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THE ILLUSION OF DEVIL'S ADVOCACY: HOW THE JUSTICES OF THE SUPREME COURT FORESHADOW THEIR DECISIONS DURING ORAL ARGUMENT

Sarah Levien Shullman*

INTRODUCTION

The common perception about oral arguments in the United States Supreme Court is that they are colorful, entertaining, and for the lawyer who happens to be arguing at that moment, overwhelmingly nerve-racking.[1] But many appellate practitioners question whether oral arguments are at all useful,[2] and some explicitly argue that the Justices' decisions are preordained.[3] They believe that oral argument today is a mere

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1. *See* Stephen M. Shapiro, *Oral Argument In The Supreme Court Of The United States* 8, available at http://www.appellate.net/articles/oralargsc.asp (accessed Sept. 15, 2004; copy on file with Journal of Appellate Practice and Process) ("Questions from the bench come in all forms and varieties. They range from the difficult to the obvious, from the subtle to the whimsical. The variety, rapidity, and unpredictability of questioning from the bench is perhaps the distinguishing hallmark of oral argument before the nine Justices of the Supreme Court.").

2. *See* Rex E. Lee, *Oral Argument In The Supreme Court*, 72 A.B.A. J. 60, 60 (June 1986) ("The first question that must be asked about oral argument in the Supreme Court or anywhere else is how much good it does—that is, how much it affects the outcome of the case. My answer to that question is a confident 'I don't know.'").

3. *See* David G. Savage, *Say the Right Thing*, 83 A.B.A. J. 54, 55-56 (Sept. 1997) ("When pressed on the issue, Thomas has told clerks that he relies on the briefs and sees no need to quiz the lawyers, and that he thinks oral arguments are overrated. They may make for a good show, but they are not altogether significant in the outcome. Thomas may well be right.").

formality, designed at a minimum to help the Court write a better opinion, although it can sometimes be used to "clarify facts and to test the vulnerability of tentative theories and approaches."[4]

But whether oral arguments are useful in the sense of being able to sway one or more of the Justices' votes, most practicing Supreme Court advocates agree on one proposition: No matter how well or poorly the argument goes, one simply cannot tell from their questions how the Justices are going to vote.[5] This article challenges that view, and suggests that oral arguments have more predictive value—and are thus more useful—than most people think.

My research indicates that by keeping track of the number of questions each Justice asks, and by evaluating the relative content of those questions, one can actually predict before the argument is over which way each Justice will vote.[6] This article also challenges the theory that the Justices use their questions to pull out the strongest and weakest points of each side equally, by showing that in the arguments I observed, they played devil's advocate much more often toward the parties with whom they disagreed than they did toward the parties they supported.

Part One of this article establishes the methodology I used to analyze the Justices' questions—specifically their content, tone, and number. Part Two summarizes my findings about oral arguments in the Supreme Court as a whole and suggests that predicting the outcome in a particular case may actually be possible. Part Three analyzes the questioning style and tendencies of each Justice. Finally, Part Four reports my predictions in three then-undecided cases, and, as a means of

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4. Lee, *supra* n. 2, at 60.

5. *See* Savage, *supra* n. 3, at 60 ("Most attorneys say they leave Supreme Court oral arguments enthused by the experience, but many emerge uncertain about the outcome."); Lee, *supra* n. 2, at 60 ("It should not be inferred, however, that comments in oral argument always reflect the justices' views. In the case of some members of the present Court, what you see and hear at oral argument is what you get at the conference vote. In other cases, it is not."); William Funk, *Supreme Court News*, 26 Admin. & Reg. L. News 8, 9 (Winter 2001) ("However, as many commentators remind us, the expressions at oral argument are an uncertain basis for predicting Supreme Court outcomes.").

6. The reader should bear in mind that my conclusions are based on the limited information that I was able to gather while attending only ten oral arguments during the October 2002 Term. Accordingly, one should not generalize my results without undertaking further research.

testing my theory, I compare my predictions to the actual outcomes.

