argument, as well as existing findings, about the information-gathering function of oral arguments, this finding is intuitive. What is also interesting, but maybe unsurprising, is the great decrease in the number of questions asked toward the end of the Burger Court and then the steep increase as the Court moves into the Rehnquist era. Most noteworthy is the precipitous drop that occurs between the 1980 and 1985 Terms when the mean number of questions per case drops from about 120 to slightly more than 80. This average remains under 100 through the next term—which coincides with the elevation of Rehnquist to Chief Justice. There is then a growth trend that begins in 1987, when Justices' inquiries increase from a mean of 92 to an astonishing high of 147 in 1995. These numbers correspond to the addition of Justices who are among the most prolific questioners in the history of the Court—namely Justices Scalia, Ginsburg, and Breyer.

Figure 3, which shows the average number of words uttered by the Justices during questions they ask, adds an additional layer of insight to our analysis of oral arguments. Not only does the mean number of questions asked increase as the Court made the transition from the Burger era to the Rehnquist era, but so too does the loquaciousness of the Justices while asking those questions. The Court used an average of just under 2,000 words per argument during the last 7 years of the Burger Court. This average increased to almost 2,200 words during the first 5 years of the Rehnquist Court. Finally, in the second 5 years after Rehnquist took over the Court (1991–1995), this number increases to more than 2,800 words per oral argument. It seems the Justices not only wanted to ask more questions beginning in the 1990s, but also had longer, more intricate questions to ask. This is consistent with our account that Justices use oral arguments to make as many (or more) points than the arguing attorneys make.



## IV. MULTIVARIATE ANALYSIS

While the descriptive data in the previous part are fascinating, we are more interested in whether the questions Justices ask indicate how they will vote on the merits of a case. To determine whether such an effect exists, we estimate two logistic regression models. Both models invoke the same dichotomous dependent variable of petitioner success. It is coded “one” if the petitioner wins and “zero” otherwise.

To test our hypothesis that the side that garners the most attention from the bench is most likely to lose its case, we create two variables. In the first model, we employ *Question Difference*, which is the difference between the number of questions asked the petitioner and the number of questions asked the respondent. It has a mean of 0.34 with a standard deviation of roughly 25. In the second model, we change out the number of questions for *Words Difference*, which is the difference between the number of words used to discuss the case with the petitioner versus the respondent. This variable has a mean of negative 26 (i.e., more words directed toward the respondent) and a standard deviation of roughly 550 words. Given our operationalization of both variables, positive numbers indicate more questions asked or more words used in discussion with the petitioner. We therefore expect the coefficients on each to have a negative sign in the model—meaning when there is more focus on the petitioner, the petitioner is less likely to win.

Because conventional wisdom in political science still suggests oral arguments have little or no influence on the outcome of cases,<sup>64</sup> we control for a variety of alternative explanations in the two models. First, we include three variables to capture the effect ideology might have on the Court’s decision to reverse: *Martin-Quinn Median* (“MQ”) measures the ideology of the median Justice on the Court;<sup>65</sup> *Lower Court Direction* is coded “one” for a liberal lower court

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64. SEGAL & SPAETH, *supra* note 9, at 280.

65. See Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999, 10 POL. ANALYSIS 134, 134–53 (2002).

decision and “zero” otherwise; and *Median Justice-Lower Court Congruence* is an interaction of the previous two variables.

These variables enable us to determine whether the Court is more likely to reverse when the lower court’s decision stands in ideological opposition to the preferences of the Court. When the Court is relatively liberal, the MQ score of the median is negative. If the decision of the lower court is liberal (coded as one), then the interaction term will be negative, which should depress the likelihood the Court will reverse because the median agrees with the outcome below. Conversely, when the median is conservative (a positive MQ score), the interaction term will be positive, meaning it is positively related with the propensity to reverse as the median is not ideologically satisfied with the outcome below.<sup>66</sup>

Political scientists have also documented that when the Solicitor General (“SG”) participates in a case as *amicus curiae*, the side the SG supports is significantly more likely to win its case.<sup>67</sup> To control for the benefit litigants might get from the federal government’s support, we include two variables: *SG Petitioner Amicus* and *SG Respondent Amicus*. The first is coded “one” if the federal government supported the petitioner and “zero” otherwise. The second is coded similarly if the government supports the respondent or not. In our sample of cases, the Solicitor General supported the petitioner 574 times and the respondent 301 times.

