

**INFORMATION, ORAL ARGUMENTS,
AND SUPREME COURT DECISION MAKING**

TIMOTHY R. JOHNSON
University of Minnesota

Conventional wisdom in judicial politics is that oral arguments play little if any role in how the Supreme Court makes decisions. A primary reason for this view is that insufficient evidence exists to test this hypothesis. Thus, I ask, do Supreme Court justices use information from oral arguments that may help them make decisions as close as possible to their preferred goals? My answer is straightforward: An investigation of the oral arguments and the Court's majority opinions in a sample of cases from the Burger Court era shows that the Court gathers information during oral arguments and then uses this information when making substantive policy choices. This finding has clear implications for the way in which scholars view the Supreme Court's decision-making process, as it suggests that the accepted view of where oral arguments fit into this process is far from accurate.

The idea that Supreme Court justices seek as much information as possible about cases they hear is not a new one, and students of the Court have explored the many ways justices receive this information—from litigant briefs (Epstein & Kobylka, 1992), briefs amicus curiae (Spriggs & Wahlbeck, 1997), briefs on certiorari (Caldeira & Wright, 1988), and the media (Epstein & Knight, 1998a). The problem for justices is that almost all the information they possess is what other actors want them to see and consider. In other words, the Court has little control over the majority of information it receives. Although justices can certainly gather any information they want—for example, by having their clerks do original research—one key means of doing

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so is by asking questions during the oral arguments of cases that are granted full review. As such, these proceedings potentially play a key informational role in the Court's decision-making process.

Although this assumption seems tenable, many students of the Court think otherwise. For example, Rohde and Spaeth (1976) assert that oral arguments have little influence on the outcome of a case because justices' voting preferences are stable. More specifically, they posit that although "oral argument frequently provides an indication of which is the most likely basis for decision," it "does not . . . provide reliable clues as to how a given justice may vote" (p. 153). Segal and Spaeth (1993) concur with this assessment and suggest that ascertaining "the extent to which it [oral argument] affects the justices' votes is problematic" (p. 208). They also contend that there is no indication that oral argument "regularly, or even frequently, determines who wins and who loses" (p. 209). For Rohde and Spaeth, and Segal and Spaeth, the short time allotted for oral arguments, combined with the fact that justices' preferences are fixed, means that their votes will not change as a result of what transpires during these proceedings. The point is not that oral arguments provide no information to the Court but that their usefulness for predicting the final disposition (vote) of a case is problematic.

The assertion that oral arguments have little to do with determining justices' votes does not mean that these proceedings have no bearing on how they make decisions. Indeed, although oral arguments may not change the disposition of a case, they may still affect the Court's substantive decisions by providing the justices with information about that case (see, e.g., Benoit, 1989; Cohen, 1978; Wasby, D'Amato, & Metrailler, 1976). If this is so, then scholars must reconsider the role that these proceedings play for Supreme Court justices. Using the strategic model as a theoretical foundation (see, e.g., Epstein & Knight, 1998a), I do just that. Specifically, I am interested in three general predictions. The first is that, as strategic actors, Supreme Court justices must gather as much information as possible about a case if they want to make efficacious policy choices that also satisfy their preferred goals. The second is that justices can use oral arguments as one way to procure such information. Finally, if this information is helpful, then they should use it when writing their substantive decisions.

To assess these predictions, I examine the types of information that justices gather during oral arguments, as well as the extent to which they seek new information during these proceedings. Additionally, I determine how often justices invoke this information in their majority opinions. The findings demonstrate that oral arguments provide information that ultimately plays a role in the Court's substantive policy choices.

THE STRATEGIC MODEL, INFORMATION, AND ORAL ARGUMENTS

In the past decade, the strategic model has gained prominence in the field of judicial politics. On this account, (a) justices are goal oriented, with policy typically their primary objective; (b) justices act strategically; and (c) the institutional setting within which they work affects justices' decisions. Most judicial scholars now accept the first tenet of this model (see, e.g., Epstein & Knight, 1998a; Eskridge, 1991; Pritchett, 1948; Segal & Spaeth, 1993). Although the second tenet is still the focus of debate (see, e.g., Martin, 1997; Segal, 1997), it has become a prevalent view of Supreme Court decision making (see, e.g., Epstein & Knight, 1998a; Wahlbeck, Spriggs, & Maltzman, 1998). Finally, several scholars have shown that justices follow institutional norms when making decisions (see, e.g., Epstein, Segal, & Johnson, 1996; Epstein, Walker, & Dixon, 1988).

