

## Chapter 1



### *Introduction*

In 1816, the state legislature of New Hampshire took control of Dartmouth College and acted as its new board of trustees because the college was in financial disarray. Dartmouth viewed the takeover as a political move by the newly empowered Democratic-Republicans (Smith 1989, 14), and sued the state. At the outset, the case looked dim for the college. However, after losing at trial, Daniel Webster joined Dartmouth's counsel (Jeremiah Mason and Jeremiah Smith) and argued the case on initial appeal. They lost there, too, as the Exeter Court upheld the trial court's decision allowing the state government to continue its oversight of the college (Smith 1989, 14).

Webster (a graduate of Dartmouth) filed an appeal to the Supreme Court, and in 1819 argued *Dartmouth College v. Woodward*. During oral arguments, Webster addressed the justices and argued that New Hampshire's decision to take over the Dartmouth board of trustees was made in error. He explained that a 1769 royal English charter established the college as a private educational institution and denied the state's argument that it was a public institution simply because it served the citizens of New Hampshire. Instead, citing common law, natural law, and historical records, Webster argued that state intervention was a violation of the contract clause of the U.S. Constitution.

After exhausting applicable legal reasoning, Webster laid out the policy consequences of a decision against Dartmouth College: if the Court ruled for New Hampshire, then all private institutions, not just colleges, would be in danger of losing control to the state. Specifically, Webster insisted, "It will be a dangerous experiment, to hold these institutions subject to the rise and fall of popular parties and the fluctuations of public opinions" (McIntyre 1903, in Peterson 1987, 100).

Finally, after four hours of intricate legal reasoning Webster paused and, while no exact transcript exists, O'Brien (2000) reports his final impassioned

plea for the justices to save the college: “Sir I know not how others feel, but for myself, when I see my Alma Mater surrounded like Caesar in the senate house, by those who are reiterating stab upon stab, I would not for this right hand, have her turn to me, and say *Et tu quoque mi fili!* And thou too, my son!” Several justices, and almost everyone in the gallery, were brought to tears and, as O’Brien notes, “Webster’s oratory won the day, as it often did” (257).

This account is indicative of the early era of the Supreme Court—when great orators such as Webster, John Calhoun, and Henry Clay appeared before the Court. During this period, oral arguments were elaborate oratories but, more important, they often provided the justices with their only source of information about a case: briefs were rarely if ever submitted and outside parties did not submit *amicus curiae* (friend of the Court) briefs.

In contrast, the modern Court obtains information from many sources: litigant briefs (Epstein and Kobylka 1992), briefs *amicus curiae* (Spriggs and Wahlbeck 1997), briefs on *certiorari* (Caldeira and Wright 1988), the media (Epstein and Knight 1998a), and lower court opinions. One may wonder, then, why the Court continues to hear oral arguments when it can readily obtain an abundance of information about a case from any number of credible sources.

The answer, which I address in this monograph, is that almost all the information justices receive is what other actors want them to consider. In short, the Court has little control over the majority of information it obtains. Unless justices ask for reargument (Hoekstra and Johnson 2003) or for the parties or interest groups to file briefs that address specific issues, there is only one time for them to gather information for themselves: the oral arguments. As such, my general thesis is that *Supreme Court justices use oral arguments as an information-gathering tool to help them make substantive legal and policy decisions as close as possible to their preferred outcomes.*<sup>1</sup>

While this conjecture seems intuitive at first blush, many students of the Court think otherwise. Indeed, the dominant view among Court scholars is that oral arguments have little influence over case outcomes because justices’ voting preferences are stable and exogenous (Segal and Spaeth 1993, 2002). As such, so the argument goes, an hour of debate about the legal and policy merits of a case will not change a justice’s likely vote.

Attitudinalists are the strongest adherents of the view that oral arguments have no effect on justices’ votes. As Rohde and Spaeth (1976, 153) posit, “oral argument frequently provides an indication of which is the most likely basis for decision,” but it “does not . . . provide reliable clues as to how a given justice may vote.” Segal and Spaeth (2002) concur with this assessment and suggest that ascertaining “The extent to which it affects the justices’ votes is problematic” (280). Additionally, they contend there is no indication oral argument “regularly, or even infrequently, determines who wins and who loses”

(280). For attitudinalists, then, the short time allotted for oral arguments, combined with the fact that justices' preferences are fixed, means that their votes will not change as a result of what transpires during these proceedings.<sup>2</sup>

The contention that oral arguments do not affect the Court's decisions is not unique to adherents of the attitudinal model, however. For instance, Abraham (1993) points out that while questions asked during oral arguments may "forecast the ultimate decision of the Court . . . in few, if any, instances is it possible to give accurate prognosis" (193). Further, Smith (1993) suggests that the justices use these proceedings simply to "probe the attorneys' minds for additional arguments and justifications to make their case opinions more complete and compelling" (271). The bottom line is that most Court scholars still adhere to the view that the oral arguments are little more than window dressing and have no effect on how justices make decisions.<sup>3</sup> For them, the short time allotted for oral arguments, combined with the fact that justices' preferences are fixed, means that their votes will not change as a result of what transpires during these proceedings.<sup>4</sup> In short, many Court scholars simply dismiss oral arguments because they find no direct link between these proceedings and the disposition (final vote) of a case.

