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James C. Phillips* and Edward L. Carter**

I think a lot of lawyers think that oral argument is just a dog and pony show.

—Justice Antonin Scalia

I. INTRODUCTION

Scholars and lawyers have long debated what role, if any, oral argument plays in the U.S. Supreme Court’s decision-making process. While some have attempted anecdotally to determine whether or not Justices use oral argument to gather information in order to decide a case, few have attempted to investigate oral argument empirically. Additionally, no scholar to date has specifically measured the levels of information-seeking behavior during oral argument of individual Justices. Finally, there have been few studies attempting to quantitatively compare oral argument behavior in different time periods. This study attempts to address such deficiencies in Supreme Court scholarship.

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1. Tim Russert (MSNBC television broadcast May 3, 2008).
Despite the dearth of quantitative investigations of oral argument, comments from the Justices themselves point to the fact that oral argument has not always been an important factor in cases. Additionally, research on judicial behavior has indicated that factors other than just the legal merits of a case are often propelling the Court towards the decisions it reaches. And qualitative studies of oral argument often reveal a Court functioning much differently than the naïve portrait of Justices asking attorneys questions in order to find out which party the law supports.

In particular, three broad research questions drive this study and its analysis. First, which factors influence the levels of information seeking Justices exhibit during U.S. Supreme Court oral argument? Second, do Justices' information-seeking levels during oral argument foreshadow how they will vote in a case? Third, is the level of information seeking significantly different in the 2000s compared to the 1960s? By addressing these questions, this study will uniquely contribute to our knowledge of Justice behavior during oral argument in several ways. The study will be the first to actually measure judicial information seeking during oral argument by way of a unique six-point ordinal scale. This study will also be the only study to apply inferential statistical analysis of oral arguments at the Justice level. Additionally, this is the only known study to specifically analyze oral arguments in cases related to the freedoms of speech and the press. Finally, this is the first study to single out judicial behavior during oral arguments in the 1960s and compare it to behavior in another era.

In order to develop a fuller picture of information seeking during oral argument, this study will employ a mixed methods approach, examining oral argument transcripts both qualitatively and quantitatively. Cases were selected from both the 1960s (twelve cases) and the 2000s (twenty-three cases) in order to compare changes in information seeking.

2. In a letter from Justice Oliver Wendell Holmes to future Justice Felix Frankfurter after Frankfurter had argued a case before the Supreme Court and lost, Justice Holmes disclosed that the Court had made up its mind on the case before even hearing oral arguments and tried to comfort Frankfurter by stating, “I think you ought to know that the result would not have been different if... John Marshall and Daniel Webster in combination had argued the case.” Kevin Stoker, The Journalist and the Jurist: Political Adversaries Enlisted in “a Long Campaign on Behalf of Civil Liberties,” 34 JOURNALISM HIST. 216, 222 (2009).
over time. Cases from the 1970s to the 1990s were not selected as oral argument transcripts from this time period did not specify which Justice was speaking, making Justice-level analysis difficult. All thirty-five cases dealt with the freedoms of speech and the press in order to ensure that ideology would be a salient factor in the analysis. Content analysis was performed on the transcripts with coding being done at the sentence level.

Obviously the Court holds a prominent place in American politics and history. Each year the first Monday in October is greeted with the famous phrase, “Oyez, oyez, oyez,” as the U.S. Supreme Court starts a new term. However, aside from the announcement of decisions in high profile cases or the confirmation hearings of nominated Justices, the Court seems to be largely outside of the consciousness of most Americans. This is largely due to the disparate media coverage of the three branches of government. The president, as the face of the executive branch, has many of his national speeches televised, and quotable sound bites broadcast on the nightly news. Meanwhile, Congress seems to be constantly clamoring for media attention, and a television network, C-SPAN, is devoted to covering Congress’s floor debates and votes.

The Supreme Court, however, performs most of its work behind closed doors with the Justices, not needing popular support for reelection due to their lifetime appointments, staying largely outside public view. And the one aspect of the Supreme Court’s function that is open to the public—the oral arguments of cases—is not televised. Thus, except for the hardy souls willing to travel to the capital and wait in line for a short turn sitting in on an oral argument, Americans are rather oblivious to this public element of the Court’s behavior and decision-making process. This has made study of the Court more difficult for scholars, particularly for quantitative methodologies, as the bulk of data about the behavior of the Justices arises from qualitative sources, such as anecdotes, interviews, or personal papers published posthumously. Furthermore, study of oral argument has lagged behind other, more accessible aspects of the Court, such as nomination hearings or opinions. Until recent efforts by scholars and the Court to post oral argument transcripts on the Internet, obtaining transcripts required a visit to the Supreme Court’s library or the Library of Congress, and the
laborious photo copying of each page. Recordings of the hearings were likewise difficult to obtain. Now, many of the major cases can be heard online at www.oyez.org, and transcripts of all cases since 1979 can be obtained on LexisNexis. This explosion of information is a boon for Court scholars and has the potential of providing an insightful glimpse into the minds of the Justices, as well as shedding needed light on the motivations that drive the Court’s behavior and decisions.

Three major competing models exist to explain judicial behavior and decision making. The legal model contends that the legal facts surrounding a case, as well as applicable statutory and Constitutional law, dictate the decisions of Justices. This model seems to infer that Justices are open to the skill and persuasion of attorneys arguing before them as some attorneys may be able to frame the legal issues more cogently than others. The attitudinal model, however, posits that Justices’ ideologies are the main driving force behind judicial decisions, negating attorney-related factors and even potential inter-Justice influences. The third model—the strategic model—holds that Justices act strategically in order to enact a case outcome as close as possible to their personal policy preferences. This model seems to indicate that ideology will lead a Justice to treat the sides in a case differently.

Prior to 2004, except for a brief period in the early 1960s, scholars of the U.S. Supreme Court could only test these models based either on a Justice’s votes on the merits, or on archival material such as released papers from judicial conferences, because court transcripts failed to delineate which Justice was speaking during oral argument. However, starting with the 2004 term, oral argument transcripts began listing which Justice was speaking. This allows behavior during oral argument to provide evidence for or against the various judicial behavior models. This study is one of the first attempts to analyze oral argument behavior of the

Justices in light of the legal, attitudinal, and strategic models.

This study will first provide an overview of relevant literature regarding current theoretical models of judicial behavior, followed by a summary of what Justices themselves have said regarding oral argument coupled with research on oral argument and Supreme Court forecasting. Part III will examine the variables to be included in this study, including how information seeking will be measured, as well as lay out the hypotheses that will be tested. Part IV will explain the methodology for analyzing the oral argument transcripts. Part V contains this study’s findings and an analysis of those findings, first looking at the data qualitatively and then quantitatively. Finally, the article will end with concluding remarks, limitations of the study, and directions for future research.

II. BACKGROUND

A. Judicial Behavior

This part will first examine the relevant literature regarding judicial behavior and decision making by reviewing the three major models currently espoused by scholars of the Court, as well as two lesser known models. Next, the literature regarding oral argument will be investigated. Finally, this section will present the literature surrounding attempts to predict Justices’ final votes on the merits.

Attempts to determine the reasoning behind the behavior of Supreme Court Justices has led to three major schools of thought. The oldest, the legal model, contends that “the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent.” Whether a Justice is “employing a strict constructionist, historical, natural law, or flexible approach to constitutional interpretation and decision making,” he or she would follow the legal model. However, despite studies

6. SEGAL & SPAETH, supra note 3, at 48.
showing empirical evidence of "judicial blindness," this traditional view has attracted significantly more detractors than adherents among political scientists and no longer dominates the field as it did earlier in the twentieth century, though law professors tend to still advance this line of thinking. One potential reason for the diminished role of the legal model is that the Justices themselves may have changed, with the legal model having more predictive accuracy in the earlier part of the twentieth century. Scholars have also argued that the legal model is limited because it is only the most difficult cases—where both sides have valid legal arguments and supporting case law—that make it to the Supreme Court, and, thus, there is often not a clear legal reason why one side should prevail over the other. But the legal model is not dead as Thomas Hansford and James Spriggs have found that the most fundamental of legal influences—precedent—still matters, and that ideology interacts with precedent in determining the Court's decisions.

Today, the leading view among scholars who study the Supreme Court, though acknowledged sometimes begrudgingly, is the attitudinal model, which theorizes that the behavior of Justices can be described and predicted by the ideological values they hold. Jeffrey Segal and Harold Spaeth have been the leading proponents of this model, which incorporates ideas from economics and psychology, as well as political science and legal realism. They found that there is little attempt by Justices to persuade each other during the initial, non-binding voting that occurs in conferences after oral argument. In addition, there is little statistical change between this original vote and the final vote on the merits.

10. Cherry & Rogers, supra note 7, at 1154.
13. Segal et al., supra note 4, at 812.
14. SEGAL & SPAETH, supra note 3.
15. Id. at 282–83.
16. Id. at 285.
implying a Justice's values have largely, if not completely, determined his or her vote without room for change. Attitudinalists take issue with those who espouse the legal model and claim that precedent is the basis for decisions, arguing that “in many cases Supreme Court decision making would look exactly the same whether Justices were influenced by precedent or not.”

While obviously determining a Justice's ideological leanings from opinions and voting records, and then using the findings to predict future voting and measure whether a Justice is voting in accord with his or her ideological preferences poses problems with research validity, Jeffrey Segal and Albert Cover found a creative way around this dilemma by examining newspaper editorials on Justices during their Senate confirmation hearings. By determining a particular Justice's values from sources outside the Justice himself, and then comparing their findings to the Justice's votes, Segal and Cover discovered that the attitudinal model explains judicial behavior remarkably well. Regarding oral argument, the attitudinal model would posit that oral argument would not indicate who might win or lose a case, and oral argument would have little function other than to potentially help a Justice clarify how a side in a case matches the Justice's predetermined position on issues. Critics of the attitudinal (or political) model contend that if ideology were the only factor in judicial decision making, voting predictions would be embarrassingly simple: conservatives would always vote for the conservative side in a case and vice versa for liberal Justices. On the contrary, some Justices shift in their ideology over time, and other Justices, such as Justice Kennedy, are liberal on some positions and conservative on others. This has caused some scholars to posit that legal and ideological factors “are both important considerations that are inextricably linked to one another as the Justices interpret and shape the law.”

17. Id. at 289.
19. Id. at 563.
20. ROHDE & SPAETH, supra note 8, at 153.
22. HANSFORD & SPRIGGS, supra note 11, at 130.
Therefore, a third theory of judicial behavior—the strategic model—has been recently revived. First posited by Walter Murphy in 1964 with his book *Elements of Judicial Strategy*, Justices, like other political actors, seek the implementation of personal policy preferences, but are limited by more than legal factors such as the preferences of fellow Justices, the norms and authority of the institution of the Supreme Court, as well as external political and societal factors. Murphy later examined how “a judge may by the power of his intellect and the sheer force of his personality lead his colleagues,” and concluded opinions of the Court are mostly compromised settlements between the Justices, finding further evidence for the strategic model.

For approximately three decades little research was done in this vein, but the 1990s witnessed a flurry of scholarly publishing promoting Supreme Court Justices as strategic actors. Forrest Maltzman and Paul Wahlbeck found that Justices do change their votes between the original vote at conference and the final vote on the merits, concluding that as strategic actors Justices can be susceptible to the persuasive efforts of other Justices. Maybe the most influential work supporting and reviving the strategic model was Lee Epstein and Jack Knight's *The Choices Justices Make*, which, maybe most significantly for this study, did not examine oral argument in determining the strategic nature of judicial behavior.

Other studies have established that Justices act as strategic actors by engaging in agenda setting via sophisticated voting and gatekeeping regarding grants for certiorari, as well as by expanding issues at the merits stage. Focusing in on the Chief Justice, research has shown that he exhibits strategic behavior by sometimes passing at conference voting in order to determine how the voting will

24. Murphy, supra note 5, at 1568.
25. Id. at 1569.
27. EPSTEIN & KNIGHT, supra note 5.
come out in order to cast a vote for the winning side,\textsuperscript{30} and by sometimes giving writing assignments that undercut his personal policy preferences in order to have a sure majority coalition.\textsuperscript{31} This highlights a difference between the strategic and attitudinal models, as attitudinalists contend that Justices may act interdependently until they cast their final vote, where they vote their personal preference, whereas the strategists argue that all along the way Justices engage in strategic behavior because all the judicial choices require interdependence.\textsuperscript{32}

While the three models previously mentioned make up the bulk of the judicial behavior and decision-making literature, two other more recent models also exist. The instrumental model looks at Supreme Court decision making through the lens of its institutional position in relation to the other branches of government, positing that the Court may interpret law in the fearful shadow of reprisals from the legislative branch, in particular, in the form of new legislation reversing the Court, "threaten[ing] impeachment, jurisdiction restrictions, [and] other legislation limiting court powers and reducing the courts' resources."\textsuperscript{33} Yet it is unclear how this model is different than the strategic model, wherein the Court acts in a calculated manner to bring about desired policy outcomes within the confines imposed by external agents.\textsuperscript{34}

Finally, the behavioralist model explains the aggregate decision making of the Court in light of individual personalities and characteristics of the Justices.\textsuperscript{35} Thus "upbringing, religion, regional identity . . . law school training" and legal experience prior to sitting on the bench would all be potentially important explanatory factors.\textsuperscript{36} Justice Breyer indirectly endorsed this model, as well as the importance of ideology, when he stated in a 1997 television

\begin{flushleft}
\textsuperscript{32} Johnson et al., \textit{supra} note 30, at 373.
\textsuperscript{34} EPSTEIN \& KNIGHT, \textit{supra} note 5.
\textsuperscript{36} Cherry \& Rogers, \textit{supra} note 7, at 1156.
\end{flushleft}
interview:

I'm a human being . . . Because I'm a human being, my own background . . . my own views, will of course shape me. They make a difference. Somebody with different life experiences has different views to a degree; that will influence the way they look at things.37

More recently, and of a more controversial nature, Supreme Court Nominee Sonia Sotomayor made a strong argument for behavioralism in stating that “our experiences as women and people of color affect our decisions.”38 She even went on to claim that “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”39 Obviously ideology would be one element of the behavioral model, indicating some conceptual overlap between it and the attitudinal and strategic models.

B. Oral Argument

Not surprisingly, over the years Justices have voiced their opinions of the value of oral argument, and in so doing have shed light on how they themselves use oral argument in the decision-making process. Justice Lewis F. Powell (1972–1987) claimed “the fact is, as every judge knows . . . oral argument . . . does contribute significantly to the development of precedents.”40 Justice Robert H. Jackson (1941–1954) concurred with his 1951 sentiments: “I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations.”41 Justice Harlan (1955–1971) declared to lawyers in 1955 that “oral argument on appeal is perhaps the most effective weapon you have got.”42 In 1928, Chief Justice Charles Evans Hughes (1910–1941) noted that oral argument made it possible for the Court to “more quickly . . . separate the wheat from the chaff.”43 And

37. WRIGHTSMAN, supra note 35, at 131.
39. Id. at 92.
42. STERN ET AL., supra note 40, at 11.
43. Id. at 570.
Justice Blackmun (1970–1994) contended 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.”

However, an examination of more recent Justices reveals a potential shift in the Court’s thinking. While few Justices will claim that oral argument is useless, it appears to not hold the important function earlier Justices ascribed to it. Justice William O. Douglas (1939–1975), though not a recent Justice, stated, “I soon learned that . . . questioning from the bench was . . . a form of lobbying for votes.”

Chief Justice William H. Rehnquist (1972–2005), emphasizing that oral argument matters only in certain cases, wrote:

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 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.

Rehnquist, though, noted a different feature of oral argument that he felt had value:

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.

Rehnquist’s successor, Chief Justice John G. Roberts, Jr.

47. Id. at 244.
(2005–present), expressed related ideas while a federal appellate judge before his nomination to the Supreme Court, arguing:

Oral argument matters, but not just because of what the lawyers have to say. It is the organizing point for the entire judicial process. The judges read the briefs, do the research, and talk to their law clerks to prepare for the argument. The voting conference is held right after the oral argument—immediately after it in the court of appeals, shortly after it in the Supreme Court. And without disputing in any way the dominance of the briefing in the decisional process, it is natural, with the voting coming so closely on the heels of oral argument, that the discussion at conference is going to focus on what took place at argument.\(^4\)

Thus, for Roberts, “oral argument is terribly, terribly important.”\(^4\)9 He also noted that generally there is no discussion of a case prior to oral argument, and therefore oral argument allows one to “begin to get a sense of what your colleagues think of the case through their questions.”\(^5\)0 Furthermore, for Roberts at least, oral argument is when his ideas began to “crystallize,” resulting in a formerly open mind beginning “to close at oral argument,” in favor of one side or the other.\(^5\)1

Justice Ruth Bader Ginsburg (1993–present) confirmed some of the ideas of Douglas, Rehnquist and Roberts by pointing out that oral argument is a time when Justices seek to persuade each other.\(^5\)2 Justice Stevens (1975–present) would not go so far as to view oral argument as a persuasive tool, but did admit that during oral argument:

You often think of the oral arguments, you have a point in mind that you think may not have been brought out in the briefs well, that you want to be sure your colleagues don’t overlook. You ask a question to bring it out. And you are not necessarily trying to sell everyone on the position but


\(^{49.}\) Id. at 69.

\(^{50.}\) Id. at 70.

\(^{51.}\) Id.

you want everyone to at least have the point in mind.\textsuperscript{53}

Justice Anthony Kennedy (1988–present) agreed with Stevens, stating in a television interview that it would be a mistake to view oral argument as a series of dialogues between attorneys and Justices; in reality, he declared, “what is happening is the court is having a conversation with itself through the intermediary of the attorney.”\textsuperscript{54} Lest such comments devalue oral argument, however, Justice Kennedy was quick to ask and answer attorneys’ favorite question: “Does oral argument make a difference? Of course it makes a difference.”\textsuperscript{55} But almost as an afterthought, and as if convincing himself, he added, “It has to make a difference.”\textsuperscript{56}

Justice Antonin Scalia (1986–present), who once himself likened oral argument to a “dog and pony show,”\textsuperscript{57} has changed his mind over the years as to oral argument’s value, though, he admits in the following excerpt from an interview with Tim Russert, it seldom is the deciding factor:

RUSSERT: Has an oral argument ever changed your mind?

SCALIA: Rarely. I think it has, but very rarely. What happens not at all rarely, but with some frequency, is that it’s a very close case. You go in on the knife’s edge. You haven’t made up your mind. And most lawyers don’t realize that. I think a lot of lawyers think that oral argument is just a dog and pony show. You know, I’ve read a [sixty]-page petitioner’s brief, a [sixty]-page respondent’s brief, a [forty]-page reply brief, as many amicus briefs as I can stomach. What’s somebody going to tell me in half an hour? And the answer is, sometimes the case is so close, that persuasive counselor, their oral argument, can make the difference.\textsuperscript{58}

But it is Justice Scalia’s colleague, Justice Clarence Thomas (1991–present), who is likely the most critical of oral argument, stating that it is “not the real meat” of the role of

\textsuperscript{53} TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 55 (2004).
\textsuperscript{54} DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 247 (7th ed. 2005).
\textsuperscript{55} Id. at 248.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 247.
\textsuperscript{58} Tim Russert, supra note 1.
the Supreme Court. Justice Thomas has also commented that "I don't see the need for all those questions. I think Justices, [ninety-nine] percent of the time, have their minds made up when they go to the bench." Such a statement, on its surface, appears to give credence to the attitudinal model.

Thus there appears to have been a shift in the way Justices talk about oral argument. Earlier in the twentieth century, Justices, for the most part, seemed to see oral argument as quite important—as something that often helped decide a case. Later in the twentieth century and into the twenty-first century more Justices now indicate that occasionally oral argument is helpful, but usually it does not persuade them to decide one way or the other. Instead the importance of oral argument for the more recent Court is in learning how the other Justices are thinking and maybe influencing them, causing former U.S. Solicitor General Walter Dellinger to argue that attorneys "need to be speaking with not only the [Justice who has asked the question, but the one to whom the question is actually addressed." Likewise, another former U.S. solicitor general, Ted Olson, likened oral argument to "highly stylized Japanese theater" because "[t]he Justices use questions to make points to their colleagues." And experienced Supreme Court lawyer David Frederick sees oral argument as a "three-way conversation" between the Justice speaking, the attorney, and a "potentially persuadable Justice." It is not surprising, therefore, that "most lawyers can count on the fingers of one hand the number of times oral argument actually seemed to make a difference," and that "conventional wisdom holds that oral argument is less important than in the past." When oral argument provided a more important tool in gathering information and making decisions, there appeared to have been fewer questions from the bench. Now, except for

62. Id.
63. Id.
65. See Biskupic, supra note 61.
Justice Thomas, "every [J]ustice . . . tends to ask questions aggressively" as they apparently seek to persuade each other.