If Supreme Court justices are to make decisions that satisfy their own goals, will be accepted by other actors, and will not violate institutional rules, they must possess as much information as possible about cases that they hear. As such, it is no surprise that they seek, and receive, an abundance of information from a variety of sources. For example, the parties and amici curiae submit briefs that contain hundreds of pages of materials, arguments, and reasons why the Court should decide a case in a particular manner. This clearly decreases the "information problem" (see Caldeira & Wright, 1988) facing the justices because these briefs often help them understand the range of policy options available to them, as well as how external actors might react to decisions (see, e.g., Epstein & Knight, 1998b; Epstein & Kobyłka, 1992).

Although litigant and amicus briefs certainly quell the justices' information problem, they also create another, possibly more difficult dilemma: All of the information provided in briefs or obtained from other sources (law reviews, lower court decisions, etc.) is that which others want the justices to see and use. In other words, this information reflects the biased goals and preferences of the parties or groups who present it to the Court. Therefore, if the justices want additional, or different, information entered into the record, they must look elsewhere.

One means by which justices can obtain information that they themselves want is by asking questions during oral arguments. Anecdotal evidence supports this assumption and also demonstrates that justices use this information when writing opinions. For instance, in a comparison of justices' inquiries during oral arguments with positions taken by the majority in *TVA v. Hill* (1978), Cohen (1978) finds explicit instances in which Justices Powell and Stevens use issues from these proceedings in their opinions. More recently, Benoit (1989) analyzes four incorporation cases to discern whether the Court's majority opinions include issues advanced by the winning party during oral arguments. Benoit's findings corroborate Cohen's but also make a key improvement over the earlier work. That is, Benoit's method controls for issues raised during oral arguments that were not discussed in the litigants' briefs, as well as for those that were raised in both instances. This is important because Benoit's findings suggest that oral arguments may provide information beyond the briefed arguments.

Although these works show that justices gather information from oral arguments and then use it in their decisions, Cohen's and Benoit's findings are problematic because neither provides a theoretical basis to explain why justices do so and because both analyses rely on anecdotal evidence. Wasby et al. (1976) begin to correct for these shortfalls. In their study of desegregation cases, they posit that oral arguments serve several functions for the Court, including providing information to the justices, allowing them to determine the implications of deciding a case in a certain manner, and communicating with each other about where they want a case to come down (pp. xvii-xviii). Although their analysis focuses only on race relation cases, the fact that Wasby et al. analyze a large number of cases suggests that their results are more readily generalizable than their predecessors' are.

No other systematic studies of oral arguments were conducted for more than a decade after Wasby et al.'s monograph. However, in the early 1990s, two such studies emerged. Schubert, Peterson, Schubert, and Wasby (1992) employ a biosocial approach to analyze how the Court uses oral arguments. They find that these proceedings provide a time for justices to clarify the issues of a case and to persuade their colleagues about these issues. This approach has merit, but Schubert et al. do not specifically focus on the types of information the justices gather; rather, they are more interested in how the justices act during these proceedings. Additionally, Wasby, Peterson, Schubert, and Schubert (1992) demonstrate that "The Court's *per curiam* opinions provide clear evidence that oral argument at times—but certainly not always—has been directly relevant to the Court's disposition of a case—and at times determinative of outcome" (p. 30). Although Wasby et al. use a nonrandom sample, their analysis suggests even more clearly that oral arguments do play a role in how the Court makes decisions.

Given these findings, combined with the assumption that strategic actors must gather as much information as possible to help them make decisions close to their preferred goals, I seek to determine whether oral arguments more generally provide information that helps Supreme Court justices do so. Specifically, I propose several hypotheses about the types of information justices gather during these proceedings and how they use this information when making substantive decisions.

First, I hypothesize that justices should use oral arguments to gather information that will help them decide cases as close as possible to their policy preferences. Second, I hypothesize that justices should use these proceedings to seek information beyond that which litigants and *amici curiae* provide. This follows Wasby et al.'s (1976) finding that during oral arguments, the justices sometimes raise questions "outside the boundaries established by the parties' arguments" (p. 414). In short, I expect that at least a majority of the Court's questions during oral arguments should address new information.¹

Next, I turn to how the Court uses information from oral arguments. The third hypothesis is that if oral arguments provide information that can help justices make policies close to their preferred goals, then they should invoke at least some of this information in their final opinions.

Finally, if oral arguments provide a unique source of information for the Court, then a significant portion of all arguments in the Court's majority opinions should reference issues that are raised by the justices for the first time during these proceedings.

DATA AND CODING SCHEME

To test these hypotheses, I analyze a random sample of 75 civil liberties cases from the Burger Court era.² For each case, I compare the issues raised in the briefs (litigant and amicus), oral argument transcripts, and majority opinion syllabi to determine the extent to which oral arguments play any role in the Court's decisions. This section explains the data collection and the coding procedures.