I do not dispute the notion that an individual justice's votes may not change based on what transpires during oral arguments, but it is naive to assume that this is the only mechanism by which these proceedings might play a role in how Supreme Court justices make decisions. Indeed, the link between oral arguments and the Court's opinions may have less to do with the disposition of cases and more to do with its substantive legal and policy decisions. In other words, while it may be difficult to draw connections between a justice's vote to affirm or reverse, the relationship between what transpires during oral arguments and the legal decisions the Court makes may be the place to uncover the influence of these proceedings.

This argument follows directly from the findings of several seminal works on Supreme Court decision making. Epstein and Kobylka (1992, 302) demonstrate that "the law and legal arguments grounded in law matter, and they matter dearly," while Maltzman, Spriggs, and Wahlbeck (2000, 5) note that "to understand fully the political dynamics of the Court, we need to move beyond a study of voting alignments to explore the multiple strategies that produce Court opinions." Thus, while oral arguments may not affect dispositive outcomes for the Court, these proceedings may very well affect the Court's substantive decisions by providing legal and policy information to the justices (Cohen 1978; Benoit 1989; Wasby, D'Amatos and Metnailer 1976). If this is the case, then scholars must reevaluate the role that oral arguments play in the Supreme Court's decision-making process. In this book I do just that by focusing on three key questions:

1. What information do Supreme Court justices obtain from oral arguments?
2. What role does the information justices gather during oral arguments play in the Court's decision-making process?
3. Under what conditions are oral arguments likely to play a role in the Court's decisions?

To answer these questions, I adopt the strategic theory of decision making, which has three tenets (Epstein and Knight 1998a). First, justices are goal oriented (with policy typically their primary objective). Second, justices' decisions depend on the choices of other actors. Third, justices' choices are affected by the institutional setting within which they work. The key is that if justices are to make efficacious decisions, while at the same time satisfying their own policy goals, they need information about each tenet of this model. While many sources provide such information to the justices, my premise is that oral arguments offer a unique means by which justices can elicit this information in cases they hear.

This research represents a key departure from extant literature on Supreme Court decision making because, to date, students of the Court have either ignored the role of oral arguments in this process or have suggested that these proceedings play little role in how justices make decisions (Segal and Spaeth 1993, 2002; Smith 1993).<sup>5</sup> Indeed, while scholars have studied almost every other aspect of the Court's decision-making process—from the decision to grant *certiorari* (Caldeira, Wright, and Zorn 1999) and conference discussions (Johnson, Spriggs, and Wahlbeck 2002) to the opinion-writing stage (Maltzman, Spriggs, and Wahlbeck 2002) and the final decisions on the merits (Segal and Spaeth 1993, 2002)—few have explored the one public aspect of this process. Using both qualitative and quantitative data, I demonstrate that scholars must reassess the conventional understanding of oral arguments and, in so doing, I also hope to provide further insight into our more general understanding of decision making on the U.S. Supreme Court.

## **The Strategic Model of Decision Making**

The theoretical foundation for my account of how oral arguments help Supreme Court justices make decisions is grounded in the idea that justices are strategic actors (Cameron 1993; Epstein and Knight 1998a; Eskridge 1991a, 1991b; Fer-john and Weingast 1992; Gely and Spiller 1990), which means that their decisions are constrained by a host of factors (Maltzman, Spriggs, and Wahlbeck

2000). Specifically, when making decisions, policy-oriented justices must account for the preferences of their immediate colleagues, the preferences of actors beyond the Court, and institutional norms and rules that might affect the decisions that they can make. This section considers the three prongs of this model.

### *Justices Are Goal Oriented*

An abundance of evidence exists to suggest that Supreme Court justices may have many different goals (see e.g., Levi 1949; Cushman 1929; Baum 1997; Hensley, Smith, and Baugh 1997; Epstein and Knight 1998a). For example, it has been well documented that some justices seek principled decisions, or decisions that will sustain the Court's legitimacy (Baum 1997; Johnson 1996; Epstein, Segal, and Johnson 1996). While I agree that justices may have many goals, and have even argued elsewhere that justices might want to achieve goals beyond legal policy outcomes (Johnson 1995b, 1996), I follow the conventional wisdom in the study of judicial politics, which suggests that the *main* goal of most Supreme Court justices is the attainment of policy in line with their personal preferences (Segal and Spaeth 1993, 2002; Maltzman, Spriggs, and Wahlbeck 2000). As Epstein and Knight (1998a, 8) point out, "[J]ustices, first and foremost, wish to see their policy preferences etched into law."

That policy is the main goal of Supreme Court justices is neither a new nor a controversial idea. Rather, this argument is well grounded in the work of legal realists such as Llewellyn (1931) and Frank (1949) and early judicial behavior scholars such as Pritchett (1948), Murphy (1964), and Schubert (1965). Scholars have provided empirical support for this argument in several ways—three of which I address here. First, individual justices' voting patterns are quite consistent over time. For instance, with the exception of two terms (1974 and 1977), Lewis Powell voted liberally in civil liberties cases no more than 43 percent of the time in any given term. Likewise, William Brennan's liberal support for civil liberties fell below 70 percent during only one term of his Court tenure (1969) (Epstein et al. 1996, 456). This consistency indicates that justices pursue specific policy goals and rarely waver from doing so.