Until recently, more scholarly studies of oral argument have had limited generality due to the anecdotal or case study nature of the research, or the fact that the articles being written were to aid lawyers preparing to argue before the Court. For example, a study of the oral arguments in *Tennessee Valley Authority v. Hill* found that Justices assume roles as either antagonists or protagonists during questioning, and that "questions and comments by members of the court . . . are highly predictive of some of their judicial opinions" with eight of the nine eventual opinions being predictable from oral argument. But the findings were limited to only one case. Stephen Wasby, Anthony D'Amato, and Rosemary Metrailer looked at the function that oral argument plays in the Supreme Court, similarly finding "strong parallels" between a Justice's remarks during argument and his final position on cases. In looking at oral arguments in school desegregation cases from 1954–1969, the authors found that at times: "A judge may appear to be asking the lawyer a question, but it may be a question in form only, with the justice more intent on stating his position. Judges may make a variety of observations which do not necessarily require a response."

They also noted the way Justices use oral arguments to communicate with each other, via remarks to counsel, to bring up points they want their fellow Justices to consider, or to convince the other Justices that a particular aspect of an argument will have to be resolved in order to decide for that argument. Given the lack of time devoted to discussion on cases among the Justices, the authors viewed the use of oral argument for discussion and persuasion among the Justices

69. *Id.*
70. *Id.* at 418.
as evidence of strategic behavior. But the authors did not make an attempt to quantify their findings.

Examining oral argument from the viewpoint of the advocate before the bench, Barrett Prettyman found an increased use of hypothetical questions by the Court, which the author postulated was possible evidence that Justices were communicating with each other about the potential road they could be on regarding a decision, and the future implications of deciding a case in a certain way. Shapiro, looking at oral argument more broadly, declared that Justices use it to clarify the record, clarify the substance of claims, clarify the scope of claims, examine the logic of claims, examine the practical impact of claims, and lobby for or against particular positions. He therefore, similar to others, viewed oral argument as a type of “early conference” for the Justices, noting that Justices who disagree with a position will often ask the bulk of the questions, and that when one Justice is particularly hammering on counsel, a Justice sympathetic to counsel’s position will often “intervene with a friendly question,” allowing counsel to “shift back to a more fruitful line of argument.”

The article's observations appeared to be essentially based on the author's extensive experience before the Supreme Court.

Former solicitor general, Rex Lee, wrote a similar article for practicing attorneys where he stated that oral argument uniquely gives the Court “the opportunity to clarify facts and to test the vulnerability of tentative theories and approaches.” Likewise, Russell Galloway provided advice and observations to his fellow attorneys in Trial magazine after witnessing eleven Supreme Court oral arguments one week. He, like others, pointed out the sometimes hostile, confrontational nature of judicial questioning, noting that when Thurgood Marshall got involved in oral argument, “he

71. See id. at 421.
74. Id. at 545, 547.
confront[ed] advocates with series of rapid-fire questions that obviate response. Finally, John Brigham compared oral argument to the Socratic method employed in law school classrooms with the Justices acting as professors; and Lawrence Baum focused on the rather un-conference-like nature of post-oral argument conferences as Justices basically state their position, and argued that to compensate for this lack of discussion time, oral argument, much like others have contended, becomes a quasi conference. The author further declared that Justices "use questions to frame cases in ways intended to appeal to particular colleagues. More subtly, [J]ustices regularly seek to make their points and expose the weaknesses of positions with which they disagree in order to sway colleagues who remain open to persuasion."

But as valuable as these observations are, they do not equate to more without concrete data to back them up. Fortunately, such empirical evidence has begun to mount.

Neil McFeeley and Richard Ault, using content analysis of oral argument transcripts, broke oral argument questions into the following categories: substantive questions, repetition, leading questions, procedural questions, tangential questions, hypothetical questions, statements (substantive/factual, rephrasal, challenge, distortion, asides), and interruptions. Their data revealed that three of the five top categories dealt with statements rather than questions, and concluded that a primary function of "oral argument is making one's own views known." Examining the link between oral argument and per curiam, one study of a random sample of 318 cases found increased questioning by Justices in cases that later were issued per curiam, and theorized that oral argument could be used at times by the Justices to rid themselves of cases without having to determine the merits.

77. Id. at 78.
78. See Symposium, May It Please the Court . . . , LAW & CTS., Spring 1995, at 3.
79. See id. at 4.
80. Id.
82. Id. at 71.
83. Stephen L. Wasby et al., The Supreme Court’s Use of Per Curiam Dispositions: The Connection to Oral Argument, 13 N. ILL. U. L. REV. 1, 1–3
Chief Justice John Roberts, after his appointment as a federal appellate judge, but before his appointment to the Supreme Court, penned an article wherein he focused on the importance of oral argument.\textsuperscript{84} As part of his study he examined fourteen cases from the 1980 term and fourteen from the 2003 term to test a hypothesis he had developed that parties that get the most attention from Justices in the form of questions or statements actually fare the worst.\textsuperscript{85} He found that in twenty-four of the twenty-eight cases, the side that lost was asked the most questions, leading to a prediction success rate of eighty-six percent.\textsuperscript{86} He concluded from the results, somewhat tongue-in-cheek, that “the secret to successful advocacy is simply to get the Court to ask your opponent more questions.”\textsuperscript{87} Ironically, journalist Tony Mauro looked at the twenty-five cases in the 2006 term that resulted in five-to-four decisions, and found that Chief Justice Roberts asked an average of only 3.6 questions of the side he eventually voted for, and 14.3 questions of the side he opposed.\textsuperscript{88}

A more recent study of ten Supreme Court cases studied the judicial patterns of question asking by placing the questions into four categories: total questions, questions asked in each case, questions asked by Justices of the side they eventually voted for, and questions asked by Justices of the side they eventually voted against.\textsuperscript{89} The questions were also ranked on a scale of one to five, with lower scores indicating helpful questions and higher scores indicating hostility by the Justice.\textsuperscript{90} Creating a profile for each Justice, the study determined that in general Justices ask more questions of the side they eventually rule against, as well as display a greater degree of measurable hostility towards the

\begin{enumerate}
\item[(84)] Roberts, supra note 48.
\item[(85)] Id. at 75.
\item[(86)] Id.
\item[(87)] Id.
\item[(90)] Id. at 273.
\end{enumerate}
Edward Carter and James Phillips performed content analysis on thirty-one cases ranging from the 1960s to the 2000s where newspapers were litigants. They simply counted the number of declarations and questions from the Court per side in each case. They found the Court treated newspaper parties and non-newspaper parties relatively equally except for when newspapers were respondents in a case. In such instances newspaper respondents received a statistically significant higher number of declarations compared to interrogatories than their non-newspaper opponents.

Taking a more interdisciplinary approach, scholars have looked at oral argument from a biosocial angle, noting that about one-third of a Justice's speaking turns were found to deal with an argument's validity, revealing the importance of persuasion between Justices in oral argument. David Gibson, a sociolinguist, investigated the way people interrupt others for strategic purposes. He found that Supreme Court Justices progress their own goals "at the expense" of the arguing attorneys. Two of Gibson's notable patterns occur when: (1) Justices interrupt to criticize one aspect of an attorney's argument without having to extend the critique to broader aspects that might support the argument in question; and (2) interruptions "subvert whatever [the attorney] intended to say, if only temporarily, while permitting the [J]ustices the opportunity to score rhetorical points that might not have found an opening, nor have been as effective, later on."

From psychology Lawrence Wrightsman looked at oral argument as part of his book-length study on the Supreme Court's psychology. He surmised that "[t]he [J]ustices' motivations behind their questions are diverse and difficult to
discern” as a “question may reflect hostility more than it reflects a genuine desire to know the answer,” whereas “another Justice may use questions to clarify his or her thoughts on the issue.”

Drawing on the work of Aaron Hull, Wrightsman divided question types into three categories: affirming (those that aid an attorney or invoke new thoughts or directions), inquisitive (focusing on just the facts of a case), and challenging (interruptions of counsel that are abrupt and harsh in tone).

These question types are related to the four major question types delineated by experienced Supreme Court bar member David Frederick in his *The Art of Oral Advocacy*: (1) background questions, (2) questions regarding the scope of the advocated rule, (3) questions involving the implications of the advocated rule, and (4) questions stemming from a Justice’s idiosyncrasies.

Wrightsman turned his full attention to oral argument in his book *Oral Arguments before the Supreme Court: An Empirical Approach*. He pointed out six main elements of oral argument:

1. The Justices are in control and hold the power. If the analogy of a “conversation” is maintained, it is more like that between a superior and a subordinate.

2. The standard operating procedure permits the Justices to interrupt counsel at any time. They may make statements as well as questions, they may make comments back and forth to each other, they may change the topic at will without apology, and they may focus on rather trivial aspects of the case. The ground rules of ordinary conversation are routinely violated.

3. Because advocates are in the position of supplicants, they must tolerate abuses of the traditional social exchange out of the fear of gaining the ire, or the further

99. *Id.* at 74.


102. See Ruth Bader Ginsburg, Forward to DAVID C. FREDERICK, THE ART OF ORAL ADVOCACY 70 (2003) (displaying, as an example, Justice Blackman asking questions about a Minnesota state park that had little to do with the issue at hand).

ire, of a Justice or Justices.

4. The give-and-take during an oral argument is like no other phenomenon in regard to the number of exchanges per minute, the number of interruptions, and the shifts from one questioner to another.

5. An oral argument is an atypical conversation, not one between two friends who see each other at a cocktail party and catch up on recent developments in their lives. The Justices know quite a bit about the advocate’s position; it is not a conversation that begins at the beginning but rather reflects a great deal of shared knowledge between the two participants.

6. To continue the analogy of a cocktail party, the Court values some guests more than others . . . there may be some tension between [a Justice] and [a] frequent advocate . . . Likewise, some advocates, because of their reputation or their entrenched position in the Supreme Court bar, get cut some slack.104

Wrightsman also identified eight potential motives for why Justices ask the questions or make the statements they do: (1) to try to learn information they feel is not contained in the briefs or lower court’s ruling, (2) to seek clarification of a party’s position, (3) to highlight weaknesses in an attorney’s argument, (4) to inject a contradictory viewpoint into the discussion, (5) to discover what are the implications or boundaries of an attorney’s argument, (6) to help an attorney by providing support, (7) to reduce tension or add humor, and (8) to speak with other Justices through the attorney.105

For his study, Wrightsman selected twenty-four cases from the 2004 term, purposively choosing twelve cases where ideology would be salient, such as issues dealing with abortion, minority rights or federalism for example, and twelve cases where ideology would be irrelevant.106 Due to interruptions that resulted in incomplete sentences, Wrightsman did not analyze each sentence a Justice uttered. Instead he looked at each Justice’s prompt in an oral argument transcript which indicates where a Justice is speaking uninterrupted, and which can obviously contain multiple sentences. With another coder, Wrightsman

104. Id. at 67–68.
105. Id. at 77–80.
106. Id. at 138.
attempted to rate each prompt as sympathetic, unsympathetic or neutral, but they found too many mixed examples. Instead they took a more holistic approach, rating each Justice as to which side to whom he or she generally addressed unsympathetic questions and comments. Wrightsman hypothesized that “[J]ustices’ questions are more likely to be predictive in those cases where ideology is central” under the theory that Justices “seek support for their own positions by asking questions that emphasize one side and . . . play devil’s advocate by asking questions that test the weaknesses of the other side.” His findings corroborated his hypothesis.

Possibly the most prolific scholar empirically exploring oral argument of late is Timothy Johnson. In 2001, he examined seventy-five cases where he compared the information being presented in briefs and amicus curiae to the topics being discussed in oral arguments, to the points made in each case’s majority opinion. Johnson found that a significant minority of topics discussed in oral arguments were never mentioned in the briefs or amicus curiae, and later were mentioned in the written opinions. Johnson concluded that oral arguments play a vital information-gathering role for Justices, who as strategic actors, desire outcomes as close as possible to their policy preferences, but are limited in the briefs and amicus curiae to only the information that attorneys want the Justices to see. However, Johnson’s conclusion rests on the assumption that the topics the Court discussed unique to oral arguments were largely explored through substantive questions from the Justices instead of leading questions or flat out declarations attempting to persuade other Justices. It may have been that Justices introduced topics in oral argument on which they were not seeking additional information from the attorneys, but that they wanted to bring up for their fellow Justices to consider because the issues were not mentioned by attorneys in the briefs. Later, Johnson, Wahlbeck, and Spriggs inspected the ratings of attorneys Justice Blackmun made in his notes during oral arguments from 1970 to 1994. They

107. Id. at 137–38.
found the better an attorney does in oral argument, the increased likelihood that attorney will win the case, even after taking into account all other factors. Thus, they contended that oral arguments do make a difference in a case’s outcome.

Johnson expanded his research with the landmark book *Oral Arguments and Decision Making on the United States Supreme Court*. By examining the oral argument notes of Justice Powell, Johnson found that, at least for Powell, oral arguments provided an opportunity to determine what other Justices’ inclinations are in a particular case. Johnson’s research also revealed that “almost one-third of all references to oral arguments were made to issues discussed during those proceedings but not in the written legal briefs,” and concluded that oral arguments can “provide unique information the Justices use when they make substantive choices about the merits of a case.”

Johnson, Ryan Black, Jerry Goldman, and Sarah Treul conducted the largest and most systematic study on oral argument to date, analyzing oral argument transcripts in all cases from 1979–1995. They found that Justices have grown more active in oral argument over that time period, with the number of sentences spoken to each side increasing from about 110 to nearly 150, and the average number of words spoken by Justices nearly doubling. The authors attempted predictions from the data patterns they found for oral argument and discovered that the probability of reversing a lower court decision significantly decreases as the Court asks more questions and makes more statements to a petitioner in a case even after controlling for other possible explanations. In cases where Justices asked the same number questions of both sides, the authors found a 0.64 probability of reversal, but in cases where Justices asked fifty more questions of the petitioning attorney than his or her counterpart, the probability drops to 0.39. Johnson and his


110. *Id.* at 122.

111. *Id.* at 122.

colleagues found the same results when using word counts as a predictor of case outcomes. The greater the discrepancy between the number of words spoken to two parties, the lower the probability a side receiving more verbal attention from Justices would prevail. In summary they declare: "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."113 Such findings are in line with previous research.114

Moving beyond the quantity of verbal activity to its quality, much like Shullman's hostility scale115 or Wrightsman's unsympathetic-sympathetic coding,116 Treul, Black, and Johnson looked at the same range of cases as in their other study, 1979–1995, and used linguistic software to measure the emotional content of remarks made by the Justices, hypothesizing that more unpleasant language against a party will lower the probability of that party prevailing.117 Their findings confirmed their hypothesis.

Both of these massive quantitative oral arguments studies are commendable, but potentially suffer from two related weaknesses. First, there is the possible occurrence of ecological fallacy, wherein aggregate-level data is used to make inferences about individuals.118 While scholars may be careful to avoid this by stating that it is the Court and not individual Justices acting in a certain way, the inferences by readers are likely to fall into this trap. Just because the Court may ask more questions of or use more unpleasant language with a losing side, does not mean that the majority of Justices are doing so.

Second, and related to the first concern, dominant Justices skew the data. When certain Justices, such as Justice Frankfurter or Justice Scalia, monopolize verbal

113. Id.
114. See Roberts, supra note 48; Shullman, supra note 89.
115. Shullman, supra note 89, at 273.
116. WRIGHTSMAN, supra note 35, at 74–75.
117. Treul, Black, and Johnson presented these findings in Jekyll and Hyde Questions from the Bench: Does the Emotional Nature of Justices' Questions Affect Their Votes on the Merits?, at the annual meeting of the Midwest Political Science Association, Chicago, Illinois on April 4, 2009. The paper can be found at the Social Science Research Center, http://ssrn.com/abstract=1407518
activity with a particular attorney, it makes it appear that the Court is behaving in a fashion that is in reality only representative of maybe one or two Justices. Thus, we may learn something in general about the Court, but we still do not know whether it is because that is how most or only a few of the Justices behave during oral argument. However, Justice-level analysis is only possible from 1963–1965 and 2004–present due to the fact that the names of the speaking Justices are identified instead of a generic “Question” or “Court.” Justice-level analysis outside those time periods is difficult unless one goes through each transcript while listening to that particular case’s oral argument, documenting which Justice is speaking.

C. Supreme Court Forecasting

Numerous scholars and other observers of the Court have attempted to predict Supreme Court case outcomes based on a host of factors, including oral argument behavior. In fact, the entire premise of the attitudinal model—that Justices vote based almost purely on ideology—is itself a forecasting model. Linda Greenhouse, based on her observations of oral argument behavior of Justices during sixteen cases in the 2002 term, accurately predicted twelve (seventy-five percent) case outcomes.\textsuperscript{119} Shullman accurately predicted the outcomes of three cases from the 2002 term after counting the questions posed by each Justice to each side in seven previous cases.\textsuperscript{120} From this exercise Shullman concluded “that one might profitably use an analysis of [the] questions [of Justices] to predict what was previously thought to be unpredictable.”\textsuperscript{121} And as already noted, then Circuit Judge Roberts argued from his observations of twenty cases that the side that receives more attention during oral argument tends to lose.\textsuperscript{122} While notable, these studies suffer from simple deficits in social science research protocol—non-random, small sample sizes.

In an attempt to pit legal experts who observe the Court closely against the cool calculations of statistical modeling,

\textsuperscript{120} Shullman, \textit{supra} note 89.
\textsuperscript{121} \textit{Id.} at 293.
\textsuperscript{122} Roberts, \textit{supra} note 48, at 75.
Andrew Martin, Kevin Quinn, Theodore Ruger, and Pauline Kim created a study entitled the Supreme Court Forecasting Project. Eighty-three experts, seventy-one from academia and twelve who were appellate attorneys took part in this project. Of this group, thirty-eight had clerked on the Supreme Court, thirty-three were chaired professors, and five were or had been law school deans. They found that the statistical model was more accurate than human experts in predicting case outcomes generally (seventy-five percent correct versus 59.1 percent correct), and that the experts did slightly better than the model when forecasting the votes of the Justices (67.9 percent correct versus 66.7 percent correct). Breaking down cases by issues, the statistical model made more accurate predictions than the legal experts in case outcomes and individual Justice votes involving civil rights, criminal procedure, and economic activity, but the experts trumped the computer in cases involving judicial power and federalism. The authors wrote:

One motivation for this study was to determine whether there are some kinds of cases where observable “legal” factors are more important for the prediction of outcomes. Our results in the judicial power cases suggest that this is an area where “legal” factors are important.124

Oral arguments were not included in the calculations of either the statistical model or the legal experts. Interestingly, Greenhouse, on a smaller sample of cases, achieved a similar success rate as the computer—seventy-five percent.125 This caused legal scholar Lee Epstein to declare that Greenhouse’s “success at prediction should cause many of us to reconsider explanations of judicial decisions that fail to take notice of [oral arguments].”126

The Supreme Court Forecasting Project is not without its critics. Miriam Cherry and Robert Rogers noted despite the study’s “sophisticated empirical and statistical approach,” the

123. See Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger & Pauline T. Kim, Competing Approaches to Predicting Supreme Court Decision Making, 2 PERS. ON POL. 761 (2004); see also Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 COLUM. L. REV. 1150 (2004).
124. Martin et al., supra note 123, at 766.
125. Greenhouse, supra note 119, at 782.
126. Epstein, supra note 9, at 758.
fact that only a few experts were involved in the prediction of each case (from one to three) make it "premature to conclude that the computer model had triumphed over the decisions of human beings, and it would be hasty to trumpet the ascendance of the [attitudinal] model over the legal model." Nor do Cherry and Rogers espouse the current methods of prediction used by legal scholars, arguing that such "approaches tend to be individualized" because "scholars work in isolation, and these individual hunches, guesses, and judgments are never aggregated or integrated," and the "predictions are not verifiable or falsifiable in any statistical sense." Instead, the authors recommend the adoption of an information market model wherein individual knowledge is organized and compiled on a much larger scale. In addition, while praising the "imagination," "commitment," and "stunning results" of the Supreme Court Forecasting Project, Susan Silbey worried "that the statistical analysis of Court decisions makes the law appear to be less of a collective moral accomplishment than it is, contributing inadvertently to increasing juridification rather than the rule of law.