LITIGANT BRIEFS

First, I obtain the briefs submitted by each party and amicus curiae.³ I do so because before I can make any claims about whether oral arguments provide information to the justices, I need a baseline on which to determine what issues have the potential to arise during these proceedings. Every unique issue raised in the briefs is counted and coded for the type of argument provided.⁴ This yields a sample of 385 arguments in cases where no amici participate and a sample of 494 issues in cases where amicus briefs are submitted.

WRITTEN ORAL ARGUMENT TRANSCRIPTS

The most important data for this analysis are drawn from the written transcripts of oral arguments. Every question asked by the Court is coded to determine the types of issues justices raise during these proceedings as well as whether these issues originate in the briefs or are raised for the first time during oral arguments. In the cases without amicus participation, the Court asks 3,223 questions, and in cases with amici curiae, the justices ask 2,344 questions. Note that I could also code the arguments presented by the litigants, but because I am concerned with the information that justices want, as opposed to what

counsel want them to have, I focus exclusively on information sought by the Court.⁵

MAJORITY OPINIONS

Finally, I compare the syllabi of each opinion with the issues raised in the briefs and at oral arguments.⁶ This analysis allows me to determine the extent to which the Court as a whole uses information from oral arguments. Specifically, I code the syllabi for the types of issues raised and for where these issues originate (e.g., in the briefs or from oral arguments). In cases without amici, information may originate from four places: (a) the litigants' briefs only, (b) the oral arguments only, (c) the briefs and oral arguments, or (d) from neither the briefs nor the oral arguments. In these cases, there are a total of 192 syllabi points raised in the majority opinions. For cases with amici, information may originate from eight places: (a) litigant briefs only, (b) amicus briefs only, (c) litigant and amicus briefs, (d) litigant briefs and oral arguments, (e) amicus briefs and oral arguments, (f) litigant and amicus briefs and oral arguments, (g) oral arguments only, or (h) neither the briefs nor oral arguments. For these cases, there are a total of 119 syllabi points.

Coding every issue raised by the Court in this manner highlights the extent to which oral arguments provide information that the justices use when making substantive decisions. If the justices raise issues from oral arguments in their opinions—especially issues that may help them reach their policy goals and that are unique to these proceedings—then there is evidence that they play a key role in the Court's decision-making process.

CODING AND DATA COLLECTION

Because I am interested in the kinds of information that the justices possess when making decisions, I create a general coding scheme to capture any arguments that may arise in a case; it includes six finite categories.⁷ Using these categories, I code every major argument offered in the litigant and amicus briefs, every question raised by the Court during oral arguments, and each argument presented in the

majority opinion syllabi.⁸ This allows me to determine the types of information the justices possess before the orals, what kind of information they seek during these proceedings, and the information they use in their opinions. The remainder of this section explains the categories that make up the coding scheme.

First, I code for *constitutional* issues, which are defined as arguments concerning applicable clauses or amendments to the Constitution. Because all of the cases in the sample are civil liberties cases, I expect that there will be some discussion about the role of the Constitution. Questions of this type test the extent to which the Court is concerned with legal issues. Second, I code for *policy* issues. Like Epstein and Knight (1998a), I define these as arguments that focus on principles or courses of action the Court should take, tests the Court should use, and beliefs about the content of public policy.

The third category includes all issues that relate to the preferences or possible reactions of *external actors*. These include all issues that generally refer to external actors' preferences, the implications of a case, and hypothetical questions asked by the Court during oral arguments. Each of these subsets provides specific information to the justices. First, knowing other actors' general preferences allows the justices to assess how close to their own bliss point they can place policy without incurring sanctions from parties beyond the Court. Second, issues concerning the ramifications of a case tell the justices who will likely be affected by their decisions. This gives them some idea about how other actors might react to a decision made in a particular manner. Third, hypothetical questions help the Court determine how far a particular decision may be taken. As Prettyman (1984) notes, these questions help the Court test "the outer reaches both of what the advocate is asking it to declare and of what the Court may in fact have to decide" (p. 556). This allows the justices to speculate about how other actors might interpret and implement specific policy choices.

The final three categories are self-explanatory. *Factual* issues include any references to facts, the record, or evidence. *Precedent* includes arguments that invoke prior cases decided by the Court.⁹ Finally, I code for any *threshold* issues, which are defined as arguments about jurisdictional or justiciability concerns. Combined, these categories cover the range of issues that could arise in any given case.¹⁰

RESULTS

This section explains the results of the analysis. First, I look at the information given to the justices prior to oral arguments. Second, I turn to an analysis of questions raised by the Court during these proceedings. Here, I am particularly interested in the extent to which the justices raise issues concerning the three aspects of the strategic model, as well as issues beyond those presented by the parties and amici curiae. Finally, I analyze how often the majority uses information from the oral arguments in its opinions.