Beyond voting patterns, Epstein and Knight (1998a, 30–32) demonstrate that almost 50 percent of all remarks made by justices during the Court's conference discussions concern policy, and 65 percent of statements in circulating memoranda during the opinion-writing process address policy considerations. These remarks include statements about legal principles the Court should adopt, courses of action the Court should take, or a justice's beliefs about the content of public policy. *Seattle Times Co. v. Rhinehart* (1984) illustrates this point. In this case a religious organization (the Aquarian Foundation) sued the

*Seattle Times* for defamation and invasion of its members' privacy. The specific dispute surrounded the foundation's allegation that the newspaper knowingly printed fictitious stories about the organization's practices and members. During pretrial discovery, a controversy arose when the trial judge issued an order compelling Rhinehart (and his group) to provide the *Seattle Times* with a list of donors and members, and simultaneously imposed a protective order prohibiting the paper from publishing these names.<sup>6</sup> The paper argued that the protective order violated its First Amendment right to publish the names, and it focused on this issue in its appeal to the Supreme Court.

During the opinion-writing stage of this case, Justice Brennan wrote a memo to Justice Powell about Powell's interpretation of the existing discovery rules under the *Federal Rules of Civil Procedure*. Brennan wrote, "Although it is undoubtedly true that discovery proceedings 'are not public components of a civil trial,' I am not sure that the materials generated by discovery are not, as a matter of modern practice, open to the public" (memo to Powell, May 3, 1984). In short, and in accordance with Epstein and Knight's argument, Brennan pointed out how he believed the policy should be interpreted and therefore how the Court should rule.

Finally, scholars address the interactions that take place between justices (Maltzman, Spriggs, and Wahlbeck 2000; Epstein and Knight 1998a; Murphy 1964). They point to justices' bargaining statements during the opinion-writing phase of a case to demonstrate that policy considerations are the driving force behind justices' decisions. In *Rhinehart*, Brennan's memo to Powell also included a statement of this nature. Indeed, he begins the memo as follows: "Thank you for your note of May 1, and for your consideration of my suggestions. If you could find your way to incorporating them I would be pleased to join your opinion" (memo to Powell, May 3, 1984). Of course, some of these memos are more forceful, but the point is the same—to move the policy set by the Court closer to a particular outcome.

### *Justices Are Strategic*

The attitudinal model of Supreme Court decision making argues that justices are unconstrained in their ability to vote for their most preferred policy outcomes because they enjoy life tenure (Segal and Spaeth 1993, 2002). In other words, because justices do not face election or retention, and because they usually do not have higher political ambitions, they can vote for their most preferred outcomes without consequence. In contrast, the strategic model suggests that, although they pursue policy goals, justices cannot always make decisions that conform perfectly to their preferences. Rather, because five justices must

usually agree on a decision to set precedent, and because external institutions (such as Congress) can sanction the Court, justices must pay particular attention to the preferences and likely actions of their immediate colleagues as well as those beyond the marble palace. In short, Supreme Court justices alter their behavior in order to achieve their goals within the context of the political environment. In this section, I separately consider intra-Court strategic interaction and interinstitutional strategic interaction.

**INTRA-COURT STRATEGIC INTERACTIONS.** A recent, yet rich, literature explores the extent and impact of internal bargaining between justices (see e.g., Johnson, Spriggs, and Wahlbeck 2002; Maltzman, Spriggs, and Wahlbeck 2000; Caldeira, Wright, and Zorn 1999; Epstein and Knight 1998a; Schwartz 1997). These works are progeny of Murphy (1964), who argued that justices are rational actors and act as such when deciding cases. The reason for this is obvious, as Murphy notes: “Since he shares decision making authority with eight other judges, the first problem that a policy oriented justice would confront is that of obtaining at least four, and hopefully eight, additional votes for the results he wants and the kinds of opinions he thinks should be written in cases important to his objectives” (37).

While Murphy did not systematically test his theory, others have done so. For example, in an analysis of the private papers of Justice Brennan and Justice Marshall, Epstein and Knight (1995) demonstrate that over 50 percent of cases in one sample contained one or more bargaining statements between the justices.<sup>7</sup> In a later monograph, Epstein and Knight (1996a, 18) conclude that “law, as it is generated by the Supreme Court, is the result of short-term strategic interactions among the justices and between the Court and other branches of government.”

Wahlbeck, Spriggs, and Maltzman (1998) support these findings in their empirical analysis of opinion circulation on the Court. They find that an opinion goes through more drafts as the ideological heterogeneity of a majority coalition increases, as the number of suggestions given to the opinion writer by other justices increases, as the number of threats made to the opinion writer increases, and as the number of times other justices say they are yet unable to join an opinion increases. This suggests to Wahlbeck, Spriggs, and Maltzman that “Opinion authors’ actions are shaped by the interplay of their own policy preferences and the actions of their colleagues” (312).

Wahlbeck, Maltzman, and Spriggs (1996) find evidence that the decision to join a majority opinion is a strategic choice as well. Specifically, they demonstrate that the decision to join is determined by how acceptable a majority opinion is to a specific justice, whether that justice can obtain concessions from

the opinion writer, and the past relationship between the opinion writer and the justice deciding whether to join. Finally, Maltzman, Spriggs, and Wahlbeck (2000) provide evidence that how the chief justice assigns opinions, how justices respond to initial opinion drafts, and how coalitions form are all processes grounded in strategic interaction.<sup>8</sup> This means that the process through which the Court makes decisions is a product of interactions and interdependencies between the justices. If, on the other hand, justices simply voted for their most preferred outcomes, there would be no evidence of bargaining and accommodation behind the scenes of the decision-making process.