Beyond the success of the federal government when it participates as *amicus curiae*, there is evidence that a litigant is more likely to win before the Supreme Court when it garners the support of one or more interest groups.<sup>68</sup> As such, we also include two variables to account for this support: *Petitioner Amicus Briefs* and *Respondent Amicus*

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66. When the decision below is conservative (coded as “zero”), the interaction term will equal zero and the effect will be accounted for statistically by the constitutive MQ term.

67. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1115 (1988); Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 136 (1988); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 505 (1998).

68. Cf. Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339, 339 (1993); Collins, *supra* note 62, at 817–21.

*Briefs*. Each of these variables is the number of briefs filed on behalf of the petitioner or respondent.<sup>69</sup>

## V. RESULTS

We report the parameter estimates for our two models in Table 1. Taken together, these results provide clear support for our hypothesis that the attention Justices give to one side or the other at oral arguments significantly affects the outcome of a case.

The first column in Table 1 presents the results for the model with the difference of questions asked to each side in a case as the main independent variable. The negative sign indicates that as the Court asks more questions of the petitioner, the Justices are less likely to reverse the lower court decision. This result holds even as we control for accepted alternative explanations for why the Justices decide for one side over the other. The second column shows the same relationship holds when we measure the attention given by the Justices to a particular side in the form of the difference in the total number of words uttered by the Justices.<sup>70</sup> Indeed, according to conventional measures of model fit, the *Words Difference* variable seems to perform a bit better than its *Question Difference* counterpart. Overall, both models do a good job of predicting whether the Court will vote to reverse, and each achieves a modest reduction in error over guessing the modal outcome (i.e., reverse). We note also that our control variables generally performed as expected. This supports our argument that we have a properly specified model.<sup>71</sup>

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69. We obtained these data from Collins, *supra* note 62, at 817–21.

70. We also experimented extensively with alternative ways of operationalizing our concept of interest. In particular, we re-estimated the model including both the number of questions or words for petitioner and respondent separately; the results are substantively the same. At the urging of Josuha Fischman, we also estimated models to allow for non-linearities in the impact of questions asked. The argument here is that parties should be worried either if they are asked many more questions than opposing counsel *or* if they are asked an exceptionally small number of questions overall (i.e., only three or four). We did not find support for this hypothesis.

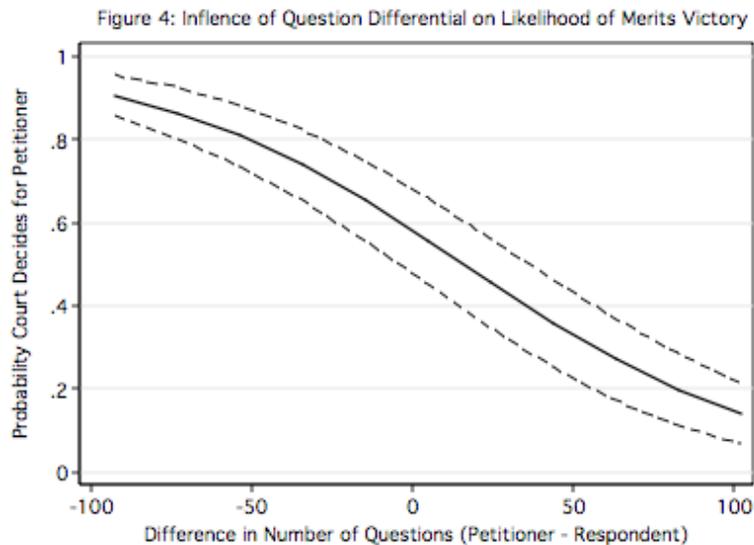
71. The support of other outside amici also seems to affect the Court's decision, but only in one direction. If the petitioner has the support of additional amici, there is an effect on the Court's propensity to reverse, but it does not reach the conventional level of statistical significance ( $p > .05$ ). As the number of amici supporting the respondent increases, however,