INFORMATION PROVIDED TO THE COURT

Clearly, the Supreme Court possesses an abundance of information prior to oral arguments. Although this information may come from many sources, the parties and amici curiae provide the majority of it. In cases when amici curiae do not participate, litigants focus the majority of their briefs on policy and legal issues. Indeed, 40% of all litigant arguments deal with issues of policy, whereas 31% deal with constitutional issues. Note, however, that whereas the litigants raise significantly more policy than constitutional issues ($p < .05$), constitutional issues are raised significantly more often than issues about external actors' preferences, relevant precedent, threshold issues, and facts ($p < .001$ for each relationship in difference of means tests). This suggests that although litigants do focus on policy issues, they still give much of their attention to legal (constitutional) issues.

These results are similar when amici curiae participate, but several key differences do emerge. First, the vast majority of information provided by amici curiae reiterates arguments presented by the parties. This comports with Spriggs and Wahlbeck's (1997) finding that "an amicus curiae brief's role most likely does not pertain to their contributing novel arguments but more likely rests with reiterating party arguments" (p. 382). In short, the justices may not find new arguments imbedded in amicus briefs, but by covering issues already in the litigants' briefs, they signal the Court as to what are the most salient issues in a case. Second, the Court is more likely to receive information about constitutional and policy concerns that are briefed by both the parties and amicus curiae.

Third, in cases when amici participate, the Court receives slightly more information about the preferences and possible reactions of external actors' prior to oral arguments. This supports Epstein and Knight's (1998b) argument that "organized interests—participating as amici curiae . . . provide information about the preferences of other actors" (p. 215). Finally, note that the Court does not gain a significant amount of additional information from amici about relevant precedent, threshold issues, or the facts of a case.

THE COURT AND ORAL ARGUMENTS

With a baseline set, I turn to the Court's use of oral arguments. Recall my first prediction that during these proceedings, the justices should seek information that will help them place policy close to their preferred policy goals. If they gather such information, then I can reject the implicit null hypothesis that oral arguments do not allow the justices to gather information that may help them attain their preferred policy goals.

Table 1 provides the data to test this hypothesis. I initially turn to the types of questions the Court raises during oral arguments, and it is evident that the justices are more concerned with policy issues and other actors' preferences than with any of the other issues. In cases without amici, 40% of the Court's questions focus on policy and 36% on external actors (top column 4); when amici participate, 43% of questions focus on policy and 34% on external actors (bottom column 6).

Differences of means tests, which compare the number of questions that focus on each issue type, corroborate the Court's emphasis on policy and external actors. Indeed, the Court asks significantly more questions about policy than about the facts of a case, relevant precedent, or threshold issues ($p < .05$ for each relationship). Additionally, the justices ask significantly more questions about external actors than about facts, precedent, or threshold issues ($p < .10$ for each relationship). In short, justices predominantly use oral arguments to assess their policy choices, as well as how other actors may react to these choices.

Although the justices clearly use oral arguments to gather information about the first two aspects of the strategic model, they are less concerned with obtaining information about institutional rules

TABLE 1
The Focus of the Court's Questions During Oral Arguments by Issue Area and Source of Information: Civil Liberties Cases (1972-1986)

<i>Issue Area</i>	<i>Briefed Issues</i>		<i>New Issue^a</i>		<i>Total</i>					
Cases without amicus participation (<i>N</i> = 45 cases)										
Constitutional	142	(66.00) ^b	176	(34.00)	318	(9.87) ^c				
Policy	330	(29.00)	974	(71.00)***	1304	(40.46)				
External actors	37	(3.00)	1122	(97.00)***	1159	(35.96)				
Precedent	82	(16.00)	234	(84.00)***	316	(9.80)				
Threshold	40	(7.00)	86	(93.00)*	126	(3.91)				
Total	631	(20.00)	2,592	(80.00)***	3,223	(100.00)				
<i>Issue Area</i>	<i>Litigant Brief Only</i>	<i>Amicus Brief Only</i>	<i>Litigant and Amicus Brief</i>	<i>New Issue^a</i>		<i>Total</i>				
Cases with amicus participation (<i>N</i> = 30 cases)										
Constitutional	18	(8.00)	18	(8.00) ^b	114	(50.00)	78	(35.00)	228	(9.73) ^c
Policy	53	(5.00)	48	(5.00)	232	(23.00)	685	(67.00)***	1018	(43.43)
External actors	0	(0.00)	10	(1.00)	17	(2.00)	760	(97.00)***	787	(33.58)
Precedent	7	(3.00)	24	(11.00)	4	(2.00)	181	(84.00)***	216	(9.21)
Threshold	3	(3.00)	3	(3.00)	1	(1.00)	88	(93.00)**	95	(4.05)
Total	81	(3.00)	81	(3.00)	368	(16.00)	1,792	(77.00)***	2,344	(100.00)

NOTE: *t* tests in the columns labeled "New Issue" are conducted to determine whether the Court's focus during oral arguments is on new issues or on issues first raised in the briefs. In the top half of the table, the test is run on the mean number of new questions versus the mean number of questions about briefed issues for each type. In the lower half of the table, the tests are conducted between columns 4 and 5.