INTERINSTITUTIONAL STRATEGIC INTERACTION. The ability of Supreme Court justices to reach their most preferred outcomes is not only constrained by their immediate colleagues' preferences. Other scholars have shown that justices must be aware of political forces beyond the Court and take these forces into consideration during their decision-making process (Marks 1989; Gely and Spiller 1990; Eskridge 1991a, 1991b; Ferejohn and Weingast 1992; Cameron 1993; Martin 1997; Johnson 2003). Justices must do so to prevent other institutions (e.g., Congress and the executive branch) from sanctioning the Court for making decisions with which they disagree. To avoid these sanctions, existing accounts suggest that justices think about whether their actions will provoke such reactions.

Consider the Court's relationship with Congress. Scholars who study the impact of the separation of powers note that the justices do not stray too far, too often, from how Congress wants them to act because a congressional majority can override statutory decisions with which it disagrees.<sup>9</sup> Intuitively, an override is most likely to happen when the Court and Congress are ideologically incompatible, which means that the justices will rule consistently with Congress if the median member of the House and the filibuster pivot in the Senate (Krehbiel 1998) are both ideologically opposed to the median justice's preferred outcome. Indeed, if the Court rules against the policy preferences of the pivotal members in this situation, Congress would have the necessary votes to pass a law overriding the decision (Eskridge 1991a). Such a scenario took place when the Court used *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) to overturn *Sherbert v. Verner* (1963), which, until that point, limited regulation of religious practices without a compelling governmental interest. Congress subsequently overturned *Smith* with the 1993 Religious Freedom Restoration Act (RFRA) and ultimately codified the compelling interest test set out in *Sherbert* (Epstein and Walker 1998b).<sup>10</sup>

Clearly, Congress has the authority to overturn Court decisions, and it has done so. However, if the two houses of Congress are divided over an issue,



then the justices are free to place decisions anywhere within the ideological boundaries of the two houses (Wolbrecht 1994). Wolbrecht notes that the justices found themselves in this situation when they decided the free exercise cases of *Braunfeld v. Brown* (1961) and *Sherbert v. Verner* (1963).<sup>11</sup> There are also times when the Senate and the House of Representatives are aligned, but cannot garner enough votes to overrule a Court decision. In this scenario, the justices can place policy wherever they choose (Eskridge 1991b). Eskridge (1991a) argues that the justices were in this position when the Court reversed a series of civil rights cases during the 1989 term, which implicated Title VII of the Civil Rights Act of 1964. While Congress tried to overturn these decisions with the Civil Rights Act of 1990, the bill failed to pass.

The justices must also be cognizant of how the executive branch will react to their decisions because the president can sanction the Court in a number of ways if he, or an executive agency, does not agree with the decisions.<sup>12</sup> First, although executive agencies have the power to enforce the Court's decisions, they do not have to do so. As Epstein and Walker (1998a, 43) note, "The bureaucracy can assist the Court in implementing its policies, or it can hinder the Court by refusing to do so, a fact of which the justices are well aware." While scholars debate about whether the president fully controls the bureaucracy, and is able to use it for his political advantage, Moe (1982) demonstrates that presidents have some control over independent commissions. Thus, even though a president may not be able to unilaterally order an agency to disregard a Court decision, the threat of an agency shirking Supreme Court decisions is real and has been carried out in the past. Wasby (1993, 330) notes that the Reagan administration had a policy of "nonacquiescence" for lower court judicial decisions that it disliked, especially in Social Security cases.

While the president may not have total control over the bureaucracy, he can personally sanction the Court by refusing to enforce its decisions. The most oft-cited example of this behavior is President Jackson's response to a Court decision that he particularly disliked: "John Marshall has made his decision, now let him enforce it" (Ducat 1996, 110). Other confrontations demonstrate that the president can, and does, judge whether the Court has made the right decision. For instance, President Jackson vetoed a bill that established a national bank, even after the Court declared such an entity constitutional (Wasby 1993). Several years later President Lincoln defied the Taney Court by refusing to release an alleged traitor, imprisoned while the right of *habeas corpus* was suspended, even though the Court ordered him to do so (Wasby 1993). This concern about enforcement is not relegated to the nineteenth century. Rather, Ducat (1996, 110) notes Justice Frankfurter's concern when the Court decided *Brown v. Board of Education* (1955): "Nothing could be worse from my point of

view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks.”

Beyond refusing enforcement, the administration can support anti-Court action in Congress if the president or an agency disagrees with the justices’ policy choices (Baum 1995a, 159). Two examples illustrate this tactic: President Roosevelt’s Court-packing plan in response to the justices’ continued rejection of his administration’s New Deal policies, and President Jefferson’s involvement in forwarding the impeachment of Justice Samuel Chase (Rehnquist 1992, 22–23). Finally, presidents and their advisors can publicly criticize the Court if they disagree with its decisions (Baum 1995a, 159), or they can fail to support it for decisions with which they disagree. Baum (1995a) argues that President Reagan and his Justice Department often used the former strategy, while President Eisenhower used the latter tactic.

