ORAL ARGUMENT IN U.S. SUPREME COURT DECISIONMAKING: IS IT WORTH ARGUING ABOUT?

Introduction

Scholars and practitioners have long debated what role, if any, oral argument plays in the decisionmaking process of the United States Supreme Court.[1] Since the latter half of the twentieth century, the majority view has been that oral argument matters little to the Justices.[2] Indeed, some Justices themselves have suggested that they are not influenced by oral argument.[3]

The view that oral argument may be nothing more than a "dog and pony show"[4] stems from both practical realities and modern views of judicial behavior. Today, the Supreme Court learns about cases from a variety of different sources.[5] In light of the abundance of material at their fingertips, the argument goes, the Justices do not need oral argument to help make up their minds about a case. Many people believe, moreover, that Supreme Court decisions are primarily based on the ideology of individual Justices, which is fixed.[6] Thus, because Justices are already set on how they will vote in a particular case, the ultimate outcome is not influenced by anything that transpires during oral argument.

Despite the widespread belief that oral argument does not play a major role in the Court's decisionmaking process, there has been little empirical research on the subject. Many scholars have studied oral argument to predict case outcomes,[7] but few have looked at how oral argument itself may influence the Court's ultimate decision in a case. Those who have studied the role of oral argument have generally reached two different conclusions. Some studies argue that oral argument plays an information-seeking role for the Court.[8] In other words, despite the

---

[1] James C. Phillips & Edward L. Carter, *Source of Information or "Dog and Pony Show"?: Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963-1965 & 2004-2009*, 50 SANTA CLARA L. REV. 79 (2010).

[2] Robert M. Casale, *Does Oral Argument in the U.S. Supreme Court Really Matter?*, 85 CONN. B.J. 323, 323 (2011).

[3] *See, e.g.*, DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 260 (2005) (stating that Justice Scalia once referred to oral argument as a "dog and pony show"); WILLIAM H. REHNQUIST, THE SUPREME COURT 243-44 (2001) (stating that oral argument rarely affects is decision in a case); Terry Rombeck, *Justice Takes Time for Q &A*, LAWRENCE J.-WORLD, Oct. 30, 2002, http://www2.ljworld.com/news/2002/oct/30/justice_takes_time/ (referring to Justice Thomas's comment that Justices largely have their minds made up prior to oral argument).

[4] Justice Scalia once referred to Supreme Court oral argument as a "dog and pony show," though he has since said that oral argument can be helpful for the justices. O'BRIEN, *supra* note 3.

[5] TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE U.S. SUPREME COURT 14 (2004).

[6] *See* Phillips & Carter, *supra* note 1, at 82.

[7] *See, e.g.*, Sarah L. Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 274, 278 (2004) (finding that one can use the number of questions asked to each side during oral argument to predict which side will eventually win or lose); John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 80 (2005) (same); Ryan C. Black, Jerry Goldman, Timothy R. Johnson, Sarah A. Treul, *Inquiring Minds Want to Know: Do Justices Tip Their Hands With Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U.J.L. & POL'Y 241 (2009) (finding that Justices' questions during oral argument can be used to predict their ultimate decision in a case).

[8] *See, e.g.*, JOHNSON, supra note 5, at 2.

availability of other resources, Justices use oral argument to gather new information about a case.[9] Other studies argue that the Justices use oral argument for strategic purposes: to make their positions known and to persuade their colleagues.[10]

By looking at seven cases from the Supreme Court's 2013-14 Term, this paper examines whether oral argument serves more of an information-seeking or persuasive function for the Court, as well as whether oral argument influences the Court's ultimate decision on a case.[11] By applying methods used by other scholars, this paper finds that rather than playing *one* role in the Court's decisionmaking process, oral argument appears to play different roles depending on the particular Justice and case. While some Justices use oral argument to learn new information about a case, other Justices use oral argument to persuade or make their positions known. The role of oral argument also varies across cases. In some cases, the Court's ultimate decision is influenced, at least in part, by new issues raised during oral argument. In other cases, the Court's decision turns solely on issues addressed in the litigants' briefs.

This paper proceeds as follows. Part I provides some background on the debate about the role of oral argument in the Supreme Court. Specifically, Part I introduces the three main models of judicial behavior—the attitudinal model, the realist model, and the strategic model—as a foundation for considering how the Justices decide cases. Part I also summarizes existing scholarship on the function of oral argument in the Court's decisionmaking process. Next, Part II describes the methods used in this paper to examine how the Court has used oral argument in seven of its most recent cases. Parts III and IV discuss the paper's findings and suggest what insight they provide into the function of oral argument for the Court.

I. Background

A. Models of Judicial Behavior

Efforts to understand the motivation behind decisionmaking by the U.S. Supreme Court has lead to three competing models to explain judicial behavior: the attitudinal model, the legal realist model, and the strategic model. The oldest model of judicial behavior—the legal model—posits that judicial decisionmaking is based on a "system of logically consistent principles, concepts and rules."[12] Justices' personal ideologies, according to the legal realists, are not important. Rather, legal facts, precedent, as well as relevant statutory and constitutional law, drive the Justices' decisions.[13] While legal realism was the dominant model of judicial decisionmaking at the beginning of the twentieth century, few scholars today would contend that

[9] *Id.*

[10] *See, e.g.*, Stephen Wasby, Anthony D'Amato & Rosemary Metrailer, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 411 (1976).

[11] This paper examines the following cases: *Burrage v. U.S.*, *Fernandez v. California*, *Kaley v. U.S.*, *Kansas v. Cheever*, *Lozano v. Alvarez*, *Mississippi v. AU Optronics*, *Sandifer v. U.S. Steel Cor*p., and *United Here Local 355 v. Mulhall*.

[12] Yosal Rogat, *Legal Realism*, in THE ENCYCLOPEDIA OF PHILOSOPHY 420 (Paul Edwards ed., 1972).

[13] *See* Scott P. Johnson, *The Influence of Case Complexity on the Opinion Writing of the Rehnquist Court*, 25 OHIO N.U. L. REV. 45, 51–54 (1999) (summarizing the history of the legal model).

the Justices' decisions are based solely on legal factors.[14] The legal model, however, is nonetheless relevant; many contemporary scholars believe that Supreme Court Justices make decisions based on an interaction of both legal and ideological considerations.[15]

The attitudinal model, on the other hand, asserts that the attitudes—or ideologies—of the Justices are what cause them to support certain legal outcomes and oppose others.[16] In other words, the basic premise of the attitudinal model is that the Justices' personal ideologies, as opposed to legal rules, serve as the driving force behind the decisions that they make.[17] Proponents of the attitudinal model concede that ideological preferences play a role in the decisions of other government actors. They argue, however, that the unique structure of the Supreme Court is particularly conducive to ideological decisionmaking.[18] Although many studies over the past few decades have exposed flaws in the attitudinal model, the model nonetheless has been extremely influential for contemporary scholarship on how Supreme Court Justices decide cases.[19] Scholars have used the attitudinal model to explain not only Justices' votes in cases, but also their actions at other stages of the decisionmaking process, such as decisions to grant or deny petitions for certiorari[20] and decisions to place cases on the discuss list.[21]

Like the attitudinal model, the strategic model of judicial decisionmaking is also premised on the notion that Justices' decisions are motivated by their personal preferences. In contrast to the attitudinal model, however, the strategic model contends that the Justices do not always decide cases based on their ideological preferences because they are limited by other factors.[22] External constraints, such as legal rules and institutional norms, may prevent Justices from deciding a case on purely ideological grounds. Internal constraints, namely the votes of other Justices, may also influence a Justice's decision in a particular case.[23] In support of the

---

[14] Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 254 (1997) ("The legal model may no longer reflect the prevailing view of legal scholars about judicial decisionmaking.").