This study, therefore, seeks to fill a niche in the oral argument literature in four ways. First, previous studies have largely glossed over oral argument transcripts from the 1960s. The only known studies to include any type of content analysis of 1960s material were Stephen Wasby, Anthony D'Amato, and Rosemary Metrailer's examination of oral arguments in school desegregation cases, and Carter and

127. Cherry & Rogers, supra note 7, at 1157.
128. Id. at 1152.
129. Regarding juridification:
In descriptive terms some see juridification as "the proliferation of law" or as "the tendency towards an increase in formal (or positive, written) law"; others as "the monopolization of the legal field by legal professionals", the "construction of judicial power", "the expansion of judicial power" and some quite generally link juridification to the spread of rule guided action or the expectation of lawful conduct, in any setting, private or public.
130. Susan S. Silbey, The Dream of a Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere, 2 PERSP. ON POL. 785, 786 (2004).
131. Wasby et al., supra note 68.
Phillips's look at oral argument in newspaper cases. However, for both of these studies the actual number of cases drawn from the 1960s was small and incidental to the study, and no comparison was made between 1960s cases and those from other decades. This study specifically targets the 1960s to get a better idea of the predictors and function of oral argument during that decade, and looks at differences in comparing the 1960s to the 2000s.

Second, this study is the first to utilize inferential statistical analysis of individual Justices during oral arguments. Other studies have looked at individual Justice behavior during oral argument or performed inferential statistical analysis of oral argument behavior, but never both. Third, this is the only known study of oral argument involving cases specifically related to the freedoms of speech and press. Fourth, while previous studies have measured the number of questions asked, the hostility of a Justice's remarks, the sympathetic nature of a Justice's comments and questions, and the degree of unpleasant emotional content in the Court's speech, no study has ever attempted to measure the degree of information seeking that Justices are engaging in during oral argument.

III. SPECIFIC AREAS OF INVESTIGATION

This study's analysis consists of three parts. First, it will examine potential factors predicting judicial behavior during oral argument. Second, it will explore how well oral argument behavior predicts voting. Third, this article will investigate whether or not the degree of information seeking is different in the 1960s as compared to the 2000s. To measure the behavior of the Justices during oral argument in a meaningful way, two variables were created to measure information seeking because of the varied explanations that the different theoretical models would use to explain. The

133. See WRIGHTSMAN, supra 35; Greenhouse, supra note 119; Mauro, supra note 88; Shullman, supra note 89.
134. See Johnson et al., supra note 10; Johnson et al., supra note 112.
135. See Mauro, supra note 88; Johnson et al., supra note 112; Roberts, supra note 48.
136. See Shullman, supra note 89.
137. See WRIGHTSMAN, supra note 35.
138. See Johnson et al., supra note 112.
legal model would argue that information seeking is the main function of oral argument, the attitudinal model would posit that information seeking is nonexistent during oral argument, and the strategic model would contend that information seeking is dependent on the side the Justice is interacting with.

For the first measure of information seeking, an ordinal scale was created based on literature from various disciplines related to questioning. In his study of examination and cross-examination, J.T. Dillon noted that question types existed “on a continuum of control,” with broader questions less controlling of an answer than narrow questions, wh—questions (who, what, when, where, why, etc.) are less controlling than simple yes/no questions, and yes/no questions less controlling than tag, or leading, questions.139 He also observed that “cross-examiners know the answers to the questions they ask. Their practice positively requires them not to ask a question to which they do not know the answer. The rule of thumb runs, ‘Never ask a question unless you already know the answer.’ ”140

In her study of power and linguistic manipulation in courtrooms, Anne Graffam Walker noted that questioning was less about seeking the truth than about winning a case, and that power is exerted through controlling witnesses during examination.141 If seeking new information, questioners ask wh—questions.142 If, however, the questioner wants to influence the direction or content of solicited information, then yes/no or disjunctive questions are employed (a disjunctive question provides a possible answer in the question itself, but then adds some phrase to the end of the question, such as “or something else,” to allow the respondent some leeway in answering).143

Yanrong Chang found that questions in the courtroom are often used not to obtain information but to persuade, with persuasive questioning taking on the form of “(i) repeating

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140. Id. at 135.
142. Id. at 69.
143. Id. at 72–73.
key questions, (ii) invalidating excuses or accounts, (iii)
asking unanswerable questions, (iv) supplying answers, and
(v) paraphrasing or restating . . . responses."144 Sandra
Harris divided courtroom questions into two types: wh—
interrogatives and other interrogatives (bipolar or yes/no,
disjunctive, and tag).145 While some might argue that the
questioning between lawyers and witnesses, or even judges
and witnesses, in a trial courtroom is not relevant to the
questioning between Justices and attorneys in the Supreme
Court, we contend that the Justices do very much treat the
attorneys as witnesses, often appearing to be attempting to
either get information out of them, when in fact the Justices
are usually leading the attorneys along to extract either a
damaging admission or a helpful insight.

Irene Koshik argued that rhetorical questions “are
designed to convey assertions, rather than seek new
information,” and that leading questions can be a form of
declarative or non-information-seeking question.146 Stephen
Levinson noted the complexity of legal questioning when he
stated that in the courtroom:

[T]he questioner hopes to elicit a response that will count
as part of an implicit argument . . . . The questions may be
rhetorical, in the sense that both know the answer . . .
they may appear to seek information when in fact the
information is already known . . . or they may appear to
merely seek confirmation when in fact they seek
information.147

Ronald Adler, Lawrence Rosenfeld, and Russell Proctor
divided questions into two types: sincere or counterfeit.148
They defined sincere questions as those whose aim is to
understand others. Sincere questions, they argued, usually
perform the following functions: clarify meanings, learn about

145. Sandra Harris, Questions as a Mode of Control in Magistrates’ Courts, 49 INT’L J. SOC. LANG. 5 (1984).
the thoughts and feelings of others, encourage elaboration, encourage discovery, and gather more facts and details. They argue that open rather than closed questions make interrogatories more sincere. On the other hand, they define counterfeit questions as questions that "are really disguised attempts to send a message, not receive one." Counterfeit questions, they contend, include questions that trap the speaker, questions that make statements, questions that carry hidden agendas, questions that seek "correct" answers, and questions based on unchecked assumptions.

Placing question types on a continuum of options available to the respondent, Mark Redmond specified the two extremes of the continuum as demonstrating either openness (numerous answer possibilities) or closedness (only one possible answer). He also clarified that open questions will likely begin with words such as who, what, when, where, why, how or tell me. More specifically, Redmond defined bipolar questions as yes/no, true/false, right/wrong, agree/disagree or any type of question wherein only two possible answers are presented or exist. According to Redmond, bipolar questions are a closed type of question since they are "highly directive . . . . The amount of information gained from [bipolar] questions is very limited," and "bipolar questions force individuals to give answers that do not really reflect their thoughts." Additionally, Redmond classified leading or tag questions as non-questions because such questioning does not genuinely seek information.

Using this literature from psychology, linguistics, philosophy, law, sociology and interpersonal communication, a six-point scale was created to measure the degree of information-seeking behavior Justices engage in during oral argument (see figure 1). The lower the score, the higher the level of information seeking engaged in by the Justices. Examples and explanations of each level are provided in table 1.

149. Id. at 151–53.
151. Id. at 220.
By utilizing content analysis, a methodology some legal scholars have argued should be embraced more in legal studies, each sentence in an oral argument transcript was coded based on the scale below, and then an average for each Justice per case side was calculated (if a Justice did not speak to the attorneys for a side, no score was possible).

Table 1. Explanations and examples of information-seeking scale.

<table>
<thead>
<tr>
<th>Level’s Value</th>
<th>Name</th>
<th>Explanation</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Wh— question</td>
<td>An open-ended question using who, what, when, where, why, or how</td>
<td>In what way are you claiming the First Amendment applies to this case?</td>
</tr>
<tr>
<td>2</td>
<td>Disjunctive</td>
<td>A closed question with an add-on that allows room to answer more openly</td>
<td>Are you claiming the First Amendment applies to this case, or are you claiming something else?</td>
</tr>
<tr>
<td>3</td>
<td>Bipolar question</td>
<td>A question with only two answer options, such as yes/no, true/false, etc.</td>
<td>Are you claiming the First Amendment applies to this case?</td>
</tr>
<tr>
<td>4</td>
<td>Tag or Leading</td>
<td>A leading question, usually framed in the negative, that implies a certain answer</td>
<td>You are claiming the First Amendment applies to this case, are you not?</td>
</tr>
<tr>
<td>5</td>
<td>Rhetorical</td>
<td>A question that does not have an answer or where an answer is not sought</td>
<td>How in the world am I supposed to believe your claim that the First Amendment applies to this case?</td>
</tr>
<tr>
<td>6</td>
<td>Declaration</td>
<td>A statement without a question mark</td>
<td>The First Amendment does not apply to this case.</td>
</tr>
</tbody>
</table>

A second way to operationalize information seeking is by quantity rather than quality. A Justice may not ask different types of questions (including non-questions) of a particular side so much as speak more to a side he or she supports or opposes. Therefore, a word count for each Justice per side was created. Conceptually the two variables are different. A correlation test confirmed that there was only moderate correlation between information-seeking scores and word counts in the 1960s cases ($r = 0.34$, $p < 0.01$) and the cases from the 2000s ($r = 0.28$, $p < 0.01$).

Given that the legal model would support the contention that attorney-specific or case-related factors should influence judicial behavior, four such variables were included in this study. Previous scholars have found that attorney experience influences the decisions of the Justices, with Richard Lazarus arguing that a Supreme Court bar has reemerged and that “more effective advocates influence the development of the law.” An attorney experience variable was created with a “1” indicating it was the attorney’s first appearance before the Court, a “2” representing an attorney’s second appearance before the Court, and so on. Data for attorneys appearing in the 1960s cases was found through name searches on Lexis Nexis, and the number of appearances of attorneys from the 2000s was found on www.oyez.org.

The second variable is whether or not a particular side in a case is represented during oral argument by an attorney from the solicitor general’s office. The solicitor general is often referred to as the tenth Justice given the office’s intimate relationship with the Court. Many have argued that the solicitor general experiences more success than other

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attorneys,\textsuperscript{156} though some dispute this claim\textsuperscript{157} or contend that it is no longer valid given the increasing partisanship of the office.\textsuperscript{158} This variable is coded “1” if a solicitor general’s office attorney argues for a side, whether as the main party or as amicus, and “0” if not.

The third attorney-specific variable represents whether an amicus party has been allowed to supplement a standing party’s argument during oral argument. Being granted amicus status for oral argument is rare given the number of parties on each side that attempt to become an amicus party before the court and the fact that a party in a case must acquiesce to giving up some of its precious argument time.\textsuperscript{159} Therefore, this potentially indicates that the Justices are interested in the viewpoint of the amicus party, potentially creating increased persuasive influence for a side with an amicus attorney. Scholars have argued that amicus parties are influential because they shape “the flow of information at the Court.”\textsuperscript{160} Therefore, some posit that amicus parties elevate the probability of a successful case outcome,\textsuperscript{161} while others find no such benefit from amicus parties.\textsuperscript{162} Some might contend that amicus parties signal ideology, and therefore are more related to the strategic model than the legal model, but Collins found that the Court uses amicus curiae for information rather than ideological signaling.\textsuperscript{163} The amicus variable is also a dummy variable with a “1” meaning an attorney from an amicus party argued on a

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\textsuperscript{157} Kevin T. McGuire, \textit{Explaining Executive Success in the U.S. Supreme Court}, 51 POL. RES. Q. 505, 505 (1998).
\textsuperscript{159} Paul M. Collins Jr., \textit{Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation}, 38 LAW & SOC’Y REV. 807, 809 (2004).
\textsuperscript{160} Paul M. Collins & Lisa A. Solowiej, \textit{Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court}, 32 LAW & SOC. INQUIRY 955 (2007); see also Collins, supra note 159.
\textsuperscript{161} Collins, supra note 159; Paul M. Collins Jr., \textit{Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs}, 60 POL. RES. Q. 55 (2007).
\textsuperscript{163} Collins, supra note 159.
\end{flushleft}
particular side, and a "0" indicating the absence of an amicus attorney.

Finally, Justices may treat petitioners and respondents differently, either because petitioners have a harder road to travel because they seek for the court to overturn a lower ruling, or because the court, by hearing the case, is signaling that they are not comfortable with the lower court's ruling, creating a more challenging environment for the respondent. Therefore a petitioner variable was created with "1" indicating the petitioner's side in a case and "0" representing the respondent's side. This leads to four hypotheses about possible predictors of oral argument information seeking (conceptually defined as behavior engaged in to gain additional information from litigants):

H1a: The experience level of attorneys on a particular side in a case should be a statistically significant predictor of information seeking during oral argument.

H1b: Whether or not an attorney from the solicitor general's office argues on a particular side in a case should be a statistically significant predictor of information seeking during oral argument.

H1c: Whether or not an attorney from an amicus party argues on a particular side in a case should be a statistically significant predictor of information seeking during oral argument.

H1d: Whether or not a particular side is the petitioner should be a statistically significant predictor of information seeking.

To investigate the strategic model, ideology scores were included in three forms. These variables were created from the Martin-Quinn scores for each Justice. These scores are calculated annually and are continuous in nature, with liberal Justices found on the negative end of the scale and conservative Justices found on the positive side of the scale. For this particular study, the most liberal score was Justice Douglas's 1964 Martin-Quinn score wherein he received a -5.581. The most conservative score was Justice Scalia's 2004 score of 2.85. While reverse causality should not be a

problem given the variables that will be used to measure oral argument behavior, the scores were lagged one year just to be safe, with 2004 scores used to predict 2005 oral argument behavior and other factors. The only exceptions to this were the first years on the bench of Chief Justice Roberts, Justice Alito, and Justice Fortas, as there were no Martin-Quinn scores available from the previous term. Additionally, ideology was operationalized three different ways. First, the straight Martin-Quinn scores were used, which measure both direction and magnitude of ideology. Second, a dummy variable was created from the scores with a “1” indicating a conservative score and a “0” indicating a liberal score to just measure magnitude and not intensity. Third, the absolute value of the Martin-Quinn score was used as a variable in order to look at intensity and not direction.

Additionally, to test for the influence of ideology, a dummy variable was created to determine whether Justices treated the side in a case that matched their ideological leanings differently than the side opposite their ideological leanings. Thus, does a conservative Justice engage in a significantly different amount of information seeking with a conservative party in a case than with a liberal party, and vice versa? To measure the partisan direction of a side in a case, this study used a measure from Spaeth’s U.S. Supreme

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165. Each Justice’s annual Martin-Quinn score is created from that Justice’s voting patterns for the year. Thus, using a Justice’s score for the 2007 term to predict how he or she would vote in 2007 is circuitous in that the independent variable (score) predicting the dependent variable (voting) is not truly independent as it is caused by voting. Thus, there is both forward causality (scores predict voting) and reverse causality (voting causes scores), and more complicated statistical methods would be necessary to separate out the distinct effects each variable is having on the other. By lagging the Martin-Quinn scores (i.e., using 2006 scores to predict 2007 voting) reverse causality is no longer an issue.

166. Martin-Quinn scores theoretically range from negative infinity to positive infinity. The negative/positive aspect of a score measures the direction of a Justice’s ideology, with negative indicating liberal leanings and positive scores representing conservative orientations. Likewise, a Justice could be slightly liberal (a negative score close to zero) or extremely liberal (a larger negative score further from zero). Hence, Martin-Quinn scores measure both the direction (negative/liberal or positive/conservative) and the intensity (larger number/more partisan or smaller number/less partisan) of ideology. By taking the absolute value of a Martin-Quinn score direction is no longer measured as it is impossible to know whether the score is in the liberal/negative or conservative/positive direction. Therefore, only intensity (how partisan) of ideology is being measured.
Court judicial database with regard to the direction of the ruling of a case in the lower court. Then, an ideology match variable was created wherein if the partisan direction of a side in a case equaled the ideology dummy variable of a Justice, the variable was coded a "0," and if there was no match it was coded a "1." This leads to two hypotheses to test the strategic model:

H2a: Ideology should be a statistically significant predictor of information seeking during oral argument.
H2b: Ideology match should be a statistically significant predictor of information seeking during oral argument.

The attitudinal model would contend that information seeking would only occur during oral argument in order to allow the Justice to determine which side matches his or her ideological preference. Thus, Justices, if they already knew which side they wanted to support, would have no need to engage in information seeking during oral argument. Thus:

H3: Justices driven purely by ideological considerations will consistently not verbally engage attorneys during oral argument.

To control for the fact that oral argument behavior may merely be due to Justice-specific factors, and, therefore, to test the behavioralist model, three more variables were created. Conceivably, since Justices that are more qualified to sit on the bench may behave differently during oral argument than less qualified peers, this study used qualification scores obtained from Segal and Cover, in which each Justice receives a score ranging from 0.000 (unqualified) to 1.000 (completely qualified). Scores for this study ranged from 0.125 for Justice Clark to 1.000 for Justices O'Connor, Scalia, Ginsburg, Brennan, Fortas, and Stewart. Because Justices who have served longer on the court may act differently from newer Justices in oral argument, a variable for experience was created with the value being the number of years on the U.S. Supreme Court ("1" for first year, for example). Because "Justice Breyer's

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168. WRIGHTSMAN, supra note 35, at 73; Grossman, supra note 35.
questions remind some observers that he was formerly a law professor,” and because the argument has been made that Justices use the Socratic method during oral argument, treating attorneys like law students, a dummy variable was created for law professor experience with a “1” indicating the Justice had taught law at some point prior to coming to the bench and a “0” indicating the absence of professorial experience. This leads to three final hypotheses in the first part of the study:

H4a: Justices’ qualification levels should be a statistically significant predictor of oral argument behavior.

H4b: Justices’ time serving in the Supreme Court should be a statistically significant predictor of oral argument behavior.

H4c: Justices’ experience as a law professor should be a statistically significant predictor of oral argument behavior.

The following conceptual model illustrates the hypotheses being examined in the first part of this study:

**Figure 2.** Potential influencers of oral argument behavior.

The second part of this study’s analysis argues that oral argument behavior will predict how Justices vote, with the information-seeking score and word count as the two
independent variables and whether or not a Justice voted for a side as a dummy dependent variable ("1" indicates voter for, "0" indicates voted against). This leads to two final hypotheses:

H5a: The information-seeking score for Justices for a particular side in a case will be a statistically significant predictor of the Justices' support for that side.

H5b: The number of words spoken by Justices to a particular side in a case will be a statistically significant predictor of Justices' support for that side.

Finally, the third part of this study's analysis will examine whether Justices behave differently in oral argument in the 2000s versus the 1960s. While scholars have lamented the polarization of the American electorate\(^{172}\) and elected political elites,\(^{173}\) it is likely that nominated political elites have likewise grown more partisan given they hail from one or both of these two groups. This would be reflected in the degree to which Justices seek information during oral argument. If there is a statistically significant difference between information seeking from Justices in the 1960s as compared to the 2000s, initial evidence would exist for the argument that the Court has grown more partisan, leading to the following hypotheses:

H6a: The information-seeking score for Justices in the 2000s will be higher (meaning less information seeking) in a statistically significant manner when compared to the information-seeking score for Justices in the 1960s.

H6b: The word counts for Justices in the 2000s will be higher in a statistically significant manner when compared to the word counts for Justices in the 1960s.

IV. EXPLAINING CASE SELECTION AND MEASUREMENT

Because ideology is an important factor in this study, and because scholars have found that issue salience triggers ideology with less salient issues reducing the impact of ideology,\(^{174}\) only cases regarding the freedoms of speech and


\(^{174}\) Andrea McAtee & Kevin T. McGuire, Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?
the press were selected in order to optimize the role ideology might be playing in judicial behavior. In order to analyze data at the Justice level, only two time periods could be studied: 1963–1965 and 2004–present. Outside of those two time periods, oral argument transcripts do not delineate which Justice is speaking. A total of twenty-three cases relating to speech and press freedoms were found from 2004–2008 based on a search of thefirstamendmentcenter.org, and the transcripts were obtained from the U.S. Supreme Court’s website (www.supremecourt.gov). Additionally, twelve cases relating to the freedoms of speech and press were obtained from the Supreme Court’s library in Washington, D.C. by the second author (see Appendix II for a full list of cases included in this study).

The first author trained one other coder and then each separately coded three cases from the 2004–2008 selections (or thirteen percent of the cases). Intercoder reliability was measured using Krippendorff’s alpha$^{175}$ and was high at 0.93. The first author then coded the remaining twenty modern cases alone. For the twelve cases from the 1960s, two coders were trained by the first author. They coded two of the same cases, achieving an intercoder reliability of 0.96. They then both coded alone five cases each. Coders were instructed that in instances where it was not clear which of two categories a sentence could be placed in, the category lower on the scale (meaning higher information seeking) was to be chosen. Each sentence was coded in the selected cases, resulting in a total of 2138 sentences being coded from the 1960s cases and 5512 sentences being coded from the 2000s cases (7600 sentences overall). A separate observation was created for each Justice for each side he or she verbally engaged during oral argument by averaging the sentence type score for each sentence.