In general, while rarely invoked by the executive branch, the sanctions delineated here may decrease the Court’s power as the ultimate arbiter of the law. It is easy to see why. If an administration refuses to enforce the justices’ decisions, then the Court is impotent to make or affect policy. Similarly, public criticism or anti-Court measures can erode the Court’s legitimacy. Thus, Supreme Court justices must account for how the executive branch may react to their decisions, and ensure that they do not stray too far, too often, from its preferred policy goals. In other words, justices “act strategically, anticipating the wishes of the executive branch, and responding accordingly to avoid a confrontation.” (Epstein and Walker 1998a, 43).

### *Justices Account for Institutional Rules*

The final tenet of the strategic model suggests that, although justices are goal oriented and consider other actors’ preferences when making decisions, they must also account for the institutional context within which they decide cases (Slotnick 1978; Danelski 1978; Maltzman and Wahlbeck 1996b; Epstein, Segal, and Johnson 1996). By institutions, I mean the rules (either formal or informal) that structure interactions between social actors (Knight 1992). In the context of the Court, legal institutions may constrain a justice’s ability to make certain decisions. That is, the “rules of the game” may prevent the justices from always making decisions that equate with their most preferred outcomes. The reason for this is simple: Supreme Court justices comply with institutional rules and norms (like precedent) because the Court must at least have the aura of acting as a legal, non-political, institution (Hoekstra and Johnson 1996; Epstein and Knight 1998a).

For instance, Knight and Epstein (1996) argue that justices adhere to the norm of respecting precedent. While their findings are far from general (they

only analyze thirteen cases), the evidence is nonetheless compelling. Indeed, if respect for precedent were not a norm, then Knight and Epstein would not have found evidence that the justices frequently discuss past cases in their private deliberations. Such references often take the form of Justice White's memo to Justice Powell in *Gertz v. Robert Welch Inc.* (1974)—one of the Court's most famous libel cases. White wrote:

I would leave unprotected by the First Amendment, along with obscenity, fighting words, and other speech that is sufficiently violence prone [he cites *Beauharnais* 1952, *Chaplinsky* 1942, and *Cantwell* 1940]. As was the case in *Metromedia* (1971), I am unaware of any satisfactory evidence or basis for further restricting state court power to protect private persons against reputation-damaging falsehoods published by the press or others. (memo from White to Powell, January 10, 1974)

That the justices make such references to precedents in private memos suggests that they act as if they themselves are constrained to follow these decisions. The question, however, is, why do the justices feel constrained by precedent? For Knight and Epstein (1996, 1029) the answer is simple: "compliance with this norm is necessary to maintain the fundamental legitimacy of the Supreme Court." In other words, they argue that if the Court frequently ignored its own legal precedents, its credibility as a judicial institution might be questioned, and it could potentially lose legitimacy—its main source of power.

Respecting precedent is an informal norm, but the Court must also follow certain formal rules such as those set out in the Constitution. Because the Constitution gives Congress the power to override Supreme Court decisions, the justices must account for the preferences of Congress when deciding where to set policy in a particular area of law. Other codified rules are found in Article III of the Constitution; these include the Court's jurisdiction to hear certain cases,<sup>13</sup> the requirement that a party must have standing (*Flast v. Cohen* 1968) to be heard in the Supreme Court, and that a case must be justiciable before the Court will consider ruling on it.<sup>14</sup>

## The Court's "Biased" Information Problem

The theory outlined above establishes that Supreme Court justices are strategic actors whose primary goal is to see the law reflect their personal policy preferences. However, to make laws that are both efficacious and in line with their preferred policy goals, justices need information that will help them assess how each tenet of the strategic model may affect the decisions they can make. That is,

justices need information about the policy options available to them, how their immediate colleagues want to decide a case, how other actors such as Congress, the president, and the public may react to a decision, and whether institutional norms or rules might limit their ability to make a particular decision. Without such information, it would be virtually impossible for the justices to make decisions that satisfy, as closely as possible, their own policy preferences. As such, it is no surprise that they seek, and receive, information from a variety of sources.

The two most pervasive sources of information for the Court are litigant and *amicus curiae* briefs (Caldeira and Wright 1988; Epstein and Kobylka 1992; Epstein 1993; Spriggs and Wahlbeck 1997; Epstein and Knight 1998b). Briefs submitted by the parties alone often account for hundreds of pages of legal arguments. Consider Supreme Court Rule 33.1, which sets the page requirements for all briefs filed to the Court (from the *certiorari* stage to the final decision stage).<sup>15</sup> Parties who petition the Court to hear their case can submit up to a thirty-page brief, and those opposing this motion have thirty pages to respond. During the *certiorari* stage the parties can also submit supplemental briefs of up to ten pages in length. If the petition for *cert.* is granted, then the attorneys submit briefs on the merits—up to fifty pages in length—to explain why the Court should rule in favor of their client.<sup>16</sup> Finally, *amici curiae* can submit twenty-page briefs at the *cert.* stage and thirty-page briefs on the merits.<sup>17</sup> Legal briefs are not the justices' only source of information, however. They also have access to every lower court decision related to a case, their own precedents in the same issue area, law review articles, and media accounts of the controversy.