[15] *See, e.g.*, THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 130 (2006).

[16] JEFFREY A. SEGAL & HAROLD J. SPAETH, SUPREME COURT AND THE ATTITUDINAL MODEL 69 (1993); *see also* DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 75 (1976).

[17] Elizabeth Coggins & Jeff Yates, *Intersection of Judicial Attitudes and Litigant Selection Theories: Explaining U.S. Supreme Court Decision-Making*, 29 WASH. U. J.L. & POL'Y 263, 265 (2009).

[18] Namely, scholars point to the fact that the Justices do not have to worry about their decisions being overturned by another court, they have lifetime appointments, they lack electoral accountability, and they control their docket, which allows them to select cases they think are important. ROHDE & SPAETH, supra note 16, at 72; Coggins & Yates, *supra* note 17, at 264, 271.

[19] *See, e.g.,* A.E. Dick Howard, *Now We Are Six: The Emerging Roberts Court*, 98 VA. L. REV. IN BRIEF 1 (2012) (finding that in the Court's 2010–11 term, of the opinions that were decided by a vote of 5–4, 88% were split along ideological lines); Mark Klock, *Cooperation and Division: An Empirical Analysis of Voting Similarities And Differences During the Stable Rehnquist Court Era—1994 to 2005*, 22 CORNELL J.L. & PUB. POL'Y 537, 577 (2013) (finding that most 5–4 decisions are split along conservative-liberal ideological lines).

[20] *See* Ryan Schoen & Paul J Wahlbeck, *The Discuss List and Agenda-Setting on the Supreme Court* 3-4 (2007), paper presented at 1st Annual Conference on Empirical Legal Studies, *available at* http://dx.doi.org/10.2139/ssrn.912783 (discussing agenda-setting scholarship on the Justices' certiorari decisions).

[21] *See* Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, LAW & SOCIETY REV., VOL. 24, NO. 3, 807, 815 (1990) (arguing that the Justices' decisions to place cases on the discuss list is largely driven by their desire to reverse or uphold the decision on ideological grounds).

[22] *See generally* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

[23] Coggins & Yates, *supra* note 17, at 274.

strategic model, several studies have found evidence that the Justices act strategically by engaging in agenda setting, changing their votes between conference and the final opinion, and taking actions to ensure a majority coalition.[24]

Each of the three models mentioned above has different implications for the role of oral argument in the Court's decisionmaking process. Under the legal model, oral argument may influence the Court's decision in a case if one advocate can argue the legal issues more persuasively than the other.[25] Oral argument may also influence the Court's decision if new legal arguments are raised by the Justices during oral argument that were not mentioned in the litigant or amicus curiae briefs. Under the attitudinal model, oral argument will not generally play an important role in the Court's decisionmaking process because the Justices' preferences are fixed beforehand. Rather, oral argument will only influence the Court's ultimate decision in a case if it provides Justices with new information that will help clarify which side best supports their predetermined positions.[26] If Justices act strategically in making their decisions, however, oral argument may serve dual functions. In addition to helping clarify which outcome would best support a Justice's personal preferences, under the strategic model, oral argument may provide Justices with insight into their colleagues' views about case. Accordingly, by expressing a particularly strong position during oral argument, a Justice may persuade other Justices to vote one way or another—especially if they are vying for that Justice's vote in another case.

B. The Role of Oral Argument in Supreme Court Decisionmaking

Although there is a general consensus that oral argument is important,[27] many scholars, lawyers, and judges have expressed doubt as to whether oral argument has any impact on the Supreme Court's ultimate decision in a case.[28] Numerous empirical studies have looked at oral argument in order to predict case outcomes.[29] Few studies, however, have looked at how oral argument itself may influence the Court's decisionmaking process. One potential reason for legal scholars' lack of focus on the influence of oral argument is the popular belief, rooted in the attitudinal model, that Justices are motivated primarily by their ideological preferences. As mentioned in the previous section, this basic premise of the attitudinal model means that unless oral argument can provide a Justice with new and important information about a case, nothing that transpires during oral argument is likely to impact the Justice's vote.

---

[24] *See, e.g.*, Forrest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POL. RES. Q. 551, 552 (2004); Gregory A. Caldeira, John R. Wright & Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 550 (1999).

[25] Phillips & Carter*, supra* note 1, at 82.

[26] *Id.* at 85.

[27] *See, e.g.*, Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 A.B.A. J. 801, 801 (1951) (declaring that oral argument is of the "highest" importance); Rex E. Lee, *Oral Argument in the Supreme Court*, 72 A.B.A. J. 60, 60 (1986) (stating that Justices seem to find oral argument useful).

[28] *See, e.g.,* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 280 (2002) (arguing that there is no empirical evidence that "oral argument regularly, or even infrequently, determines who wins and who loses"); THOMAS G. WALKER & LEE EPSTEIN, THE SUPREME COURT OF THE UNITED STATES: AN INTRODUCTION 106 (1993) (suggesting that few Justices' minds are changed after oral argument); *see also supra* note 3.

[29] *See supra* note 7.

The fact that oral argument no longer serves as the main source of information about a case also may have led to the perception that oral argument is not important—at least for those who believe that the Justices' votes are set once they know the facts and legal issues about a case. Modern Supreme Court Justices have several sources from which they can learn about a case, including litigant and amicus curiae briefs, lower court opinions, and law review articles.[30] In contrast, during the nineteenth century, oral argument served as the main opportunity for Justices to learn necessary legal and factual information. Amici briefs did not exist and litigants themselves rarely filed briefs.[31] Finally, the lack of empirical studies on the role of oral argument may simply be due to the fact that, until the 1980s, oral argument recordings were difficult to obtain.[32]

Recognizing the scarcity of studies on the subject, some scholars have attempted examine the impact of oral argument on the Court's decisionmaking process. In their study of school desegregation cases from 1954 to 1969, for example, Stephen Wasby *et al.* find that oral argument can influence the outcome of a case by helping the Court shape its strategy.[33] According to Wasby *et al.*, oral argument can bring to light particular issues that the Justices had not previously considered.[34] More importantly, however, Wasby *et al.* argue that the Justices use oral argument to "persuade [their] colleagues that they will have to deal with [a] point . . . to decide the case in a certain direction" or to "bring [certain points] out in the open."[35] In many cases, Wasby *et al.* find that "[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."[36]