TABLE 1: LOGISTIC REGRESSION OF PETITIONER SUCCESS (ROBUST STANDARD ERROR IN PARENTHESES)

Variable Name	Questions Model	Word Count Model
Question Difference	-0.021* (0.002)	--
Words Difference	--	-0.001* (0.0001)
Martin-Quinn Median	-0.678* (0.254)	-0.655* (0.255)
Lower Court Direction	-0.000 (0.237)	-0.014 (0.238)
Median Justice-Lower Court Congruence	-0.421 (0.346)	0.391 (0.347)
SG Petitioner Amicus	0.761* (0.145)	0.730* (0.146)
SG Respondent Amicus	-0.852* (0.172)	-0.821* (0.175)
Petitioner Amicus Briefs	0.040 (0.028)	0.042 (0.028)
Respondent Amicus Briefs	-0.116* (0.027)	-0.120* (0.026)
Constant	0.835* (0.180)	0.815* (0.181)
Bayesian Information Criterion (BIC)	2637	2603
Percent Correctly Predicted	66.2	67.5
Proportional Reduction in Error (PRE)	15.1	18.2
Observations	2086	2086

there is a significant increase in the likelihood the Justices will affirm the lower court decision. While we do not know for sure why amici only seem to affect decisions to affirm, one plausible explanation is that the Court is already predisposed to reverse, and therefore the Justices do not need additional support from outside parties (beyond the SG) to push them toward doing so.

Although the coefficients on our variables of interest appear small, their substantive effects are quite strong. Figure 4 presents the results for *Question Difference*. When the Justices ask an equal number of questions to the petitioner and respondent, there is a 0.64 probability of reversal.<sup>72</sup> When the Court asks 50 more questions of the petitioner (which is 2 standard deviations below the mean), this probability plummets to 0.39. Finally, the probability of reversal reaches an abysmally low value of 0.18 if the difference is at its maximum level (94 more questions asked of the petitioner than of the respondent). As Figure 4 indicates, alternatively, when the Court pays more attention to the respondent (negative numbers on the x-axis in Figure 4), the probability of reversal (i.e., victory for the petitioner) clearly increases.

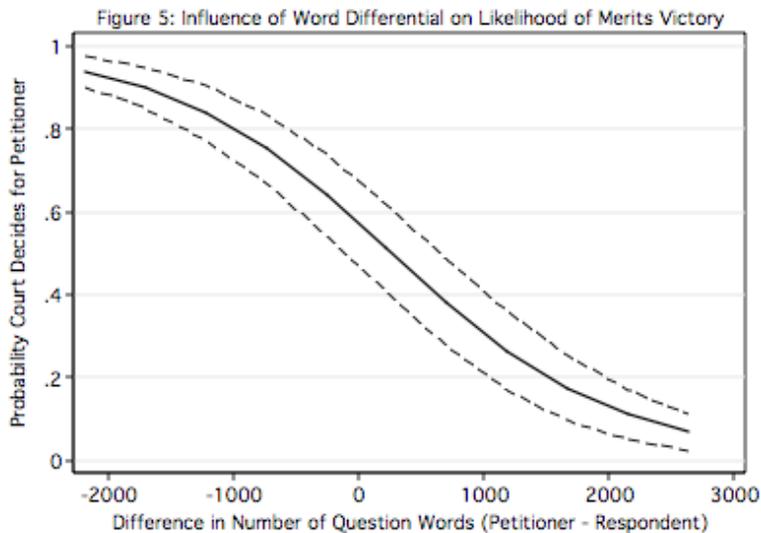


We also are interested in whether more than simply the number of questions asked from the bench affects case outcomes. Figure 5

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72. To generate the probabilities, we hold all other variables at their median values. Predicted probabilities and their confidence intervals were generated using the *spost* series of commands in Stata 10.

provides such evidence. Indeed, if the difference between the words aimed at the parties is at its mean value (-22.11), there is a 0.64 probability the Court will reverse. When the Court asks two standard deviations' more questions of the respondent than the petitioner, this probability increases to 0.85. If the difference is at its maximum (2,423 more words used to speak to the respondent), there is a 95% chance of reversal. Similarly, if the Justices use more words when speaking to the petitioner, the probability of reversal significantly decreases. At 2 standard deviations above the mean (1,100 words more for petitioner), the probability of reversal drops to 34%. Finally, it drops to 8 percent when the difference in words used to speak to the petitioner is at the maximum difference from words used to address the respondent (2,644).