This abundance of information decreases the “information problem” facing the justices (Caldeira and Wright 1988). Indeed, at each stage of their decision-making process the justices gather information about a wide range of policy options, how external actors might react to their decisions, and what institutions might limit their choices. But, while the general information problem may be solved, the justices face another potential problem: almost all of the information provided by litigants, *amici*, or other sources (law reviews, lower court decisions, etc.) is what *others* want the justices to see and have. For instance, if the Catholic League for Religious Liberties and the National Association for Women submit briefs *amicus curiae* in an abortion case, each is certain to argue that the Court should rule in a manner consistent with its membership's policy goals—either to overturn *Roe v. Wade* (1973), or to increase the freedom of women to choose abortion as an option during pregnancy. This is an important point because it suggests that almost all of the information in the Court's possession invariably reflects the goals and preferences of the parties who present it to the Court. I designate this phenomenon the Court's “biased information problem.”

Ultimately, if the justices make decisions based solely on information that others provide to the Court, several adverse consequences might result. First, litigant and *amicus* briefs (for example) may not provide a path by which the justices can reach a decision at or near their most preferred policy choices.<sup>18</sup> Second, unless the justices obtain information about how external actors may react to a particular decision, they may have a more difficult time creating efficacious and lasting policies (Martin 1996, 1997; Eskridge 1991a). For example, as noted in the previous section, Congress might sanction the Court if the justices often decide cases out of line with the preferences of the pivotal member. Finally, the litigant briefs, *amicus* briefs, or lower court decisions may fail to adequately elucidate institutional constraints the Court may face as a case winds its way from the *certiorari* stage to a final decision on the merits.

### Solving the Biased Information Problem: The Role of Oral Arguments

While scholars have studied the kinds of information actors provide to the Court (Epstein and Kobylka 1992; Spriggs and Wahlbeck 1997), and while others have focused on the Court's "lack of information" problem (Caldeira and Wright 1988), none have analyzed the effect of the biased information that justices do receive from external sources. I do so by analyzing how the justices can overcome the biased information problem as they procure information on their own terms during oral arguments. These proceedings often afford the justices their only chance to obtain information that they want, and often need, in a much less biased form.<sup>19</sup> Indeed, during oral arguments a justice can probe the litigants about issues that may help her reach an efficacious decision that is also near her preferred policy.<sup>20</sup> Scholarly accounts as well as the justices themselves suggest that this is the case.

#### *Evidence from the Academy*

Existing anecdotal evidence suggests that Supreme Court justices use information garnered from oral arguments when writing opinions. For instance, in a comparison of justices' inquiries during oral arguments with positions taken by the majority in *Tennessee Valley Authority v. Hill* (1978), Cohen (1978) finds explicit instances where Justices Powell and Stevens utilized issues discussed during the oral arguments in their opinions.<sup>21</sup> More recently, Benoit (1989) analyzes four incorporation cases to discern whether the Court's majority opinions include issues advanced by the winning party during oral arguments. Benoit's findings corroborate Cohen's but also make a key improvement

over the earlier work, because his method controls for issues raised during oral arguments that were not discussed in the litigants' briefs, as well as for those that were raised in both instances. This is important, because Benoit's findings suggest that oral arguments may provide unique information to the Court beyond the litigants' briefed arguments.

Wasby, D'Amato, and Metrailler (1976) find instances where the Court relied on oral arguments across a series of school desegregation cases. The analysis leads them to conclude that justices use oral arguments for several functions. First, the main role of these proceedings is to provide information that allows justices "to obtain support for their own positions or to assure themselves with respect to an eventual outcome" (418). Second, Wasby and his colleagues claim oral arguments help the justices gain a sense of how their colleagues view a case. Third, they argue that justices use this time to inquire about the beliefs of external actors such as the legislative and executive branches (419). These findings suggest that justices may use oral arguments as a strategic information-gathering tool. Unfortunately, the hypotheses are only tested on an analysis of cases within one issue area—desegregation.

Beyond the anecdotal accounts, two systematic accounts of oral arguments exist in the literature. Schubert et al. (1992) employ a biosocial approach to analyze how the Court utilizes oral arguments. They find that these proceedings provide a time for justices to clarify the issues of a case and to persuade their colleagues about these issues. This approach has merit, but Schubert et al. do not specifically focus on the types of information the justices gather; rather they are interested in how the justices act during these proceedings. Additionally, Wasby et al. (1992) demonstrate that "The Court's *per curiam* opinions provide clear evidence that oral argument at times—but certainly not always—has been directly relevant to the Court's disposition of a case—and at times determinative of outcome" (30). Although Wasby et al. use a nonrandom sample, their analysis suggests even more clearly that oral arguments play an informational role in how the Court makes decisions, at least those that are *per curiam*.<sup>22</sup>

### *Perspectives from the Bench*

Almost universally, past and present justices publicly agree with the scholarly assessments concerning oral arguments. While there is some dissension from this view, Justice Robert Jackson (1951) summed up the general sentiment: "I think the justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations . . . it always is of the highest, and often of controlling, importance." (801). Justice Lewis F. Powell reaffirmed Jackson's sentiment several decades later: "the fact is, as every judge knows . . . the oral

argument . . . does contribute significantly to the development of precedents” (in Stern, Gressman, and Shapiro 1993, 571). Other justices posit that these proceedings do, at times, have a great effect on their decisions (see e.g., Hughes 1928; White 1982; Rehnquist 2001). If past and present Supreme Court justices maintain that oral arguments provide information that helps them decide cases, then the notion that the information obtained during these proceedings might influence the Court’s decisions gains additional merit. This section considers not only these general statements, but also the more specific claims about how the justices think oral arguments affect their decisions.