^a New issues are operationalized as those that were not raised in the briefs submitted prior to oral arguments. The Court raises them for the first time during these proceedings.

^b Percents are in parentheses. They are calculated horizontally for each issue area.

^c Percentages in the last column are calculated for each issue type raised by the Court.

* = Difference is significant at .10 level, ** = Difference is significant at the .01 level, *** = Difference is significant at the .001 level (two tailed tests).

(operationalized as questions about precedent and threshold issues). Indeed, less than 15% of their questions seek information about these issues. Further support for this finding comes from the difference of means tests conducted in Table 1. They demonstrate that the justices are statistically less likely to focus on institutional rules than they are to focus on policy or external actors. Thus, although I find support for the hypothesis that the Court focuses on questions pertaining to policy and external actors' preferences, the finding concerning the justices' attention to institutional rules works against the third part of this hypothesis.

So far, I have shown that the justices obtain specific types of information from oral arguments that may help them make decisions close to their preferred goals. This alone suggests that judicial scholars should reconsider whether these proceedings play a role in how the Court makes decisions. However, Table 1 also provides a test of the second hypothesis, which is that oral arguments provide unique information to the Court.

The third column in the top of Table 1 and the fifth column in the bottom of the table show the number of questions that raise issues for the first time during oral arguments. I turn first to cases with no amicus participation. Only 20% of the Court's total questions focus on arguments initially discussed in the parties' briefs.¹¹ The remaining 80% of the Court's questions raise issues not addressed by the parties. Further, the presence of amici only decreases the Court's willingness to raise new issues by 3 percentage points. This means that even though the justices may have slightly more information going into the oral arguments (because amici are present), they are still more interested in obtaining new information than they are with clarifying the information provided in the briefs. A difference of means test between the number of new questions raised and the number of questions raised about briefed issues supports this conclusion. Indeed, the Court is significantly more likely to ask questions that raise new issues than it is to ask about issues that are initially raised in a litigant or amicus brief (in both halves of the table, $p < .001$).

The overall number of new issues raised by the Court is staggering, and these findings hold for almost all of the individual issue types. With the exception of questions about constitutional issues, at least two thirds of the Court's questions about each issue type raise concerns not addressed by the parties or amici.¹² Equally as striking is that about 70% of all policy questions are raised for the first time during oral arguments. The difference between these questions and those that address policy issues first raised by the parties or amici is also significant in both parts of Table 1 ($p < .001$).

The other key findings from Table 1 are the Court's emphasis on seeking new information about external actors and institutional rules. Almost 100% of its questions about the preferences or possible reactions of actors beyond the Court are raised for the first time during oral

arguments. This is significantly greater than the number of questions that refer to briefed arguments about external actors' preferences ($p < .001$), which suggests that the justices did not get information from the briefs, which they wanted, about external actors. Thus, they used oral arguments to do so. Additionally, even when amici provide more information about external actors, the Court still seeks additional information.¹³ This is also an important finding because although the literature on amicus curiae participation indicates that these briefs provide the Court with a lot of information about external actors' preferences (Epstein & Knight, 1998b), the justices clearly use oral arguments to gather information beyond what even the amici provide.

Finally, note that more than 80% of the Court's questions concerning applicable precedent and more than 90% of its questions about threshold issues are new.¹⁴ Considering that only about 15% of the arguments in the litigant and amicus briefs focus on these two issue types, this is also a significant emphasis during oral arguments. Again, the point is that the Court has a norm respecting precedent (Knight & Epstein, 1996) and rules governing when a case cannot be heard (Epstein & Knight, 1998a), and the justices must ensure that they can make decisions close to their preferred goals while still following these institutions. As such, although the justices focus few of their total questions on precedent and threshold issues, the questions they do raise focus on matters that were not fully briefed by the parties or amici curiae.

Only one conclusion can be drawn from this analysis: Oral arguments provide a plethora of information about policy issues and external actors' preferences, as well as information that the justices did not, or could not, attain from the litigant or amicus curiae briefs. These findings support my first two hypotheses and cut deeply into the accepted view among judicial scholars that oral arguments play a limited role, at best, in the Court's decision-making process. The fact that justices seek new information during these proceedings indicates that oral arguments play a key role for the Court. If the accepted view were correct, then the justices would not act in this manner because they would not need any information beyond their personal preferences and the facts of the case (Segal & Spaeth, 1993).

