

ORAL ARGUMENT IN THE EARLY ROBERTS COURT: A QUALITATIVE AND QUANTITATIVE ANALYSIS OF INDIVIDUAL JUSTICE BEHAVIOR*

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I. INTRODUCTION

President Obama's recent nominations of Justices Sotomayor and Kagan to the Supreme Court stirred up support among Democrats, opposition from Republicans, and attention from the media, placing the Supreme Court again in the national consciousness. In addition, the makeup of the Supreme Court is under intense scrutiny internationally as cases with global implications, such as those involving Guantanamo Bay detainees and Mexican nationals on death row in the United States, make up an increasingly prominent portion of the Court's docket.

In the context of politics, discussion about Supreme Court justices often focuses simplistically on whether they are liberal or conservative. The reality, however, is more nuanced. It has been posited that justices tend to drift ideologically during their time on the Court, and that most often the drift is from

* This is the second in a series of articles by the authors examining Supreme Court oral argument from both qualitative and quantitative perspectives. The first article examined how information seeking and the quantity of verbal activity has changed from the 1960s to the present, and that research sought to determine causes of justices' behavior during oral argument. See 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). The reader should note that although Justices Sotomayor and Kagan joined the Court before this article reached publication, the research underlying it was conducted when Justice Alito was the most junior justice.

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conservative to liberal.¹ But perhaps more important than characterizing justices with broad political labels is understanding how they actually decide cases and justify those decisions. Clearly, each justice on the Court has a certain style of judging that affects the results of the cases that reach the Court. Generally, scholarly attention has been paid to the Court's published opinions, which are (1) collective works not only among nine justices but also their approximately three dozen law clerks; and (2) not themselves decisions but rather justifications for decisions reached earlier. The actual decisionmaking process takes place behind closed doors with little public insight available. Justices read briefs in their chambers and hold decision conferences with no one present other than themselves.

But there is one aspect of the process of judging at the Court that is open to the public and that might give insight into the decisions reached: oral argument. In the Supreme Court, oral argument is the only time all the justices appear together to consider a case in the public eye, and oral argument is the sole public face of the Court's work between the time briefs are submitted and opinions are published. Hence it is of great importance, and yet it remains obscure and little understood. The Court communicates with itself and the lawyers in deciding a case, and oral argument provides a first-hand look at these interpersonal and group communication processes.

With that reality in mind, this paper will progress as follows: Part II will explore what justices themselves have said about oral argument's function and value, what scholarly research has uncovered about oral argument, and how oral argument could predict justices' votes. Part III will describe how the data for this study was collected and analyzed. Part IV will provide a comparative picture of the justices' oral argument behavior, and then look specifically at each justice and how that justice's behavior may or may not be indicative of voting on the merits. Finally, Part V will summarize the paper's findings, weaknesses, and contributions.

1. See e.g. Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?* 101 Nw. U. L. Rev. 1483 (2007).

II. BACKGROUND

A. Justices on Oral Argument

A review of justices' comments on the function and importance of oral argument can divide justices into three schools of thought: (1) oral argument is important in helping decide cases; (2) oral argument's main function is to communicate with other justices; and (3) oral argument has little to no value. Within the camp of justices arguing that oral argument helps decide cases there is delineation between those who see oral argument as a general help, and those who see oral argument as important in close cases, often dealing with obscure law. Interestingly, it is generally justices from previous eras who fall into the first camp, while more recent justices view oral argument's value in determining cases as limited to a few circumstances, possibly hinting at a shift in the function of oral argument over time.²

Many of the current or recent justices indicate oral argument is used as a vehicle for communication with their fellow justices, though less-recent justices have noticed this function as well. Justice Ginsburg outlined five functions of justices' questions and remarks during oral argument:

- to let counsel know what troubles the court, or at least the questioner, about the case or the issue on which counsel is holding forth;
- to satisfy the court on matters the judges think significant, issues the judges might puzzle over in chambers, and resolve less satisfactorily without counsel's aid;
- to cue counsel that an argument he or she is pursuing with gusto is a certain loser, so that precious time would be better spent on another point;

2. A full discussion of justices' expressed views on oral argument can be found in the authors' previous article. See Phillips & Carter, *supra* n. *.

- to assist counsel to strengthen a position in hopes of persuading one's colleagues; and
- to nail down a concession that will show up in an opinion, perhaps in a footnote.³

B. Research on Oral Argument

Research to date on oral argument by scholars, attorneys, and observers of the Court can generally either be classified as anecdotal or case-study in nature, or as more quantitatively empirical.⁴ From more anecdotal research, often geared towards practicing attorneys, others have found that justices may play the role of antagonist or protagonist during questioning,⁵ justices may make questions in form only with the purpose of stating their opinion,⁶ justices use hypothetical questions to communicate with each other,⁷ justices use oral argument as a pre-conference,⁸ justices hostile to one side will ask the majority of questions to that side and justices supportive of a side will

3. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 569 (1999). More generally Justice Ginsburg noted that “[o]ral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between court and counsel.” *Id.* at 569. She did admit, though, that “[a]s between briefing and argument, there is near-universal agreement among federal appellate judges that the brief is more important—certainly is more enduring.” *Id.* at 567. Finally, Justice Ginsburg classifies oral argument as “a hold-the-line operation,” for during her time on the bench she has “seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs.” *Id.* at 570. But she added that she has seen “several potential winners become losers in whole or in part because of clarification elicited at argument.” *Id.*

4. A more detailed review of research on oral argument can be found in the authors’ previous article. See Phillips & Carter, *supra* n. *, at part IIB.

5. Donald S. Cohen, *Judicial Predictability in United States Supreme Court Advocacy: An Analysis of the Oral Argument in Tennessee Valley Authority v. Hill*, 2 U. Puget Sound L. Rev. 89, 134 (1978–79).

6. Stephen L. Wasby, Anthony A. D’Amato, & Rosemary Metrailler, *The Functions of Oral Argument in the U. S. Supreme Court*, 62 Quarterly J. Speech 410, 414 (1976).

7. E. Barrett Prettyman Jr., *The Supreme Court’s Use of Hypothetical Questions at Oral Argument*, 33 Catholic U. L. Rev. 555 (1984).

8. Stephen M. Shapiro, *Symposium on Supreme Court Advocacy: Oral Argument in the Supreme Court of the United States*, 33 Catholic U. L. Rev. 529, 530–31, 544–45 (1984).

often jump in to help that side's attorney;⁹ oral argument is similar to the Socratic method with the justices as professors and lawyers as students,¹⁰ and justices try to persuade their colleagues via their comments and questions in oral argument.¹¹ More empirically rigorous research has discovered that justices tend to use statements more than questions in oral argument;¹² that justices strategically interrupt counsel in order to "score rhetorical points";¹³ that justices' questions can be divided into either affirming, inquisitive, or challenging,¹⁴ and that justices use oral argument to find out what their colleagues are thinking on a case.¹⁵

C. Predicting Case Outcomes from Oral Argument Behavior

Many have taken note that justices quite often foreshadow their leanings in a case during oral argument.¹⁶ In a qualitative sense observers of the Court have found that justices' comments and questions often predict voting patterns,¹⁷ that justices speak more to the side they will eventually oppose,¹⁸ that justices are more hostile to the side they vote against,¹⁹ and that justices are

9. *Id.* at 547.

10. John Brigham, *May It Please the Court . . .*, L. & Cts. 3 (Spring 1995); see also Wasby, et al., *supra* n. 6, at 414.

11. Lawrence Baum, *May it Please the Court . . .*, L. & Cts. 4 (Spring 1995).

12. Neil D. McFeeley & Richard J. Ault, *Supreme Court Oral Argument*, 20 *Jurimetrics* 52, 71 (1979).

13. David R. Gibson, *Opportunistic Interruptions: Interactional Vulnerabilities Deriving from Linearization*, 68 *Soc. Psychol. Q.* 316, 331 (Dec. 2005).

14. Lawrence S. Wrightsman, *The Psychology of the Supreme Court 74-75* (Oxford U. Press 2006).

15. Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court 59-67* (St. U. of N.Y. Press 2004).

16. For a more comprehensive review of Supreme Court vote forecasting, see Phillips & Carter, *supra* n. *, at part IIC.

17. Cohen, *supra* n. 5, at 136; Wasby et al. *supra* n. 6, at 414; Linda Greenhouse, *Press Room Predictions*, 2 *Perspectives on Pol.* 781 (2004) (comparing actual outcomes to reporter's post-argument predictions).

18. Tony Mauro, *When In Doubt, Look to Roberts for Outcome of Supreme Court Case*, 236 *Leg. Intelligencer* 4 (July 19, 2007); John G. Roberts Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 *J. S. Ct. History* 68, 75 (Mar. 2005); Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions during Oral Argument*, 6 *J. App. Prac. & Process* 271 (2004).

19. See generally Shullman, *supra* n. 18.

more unsympathetic to the side they do not vote for on the merits.²⁰ In more quantitatively oriented studies, Timothy Johnson and colleagues have determined that when the Court speaks more to one side, or uses more unpleasant language to one side during oral argument, the probability of that side winning plummets.²¹ Due to the established link between oral argument behavior and voting on the merits, Supreme Court scholar Lee Epstein has cautioned against the use of prediction models that fail to take into account oral argument behavior.²²

Thus, despite conventional notions, information gathering is just one of a few functions of oral argument, and likely not its main function. Instead justices spend a large amount of time asking pseudo-questions or making statements in order to influence each other. These behavioral patterns do appear to have predictive ability when it comes to which side ultimately prevails, but we still do not know how individual justices are behaving, and how such behavior might differ both across justices and in the ability to predict each justice's eventual vote.

III. DATA MEASUREMENT AND COLLECTION

A. Measuring the Seeking of Information

In order to create a valid and reliable measure of information seeking, literature from psychology, law,²³ rhetoric,

20. Lawrence S. Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach* 140 (Oxford U. Press 2008).

21. Timothy R. Johnson, Ryan C. Black, Jerry Goldman, & 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 *Washington U. J. of L. and Policy* 241 (2009); Timothy R. Johnson, Ryan C. Black, Sarah A. Treul, & Jerry Goldman, *Jekyll and Hyde Questions from the Bench: Does the Emotional Nature of Justices' Questions Affect Their Votes on the Merits?* (unpublished ms. presented at Midwest Political Sci. Assn., Chicago, Ill., Apr. 4, 2009) (copy on file with *Journal of Appellate Practice and Process*).

22. Lee Epstein, *Introduction to the Symposium—Forecasting U.S. Supreme Court Decisions*, 2 *Perspectives on Pol.* 757, 758 (Dec. 2004) (referring with approval to *Greenhouse*, *supra* n. 17).

23. Most of the research on questioning in a legal setting is from trials in courtrooms, which some may argue are irrelevant to the proceedings of an appellate case; however, comments by the justices as well as findings by Court observers seem to indicate that in an appellate trial the questioning justice acts like a questioning attorney in a trial setting, the questioning justice's colleagues function as a jury that he or she is trying to persuade, and

sociology, interpersonal communication, and linguistics was analyzed.²⁴ Based on this research on interrogation, questions can be first broken into three groups: genuine questions, counterfeit or pseudo-questions, and non-questions.²⁵ Dividing up these three categories further, genuine questions include open-ended questions (wh- questions),²⁶ the highest degree of information seeking; close ended, or bipolar, questions, the lowest degree of information seeking for genuine questions;²⁷ and disjunctive questions, which are a hybrid of open- and closed-ended questions.²⁸ For pseudo-questions, leading questions appear to contain a bit more information-seeking qualities than rhetorical questions, as they can still be answered in the affirmative or the negative, whereas rhetorical questions do not really elicit a response, though, if misinterpreted, might be met with an answer.²⁹ Finally, non-questions, if excluding pseudo-questions, would consist of declarations. From these question types and their relative degrees of information seeking, the six-point scale shown in Figure 1 was created. With this ordinal scale each sentence uttered by a justice in oral argument can be given a numeric score so that an average information-seeking score can be generated for each justice per side that they

the attorneys engaging in oral argument become the witnesses. See e.g. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 247 (7th ed., W.W. Norton & Co. 2005); Joan Biskupic, *Justices Make Points by Questioning Lawyers*, USA Today 7A (Oct. 6, 2006); Wasby, et al., *supra* n. 6, at 418; Baum, *supra* n. 11, at 4; Gibson, *supra* n. 13. For additional sources addressing this point, see Phillips & Carter, *supra* n. *, at part IIB.

24. For a more in-depth survey of questioning, see Phillips & Carter, *supra* n. *, at part III.

25. Ronald B. Adler, Lawrence B. Rosenfeld & Russell F. Proctor II, *Interplay: The Process of Interpersonal Communication* 199–202 (8th ed., Oxford U. Press 2001).

26. J. T. Dillon, *The Practice of Questioning* 19–23 (Routledge 1990) (discussing uses of various types of questions in various court proceedings).

27. *Id.*

28. Anne Walker Graffam, *Linguistic Manipulation, Power, and the Legal Setting*, in *Power Through Discourse* 57, 73 (Leah Kedar ed., Ablex Publishing 1987) (explaining that a disjunctive question is a question that starts off having only two possible answers, such as a yes/no question, but a phrase—such as “or something else”—is added to the end of the question that opens up the possible answers); see also Sandra Harris, *Questions as a Mode of Control in Magistrates' Courts*, 49 *Intl. J. of the Sociology of Lang.* 5, 10–11 (1984) (classifying types of questions); Mark V. Redmond, *Communication: Theories and Applications* 219–22 (2000) (including illustrations).

29. Irene Koshik, *Beyond Rhetorical Questions: Assertive Questions in Everyday Function* 1–2 (John Benjamins Pub. Co. 2005).

verbally engage. The higher the information-seeking score (ISS) a justice receives, the more information seeking he or she appears to be engaging in.³⁰

Figure 1
Degree-of-Information-Seeking Scale³¹

Seeking Less Information

Seeking More Information



Non-question	Pseudo-question	Closed question	Open-ended question		
1	2	3	4	5	6
Declaration	Rhetorical	Leading	Bipolar	Disjunctive	Wh-

Table 1 Explanations and Examples of Question Coding for Degree-of-Information-Seeking Scale			
Level Value	Type	Explanation	Example
1	Wh- question	An open-ended question using who, what, when, where, why or how	In what way are you claiming the First Amendment applies to this case?

30. Our previous research had the information-seeking scale reversed so that a 1 would represent a wh- question and a 6 would represent a declaration. However, due to the unintuitive nature of having higher numbers indicate lower information seeking, we reversed the scale for this article.

31. Examples and explanations of each question type and each level of the scale can be found in Table 1, which follows Figure 1.

Table 1 (continued)			
Explanations and Examples of Question Coding for Information-Seeking Scale			
Level Value	Type	Explanation	Example
2	Disjunctive question	A closed question with an add-on that allows room to answer more openly	Are you claiming the First Amendment applies to this case, or are you claiming something else?
3	Bipolar question	A question with only two answer options, such as yes/no, true/false	Are you claiming the First Amendment applies to this case?
4	Tag or leading question	A leading question, usually framed in the negative, that implies a certain answer	You are claiming the First Amendment applies to this case, are you not?
5	Rhetorical question	A question that does not have an answer or to which an answer is not sought	How in the world am I supposed to believe your claim that the First Amendment applies to this case?
6	Declaration	A statement without a question mark	The First Amendment does not apply to this case.

B. Case Selection

To avoid the potential problem of selection bias found in our previous study, which only looked at cases with a high degree of ideological salience, oral argument transcripts to be included in the study were selected using random stratified sampling to ensure cases with varying scenarios. The five case types sampled for were (1) solicitor general as amicus party, (2) solicitor general as main party, (3) non-solicitor general amicus party, (4) female attorney arguing, and (5) no amicus or solicitor

general attorneys. For each term from 2005 to 2008, two cases were randomly sampled from each of these five categories.³² Ordinarily this would create ten cases for each year (two cases multiplied by five categories), but in both the 2005 and 2008 terms there was only one case that fell into the “non-solicitor general amicus party” category, leading to only nine cases selected for those two terms. Hence a total of thirty-eight cases were randomly selected for analysis from the four terms. Additionally, cases from the 2005 term were only selected from the point on which Justice Alito joined the Court. Moreover, the data from nineteen cases related to the freedoms of speech and press from the 2004 to 2007 terms used in a previous study were compared to the data collected from the thirty-eight randomly selected cases. A difference-of-means test showed that the data from the two samples did not differ in a statistically significant way, so those nineteen cases were added to the initial thirty-eight, bringing to fifty-seven the total number of cases included in the study.³³

C. Coding Procedures

Utilizing content analysis, which some in the legal studies community contend should be used more often as a research methodology in legal scholarship,³⁴ each sentence uttered by a justice during oral argument was given an information-seeking score ranging from one to six based on the previously defined scale. Then, an average was created for each justice per side he or she engaged in. If a justice did not speak to a particular side in oral argument, they received a zero for their information-seeking score. If a justice did not engage both sides in a case, then they were not given a score for that case due to the possibility they may not have even been in oral argument.

32. Each case in a term was assigned a number, and then each of the five case types were color coded. From each case type two cases were then randomly selected using a random number generator that can be found at <http://www.randomizer.org/form.htm> (accessed Nov. 5, 2010; copy of home page on file with Journal of Appellate Practice and Process).