The notion that Supreme Court Justices use oral argument to persuade one another finds support in subsequent studies. In his study of twenty-four cases from the 2004 Term, Lawrence Wrightsman concludes that the Justices primarily ask questions during oral argument to support their positions and point out the weaknesses of the opposing side.[37] David Gibson also argues that the Justices "use oral argument as an early opportunity to make known their tentative views to the other Justices, and to express . . . their agreement or disagreement" with a particular side.[38] Some Justices themselves have acknowledged that they often use oral argument to persuade other Justices to support a particular position. For example, Justice Ginsburg wrote that Justices often "ask questions with persuasion of [their] colleagues in mind,"[39] while Justice Stevens similarly commented that Justices sometimes use oral argument to make "a point . . . that you think may not have been brought out in the briefs well [and] that you want to be sure your colleagues don't overlook."[40] Also, Justice Kennedy once described oral argument as "the court

---

[30] JOHNSON, supra note 5, at 12; Caldeira & Wright, *supra* note 21, at 816.

[31] JOHNSON, *supra* note 5, at 2.

[32] Phillips & Carter, *supra* note 1, at 79–80.

[33] Stephen Wasby, Anthony D'Amato & Rosemary Metrailer, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 411 (1976).

[34] *See id.*

[35] *See id.* at 418.

[36] *Id.* at 414.

[37] LAWRENCE S. WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH 137–38 (2008).

[38] Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U. L. REV. 529, 530–31 (1984).

[39] Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999).

[40] JOHNSON, *supra* note 5, at 55.

[] having a conversation with itself through the intermediary of the attorney,"[41] suggesting that the Justices use oral argument as a forum for debate.

Some scholars have focused less on the persuasive function of oral argument, instead viewing oral argument as an opportunity for Supreme Court Justices to gather and clarify information about a case. For example, in his book *Oral Arguments and Decision Making on the Supreme Court*, political scientist Timothy Johnson argues that that the Justices "use oral arguments as an information-gathering tool to help them make . . . decisions as close as possible to their preferred outcomes."[42] Studying a random sample of seventy-five cases decided by the Court between 1972 and 1986,[43] Johnson concludes that the Justices often use oral argument to raise issues that were not presented by the litigants or amici in their briefs.[44] In the cases he studied, Johnson finds that during the opinion-drafting process, the Justices often brought up questions raised during oral argument.[45] Johnson also finds that almost one-third of the issues discussed in the Court's written opinions exclusively came from oral argument.[46] Other scholars have similarly asserted that the Justices use oral argument to clarify the substance and scope of claims and obtain information about the potential implications of various case outcomes.[47]

Supreme Court Justices themselves have expressed conflicting opinions about the role of oral argument. Although the majority of Justices acknowledge that oral argument is important, few Justices have gone beyond vague assertions about its value. In 1951, Justice Jackson wrote that "[he] think[s] the Justices would answer unanimously that . . . they rely heavily on oral presentations" and use them to "form at least a tentative conclusion" about a case.[48] Presumably based on his belief that Justices can be persuaded by the oral advocacy of litigants, Jackson wrote an article providing advocates with several suggestions on presenting an effective oral argument.[49] Justice Powell reaffirmed Justice Jackson's view when he said that "every judge knows . . . oral argument . . . contribute[s] significantly to the development of precedents."[50] Justice Harlan also remarked that there was "no substitute" for the Socratic method of oral argument "in getting at the heart of an issue and in finding out where the truth lies."[51]

Regarding whether oral argument can change Justices' minds about a case, Justice Brennan reflected that there were "many occasions when [his] judgment of a decision has turned on what happened in oral argument."[52] Chief Justice Rehnquist, on the other hand, once mentioned that "in a significant minority of cases in which [he] ha[s] heard oral argument, [he] ha[s] left the bench feeling differently than [he] did when [he] came on the bench."[53] Similarly,

---

[41] O'BRIEN, *supra* note 3, at 247.
[42] JOHNSON, *supra* note 5, at 2.
[43] JOHNSON, *supra* note 5, at 17.
[44] *Id.* at 246.
[45] *Id.*
[46] *Id.* at 247.
[47] Shapiro, *supra* note 38; Lee, *supra* note 27.
[48] Jackson, supra note 27.
[49] *Id.*
[50] KENNETH S. GELLER, EUGENE GRESSMAN, ROBERT L. STERN & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 571 (7th ed. 1993).
[51] Wasby, D'Amato & Metrailer, *supra* note 33, at 411.
[52] *Id.*
[53] REHNQUIST, *supra* note 3.

according to Justice Thomas, "Justices, [ninety-nine] percent of the time, have their minds made up" before oral argument.[54] Although comments by the Justices do not provide a complete insight into the role of oral argument in the U.S. Supreme Court, they suggest that oral argument may have at least some influence on the Justices' decisions.

II. Summary and Methodology

This paper examines whether, as argued by Timothy Johnson, Supreme Court Justices use oral to gather information about a case, or rather, as argued by Wasby *et al*., the Justices use oral argument as an opportunity to persuade their colleagues and make their positions known.[55] As Johnson argues in his book, if the Justices use oral argument to learn new information, then oral argument likely influences the Court's ultimate decision by helping the Justices identify which outcome best supports their desired objectives. Oral argument, moreover, would influence the Court's decision whether one believes that Justices decide cases based on their personal ideologies (the attitudinal model) or based on legal principles (the legal model). In either case, the Justices are obtaining new information about issues that are important to them. If, on the other hand, Justices use oral argument primarily as a persuasive tool or to make their positions known, then oral argument most likely serves a very different function. Namely, oral argument would more likely have an effect on the Court's ultimate decision in cases where some Justices have not formed a position prior to oral argument. Furthermore, oral argument would only influence the Court's decisionmaking process if we think that the Justices are susceptible to persuasion by their colleagues.

To determine whether the Justices use oral argument as more of an information-gathering or persuasive tool, I studied the oral argument and final opinions of seven 2013–14 Term cases: *Burrage v. U.S.*, *Fernandez v. California*, *Kaley v. U.S.*, *Kansas v. Cheever*, *Lozano v. Alvarez*, *Mississippi v. AU Optronics Corp.*, and *Sandifer v. U.S. Steel Corp*. I chose these cases because, as of March 2014, they were the only cases from the term in which the Court had issued written opinions. Three of seven the decisions were unanimous with no concurring opinions.[56] Two cases were decided unanimously but included concurring opinions.[57] Two of the seven cases were decided by a vote of 6–3.[58] It is important to note at the outset that the vote distribution in these cases is not typical. In the past three terms, 44–49% of the merits cases have resulted in unanimous decisions, and 20–29% of the merits cases have been decided by a 5–4 vote.[59] Presumably, the Court decides the easier cases first, which is the reason why a considerable majority of 2013–14 Term cases decided before April were unanimous opinions.