I. METHODOLOGY

I attended ten oral arguments at the Supreme Court during the October 2002 Term. Using the methodology described below, I tracked all of the questions asked from the bench. After the first seven of those ten cases were decided, I compared the content and tone of the Justices' questions in those cases to their decisions in each. This analysis allowed me to develop a theory about the predictive value of oral argument, which I then tested by predicting the outcomes in the three cases that had not yet been decided, and comparing my predictions to the actual results.[7]

A. Tracking the Questions

During oral argument, I recorded every question and noted which Justice asked it.[8] Next, I assigned a score to each question based on its content, using a scale of one (the most helpful questions) to five (the most hostile). For example, a one was assigned if the Justice asked a question that was designed to elicit the lawyer's best argument. Thus, helpful questions that began with: "Aren't you really trying to say that . . .," if the lawyer really was trying to say that, would be given a one or a two. A five, on the other hand, was assigned to very hostile or argumentative questions. For example, a statement that began with: "I just don't see how your argument could possibly be

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7. While my methods were not scientifically exact, they were consistently applied to each argument. If there was any uncertainty about the content or tone of a particular question, it was excluded from my analysis. Likewise, if there was any uncertainty about which Justice was speaking, those questions were also excluded. (The non-credentialed press section, where I sat during oral arguments, is on the far left side of the courtroom, behind large marble columns. From these seats, you cannot always tell who is speaking unless you know the voices of all the Justices.)

8. These notations were necessary because up until October Term 2004, oral-argument transcripts did not indicate which Justice asked each question. *See* Assoc. Press, *High Court to Name Names*, available at http://www.nusd.k12.az.us/nhs/gthomson.class/articles/judicial ("For decades, transcripts listed 'Question' without identifying the questioner.") (accessed Dec. 20, 2004; copy on file with Journal of Appellate Practice and Process).

correct," would receive a five. A three was assigned to completely neutral questions, or questions meant only to clarify a particular fact or minor point.

I also tallied the number of questions each Justice asked, dividing them into categories: (1) questions asked in total; (2) questions asked per case; (3) questions asked of the party with which the Justice sided in the final decision; and (4) questions asked of the party against which the Justice sided in the final decision. To clarify, my observations show, for example, that many Justices asked far more questions of the respondent in cases in which they ultimately decided against the respondent's position.

In addition, I made notations about the Justices' tones of voice, when they made jokes, how often they used hypotheticals, and any other potentially relevant or interesting observations that occurred to me during the oral arguments. (These notes were not given scores, but I referred to them when preparing Part III of this article, in which I analyze the styles of the individual Justices.)

B. Analyzing the Questions

After seven of the cases were decided, I entered the questions from all of the arguments and their corresponding scores into a spreadsheet. I tallied the numbers and calculated averages for categories such as how many questions each Justice asked per case; which Justice asked the most questions overall; how hostile or helpful each Justice's questions were on average; and how many questions were asked of one party when the Justice ultimately decided for (or against) that party, and whether those questions were hostile or helpful. I also compared the authors of the seven decided opinions to the Justices who asked the most and fewest (and most hostile and helpful) questions in those cases, to see if these factors seemed to play any role in the opinion assignments.[9] Finally, I searched for patterns in the data, essentially exploring the predictive value of the Justices' questions in hindsight. I then applied the theory I

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9. Because opinions are assigned by the senior Justice in the majority based on a myriad of factors, some perhaps impossible to divine, an analysis of the likelihood of a particular Justice's being assigned a particular opinion is beyond the scope of this paper.

derived from the results of that analysis to predict the outcomes in the three remaining cases.

II. BRIEF SUMMARY OF CASES OBSERVED

1. The Seven Decided Cases

In *Yellow Transportation, Inc. v. Michigan*,[10] the issue was whether, under the Intermodal Surface Transportation Efficiency Act of 1991,[11] only a state's generic fee is relevant to determining the fee that it should have collected or charged as of November 15, 1991.[12] The Court reversed and remanded, holding that states may not modify a reciprocity agreement to alter any fee charged or collected as of that date.[13] The Court held that because the ICC's interpretation of the fee-cap provision was a permissible reading of the statute and reasonably resolved any ambiguities, it should have received deference under *Chevron*,[14] and the Michigan Supreme Court erred in declining to enforce the ICC's interpretation.[15]

In *Federal Communications Commission v. NextWave Personal Communications, Inc.*,[16] the Court considered whether section 525 of the Bankruptcy Code[17] prohibits the FCC from revoking licenses held by a debtor upon the debtor's failure to make timely payments for their purchase. The Court held that the FCC is prohibited under the express language of section 525 from revoking licenses, finding that whether the FCC had a valid regulatory motive for attempting to revoke them is irrelevant.[18]

10. 537 U.S. 36 (2002).