33. See Appendix II for a complete list of the cases studied.

34. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 Cal. L. Rev. 63 (2008).

Additionally, the number of words a justice uttered to each side was summed, with a zero given if a justice did not speak to one side, and nothing recorded if the justice did not speak to both sides.

Six coders in all analyzed the cases, with some overlap in order to ensure reliability.³⁵ Each coder achieved a high degree of intercoder reliability on practice material before scoring the actual cases.³⁶ In determining the information-seeking score for each sentence, coders were instructed that in instances where it was not clear which of two categories a sentence should be placed in, the category higher on the scale (meaning more information seeking) should be chosen. From the thirty-eight randomly selected cases, 7817 sentences were analyzed, and from the nineteen freedom of speech or press cases, 5512 sentences were analyzed, totaling 13,329 sentences from the fifty-seven cases included in the study.

Additionally, since it may not be the quality of the verbal interaction between justices and counsel that matters, but instead just the sheer quantity of words spoken by a justice, the average word count for each justice for each side he or she interacted with during oral argument was recorded. Some may argue that information-seeking scores and word counts are capturing the same construct, though it is unclear if lower information-seeking scores would correlate with lower or higher word counts. However, when excluding instances where the a justice does not speak³⁷ since both the ISS and word count would be zero,

35. The authors wish to thank Zach Anderson, Megan Moench, Rob Cook, Anesha Brown, and Josh Guest for their invaluable coding assistance.

36. All coders achieved a .90 or better measured with Krippendorff's alpha. Krippendorff's alpha can be used to measure the intercoder reliability of nominal, ordinal, interval, and ratio-level data, and corrects some of the deficiencies of other well-known measures: percent agreement, Scott's pi, Cohen's kappa, Pearson's r, and Holsti's cr. See Klaus Krippendorff, *Reliability in Content Analysis: Some Common Misconceptions and Recommendations*, 30 *Human Commun. Research* 411 (July 2004); Andrew F. Hayes & Klaus Krippendorff, *Answering the Call for a Standard Reliability Measure for Coding Data*, 1 *Commun. Methods & Measures* 77 (2007). Krippendorff's alpha was measured in SPSS 16.0 using a macro that can be found at <http://www.comm.ohio-state.edu/ahayes/SPSS%20programs/kalpha.htm>.

37. Such instances will sometimes be termed non-speaking observations. The "observation" is from the point of view of the researcher, indicating that we observed no speaking, and should not be confused with a justice's making a verbal observation during oral argument, which cannot happen if he or she does not speak.

correlation is low to moderate,³⁸ and when including non-speaking observations correlation is almost nothing,³⁹ indicating that information-seeking scores and word counts are not measuring the same underlying construct.

IV. ANALYSIS

This part of the paper will consist of two sections. First, a quantitative comparative examination of the justices will take place on the two dimensions measured: information seeking and word counts. Second, each justice will be investigated individually to obtain a more complete picture of that justice's behavior during oral argument, including both quantitative and qualitative findings. Additionally, for each justice oral argument behavior will be analyzed to see if that justice's eventual vote on the merits can be predicted based on information seeking and word counts.

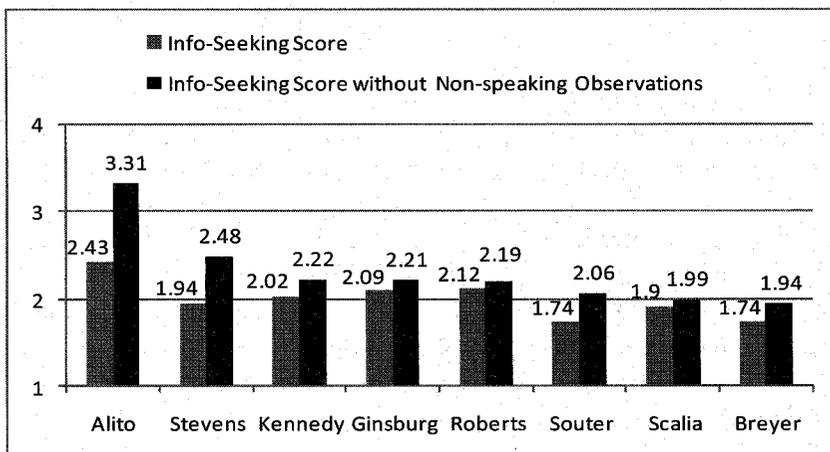
A. Comparison of the Early Roberts Court Justices

Two information-seeking scores were created for each justice for comparison with all of the other justices on the Roberts Court, excluding the notably taciturn Justice Thomas, who only spoke a couple of sentences in the fifty-seven cases analyzed. The first score includes zeros for anytime a justice did not speak to a side in a case. The second score excludes all of the non-speaking observations, resulting in a higher score. As can be seen in Figure 2, the justices clearly differ on the degree of information seeking they engage in during oral argument.

38. Spearman's Rho = $-.326$, $p < .001$, $N = 762$.

39. Spearman's Rho = $.009$, $p = .009$, $N = 864$.

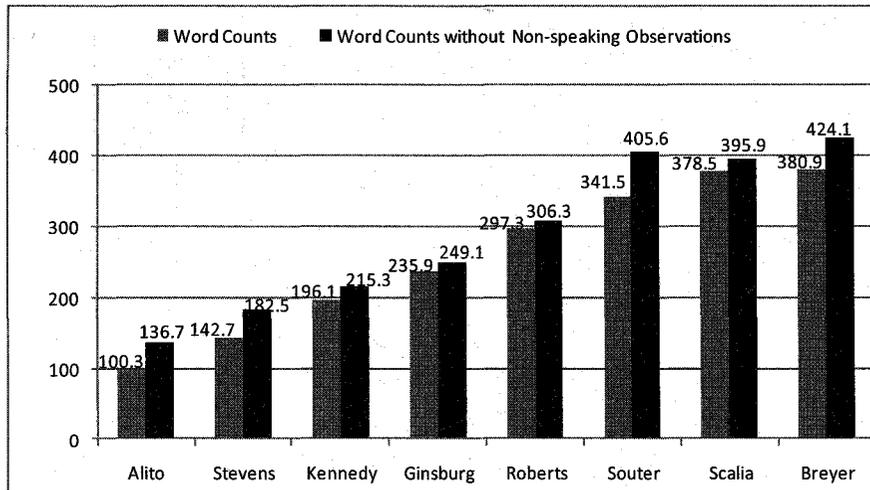
Figure 2
Justices' Average Information-Seeking Score per Side
during Oral Argument



In both conditions (with and without non-speaking observations) Justice Alito is the justice engaging in the highest level of information seeking during oral argument. On the other end of the scale is Justice Breyer who does not quite average a rhetorical question every time he talks during oral argument, indicating he asks very few questions in relation to declarations, and the questions he does ask are of lesser information-seeking value.

Turning to word counts, an interesting finding emerges in that the justices who have higher information-seeking scores are the justices who speak less during oral argument, and the justices who speak the most during oral argument have the lowest information-seeking scores. Like the information-seeking scores graph, each justice received two word-count averages—one with and one without non-speaking observations, as shown in Figure 3.

Figure 3
Justices' Average Word Counts per Side during Oral Argument



Excluding Justice Thomas, the justice who speaks the least during oral argument is Justice Alito, with Justices Souter, Scalia, and Breyer all on the other end of the spectrum as the most verbose justices on the early Roberts Court, averaging nearly four times as many words uttered to each side during oral argument compared to Justice Alito. In fact, on average these three justices together speak more than the other six justices combined.

By simultaneously examining both dimensions (information-seeking scores and word counts), a pattern emerges with the early Roberts Court separating into three clusters of justices based on oral argument behavior, as can be seen in Figures 4 and 5. The first cluster is the least inquisitive and most talkative and consists of Justices Breyer, Scalia, and Souter. The second cluster, Justices who are middle-of-the-road in information seeking and verbal activity, is made up of the Chief Justice, and Justices Ginsburg, Kennedy, and arguably, Justice Stevens. The final cluster are the justices who are the least talkative and most inquisitive, and for the early Roberts Court that consists solely of Justice Alito.

Figure 4
Combined ISS and Word Count for All Observations

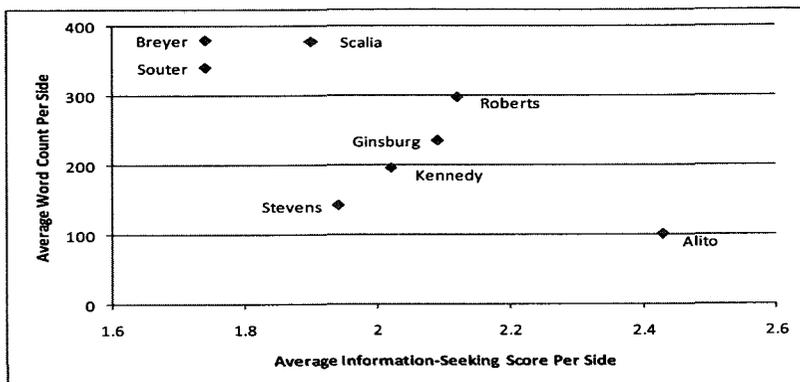
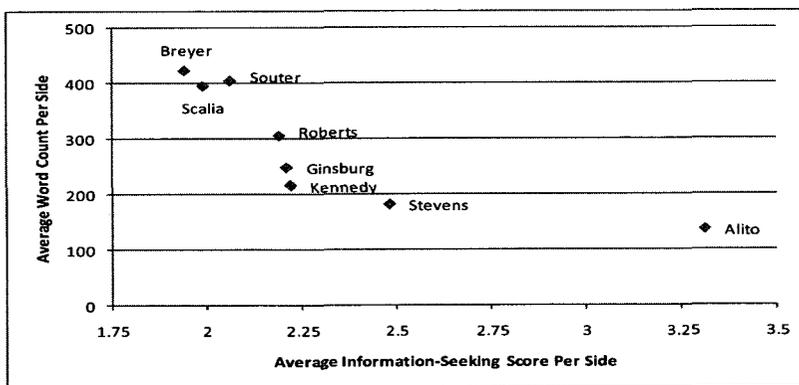


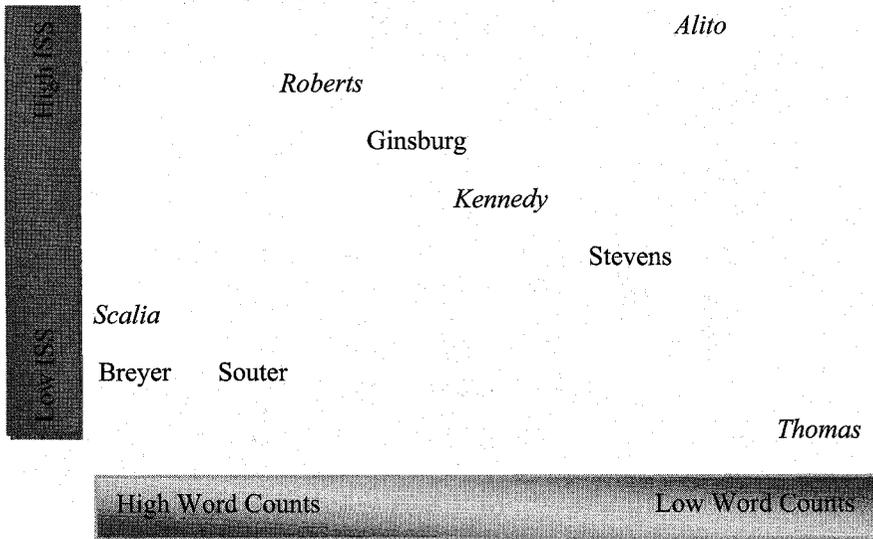
Figure 5
Combined ISS and Word Counts
Excluding Non-Speaking Observations



By including Justice Thomas with the other justices into a two-dimensional portrayal of the type of justice each is regarding information-seeking and word counts, one can see there are really four categories of justice regarding oral argument behavior with Justice Thomas falling into the uninquisitive, reserved category, as can be seen in Figure 6. No

partisan patterns emerge as both conservative and liberal justices can be found in the varying categories.⁴⁰

Figure 6
Two-Dimensional Portrait of Roberts Court Justices
during Oral Argument

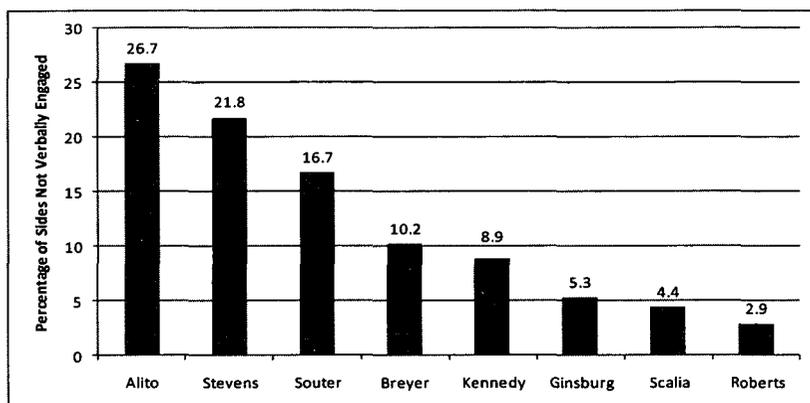


In examining the percentage of the time that justices do not verbally engage a side during oral argument, perhaps not surprisingly Justice Alito leads the Court with the highest percentage (excepting Justice Thomas) as Justice Alito chooses not to speak to over a quarter of the parties that come before him for oral argument. Justice Stevens follows, not speaking to just over a fifth of the parties in oral argument. After that, however, the order breaks from the patterns in information seeking and word counts with Justices Souter and Breyer, both low in information seeking and high in word counts. The Chief Justice, in the middle of the pack as far as information seeking and word counts are concerned, is the least likely to refrain from verbally engaging with a side during oral argument, which can be seen in

40. Figure 6 is based on justices' ISS and word counts for all observations, and in it, the names of the justices considered to be conservative are in italics.

Figure 7. (This is not due to his administrative responsibilities in giving the green light to attorneys to begin their arguments or informing them that their time is up, as such statements were not included in the coding.)

Figure 7
Percentage of Sides in Cases Not Verbally Engaged
by Each Justice



B. Individual Looks at the Early Roberts Court Justices

This section will examine each justice individually, first from a qualitative angle in order to get a sense of the tone and style the justice uses during oral argument. From this qualitative picture a description or typology was created and which is the title following the justice's name. Then a quantitative examination of each justice will follow.

1. The Chief Justice: Gentle but Astute Administrator

In his first year on the Court, the Chief Justice prominently proclaimed that his goal was to build consensus on the Court while deciding cases on narrow grounds.⁴¹ Befitting his role, the Chief Justice at oral argument sometimes undertakes to keep his colleagues from venturing too far astray in their questioning. For

41. Associated Press, *Chief Justice Says His Goal Is More Consensus on Court*, 155 N.Y. Times A16 (May 22, 2006).

example, it appeared in *Morse v. Frederick*⁴² that the Chief Justice had finally had enough of his colleagues' hypothetical questions when he gently guided them—not to mention the attorney trying to respond to their dizzying array of doomsday scenarios—back on track: “Can we get back to what the case is about?” he asked.⁴³ He went on to succinctly state the attorney's position in order to draw attention, seemingly for benefit of his colleagues, to the weaknesses of the argument.⁴⁴ Likewise in *Wisconsin Right to Life v. FEC*⁴⁵ the Chief Justice handled an escalating verbal tug-of-war between Justices Souter and Scalia by simply indicating which justice the Court would hear from:

JUSTICE SOUTER: But Yellowtail—

ATTORNEY: —which involves very—

JUSTICE SOUTER: —is—is an ad of—an obviously sham ad. The problem that we're dealing with—

JUSTICE SCALIA: Mr. Bopp, did—did the opinion refer to—

JUSTICE SOUTER: May—may I finish?

JUSTICE SCALIA: —sham ads?

JUSTICE SOUTER: Excuse me. May I—may I finish my question?

JUSTICE SCALIA: Did the opinion refer to—

CHIEF JUSTICE ROBERTS: Justice Souter.

JUSTICE SOUTER: May I finish my question? The—the—no one is saying that your ad in this case is an obviously sham ad like Yellowtail. . . .⁴⁶

42. 551 U.S. 393 (2007).

43. Transcr., *Morse v. Frederick*, <http://www.supremecourt.gov> at 48 (Mar. 19, 2007) (551 U.S. 393 (2007)) (accessed Oct. 12, 2010; copy on file with Journal of Appellate Practice and Process). To access any oral argument transcript cited in this article, highlight “Oral Arguments” on the left side of the Supreme Court's home page, click on “Argument Transcripts,” and scroll down to “Argument Session: [beginning date]–[ending date],” for the date span that includes the argument date.

44. *Id.*

45. 546 U.S. 410 (2006).

46. Transcr., *Wis. Right to Life v. FEC*, <http://www.supremecourt.gov> at 15–16 (Jan. 17, 2006) ((546 U.S. 410 (2006)) (accessed Oct. 12, 2010; copy on file with Journal of Appellate Practice and Process).