In each of the seven cases, I first looked at the oral argument transcript to assess whether the Justices used oral argument to learn new information. I divided the Justices' questions during oral argument into (1) questions directed at learning information, and (2) questions directed at persuading or making a point. Specifically, I separated questions using an "information-seeking

[54] Rombeck, *supra* note 3.
[55] *See supra* Part I.B.
[56] These cases were Kansas v. Cheever, Mississippi v. AU Optronics Corp., and Sandifer v. U.S. Steel.
[57] These cases were Burrage v. U.S. and Lozano v. Alvarez.
[58] These cases were Fernandez v. California and Kaley v. U.S.
[59] *Stat Pack Archive*, SCOTUSBLOG, http://www.scotusblog.com/reference/stat-pack/ (last visited Mar. 22, 2014).

scale" created by Edward Carter and James Phillips in their 2010 study on Supreme Court oral argument.[60] The scale, which is illustrated in *Figure 1*, divides questions into open-ended questions, close-ended questions, and non-questions.[61] Open-ended questions are those that usually begin with who, what, when, where, why or how. They generally serve an information-seeking function because they elicit an infinite number of responses from the advocate.[62] Close-ended questions, in contrast, only allow for two possible answers, such as yes or no. Two types of close-ended questions often arise during Supreme Court oral argument: bipolar and leading. Bipolar questions are considered less information-seeking than open-ended questions because they are "highly directive [and] . . . [t]he amount of information gained from [bipolar] questions is very limited."[63] Leading questions are directed more at persuasion than information gathering because their purpose is generally to "send a message, not receive one."[64] Finally, non-questions are simply statements or rhetorical questions that are not directed at eliciting any information at all.[65] When a Justice makes a statement or asks a rhetorical question, the Justice is speaking in order to persuade or make his or her position known.

Figure 1: Explanation of Edwards & Carter Information-Seeking Scale[66]

Information -seeking

Non-information seeking

Type	**Explanation**	**Example from 2013-14 Term cases**
Open-ended question	A question that does not limit the possible answers	"[W]hat realistically, can [experts] do in these cases where there is the ingestion of multiple drugs and the consequence is death?" (J. Alito, *Burrage v. U.S.*)
Close-ended question (bipolar)	A question that only allows two answer options	"As a matter of law, is that a violation?" (J. Kennedy, *Burrage v. U.S.*)
Close-ended question (leading)	A question that implies a certain yes/no answer	"So . . . the defendant isn't allowed to challenge the connection between the assets and the offense, right?" (J. Ginsburg, *Kaley v. U.S.)*
Non-question (rhetorical/statement)	A question where an answer is not sought or a statement	"[T]he holding of the [previous] case is that the prosecution may rebut this presumption with evidence from the reports of the examination that the defendant's requested." (J. Kagan, *Kansas v. Cheever*)

Of course, classifying the Justices' questions by type will not provide a perfectly accurate picture of the Justices' motivations during oral argument. For example, there are some instances

[60] Carter & Phillips, *supra* note 1, at 109–10.
[61] *Id.* at 110.
[62] *Id.* at 109.
[63] *Id.* (quoting MARK V. REDMOND, COMMUNICATION: THEORIES AND APPLICATIONS 220 (2000)).
[64] *Id.* (quoting RONALD B. ADLER, RUSSELL F. PROCTOR II & LAWRENCE B. ROSENFELD, INTERPLAY: THE PROCESS OF INTERPERSONAL COMMUNICATION 153 (2001)).
[65] *Id*. at 109–10.
[66] *Id.* at 110.

in which a Justice may ask an open-ended question during oral argument without actually seeking information. In the oral argument for *Burrage v. U.S.*, for instance, Justice Scalia posed a hypothetical to the petitioner and asked, "[s]o why isn't that but-for causation?"[67] While Justice Scalia's question is framed in an open-ended manner, and thus would be classified as an information-seeking question, a statement made by Scalia less than one minute later reveals that the purpose of his question was actually to make a point. When the petitioner responds that the hypothetical is "a form of but-for causation," Justice Scalia says: "I don't care if it's a form of but-for causation. It's but for causation."[68]

There are also methodological difficulties with categorizing the Justices' questions. During oral argument, Justices sometimes ask multiple questions in a row. One of the questions may be open-ended, while the other may be a bipolar question. In situations where a Justice posed multiple questions that all asked for essentially the same information, I only counted the final question in the series. For example, in *Burrage v. U.S.*, Justice Sotomayor asked the petitioner: "What would save your case in it? Is there a different proximate cause standard not involving but-for that would still get you what you are looking for?"[69] I counted Sotomayor's question as one bipolar question, and I did not count the open-ended question she posed first. Similarly, in *Kansas v. Cheever*, Justice Kagan first asked the respondent "if that's policy why isn't the – cross examination analogy as well?" and then said, "they are both the same kind of policy . . . one is no more policy than the other."[70] Here, I counted Justice Kagan's question as one statement because even though she appeared to ask an open-ended question, the second part of her question shows that she is making a point.

In some rare cases, I did not count certain questions or statements at all. Namely, I did not count statements that were made jokingly, such as the following statements made in *Lozano v. Alvarez*:

> *J. Scalia: Justice Sotomayor is from New York.*
> *J. Sotomayor: Yes, obviously.*
> *J. Roberts: Those of us from the Midwest think it's actually easier to hide a child in New York.*[71]

I also did not count questions in which the sole purpose of the question was to clarify what the litigant was saying.

In addition to looking at the questions posed during oral argument, I also examined issues raised in the written opinions of each of the seven cases. Specifically, I looked at whether the written opinions included any issues that came up during oral argument but were not raised in either the litigant or amicus briefs. As mentioned in Part I.B, Timothy Johnson conducted a similar comparison in his book on Supreme Court oral argument.[72] My assumption was that if the Court's opinions include issues brought up exclusively at oral argument, it would show not only that the Justices use oral argument to gather new information about a case, but also that oral argument has a visible influence on the Court's decisionmaking process. If, on the other hand,

---

[67] Transcript of Oral Argument at 6, Burrage v. U.S, 571 U.S. ___ (2014) (No. 12–7515).
[68] *Id.*
[69] *Id.* at 10.
[70] Transcript of Oral Argument at 42, Kansas v. Cheever, 571 U.S. ___ (2013) (No. 12–609).
[71] Transcript of Oral Argument at 29, Lozano v. Alvarez, 572 U.S. ___ (2014) (No. 12–820).
[72] *See supra* Part I.B.

the Court's opinions do not include any issues that are unique to oral argument, it would suggest that the Justices do not obtain new and important information from oral argument. The absence of issues unique to oral argument, however, does not rule out the possibility that oral argument serves an important strategic function for the Justices.