41 LAW & SOC'Y REV. 259 (2007).

175. Andrew F. Hayes & Klaus Krippendorff, Answering the Call for a Standard Reliability Measure for Coding Data, 1 COMM. METHODS & MEASURES 77 (2007); Klaus Krippendorff, Reliability in Content Analysis: Some Common Misconceptions and Recommendations, 30 HUM. COMM. RES. 411 (2004). Krippendorff’s alpha can be used to measure the intercoder reliability of nominal, ordinal, interval, and ratio-level data, and corrects some of the deficiencies of other well-known measures: percent agreement, Scott’s pi, Cohen’s kappa, Pearson’s $r$, and Holsti’s $cr$; Krippendorff’s alpha was measured in SPSS 16.0 using a macro that can be found at http://www.comm.ohio-state.edu/ahayes/SPSS%20programs/kalpha.htm.
uttered to that side in a case and summing the number of words spoken to that side.

V. CAUSES OF INFORMATION SEEKING & PREDICTING THE VOTES OF JUSTICES

As this study employs mixed methods—qualitative and quantitative analysis—this part of the article will first examine the oral arguments qualitatively by presenting examples of how Justices use statements and questions during oral arguments. Then this part will turn to a quantitative examination of information-seeking levels during oral argument, investigating what is driving information seeking and how information seeking may forecast a Justice's eventual vote on the merits.

A. Excerpts from Oral Argument Transcripts

A reading of Supreme Court oral argument transcripts soon destroys any notion one might have possessed of the black-and-white boundaries of questions and statements. Justices blur the line between questions and declarations, sometimes even within the same remark, as Justice Ginsburg did in the following excerpt:

JUSTICE GINSBURG: So if that is the rationale that the district court went on, can this Court possibly uphold it when there is nobody, as far as we know—they haven't even come into this case at this level, filing a friend of the Court brief.

ATTORNEY: Yes, Your Honor. 176

Statements at times served a quasi-information-seeking role by being used by the Justices to set up questions:

176. Transcript of Oral Argument at 8, Clingman v. Beaver, 544 U.S. 581 (2005) (No. 04-37) [hereinafter Clingman], available at http://www.supremecourtus.gov/oral-arguments/argument_transcripts/04-37.pdf. The state of Oklahoma changed its laws regarding primaries, allowing only members of a particular party and Independents to vote in that party's primary election. Id. at 3. The Libertarian Party and some voters challenged the laws on the grounds of a First Amendment violation of the freedoms of expression and association in that Libertarian Party could not allow voters from other parties to participate in its primary elections. Id. at 42-43. Here Justice Ginsburg is pointing out to the petitioner's attorney that the District Court rejected all of the arguments of the Libertarian Party except for one—that the law is damaging to major parties—but no major party has complained about that in the litigation. Id. at 8.
JUSTICE GINSBURG: You—you did draft this injunction. It wasn’t the—an inspiration from the judge unaided by your advocacy. Is that so?\(^{177}\)

And, understandably, declarations are a necessary part of presenting a hypothetical situation that ends in a question:

JUSTICE GINSBURG: That is, suppose the inmate’s position is I want to go there and I want to read Law Week and Legal Times and other—I want to see what’s new, what’s breaking in the law so that maybe I’ll have something I can put in a petition, and that’s why I want to go every—every chance I get to the law library. Could such an inmate go to the library?\(^{178}\)

Frequently Justices use statements to indirectly seek information in the way of provoking an attorney’s response, as did Justice Breyer in this exchange:

JUSTICE BREYER: But I don’t see how you can have a constitutional rule that would forbid—allow you to open and drain, but wouldn’t allow the Dems to do the same as they've done in Alaska.

ATTORNEY: I think in—-in Alaska, of course, right now there is a party option where all the parties but the Republicans have opened the primary.\(^{179}\)

\(^{177}\) Transcript of Oral Argument at 35, Tory v. Cochran, 544 U.S. 734 (2005) (No. 03-1488) [hereinafter Tory], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1488.pdf. Cochran sued a former client, Tory, as Tory was defaming Cochran and demanding money in order to stop. See id. at 11. A judge ordered Tory to not talk about Cochran again, wherein Tory appealed, arguing his First Amendment right to free speech was being violated. Id. at 6. Here Justice Ginsburg is addressing the fact that Cochran’s attorney helped the original judge write the injunction against Tory. Id. at 35.

\(^{178}\) Transcript of Oral Argument at 10, Beard v. Banks, 548 U.S. 521 (2006) (No. 04-1739) [hereinafter Beard], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1739.pdf. Banks, a prisoner in Pennsylvania, sued Beard, the Secretary of the Pennsylvania Department of Corrections, because he had been placed in the highest security of detention possible due to his inability to cooperate, and had been subsequently denied access to most newspapers and magazines, which Banks argued was a violation of his First Amendment rights. Id. at 3, 32. Here Justice Ginsburg is responding to a statement by Beard’s attorney that it is a tremendous burden to allow an inmate to go to the mini law library in the prison because of the personnel and security requirements to move a prisoner. Id. at 10.

\(^{179}\) Clingman, supra note 176, at 27. The respondent has argued via briefs that the Constitution requires states adopting party primary rules similar to those in place in Alaska, wherein parties can open up their primaries to
Other times Justices state their desire for more information from an attorney:

JUSTICE SOUTER: No, I just want to know what—
ATTORNEY: —than Social Security.

JUSTICE SOUTER: —your position is. I just want to know what your position is.

ATTORNEY: My position is that . . .

Such statements can often be direct requests, as the following example from Justice Kennedy illustrates:

JUSTICE KENNEDY: I'm asking what your recommendation is to what our rule should be in this case.

The Justices themselves seem to understand that just because there is not a question mark at the end of a sentence, does not mean that the sentence was not a question, as can be seen from the following exchange between Justice Kennedy and an attorney where Kennedy never directly asks a question, but demands the attorney answer his question anyway, with the attorney then trying to clarify what the question might have been:

180. Transcript of Oral Argument at 55, Veneman v. Livestock Marketing Ass'n, 543 U.S. 977 (2004) (No. 03-1164) [hereinafter Veneman], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1164.pdf. Federal law required cattle producers to pay a fee for generic pro-beef advertising overseen by the government. Id. at 4–6, 35. Some cattle producers did not agree with the message of the advertisements and sued the Department of Agriculture, arguing that being forced to fund advertising they did not agree with violated their First Amendment speech rights. See id. at 5–7, 17. Justice Souter had proposed a hypothetical question to the respondent regarding a similar situation to the case, but with an excise tax instead, and wanted to know if the respondent thought the hypothetical situation created a First Amendment problem. Id. at 55.

181. Transcript of Oral Argument at 20, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-278) [hereinafter Morse], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-278.pdf. Frederick, a student, held up a banner at a school-supervised event that read “Bong Hits 4 Jesus,” a slang term for marijuana usage. Id. at 4, 17. The principal, Morse, took the banner away and suspended Frederick from school for violating the school’s policy prohibiting the display of material promoting the use of illegal drugs. See id. at 18–20, 46. Frederick sued Morse, alleging his First Amendment right to freedom of speech was infringed. See id. at 29–30. The attorney from the solicitor general’s office supporting the petitioner had just stated the narrow rationale for why the Court should rule in Morse’s favor when Justice Kennedy spoke. See id. at 19–20.
JUSTICE KENNEDY: So, in this case—
ATTORNEY: —is permissible.

JUSTICE KENNEDY: —I take it, it would be okay if the beef producers had to use a dollar a head to put, “Eating too much beef is dangerous to your health.”

ATTORNEY: Well, if they had—well, they’re not beef producers. I mean, I am troubled by—they’re—these are cattle.

JUSTICE KENNEDY: All right, cattle, then—
ATTORNEY: All right? And then—and then they're trying, ultimately, to brand us as though we are slicing these things up and selling them.

JUSTICE KENNEDY: But what’s the answer to my question?

ATTORNEY: If the question is, can retail grocers be required to put on the beef packages they sell . . . .

For the most part, though, attorneys appear to understand the way Justices sometimes want answers to statements, as shown in the example below where an attorney was addressed by Justice Alito after her time had run out:

JUSTICE ALITO: Well, for that reason, they're—for that reason, they're not likely to—in most instances, they would not be hostile to receiving that kind of information, if it was provided to them.

ATTORNEY: May I answer?

CHIEF JUSTICE ROBERTS: Sure.

182. Veneman, supra note 180, at 52–53. Justice Kennedy is trying to see if the respondent's attorney thinks it would be permissible to tax the beef producers in order to put a government-sponsored message on beef packages warning consumers of the potentially adverse effects of beef consumption, similar to the way cigarette manufacturers must warn consumers about the danger of using their product. Id.

183. Transcript of Oral Argument at 60, Garcetti v. Ceballos, 547 U.S. 410 (2006) (No. 04-473), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-473b.pdf. An employee of the Los Angeles District Attorney's office, Ceballos, found evidence that law enforcement had lied in a search warrant affidavit, wherein Ceballos informed prosecuting attorneys of the situation, but the District Attorney's office decided to prosecute anyway. Garcetti, 547 U.S. at 410. Ceballos then informed the defendant's attorneys of the potentially invalid affidavit and was subpoenaed to testify by defense attorneys, leading to retaliation against Ceballos by D.A. attorneys. Id. Ceballos sued, arguing that his cooperation with the defense was protected by the First Amendment. Id. Here Justice Alito is responding to the respondent's argument that if would be harmful to government attorneys if
Maybe the most humorous example of the ambivalence attorneys face over whether or not a Justice just asked a question or made a statement is found in this reply to Justice Scalia:

JUSTICE SCALIA: Why would it lessen? I assume whatever you put in an appendix, saying all these other situations that are not before us are not covered. Isn't that the most blatant dictum? But—but—and, of course, we're not bound in later cases by our dicta. But come to think of it, I guess the whole doctrine of overbreadth rests upon dictum, doesn't it? It—it rests upon our determination in this case, which involves somebody who undoubtedly was selling child porn, and a horrible kind of child porn—we say in this case, how, we can—we can contemplate other cases, where we would not hold the person guilty. This is all dictum, too, isn't it? So I guess the whole doctrine is—is based on dictum. So we may as well put it in all an appendix. Let's put our dictum in an appendix. I agree.

ATTORNEY: In answer to Your Honor's question or comment . . . .

If statements can act as questions, however, questions are not always very high in information-seeking value, such as the following rhetorical question:

ATTORNEY: Yes, as it turns out, because in 2006 we ran the same sort of anti-filibuster ads and Senator Kohl, now up for reelection, changed his position on the filibuster. So these things happen. In other words, people—people's positions are affected by grassroots lobbying, and at least people should have the opportunity to engage in grassroots lobbying.

JUSTICE KENNEDY: Is that called democracy?

employees in their office were afraid to come forward to tell them of information potentially damaging the attorney’s case. Transcript of Oral Argument, supra note 183, at 60.

184. Transcript of Oral Argument at 43–44, United States v. Williams, 128 S. Ct. 1830 (2008) (No. 06-694), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-694.pdf. Williams was convicted of promoting child pornography under federal law and sued, arguing that the law was overbroad and restricted his First Amendment right of free speech. See id. at 14, 29. Justice Scalia is here reacting to the respondent's claim that if the Court provided an appendix listing what materials are considered child pornography, the problem of overbreadth would be lessened. Id.
ATTORNEY: We are hopeful, Your Honor.\textsuperscript{185}

Another type of question employed by Justices that has very little information-seeking value is the leading question, particularly when it appears to also simultaneously attack the attorney’s position:

CHIEF JUSTICE ROBERTS: And you think it was clearly established that she had to allow a student at a school-supervised function to hold a [fifteen]-foot banner saying “Bong Hits 4 Jesus”?\textsuperscript{186}

In the following questioning, Justice Scalia, by shifting from the word “reasonable” to “remotely,” turns what appears to be a bipolar question in the first instance to a leading or rhetorical question in the second instance:

JUSTICE SCALIA: Do you think that it—it is a reasonable description of what happened—he was fired for complaining about his girls’ team not getting enough facilities—that he was, on the basis of sex, excluded from participation in, denied benefits of, or subjected to discrimination under an education program?

MR. DELINGER: Absolutely.

JUSTICE SCALIA: Do you think that—that remotely describes what happened to this coach?

MR. DELINGER: Absolutely.\textsuperscript{187}

\textsuperscript{185} Transcript of Oral Argument at 42, FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007) (No. 06-969) [hereinafter FEC], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-969.pdf. A nonprofit group, Wisconsin Right to Life, ran television ads encouraging Wisconsin voters to contact their U.S. senators and urge the senators to oppose filibusters of judicial nominees. FEC, 127 S. Ct. at 2660–61. The group was unable to continue running the ads sixty days prior to the 2004 election because federal law prohibited it, which, the group argued, was a violation of their First Amendment right to free speech. Id. at 2661. At this point in oral argument, Justice Stevens had just questioned the sincerity of the petitioner’s motives in running the ads, attempting to establish that it was not a realistic goal that the ads would actually change the targeted senator’s mind on the issue, but instead the ads were discretely trying to encourage voters to not re-elect the senator. FEC, supra note 185, at 42.

\textsuperscript{186} Morse, supra note 181, at 30–31. The respondent had just argued that existing law clearly showed that the principal could not censor the student’s speech. Id.

\textsuperscript{187} Transcript of Oral Argument at 7, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (No. 02-1672) [hereinafter Jackson], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1672.pdf. A high school girls’ basketball coach, Jackson, sued the Birmingham Board of Education because he claimed he was fired for complaining that his
And, as also just shown above, some Justices have a tendency to ask the same question in a few different forms, meaning that what at first glance may look like two or three different questions, is in reality only one:

JUSTICE ALITO: What's the difference between that?
ATTORNEY: The money is being used—
JUSTICE ALITO: What's the difference between saying would you like to make a contribution, and would you like to allow us to use money that we possess for our purposes rather than returning it to us? What's the difference between those two?\textsuperscript{188}

After reading oral argument transcripts one soon comes to the conclusion that often Justices ask questions to which they already know the answer. In the following exchange Justice Souter asks a question, but does not get the answer he wanted, so he goes on to propose his own answer:

JUSTICE SOUTER: What’s the—
ATTORNEY: Deception is the—my constitutional argument.
JUSTICE SOUTER: —what’s the difference between the checkoff and the excise tax?
ATTORNEY: Well, the checkoff in this case is money that goes to a group, which, though it is organized by the government, purports to represent—
JUSTICE SOUTER: So the answer is—
ATTORNEY: —the way it structured—
JUSTICE SOUTER: —where—

\textsuperscript{188} Transcript of Oral Argument at 41, Davenport v. Wash. Educ. Ass’n, 551 U.S. 177 (2007) (No. 05-1589) [hereinafter Davenport] available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1589.pdf. Davenport, a non-union teacher, sued the teachers union, Washington Education Association, because it collected fees from him and then used them for political purposes that he did not agree with, which, he argued, was a violation of his First Amendment rights. Davenport, 551 U.S. at 183. The respondent had just finished trying to argue that it is different for a union to ask for a contribution versus asking a potential non-union donator if using the donator's money for a particular purpose is acceptable. Davenport, supra note 188, at 41.
ATTORNEY: —these people.

JUSTICE SOUTER: —where the money goes and who pays out the money for the ad, that's the difference.

ATTORNEY: Well, the difference is the whole structure. Keep in mind—

JUSTICE SOUTER: Well, isn't that the—isn't that the essential difference between the structure in this case and the structure in the case in which the government comes out, saying, “This is your government, saying, ‘Don't smoke.'”

ATTORNEY: Yes, one—the difference is that in one case, we've got Congress, we've got the executive, we have one—

JUSTICE SOUTER: Right.189

Often Justices will answer their own questions, as illustrated in the two examples below:

CHIEF JUSTICE ROBERTS: Well, how far away is the furthest county seat for somebody in the country?

ATTORNEY: I don't know the—

CHIEF JUSTICE ROBERTS: County seats aren't very far for people in Indiana.

ATTORNEY: No . . . .190

CHIEF JUSTICE ROBERTS: What did he have to do to become on the ballot for delegate?

ATTORNEY: If he wanted to be a single person running—appearing as a gadfly—

CHIEF JUSTICE ROBERTS: 500 signatures, right?191

189. Veneman, supra note 180, at 46–47. The Justices have been trying to determine whether adding a tag to an advertisement alerting the viewer that the ad was funded by the government would be permissible in the respondent’s view when this exchange occurs. Id. at 46.

190. Transcript of Oral Argument at 16, Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) (No. 07-21) [hereinafter Crawford], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-21.pdf. The state of Indiana passed a law that required voters to present photo identification when voting in person. Id. at 4. The law was challenged by the local Democratic Party as placing an undue burden on the right to vote, particularly for minorities and the elderly. Id. at 4–5, 48–49. At this point in oral argument the respondent has been arguing that the requirement that voters who forget their ID have to go to the county seat to cast their vote is overly burdensome. Id. at 16.

Attorneys, maybe sensing this, even sometimes ask Justices to answer their own questions:

JUSTICE STEVENS: Would it also prohibit you from using—urging everyone to look to a website that used the same magic words?
ATTORNEY: Would it?
JUSTICE STEVENS: Yes.192

The Court publishes a guide for attorneys, including the proper way to answer questions during oral argument. It states: "Expect questions from the Court, and make every effort to answer the questions directly. If at all possible, say 'yes' or 'no,' and then expand upon your answer if you wish."193 In the following exchange the attorney, while understanding correct protocol, wishes to diverge from it, to Justice Souter's chagrin:

JUSTICE SOUTER: And if—if there is no efficacy and there is an infringement of what, at least for people on the outside, would be a protected right, then they have no justification for taking those rights away. And if that's going to be the analysis, then on—the argument you just gave, they've got to give the TV rights back, they've got to give the magazine rights back, and so on. Isn't that correct?
ATTORNEY: May I answer it this way? I know I'm supposed to say yes or no and then—
(Laughter.)
ATTORNEY: —to give an explanation.

192. FEC, supra note 185, at 53. Justice Stevens had just asked the respondent if the Constitution allows Congress to prohibit election ads from using certain words, to which the respondent had replied that it did. Id.
JUSTICE SOUTER: I sure would like that, but—  
(Laughter.)

ATTORNEY: I'll say no. My instinct is no, and I would also say the—

JUSTICE SOUTER: But then why? Why?194

Some Justices are not averse to jumping in and helping an attorney when he or she is struggling, either with a line of reasoning or with another Justice's questioning. In the example below Justice Scalia, like the law professor he once was, leads the attorney along, metaphorically holding the attorney's hand as they traverse through a point:

JUSTICE SCALIA: To apply an opinion of this Court to particular circumstances, and find that in the view of the court of appeals, it produces a certain result is not necessarily to say that that is clearly established Supreme Court law. It just means that is their best guess as to how it comes out, right?

ATTORNEY: That's correct.

JUSTICE SCALIA: I mean, they're forced to decide it one way or the other, the Supreme Court opinion either means this or that. They're not applying a clearly established test to the Supreme Court, are they?

ATTORNEY: Not by doing that . . . .195

Justice Ginsburg, also a former law professor, takes a similar tact with an attorney, in this case the solicitor general of the United States, with Justice Scalia jumping in as well:

JUSTICE GINSBURG: Is it relevant, General Clement, that the legislature didn't seem to be, or the ballot

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194. *Beard*, supra note 178, at 33. The respondent had been arguing with Chief Justice Roberts that because the First Amendment right deprivation of withholding newspaper and magazine reading was ineffective in rectifying an inmate's recalcitrant behavior, the justification for infringing those rights was not warranted and the policy should stop, to which Justice Souter sought to take the attorney's argument to the next logical step. *Id.* at 32–33.

195. Transcript of Oral Argument at 6, *Carey v. Musladin*, 549 U.S. 70 (2006) (No. 05-785) [hereinafter *Carey*], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-785.pdf. Musladin was convicted of murder and at his trial the victim's family wore buttons displaying pictures of the victim. *Carey*, 549 U.S. at 72. Musladin appealed his conviction under the argument that his Due Process right to a fair trial had been compromised because the buttons had prejudiced the jury. *Id.* at 73. Prior to this exchange, the petitioner had been arguing that the Circuit Court of Appeals had misapplied Supreme Court precedence, giving a very narrow interpretation to the issue of what may cause a prejudiced trial. *Carey*, supra note 195, at 5.
ATTORNEY: That’s absolutely right, Justice Ginsburg, and I think the way we look at it is that this whole debate about the purpose of the provision is a little bit of a red herring, because at the end of the day it’s clearly a hybrid. If you look at the text, it’s hard to understand how it does not have at least the effect of protecting workers. On the other hand, you’re absolutely right that it doesn’t address the entirety of germane, of non-germane expenses. It addressed a subset that have the most direct impact on the election process.