The Chief Justice's gentle demeanor extends not just to his colleagues but to the lawyers at oral argument as well. In *Beard v. Banks*,⁴⁷ the Chief Justice noted that a lawyer had responded to a question by another justice in a way that undermined the lawyer's position; the Chief Justice did not jump on the error like some justices might have, but instead tried to help the lawyer see his error.⁴⁸ Even so, the Chief Justice ultimately joined the majority in siding against that lawyer's client.⁴⁹

In another case, the Chief Justice once again restrained himself from harshly criticizing an attorney with whom he disagreed and who seemed to have made a mistake: "I'm just not sure your agreement with it is advisable," he said.⁵⁰ Additionally, the Chief Justice is straightforward enough to acknowledge when he is making a point at oral argument rather than seeking new information or asking a question.⁵¹

That being said, the Chief Justice will occasionally get pointed with an attorney who brazenly presses forward with a foolish argument, as he did with the lawyer representing the religious group Summum in *Pleasant Grove v. Summum*:⁵²

MS. HARRIS: And that is exactly why, Justice Kennedy, the city, any city, is permitted to make a decision that it will close its public parks to all unattended displays. The Court said that in *Pinette*. It said that earlier in *Vincent*. But because there—

CHIEF JUSTICE ROBERTS: How far do you push that? I mean, what about the hypotheticals on the other side? I mean, you have a Statue of Liberty; do we have to have a statue of despotism? Or do we have to put any president

47. 548 U.S. 521 (2006).

48. Transcr., *Beard v. Banks*, <http://www.supremecourt.gov> at 40 (Mar. 27, 2006) (548 U.S. 521 (2006)) (quoting the Chief Justice: "Well, then now you're giving— now you're making their situation worse. . . .") (accessed Oct. 12, 2010; copy on file with Journal of Appellate Practice and Process).

49. *Beard*, 548 U.S. at 524.

50. Transcr., *Carey v. Musladin*, <http://www.supremecourt.gov> at 20 (Oct. 11, 2006) (549 U.S. 70 (2006)) (accessed Oct. 12, 2010; copy on file with Journal of Appellate Practice and Process).

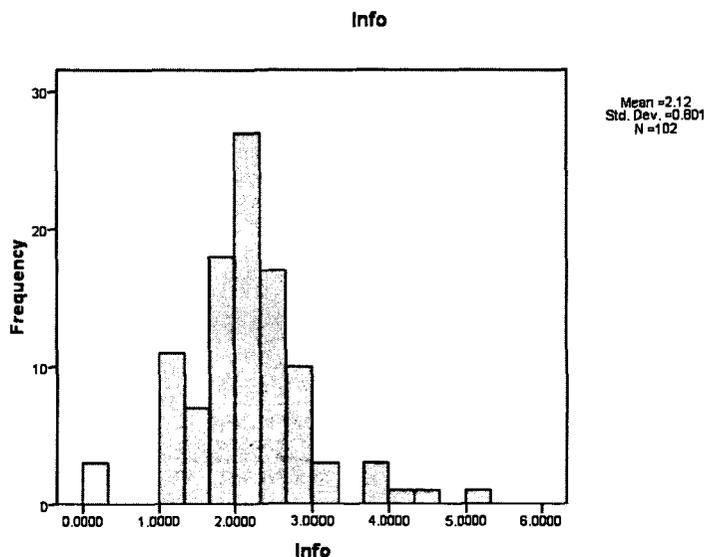
51. See e.g. *Morse* Transcript, *supra* n. 43, at 54 (quoting the Chief Justice: "That gets back to the point I was trying to make earlier. . . .").

52. ___ U.S. ___, 129 S. Ct. 1125 (2009).

who wants to be on Mount Rushmore? How do you answer those?⁵³

The Chief Justice sits in the middle of his colleagues when it comes to oral argument, both literally and behaviorally. His average information-seeking score is 2.12 when including non-engaged sides and 2.19 when not including non-engaged sides, placing him second and fifth respectively for inquisitiveness. A frequency distribution of his information-seeking scores (ISS) over the 102 sides he saw in the cases analyzed in this study reveal relatively normal distribution, indicating relatively consistent information-seeking across all sides, as shown in Figure 8.

Figure 8
Distribution of the Chief Justice's Info-Seeking Scores

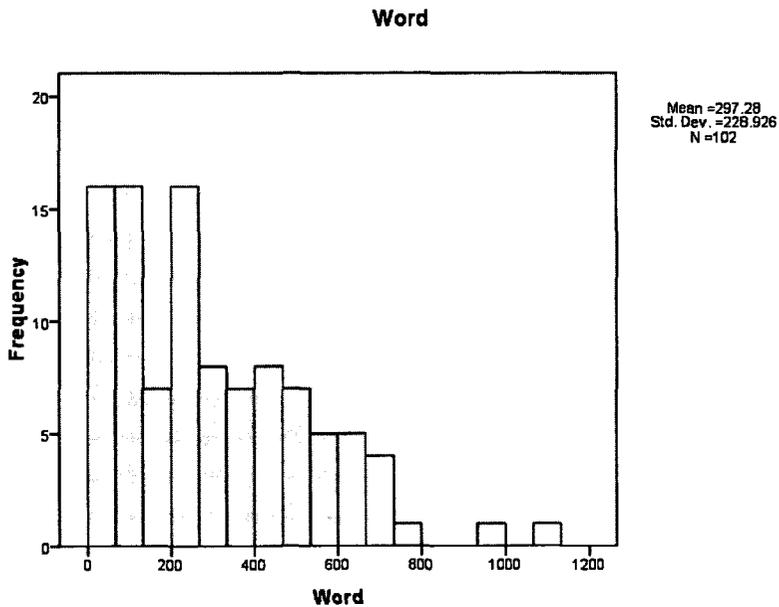


The Chief Justice's average word count per side is 297.3 (with non-engaged sides) and 306.3 (without non-engaged sides), putting him fifth in both instances among his colleagues. A frequency distribution of word counts for the Chief Justice reveals a right-skewed distribution, showing that he tends to

53. Transcr., *Pleasant Grove v. Sumnum*, <http://www.supremecourt.gov> at 35 (Nov. 12, 2008) (___ U.S. ___, 129 S. Ct. 1125 (2009)) (accessed Oct. 12, 2010; copy on file with Journal of Appellate Practice and Process).

utter fewer words than his average of 297 might indicate, but a few instances of heavy verbal engagement shift the mean upward, as can be seen in Figure 9.

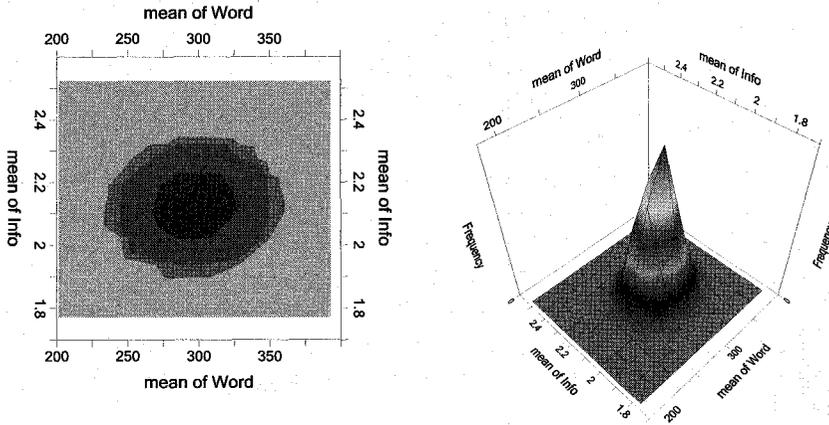
Figure 9
Distribution of the Chief Justice's Word Counts



Using Bayesian estimation,⁵⁴ a combined portrait of the Chief Justice's oral argument behavior on the two dimensions measured during this study can be presented, yielding the patterns displayed in Figure 10.

54. Bayesian estimation and graphics were produced by statistical program Amos 7.0.

Figure 10
Bayesian Estimation of the Chief Justice's
Average ISS and WC



The black oval-shaped mass in the center of the graphic on the left represents the ninety-five percent confidence interval for the combined ISS and word counts.⁵⁵ The fact that the oval is wider than it is tall attests to the above-mentioned frequencies distributions wherein the ISS distribution was more tightly packed around the mean, compared to the distribution of word counts with the high values far away from the mean. The ninety-five percent confidence interval for the Chief Justice's true ISS mean falls between 1.96 and 2.28, and we can be ninety-five percent confident that his actual word count average is located in the range of 251.4 to 343.0

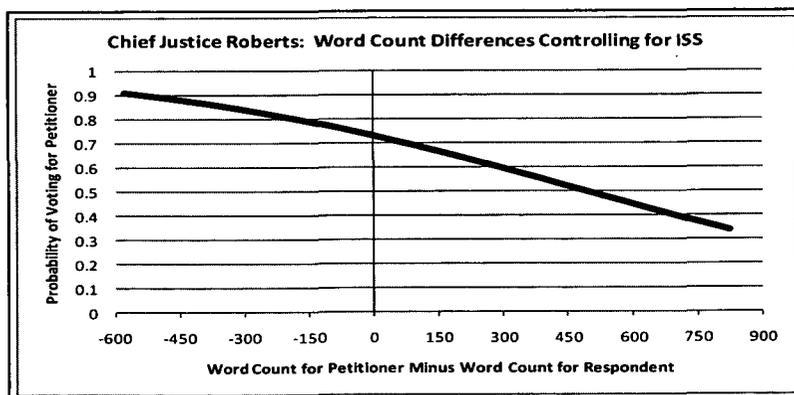
In examining whether the Chief Justice's behavior during oral argument foreshadows his eventual vote on the merits, information-seeking scores are not a statistically significant predictor of his voting patterns. To determine this, probit

55. A ninety-five percent confidence interval is used when one obtains statistical information from a sample rather than from the entire population. Because sample data is used one cannot be completely sure of the means obtained. Therefore, confidence intervals are calculated allowing one to obtain a certain level of confidence that the true means—the means of the population—are contained within the range of scores identified. In this instance, using confidence of ninety-five percent, we can be ninety-five percent sure that the true means for ISS and word counts for the Chief Justice for every case he has ever been involved in lies between the ranges identified by the dark black oval.

regression was performed. Similar to studies done by Johnson and colleagues, the dependent variable was whether the Chief Justice voted for the petitioner, with the two independent variables being the ISS for the petitioner minus the ISS for the respondent and the word count for the petitioner minus the word count for the respondent.⁵⁶

For the Chief Justice, while ISS did not matter, word counts are a statistically significant predictor of the Chief Justice's voting, with higher word counts when compared to the other side signaling a decreased probability he will support that side, as shown in Figure 11. Such disproportionate treatment should not be surprising given the Chief Justice's previous statements on the role of oral argument in his decisionmaking process as he has written that oral argument is like the end of a funnel where his ideas begin to "crystallize," causing a formerly open mind to begin "to close at oral argument" in favor of one side over the other.⁵⁷

Figure 11
Probability of the Chief Justice Voting for a Party
Based on WC Differences



Once the Chief Justice exceeds 450 words uttered to one side over another in a case, the probability of supporting that

56. The variables were formulated this way because what really matters is not how much information seeking or speaking a justice does to one particular side, but how much the justice does to one side in comparison to the other side.

57. Roberts, *supra* n. 18, at 70.

side drops below fifty percent, equaling bad news for that party. If the Chief Justice shows the same attention verbally to both sides during oral argument, then the petitioner would have a probability of prevailing above seventy percent.⁵⁸ While this might seem odd at first, petitioners often do better than respondents in Supreme Court cases for the reason that the Supreme Court is more likely to hear a case to overturn a lower court's decision than to hear a case merely to affirm a lower court's ruling. These results, though, only explain about ten percent of the Chief Justice's voting patterns.⁵⁹

2. Justice Stevens: Reserved, Polite Veteran

Justice Stevens was the most senior member of the Court during this time period, both in age (born in 1920 and thirteen years older than the next eldest justice) and in tenure, having taken his seat in 1975, eleven years before the next longest-serving justice.⁶⁰ Whether a reflection of an earlier period's rule of decorum or his personality, Justice Stevens is the only justice who frequently asks counsel if he can ask them a question (and no attorney ever responded in the negative in the cases analyzed in this study). While possessing a relatively high ISS, Justice Stevens will sometimes ask questions he already knows the answer to, as he did in *FEC v. Wisconsin Right to Life*:⁶¹

JUSTICE STEVENS: Would it also prohibit you from using—urging everyone to look to a web site that used the same magic words?

ATTORNEY: Would it?

58. See Table 2 in Appendix I for more details relating to this conclusion.

59. Pseudo $R^2 = .1047$.

60. See Supreme Court of the United States, *The Justices of the Supreme Court*, <http://www.supremecourtus.gov> (highlight "About the Supreme Court," click on "Biographies of Current Justices of the Supreme Court," scroll down to "John Paul Stevens (Retired), Associate Justice") (accessed Oct. 12, 2010; copy on file with Journal of Appellate Practice and Process).

61. 551 U.S. 449 (2007).

JUSTICE STEVENS: Yes.⁶²

Such instances may reflect Justice Stevens's practice of using oral argument to influence the thinking of his colleagues. Additionally, like the Chief Justice, Justice Stevens is not above admitting when he is trying to make a point, though in *Rumsfeld v. FAIR*⁶³ he makes his point using a question:

JUSTICE STEVENS: So, the—

GENERAL CLEMENT: —hypothetical.

JUSTICE STEVENS: —the point I'm trying to make is, Does your agreement, that you can engage in speech by posting banners or handing a note, apply to symbolic speech—

GENERAL CLEMENT: It could—

JUSTICE STEVENS: —the kind of conduct that is symbolic speech?⁶⁴

Justice Stevens seldom gets involved in lengthy discussions with attorneys and appears to be content to allow his colleagues most of the speaking time.

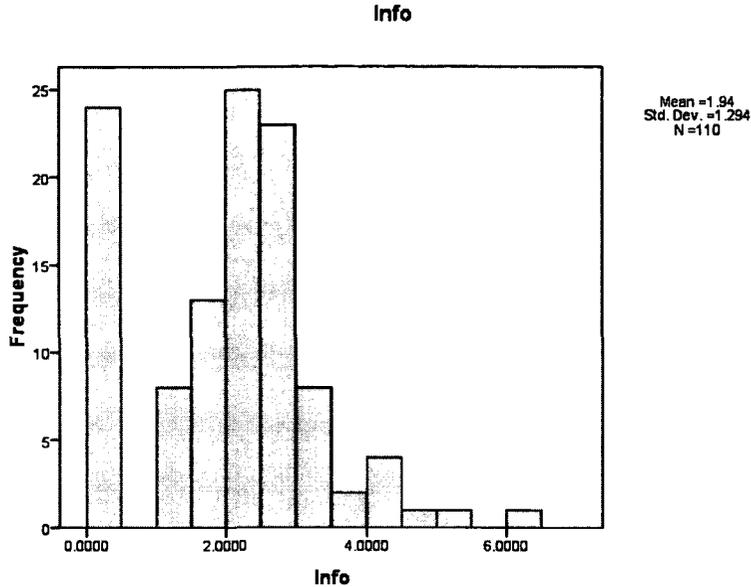
After Justice Alito, Justice Stevens has the highest average information-seeking score (minus non-speaking observations) at 2.43, which is 25.3 percent higher than Justice Breyer's lowest-on-the-Court ISS. As shown in Figure 12, Justice Stevens's frequency distribution of information-seeking scores with the non-speaking observations is skewed right with a high proportion of non-speaking.

62. Transcr., *FEC v. Wisconsin Right to Life*, <http://www.supremecourt.gov> at 52 (Apr. 25, 2007) (551 U.S. 449 (2007)) (accessed Oct. 13, 2010; copy on file with Journal of Appellate Practice and Process).

63. 547 U.S. 47 (2006).

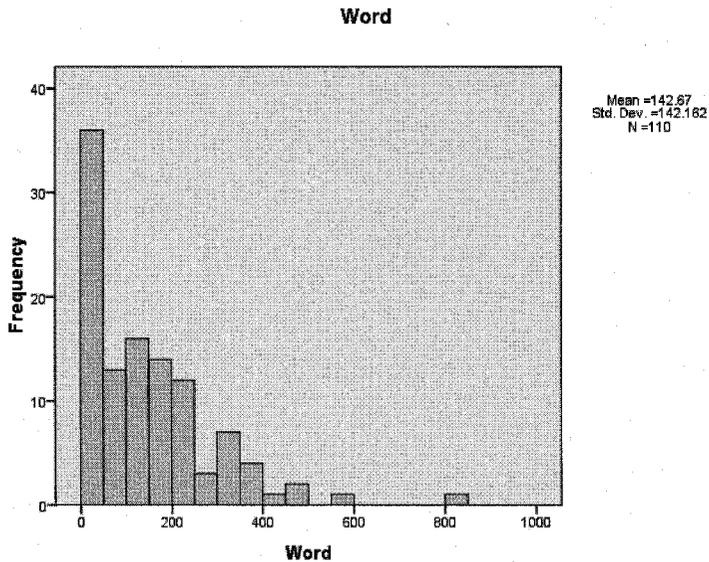
64. Transcr., *Rumsfeld v. FAIR*, <http://www.supremecourt.gov> at 23 (Dec. 6, 2005) (547 U.S. 47 (2006)) (accessed Oct. 13, 2010; copy on file with Journal of Appellate Practice and Process).