DECISIONS ON THE MERITS

The above discussion indicates that Supreme Court justices use oral arguments to gather information that may help them make decisions in line with their preferred goals. However, this behavior is meaningless if they then ignore this information when making substantive decisions. Thus, I also seek to determine how the Court uses oral arguments in its majority opinions.¹⁵ I turn first to the most general test: the extent to which the Court refers to any orally argued issues in its decisions. In cases with no amici curiae, the majority invokes an average of 6.40 issues that were addressed during oral arguments but only 0.96 issues found only in the briefs. This difference is statistically significant ($p < .05$). In cases with amici, the average number of syllabi points referring to issues from oral arguments drops to 3.07, but this is still significantly greater than the average of 0.70 syllabi points that refer to issues found only in the briefs ($p < .001$).¹⁶ Additionally, given that in cases without amici, there is an average of 8.35 total syllabi points per decision and 7.68 points in cases with amici, the Court clearly focuses a major portion of its opinions on issues that are discussed during oral arguments. This supports my third hypothesis that justices should invoke at least some information from oral arguments when making substantive decisions.

Although this initial finding is compelling, it allows only limited conclusions. Indeed, with the data explicated above, it is impossible to determine whether the Court uses oral arguments as a unique source of information. This is the case because the mean number of references to orally argued issues do not distinguish between those issues raised for the first time during the oral arguments and those that were first raised in a litigant or amicus brief. In other words, I have a problem of behavioral equivalence—I cannot say whether the briefs or the oral arguments led the justices to use a particular issue in their opinion. Thus, additional analysis is warranted. I do so by determining from where each syllabi issue originated. The results are presented in Table 2.

This table paints a compelling picture of the unique role that oral arguments play in the Supreme Court's decision-making process. First, note that in cases without amicus participation, 11% of all syllabi points refer to arguments raised only in the litigants' briefs. The

TABLE 2
The Origin of Information Found in Supreme Court
Majority Opinions: Civil Liberties Cases (1972-1986)

<i>Where Information Is Found</i>	<i>Number of References</i>	
Cases without amicus participation (<i>N</i> = 45)		
Brief only	22	(11.00)***
Brief and oral argument	84	(44.00)
Oral argument only	63	(33.00)
No matching references	23	(12.00)***
Total issues in syllabi	192	(100.00)
Cases with amicus participation (<i>N</i> = 30)		
Litigant brief only	7	(6.00)**
Amicus brief only	0	(0.00)***
Litigant and amicus brief	10	(8.00)
Litigant brief and oral argument	15	(13.00)
Amicus brief and oral argument	5	(4.00)**
Litigant and amicus brief and oral argument	42	(35.00)
Oral argument only	29	(25.00)
No matching reference	11	(9.00)**
Total issues in syllabi	119	(100.00)

NOTE: Percentages are in parentheses and are rounded to the nearest whole number. *t* tests are conducted between the mean number of issues in the majority opinions that were raised at oral argument only and each of the other categories.

* Difference is significant at .10 level. ** Difference is significant at the .01 level. *** Difference is significant at the .001 level (two-tailed tests).

results are similar for cases with amicus participation. Only 6% of the majority's main arguments refer to issues raised uniquely by the litigants, none refer to issues raised only by amicus briefs, and only 8% refer to issues found in both a litigant and amicus brief. The point is that if an issue is briefed but ignored by the Court during oral arguments, then the majority is unlikely to address it in an opinion.

Second, I turn to the Court's focus on information that is raised in the litigant or amicus briefs and is then addressed by the justices during oral arguments. In cases without amici, 44% of all syllabi points fall into this category. In cases with amici, this percentage increases slightly: 52% of all syllabi points refer to issues that are initially raised in a brief (by a litigant, an amicus, or both) and then discussed at oral arguments. This indicates that when the parties or amici curiae highlight a point in their briefs and then the Court asks about it during the arguments, the majority opinion more often than not discusses this issue. But again, the causation arrow for this relationship is impossible

to draw. Indeed, did the Court pick up on the issue because of the briefs, because of the discussion during oral arguments, or because the issue was discussed in both instances?

Fortunately, Table 2 also provides data about the extent to which the Court uses unique information from oral arguments. Here, I report the number of syllabi points that refer to issues raised by the Court only during oral arguments. In cases without amicus participation, one third of all the majority syllabi points fall into this category, and in cases with amici, 25% of syllabi points do so. This is significantly greater than the number of issues that the Court obtains uniquely from the briefs ($p < .001$) but statistically indistinguishable from the number of syllabi points that refer to issues raised in both the briefs and at oral arguments.¹⁷ This supports my third hypothesis that oral arguments provide an independent source of information that the justices ultimately use when making substantive decisions.