III. Questions Asked During Oral Argument: Results and Analysis

A. Results

In total, the Justices asked approximately 391 questions during the seven oral arguments: 200 to the winning party and 191 to the losing party. Statements and rhetorical questions made up the largest percentage of questions (34%). The Justices asked open-ended questions 30% of the time and bipolar questions 27% of the time. 10% of the questions asked were leading questions. There was not much of a difference between the types of questions posed to the winning party and those posed to the losing party. The main difference was that the percentage of statements and rhetorical questions directed at the losing party was slightly higher (38%) than those directed at the winning party (31%). The Justices also asked slightly more open-ended questions to the winning party (32% compared to 28%); however, the 4% difference does not appear significant. There was not much of a difference between the types of questions posed in cases decided unanimously and those decided non-unanimously. The biggest difference was that 42% of the questions in non-unanimous cases were statements or rhetorical questions, while statements and rhetorical questions only made up 32% of the questions in unanimous cases. The Justices asked open-ended questions 25% of the time in the non-unanimous cases and 29% of the time in unanimous cases. Bipolar questions made up 22% of the questions in non-unanimous cases and 30% in unanimous cases.[73]

The results are more interesting when one looks at the types of questions asked by each Justice. For example, as illustrated in *Figure 2*, 31 (23%) of the Court's 137 statements and rhetorical questions made during the seven oral arguments came from Justice Scalia. In fact, as shown in *Figure 3*, when one looks at the 63 questions asked by Justice Scalia during oral arguments, 49% of his questions were either statements or rhetorical questions. Justice Alito, on the other hand, asked only 4 (3%) of the Court's 137 statements/rhetorical questions. Out of all of Justice Alito's questions, 9% were either statements or rhetorical questions. On the opposite end, 24 (22%) of the Court's 110 open-ended questions came from Justice Breyer. Out of all of Justice Breyer's questions, 49% were open-ended questions. As illustrated in *Figure 3*, there was a wide discrepancy among the types of questions asked by the other Justices as well.

Figure 2: Type of Question by Justice as a % of Total Questions Asked by the Court

Type	Alito	Breyer	Ginsburg	Kagan	Kennedy	Roberts	Scalia	Sotomayor
Open-ended	17%	22%	11%	7%	10%	7%	13%	13%
Bipolar	14%	12%	14%	9%	19%	14%	9%	10%
Leading	22%	5%	15%	5%	7%	7%	22%	17%
Statement/ Rhetorical	3%	8%	7%	15%	12%	17%	23%	15%

[73] These results are listed in the Appendix.

Figure 3: Type of Question by Justice as a % of Total Questions Asked by the Justice

Type	Alito	Breyer	Ginsburg	Kagan	Kennedy	Roberts	Scalia	Sotomayor
Open-ended	41%	49%	30%	20%	22%	18%	22%	27%
Bipolar	30%	24%	33%	23%	39%	29%	14%	19%
Leading	20%	4%	14%	5%	6%	6%	14%	13%
Statement/ Rhetorical	9%	22%	23%	53%	33%	47%	49%	40%

B. Analysis and Implications

At first blush, the types of questions raised by the Court during oral argument do not appear to provide much insight into the function of oral argument. Although statements and rhetorical questions made up the majority of questions posed by the Court (34%), the Court also asked a fair amount of open-ended questions (30%). If oral argument primarily serves as a persuasive tool for the Court, one would think that the Justices would make many more statements or close-ended questions than open-ended ones. If, on the other hand, oral argument primarily serves as an information-gathering tool for the Court, one would think that the Justices would ask many more open-ended questions. In other words, the fact that the breakdown of questions is fairly equal does not seem to provide any indication as to how the Justices use oral argument. The most significant finding was that the proportion of statements and rhetorical questions was considerably higher in cases with non-unanimous opinions because it suggests that in more difficult cases, the Justices spend more time trying to persuade their colleagues.

When one looks at the questions asked by each Justice during oral argument, however, it becomes apparent that oral argument serves both an information-gathering and persuasive function—but its function depends on the individual Justice. For some Justices, such as Justices Kagan, Scalia, and Roberts, oral argument appears to serve largely as a persuasive tool and is less important for learning new information about a case. Approximately half of the questions asked by Kagan (53%), Scalia (49%), and Roberts (47%) during oral argument were either statements or rhetorical questions. In contrast, all three Justices asked far fewer open-ended questions. By posing mostly statements and rhetorical questions, Justices Kagan, Scalia, and Roberts show that, during oral argument, they do not necessarily want to learn about new issues to help make up their minds about a case. Rather, they see oral argument as an opportunity to make their own arguments, presumably in order to persuade the other Justices that their position is right. Considering oral argument appears to serve first and foremost a persuasive function for Kagan, Scalia, and Roberts, it is less likely to influence their ultimate decision on a case.

The above findings are consistent with statements made by Justices Kagan, Scalia, and Roberts about their views on oral argument. Justice Scalia, for example, has stated that it is "quite rare . . . that oral argument will change my mind."[74] Similarly, Justice Roberts once remarked that during oral argument, "[q]uite often the judges are debating among themselves and

[74] THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 61 (Mark Farkas, Brian Lamb & Susan Swain, eds. 2010).

just using the lawyers as a backboard."[75] According to Justice Kagan, "oral argument provides the first chance for [Justices] to see what [their] colleagues might think about a case, what's worrying them about a case, what interests them about a case."[76] The statements by all three Justices show that they are less concerned with obtaining information from the advocates during oral argument. Rather, the interaction among the Justices is more important.

For other Justices, namely Justices Breyer and Alito, oral argument appears to serve primarily as an opportunity to gather new information about a case or clarify issues that were not flushed out in the litigant or amici briefs. Open-ended questions made up approximately half (49%) of the questions posed by Justice Breyer, while Justice Alito also asked a significant amount (41%) of open-ended questions. In contrast, Justice Alito posed very few rhetorical questions or statements (9%). Justice Breyer also asked significantly fewer rhetorical questions and statements (22%). The fact that Justices Breyer and Alito ask more open-ended questions during oral argument suggests they are less concerned with persuading other Justices and more concerned with learning information that will help them make up their minds about a case. These findings are not necessarily surprising considering past statements made by Breyer and Alito about oral argument. When asked whether he has ever changed his mind after oral argument, Justice Alito responded "[o]h yes, certainly."[77] Justice Breyer has also acknowledged that he often sees a case differently after hearing an advocate's oral argument.[78] Other studies have likewise found that Justice Breyer's questions during oral argument often focus on learning about the policy implications of a case and clarifying the parties' positions.[79]

Other Justices, such as Ginsburg and Kennedy, appeared to take a middle approach, using oral argument equally for information-seeking and persuasion. While Justice Ginsburg posed slightly more open-ended questions than statements (30% compared to 23%), Justice Kennedy made more statements than open-ended questions (33% compared to 22%). Neither Justice, however, placed significant emphasis on one style of question over the other. The approach taken by Ginsburg and Kennedy suggests that for them, more than other Justices, oral argument can serve multiple functions. On the one hand, both Ginsburg and Kennedy use a fair amount of their time to argue their positions on a case. On the other hand, they also appear interested in learning information from the advocates. Consistent with her question-asking style, Justice Ginsburg in the past has suggested that she sees oral argument as serving a dual purpose in the Court's decisionmaking process. According to Ginsburg, "[o]ral argument . . . is an exchange of ideas," in which the Justices both receive information from the advocates and provide their own thoughts about a case.[80]

The above findings have important implications for Supreme Court's decisionmaking process. First, the fact that open-ended questions make up a fairly large proportion of the Court's

---

[75] Adam Liptak, *Are Oral Arguments Worth Arguing About?,* N.Y. TIMES, May 6, 2012, at SR5.