Figure 12
Distribution of Justice Stevens's
Information-Seeking Scores



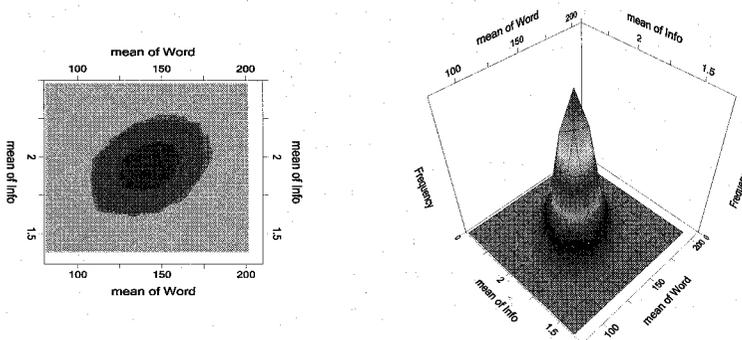
Turning to frequency of verbal activity, again Justice Stevens is second only to Justice Alito, both in having low average word counts and in the high percentage of time Justice Stevens does not speak at all to a side in a case during oral argument. Justice Stevens's average word count is 142.7 with non-speaking observations included and 182.5 without, less than half of the more verbose justices, and 21.8 percent of the time he refrained from saying anything to a side in a case. The frequency distribution for word counts is right skewed with a few instances of extreme verbal engagement that have the effect of inflating the mean score. This pattern is shown in Figure 13.

Figure 13
Distribution of Justice Stevens's Word Counts



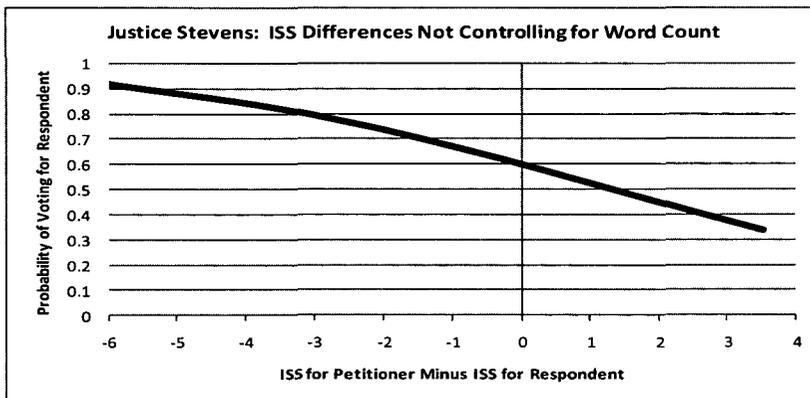
Combining these two estimations to show the Bayesian estimated ninety-five percent confidence intervals indicates Justice Stevens's "true" mean ISS to likely be between 1.69 and 2.19 and "true" mean word count to fall between 115.5 and 169.9 words, as can be seen in Figure 14.

Figure 14
Bayesian Estimation of Justice Stevens's Average ISS & WC



By themselves, both information-seeking scores and word counts were statistically significant predictors of Justice Stevens's voting patterns.⁶⁵ However, because of their moderate correlation,⁶⁶ when combining both variables in an analysis, ISS ceased to be statistically significant, though the two variables are jointly significant.⁶⁷ Thus, probabilities for voting were calculated by looking at the variables before combining them, and the results of that calculation are graphed in Figure 15.

Figure 15
Probability of Justice Stevens Voting for Petitioner
Based on ISS Differences



The more information-seeking Justice Stevens engaged in with a side, compared to the other side, the less likely he was to eventually vote for that side. Thus, at one extreme, if Justice Stevens merely spoke declarations to the petitioner (ISS score of 1) and asked wh- open-ended questions to the respondent (6), the ISS difference would be -5 and the probability of supporting the petitioner would be close to ninety percent. At the other extreme for Justice Stevens's data, if he asked only wh-questions to the petitioner and averaged asking leading questions to the respondent, there would be less than a forty percent

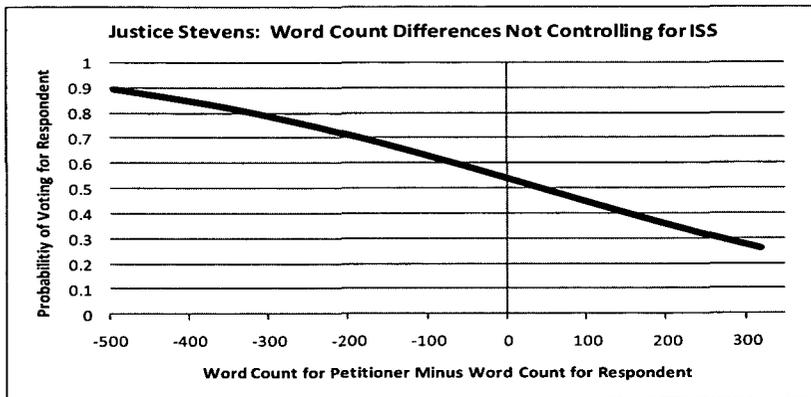
65. Technically ISS just missed statistical significance at $p = .055$, though it was close enough that we labeled it statistically significant.

66. Pearson's $r = .476$, $p < .001$.

67. See Table 2 in Appendix I.

chance he would support the petitioner. However, information-seeking scores on their own only explain about six percent of Justice Stevens's voting habits.⁶⁸ Word counts do a slightly better job of predicting his votes, as can be seen from the data displayed in Figure 16.

Figure 16
Probability of Justice Stevens Voting for Petitioner
Based on WC Differences



Examining the fifty percent threshold for supporting the petitioner in a case versus the respondent, when Justice Stevens speaks approximately fifty words or more to the petitioner above and beyond those spoken to the respondent, then he is increasingly likely to vote for the respondent, and vice versa. Hence, similar to the rule for the Chief Justice, less attention from Justice Stevens in oral argument is better for the advocate. However, at best the combined variables of ISS and word counts are only explaining around nine percent of Justice Stevens's voting.⁶⁹

3. Justice Scalia: Assertive Law Professor

In the fifty-seven cases we studied, Justice Scalia, a former law professor quite familiar with the Socratic method, proved

68. Pseudo $R^2 = .0577$.

69. Pseudo $R^2 = .0935$.

himself to be an aggressive participant in oral argument.⁷⁰ As illustrated in Figures 2, 3, 4, 5, and 6, Justice Scalia is one of the least inquisitive and most verbally active on the Supreme Court bench. His participation tends to come in the form of declarations, rhetorical questions, leading questions and yes/no questions rather than open-ended questions. For example, Justice Scalia became very involved in directing the argument of Deputy Solicitor General Edwin S. Kneedler in the following exchange, which took place during the oral argument in *Veneman v. Livestock Marketing Association*:⁷¹

JUSTICE SCALIA: Mr. Kneedler—

MR. KNEEDLER: What the numbers—

JUSTICE SCALIA: —can I come back to Rust versus Sullivan? You say that that was a government speech case? I had not recollected it as a government speech case.

MR. KNEEDLER: This Court—

JUSTICE SCALIA: This is government subsidizing speech by private organizations, and it chose to subsidize one type of speech, but not another.

MR. KNEEDLER: Yes—

JUSTICE SCALIA: Did we say, in the opinion, that this was—

MR. KNEEDLER: Not in Rust, but in the Court's subsequent cases, Rosenberger, Southworth—in particular, in *Velazquez*—this Court said that Rust has come to be understood by the Court as a government speech case, because the government prescribed the message, and it's government speech whether or not the government speaks for itself or enlists others to transmit the message.

JUSTICE SCALIA: Well, for the precise purpose at issue here, I think it makes a lot of difference. You can fund private people for some things, and not fund them for others, and it doesn't make whatever they say government speech. I think that's a—

70. Admitting to a potential nexus between his classroom experience and courtroom demeanor, Justice Scalia explained his sometimes overbearing behavior during oral argument behavior this way: "It is the academic in me. I fight against it. The devil makes me do it." O'Brien, *supra* n. 23, at 248.

71. 544 U.S. 550 (2005).

MR. KNEEDLER: But—

JUSTICE SCALIA: —I think that’s a really—

MR. KNEEDLER: —but there’s really no—

JUSTICE SCALIA: —strong proposition, that whenever you’re subsidizing any private enterprise, the speech of that private enterprise becomes public speech.

MR. KNEEDLER: There’s really no need to get to that point here, because the Beef Board, which is the entity that does the speaking, is, I think, unquestionably a government body. It’s established by special statute under the Lebron test. All of its members are appointed by the—

JUSTICE SCALIA: That’s fine. But what you were using Rust for was to establish the proposition that in order to be government speech, it—you don’t have to—you don’t have to say, “This is the government speaking.”

MR. KNEEDLER: Well, I think—

JUSTICE SCALIA: And Rust doesn’t stand for that.

MR. KNEEDLER: —Right⁷²

This exchange becomes particularly noteworthy in light of the Court’s holding in favor of the government in a majority opinion written by Justice Scalia. The Court held that beef producers could not succeed in a First Amendment challenge to a government-mandated beef advertising program funded by the beef producers themselves.⁷³ In order to reach this holding, Justice Scalia had to distinguish *Rust v. Sullivan*,⁷⁴ in which the Court held that government-funded doctors spoke for the government and thus had to deliver the government-approved family planning message, and *Legal Services Corporation v. Velazquez*,⁷⁵ in which the Court held that government-funded lawyers did not speak for the government and thus their message could not be controlled. Key to this distinction was interpretation of what the Court actually said in *Rust*, and it was

72. Transcr., *Veneman v. Livestock Marketing Assn.*, <http://www.supremecourt.gov> at 13–15 (Dec. 8, 2004) (decided as *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005)) (accessed Oct. 13, 2010; copy on file with Journal of Appellate Practice and Process).

73. *Johanns*, 544 U.S. at 567 (vacating decision below in favor of the association).

74. 500 U.S. 173 (1991).

75. 531 U.S. 533 (2001).

clear at oral argument that Justice Scalia wanted to guide the government lawyer toward the interpretation that the majority opinion ultimately gave to *Rust*.

When confronted with the argument of the beef producers who did not want to be forced to pay for an advertising campaign that they disagreed with, Justice Scalia pressed and attempted to pin down First Amendment attorney Laurence H. Tribe, himself a Harvard law professor and a law school classmate of Justice Scalia:

JUSTICE SCALIA: Let's first address the question you said—you said you were going to address, whether in order to be government speech, within the meaning of our cases, it has to be identified as such. Is that really true? I mean, you know, in World War II, Bob Hope would appear in movie theaters and say, you know, "Buy war bonds?"

MR. TRIBE: Yes, I don't—

JUSTICE SCALIA: "This is Bob Hope. You people ought to go out now"—

MR. TRIBE: Justice Scalia, I think, although it's an interesting digression about whether the government is being candid, the objection here has nothing to do with that.

JUSTICE SCALIA: Okay, so it is—

MR. TRIBE: But being the government—

JUSTICE SCALIA: —it is not essential—

MR. TRIBE: It may be.

JUSTICE SCALIA: —that government might—in order to be government speech, the government does not have to identify itself as the speaker.

MR. TRIBE: I—

JUSTICE SCALIA: Yes or no? Yes or no?

MR. TRIBE: I think the answer is yes, it must identify itself, but it doesn't help, because—

JUSTICE SOUTER: Well, it doesn't—

MR. TRIBE: —the government—

JUSTICE SOUTER: —we understand that you have a First Amendment claim, which you're going to have even if we say, "This is not government speech." I think the whole point here is to decide whether this is even—

MR. TRIBE: No, no, Justice—

JUSTICE SOUTER: —an issue that should be disposed of on any grounds other than candor.

MR. TRIBE: Justice Souter, I think that we're getting off track by assuming that it helps for it to be government speech. My point is that a central theme of this—

JUSTICE SCALIA: Well, just indulge us. I mean, some of us think it makes—

MR. TRIBE: Let me—

JUSTICE SCALIA: —a difference—

MR. TRIBE: Well, but—

JUSTICE SCALIA: —and I would—

MR. TRIBE: —but let me ask you whether—

JUSTICE SCALIA: —I would like to know whether it is essential to its character as government speech that the government's [sic] say, "This your [sic] government speaking."⁷⁶

Frequently Justice Scalia locks horns with attorneys for protracted verbal entanglements when he disagrees with their arguments. He is also quick to insert a comment or two to aid an attorney representing a position he favors when that lawyer is drowning under a barrage of hostile questioning from other justices, as he did in *Carey*:

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

ATTORNEY: That's correct.

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

ATTORNEY: Not by doing that . . .⁷⁷

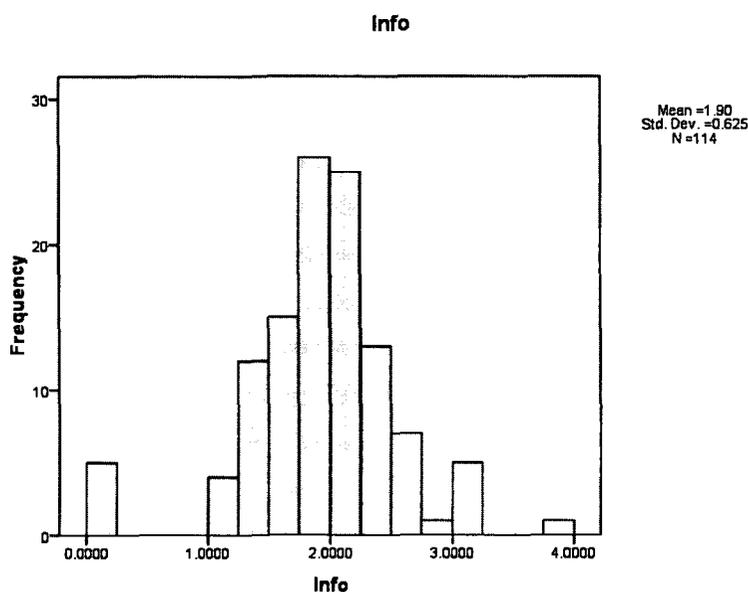
76. *Veneman* Transcript, *supra* n. 72, at 32–34.

77. *Carey* Transcript, *supra* n. 50, at 6.

Additionally, more than any other member of the Court, Justice Scalia uses humor strategically, either to disrupt an attorney's line of reasoning, or to slow down another justice's assault on a lawyer.

Justice Scalia's mean information-seeking score of 1.90 places him with Justices Breyer and Souter as the least inquisitive of the early Roberts Court as he averages less than a rhetorical question every time he utters a sentence to counsel. A distribution frequency of his information-seeking scores shows a relatively normal distribution, with a few potential outliers on either extreme of the scale, as shown in Figure 17.

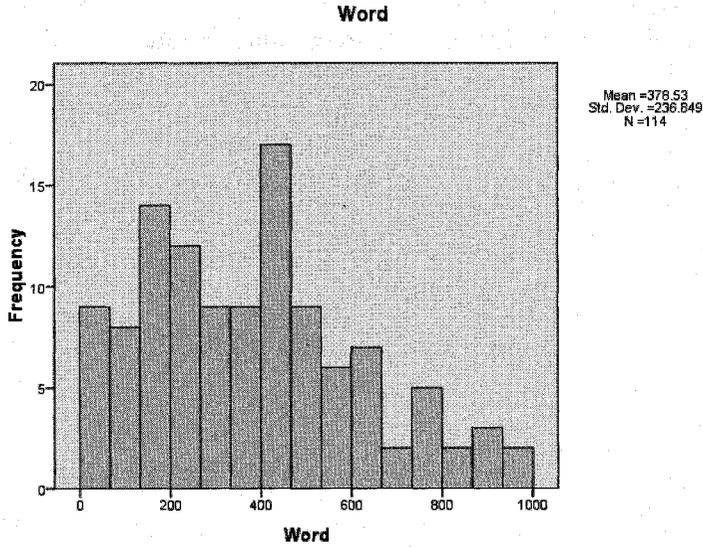
Figure 17
Distribution Frequency of Justice Scalia's
Information-Seeking Scores



One of the most verbally active justices, again along with Justices Breyer and Souter, Justice Scalia averages about 378 words per side during oral argument. A frequency distribution of his average word counts shows a non-normal distribution skewed to the right, meaning that a few intense verbal engagements have shifted his average word count score higher than would be suggested by the word counts for the majority of

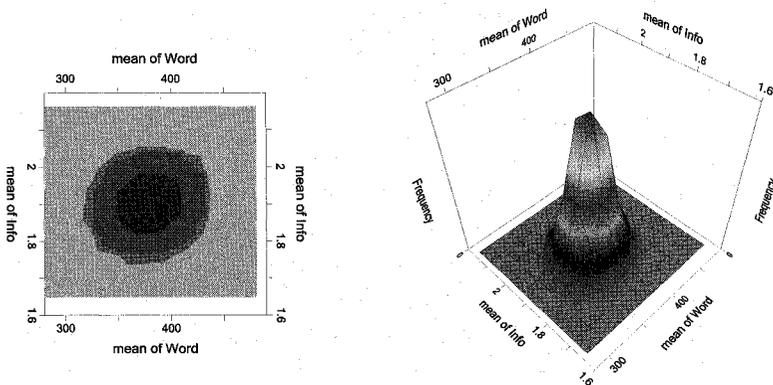
his performances. This atypical distribution is shown in Figure 18.