JUSTICE SCALIA: Or even non-germane political expenses.

ATTORNEY: That’s true. That’s true, I mean, for example

Justices may use a series of low-information-seeking questions, such as leading or rhetorical questions, to make a point to help an attorney:

JUSTICE SCALIA: Are we—are we talking wealthy people here? What’s the average price of a home in the United States? I think it’s a good deal above $350,000, isn’t it?

ATTORNEY: It certainly is in this area and in many congressional districts in the United States. And that’s a very good point, Justice Scalia. 196

196. *Davenport*, supra note 188, at 20–21. The solicitor general had been pointing out to the Court that the union made it much easier for non-members to opt in to paying dues then to opt out, and was bringing up the point that the difficulty of opting out may infringe on the constitutional right of being able to opt out of union due payment. *Id.* at 20.

197. Transcript of Oral Argument at 16, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320) [hereinafter *Davis*], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-320.pdf. *Davis*, a millionaire candidate for U.S. Congress in New York, argued that federal law that allows opponents of millionaire candidates to raise more from individuals and organizations then under normal circumstances was a violation of the millionaire candidate’s First Amendment and Fifth Amendment rights. *Davis*, 128 S. Ct. at 2767, 2775 n.9. The petitioner had been stating just prior to this exchange that in an election opponents to millionaire candidates may try and make an argument to voters that the
A Justice may also help an attorney by trying to steer the conversation away from an unhelpful avenue of discussion, as seen in the two examples below:

JUSTICE SCALIA: Then why are we arguing about whether there is one half of one percent of the electorate who may be adversely affected and as to whom it might be unconstitutional? That one half of one percent, if and when it is sought to be applied to them, have a cause of action to say you can't apply it to me. But why—what precedent is there for knocking down this entire law on a facial challenge when I think everybody agrees that in the vast majority of cases it doesn't impose a significant hardship?

ATTORNEY: None. I think that that's exactly the point. That's why we argue there's no standing.\(^{198}\)

JUSTICE SCALIA: So you want to get away from a hypothetical then. I don't know why you try to defend a hypothetical that involves a banner that says amend the marijuana laws. That's not this case as you see it, is it?

ATTORNEY: Well, it certainly not this case, but—

JUSTICE SCALIA: This banner was interpreted as meaning smoke pot, no?

ATTORNEY: It was interpreted—exactly, yes.\(^{199}\)

And, blatantly, Justices occasionally jump in to help an attorney know how best to answer a difficult question, or when to agree with an adversarial Justice, as happened twice in the following case's oral arguments:

JUSTICE SOUTER: Sure. You're saying this is an applied challenge which is different in some relevant respects, so that the facial holding in McConnell shouldn't apply to us, it shouldn't bar, shouldn't justify the Government barring our ad. Isn't that your logic?

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wealthy candidate is out of touch and not representative of the people in the congressional district. \textit{Davis, supra} note 197, at 16.

198. \textit{Crawford, supra} note 190, at 35. The respondent had just agreed with Justice Scalia that a facial challenge may not be appropriate in the case because there was only a small minority of the population that might be affected by the law. \textit{Id.}

199. \textit{Morse, supra} note 181, at 8. Previous to this point in the oral argument Justice Souter had proposed a hypothetical to the petitioner in which the student's banner had instead been advocating the amendment of current drug usage laws regarding marijuana. \textit{Id. at 7.}
JUSTICE SCALIA: You could say yes to that, I think.
ATTORNEY: Thank you.200

JUSTICE SOUTER: The way to do that is say, there's something different about my case from the case which was taken as typical in upholding statute against facial challenge.

JUSTICE SCALIA: He fears the Greeks even when they bear gifts.

(Laughter.)
ATTORNEY: Yes, we have.201

As can be seen from some of the examples above, humor is often a part of oral argument, and Hobbs, after her study of oral arguments, argued that "humor can be a potent weapon in an attorney's arsenal,"202 though the Supreme Court guide for attorneys cautions that "attempts at humor usually fall flat."203 Understandably, then, it is the Justices, particularly Justice Scalia, who inject most of the levity into oral argument, often with what appear to be strategic motivations. In the example below Justice Scalia uses humor to neutralize Justice Souter's attempt at a point at the expense of the attorney:

JUSTICE SOUTER: So—so but at some point, there's sort of a reasonableness limit then you're saying.
ATTORNEY: There is a reasonableness limit, and we've—we've—

JUSTICE SCALIA: Do—do you concede that just because a right is enumerated, it means it cannot be entirely taken away in prison?

ATTORNEY: No. This Court—

JUSTICE SCALIA: I mean, like, you know, try the right to

200. FEC, supra note 185, at 48. Justice Souter had been just arguing with the respondent that the respondent was trying to put on the Government the burden of satisfying strict scrutiny in order to avoid the holding in a previous FEC-related case. See id.

201. Id. at 49. Justice Souter had just been claiming that the respondent's first step in advancing their argument was that this case was significantly different than previous cases which provide the precedent for determining the case. Id.


203. CLERK OF THE COURT, supra note 193, at 11.
bear arms.

(Laughter.)

ATTORNEY: That's right. No. I mean—no. This Court has drawn—has drawn that distinction.204

Generally, though, humor is used by the Justices to undermine attorneys, at times interrupting an attorney with a seemingly irrelevant humorous comment:

ATTORNEY: But I don't think it needs to be because of the pattern and practice that this man has engaged in over [three] years. And if we take the example, which is so he has a change of heart and suddenly he now wants to praise Mr. Cochran and that's become his—and he's going to promote him as mayor of San Francisco, he can certainly go into the court and modify the injunction.

CHIEF JUSTICE REHNQUIST: I thought he lived in L.A. (Laughter.)

JUSTICE SCALIA: I think he'd like to get him up to San Francisco. (Laughter.)205

More frequently, Justices will use humor to make a point, causing an attorney's argument to appear foolish, as seen in the examples below:

JUSTICE SCALIA: You think that's really a proper function of government, to look out over there and say, we're going to even the playing field in this election? What if someone candidate is more eloquent than the other one? You make him talk with pebbles in his mouth or what? (Laughter.)206

JUSTICE KENNEDY: So under your view, if the principal
sees something wrong in the crowd across the street, had
to come up and say now, how many here are truants and
how many here are—I can’t discipline you because you’re
a truant, you can go ahead and throw the bottle.
(Laughter.)
ATTORNEY: No, I don’t think she needs to do that in the
heat of the moment. But later on once she’s discovered the
true facts, then at that point I think she loses a basis for
punishing him as a student if he was not there as a
student.
JUSTICE SCALIA: Because you’re both a truant and
disrupter, you get off.
(Laughter.)
JUSTICE SCALIA: Had you been just a disrupter, tough
luck.207
Most commonly Justices use oral argument to try and control
attorneys, pushing them toward certain conclusions or
concessions that the Justices desire. At times the Justices
appear to be engaging in a form of verbal bullying, as in the
following parley between Justice Scalia and his old Harvard
law classmate and longtime ideological nemesis, Larry Tribe
(who, incidentally, is one of the few attorneys with the
chutzpah to violate the guidelines recommended by the
Court208 by frequently interrupting Justices, possibly due to a
combination of his experience before the Court, standing in
the legal community, and personality):
JUSTICE SCALIA: Okay, so it is—
MR. TRIBE: But being the government—
JUSTICE SCALIA: —it is not essential—
MR. TRIBE: It may be.
JUSTICE SCALIA: —that the government might—in
order to be government speech, the government does not
have to identify itself as the speaker.
MR. TRIBE: I—

207. Morse, supra note 181, at 52–53. The respondent had just been
attempting to make a point with several of the Justices that the student in the
case had not been in the custody of the school because he had yet to come to
school and that after the assembly where the infraction took place he went to
school because the principal had ordered him to. Id. at 52.
208. “Never interrupt a Justice who is addressing you. . . . If you are
speaking and a Justice interrupts you, cease talking immediately.” CLERK OF
THE COURT, supra note 193, at 10.
JUSTICE SCALIA: Yes or no? Yes or no?
MR. TRIBE: I think the answer is yes . . . 209

Here is another example of a Justice pushing an attorney towards a particular response:

JUSTICE SOUTER: Do you have to depend on there being a message? Isn't it enough if there is an influence that is conveyed? I mean, what I thought the problem was, was that there was as a result of the obtrusive wearing of the button, that it created a risk simply of an emotional approach to the determination of guilt or innocence. The jurors are more likely to feel sorry for the family members sitting there a few feet away from them. Perhaps they may be more likely to feel sorry for the victim, but certainly for the family members. And it would be that improper influence of emotionalism as opposed to a particular message that is the problem here, isn't it?
ATTORNEY: I don't disagree with that.
JUSTICE SOUTER: Do you accept that?
ATTORNEY: I do accept that, and I don't need to rely on a message. I would agree with the argument that you've advanced.
JUSTICE SOUTER: Okay. 210

Or, even more aggressively, Justice Souter seeks concession on a point:

JUSTICE SOUTER: Salerno says unless there are no cases, the facial challenge is inappropriate. And that—in the real world that will never be true with respect to a— a voter ID law, will it?
ATTORNEY: Well, I hope not. But I think that the Court has shown—
JUSTICE SOUTER: It never will be true, will it?
ATTORNEY: Right. 211

209. Veneman, supra note 180, at 32–33. Justice Scalia had just re-stated the respondent’s comments that he would address whether or not in Supreme Court precedent the government has to identify it is speaking to be classified as government speech, after which Justice Scalia followed with the example of Bob Hope trying to sell war bonds in World War II; however, the respondent labeled such an example a digression and indicated that his objection in the case was unrelated to whether or not the government identified itself. Id. at 32.

210. Carey, supra note 195, at 45. The respondent had just claimed that the risk with allowing buttons to be worn in the courtroom was than any number of messages could be sent to the jury. Id. at 44.
Such judicial aggression is not limited to just a quick exchange or one point, particularly if the attorney is resistant:

JUSTICE SOUTER: You mean the people in North Carolina were unaware of the Edwards position, they were unaware of the distinction between Faircloth and Edwards?
ATTORNEY: I have no idea.
JUSTICE SOUTER: Of course they knew that.
ATTORNEH: I have no idea.
JUSTICE SOUTER: Of course they knew that. And just as presumably, you knew the position of Senator Feingold in these advertisements, and the people in the state knew because of your other—because of your other public statements.
ATTORNEY: Because of one or two press releases?
JUSTICE SOUTER: Why should those things be ignored?
ATTORNEY: There's absolutely no evidence that anyone in Wisconsin knew his position on the filibuster.
JUSTICE SOUTER: You think they're dumb?
ATTORNEY: No.
JUSTICE SOUTER: You have a web site. You have a web site that calls their attention, and you think nobody's going to it?
ATTORNEY: But we can't run the ads, we can't—
JUSTICE SOUTER: Nobody's paying attention to what the Senator is doing?
ATTORNEY: If we can't run the ads, we can't draw peoples [sic] attention to the web site.
JUSTICE SOUTER: You think the only source of information about Senator Feingold is your advertisement?
ATTORNEY: No, but I don't—
JUSTICE SOUTER: Then if your advertisement is not the sole source of information, then why do you assume that no one in Wisconsin knows what the senator has been

211. Crawford, supra note 190, at 36. Justice Souter had been trying to get the respondent to concede that if the Salerno standard was used in the case that a facial challenge to a registration requirement would be impossible, to which the respondent disagreed. *Id.*
doing when he votes.

ATTORNEY: Look, polls show that a majority of the people don't even know who the Vice President of the United States is. So to suggest that they know a particular position—

JUSTICE SOUTER: So your position is that we ignore context because no one—because the voters aren't smart enough to have a context?212

If an attorney does not give a satisfactory response, a rebuke is possible. In the dialogue below Chief Justice Roberts criticizes an attorney’s response to a question:

ATTORNEY: Well, my—I suppose my most straightforward answer would be that the Jewish Forward can burn as quickly as the New York Times, that the Christian Science Monitor—

CHIEF JUSTICE ROBERTS: Well, then now you’re giving—now you’re making their situation worse because they tried to make your client’s situation better. I mean, yes, they could—maybe they could prohibit religious journals as well, but they—for various reasons, they decided not to do that. Maybe they could have eliminated legal materials as well, but again, they decided not to do it. They take a more circumscribed approach. So I’m not sure it’s a very effective response to say, well, they let religious materials in and that can be used as well.213

Sometimes a hapless attorney will invoke a barrage of correction from the bench with multiple Justices joining the fray:

ATTORNEY: And Storer says if you find that happens rarely, while it’s not conclusive, it’s the—it’s indicative that there is a severe burden.

JUSTICE GINSBURG: But Storer—

212. *FEC, supra* note 185, at 37–38. Justice Souter had been arguing that context cannot be ignored regarding television advertisements, using the example of some ads run in North Carolina dealing with then Senate candidate John Edwards, and the respondent had replied with the argument that speech should not be prohibited because of the anticipated meaning some viewers might take away from an ad’s message or timing. *Id.*

213. *Beard, supra* note 178, at 40. Justice Breyer had just finished asking the respondent his take on the petitioner’s argument that certain types of literature were banned in maximum security because of the potential it could be made into a weapon or burned, whereas other types of literature that were not so easily formed into something that could cause harm were not banned. *Id.* at 39–40.
CHIEF JUSTICE ROBERTS: Isn't that a general election case?
JUSTICE SCALIA: That's a general election case, isn't it?214

Likewise, at times Justices cannot wait, piling question on top of question and statement on top of statement as they almost fight over each other215 to get at an attorney, as the following long excerpt illustrates:

JUSTICE BREYER: It goes on frequently in an opinion. I have been known to do that myself. And I say this court over here says it's a da-da-da, and I say “sure isn't that.” Well, what is it?
JUSTICE GINSBURG: And that language came from one of our opinions, didn't it? The branding language?
JUSTICE KENNEDY: That was quoting Holbrook and Flynn.
ATTORNEY: That's correct, Justice Ginsburg. That's right.
JUSTICE GINSBURG: So you can't fault the court for just saying it isn't that. Mr. Ott says it isn't that.
ATTORNEY: That's correct. But I believe that it is not part of the test. It was that the branding language, as in Justice Brennan's—in Justice Brennan's dissent was not part of the text articulated by—
JUSTICE SCALIA: Repeated later in opinions for the majority, I think.
ATTORNEY: That’s correct.
JUSTICE SCALIA: In later cases, so I mean—
ATTORNEY: That's correct.
JUSTICE SCALIA: Don't just put it in Brennan's dissent.
CHIEF JUSTICE ROBERTS: I don't understand your point about the state court focusing on Norris. The question under AEDPA is still whether or not it is an unreasonable application of Supreme Court law.

214. New York, supra note 191, at 29. The respondent had just turned to Storer v. Brown, 415 U.S. 724 (1974), arguing that the holdings in that case were favorable to his position in this case. Id.
215. The Supreme Court's published guidelines for attorneys notes: “[O]rdinarily if two Justices start to speak at once, the junior Justice will withdraw in deference to the senior.” CLERK OF THE COURT, supra note 193, at 13.
ATTORNEY: Well, in this instance, much has been said about the opinion and the carefully written opinion of the state court. But the portion of the opinion that focuses on this issue is, as I said, roughly two pages in length and deals almost entirely with Norris. Norris was the contrast case for the court of appeals.

JUSTICE GINSBURG: But in here it—you agree that the California court has as much authority to say what Federal law is as the Ninth Circuit, right? They are on a par. Ninth Circuit decisions in no way binds the Supreme Court of California. Isn't that so?

ATTORNEY: That is correct.

JUSTICE GINSBURG: So that this state court of appeals chose to be respectful to the Ninth Circuit to consider what it had said, doesn't sound to me like a very strong argument.

ATTORNEY: Well, Justice Ginsburg, I would respectfully disagree...

Or a Justice will pass judgment on an attorney's position:

JUSTICE SCALIA: But you want to limit expenditures, even if it's the person's own money. No possibility of corruption. You're saying, no, this is enough speech. We don't want to hear any more from you. We, the State, will tell you how much campaigning is enough. That's extraordinary.

Justices will sometimes admit that they are not so much seeking information from an attorney as they are trying to make a point, as the two following exchanges show:

JUSTICE STEVENS: So, the—

ATTORNEY: —hypothetical.

216. Carey, supra note 195, 28–30. The respondent had just critiqued the lower court's opinion, arguing that it had injected additional and false analysis through referring to the branding of the defendant in the eyes of the jury. Id. at 28.

217. Transcript of Oral Argument at 52, Randall v. Sorrell, 548 U.S. 230 (2006) (No. 04-1528), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1528.pdf. Randall, a state legislature in Vermont, sued Sorrell, the state's attorney general, over Vermont's laws regarding how much money a candidate could raise from individuals and groups as well as spend, which Randall argued was an unconstitutional infringement of his First Amendment right to free speech. See id. at 3–5. An attorney for the respondent had just argued that Vermont's law was enacted in order to avoid a candidate's dependence on big money donors because the more money that was spent the more money a candidate would need. Id. at 52.
JUSTICE STEVENS: —the point I'm trying to make is, Does your agreement, that you can engage in speech by posting banners or handing a note, apply to symbolic speech—

ATTORNEY: It could—

JUSTICE STEVENS: —the kind of conduct that is symbolic speech?218

CHIEF JUSTICE ROBERTS: That gets back to the point I was trying to make earlier. He came here because it was the school event, the school sponsored activity. He could have gone anywhere along the route. He knew that it was coming by the school, he knew that they were going to be, the students were going to be released to see it. He went to join up with the school even if he were truant that day.219

Though usually Justices will not acknowledge they are making a point—they just make it:

JUSTICE SCALIA: That brings us back to the question I asked earlier and I suggested in my answer to that I don't think it's content discrimination of the sort that triggers strict scrutiny when the government gives money for a particular purpose only and not for other purposes, and I also don't think it's content discrimination of the sort that triggers strict scrutiny when the government allows a private organization to use governmental power to exact money from people for a particular purpose only. That's a different ball game.220
Similarly, Justices are not afraid to tell attorneys what point they should be making:

ATTORNEY: Yes, that is it's only in regard to influencing elections or operating a political committee, which is a second.

JUSTICE GINSBURG: But I thought that that was content. You could do it, say, in the press, but you couldn't do it over the air.

JUSTICE SCALIA: That's my understanding, too. I think you got to get out of it some other way. I mean, you've got to say it's content but it doesn't apply when it's the government contributing money or it doesn't apply when you're applying it to money that's being coerced by the government.

ATTORNEY: Yes, Your Honor.221

Likewise Justices will tell attorneys what point they have to concede, though not always without resistance from the attorney:

JUSTICE GINSBURG: How is the government speaking? You have already acknowledged that the wealthy candidate can spend as much as he or she wants and the end result of this scheme is that there will be more, not less, speech because the non-affluent opponent will now have more money to spend that he didn't have before. So I think you have to concede that overall the scheme will produce more political speech, not less.

ATTORNEY: Well, Justice Ginsburg, I can't concede that, and this is the reason why.222

Neither do Justices quail from correcting attorneys:

ATTORNEY: Because there is no Federal labor policy that requires States to use State treasury money to finance a party who is engaged in this debate. That's why this is just like Rust.

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221. *Id.* at 53. The respondent had just argued that he did not believe that the state's laws were content-based restrictions, wherein Justice Ginsburg had corrected him by stating that content refers to a category of speech, not necessarily a political position.

222. *Davis, supra* note 197, at 5–6. The petitioner had just agreed with Justice Scalia that the government cannot engage in political speech, wherein Chief Justice Roberts had challenged that notion and asked for case law supporting it. *Id.* at 5.
JUSTICE SCALIA: Just like—like Gould . . . 223

Nor do Justices shy away from merely lecturing the attorney as if he or she was a student in a classroom, as did Justice Ginsburg and Justice Scalia224 in the examples below:

JUSTICE GINSBURG: Mr. Blumstein, there's one feature of this that I find puzzling. You're making this a First Amendment case. But you joined an association that has such, certain rules and when one joins, one agrees to abide by the rules.