Former Chief Justice Hughes (1928, 61) wrote that, in most cases, the impressions a justice develops during oral arguments “accord with the conviction which controls his final vote.” While a justice may enter oral arguments with relatively clear preferences concerning the outcome of a case (as the attitudinal model assumes), the arguments can mitigate or crystallize these preferences. To support this claim, Hughes (1928, 62) explains that one of his colleagues from the New York Court of Appeals kept track of his immediate post-oral argument impressions of a case, and that 90 percent of the time these thoughts accorded with his final vote.

This account resembles Justice Harlan’s experience with oral arguments at the Court. When he kept a diary of his postargument impressions of a case, Harlan (1955, 7) found that “more times than not, the views which I had at the end of the day’s session jibed with the final views I formed after the more careful study of the briefs.” Contemporary justices support the conclusions drawn by Justices Hughes and Harlan. For instance, Justice Brennan asserts that “I have had too many occasions when my judgment of a decision has turned on what happened in oral argument” (in Stern, Gressman, and Shapiro 1993, 732). He goes on to suggest that, while not controlling his votes, this process helps form his substantive thoughts about a case: “Often my idea of how a case shapes up is changed by oral argument” (in Stern, Gressman, and Shapiro 1993, 732).

These insights raise the possibility that oral arguments can force justices to reassess their perceptions about the substantive issues involved in cases they hear. This, then, may lead to changes—not necessarily of votes—but of the policy choices made within a written opinion. Chief Justice Rehnquist (2001) agrees with this assertion and argues that oral advocacy can affect his thoughts about specific cases: “I think that in a significant minority of cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing” (243).

The notion that oral arguments can affect substantive decisions is widely accepted by many Supreme Court justices. However, not all members of the

bench were initially convinced that this process was even remotely important. Justice Antonin Scalia, for one, thought that oral arguments were “a dog and pony show” before joining the bench, but after serving almost a decade on the Court he came to believe that “Things can be put in perspective during oral argument in a way that they can’t in a written brief” (in O’Brien 2000, 260). Chief Justice Rehnquist (2001) confirms this point and argues that a good oral argument “will have something to do with how the case comes out” (244).

Clearly, these public statements suggest that justices believe oral arguments play a key role in how they decide cases, but why? Different justices provide different answers to this question. Chief Justice Rehnquist (1984) posits that oral arguments allow justices to evaluate counsel’s “strong and weak points, and to ask . . . some questions [about the case]” (1025). Similarly, Justice Byron White (1982, 383) suggests that during these proceedings the Court treats lawyers as resources. By this, he seems to suggest that counsel come to the Court to provide new or clarifying information, which enables the justices to gain a clearer picture of the case at hand. Indeed, there may be points about which the justices are still unclear after reading the briefs, and this face-to-face exchange can make them clearer. As Chief Justice Rehnquist (2001, 245) argues: “One can do his level best to digest from the briefs . . . what he believes necessary to decide the case, and still find himself falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings.”

Justice William O. Douglas holds a somewhat different perspective on oral arguments. He argues that these proceedings are meant to teach the justices about the key points of a case: “The purpose of a hearing is that the Court may learn what it does not know . . . It is the education of the Justices . . . that is the essential function of the appellate lawyer” (in Galloway 1989, 84). Moreover, Justice John Harlan (1955) claims oral arguments are the best mechanism for information gathering: “there is no substitute . . . for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies” (7).

That oral arguments provide the justices with an opportunity to query the litigants and gather information is intuitive. While the briefs may address almost every legal intricacy, counsel cannot always know what information the justices want. It is only during oral arguments, then, that justices can discuss the issues that pique their interests. As Chief Justice Rehnquist (1984, 1021) writes: “Oral argument offers a direct interchange of ideas between court and counsel . . . Counsel can play a significant role in responding to the concerns of the judges, concerns that counsel won’t always be able to anticipate when preparing briefs.” Thus, for him, oral argument is “Probably the most important catalyst for generating further thought” (Rehnquist 2001, 241).<sup>23</sup>

Rehnquist (1986) best sums up how justices perceive oral arguments: “Justices of the Supreme Court of the United States have almost unanimously



agreed that effective oral advocacy is one of the most powerful tools of the professions” (289). Even the principal skeptic (Justice Scalia) changed his view once he joined the Court.

The justices’ accounts reinforce the existing empirical findings and provide compelling support for the idea that, in certain instances, oral arguments play a key role in how the justices make decisions. The works of Benoit (1989), Cohen (1978), and Miller and Barron (1975) demonstrate that relationships exist between orally argued issues and positions used by the justices in their opinions. Additionally, the implication of Wasby, D’Amato, and Metrailler’s (1976) analysis is that oral arguments help the justices make decisions that are close to their preferred policy goals, and help them account for the preferences of other actors (both on and beyond the Court). Combined with the justices’ public statements, these works demonstrate that a systematic analysis of the informational role oral arguments play in the Supreme Court’s decision-making process is warranted. This is my task in this book.