Figure 18
Distribution Frequency of Justice Scalia's Word Counts



A graphic display of Bayesian estimation on the two variables allows for the presentation of a two-dimensional picture of Justice Scalia's oral argument behavior, which is shown in Figure 19.

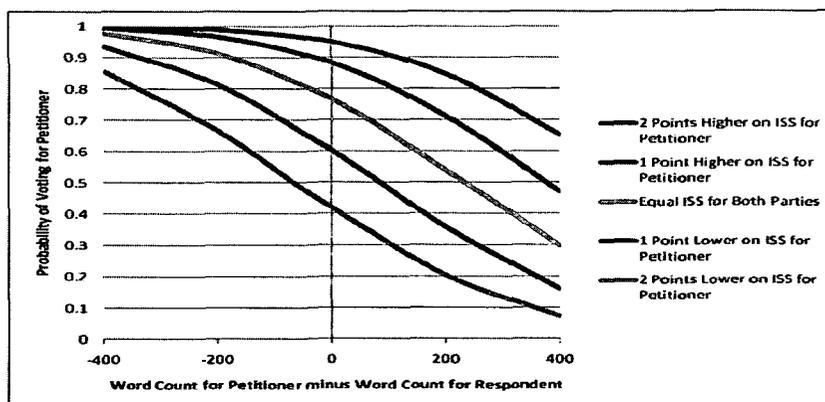
Figure 19
Bayesian Estimation of Justice Scalia's Average ISS and WC



We can be ninety-five percent confident that the actual value of Justice Scalia's mean information-seeking score lies between 1.78 and 2.02, and the actual value of his word count average can be found in the range of 333.8 to 423.4.

Turning to predicting Justice Scalia's voting patterns based on his oral argument behavior, unlike any other justice examined in this study, both information-seeking scores and word counts are statistically significant predictors of his voting patterns.⁷⁸ Similar to other justices where word counts matter in foretelling voting, increased verbal activity in relation to the other side lowers the probability of supporting that side. However, unlike the few other justices where information-seeking scores are statistically significant predictors of voting, the higher Justice Scalia's ISS (meaning more inquisitiveness), the higher the probability Justice Scalia will support that side, as Figure 20 indicates. A study of the transcripts shows that this pattern derives from the fact that Justice Scalia tends to batter attorneys he will eventually oppose with declarations, while he is more likely to lob softball questions to sides he ends up voting for.

Figure 20
Probability of Justice Scalia Voting for Petitioner
Based on ISS & WC Differences



When Justice Scalia pays a significant amount more of attention to a side in a case, irrespective of how much

78. See Table 2 in Appendix I.

information seeking he engages in, the probability of his supporting the “ignored” side is very high. When his verbal activity is equal, then only in instances in which he engages in low levels of information-seeking with a side is there a less than fifty percent chance that he will support the petitioner. However, when word counts for a side are much higher compared to the opposing side in a case, there is only a greater than fifty percent probability of his supporting that high-word-count side if he engages in high levels of information-seeking with that side. Thus, for Justice Scalia and only for Justice Scalia, both word counts and information seeking matter in foreshadowing his eventual vote. More than those of any other justice, his information-seeking scores and word counts help explain Justice Scalia’s eventual votes on the merits, with the two variables combined predicting nearly a third of his voting habits.⁷⁹

In summary, Justice Scalia speaks much, particularly to the side he will vote against, and inquires little, especially of the side he will oppose. He has indicated that oral argument “rarely” changes his mind, but that it “can make the difference” in “close” cases.⁸⁰ Interestingly, one piece of evidence suggesting that Justice Scalia heads into oral argument strongly leaning towards deciding for one side or the other is his sometimes circulating a memo about a case before oral argument, a practice not joined by his colleagues and one that violates the justices’ unwritten tradition of not speaking to each other about a case prior to hearing it argued.⁸¹

4. Justice Kennedy: Cut-to-the-Chase Questioner

As the Roberts Court’s swing or median justice, Justice Kennedy likely wields a disproportionately large influence compared to the other justices who tend to be more consistently liberal or conservative. Possibly because he recognizes the fact

79. Pseudo $R^2 = .3265$

80. *The Tim Russert Show*, TV Series (MSNBC May 3, 2008); transcript available at <http://www.msnbc.msn.com/id/24466429> (accessed Oct. 14, 2010; copy on file with Journal of Appellate Practice and Process).

81. E-mail from David M. O’Brien, Leone Reaves & George W. Spicer Professor, U. of Va. & author of *Storm Center*, to James C. Phillips, *Scalia cite* (July 7, 2009) (noting that a memo of this type was familiarly known at the Supreme Court as a “Ninogram”).

that many cases will come down to his vote, he repeatedly tends to be very candid in his requests from counsel, asking them to boil down their argument or authority, as he did in *Morse v. Frederick*: “I’m asking what your recommendation is to what our rule should be in this case,”⁸² and in *Davis v. FEC*:⁸³

JUSTICE KENNEDY: But the party for the less well-funded candidate has the option to have much closer ties, much greater involvement, than the party for the other candidate; and that seems to me highly problematic. And I want to know the best case that you have for that proposition and the best statement of law that you can give me for why that is unconstitutional.⁸⁴

Similarly, Justice Kennedy seems to exhibit little patience for unfruitful lines of questioning as he attempts to get at the core issues in a case, such as in this example from *Tory v. Cochran*:⁸⁵

JUSTICE KENNEDY: Well—well, there really—there are findings against you, and to say that a lawyer is a crook, a liar, and a thief and you’re trying to tell us that that’s not defamatory, I mean, I—I think we should just proceed on—on some other basis⁸⁶ for this argument. We have other questions to discuss.

This impatience to get to the issues Justice Kennedy finds most important can cause attorneys to have to adjust quickly, as in this example, when Justice Kennedy allowed an amicus attorney to utter only one sentence of his opening statement before showing a lack of interest in the lawyer’s prepared remarks and direction:

MR. GARRE: Thank you, Justice Stevens, and may it please the Court:

82. *Morse* Transcript, *supra* n. 43, at 20.

83. 554 U.S. 724 (2008).

84. Transcr., *Davis v. FEC*, <http://www.supremecourt.gov> at 19–20 (Apr. 22, 2008) (554 U.S. 724 (2008)) (accessed Oct. 14, 2010; copy on file with Journal of Appellate Practice and Process).

85. 544 U.S. 734 (2005).

86. Transcr., *Tory v. Cochran*, <http://www.supremecourt.gov> at 10–11 (Mar. 22, 2005) (544 U.S. 734 (2005)) (accessed Oct. 14, 2010; copy on file with Journal of Appellate Practice and Process).

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

JUSTICE KENNEDY: If we can just continue on government speech, because that's where—

MR. GARRE: Yes.

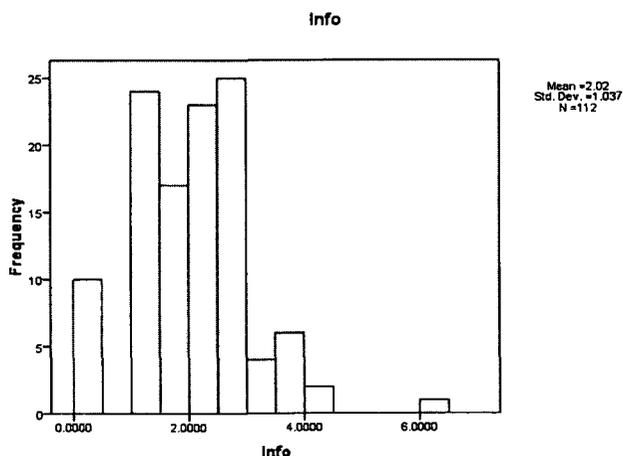
JUSTICE KENNEDY: —where we left off. It seems to me there is something offensive about making a particular portion of the public pay for something that the government says.

MR. GARRE: Justice Kennedy—

JUSTICE KENNEDY: It ought to be out of the general fund.⁸⁷

As is fitting given his central position in the Court's decisionmaking, Justice Kennedy falls near the median of information-seeking on the Roberts Court with an ISS of 2.02 when including non-speaking observations and 2.22 when excluding them, ranking him fourth and third on those measures, respectively. A frequency distribution shows a rather consistent performance with only a few exceptions outside his norm, which can be seen in Figure 21.

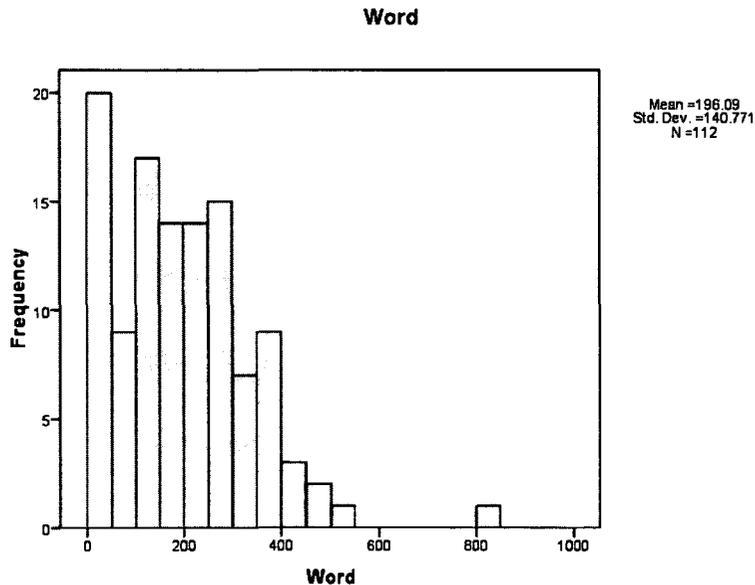
Figure 21
Distribution of Justice Kennedy's Average
Information-Seeking Scores



87. *Veneman* Transcript, *supra* n. 72, at 20–21.

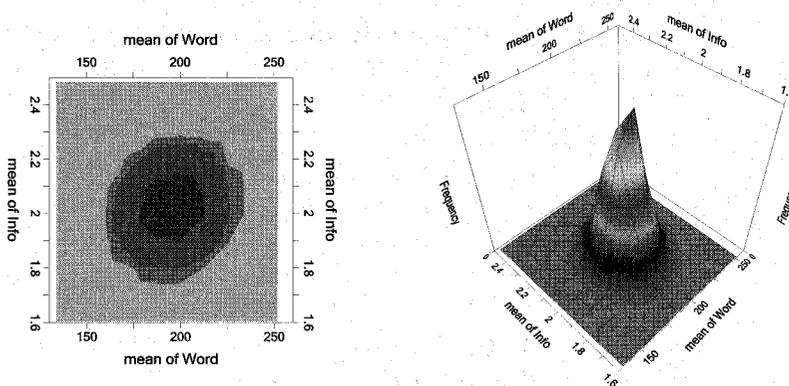
Regarding word counts, Justice Kennedy ranks third on the current Court (fourth if Justice Thomas is included with his near zero average), speaking 196 words per side when non-speaking observations are included and 215 when they are not, which is about twice of Justice Alito and half of Justice Breyer, the two ends of the word count continuum. Justice Kennedy is also fifth of the eight justices examined in this study when it comes to how many sides he chooses not to verbally engage, with that figure being 8.9 percent. The frequency distribution for Justice Kennedy's average word counts reveals a high number of instances in which he says little or very little, and a somewhat normal distribution after that with a couple of outliers, all as shown in Figure 22.

Figure 22: Distribution of Justice Kennedy's Average Word Counts



The visual portrayal of the Bayesian estimation of the means of both variables shows that the ninety-five percent confidence interval for Justice Kennedy's average ISS lies between about 1.82 and 2.22, and for his average word counts is between 169.2 to 222.9, which the patterns shown in Figure 23 both indicate.

Figure 23
Bayesian Estimation of Justice Kennedy's
Average ISS and WC



Because of Justice Kennedy's fairly equal treatment of both the sides he votes for and against (possibly because he is usually not leaning one way or the other when he enters oral argument), neither his information-seeking scores nor his word counts are statistically significant predictors of his votes on the merits in the cases analyzed in this study.⁸⁸

5. Justice Souter: Inconsistent Dominator

While lacking Justice Scalia's acerbic wit, Justice Souter is the member of the Court most like Justice Scalia in his penchant for dominating oral argument in a case for stretches of time, as well as in his habit of pushing attorneys for answers he seeks, even not waiting for them to provide the "correct" answer, as in *Haywood v. Drown*.⁸⁹

JUSTICE SOUTER: What if the New York legislature passed a statute saying the—the State court supreme court will not have jurisdiction over 1983 actions for—for harm committed on Wednesday? Would you say that that was a jurisdictional rule?

88. See Table 3 in Appendix I.

89. ___ U.S. ___, 129 S. Ct. 2108 (2009).

MS. UNDERWOOD: I think—

JUSTICE SOUTER: I will answer the question for you, if you want.

MS. UNDERWOOD: I think it would be hard to—

JUSTICE SOUTER: You wouldn't have.

MS. UNDERWOOD: —to find a rationale for it.

[intervening questioning by Justice Scalia]

JUSTICE SOUTER: Would you say it was jurisdictional so long as the Supreme Court said—or so long as the State legislature said, no State or Federal actions for—for—for Wednesday damages? Would you call that jurisdictional?

MS. UNDERWOOD: I would call it very strange.

JUSTICE SOUTER: You might call it crazy outside of court, but the one thing you wouldn't do is walk into a court and say it's jurisdictional.

And the—my—the point I am getting at is, the finer the comb that—that—that keeps the certain class of case out, the less plausible it is to say that this is a jurisdictional kind of criterion sense of it?⁹⁰

In *FEC v. Wisconsin Right to Life* Justice Souter pressed an attorney in hopes of getting a particular concession, and somewhat castigated the attorney when he apparently did not receive what he considered to be the correct response:

JUSTICE SOUTER: You mean the people in North Carolina were unaware of the Edwards position, they were unaware of the distinction between Faircloth and Edwards?

MR. BOPP: I have no idea.

JUSTICE SOUTER: Of course they knew that.

MR. BOPP: I have no idea.

90. Transcr., *Haywood v. Drown*, <http://www.supremecourt.gov> at 45–47 (Dec. 3, 2008) (___ U.S. ___, 129 S. Ct. 2108 (2009)) (accessed Oct. 14, 2010; copy on file with Journal of Appellate Practice and Process). Of course, this is not the only argument in which Justices Souter and Scalia have interrupted each other. Perhaps because of their verbal similarities, Justices Souter and Scalia will sometimes talk over and around each other in oral argument, as previously noted when looking at the Chief Justice's handling of his colleagues. See text accompanying n. 45, *supra*.

JUSTICE SOUTER: Of course they knew that. And just as presumably, you knew the position of Senator Feingold in these advertisements, and the people in the state knew because of your other—because of your other public statements.

MR. BOPP: Because of one or two press releases?

JUSTICE SOUTER: Why should those things be ignored?

MR. BOPP: There's absolutely no evidence that anyone in Wisconsin knew his position on the filibuster.

JUSTICE SOUTER: You think they're dumb?

MR. BOPP: No.

JUSTICE SOUTER: You have a web site. You have a web site that calls their attention, and you think nobody's going to it?

MR. BOPP: But we can't run the ads, we can't—

JUSTICE SOUTER: Nobody's paying attention to what the Senator is doing?

ATTORNEY: If we can't run the ads, we can't draw peoples [sic] attention to the web site.

JUSTICE SOUTER: You think the only source of information about Senator Feingold is your advertisement?

MR. BOPP: No, but I don't—

JUSTICE SOUTER: Then if your advertisement is not the sole source of information, then why do you assume that no one in Wisconsin knows what the senator has been doing when he votes.

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

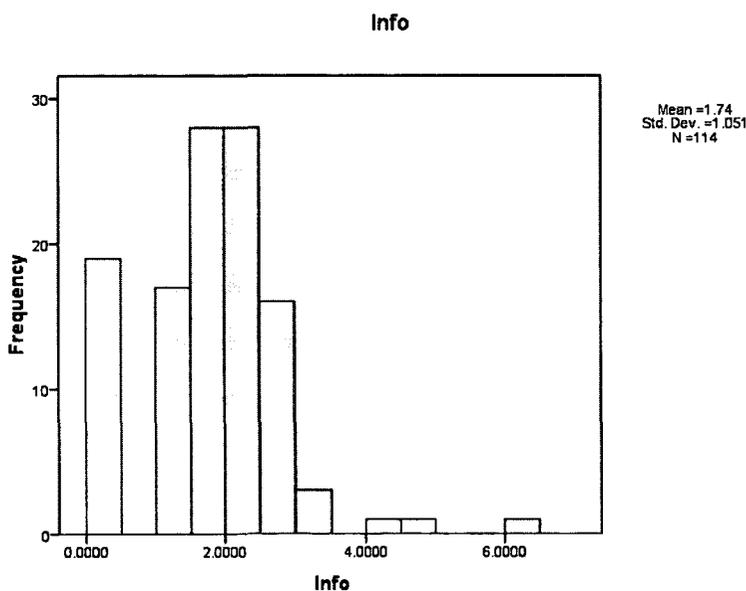
JUSTICE SOUTER: So your position is that we ignore context because no one—because the voters aren't smart enough to have a context?⁹¹

Thus, while jurisprudentially quite distinct, when it comes to oral argument behavior, Justices Souter and Scalia have quite a bit in common.