[76] Robert Barnes, *Justices Crank Up the Volume,* WASH. POST, Mar. 2, 2011, at A03.

[77] THE SUPREME COURT, supra note 74, at 139.

[78] RYAN A. MALPHURS, RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS 89 (2013).

[79] *See* Cynthia K. Conlon & Julie M. Karaba, *May It Please the Court: Questions About Policy at Oral Argument*, 8 NW. J. L. & SOC. POL'Y 89, 109 (2012).

[80] TIMOTHY S. BISHOP, KENNETH S. GELLER, EDWARD A. HARTNETT, DAN HIMMELFARB & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 789 (9th ed., 2007).

questions during oral argument suggests that, as argued by Timothy Johnson,[81] oral argument plays an information-seeking role for the Court. Although Justices have access to a variety of other sources of information, they may not think other sources adequately address certain issues or arguments. Oral argument thus gives Justices an opportunity to fill holes in their understanding about a particular case. Second, the fact that statements and rhetorical questions also make up a large portion of the Court's questions during oral argument suggests that Justices also use oral argument as a tool of persuasion. By making certain points, the Justices are not trying to develop their understanding of a case; rather, they are trying to sway the minds of their colleagues. As illustrated above, however, each Justice uses oral argument differently. Lawyers arguing before the Supreme Court may benefit from knowing, for example, that Justice Roberts appears to use oral argument primarily for persuasion, while Justice Alito is more interested in gathering information.

The findings do not necessarily favor one model of judicial behavior over another. Even if the Justices primarily decide cases based on their personal ideologies, as posited by the attitudinal model, they may nonetheless use oral argument as an opportunity to learn new information that helps them reach a decision consistent with their ideological preferences. Considering the large number of statements and rhetorical questions posed by the Justices during oral argument, however, the attitudinal model does not fully explain Justices' behavior. Instead, the fact that all Justices use oral argument, at least in part, to persuade their colleagues supports the strategic model of judicial behavior. One would assume that if the Justices' decisionmaking were solely based on personal ideologies, they would not spend such a significant amount of time attempting to persuade one another during oral argument.

IV. Oral Argument Issues in the Written Opinions: Results and Analysis

A. Results

Five of the Court's written opinions discuss issues mentioned during oral argument that were not raised in either the litigant or amicus briefs. Two of the opinions—*Kansas v. Cheever* and *Sandifer v. U.S. Steel Corp*.—only address issues that were presented in the parties' briefs. The opinions in *Fernandez v. California*, *Kaley v. U.S.*, and *Lozano v. Alvarez* each mention one or two issues unique to oral argument, but in all three cases, the legal issues raised for the first time at oral argument were not crucial to the Court's decision. In contrast, the opinions in *Mississippi v. AU Optronics* and *Burrage v. U.S*. included issues raised during oral argument that were not addressed in the briefs, and in both cases, these issues appeared central to the Court's reasoning.

The majority opinion in *Fernandez v. California* uses a practical problem raised by Justices Breyer and Kennedy at oral argument to explain one of the reasons for the Court's decision not to extend *Randolph* to cases where the objecting tenant is not physically present.[82] Writing for the Court, Justice Alito emphasizes the Court's "refus[al] to stretch *Randolph* to such great lengths" where it could be possible that "[a] wife would be unable to consent to a search of

[81] *See supra* Part I.B.
[82] *See* Fernandez v. California, 571 U.S.___(2014) (No. 12–7822), slip op. at 12.

the house 10 years after the date on which her husband objected."[83] Justices Breyer and Kennedy raised similar points for the first time at oral argument. Breyer expressed his concern with the fact that, under the petitioner's proposed rule, a wife would possibly "never be able to [let] a policeman in the house" once her husband objected.[84] During oral argument, Justice Kennedy also asked the petitioner "[w]hat happens for the next ten hours" or "500–plus days" when the defendant is in custody "and for all that time, the co-tenant . . . cannot invite the police" into the house.[85] The majority in *Fernandez* also notes that it was not "persuaded to hold that an objection lasts for a 'reasonable' time."[86] Interestingly, the "reasonable time" rule was not advanced by either of the litigants. Rather, at oral argument, Justice Breyer suggested adopting a rule that an objection to police entry could be "at least valid for a reasonable time thereafter."[87]

In *Kaley v. U.S.*, which held that a defendant challenging the legality of a pre-trial asset seizure does not have a right to contest a grand jury's probable cause determination,[88] the majority refers to an issue raised for the first time at oral argument. According to the majority, the "rule the Kaleys seek would have strange and destructive consequences" because it would essentially require "a judge to decide anew the exact question the grand jury has already answered."[89] If the judge reached an opposite conclusion to the grand jury, moreover, "the same judge who found probable cause lacking would [have to] preside over a trial premised on its presence."[90] At oral argument, Justice Ginsburg first raised "the anomaly" of having "a judge who has determined there is no probable cause to preside at a trial because the grand jury has found that there is probable cause."[91] In response to Justice Ginsburg's concern, the attorney for the Kaleys explained that a judge would not necessarily have to conclude that probable cause was lacking; instead, "the judge might conclude . . . that [at] that hearing at that moment in time the government did not satisfy its burden" of proving probable cause.[92] In its opinion, the Court explains that the advocate's response at oral argument was insufficient.[93]

The majority opinion in *Lozano v. Alvarez*, written by Justice Thomas, refers to one issue raised for the first time at oral argument by Justice Scalia. In support of its holding that equitable tolling does not apply to the provision of the Hague Convention at issue, the Court emphasizes that equitable tolling only applies to a treaty when there is "a background principle of equitable tolling that is shared by the signatories to the [treaty]."[94] The petitioner in the case, however, "[did] not identif[y] a background principle of equitable tolling."[95] Justice Thomas mentions that, instead, the petitioner conceded at oral argument, "that in the context of the [Hague] Convention, 'foreign courts have failed to adopt equitable tolling . . . because they lac[k] the presumption that

---

[83] *Id*.
[84] Transcript of Oral Argument at 4, Fernandez v. California, 571 U.S.___(2014) (No. 12–7822).
[85] *Id.* at 10.
[86] Fernandez v. California, 571 U.S.___(2014) (No. 12–7822), slip op. at 13.
[87] Transcript of Oral Argument at 29, Fernandez v. California, 571 U.S.___(2014) (No. 12–7822).
[88] Kaley v. U.S., 571 U.S.___(2014) (No. 12-464), slip op. at 1.
[89] *Id.* at 10.
[90] *Id.* at 10–11.
[91] Transcript of Oral Argument at 9, Kaley v. U.S., 571 U.S.___(2014) (No. 12-464).
[92] *Id.* at 12.
[93] *Id.* at 11 (citing Transcript of Oral Argument at 12, Kaley v. U.S., 571 U.S.___(2014) (No. 12-464)).
[94] Lozano v. Alvarez, 571 U.S.___(2014), slip op. at 10.
[95] *Id.*

we [have]."[96] Although the fact that other countries do not apply equitable tolling was discussed in the litigant briefs, the specific background principle issue was only mentioned during oral argument.