Beyond the general finding that the Court invokes new issues from oral arguments, there is reason to believe that it invokes specific types of information that are added to the record for the first time during oral arguments. Specifically, I am concerned with the extent to which the Court invokes points raised about policy or external actors. In cases without amicus participation, the Court is significantly more likely to invoke new policy issues than any other type of issue that is raised for the first time during these proceedings.¹⁸ Although the findings are mixed for external actors, the Court still invokes significantly more of these issues than new issues raised about constitutional issues ($p < .05$) or threshold issues ($p < .001$). Finally, note that although the findings are less impressive for cases with amici participation, a significant minority of all new issues from oral arguments, which end up in majority opinions, concern policy considerations and external actors' preferences.

CONCLUSION

This article takes a major step toward demonstrating that oral arguments may be a more important part of the Supreme Court's decision-making process than many judicial scholars realize. It suggests that justices use oral arguments to gain specific information about a

case and that they use this information when making their final substantive decisions. This corroborates the findings of early anecdotal work in this area (Benoit, 1989; Cohen, 1978), and extends the findings of Wasby et al. (1976) and Wasby et al. (1992). It extends the findings of these works because it includes amicus briefs in the analysis and because it looks to a larger sample of cases. Thus, we now have an even clearer picture of where oral arguments fit into the Supreme Court's decision-making process. Additionally, the findings here refute the notion that justices do not need information beyond their own preferences to make decisions. Indeed, if justices decided cases based only on their own preferences, they would not need oral arguments to gather information about a case. And although they may still conduct these proceedings as a symbolic tool (Baum, 1995), the results here would change dramatically if oral arguments were viewed by the justices as purely symbolic rather than as a time to gather information.

Several findings are notable. First, as policy-oriented and strategic actors, Supreme Court justices use their questions during oral arguments to gather information about the extent of their policy options and to help them form beliefs about the preferences and possible reactions of external actors. In other words, these proceedings help the justices obtain information that can help them place policy close to their goals. This extends Wasby et al.'s (1976) findings beyond race relation cases. Second, the justices use oral arguments to obtain information beyond that which is provided by the parties or *amicus curiae*. This is the most important finding because it suggests that these proceedings play a unique informational role for the justices. Thus, when the parties or *amicus curiae* do not address certain issues, the Court is willing to raise them during oral arguments. Finally, a significant minority of points raised in majority opinion syllabi are addressed for the first time during these proceedings. This is clear evidence that oral arguments are an integral part of the Court's decision-making process.

In the end, the data in this article do not say definitively that justices use oral arguments to assess their policy options and beliefs about external actors' preferences. The data also do not say for sure whether justices use oral arguments more generally. To make these claims, more systematic research is required to determine whether these findings hold up across other issue areas, across Court eras, and across

individual justices. However, because very few scholars have studied this aspect of the Court's decision-making process (but see, e.g., Schubert et al., 1992; Wasby et al., 1976; Wasby et al., 1992), the evidence presented here is a good start and suggests that this area is ripe for future research.

NOTES

1. I operationalize *new* as meaning information that was not provided in the litigant or amicus curiae briefs. Of course, these may not be new issues per se because they may have been derived from a lower court opinion, or from the Court's past decisions, but they are "new" issues for the case at hand. Thus, because they enter the record for the first time in the form of a question asked by a justice during oral arguments I code them as "new."

2. I used Spaeth's (1995) Supreme Court database to select the cases. These data were provided by the Inter-University Consortium for Political and Social Research through Washington University in St. Louis and Southern Illinois University.

3. The analysis of these cases is conducted separately. The *N* for cases without amici is 45, and the *N* with amici is 30.

4. There has been some controversy concerning the proper manner for coding the arguments in litigant or amicus briefs. McGuire and Palmer (1995, 1996) argue that one should code the "questions" section of the briefs. However, Epstein, Segal, and Johnson (1996) suggest that one should look to the body of the brief because any issue in the body is considered a part of the record. Spriggs and Wahlbeck (1997) compromise between the McGuire/Palmer and the Epstein et al. approaches and use the headings located in the "argument" section of each brief. This seems to be the most logical coding scheme. Indeed, as Spriggs and Wahlbeck (1997) point out, "Supreme Court Rule 24.6 mandates that briefs be 'logically arranged with proper headings' " (p. 370). Additionally, Stern, Gressman, Shapiro, and Geller (1993) suggest that these headings tell the reader exactly the point that will be made in the section below the heading (p. 548). I follow Spriggs and Wahlbeck and Stern et al. Thus, I code each of the headings (or subheadings when needed) in the litigant and amicus briefs. This gives me a raw measure of all the issues raised in the briefs for each case.