91. *FEC v. Wisc. Right to Life* Transcript, *supra* n. 62, at 37–38.

Justice Souter ties for seventh in ISS including non-speaking observations (1.74) and ranks sixth for inquisitiveness excluding non-speaking observations (2.06), placing him in the trio of low-information-seeking justices along with Justices Scalia and Breyer. A look at the frequency of his mean information-seeking scores shows a very narrow distribution, with a few outliers to the right and a healthy portion of instances of non-speaking, as shown in Figure 24.

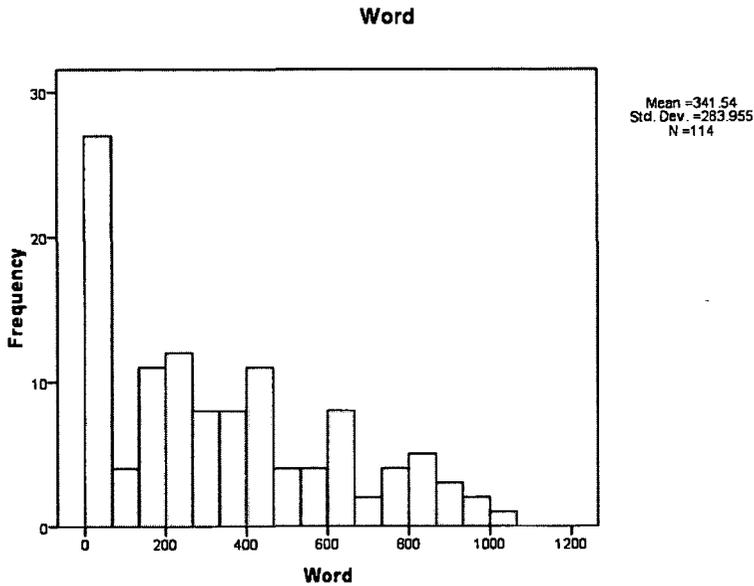
Figure 24
Distribution of Justice Souter's
Average Information-Seeking Scores



Similarly, Justice Souter ranks sixth (including non-speaking instances) and seventh (excluding non-speaking instances) with mean word counts of 341.5 and 405.6 respectively, again placing him with Justices Breyer and Scalia as the most garrulous on the Court. Interestingly, Justice Souter is behind only Justices Alito and Stevens (if Justice Thomas is not counted) when it comes to the percentage of the time he does not verbally engage a side in a case with a rate of 16.7 percent. Thus, whereas Justice Souter will sit silently during oral argument a fair amount of the time, comparatively speaking,

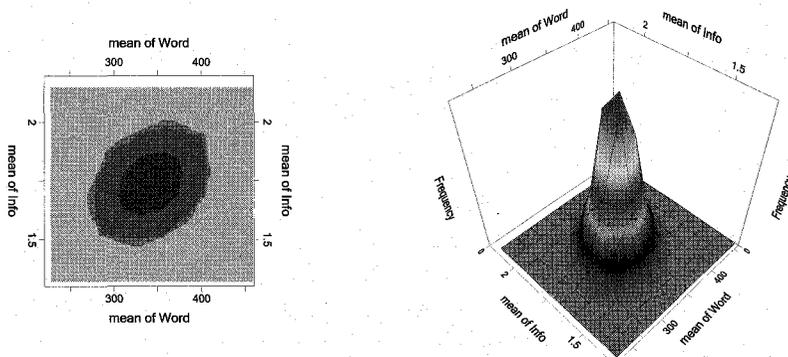
when he does engage, he out-talks most other justices. This pattern is reflected in the relatively flat, almost bimodal distribution of his average word counts if one ignores the high frequency of zero word counts, which is shown in Figure 25.

Figure 25
Distribution of Justice Souter's Average Word Counts



A view of the graphic portrait of Bayesian estimation of Justice Souter's combined ISS and word counts indicates the ninety-five percent confidence interval for his actual mean information seeking ranges between 1.54 and 1.93 and for his true mean word counts ranges between 288.1 and 395.1, which can be displayed graphically as in Figure 26.

Figure 26
Bayesian Estimation of Justice Souter's
Average ISS and WC



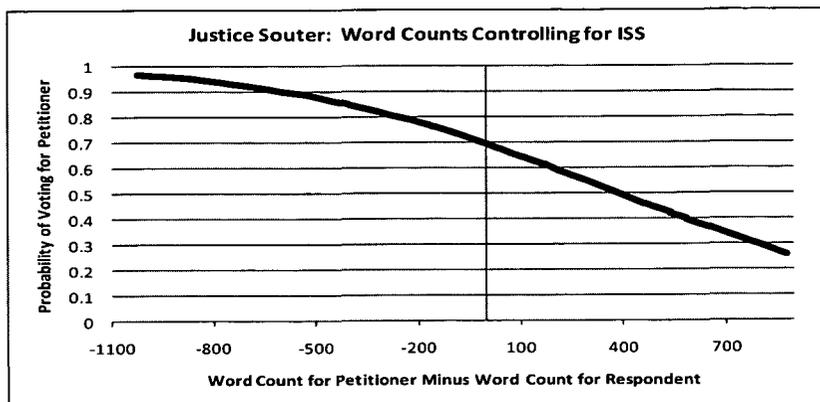
In predicting Justice Souter's votes on the merits, both information-seeking scores and word counts were statistically significant, though word counts explained more than ISS (sixteen percent versus ten percent).⁹² Unlike Justice Scalia's scores, Justice Souter's ISS and probability of support results indicate a negative relationship, meaning that the more information seeking Justice Souter engages in with a side, the less likely he is to vote for that side. Because of the two variables' moderate correlation,⁹³ when combining the ISS and word counts in statistical analysis, ISS ceased to be statistically significant, though word counts still predicted voting. Together the two variables explain about nineteen percent of Justice Souter's voting patterns.⁹⁴ When controlling for information-seeking scores, the probability of Justice Souter voting for the petitioner decreases the more he speaks to the petitioner compared to the respondent, which is shown in Figure 27.

92. Pseudo R^2 values of .1602 and .0986 respectively.

93. Pearson's $r = .431$, $p = .001$.

94. Pseudo $R^2 = .1901$.

Figure 27
Probability of Justice Souter Voting for Petitioner
from ISS & WC Differences



In cases in which Justice Souter speaks 600 words or more to the respondent above and beyond what he speaks to the petitioner, the probability he will support the petitioner is above ninety percent. When the word counts for the two sides are equal, there is about a seventy percent chance he will vote for the petitioner. And when Justice Souter utters 400 more words or more to the petitioner versus the respondent, the probability of his voting for the petitioner drops below fifty percent.⁹⁵ Given Justice Souter's loquaciousness during oral argument, it will be interesting to see if his replacement, Justice Sotomayor, fills the void, if other justices pick up the slack, or if the Court speaks less without him.

6. Justice Thomas: Reserved Observer

Justice Thomas is well known for his courtroom silence. While many have put forth theories as to why he so seldom wades into oral argument, he has himself declared that oral argument is "not the real meat" of the role of the Supreme

95. See Table 3 in Appendix I for more details.

Court.⁹⁶ Furthermore, Justice Thomas has stated, “I don’t see the need for all those questions [during oral argument]. I think justices, 99 percent of the time, have their minds made up when they go to the bench.”⁹⁷ Directly addressing his oral argument reticence, Justice Thomas simply explained: “[i]f I wanted to talk a lot, I would be on the other side of the bench.”⁹⁸

In the fifty-seven cases examined in this study, Justice Thomas spoke in only one case: *Holmes v. South Carolina*.⁹⁹ Given their rarity, we quote his remarks in full:

MR. ZELENKA: I see my time is about up, but I would—

JUSTICE THOMAS: Counsel, before you change subjects, isn’t it more accurate that the trial court actually found that the evidence met the Gregory standard?

MR. ZELENKA: No. He specifically found, I believe, from my reading—

JUSTICE THOMAS: Well, he says—

MR. ZELENKA: —that it didn’t meet the Gregory standard.

JUSTICE THOMAS: Well, he says at first blush, the above arguably rises to the Gregory standard. However, the engine that drives the train in this Gregory analysis is the confession by Jimmy McCaw White. And then he goes on to say that that, of course, can’t be introduced because it’s hearsay. So it—it seems as though he says that if it is to be believed what Jimmy White says, it meets the Gregory standard. So I don’t quite understand where Gay, which is subsequent to—to this case—where Gay comes in because it didn’t seem to be the standard that the trial court applied.¹⁰⁰

96. Tony Mauro, *Courtside—Is the Court Above it All? Recent Events Demonstrate a Strong Urge to Go Its Own Way*, 27 Leg. Times 10 (Mar. 29, 2004).

97. Lawrence S. Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach* 25 (Oxford U. Press 2008).

98. Michael A. Fletcher and Kevin Merida, *Jurist Mum Come Oral Arguments; Reticence on Bench Perplexes Observers*, Wash. Post A11 (Oct. 11, 2004).

99. 547 U.S. 319 (2006).

100. Transcr., *Holmes v. S. Car.*, <http://www.supremecourt.gov> at 43–44 (Feb. 26, 2006) (547 U.S. 319 (2006)) (accessed Oct. 20, 2010; copy on file with Journal of Appellate Practice and Process).

While drawing a general conclusion about Justice Thomas's overall oral-argument behavior from such a tiny selection is presumptuous, this sample is nonetheless the only empirical evidence of his style that can be analyzed in the sample taken for this study. Justice Thomas spoke six sentences, the first being a leading question, the rest being declarations. He uttered a total of 129 words, had an information-seeking score of 1.29, and consequently voted against the side he engaged with in oral argument.

7. Justice Ginsburg: Consummate Academic

Justice Ginsburg's verbal style in oral argument is like Justice Scalia's—that of the law professor who never asks a question that she does not already know the answer to—though Justice Ginsburg's questioning lacks the edge that Justice Scalia's often has. This academic approach probably should not be surprising given both Justice Ginsburg's background in legal pedagogy and remarks she has made linking the behaviors of the courtroom and the classroom:

I enjoyed the give-and-take characteristic of appellate advocacy as a lawyer and law teacher; I enjoy it even more as a judge. . . . (My revered former D.C. Circuit colleague, Carl McGowan, a truly great appellate judge, once said, and I agree: "Law teaching and appellate judging are more alike than any other two ways of working at the law.")¹⁰¹

In *Carey* Justice Ginsburg's questioning exemplified this almost pedagogic approach when she pushed the attorney to a conclusion she sought:

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

MR. FERMINO: That is correct.

JUSTICE GINSBURG: So that this state court of appeals chose to be respectful to the Ninth Circuit to consider what

101. Ginsburg, *supra* n. 3, at 567.

it had said, doesn't sound to me like a very strong argument.

MR. FERMINO: Well, Justice Ginsburg, I would respectfully disagree. . . .¹⁰²

Likewise in *Davis v. FEC* Justice Ginsburg attempted to get a reluctant attorney to concede a point:

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

MR. HERMAN: Well, Justice Ginsburg, I can't concede that. . . .¹⁰³

Possibly reflecting her previous time as a law professor, Justice Ginsburg does not shy away from an old-fashioned lecture when she feels it is necessary, as was apparently the case in *Tennessee Secondary School Athletic Association v. Brentwood*:¹⁰⁴

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

Nothing in the world stops Brentwood from saying this anti-recruiting rule is a really bad rule, it is unfair to us; you could have written op ed pieces about it, the school could have talked about it, the school could have urged the board of education to drop it. Nothing stopped you from attacking this rule that you don't like. But when you signed on, the First Amendment doesn't give you license not to follow the rules that you disagree with.¹⁰⁵

102. *Carey* Transcript, *supra* n. 50, at 29–30.

103. *Davis* Transcript, *supra* n. 84, at 5–6.

104. 551 U.S. 291 (2007).

105. Transcr., *Tenn. Secondary Sch. Athletic Assn. v. Brentwood*, <http://www.supremecourt.gov> at 27 (Apr. 18, 2006) (551 U.S. 291 (2006)) (accessed Oct. 20, 2010; copy on file with Journal of Appellate Practice and Process).

But Justice Ginsburg is just as willing to aid an attorney as challenge him or her, as she did after Justice Scalia's humorous attack in *Scheidler v. NOW, Inc.*,¹⁰⁶ almost appearing to be directly responding to Justice Scalia himself:

JUSTICE SCALIA: How—I mean, can we do that in a case that comes up here, and just say, “There are good arguments on both sides, it’s quite plausible,” and remand the case without resolving the issue?

[Laughter.]

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

MR. UNTEREINER: That’s right, Justice Ginsburg. . . .¹⁰⁷

Similarly Justice Ginsburg seemed to be throwing the solicitor general a rope in *Davenport v. Washington Education Association*.¹⁰⁸

JUSTICE GINSBURG: Is it relevant, General Clement, that the legislature didn’t seem to be, or the ballot initiative didn’t seem to be focused at all on beefing up the rights of the non-member of the union? It seemed to be concerned with the integrity of the election process, because they left the same old Hudson in place for union nongermane spending that didn’t have to do with elections.

MR. CLEMENT: That’s absolutely right, Justice Ginsburg.
 . . .¹⁰⁹

Justice Ginsburg engages in about the same amount of information seeking as do Justice Kennedy and the Chief Justice, with an ISS of 2.09 with non-speaking observations and 2.21 without them, ranking her third and fourth in those categories, respectively. A look at the frequency of her information-seeking scores shows a tighter distribution than is

106. 547 U.S. 9 (2006).

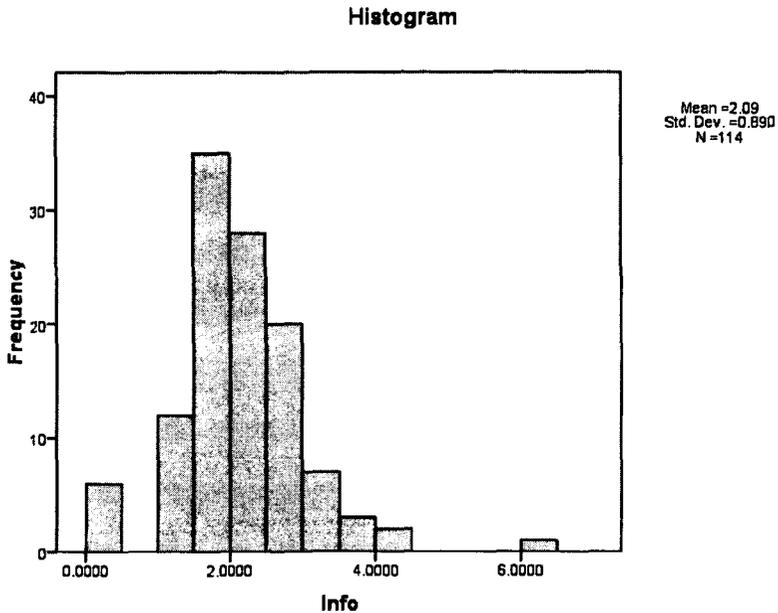
107. Transcr., *Scheidler v. NOW*, <http://www.supremecourt.gov> at 14 (Nov. 30, 2005) (547 U.S. 9 (2006)) (accessed Oct. 20, 2010; copy on file with Journal of Appellate Practice and Process).

108. 551 U.S. 177 (2007).

109. Transcr., *Davenport v. Wash. Educ. Assn.*, <http://www.supremecourt.gov> at 20–21 (Jan. 10, 2007) (551 U.S. 177 (2007)) (accessed Oct. 20, 2010; copy on file with Journal of Appellate Practice and Process).

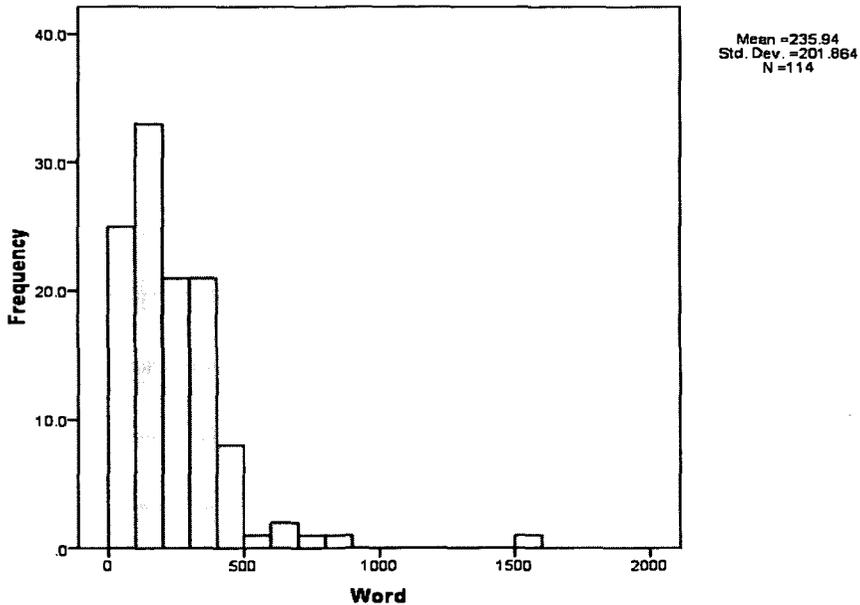
typical among the other members of the Court, with a single outlier to the right of the scale, all as shown in Figure 28.