Nothing in the world stops Brentwood from saying this anti-recruiting rule is a really bad rule, it is unfair to us; you could have written op-ed pieces about it, the school could have talked about it, the school could have urged the board of education to drop it. Nothing stopped you from attacking this rule that you don't like. But when you signed on, the First Amendment doesn't give you license not to follow the rules that you disagree with.225

ATTORNEY: Your Honor, the problem with the Solomon Amendment is that the Government is demanding absolute parity. We have a statute before us that

223. Transcript of Oral Argument at 35, Chamber of Com. v. Brown, 128 S. Ct. 2408 (2008) (No. 06-939), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-939.pdf. California passed a law preventing the use of state funds to either prevent or promote union organizing, and several California companies challenged the law arguing that it infringed upon their right to non-threatening anti-labor speech protected by federal law. Id. at 3–4. Chief Justice Roberts had just put forth a hypothetical situation in asking how the state can receive federal grant money based on federal guidelines that certain policies needed to be implemented, and then have the state turn around and say that it did not want to waste the money on implementing those guidelines. Id. at 34–35.

224. Noting a possible connection between the classroom and the courtroom, after admitting his, at times, overbearing nature during oral argument questioning, Scalia declared: “It is the academic in me. I fight against it. The devil makes me do it.” O’BRIEN, supra note 54, at 248.

demands exactly the same services, without regard to whether the military actually needs them. In order for Congress to justify the parity requirement, which is the only statute before this Court, Congress has to state a need. It has to say why it needs what—

JUSTICE SCALIA: Here's a need. How about this? We have said in our opinions—and I am quoting from Rostker versus Goldberg—"Judicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." And that's precisely what we have here.226

The Justices frequently exert control in the courtroom, changing the topic when they feel so inclined:

JUSTICE KENNEDY: Well—well, there really—there are findings against you, and to say that a lawyer is a crook, a liar, and a thief and you're trying to tell us that that's not defamatory, I mean, I—I think we should just proceed on—on some other basis for this argument. We have other questions to discuss.227

A very dramatic example of this came after the first sentence228 of address to the Court by an amicus attorney with the Justice uninterested in the attorney's prepared direction:

ATTORNEY: Thank you, Justice Stevens, and may it please the Court:

The First Amendment does not prevent the government from speaking out in order to revive and expand the market for the nation's most important agricultural product.

JUSTICE KENNEDY: If we can just continue on

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226. Rumsfeld, supra note 218, at 43–44. Justice Breyer had just been questioning the respondent as to why the remedy in this situation was not more speech instead of restricting the military's speech. Id. at 43.

227. Tory, supra note 177, at 10. The petitioner had been going back and forth with several Justices, claiming that defamation had not occurred. Id. at 9–10.

228. Chief Justice Roberts, writing of his time as an advocate before the Court, noted:

When I was preparing for Supreme Court arguments, I always worked very hard on the first sentence, trying to put in it my main point and any key facts, because I appreciated that the first sentence might well be the only complete one I got out in the course of the argument.

Roberts, supra note 48, at 71.
government speech, because that's where—

ATTORNEY: Yes.

JUSTICE KENNEDY:—where we left off. It seems to me there is something offensive about making a particular portion of the public pay for something that the government says.

ATTORNEY: Justice Kennedy—

JUSTICE KENNEDY: It ought to be out of the general fund.229

Another clear instance of a Justice not seeming to care what an attorney wants to say comes in this exchange between Justice Breyer and an attorney:

JUSTICE BREYER: What does he do? I mean I looked at what he does in 74, 75, 76a. He seems to spend a lot of time moving furniture. He lists that twice. He runs the office. And he represents, he is out in the local office somewhere and he talks to constituents. I mean, he doesn’t even appear in the Senate office except very rarely in which case he is doing casework. So I guess if he is included in that, I mean so is a full-time furniture mover.

ATTORNEY: Justice Breyer, he did significantly more than that. First—

JUSTICE BREYER: I have the whole list here. What here suggests, he ever—he doesn’t even write a statement for the floor. There is nothing here that suggests one word of anything he did ever went to a committee meeting, to a floor of the Senate, anything.230

Apparently Justices, somewhat like football teams who are ahead near the end of a game and to kill time keep running the football, spend a fair amount of an attorney’s allotted

229. Veneman, supra note 180, at 20–21. The second attorney for the petitioners had just been granted permission to begin his argument. Id. at 20.

230. Transcript of Oral Argument at 15, Dayton v. Hanson, 550 U.S. 511 (2007) (No. 06-618) [hereinafter Dayton], available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-618.pdf. U.S. Senator Mark Dayton fired his employee Hanson after Hanson had taken leave from work for a heart problem, wherein Hanson sued Dayton, arguing that he had been discriminated against because of a disability, and Dayton responded that the Speech or Debate Clause of the Constitution granted him immunity from the lawsuit. Brief for Appellant at 5–6, Dayton v. Hanson, No. 06-618 (U.S. Feb. 27, 2007). The petitioner had just been arguing that the Speech or Debate Clause protected Dayton because hiring and firing employees that were involved with legislation fell within the Clause’s sphere of protected activity. Dayton, supra note 230, at 15.
time in oral argument making points and giving their opinions. Maybe the most typical example of such behavior is
the following in which Justice Scalia,\textsuperscript{231} after an attorney has
asked to be allowed to reserve the rest of her time, jumps in
and makes a series of statements attacking her arguments,
asking only one question, a leading one, and thus reduces the
time she will have for rebuttal at the end of the case:

ATTORNEY: I would like to reserve the balance of my
time.

JUSTICE SCALIA: A physical, a physical office, yes. I
mean, they didn't work in the hallway. But their staff
salary was not paid out of their, quote, "office." It was
paid out of the Senate.

ATTORNEY: Well, actually the structure doesn't support
that. The Senate, within the Senate, each member does
pay the salary, sets the salary. We can have legislative
directors and do have legislative directors in two different
offices, different salaries, different numbers of paid days,
different number of annual leave days.

JUSTICE SCALIA: Setting it is quite different from
paying it.

ATTORNEY: It is paid for—

JUSTICE SCALIA: The Senator sets it and the Senate
pays it.

ATTORNEY: Justice Scalia, actually the Senate is given
an appropriation and all of his salaries must be paid from
the appropriation.

JUSTICE SCALIA: Right. The Senate puts a limit on how
much money it will spend for a particular Senator. That's
all that amounts to. It doesn't hand him the money. It's
still the Senate's money, isn't it? And what the Senate
says is each office will have so much of a call upon our
fund and no more.

ATTORNEY: Is the appropriated fund for the Senator and
the Senator is the one who pays the fund. If I may, I'd like

\textsuperscript{231} Justice Scalia's aggressive verbal attacks initially caught even some of
his own colleagues off guard, particularly given that they hailed from an era
when oral argument behavior was more staid. One of Scalia's biographers, John
Jeffries, records that the new Justice asked so many questions during his initial
period on the bench that Justice Powell leaned over to Justice Marshall during
one oral argument session and whispered, "Do you think he knows that the rest
of us are here?" Biskupic, supra note 61.
Giving credence to the argument that Justices use oral argument to speak to each other since they do not have that opportunity during voting on the merits of a case, some of the most interesting and dramatic parts of oral argument occur when Justices speak to each other. Sometimes this inter-Justice communication is indirect, occurring through the attorney. In the exchange below Justice Souter first hammers home a point, then Justice Scalia attempts to rebuff Justice Souter's point via questioning the attorney, and then Justice Ginsburg pushes back against Justice Scalia through her statement to the attorney:

JUSTICE SOUTER: It never be—if that's going to be the standard, there will never be a facial challenge.
ATTORNEY: I'm not sure that that's terribly significant, because if you have an as-applied challenge—
JUSTICE SOUTER: There never will be there one, will there?
ATTORNEY: As to an as-applied challenge? I don't know why not.
JUSTICE SOUTER: No, as to a pre-enforcement facial challenge to a law like this.
ATTORNEY: I think it could be pre-enforcement and as-applied in a way that could have ultimately—
JUSTICE SOUTER: Yes, but I want you to answer my question.
ATTORNEY: I'm sorry. Yes, I think that's true.
JUSTICE SOUTER: We're not going to have facial challenges here, are we?
ATTORNEY: Right.
JUSTICE SOUTER: Okay.
JUSTICE SCALIA: Does that scare you, Mr. Fisher, that there can't be a facial challenge?
ATTORNEY: No.
JUSTICE SCALIA: I mean, every facial challenge is an

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232. Dayton, supra note 230, at 30–31. Justice Souter had just referred to the petitioner's argument that the personal office of a member of Congress had always existed was a fiction, wherein the petitioner had responded that members of Congress have always had a personal space—an office to do their work. Id. at 29–30.
immense dictum on the part of this Court, isn’t it?
ATTORNEY: I think that’s right.
JUSTICE SCALIA: This Court is sitting back and looking at the ceiling and saying, oh, we can envision not the case before us, but other cases. Maybe it’s one half of one percent or maybe it’s [forty-five] percent, who knows. But we can imagine cases in which this law could be unconstitutional, and therefore, the whole law is unconstitutional. That’s not ordinarily the way courts behave, is it?
ATTORNEY: I should hope not.
JUSTICE SCALIA: Now, we’ve done that in the First Amendment area.
JUSTICE GINSBURG: That is not the case that you are confronting.
ATTORNEY: That’s right.233

Here again the Justices engage in a verbal tug-of-war with the attorney caught in the middle:

JUSTICE SOUTER: So it didn’t deter him. You’re in the position in which it clearly didn’t deter your client. He says, I’m going to spend three times as much as the threshold figure, and there is no empirical evidence that it’s deterring anybody else.

ATTORNEY: Well, Justice Souter, in fact it did deter my client. If you look at his election in its totality, his opponent spent over [five] million.

JUSTICE SCALIA: Do we usually evaluate restrictions on First Amendment rights on the basis of whether the chill that was imposed by the government was actually effective in stifling the right?

ATTORNEY: No, Your Honor.

JUSTICE SCALIA: If the person goes ahead and speaks anyway, is he estopped from saying that the government was chilling his speech nonetheless?

ATTORNEY: Absolutely not, Justice Scalia.

JUSTICE SCALIA: Isn’t that’s what’s going on here?

ATTORNEY: Absolutely.

233. Crawford, supra note 190, at 36–38. Justice Souter had just made the point, agreed to by the respondent, that a voter ID law will always have potential cases of infringement on rights, making it impossible for a facial challenge to always be inappropriate. Id.
JUSTICE SOUTER: Don't we expect a chill argument to at least have a ring of plausibility? And your chill argument is that it is deterring. It didn't deter your client. There is no indication that it would deter anybody else and I have to say I don't see why it would.\(^2\)

Occasionally, though, Justices will eschew subtlety and directly answer another Justice's question or comment on their remark, as in the following three examples:

JUSTICE SCALIA: That's a fairly bright line that you don't have to worry about stepping over the wrong side of it.

ATTORNEY: That's right.

JUSTICE SCALIA: Whereas this one, especially if you adopt a context determination that requires a 1000-page district court opinion, who knows.

JUSTICE BREYER: Is that right? I mean, 1000 is what we have here, is we happen to have three criteria, absolutely clear: Does it mix the candidate? Does it run within [thirty] or [sixty] days before the election? And is it targeted to an electorate? Now, that's clear.\(^3\)

JUSTICE STEVENS: It had never anticipated a private right of action, even though it read the Cannon opinion, which was written some [twenty] years ago? Maybe more than that. I don't remember.

ATTORNEY: Justice Cannon [sic], your opinion there is going to be around for a long time. The scholars are going to have to debate it for years.

JUSTICE SCALIA: There were some later cases that cast a good deal of doubt on whether we would apply Cannon anymore.

JUSTICE STEVENS: But Congress itself has adopted the rule set forth in Cannon.\(^4\)

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\(^2\) *Davis*, *supra* note 197, at 6–7. The petitioner argued that the millionaire’s law would deter self-financed candidates from reaching the $350,000 threshold that allows their challenger to raise more money from individuals, but Justice Souter responded that the petitioner was not deterred by the law in this case and actually planned to spend a million dollars, which the petitioner said was correct. *Id.* at 4, 6–7.

\(^3\) *FEC*, *supra* note 185, at 40. Justice Scalia had just made the point, which was agreed to by the respondent, that it is easy for donors to tell whether or not they are giving money directly to a candidate. *Id.*

\(^4\) *Jackson*, *supra* note 187, at 38–39. The respondent had been arguing
JUSTICE SCALIA: How—I mean, can we do that in a case that comes up here, and just say, “There are good arguments on both sides, it’s quite plausible,” and remand the case without resolving the issue?

(Laughter.)

JUSTICE GINSBURG: They asked the District Court to resolve it. They said the District Court should resolve it in the first instance, and then they would review it, presumably.

ATTORNEY: That’s right, Justice Ginsburg.237

In the exchange below the attorney is ignored altogether, and the first Justice seems to be jarred a little by his colleague’s direct address:

JUSTICE BREYER: So therefore—

JUSTICE SCALIA: Is this a civil rights statute that provides for a private cause of action? I—I want to know what the hypothetical is.

JUSTICE BREYER: I’d—I’d like to—I’m thinking of various civil rights statutes which make it unlawful to describe—to—to discriminate.238

But by far the most hostile interaction between Justices during oral argument occurred between Justices Souter and Scalia,239 with Chief Justice Roberts eventually having to step in:

that the board of education had not anticipated that accepting federal funds would make it vulnerable to retaliatory private action. Id.

237. Transcript of Oral Argument at 14, Scheidler v. Nat’l Org. for Women, Inc., 547 U.S. 9 (2006) (No. 04-1244), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1244.pdf. The National Organization for Women contended that acts of physical violence by anti-abortion protestors equated to extortion under the Hobbs Act, while Scheidler and other protestors argued that such violence was not relevant to the Act because the violence was not used for robbery or extortion. Scheidler, 547 U.S. at 13. The petitioner had been arguing prior to this point in the transcript that the lower circuit court had failed to reach a definite conclusion. Transcript of Oral Argument, supra note 237, at 14.

238. Jackson, supra note 187, at 33–34. Justice Breyer had just put forth a hypothetical situation where a white person was beat up for associating with blacks and asked the attorney if the white individual could sue under civil rights statutes. Id. at 33.

239. Apparently these two Justices have seriously sparred before during oral argument, with one attorney noting during a particularly prolonged exchange between Souter and Scalia that “I almost sat down.” Matt Stearns, High Court Rivals Duel on Kansas Death Law, KAN. CITY STAR, Apr. 26, 2006, at A1.
JUSTICE SOUTER: But Yellowtail—
ATTORNEY: —which involves very—
JUSTICE SOUTER: —is—is an ad of—an obviously sham ad. The problem that we're dealing with—
JUSTICE SCALIA: Mr. Bopp, did—did the opinion refer to—
JUSTICE SOUTER: May—may I finish?
JUSTICE SCALIA: —sham ads?
JUSTICE SOUTER: Excuse me. May I—may I finish my question?
JUSTICE SCALIA: Did the opinion refer to—
CHIEF JUSTICE ROBERTS: Justice Souter.
JUSTICE SOUTER: May I finish my question? The—the—no one is saying that your ad in this case is an obviously sham ad like Yellowtail.240

Taking into account the exchange above, Cooper sees oral argument as a time when the Justices may “act out publicly some of the usually unseen conflicts within the Court.”241 He divides such conflicts into two categories: (1) “matters of the moment” or (2) “part of an ongoing pattern.”242

In short, Justices appear to use oral argument very little for information seeking. Often their questions are not very inquisitive, and most of the time they are speaking in statements rather than questions. True, some of those statements request information or are interpreted by the attorneys as questions, but those are not the norm. Instead, Justices seek to make their viewpoints known, likely to signal to other Justices how they are leaning in a case and also in a possible attempt to influence their colleagues on the bench.

240. Transcript of Oral Argument at 15–16, Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) (No. 04-1581), available at http://www.supremecourtus.gov/oral-arguments/argument-transcripts/04-1581.pdf. Wisconsin Right to Life preemptively sued the FEC due to their intention to use funds to run televised political ads within sixty days of an election, a violation of federal law. Wis. Right to Life, Inc., 546 U.S. at 410–411. Justice Souter was questioning the petitioner as to how this case was different than a similar case the Court had ruled on. Transcript of Oral Argument, supra note 240, at 15–16.
241. COOPER, supra note 45, at 72.
242. Id.
B. Analytical Findings

1. 1963–1965

The sentence type appearing most frequently in the 1960s cases was that of a declaration as Justices spent 44.1 percent of the time not asking any type of question at all (see figure 3).

![Figure 3. Sentence-type distribution in percentages, 1963–1965.](image)

In fact, by dividing the sentence types into two categories—information seeking (1–3) and non-information seeking (4–5), over half of the time (51.9 percent) Justices did not appear to be seeking information during oral argument in the 1960s. The average number of words uttered by a Justice per side in a case in the 1960s cases was 200.

To determine what factors are causing information seeking during oral argument, ordinary least squares (OLS) regression analysis was performed first with information-seeking scores as the dependent variable (see table 2 in Appendix I). Three models compete for the best fit of the data (highest adjusted \(R^2\)): two, three and five. For information

243. Ordinary least squares (OLS) regression is the basic form of regression analysis wherein a linear relationship between the independent (causal) and dependent (reactive) variables is assumed. OLS regression predicts a value for each dependent variable data point based on the existing correlational relationship between the independent and dependent variables. Then, OLS regression run a line through the data points, minimizing the difference between the predicted and actual values of the dependent variable.
seeking, three of the legal model predictors—attorney experience, an attorney from the solicitor general's office, and sides with an amicus party arguing during oral argument—reached statistical significance (p < 0.05) in every model. Whether or not a side was the petitioner (or appellant) in a case approached, but did not reach statistical significance.

The substantive contributions of these variables, however, varied somewhat. For example, for every additional case one side's attorney had argued before the Supreme Court, the mean information-seeking scores for that side decreased by between 0.09 and 0.11, depending on the model examined. Thus, an attorney representing a side for whom this appearance made his$^{244}$ tenth appearance before the court could expect, on average, a decrease on the information-seeking scale of 0.9–1.1, meaning that Justices were more likely to seek information from more experienced attorneys after controlling for other potential causes of information seeking. For sides that included an attorney from the U.S. solicitor general's office, an increase in the information-seeking score occurred, ranging from 0.54–0.68. Hence, Justices in the 1960s cases tended to engage in less information seeking with solicitor general attorneys than other attorneys. Finally, when a side had an amicus party arguing with it in oral argument, information-seeking scores increased, on average, from 0.97–1.29, as Justices engaged in less information seeking with sides aided by amicus parties. This is interesting because it appears that during the 1960s, Justices were not seeking additional specific information from oral amici, which is in contrast to the findings of Collins$^{245}$.

Regarding ideology, both the raw Martin-Quinn scores and the absolute values of those scores reached statistical significance (p < 0.01), whereas the dummy variable indicating ideological direction based on the Martin-Quinn scores was not statistically significant (1=conservative and 0=liberal). Thus, it is both the direction of a Justice' ideology as well as how ideological he is that matters in predicting information seeking. Substantively, for every Martin-Quinn unit that a Justice moved to the right (toward a higher,

244. There were no female attorneys included in the sample of 1960s First Amendment-related cases.
245. Collins, supra note 159.
positive value), information scores decreased by approximately 0.19, evidencing that more conservative Justices engaged in more information seeking. Looking at the absolute value of ideology, as values increased, indicating increasing partisanship, information-seeking scores decreased by 0.30. Thus more ideologically extreme Justices engaged in more information-seeking behavior. The ideological match variable was not significant. For the attitudinal model, no Justice abstained from speaking in all twelve cases, seemingly indicating that no one was purely driven by ideology, though Justice Clark only spoke to seven of the twenty-four (29.2 percent) parties he encountered.

An examination of Justice-specific control variables shows that all three—perceived qualifications, years on the Supreme Court, and law professor experience—were statistically significant predictors in most or all of the models (p < 0.05). The results are contradictory for interpreting the substantive impact of the perceived qualifications, as in models 2 and 3 the sign on the coefficient is negative, meaning more qualified Justices engage in more information seeking (i.e., have lower information-seeking scores), but the sign on model 5 is positive, indicating just the opposite: more qualified Justices engaged in less information seeking. More specifically, for example, in model 5, an increase of 0.5 units on the 0–1 perceived qualification scale results in an increase information-seeking score of 0.99, meaning that Justices who were perceived as more qualified in the Segal ratings were less likely to engage in information seeking. However, looking at model 2, an increase of 0.5 on Segal’s 0–1 perceived qualification scale leads to a substantial decrease in information-seeking scores of 1.81, with more “qualified” Justices seeking more information during oral argument.

Fortunately the Supreme Court experience variable is consistent. An examination of model 2 shows that for every ten years on the bench, information-seeking scores decreased by 0.4 as more experienced Justices engaged in more information seeking. Finally, Justices who had experience teaching law before coming to the Supreme Court experienced a decrease in information-seeking scores, ranging from 0.45 to

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246. Perceived Qualifications and Ideology of Supreme Court Nominees, supra note 169.
Thus, former law professors engaged in more information seeking, at least on the surface.