5. Although the oral argument transcripts are a rich data source, the analysis of them is troublesome because they do not explicate which justice asks which questions to the parties. Instead, the transcripts only say "Court" before each question. This means that I cannot differentiate between the justices and, therefore, cannot make any individual-level claims about the types of information sought during oral arguments. As a result, this analysis is based on aggregate Court behavior.

6. I use the major arguments found in the syllabus of the opinions. This approach allows for a clear comparison of the main issues raised by the parties and amici and follows the accepted means of coding Court decisions (see, e.g., Epstein, Segal, & Johnson, 1996; Spriggs & Wahlbeck, 1997). Two caveats should be made about this approach. First, the Court does not write the syllabi; the reporter publishing the cases does so. This introduces an outside, potentially biased source into the equation. However, because I am interested in the use of information from oral arguments in the main issues decided by the Court, this seems the best, and most objective, means by which to compare the arguments and the opinions. Second, I may be losing infor-

mation by not analyzing the entire opinions. As Wasby et al. (1992) point out, there are many explicit references to oral arguments in the Court's opinions (many times in footnotes). I lose these references by focusing only on the syllabi. The point is that the results presented here probably underestimate the Court's use of information from oral arguments.

7. A pilot study of several oral argument transcripts, combined with earlier research on legal argumentation before the Court, led me to create this finite set of categories. At first, the coding scheme included nine different categories, but I determined that several could be combined. The final scheme includes six categories.

8. Note that coding is not done on key words or word matches. Rather, like Epstein and Knight (1998a), Epstein et al. (1996), Spriggs and Wahlbeck (1997), and McGuire and Palmer (1995, 1996), I use an objective coding scheme to determine the types of information found in the briefs, oral argument transcripts, and Court opinions. This is the accepted means of content analyzing arguments presented to the Court. For an explication of the coding scheme and to find data for replication, navigate to <http://www.siu.edu/departments/cola/polysci/johnson.html>

9. In the briefs, I may underestimate the use of precedent. Court rules specify that briefs must list all precedents at the start of the document (Supreme Court Rule 24.1.d). However, I only code precedent that is invoked in the main argument section of the briefs. I do so because I want to capture only those cases that counsel believe are most important for their case rather than every precedent they cite in the hope that they may help their case.

10. The categories are not mutually exclusive, and double coding was used. Thus, an argument could be a constitutional issue and also a policy issue. This convention follows Epstein and Knight (1998a), and they provide examples of how one issue may be coded as two types. The reader should also note that this coding scheme is subjective but highly reliable. Indeed, the intercoder reliability analysis produces highly significant Kappas for each phase of the coding (see Cohen, 1960; Landis & Koch, 1977).

11. This calculation excludes the factual questions asked by the Court, as there is no basis for arguing that these questions help the justices act strategically.

12. The difference between the number of questions asked about constitutional issues raised initially in a brief and those that are raised for the first time at oral arguments is not significantly different ($p = .34$).

13. In these cases, difference of means tests show that the Court is significantly more likely to raise new issues about external actors' preferences than to address these issues raised first by a litigant, an amicus, or by both a litigant and an amicus. The difference in each instance is significant at $p < .001$.

14. These differences are both significantly different from zero. For precedent, the Court is much more likely to ask about a case not briefed ($p < .001$), and the same holds true for threshold issues ($p = .10$).

15. Although justices may cite oral arguments more often in dissents and concurrences because they are freer to write whatever they want in these types of opinions (see, e.g., Hoekstra & Johnson, 1997), I am more concerned with how the majority in each case deals with arguments arising from these proceedings. Indeed, like Spriggs and Wahlbeck (1997), I choose not to code dissenting and concurring opinions because the majority sets the "law of the land." This means that my analysis tests the extent to which oral arguments actually play some role in the policy that is ultimately set by the Court. Although the results may be stronger if I include all types of opinions, scholars who have studied oral arguments have only looked at majority opinions (see, e.g., Benoit, 1989; Cohen, 1978; Schubert et al., 1992; Wasby et al., 1992). Additionally, those who have studied the effect of arguments more generally also analyze the majority opinions (Epstein & Knight, 1998a; Spriggs & Wahlbeck, 1997).

16. By "found in a brief," I mean any issues found only in a litigant brief, only in an amicus brief, or in a litigant brief and reiterated by an amicus. In other words, these issues are not raised at all during oral arguments.

17. The results are similar for cases with amici curiae. See the bottom of Table 2 for significance tests for these cases.

18. Differences of means tests were run between policy and each of the other issue areas (constitutional, external actors, precedent, and threshold issues). The difference for each comparison is significant ($p < .01$ for each relationship).

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Timothy R. Johnson is an assistant professor in the Department of Political Science at the University of Minnesota. His current research focuses on Supreme Court decision making, strategic interaction between justices, oral arguments, executive/Court relations, and federal district court decision making. He received his Ph.D. from Washington University in St. Louis in 1998.