The Court's decision in *Mississippi v. AU Optronics Corp.* largely turned on a point raised by Justice Sotomayor during oral argument that was not mentioned in any briefs, namely the similarity between the language of the statute in question—§ 1332(d)(11)(B)(i)—and Federal Rule of Civil Procedure 20.[97] In the opinion, Justice Sotomayor writes:

> Here, Congress used the terms "persons" and "plaintiffs" just as they are used in Federal Rule of Civil Procedure 20, governing party joinder. Where § 1332(d)(11)(B)(i) requires that "claims of 100 or more persons [must be] proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions or law or fact," Rule 20 provides that "[p]ersons may join in one action as plaintiffs if they assert any right to relief jointly . . . and any question of law or fact common to all plaintiffs will arise in the action." Thus, just as it is used in Rule 20, the term "persons" in § 1332(d)(11)(B)(i) refers to the individuals who are proposing to join as plaintiffs in a single action.[98]

The above passage echoes statements made by Justice Sotomayor at oral argument. At one point during oral argument, Justice Sotomayor told the petitioner, "[y]ou know, this language is very reminiscent of what's in [Rule 20], the joinder rule . . . And if I look at the joinder rule, it uses 'persons' and 'plaintiffs' essentially the same way."[99]

The Court's opinion in *Mississippi v. AU Optronics Corp.* also points out that "if the term 'plaintiffs' is stretched to include all unnamed individuals . . . then § 1332(d)(11)(B)(i)'s requirement that 'jurisdiction shall exist only over those plaintiffs whose claims [exceed $75,000]'" would turn into "an administrative nightmare."[100] The Court declares, for example, that it would be too difficult for "a district court to identify the unnamed parties whose claims in a given case are for less than $75,000."[101] "Even if [a court] could identify every such person," moreover, it would struggle to "ascertain the amount in controversy for each individual claim."[102] Congress, according to the Court, could not have "intended that federal district courts engage in these unwieldy inquiries."[103] The administrative problem highlighted by the Court in its opinion was not addressed in any of the briefs. The problem was first raised by Justice Sotomayor during oral argument when she asked the respondent "[s]o how do you remand a case when it involves unnamed plaintiffs? . . . . What does a court do to figure out which all of those unnamed people have claims above or below $75,000?"[104] In response, the respondent stated that the claims under $75,000 would not necessarily get remanded because of district court's ability

---

[96] *Id.* (citing Transcript of Oral Argument at 19–20, Lozano v. Alvarez, 571 U.S.___(2014) (No. 12-820)).

[97] *See* Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036), slip op. at 7; Transcript of Oral Argument at 27–28, Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036).

[98] Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036), slip op. at 7.

[99] Transcript of Oral Argument at 27–28, Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036).

[100] Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036), slip op. at 8.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 9.

[104] Transcript of Oral Argument at 27, Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036).

to exercise supplemental jurisdiction.[105] The Court rejected the respondent's answer in its opinion, stating that while "[w]e need not decide the issue here . . . at least one Court of Appeals has rejected that view."[106]

In *Burrage v. U.S.*, the Court unanimously held that "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death . . .the defendant cannot be liable under [21 U.S.C. § 841(b)(1)(C)] unless such use is a but-for cause of the death or injury."[107] In the opinion, Justice Scalia refers to oral argument when discussing the unworkability of the government's proposed "contributing-cause" test. Scalia points out that taken literally, the government's contributing-cause test would include any "act or omission that makes a positive incremental contribution, however small, to a particular result."[108] "But at oral argument," Scalia continues, the government "insisted that its test excludes causes that are 'not important' or 'too insubstantial,'" and "could not specify how important or how substantial a cause must be to qualify."[109] The uncertainty of the contributing-cause standard, according to the Court, "[could not] be squared with the beyond-a-reasonable doubt standard" in cases like *Burrage* where evidence of causation is often presented in terms of probabilities.[110] "Is it sufficient that the use of a drug made the victim's death 50 percent more likely? Fifteen percent? Five? Who knows."[111]

The unworkability problem mentioned in the Court's opinion was brought up by Justices Kagan and Scalia during oral argument but was not mentioned in any of the briefs. Although the opinion only explicitly refers to oral argument once, the entire paragraph mirrors questions raised at oral argument. For example, during oral argument, Justice Kagan asked the government whether the fact that "the heroin made it 50 more likely that death resulted" would be sufficient to impose liability under the proposed contributing-cause standard.[112] If 50 percent were sufficient, she asked, "[h]ow about 30 percent?"[113] Justice Kagan also cast doubt on the compatibility between a test based "on probabilities and likelihoods" and the requirement of finding guilt beyond a reasonable doubt.[114] Later, when the government suggested that it would not object to a Court decision requiring a drug to be a "substantial contributing factor," Justice Scalia questioned what would count as substantial—"10 percent, 20 percent . . . 5 percent, what?"[115]

B. Analysis and Implications

Examination of the written opinions shows that although oral argument often raises new issues that influence the Court's decisionmaking process, matters raised for the first time at oral

[105] *Id.* at 28–29.
[106] Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036), slip op. at 9 fn.6.
[107] Burrage v. U.S., 571 U.S.___(2014), slip op. at 14–15.
[108] *Id.* at 14.
[109] *Id.* (citing Transcript of Oral Argument at 28, 41–42, Burrage v. U.S., 571 U.S.__ (2014)).
[110] *Id.*
[111] *Id.*
[112] Transcript of Oral Argument at 29, Burrage v. U.S., 571 U.S._ (2014).
[113] *Id.* at 32.
[114] *Id.* at 42.
[115] *Id.* at 41–42.

argument are rarely, if ever, crucial to the Court's ultimate decision. The influence of oral argument, moreover, appears to vary across cases. In some cases, such as *Burrage v. U.S.* and *Mississippi v. AU Optronics Corp*., oral argument appears to have played a pretty significant role in the Court's final analysis. In *Burrage v. U.S.*, for example, a notable part of the Court's opinion mirrored questions posed by Justices Scalia and Kagan during oral argument. In rejecting the government's "contributing-cause" test, the Court appeared particularly put off by the government's explanation of the test during oral argument.[116] Specifically, in its opinion the Court emphasizes that the government could not provide the Justices with an answer as to how important something must be in order to qualify as a contributing cause under its test.[117] If the government had provided the Court with a more clear-cut test at oral argument, it is at least possible that the Court's decision could have turned out differently.