Next, ordinary least squares regression was performed with the average word count per side per justice as the dependent variable (see table 3 in Appendix I). Regression of word counts on the same variables shows some changes in the predictors that reach statistical significance. Two different types of regression were performed. Arguably, models 3, 5, and 6 had the best fit. For the legal model variables, attorney experience, whether or not counsel was from the solicitor general’s office, and being the petitioner in a case did not matter. Whether or not a side had an amicus party was statistically significant in two of the models (p < 0.05), and approached statistical significance in four more models (p < 0.10). In the two models where the amicus party variable did achieve statistical significance, having an amicus party on one’s side during oral argument led to an average increase in word counts per Justice of 249.4 to 284.5 words. Thus, Justices want to talk more when an amicus party is involved. This is understandable given the fact that the court has invited an amicus party for a specific reason. However, coupled with the findings regarding information-seeking scores, in the 1960s, Justices seemed to be inviting amicus parties to argue before the court in order for the Justices to make more declarations to them, but not engage in higher levels of information seeking.

Ideology was a statistically significant predictor of word counts in all three forms: raw Martin-Quinn scores, absolute value of Martin-Quinn scores, and dummy variable of Martin-Quinn scores. With regard to the plain ideology variable (raw Martin-Quinn scores), for every Martin-Quinn unit that a Justice moved to the right (toward a higher, positive value), word counts decreased from between 32.6 to 36.7 words (depending on the specific model), evidencing that more conservative Justices spoke less on the Warren Court in this time period. For the absolute value of ideology, looking at the model with the best fit of the two (model 8), an increase in one unit led to a decrease in words of forty-seven, showing that more ideologically extreme Justices spoke less. And in examining the ideology dummy variable, conservative Justices spoke, on average, 114.2 words more per side than liberal Justices. Again, the ideology match variable was not
significant; and no justice refrained completely from speaking in all twelve cases, indicating a lack of support for the attitudinal model.

Surveying the three Justice-specific variables in the three best regression models indicates that years on the court and perceived qualifications were always statistically significant ($p < 0.05$), and law professor experience ranged from insignificant to approaching significance to significant, depending on the model. At times, both the years on the court and perceived qualifications variables exhibited a nonlinear relationship as quadratic or logged versions of the variables achieved statistical significance when the linear version did not. For the perceived qualifications variable, using model 8 because of its straightforward interpretation, an increase of 0.5 units on the Segal scale resulted in an increased word count of 145.9. Therefore, Justices perceived as more qualified spoke more during oral argument in the 1960s. Increasing the amount of time a Justice spent on court also led to higher word count totals. Looking at model 5, on average, a one year increase of Court experience decreases word counts by nearly twenty-five words, though the nonlinear nature of the variable makes this only a rough approximation as the line will flatten out as experiences increases. Finally, in model 3, having law professor experience actually decreased the average word count by 178.5 words ($p < 0.05$), but did not achieve statistical significance in models 5 and 6.

Next, probit regression was performed in order to see whether the behavior of Justices during oral argument in the 1960s can predict their eventual vote on the merits (see table 4 in Appendix I). In none of the models did information-seeking scores or word counts achieve statistical significance. What did matter was whether or not a Justice's ideology matched the ideology of a side in a case, as well as whether or not a side was the petitioner. Not surprisingly, sides that did not match a Justices' ideology had a lower probability of earning that Justice's vote. Being a petitioner in the 1960s,

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247. Probit regression is a nonlinear regression model used when the dependent variable is binary (can only take two values). Probit regression results in predicted values ranging from "0" to "1," or, the probability of something occurring. Probit regression uses standard normal cumulative probability distribution functions to make calculations.
however, meant an increased probability of getting Justices to vote your way.

2. 2004–2009

Turning to the Rehnquist and Roberts Courts, Justices in the 2000s engaged in even less information seeking (see figure 4) as just over two-thirds of the sentences of Justices were declarations and only a quarter of sentences were some type of legitimate information-seeking question (types 1–3).

**Figure 4.** Sentence-type distribution in percentages, 2004–2008.

**Figure 5.** Comparison of sentence-type percentages, 1960s v. 2000s.
A comparison of the two decades (see figure 5) shows a significant shift toward less information seeking in the 2000s. The percentage of open-ended questions (type 1) and bipolar questions (type 3) decreased by 28.1 percent and 58.3 percent respectively, whereas rhetorical questions (type 5) and declarations (type 6) increased by 100 percent and 56.2 percent respectively.

![Figure 6. Comparison of mean information-seeking scores, 1960s v. 2000s.](image)

When creating an average for each time period (see figure 6), a clear pattern emerges with the 1960s Justices averaging a 3.9 (approximately a leading question for each sentence uttered), and the 2000s Justices averaging a 4.8 (nearly one rhetorical question for each utterance). A difference of means test confirms that this gap is statistically significant ($p < 0.0001$).
Comparison of the average for each time period (see figure 7) reveals the 1960s courts averaged using approximately 30.1 percent fewer words per Justice per side than the 2000s courts. This difference is statistically significant (p < .0001). This difference is not due to longer times for oral argument in the 2000s. On the contrary, oral arguments times in the 1960s averaged 24.8 more minutes per case (see figure 8), a difference that was statistically significant in a difference of means test (p < 0.01).
Therefore, with 41.6 percent more speaking time in the 1960s, Justices spoke 30.1 percent less than their counterparts in the 2000s. Overall then, compared to their 1960s counterparts, Justices from the 2000s spoke more and engaged less in information-seeking behavior. Unlike the 1960s Justices, a look at the difference between which side for whom a Justice voted and both the information-seeking scores and word counts reveals that Justices in the 2000s treated the side they would eventually vote for differently than the side they would vote against, as can be seen in figures 9 and 10. Whereas Justices in the 1960s averaged 0.21 higher on the information-seeking scale for sides they eventually opposed as compared to the sides they eventually supported (a higher number meaning less information seeking), Justices from the 2000s averaged 0.45 higher on the information-seeking scale for sides they eventually voted against—over double the difference of the 1960s court. And while 1960s Justices actually spoke, on average, about six words more to the side they would vote for, Justices in the 2000s averaged speaking eighty-nine words more to the side they would vote against.

![Figure 9. Mean information-seeking scores per side in a case, 1960s and 2000s.](image)
Noticeably absent from the list of Justices in the Rehnquist and Roberts Courts is Justice Clarence Thomas. In all twenty-three cases coded from the 2000s, the notedly reserved Justice Thomas did not speak a single word. He also appears to be the most partisan Justice currently on the Court, with a Martin-Quinn score for that time period ranging from 4.097 to 4.228, significantly higher than the next most conservative Justice—Scalia at 2.769 in 2006—and further from the center than the most liberal Justice—Stevens at −2.57 in 2006. This would appear to indicate at least one Justice that fits the attitudinal model in that he does not demonstrate the need to gain additional information during oral argument, nor does he seek to act strategically to try and influence his fellow Justices in that venue. On the other hand, Chief Justice Roberts has commented that Justice Thomas’s oral argument silence is due to his belief that that forum is for the attorneys to speak their cause.248

248. Chief Justice John G. Roberts Jr., Question and Answer Session Following an Address at Brigham Young University (Oct. 23, 2007). There are numerous theories as to why Justice Thomas is so taciturn during oral argument. As noted previously, Justice Thomas has stated that oral argument is “not the real meat” of the role of the Supreme Court, Mauro, supra note 59, at 10, and has indicated that oral argument holds little value since, in his opinion, ninety-nine percent of the time Justices have already made up their mind before oral argument. Rombeck, supra note 60. Directly addressing his courtroom silence Thomas simply stated: “If I wanted to talk a lot, I would be on the other side of the bench.” David Lehrman, The New Order: As Alito Takes His Seat, the Justices Get a Change of Scenery, LEG. TIMES, Mar. 6, 2006, at 60.
In order to control for legal, ideological and Justice-specific factors, ordinary least squares regression was performed on the data from the 2000s cases. First, the average information-seeking score was used as a dependent variable (see table 5 in Appendix I). Models two and four achieved the best fit with an adjusted $R^2$ score at 0.18 or slightly higher. Turning first to variables related to legal factors, attorney experience and whether or not an attorney was from the solicitor general’s office did not achieve statistical significance. Whether or not a side had an amicus attorney did achieve statistical significance ($p < 0.05$) in four of the models, and approached statistical significance in the other two models ($p < 0.10$). Hence, having an amicus attorney on a side resulted in a 0.22–0.26 drop in information-seeking scores (meaning more information seeking occurred), a finding that is hardly substantive though statistically significant. Whether or not a side was the petitioner was statistically significant in all six models ($p < 0.01$), though likewise not very substantive a finding, with information-seeking scores reduced by between 0.24 and 0.26 for petitioners. Thus, Justices are engaging in higher levels of information seeking with petitioners and those joined by amicus parties, but not by much.

Ideology only reached statistical significance in one of the three forms of ideology—absolute value of ideology ($p < 0.01$). In model 4 an increase in one unit of ideology (or Martin-Quinn unit) resulted in an increase in information-seeking scores by 0.4. Therefore, more ideologically extreme Justices engaged in less information seeking in the 2000s. The direction of ideology—liberal or conservative—does not appear to matter for the 2000s Justices. Ideological mismatch was not statistically significant. And, as noted above, Justice Thomas's complete lack of participation in the twenty-three cases studied indicates possible support for the attitudinal model for at least one Justice.

Looking at Justice-specific factors, perceived qualifications and years on the Court did achieve statistical significance in the two best models of fit (models 2 and 4), and law professor experience was statistically significant in all but model 6. The nonlinear nature of the relationship makes interpretation of the cubic perceived qualification variable difficult. Suffice to say, the sign of the coefficient is negative,
meaning an increase in perceived qualifications leads to more information seeking (lower information-seeking scores). In model 2, for every additional year on the bench, information-seeking scores increased by 0.15. Thus more experienced Justices sought less information during oral argument. Likewise in model 2, Justices with law professor experience experienced a drop in information-seeking scores by 0.97, meaning that Justices who spent time teaching law were more likely to ask questions with more information-seeking qualities.

3. Comparison

a. Information-Seeking Scores

Comparing the 1960s predictors of information seeking during oral argument to 2000s predictors highlights some interesting differences between the two decades (see table 6). In the 1960s there was evidence supporting the legal, strategic, and behaviorist models, and no evidence supporting the attitudinal model. However, four decades later the strength of the legal and strategic models decreased while the behaviorist model's evidence stayed the same. Furthermore, in the form of at least one Justice, evidence for the attitudinal model was found.

<table>
<thead>
<tr>
<th>1960s Info-Seeking Score Predictors</th>
<th>2000s Info-Seeking Score Predictors</th>
</tr>
</thead>
</table>
| Legal Model
  Attorney Experience
  Solicitor General Attorney
  Amicus Party
  Petitioner
| Legal Model
  Attorney Experience
  Solicitor General Attorney
  Amicus Party* 
  Petitioner
|
| Strategic Model
  Ideology (Martin-Quinn Scores)
  Ideological Extremity (Ab. Value)
  Ideological Direction
  Ideology Mismatch
| Strategic Model
  Ideology (Martin-Quinn Scores)
  Ideological Extremity (Ab. Value)* 
  Ideological Direction
  Ideology Mismatch
|
Therefore, to specifically answer hypotheses put forth in this study as they relate to information-seeking scores, H1a (attorney experience) is confirmed with the 1960s data, but not with the 2000s. Likewise, H1b (solicitor general attorney) is confirmed with the 1960s data, but not data from the 2000s. For H1c (amicus party), both findings from the 1960s and 2000s confirm the hypothesis. And looking at H1d (petitioner), data from the 1960s does not support the hypothesis while the 2000s data does.

Turning to the strategic model hypotheses, H2a (ideology score) is confirmed with at least one of the three measures of ideology in both decades. However, H2b (ideology match) is not supported in either decade. For the attitudinal model hypothesis, no support is found in the 1960s findings, but H3 (no verbal activity) is supported with the 2000s data. Finally, the most successful model, in that all of its hypotheses were supported in both datasets, was the behavioralist model. Thus, H4a (perceived qualification), H4b (time on Court), and H4c (professor experience) are all confirmed.

An examination of OLS regression on the 2000s word counts of the Justices indicates some changes in significant predictors from the predictors of information-seeking scores (see table 7 in Appendix I). Models 3, 4, and 5 appear to have the best fit. Not a single legal variable reached statistical significance after controlling for ideological and Justice-specific factors. Ideology scores achieved statistical significance in the quadratic form in model 3 and in the absolute value form in model 4 and 5, and approached statistical significance in the dummy variable form in models
6 and 7. Using model 5 as appears to have the best fit (adjusted $R^2 = 0.111$, SER = 206.92), for every one-unit increase of ideology, word counts increased by 59.3. Thus, more ideologically extreme Justices, on average, spoke more during oral argument in the 2000s. Again whether or not a party’s ideology matched a Justice’s ideological leanings did not matter. Regarding the attitudinal model, Justice Thomas’s lack of participation could add support to such a theory.

It was Justice-specific variables, however, that seemed to perform the brunt of the explanatory work in the regression models. Perceived qualifications and law professor experience were statistically significant in every model. Using model 5, for every 0.5 unit increase in perceived qualifications, average word counts per side increased by nearly 202 words, a substantive increase showing that more “qualified” Justices spoke more during oral argument in the 2000s. Also, Justices with law professor experience spoke, on average, sixty-six words more per side in a case than their counterparts who had not taught law. The variable for years on the Supreme Court achieved statistical significance in the three models with the best fit (models 3–5). Using model 5, for every ten additional years on the court, word counts increased by about twenty-four, a modest finding at best. Thus, for the 2000s Justices, it is the more “qualified,” more experienced, ex-law professors who are more ideologically extreme who, on average, speak more during oral argument.

b. Word Count Scores

A comparison of the predictors of word counts in the 1960s versus the 2000s likewise indicates shifts in which models of judicial behavior and decision making carry the most weight (see table 8).

249. $R^2$ is the proportion of a dependent variable’s variance that is explained by its predictors (independent variables). Adjusted $R^2$ is a modified version of $R^2$ that takes into account the addition of predictors and prevents increased numbers of independent variables from artificially inflating the score. Adjusted $R^2$ scores generally range from 0–1, with scores closer to 1 indicating a better fit of the model to the data. The standard error of the regression (SER) estimates the standard deviation of a model’s regression error. It is also a measure of fit, though its units are dependent upon the units of the dependent variable. Roughly, the lower the SER, the better the fit of the model to the data.
Table 8. Comparison of predictors of word counts in the 1960s v. 2000s.

<table>
<thead>
<tr>
<th>1960s Word Count Predictors</th>
<th>2000s Word Count Predictors</th>
</tr>
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<tbody>
<tr>
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<tr>
<td><strong>Amicus Party</strong></td>
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</tr>
<tr>
<td>Petitioner</td>
<td>Petitioner</td>
</tr>
<tr>
<td>Strategic Model</td>
<td>Strategic Model</td>
</tr>
<tr>
<td><strong>Ideology (Martin-Quinn Scores)</strong></td>
<td><strong>Ideology (Martin-Quinn Scores)</strong></td>
</tr>
<tr>
<td>Ideological Extremity (Ab. Value)</td>
<td>Ideological Extremity (Ab. Value)</td>
</tr>
<tr>
<td>Ideological Direction</td>
<td>Ideological Direction</td>
</tr>
<tr>
<td>Ideology Mismatch</td>
<td>Ideology Mismatch</td>
</tr>
<tr>
<td>Attitudinal Model</td>
<td>Attitudinal Model</td>
</tr>
<tr>
<td>No oral argument behavior</td>
<td>No oral argument behavior</td>
</tr>
<tr>
<td>Behavioralist Model</td>
<td>Behavioralist Model</td>
</tr>
<tr>
<td><strong>Perceived Qualifications</strong></td>
<td><strong>Perceived Qualifications</strong></td>
</tr>
<tr>
<td><strong>Years on the Supreme Court</strong></td>
<td><strong>Years on the Supreme Court</strong></td>
</tr>
<tr>
<td><strong>Law Professor Experience</strong></td>
<td><strong>Law Professor Experience</strong></td>
</tr>
</tbody>
</table>

NOTE: bold=statistically significant; *not statistically significant in every model.

The legal model, having only minimal support from the 1960s data, has no support from the 2000s data. The strategic model loses some support, but still retains a fair degree of evidence for its validity. The attitudinal model is supported by no evidence in the 1960s, but by some evidence in the 2000s. And the behavioralist model retained and even slightly increased its strong support from the 1960s to the 2000s. Obviously there are some large differences between the predictors of information-seeking scores and the predictors of word counts. That indicates some divergence in the concepts and also shows that one may be a better operationalization of information seeking than the other.

Specifically looking at this study’s hypotheses in light of word counts as a measure of information seeking, H1a (attorney experience), H1b (solicitor general attorney), and H1d (petitioner) are rejected. Hypothesis 1c (amicus party) is supported by the 1960s findings, but not supported by the
2000s data. For the strategic model hypotheses, H2a (ideology score) is supported by both decades, but H2b (ideology mismatch) is not supported by the data from either decade. For the attitudinal model's hypothesis—H3 (no verbal activity)—support emerges from the 2000s findings, but not from the 1960s findings. And all three of the Justice-specific or behavioralist model hypotheses—H4a (perceived qualifications), H4b (time on Court), and H4c (professor experience)—are supported in both decades' data.

Turning to predictors of Justice voting in the 2000s, unlike the data from the 1960s, information-seeking (or sentence type) scores and word counts were statistically significant predictors of how a Justice will vote, with word counts continuing to be significant even after controlling for other predictors (see table 9 in Appendix I). As noted in models 2 and 3 of the probit regression of 2000s vote outcomes, attorney experience (in the quadratic form), whether or not an amicus attorney argues on a side, whether or not a side is the petitioner, and whether or not the ideological leanings of a side match a Justice are all significant predictors of Justices' voting patterns in cases. Whether or not an attorney from the solicitor general's office argues on a side does not appear to matter. Thus both legal and ideological factors appear to influence judicial decision making.

As information-seeking scores increase (and therefore information seeking decreases), the probability of a Justice supporting that particular side decreases. Similarly, as word counts increase the probability of a Justice voting for that side decreases. Given the difficulty of interpreting probit coefficients, figures 11 and 12 and table 10 show how probabilities change for the change in values of both variables. A party in a case has above a 0.50 probability of prevailing as long as a Justice has an information-seeking score of less than 4.5. But once a Justice reaches an average information-seeking score of 4.5 or higher, the probability of prevailing in a case drops below 0.50.
Figure 11. Probability of a 2000s Justice supporting a side as information-seeking scores change.

Figure 12. Probability of a 2000s Justice supporting a side as word counts change.

Much like voting and information-seeking scores, a linear relationship appears to exist between the probability of a Justice supporting a side in a case and the number of words he or she speaks to that side. When very few words are
spoken probability is high at above 0.60. However, when Justices become extremely verbose probability drops below 0.20.

**Table 10.** Predicted probabilities of Justice support based on information-seeking scores and word counts.

<table>
<thead>
<tr>
<th>Information-seeking Score</th>
<th>Probability of Justice Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0.7817</td>
</tr>
<tr>
<td>2</td>
<td>0.7102</td>
</tr>
<tr>
<td>3</td>
<td>0.6294</td>
</tr>
<tr>
<td>4</td>
<td>0.5424</td>
</tr>
<tr>
<td>5</td>
<td>0.4533</td>
</tr>
<tr>
<td>6</td>
<td>0.3665</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Word Count</th>
<th>Probability of Justice Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>68 (1 standard deviation below mean)</td>
<td>0.5957</td>
</tr>
<tr>
<td>287 (mean)</td>
<td>0.4694</td>
</tr>
<tr>
<td>507 (1 standard deviation above mean)</td>
<td>0.3493</td>
</tr>
</tbody>
</table>

**NOTES:** Based on a baseline model of information-seeking score = mean (4.80) and word count = mean (287.4), mean word count probability does not equal 0.5 given the vote outcomes of the cases selected.

Thus, the message of the findings is that if 2000s Justices were asking questions of a party, but not too many, there was a good chance the Justice would eventually vote for that side. On the other hand, when a Justice made lots of statements to a side, that side would likely not get the Justice’s vote.