Figure 28
Distribution of Justice Ginsburg's Average
Information-Seeking Scores



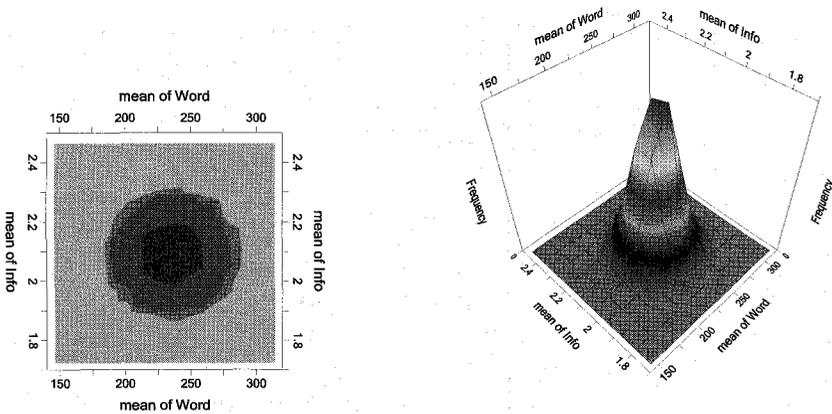
For average word counts per side, Justice Ginsburg again falls between Justice Kennedy and the Chief Justice, placing fourth with averages of 235.9 (all observations) and 249.1 (speaking observations only) words per side. Justice Ginsburg's distribution of word counts is even more narrow than her ISS distribution, with a slight skew and an outlier to the right, as Figure 29 indicates. More than most justices, Justice Ginsburg rarely fails to say something to a side in a case, ranking her sixth on the Court with only 5.3 percent of sides in the cases analyzed failing to hear her voice during oral argument.

Figure 29
Distribution of Justice Ginsburg's
Average Word Counts per Side



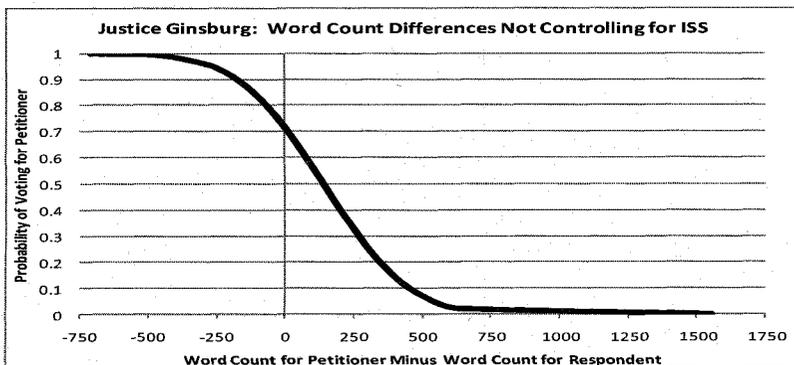
Combining ISS and word counts into a graphic representation of their Bayesian estimated means and ninety-five percent confidence intervals shows that Justice Ginsburg's actual mean ISS has a ninety-five percent probability of falling between 1.92 and 2.26 and that her actual mean word count per side can be found with ninety-five percent certainty between 197.6 and 274.4, as indicated in Figure 30.

Figure 30
Bayesian Estimation of Justice Ginsburg's
Average ISS and Word Counts



Justice Ginsburg's voting patterns cannot be predicted from her information-seeking scores, but the difference between her average word counts with petitioners and average word counts with respondents is a statistically significant predictor of whether she will vote for the petitioner. This calculation is shown in Figure 31.

Figure 31
Probability Justice Ginsburg Will Support Petitioner Based
on WC Differences



Similar to our results for other justices, the more Justice Ginsburg speaks to a side, the less likely she is to vote for it. When Justice Ginsburg utters 180 or more words to the respondent in a case, she has a ninety percent or greater chance of supporting the petitioner. When she gives equal treatment in verbal quantity to both sides in a case, her likelihood of supporting the petitioner drops to about seventy percent. And when Justice Ginsburg speaks 140 or greater more words to the petitioner versus the respondent, the probability of her voting for the petitioner drops below fifty percent.¹¹⁰

8. *Justice Breyer: King of the Hypothetical*

More than any other member of the early Roberts Court, Justice Breyer uses hypothetical questions during oral argument. Maybe partly because of the time necessary to develop some of his hypothetical scenarios, Justice Breyer can monopolize oral arguments for long sections of time, often giving attorneys little opportunity to speak. Justice Breyer's hypotheticals not only provide challenges for attorneys, but they are also sometimes not clear to his fellow justices. One even prompted the following unusual exchange in *Jackson v. Birmingham Board of Education*,¹¹¹ in which Justice Scalia asked Justice Breyer a question:

JUSTICE BREYER: But suppose you go back to the very old, bad days of the 1950's in the South, the '60's. They pass some civil rights legislation. A lot of legislation was passed in the '60's. Now, under that civil rights legislation, imagine an individual had been kept out of a restaurant or he'd been treated physically badly, not because of his race. He was white, but he was associating with people who were black. And they both go into the restaurant and they both are refused service. Maybe they're beaten up. I mean, both of them.

Now, can the white individual bring a lawsuit under the—the civil rights statute? I've always thought the answer to that question is, of course, he can. Would you—do you think it's the contrary answer?

110. See Table 3 in Appendix 1 for more details.

111. 544 U.S. 167 (2005).

MR. THOMAS: Justice Breyer, in that context—

JUSTICE BREYER: Yes.

MR. THOMAS: —I—I would say yes.

JUSTICE BREYER: Yes, of course.

MR. THOMAS: But again—

JUSTICE BREYER: So therefore—

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

JUSTICE BREYER: I'd—I'd like to—I'm thinking of various civil rights statutes which make it unlawful to describe—to—to discriminate. . . .¹¹²

Sometimes Justice Breyer appears to go off on a bit of a tangent, speaking his inner thoughts but not really engaging the attorney. In *Pleasant Grove*, for example, he interrupted Justice Stevens's questioning, and when the attorney finally got back to answering Justice Stevens's question, Justice Breyer did not seem to catch the answer because he continued to press the attorney about the response he had just uttered:

JUSTICE STEVENS: Well, supposing the Government in the Vietnam Memorial decided not to put up the names of any homosexual soldiers. Would that be permissible?

MR. JOSEFFER: Yes. When the—when the Government is speaking, it can choose who to memorialize and who not—

JUSTICE BREYER: That seems to be the problem here. And what I have in this is the—the problem I have is that we seem to be applying these subcategories in a very absolute way. Why can't we call this what it is—it's a mixture of private speech with Government decisionmaking—and ask the question, as we do in election cases, is the restriction proportionate to a legitimate objective? I know how you're going to answer that question. You're going to say: Of course, it is.

But what's interesting me is, are we bound in these cases to apply what I think of as an artificial kind of conceptual

112. Transcr., *Jackson v. Birmingham Bd. of Educ.*, <http://www.supremecourt.gov> at 33–34 (Nov. 30, 2004) (554 U.S. 167 (2005)) (accessed Oct. 20, 2010; copy on file with Journal of Appellate Practice and Process).

framework or are we free to ask what seems to me to be at the heart of the matter? The answer to Justice Steven's hypothetically [sic] is: Of course the Government can't do that because it's disproportionate.

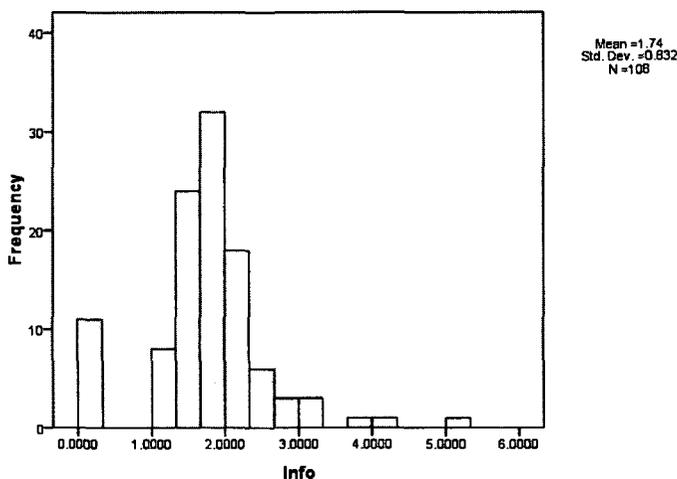
JUSTICE STEVENS: I didn't get the answer. Did you—

MR. JOSEFFER: Yes, the Government can choose to memorialize who it wants on the mall. When the Government is—now, to be clear, that's under the Free Speech Clause.

JUSTICE BREYER: So what is the answer to the—what is the answer to Justice Stevens's hypothetical? What is the answer to the homosexual hypothetical? What is the answer?¹¹³

Justice Breyer is one of the Court's least inquisitive justices, with average information-seeking scores of 1.9 (with non-speaking observations) and 1.99 (without non-speaking observations) that place him sixth and last, respectively, in each case, not counting Justice Thomas. As Figure 32 shows, a frequency chart of his average information-seeking scores reveals a narrow distribution skewed to the right.

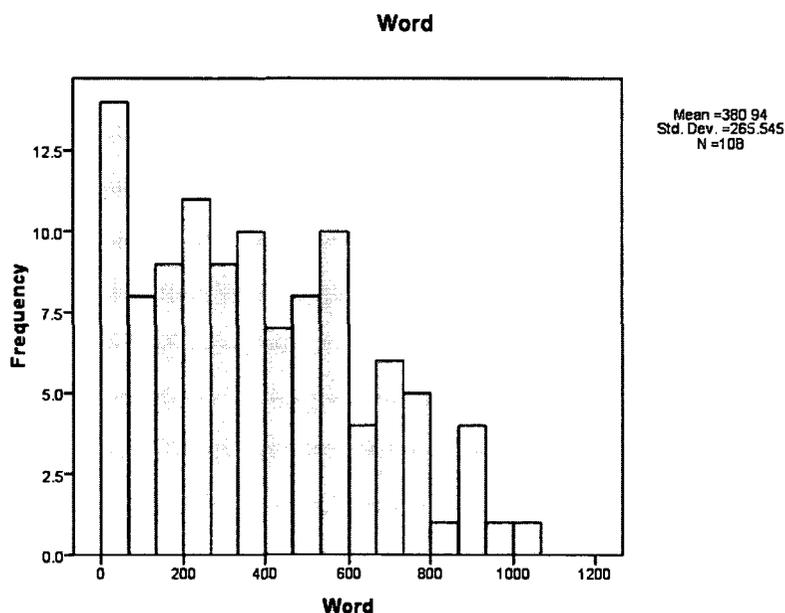
Figure 32
Distribution of Justice Breyer's
Average Information-seeking Scores
 Info



113. *Pleasant Grove* Transcript, *supra* n. 53, at 23–24.

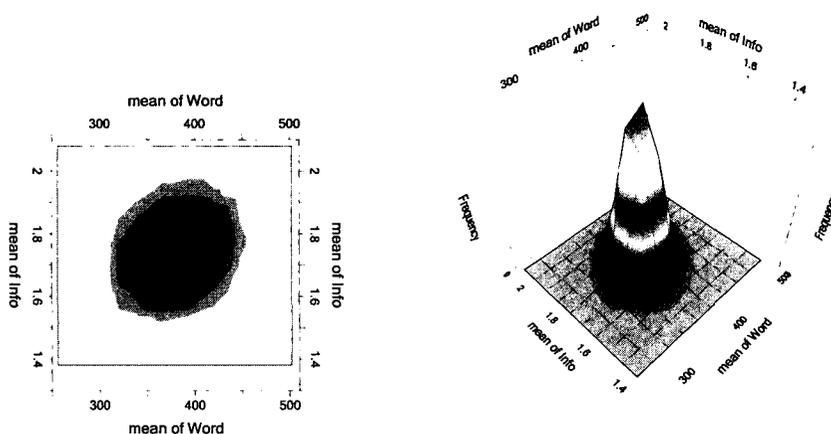
Furthermore, Justice Breyer was the most talkative justice examined in this study. If non-speaking instances are included, Justice Breyer averages uttering nearly 381 words per side, and if non-speaking instances are excluded Justice Breyer's mean word count per side is 424 words—almost the equivalent of Justices Alito, Stevens, and Kennedy combined. Justice Breyer's distribution of average word counts is non-normal and rather evenly spread out, as Figure 33 shows. But despite his verbosity during oral argument, ten percent of the time Justice Breyer will not engage a side, placing him in the middle of his colleagues in that area.

Figure 33
Distribution of Justice Breyer's
Average Word Counts per Side



The ninety-five percent confidence interval for Justice Breyer's average ISS as determined using Bayesian estimation gives the range of 1.58 to 1.91, and the ninety-five percent confidence interval for his average word count is 329.4 to 432.6, both of which are illustrated in Figure 34.

Figure 34
Bayesian Estimation of Justice Breyer's
Average ISS and Word Counts



Further, Justice Breyer's voting patterns cannot be predicted using either his information-seeking scores or his word counts.¹¹⁴

9. Justice Alito: Inquisitive but Reserved Newcomer

While serving for thirteen years on the Third Circuit, Justice Alito was given the moniker of “Scalito” or “Little Scalia” for his consistently conservative jurisprudence.¹¹⁵ Yet during Supreme Court oral argument, Justice Alito, as the Court's newest member, is the polar opposite of Justice Scalia, and, if anything, could be called “Little Stevens” for the similarities between the two justices' verbal styles. Though mild-mannered and polite, Justice Alito is not a pushover. He does hold attorneys' feet to the fire, usually by restating their argument in such a way that they feel compelled to further

114. See Table 4 in Appendix I.

115. See e.g. Shannon P. Duffy, *The Mild-Mannered Scalia*, 228 Leg. Intelligencer 1 (Mar. 3, 2003) (noting the Scalito nickname but stating that Justice Alito's “tone during oral arguments is probing but always polite”).

justify it.¹¹⁶ He also tries to help attorneys understand other justices' questions, as he did in the case of an attorney who failed to respond to a question asked by Justice Souter:

JUSTICE SOUTER: Well, what about the situation in which the contract runs for a year and you bill monthly? On your theory the contract is still going on and yet there is no prepayment. I assume on your argument they would be just as bound by the California policy as if they got a hundred percent payment up front.

MR. GOTTESMAN: Well, that's—that's a question about a meaning of a provision that isn't at this issue in this case. The ones that are at issue in this case—

JUSTICE SOUTER: Well, do you concede that if they—if all they did under a 12-month contract was—was bill for services rendered every past 30 days, that there would be either no application of the California law or that the application would be pre-empted?

MR. GOTTESMAN: That might well be the case. But we don't have an interpretation of that provision of the California law.

JUSTICE ALITO: I'm sorry. That was an either/or.

(Laughter.)

JUSTICE ALITO: Which might be the case?

MR. GOTTESMAN: Oh. I say it might be the case.

JUSTICE SOUTER: It's like saying yes.

MR. GOTTESMAN: Yes.

(Laughter).

MR. GOTTESMAN: But again, that issue isn't here. . . .¹¹⁷

Justice Alito does not tend to monopolize time in oral argument and, unlike many of the other justices, will not engage in lengthy back-and-forth with attorneys. Generally he is content to ask a question or two at a time, and allow the attorney to expound on an answer, or to allow other justices to pursue

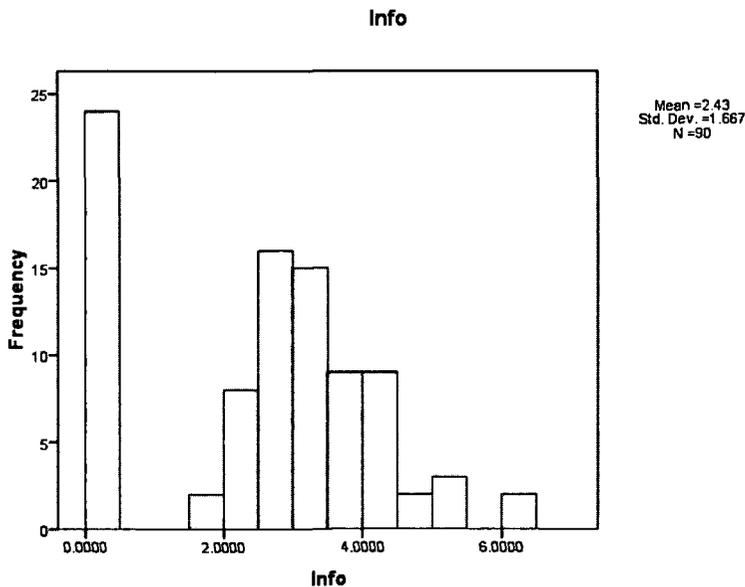
116. Transcr., *Chamber of Commerce of U.S. v. Brown*, <http://www.supremecourt.gov> at 41 (Mar. 19, 2008) (554 U.S. 60 (2008)) (quoting Justice Alito during an exchange with a lawyer: ". . . it's your position that . . .") (accessed Oct. 23, 2010; copy on file with Journal of Appellate Practice and Process).

117. *Id.* at 44.

further the line of reasoning initiated by his question or comment.