## Studying Oral Arguments Systematically

Theoretically, a systematic examination of oral arguments has not been conducted because many scholars argue that we can understand Supreme Court decision making without accounting for these proceedings. Practically, such an analysis is seemingly unfeasible because the data are very difficult to obtain. Indeed, while the Court makes oral argument transcripts available to the public, it does so only on microfiche and reel-to-reel tapes.<sup>24</sup> Moreover, the written transcripts are often more than fifty pages long per case, and they do not delineate which justices ask which questions during the proceedings. Instead, they identify the questioner as simply “the Court.”<sup>25</sup> As a result, scholars have largely relied on case studies or journalistic accounts (e.g., Galloway 1989; Lane 2000) to determine the role oral arguments might play in the Court’s decision-making process.

To test my hypothesis that oral arguments are a strategic, information-gathering tool for the Court, I rely on several sources of original data: litigant and *amicus* briefs, oral argument transcripts, notes and memoranda from the private papers of Supreme Court justices, and the final decisions handed down by the Court. I gather these data for a sample of cases decided between 1972 and 1986.

First, I utilize the briefs submitted by the parties as well as by all *amici curiae* involved in a case. I do so because the briefs often set the initial policy and legal boundaries for cases heard by the Court (see Lawrence 1990; Epstein and Kobylyka 1992; Wahlbeck 1998). Second, I analyze the corresponding oral argument transcripts for each case to determine which issues pique the justices’ interest during oral arguments. Instead of focusing on issues raised by the attorneys, note that I focus only on questions raised by the Court, because I am

interested in the types of information the justices want, rather than what information the attorneys want them to have. This allows me to ascertain whether, consistent with my general hypothesis, justices use oral arguments to gather information about their policy options, other actors' preferences, and institutional constraints they may face.<sup>26</sup>

Third, I rely on the private papers of Justices Brennan and Douglas, located at the Library of Congress, and those of Justice Powell, located at Washington and Lee University Law School in Lexington, Virginia. I analyze these justices' conference notes and intra-Court memoranda to discern when, and how often, the justices discuss issues raised at oral arguments during conference and when opinions are circulated between chambers. Fourth, to determine the extent to which the justices use oral arguments to learn about their colleagues' perceptions of a case, I utilize the notes Justice Powell took during oral arguments. I do so because, within these notes, Powell kept track of questions raised and comments made by his colleagues. Fifth, I compare the questions raised during oral arguments with the major issues decided in majority opinions.

Finally, I utilize data beyond my sample from Spaeth's *Expanded Supreme Court Database* (2001) and his *Burger Court Database* (2001) obtained from the Inter-University Consortium for Political and Social Research. These data sets contain information from the Vinson, Warren, and Burger Courts about all aspects of Supreme Court decision making—from the decision on *certiorari*, to conference votes, to the final votes on the merits. Combined with an analysis of all formally decided cases during this period, I am able to conduct a final test of the strategic use of oral arguments. That is, I use the Spaeth data to determine the circumstances under which the Supreme Court turns to oral arguments when making substantive decisions.

My task is to use these data to systematically explain the role oral arguments play in the Supreme Court's decision-making process. Only by comparing the oral argument transcripts with the justice's internal records and final opinions can I test whether information from these proceedings plays a strategic and informational role for the Supreme Court. By analyzing the sample of cases from the Burger Court, as well as the cases drawn from Spaeth databases, I am able to argue that my findings are generalizable beyond a few cases.

## Chapter Outline

The book follows the course that a case takes from the filing of briefs, to oral arguments, through conference and the opinion-writing stage, and finally to the Court's decisions on the merits. Chapter 2 begins with an exploration of the information justices have prior to oral arguments—from the litigant and

*amicus* briefs. From there it explores the types of information (policy considerations, external actors' preferences, etc.) that justices seek to gather during oral arguments. Chapter 3 draws on game-theoretic cheap talk literature (Gibbons 1992; Morrow 1994; Farrell 1987; Crawford and Sobel 1982) to argue that justices also use oral arguments to learn about their colleagues' perceptions of a case, and who they may have to persuade to procure a majority coalition during and after conference.

Chapter 4 looks at when, and to what extent, justices invoke information from the oral arguments in their conference discussions and in memoranda sent to the Court during the opinion-writing stage. I am particularly interested in how often justices invoke any information from these proceedings, and more important, how often they discuss issues raised for the first time during the oral arguments, as opposed to information that originated in the litigant or *amici curiae* briefs. This is a key advance over previous work because, to date, scholars have not yet analyzed the extent to which the justices discuss oral arguments in their private deliberations.

Chapter 5 takes the final step by exploring the extent to which information from the oral arguments finds its way into the Court's majority opinions. Additionally, this chapter provides a systematic explanation of the circumstances under which we should expect the Court to turn to oral arguments in its opinions.

In the concluding chapter, I tie together the theory and empirical analysis. Specifically, I summarize the role oral arguments play for the Supreme Court, and what impact these proceedings have on the justices' decision-making process. This chapter also clarifies where the findings of each chapter fit into the overall framework of judicial decision making, how they may help us understand other branches of government, their implications for future studies of decision making, and their implications for our notion of the Court's countermajoritarian role in our system of democracy.