**Table 11.** Comparison of predictors of Justices’ votes, 1960s v. 2000s.

<table>
<thead>
<tr>
<th>1960s Voting Predictors</th>
<th>2000s Voting Predictors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Info-seeking Score</td>
<td><strong>Info-seeking Score</strong>*</td>
</tr>
<tr>
<td>Word Count</td>
<td><strong>Word Count</strong></td>
</tr>
<tr>
<td>Attorney Experience</td>
<td><strong>Attorney Experience</strong>*</td>
</tr>
<tr>
<td>Solicitor General Attorney</td>
<td>Solicitor General Attorney</td>
</tr>
<tr>
<td>Amicus Party</td>
<td><strong>Amicus Party</strong></td>
</tr>
<tr>
<td>Petitioner</td>
<td>Petitioner</td>
</tr>
<tr>
<td>Ideology Mismatch</td>
<td>Ideology Mismatch</td>
</tr>
</tbody>
</table>

**NOTES:** bold=statistically significant; *not statistically significant in every model.
A look at the differences between statistically significant predictors of Justices' vote on the merits in the 1960s and the 2000s indicates an increase in variables that appear to matter (see table 11).

In the 1960s, even after controlling for whether or not a petitioner's ideology matched that of a Justice or not, being a petitioner was a statistically significant predictor of an individual Justice's votes, lending some support to the legal model. Additionally, evidence for the attitudinal model could be found in the fact that whether a party had the same ideological orientation as a Justice was also a statistically significant predictor of voting. Both of these predictors remained important in the 2000s, but three predictors related to the legal model—attorney experience, amicus party and petitioner—became statistically significant. More recent Justices are telegraphing their future voting via word counts, even after controlling for other predictors of voting. Hence, H5a (information-seeking scores predict voting) and H5b (word counts predict voting) are supported by the 2000s data, but not by the 1960s findings.

Lastly, as previously noted, difference of means tests confirmed that there was a statistical difference between both information-seeking scores and word counts between the 1960s and 2000s, with the more recent Justices engaging in less information seeking and speaking more during oral argument. However, difference of means tests do not control for other factors. Thus, to make certain that the differences were real and not being caused by other variables, the data from the two time periods was combined and regression was performed with the addition of a dummy variable for the 1960s. As can be seen in table 12 in Appendix I, even after controlling for other variables, the 1960s show a statistically significant decrease in information-seeking scores ranging from 0.75 to 0.84 in every attempted model. Thus, H6a (information-seeking scores higher in 2000s) is confirmed.

Regression on combined word counts revealed the 1960s dummy variable to be statistically significant in four of the five models after controlling for other predictors, with Justices in the 1960s averaging about seventy-five fewer words spoken per side in a case (see table 13 in Appendix I). Therefore, H6b (word counts higher for 2000s) is supported. Because of the skewed distribution of cases, with nearly two-
thirds coming from the 2000s, the combined data regressions are not useful for examining other patterns among predictors as the results would be disproportionately weighted to the 2000s data.

VI. CONCLUSION

The findings of this study are threefold. First, the function of oral argument appears to have shifted from the 1960s to present. Whatever information-seeking value oral argument had for the court in the 1960s, that value has diminished as Justices use the oral argument time less for asking questions and, more ostensibly, for speaking. Second, while it is normal for scholars to stake out a school of thought and strenuously defend it, the picture painted by these findings on the predictors of judicial behavior during oral argument is not nearly as black-and-white as favoring only one judicial behavior and decision-making model to the exclusion of the other two. It appears that legal factors matter to the Justices, both in influencing their behavior and their eventual vote on the merits. Likewise, Justices' ideological leanings appear to lead them to interact differently with differing parties, pointing to the presence of strategic behavior.

Furthermore, for apparently at least one Justice, and maybe to a lesser extent for other Justices in particular cases, the attitudinal model has merit in that information seeking is not even attempted, presumably because ideology dictates a Justice's decisions and further information is unnecessary. Additionally, ideology plays a key role in predicting a Justice's final vote. These findings coincide with arguments made by other scholars. Cherry and Rogers contended:

[T]rying to determine whether the legal or attitudinal model is most accurate may be asking the wrong question. Relying on any single model may necessarily neglect elements of truth in another model. A better approach might be to look for a method of incorporating all existing models of Supreme Court prediction and decisionmaking.250

Likewise, noted Court scholar Lee Epstein came to a similar conclusion following the results of the Supreme Court

250. Cherry & Rogers, supra note 7, at 1157.
Forecasting Project:

Political scientists concerned with explaining the range of judicial decisions can no more afford to neglect the law than law professors can ignore politics. At the least, omission of either amounts to underspecification; at most it serves to perpetuate myths about judging in both disciplines: that it is a phenomenon largely about politics or law. It is about both, and only by characterizing it as such—perhaps through deeper collaborations between law and political science—are we likely to develop truly accurate accounts of how Justices operate.\textsuperscript{251}

In addition, this study indicates that the behavioralist model deserves increased consideration and testing by scholars as the model with the strongest support from this data.

Third, at least in the current Court, Justices do tip their hands in oral argument as to which side they favor. While there are exceptions, in general, the less information seeking a Justice exhibits to a side, and the more a Justice speaks to or with a side, the less likely that Justice is to support that side in his or her eventual vote. This may allow for more accurate predictions of case outcomes following oral argument.

This study, of course, has limitations that can provide some direction for future research in this area. The case selection for this study was not random, limiting the generalizability of these findings. It is possible that a random selection of cases could have outcomes different enough to change this study's conclusions. Additionally, the cases selected were all arguably high in ideological salience given they focused on the core Constitutional principles of the freedoms of speech and the press. Wrightsman found a noted difference in the amount of questioning Justices engaged in with the parties they would eventually oppose when comparing cases where ideology was salient to cases where it was not.\textsuperscript{252} Future research could easily remedy this. What future research will have a harder time remedying is the fact that even a large, random sample of cases is limited to the two time periods in which transcripts note which Justice is speaking. Thus, findings are potentially influenced by idiosyncrasies of the 1963–1965 Warren and 2004–present

\textsuperscript{251} Epstein, supra note 9, at 757–58.

\textsuperscript{252} WRIGHTSMAN, supra note 103.
Another limitation of this study was that gender was not taken into account. It is possible that the gender of the attorneys and the Justices interact in significant ways, resulting in omitted variable bias in the present study. The texts which were coded are only as accurate as the transcriber, and potentially leaving off question marks or placing periods where a comma or semicolon should have been could somewhat affect the data. Finally, studying the complexities of face-to-face communication, where much meaning is communicated via nonverbal behaviors such as facial expressions and tone, with mere transcripts is problematic in measuring meaning, particularly in identifying questions that do not appear to be questions on paper, and vice versa. Sacrificing some accuracy was deemed a necessary evil, however, in order to ensure some reliability to the study. If a reliable method of measuring information seeking, taking into account spoken communication, could be devised, such a methodology would likely be a more accurate measure than the one used here. In conclusion, oral argument provides a window into how current Justices are thinking on a particular case and appears to function as a venue for Justice to signal to each other their possible voting intentions as well as attempt to influence their companions on the Bench in their eventual vote.
### Table 2. OLS regression of 1960s information-seeking score on predictors.

<table>
<thead>
<tr>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
<th>Model 5</th>
<th>Model 6</th>
<th>Model 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney</td>
<td>-0.11t</td>
<td>-0.10t</td>
<td>-0.10t</td>
<td>-0.09t</td>
<td>-0.10t</td>
<td>-0.10t</td>
</tr>
<tr>
<td>Experience</td>
<td>(0.03)</td>
<td>(0.03)</td>
<td>(0.03)</td>
<td>(0.03)</td>
<td>(0.03)</td>
<td>(0.03)</td>
</tr>
<tr>
<td>Sol. General</td>
<td>0.62†</td>
<td>0.68†</td>
<td>0.68†</td>
<td>0.62†</td>
<td>0.54†</td>
<td>0.62†</td>
</tr>
<tr>
<td>Attorney</td>
<td>(0.19)</td>
<td>(0.19)</td>
<td>(0.19)</td>
<td>(0.17)</td>
<td>(0.20)</td>
<td>(0.20)</td>
</tr>
<tr>
<td>Amicus Party</td>
<td>1.29†</td>
<td>1.06†</td>
<td>1.07†</td>
<td>0.97†</td>
<td>1.09†</td>
<td>1.22†</td>
</tr>
<tr>
<td>(0.45)</td>
<td>(0.42)</td>
<td>(0.43)</td>
<td>(0.45)</td>
<td>(0.39)</td>
<td>(0.45)</td>
<td>(0.43)</td>
</tr>
<tr>
<td>Petitioner</td>
<td>0.28*</td>
<td>0.24*</td>
<td>0.25*</td>
<td>0.23</td>
<td>0.28*</td>
<td>0.28*</td>
</tr>
<tr>
<td>(0.15)</td>
<td>(0.14)</td>
<td>(0.15)</td>
<td>(0.14)</td>
<td>(0.16)</td>
<td>(0.16)</td>
<td></td>
</tr>
<tr>
<td>Ideology</td>
<td>0.07</td>
<td>0.04</td>
<td>0.05</td>
<td>0.06</td>
<td>0.08</td>
<td>0.05</td>
</tr>
<tr>
<td>(0.14)</td>
<td>(0.13)</td>
<td>(0.13)</td>
<td>(0.08)</td>
<td>(0.15)</td>
<td>(0.14)</td>
<td></td>
</tr>
<tr>
<td>Ideology</td>
<td>-0.21t</td>
<td>-0.21t</td>
<td>-0.19t</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>(0.06)</td>
<td>(0.06)</td>
<td>(0.05)</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td></td>
</tr>
<tr>
<td>Abs. Value of Ideology</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Logged Abs. Value of Ideology</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Ideology Dummy</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Perceived Qual.</td>
<td>0.23</td>
<td>-3.62†</td>
<td>-2.83†</td>
<td>0.88†</td>
<td>1.98†</td>
<td>0.42</td>
</tr>
<tr>
<td>(0.29)</td>
<td>(1.20)</td>
<td>(1.20)</td>
<td>(0.29)</td>
<td>(0.39)</td>
<td>(0.28)</td>
<td>(1.25)</td>
</tr>
<tr>
<td>Perceived Qual.</td>
<td>3.18†</td>
<td>2.78†</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>2.90†</td>
</tr>
<tr>
<td>(0.96)</td>
<td>(0.98)</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>(1.03)</td>
<td></td>
</tr>
<tr>
<td>Years on Sup. Court</td>
<td>-0.03t</td>
<td>-0.04†</td>
<td>—</td>
<td>0.02*</td>
<td>-0.06</td>
<td>-0.01</td>
</tr>
<tr>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.04)</td>
<td>(0.01)</td>
<td>—</td>
<td></td>
</tr>
<tr>
<td>Years on Sup. Court^2</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>0.003†</td>
<td>0.003†</td>
<td>—</td>
</tr>
<tr>
<td>(0.001)</td>
<td>(0.001)</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td></td>
</tr>
<tr>
<td>Logged Years on Court</td>
<td>—</td>
<td>—</td>
<td>-0.30†</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>(0.08)</td>
<td>(0.08)</td>
<td>(0.08)</td>
<td>(0.08)</td>
<td>(0.08)</td>
<td>(0.08)</td>
<td>(0.08)</td>
</tr>
<tr>
<td>Professor</td>
<td>-0.54†</td>
<td>-0.45†</td>
<td>-0.69†</td>
<td>0.31</td>
<td>-0.17</td>
<td>0.04</td>
</tr>
<tr>
<td>Experience</td>
<td>(0.22)</td>
<td>(0.22)</td>
<td>(0.25)</td>
<td>(0.31)</td>
<td>(0.24)</td>
<td>(0.16)</td>
</tr>
<tr>
<td>Constant</td>
<td>4.06†</td>
<td>4.99†</td>
<td>4.88†</td>
<td>3.35†</td>
<td>2.31†</td>
<td>3.75†</td>
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<td>(0.33)</td>
<td>(0.42)</td>
<td>(0.41)</td>
<td>(0.32)</td>
<td>(0.42)</td>
<td>(0.33)</td>
<td>(0.42)</td>
</tr>
<tr>
<td>N</td>
<td>165</td>
<td>165</td>
<td>165</td>
<td>165</td>
<td>165</td>
<td>165</td>
</tr>
<tr>
<td>F-statistic</td>
<td>5.56†</td>
<td>6.32†</td>
<td>6.60†</td>
<td>6.09†</td>
<td>6.28†</td>
<td>4.41†</td>
</tr>
<tr>
<td>Adjusted R^2</td>
<td>0.166</td>
<td>0.215</td>
<td>0.218</td>
<td>0.179</td>
<td>0.217</td>
<td>0.106</td>
</tr>
<tr>
<td>SER</td>
<td>0.842</td>
<td>0.816</td>
<td>0.815</td>
<td>0.835</td>
<td>0.815</td>
<td>0.872</td>
</tr>
</tbody>
</table>

NOTE: *p < 0.10; †p < 0.05; ‡p < 0.01; robust standard errors in parenthesis below the coefficients.
Table 3. OLS regression of 1960s word counts on predictors.

<table>
<thead>
<tr>
<th></th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
<th>Model 5</th>
<th>Model 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>DV= Word Count</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney</td>
<td>-5.81</td>
<td>-5.55</td>
<td>-4.98</td>
<td>-2.93</td>
<td>-3.21</td>
<td>-4.42</td>
</tr>
<tr>
<td>Experience</td>
<td>(5.02)</td>
<td>(4.61)</td>
<td>(4.57)</td>
<td>(5.50)</td>
<td>(5.13)</td>
<td>(4.51)</td>
</tr>
<tr>
<td>Attorney</td>
<td>(38.53)</td>
<td>(36.76)</td>
<td>(35.22)</td>
<td>(40.78)</td>
<td>(38.13)</td>
<td>(36.08)</td>
</tr>
<tr>
<td>Amicus Party</td>
<td>287.28* (148.14)</td>
<td>284.53† (140.54)</td>
<td>240.86* (133.38)</td>
<td>224.06* (135.02)</td>
<td>249.42† (126.29)</td>
<td>222.72* (129.15)</td>
</tr>
<tr>
<td>Petitioner</td>
<td>.22</td>
<td>1.27</td>
<td>-6.30</td>
<td>-9.54</td>
<td>-2.24</td>
<td>-2.30</td>
</tr>
<tr>
<td></td>
<td>(27.56)</td>
<td>(26.62)</td>
<td>(27.08)</td>
<td>(28.37)</td>
<td>(27.88)</td>
<td>(25.92)</td>
</tr>
<tr>
<td>Ideology</td>
<td>12.41</td>
<td>13.13</td>
<td>8.35</td>
<td>9.85</td>
<td>12.96</td>
<td>12.86</td>
</tr>
<tr>
<td>Mismatch</td>
<td>(25.70)</td>
<td>(24.88)</td>
<td>(25.88)</td>
<td>(26.76)</td>
<td>(26.46)</td>
<td>(25.00)</td>
</tr>
<tr>
<td>Ideology</td>
<td>-32.60† (12.76)</td>
<td>-36.72‡ (11.97)</td>
<td>-34.89‡ (12.16)</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Abs. Value of</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>-60.80‡ (17.48)</td>
<td>-47.04† (18.66)</td>
<td>—</td>
</tr>
<tr>
<td>Ideology Dummy</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>-114.17‡ (27.94)</td>
</tr>
<tr>
<td>Perceived</td>
<td>35.03</td>
<td>69.65</td>
<td>-649.57‡ (54.78)</td>
<td>158.45‡ (51.37)</td>
<td>291.84‡ (243.51)</td>
<td>-588.74‡ (243.51)</td>
</tr>
<tr>
<td>Qualification</td>
<td>(51.37)</td>
<td>(243.51)</td>
<td>(59.30)</td>
<td>(62.47)</td>
<td>(196.56)</td>
<td>(236.72)</td>
</tr>
<tr>
<td>Perceived</td>
<td>—</td>
<td>—</td>
<td>608.27‡ (196.56)</td>
<td>—</td>
<td>—</td>
<td>562.13‡ (192.47)</td>
</tr>
<tr>
<td>Qual.²</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Years on Sup.</td>
<td>-7.07‡ (2.62)</td>
<td>—</td>
<td>2.72</td>
<td>-24.91† (2.61)</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Court</td>
<td></td>
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<td>484.14‡ (96.41)</td>
<td>122.90† (60.93)</td>
<td>141.51† (61.42)</td>
<td>455.76‡ (95.17)</td>
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<td>(96.41)</td>
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NOTE: *p < 0.10; †p < 0.05; ‡p < 0.01; robust standard errors in parenthesis below the coefficients.
Table 4. Probit regression of Justice vote on potential predictors.

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<td>(0.0005)</td>
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<td>-0.77‡</td>
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<td>(0.06)</td>
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<td>(0.46)</td>
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<td>0.99‡</td>
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<td>(0.24)</td>
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NOTE: *p < 0.10; †p < 0.05; ‡p < 0.01; robust standard errors in parenthesis below the coefficients.

Table 5. OLS regression of 2000s information-seeking scores on predictors.

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<th>Model 6</th>
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<td>-0.03*</td>
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Table 5. (continued)

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NOTE: *$p < 0.10$; †$p < 0.05$; ‡$p < 0.01$; robust standard errors in parenthesis below the coefficients.

Table 7. OLS regression of 2000s Justice word counts on predictors.

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<th></th>
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<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
<th>Model 5</th>
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Table 7. (continued)

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<td>(25.10)</td>
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<td>654.81$^2$</td>
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<td>563.46$^2$</td>
<td>576.14$^2$</td>
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<td>7.02$^2$</td>
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<td>4.49$^2$</td>
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NOTE: *p < 0.10; †p < 0.05; ‡p < 0.01; robust standard errors in parenthesis below the coefficients.

Table 9. Probit regression of 2000s Justices votes on predictors.

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<tr>
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</tr>
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<td>-0.22$^†$</td>
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<td>(0.12)</td>
</tr>
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Table 9. (continued)

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<th>Model 3</th>
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NOTE: *p < 0.10; †p < 0.05; ‡p < 0.01; robust standard errors in parenthesis below the coefficients.

Table 12. Combined OLS regression of information-seeking score with 1960s dummy variable.

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<thead>
<tr>
<th></th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
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<th>Model 5</th>
<th>Model 6</th>
<th>Model 7</th>
<th>Model 8</th>
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<td>0.0026*</td>
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<tr>
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<td></td>
<td>(0.0001)</td>
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<td>(0.00014)</td>
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<td>-0.00002*</td>
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<td>-0.004</td>
<td>-0.001</td>
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<td>-0.01</td>
<td>0.0002</td>
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<td>-0.09†</td>
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<td>0.45†</td>
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<td>0.32‡</td>
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Table 12. (continued)

<table>
<thead>
<tr>
<th>Model 1</th>
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<th>Model 4</th>
<th>Model 5</th>
<th>Model 6</th>
<th>Model 7</th>
<th>Model 8</th>
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<td>485</td>
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<td>485</td>
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<td>16.77‡</td>
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</table>

NOTE: *p < 0.10; ‡p < 0.05; †‡p < 0.01; robust standard errors in parenthesis below the coefficients.

Table 13. Combined OLS regression of word counts with 1960s dummy variable.

<table>
<thead>
<tr>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
<th>Model 5</th>
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</thead>
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<td>-0.27</td>
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<td>(0.89)</td>
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<td>(0.91)</td>
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<td>(30.90)</td>
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<td>(31.10)</td>
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<td></td>
<td>Model 1</td>
<td>Model 2</td>
<td>Model 3</td>
<td>Model 4</td>
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<td>------------</td>
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<td>------------</td>
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NOTE: *p < 0.10; †p < 0.05; ‡p < 0.01; robust standard errors in parenthesis below the coefficients.
## APPENDIX II: CASES INCLUDED IN THE STUDY

<table>
<thead>
<tr>
<th>Term</th>
<th>Case</th>
<th>Number</th>
<th>Oral Argument Date</th>
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<tr>
<td>2007</td>
<td>Crawford v. Marion County Election Board</td>
<td>07-21</td>
<td>January 9, 2008</td>
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<td>Federal Election Commission v. Wisconsin Right to Life, Inc.</td>
<td>06-969</td>
<td>April 25, 2007</td>
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<td>2006</td>
<td>Morse v. Frederick</td>
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<td>March 19, 2007</td>
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<td>Carey v. Musladin</td>
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<td>October 11, 2006</td>
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<td>Garcetti v. Ceballos (Reargued)</td>
<td>04-473</td>
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<td>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</td>
<td>04-1152</td>
<td>December 6, 2005</td>
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<td>March 29, 2005</td>
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<td>Jackson v. Birmingham Board of Education</td>
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<td>Ginzburg, ET AL. v. United States</td>
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<td>Rosenblatt v. Baer</td>
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<td>Estes v. Texas</td>
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