Similarly, in *Mississippi v. AU Optronics Corp*., issues raised by Justice Sotomayor for the first time at oral argument were central to the Court's decision. In the opinion, Justice Sotomayor began the Court's analysis by pointing to the similarities between the statute in question and Federal Rule of Civil Procedure 20.[118] Although it is unlikely that the Court would have decided in favor of AU Optronics had Justice Sotomayor not raised the Rule 20 issue at oral argument, the Court's reasoning would certainly have rested on weaker footing. The Court's discussion of the "administrative nightmare" that would result from interpreting "persons" in the statute to include all unnamed plaintiffs was another important point made by the Court in its decision, and it was also raised for the first time at oral argument by Justice Sotomayor.[119]

It is important to note that during the oral argument for *Mississippi v. AU Optronics Corp.*, Justice Sotomayor raised the Rule 20 and administrative issues in order to make a point. She did not need any clarification from the advocates that the language in the statute was very similar to Rule 20 or that it would be too difficult to remand claims below $75,000. Nor was she seeking new information from the advocates. Rather, she was using oral argument as a persuasive tool. Thus, oral argument may not have influenced Justice Sotomayor's decision in the case. Considering the Rule 20 issue plays a key part in the Court's decision, however, other Justices were presumably influenced by Justice Sotomayor's statements at oral argument. In fact, it may have been one of the reasons why she wrote the Court's opinion.

In the other three cases—*Fernandez v. California*, *Lozano v. Alvarez*, and *Kaley v. U.S.*—issues raised for the first time at oral argument played minor roles in the Court's decisions. In these cases, oral argument seems to have influenced the Court's decisionmaking process simply by giving Justices additional reasons to support a particular outcome. In *Fernandez v. California*, for example, the majority's opinion in no way turned on questions unique to oral argument. During oral argument, however, Justices Kennedy and Breyer raised practical problems with extending *Randolph* to a situation where the objecting tenant is no longer present, and the majority used their points to bolster its argument.[120] The fact that the opinion rejects the

[116] Burrage v. U.S., 571 U.S.___(2014), slip op. at 14.
[117] *Id.* (citing Transcript of Oral Argument at 28, 41–42, Burrage v. U.S., 571 U.S.__ (2014)).
[118] Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036), slip op. at 7.
[119] *See* Mississippi v. AU Optronics Corp., 571 U.S.___(2014) (No. 12-036), slip op. at 9.
[120] *See* Fernandez v. California, 571 U.S.___(2014) (No. 12–7822), slip op. at 12; Transcript of Oral Argument at 4, Fernandez v. California, 571 U.S.___(2014) (No. 12–7822).

"reasonable time" rule proposed by Justice Breyer during oral argument also indicates that Breyer's proposal may have played a part in the Justices' discussions after oral argument. Thus, even though the majority ultimately rejected the rule advanced by Justice Breyer, Breyer's questions at oral argument played some role in the Court's decisionmaking process.

The Court's opinions in *Lozano v. Alvarez* and *Kaley v. U.S.* both cite statements made by the losing party at oral argument in order to provide further support for the Court's decision. Similarly to the use of oral argument in *Mississippi v. AU Optronics Corp.*, the issues raised by the advocates for the first time during oral argument in *Lozano v. Alvarez* and *Kaley v. U.S.* were not in response to open-ended questions by the Justices. Rather, they were made in response to Justices' efforts to persuade one another. When Justice Ginsburg in *Kaley v. U.S.*, for example, questioned how a judge could preside over a trial after determining that probable cause is lacking, she was not looking to learn new information from the Kaleys' attorney.[121] Likewise, when Justice Scalia in *Lozano v. Alvarez* stated that "a treaty should be interpreted uniformly by all the parties to it," he was making a point as opposed to seeking to elicit an answer from the petitioner.[122]

In sum, the fact that five out of seven opinions from the 2013–2014 Term discuss issues raised by the Justices for the first time at oral argument suggests that, in general, oral argument has at least some influence on the Court's ultimate decision in a case. At the same time, issues unique to oral argument constituted only minor part of the Court's opinion in most cases, which suggests that issues raised for the first time at oral argument are unlikely to play a crucial role in determining case outcomes. Furthermore, as demonstrated by *Kansas v. Cheever* and *Sandifer v. U.S. Steel Corp*., sometimes issues raised for the first time at oral argument play no role in the Court's final decision.

The findings do not necessarily support one model of judicial behavior over another, but they do emphasize the importance of oral argument as a persuasive tool for the Justices. As mentioned above, references to oral argument in the Court's written opinions largely concern instances during oral argument where a Justice was making a point rather than eliciting new information. Accordingly, it suggests that Justices can often be persuaded by arguments made by their colleagues during oral argument. It also suggests that, contrary to arguments made my some scholars, the Justices do not always go into oral argument with their minds made up. If the Justices' votes in a case were fixed according to their ideological preferences alone, one would not expect the Court's opinions to be influenced by the persuasive tactics of other Justices.

Conclusion

In discussing the *Brown v. Board of Education* oral argument, Justice Frankfurter noted that "particularly in a case of this sort, a question does not imply an answer; [only] an eagerness for education."[123] This paper partially confirms Justice Frankfurter's remarks. As illustrated by the types of questions asked by the Justices during oral argument, oral argument plays an important information-seeking role for the Court by allowing Justices to learn new information

[121] Transcript of Oral Argument at 9, Kaley v. U.S., 571 U.S.___(2014) (No. 12-464).

[122] Transcript of Oral Argument at 19–20, Lozano v. Alvarez, 571 U.S.___(2014) (No. 12-820)).

[123] Stephen L. Wasby, Anthony A D'Amato & Rosemary Metrailer, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q. J. SPEECH 410, 411 (1976).

about a case. At the same time, the Justices do not use oral argument simply to gather information. For some Justices, oral argument is more important as a strategic tool, allowing them to make their positions known and persuade their colleagues. The function of oral argument is not only different for each Justice, but it is also different for each case. As demonstrated by the Court's written opinions, sometimes issues raised for the first time at oral argument can be especially influential in the Court's final decision. In other cases, the Court's decision appears to be influenced solely by issues raised by the parties or amici in their briefs. Although the paper's findings do not provide a full picture of the role of oral argument in Court's decisionmaking, they at least clarify one thing: oral argument *is* worth arguing about.

Appendix: Results from Questions Asked at Oral Argument

Total Questions Asked By the Court

Type	% of Total
Open-ended	31%
Bipolar	30%
Leading	9%
Statement/Rhetorical	31%

Questions Asked to the Winning Party

Type	% of Total
Open-ended	29%
Bipolar	27%
Leading	10%
Statement/Rhetorical	34%

Total Questions Asked to the Losing Party

Type	% of Total
Open-ended	27%
Bipolar	24%
Leading	11%
Statement/Rhetorical	38%

Total Questions Asked In Unanimous Cases

Type	% of Total
Open-ended	29%
Bipolar	30%
Leading	9%
Statement/Rhetorical	32%

Total Questions Asked In Non-Unanimous Cases

Type	% of Total
Open-ended	25%
Bipolar	22%
Leading	11%
Statement/Rhetorical	42%