## VI. DISCUSSION

The analysis we present here is clear: when Justices pay more attention to one side during oral arguments, that side is much more likely to lose its case. This is an important finding because it supports previous evidence provided by Roberts, Greenhouse, Shullman, and

Wrightsmen.<sup>73</sup> Although these accounts are persuasive to us, each focused on fewer than thirty cases, which suggested that additional systematic evidence was needed to support their shared thesis. We provide such evidence, but questions remain.

For instance, Greenhouse, Shullman, and Wrightsmen code the questions asked for whether they are helpful or hostile to the attorney in the line of fire.<sup>74</sup> We have not done so here. In this way our findings are closer to those of Chief Justice Roberts. In our next project on this topic, however, we explicitly address this issue. With the data-generating process we described above, we also gathered data on the linguistic/emotional nature of the questions asked and words used by the Justices when they ask their questions. These data, based on the work of Cynthia Whissell,<sup>75</sup> will enable us to gauge the level of pleasantness of the words used by the Court. As such, we can more broadly test the notion that more helpful or hostile treatment of the parties affects case outcomes.

Beyond testing the emotional content of Justices' words, we test our hypothesis only on the last several years of the Burger Court and on the first ten years of the Rehnquist Court. Because of data limitations in some of our control variables, this was a necessary choice for this Article. But we have the oral argument data to extend our analysis through the 2007 term. Thus, we will be able to test the results on the full Rehnquist Court, the final years of the Burger Court, and the first few terms of the Roberts Court. As such, we will be able to assess whether changes in Chief Justices, as well as changes in natural courts, affect how questioning at oral arguments relates to how the Court decides.

Next, we will conduct our analysis at the individual Justice level. That is, we will analyze the behavior of all Justices at oral arguments

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73. Roberts, *supra* note 8, at 75; Greenhouse, *supra* note 27; Shullman, *supra* note 42, at 273; WRIGHTSMAN, *supra* note 49, at 145.

74. Greenhouse, *supra* note 27; Shullman, *supra* note 42, at 273; WRIGHTSMAN, *supra* note 49, at 145.

75. Whissell has published dozens of articles with numerous coauthors applying her methodology to measure emotional content of numerous materials. *See, e.g.*, Lee Sigelman & Cynthia Whissell, "The Great Communicator" and "The Great Talker" on the Radio: Projecting Presidential Personas, 32 PRESIDENTIAL STUD. Q. 137 (2002); Cynthia Whissell, *Linguistic, Emotional and Content Analyses of Sexually Explicit Scenes in Popular Fiction*, 7 CAN. J. HUM. SEXUALITY 147 (1998).

(even Justice Thomas) to determine whether variation exists in how they act during these proceedings and whether such variation affects how they decide a case. We will utilize the transcripts from the 1998 Term forward because these terms specifically identify each Justice who asks questions of the attorneys.

Finally, we hope to go where none of these studies, including our own, has gone. Given the availability of the audio files for oral arguments, we hope to employ these data to go along with the written transcripts we use here.<sup>76</sup> Like Shullman,<sup>77</sup> we believe listening to the arguments will give us the best insight into how the Justices ultimately will act in a case.

In the end, our analysis supports a decade-long line of research that demonstrates how oral arguments can and do affect decisions Justices make. This enables Court watchers to make predictions about cases, as Goldstein did in *Heller*, as well as for analysts like us to show that such anecdotal accounts are accurate and reliable.

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76. For thousands of hours of audio, see Oyez: U.S. Supreme Court Media, <http://www.oyez.org/cases/> (last visited Oct. 9, 2008).

77. Shullman, *supra* note 42, at 292–93.