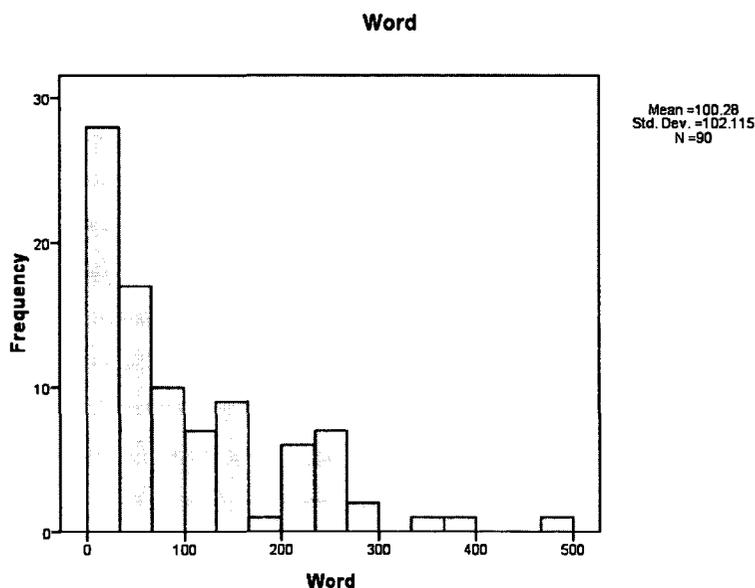
Justice Alito undoubtedly engages in the most information seeking of any member of the Roberts Court, with an average ISS of 3.31 after subtracting non-speaking observations. (His ISS is 2.43 with non-speaking observations.) While such a score is only an average of a little more than one leading question every time he speaks, this score is 33.5 percent higher than that of the next closest justice—Justice Stevens—and 70.6 percent higher than the justice with the lowest ISS: Justice Breyer. As Figure 35 indicates, a frequency distribution shows a somewhat normal distribution with a large portion of non-speaking observations. In fact, Justice Alito has the highest percentage of instances in which he does not speak to a side in a case at 26.7 percent.

Figure 35
Distribution Frequency of Justice Alito's
Information-Seeking Scores



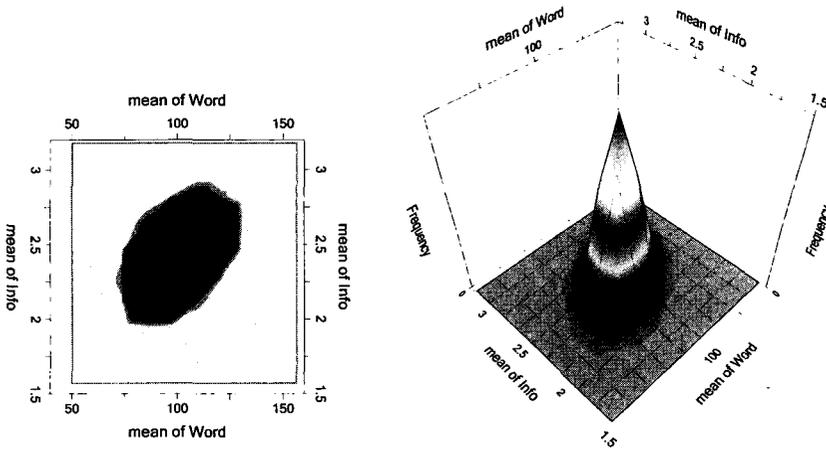
Regarding word counts, Justice Alito is the least talkative justice outside of Justice Thomas, averaging just over 100 words per side, approximately a fourth of what the most verbally active justices speak. A look at the frequency of word counts for Justice Alito exhibits a non-normal severely right skewed distribution, which is shown in Figure 36. Occasionally Justice Alito can get wordy, at least compared to his norm, but he never strays into the verbal territory of Justice Breyer or Justice Souter.

Figure 36
Distribution Frequency of Justice Alito's Word Counts



Bayesian estimation graphically portrayed reflects the frequency distributions above with the ninety-five percent confidence interval showing that Justice Alito's true mean for ISS falls between about 2.07 and 2.78, and for word counts can be found between around 78.3 to 122.3, both as shown in Figure 37.

Figure 37
Bayesian Estimation of Justice Alito's
Average ISS and WC



While some might argue that Justice Alito's relative inquisitiveness, low verbal activity, and high rate of non-engagement are evidence of his junior status on the Court and will likely change as his seniority increases, the justice most similar to him on these dimensions—Justice Stevens—is currently the most senior justice on the Supreme Court. Only time will tell if these initial findings reflect Justice Alito's courtroom style and personality, or if they are indicators of his comparative newcomer status.

Because of Justice Alito's relatively even hand as far as his verbal treatment of sides in cases is concerned, neither information-seeking scores nor word counts predicted his voting.¹¹⁸ Hence, like a few of the other justices, Justice Alito's eventual vote on the merits in a particular case cannot be determined from his oral argument behavior as measured by ISS or word counts.

118. See Table 4 in Appendix I.

V. CONCLUSION

In summary, this study's findings were twofold:

First, the justices on the early Roberts Court vary on the degree of information seeking and speaking that they do during oral argument, with the justices classifiable into four categories. At one extreme are the most talkative, least inquisitive justices, who tend to ask very few meaningful questions, monopolize counsel's time, and make their own points: Justices Breyer, Souter, and Scalia. Next are the median justices who are neither the most nor least talkative, and who are average in their information seeking compared to their colleagues: the Chief Justice and Justices Ginsburg, Kennedy, and Stevens. Then there is the category of the reserved but inquisitive justice who does not speak as much as other members of the bench, but does ask meaningful questions: Justice Alito. Finally, there is the category of the reserved and verbally uninquisitive justice who rarely speaks and even more rarely asks questions: Justice Thomas.

Second, the oral-argument behavior of five of the nine justices on the early Roberts Court tends to portend their eventual votes on the merits based on their disparate treatment of the two sides in the areas of information seeking and word counts. For five of the justices—the Chief Justice and Justices Ginsburg, Scalia, Souter, and Stevens—the more they speak to one side, the less likely they are to vote for that side. For three—Justices Scalia, Souter, and Stevens—information-seeking levels predicted eventual voting. For Justices Souter and Stevens, the more information seeking they engaged in with a side, the less likely it was that they would support that side. Just the opposite appears to be the case for Justice Scalia, however, with higher levels of information seeking from a particular side increasing the probability he would vote for that side in a case. In comparison, Justices Alito, Breyer, and Kennedy did not signal their voting intentions via information seeking and word counts.

Obviously no study is without weaknesses. Studying oral argument by merely analyzing transcripts is rather one-dimensional, as tone and body language are redacted from the analysis, limiting the findings. Also, the transcripts may have some errors—where, for example, the transcriber placed a

comma instead of a period or a period instead of a question mark—and this would have influenced the way in which those sentences were coded. Finally, the information-seeking scale used in this study may not be a perfect ordinal measure, and other ways to look at and measure the question types used by the justices may be a more accurate way to gauge information seeking.

That being said, and despite this study's weaknesses, the findings are important for practitioners, observers of the Court, and scholars of judicial behavior. For those who actually argue before the Supreme Court, a better understanding of how justices signal their leanings will help attorneys to read justices during oral argument and tailor their argument more effectively. For observers of the Court, particularly journalists, this study provides empirical methods that can be employed to predict with greater certainty how justices will vote in any given case. And for scholars of the Court, this study adds fodder to the debate over whether justices' behavior and decisionmaking are based more on strategic, legal, or ideological reasons; it also shows that the justices are sufficiently different that multiple measures of their behavior should be used to capture individual variance. Future studies should determine whether justices have merely predetermined their decisions and are engaging in persuasive behavior towards their colleagues via their questions to counsel at oral argument, or whether they are merely beginning to crystallize their thoughts on the case before them during oral argument and engaging in one last attempt to test their most developed theories as to who should win on the merits.

APPENDIX I

Table 2
Probit Regression of Petitioner Vote:
The Chief Justice and Justices Stevens and Scalia¹¹⁹

ROBERTS	1	2	3
Word Difference	-.0012* (.0005)	—	-.0013* (.0005)
ISS Difference	—	.063 (.208)	.135 (.220)
Constant	.609** (.201)	.515* (.207)	.558** (.217)
F-test for Word & ISS	—	—	—
Observations	51	51	51
Wald χ^2	5.39*	.09	6.16*
Pseudo R ²	.0994	.0013	.1047
Log pseudo-likelihood	-27.82	-30.85	-27.66
STEVENS	1	2	3
Word Difference	-.0023* (.0010)	—	-.0018* (.0011)
ISS Difference	—	-.189* (.099)	-.110 (.105)
Constant	.097 (.186)	.254 (.179)	.148 (.196)
F-test for Word & ISS	—	—	7.35*
Observations	55	55	55
Wald χ^2	5.88*	3.67*	7.35*
Pseudo R ²	.0785	.0577	.0935
Log pseudo-likelihood	-34.45	-35.23	-33.89
SCALIA	1	2	3
Word Difference	-.0029*** (.0006)	—	-.0032*** (.0007)
ISS Difference	—	.440* (.195)	.463* (.210)
Constant	.709*** (.207)	.563** (.183)	.726*** (.208)
F-test for Word & ISS	—	—	—
Observations	57	57	57
Wald χ^2	20.16***	4.20*	20.31***
Pseudo R ²	.2517	.0646	.3265
Log pseudo-likelihood	-25.32	-31.65	-22.79

119. Note that [†]p ≤ .10; *p ≤ .05; **p ≤ .01; and *** p ≤ .001.

Table 3
Probit Regression of Petitioner Vote:
Justices Kennedy, Souter, and Ginsburg¹²⁰

KENNEDY	1	2	3
Word Difference	-.0005 (.0011)	—	-.0006 (.0010)
ISS Difference	—	.088 (.160)	.096 (.158)
Constant	.820*** (.201)	.754*** (.199)	.785*** (.210)
Observations	56	56	56
Wald χ^2	.21	.30	.76
Pseudo R ²	.0034	.0063	.0107
Log pseudo-likelihood	-29.00	-28.91	-28.78
SOUTER	1	2	3
Word Difference	-.0016*** (.0005)	—	-.0013* (.0005)
ISS Difference	—	-.334* (.147)	-.206 (.140)
Constant	.474** (.184)	.368* (.181)	.462* (.187)
Observations	57	57	57
Wald χ^2	10.57**	5.18*	11.96**
Pseudo R ²	.1602	.0986	.1901
Log pseudo-likelihood	-31.02	-33.29	-29.92
GINSBERG	1	2	3
Word Difference	-.0041** (.0016)	—	-.0041* (.0016)
ISS Difference	—	.216 (.166)	.132 (.152)
Constant	.565** (.191)	.227 (.170)	.554** (.193)
Observations	57	57	57
Wald χ^2	6.74**	1.69	6.73*
Pseudo R ²	.2838	.0317	.2920
Log pseudo-likelihood	-27.53	-37.22	-27.22

120. Note that * $p \leq .05$; ** $p \leq .01$; and *** $p \leq .001$.

Table 4
Probit Regression of Petitioner Vote:
Justices Breyer and Alito¹²¹

BREYER	1	2	3	4
Word Difference	-.0006 (.0005)	--	-.0006 (.0005)	--
Log respondent Word Count	--	--	--	.699* (.342)
ISS Difference	--	.016 (.174)	.045 (.183)	.038 (.165)
Constant	.324 (.223)	.486 (.185)	.329 (.223)	-3.780 (2.079)
F-test for Word/ ISS	--	--	--	--
Observations	54	54	54	54
Wald χ^2	1.27	.01	1.33	4.17
Pseudo R ²	.0197	.002	.0208	.0663
Log pseudo-likelihood	-32.97	-33.63	-32.94	-31.41
ALITO				
Word Difference	-.0023 (.0014)	---	-.0017 (.0014)	---
Log respondent Word Count	---	---	---	---
ISS Difference	---	-.117 (.078)	-.080 (.084)	---
Constant	.325* (.198)	.385* (.205)	.370* (.205)	---
F-test for Word/ ISS	---	---	3.96	---
Observations	45	45	45	---
Wald χ^2	2.68	2.26	3.96	---
Pseudo R ²	.0480	.0414	.0637	---
Log pseudo-likelihood	-28.40	-28.60	-27.93	---

121. Note that ⁺p ≤ .10; *p ≤ .05; **p ≤ .01; and *** p ≤ .001.

APPENDIX II

Cases Included in Study

<i>Term</i>	<i>Case</i>	<i>Number</i>	<i>Oral Arg. Date</i>
2008	Forest Grove School Dist. V. T.A.	08-305	Apr. 28, 2009
2008	United States, Ex Rel. Eisenstein v. City of New York	08-660	Apr. 21, 2009
2008	Nken v. Mukasey	08-681	Jan. 21, 2009
2008	Coeur Alaska, Inc. v. Southeast Alaska Conservation Council	07-984	Jan. 12, 2009
2008	Cone v. Bell	07-1114	Dec. 9, 2008
2008	Pacific Bell Telephone Co. v. linkLine Communications, Inc.	07-512	Dec. 8, 2008
2008	Haywood v. Drown	07-10374	Dec. 3, 2008
2008	Pleasant Grove City v. Summum	07-665	Nov. 12, 2008
2008	Jimenez v. Quarterman	07-6984	Nov. 4, 2008
2007	Meacham v. Knolls Atomic Power Laboratory	06-1505	Apr. 23, 2008
2007	Metropolitan Life Ins. Co. v. Glenn	06-923	Apr. 23, 2008
2007	Davis v. Federal Election Commission	07-320	Apr. 22, 2008
2007	Irizarry v. United States	06-7517	Apr. 15, 2008
2007	Greenlaw v. United States	07-330	Apr. 15, 2008
2007	United States v. Clintwood Elkhorn Mining Co.	07-308	Mar. 24, 2008
2007	Chamber of Commerce of United States v. Brown	06-939	Mar. 19, 2008
2007	Rothgery v. Gillespie County	07-440	Mar. 17, 2008
2007	Crawford v. Marion County Election Board	07-21	Jan. 9, 2008
2007	Kentucky Retirement Systems v. EEOC	06-1037	Jan. 9, 2008
2007	Rowe v. New Hampshire Motor Transp. Assn.	06-457	Nov. 28, 2007
2007	Danforth v. Minnesota	06-8273	Oct. 31, 2007
2007	United States v. Williams	06-694	Oct. 30, 2007

2007	New York State Board of Elections, ET AL. v. Margarita Lopez Torres, ET AL.	06-766	Oct.3, 2007
2007	Brian Michael Gall v. United States	06-7949	Oct. 2, 2007
2007	Washington State Grange v. Washington State Republican Party	06-713	Oct. 1, 2007
2006	Federal Election Commission v. Wisconsin Right to Life, Inc.	06-969	Apr. 25, 2007
2006	Office of Sen. Mark Dayton v. Hanson	06-618	Apr. 24, 2007
2006	Hinck v. United States	06-376	Apr. 23, 2007
2006	Brendlin v. California	06-8120	Apr. 23, 2007
2006	Tennessee Secondary School Athletic Association v. Brentwood Academy	06-427	Apr. 18, 2007
2006	Leegin Creative Leather Products, Inc. v. PSKS, Inc.	06-480	Mar. 26, 2007
2006	Wilkie v. Robbins	06-219	Mar. 19, 2007
2006	Morse v. Frederick	06-278	Mar. 19, 2007
2006	Smith v. Texas	05-11304	Jan. 17, 2007
2006	Davenport v. Washington Education Association	05-1589	Jan. 10, 2007
2006	Rockwell International Corp. v. United States	05-1272	Dec. 5, 2006
2006	Burton v. Stewart	05-9222	Nov. 11, 2006
2006	Carey v. Musladin	05-785	Oct.11, 2006
2005	Kansas v. Marsh (Reargued)	04-1170	Apr. 25, 2006
2005	Empire HealthChoice Assurance, Inc. v. McVeigh	05-200	Apr. 25, 2006
2005	Dixon v. United States	05-7053	Apr. 25, 2006
2005	Brigham City v. Stuart	05-502	Apr. 24, 2006
2005	Beard v. Banks	04-1739	Mar. 27, 2006
2005	Garcetti v. Ceballos (Reargued)	04-473	Mar. 21, 2006
2005	Howard Delivery Service, Inc. v. Zurich American Ins.	05-128	Mar. 21, 2006
2005	League of United Latin American Citizens v. Perry	05-204	Mar. 1, 2006
2005	Randall v. Sorrell	04-1528	Feb. 28, 2006

2005	Holmes v. South Carolina	04-1327	Feb. 22, 2006
2005	Rapanos v. United States	04-1034	Feb. 21, 2006
2005	Wisconsin Right to Life, Inc. v. Federal Election Commission	04-1581	Jan. 17, 2006
2005	Rumsfeld v. Forum for Academic and Institutional Rights, Inc.	04-1152	Dec. 6, 2005
2005	Scheidler v. National Organization for Women, Inc.	04-1244	Nov. 30, 2005
2004	Tory v. Cochran	03-1488	Mar. 22, 2005
2004	Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.	04-480	Mar. 29, 2005
2004	Clingman v. Beaver	04-37	Jan. 19, 2005
2004	Veneman v. Livestock Marketing Association	03-1164	Dec. 8, 2004
2004	Jackson v. Birmingham Board of Education	02-1672	Nov. 30, 2004