11. 49 U. S. C. § 11506(c)(2)(B)(iv)(III) (1994), amended and recodified in 49 U.S.C. § 14504(c)(2)(B)(iv)(III) (available at http://uscode.house.gov).

12. *Yellow Trans.*, 537 U.S. at 44.

13. *See id.* at 45-48.

14. *Chevron USA, Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

15. *Yellow Trans.*, 537 U.S. at 48.

16. 537 U.S. 293 (2003).

17. 11 U.S.C. § 525 (2003) (available at http://uscode.house.gov).

18. *NextWave*, 537 U.S. at 301-02.

    Barnhart v. Peabody Coal Co.[19] posed the question of whether the Commissioner of Social Security's failure as of October 1, 1993, to assign responsibility for eligible retired coal miners to the signatory operators that employed them voids the miners' benefits. The Court held that despite their untimeliness, initial assignments made after October 1, 1993, are valid.[20]

    In a more prominent case, *Eldred v. Ashcroft*,[21] the Court considered whether the twenty-year term extension set forth in the Copyright Term Extension Act of 1998[22] violates either the Copyright Clause or the First Amendment.[23] In a much-anticipated decision, the Court upheld the CTEA.[24]

    The issue in *United States v. Bean*[25] was whether a federal district court has authority to exempt a convicted felon from the blanket prohibition against possessing firearms,[26] when annual appropriations limitations from Congress prevent the Bureau of Alcohol, Tobacco and Firearms from processing applications for such exemptions. The Court held that absent an actual denial by ATF of a felon's petition, judicial review is precluded under 18 U.S.C. § 925(c).[27]

    In *Miller-El v. Cockrell*,[28] the issue was whether the Court of Appeals erred in evaluating the petitioner's claim under *Batson v. Kentucky*,[29] and denying him a certificate of appealability (COA). In an eight-to-one opinion sharply criticizing the lower federal and Texas courts, the Court held that deference by federal judges to state-court decisions does not by definition preclude relief, and that the Fifth Circuit erred in collapsing review of the petitioner's COA request into an analysis of the merits of the case.[30] A prisoner seeking a COA

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19. 537 U.S. 149 (2003).

20. *Id.* at 172.

21. 537 U.S. 186 (2003).

22. Pub. L. 105-298, § 102(b) and (d), 112 Stat. 2827-2828 (1998) (amending 17 U.S.C. §§ 302, 304).

23. *Eldred,* 537 U.S. at 198.

24. *Id.* at 218 (addressing Copyright Clause), 221-22 (addressing First Amendment).

25. 537 U.S. 71 (2002).

26. *See* 18 U.S.C. § 922(g)(1) (available at http://www.uscode.house.gov).

27. *Bean,* 537 U.S. at 78.

28. 537 U.S. 322 (2003).

29. 476 U.S. 79 (1986).

30. *Miller-El,* 537 U.S. at 336-37.

need only demonstrate "a substantial showing of the denial of a constitutional right."[31]

Finally, in *Moseley v. V Secret Catalogue*[32] the Court considered whether a party seeking an injunction under the Federal Trademark Dilution Act of 1995 must prove that the defendant's use of a similar mark caused it economic harm. The Court unanimously decided for the petitioner, holding that the Act requires proof of actual dilution, and that there was insufficient evidence in this case to support summary judgment for the respondent.[33]

2. The Three Test Cases[34]

Both *Ewing v. California*[35] and *Lockyer v. Andrade*[36] addressed the constitutionality of California's three-strikes law, and whether imposing a twenty-five-years-to-life prison term for a third-strike conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment when the third strike is petty theft. The Supreme Court upheld the three-strikes law in two five-to-four opinions.[37]

In *Norfolk & Western Railway Company v. Ayers*,[38] the petitioner alleged that it was error for the court below to (1) award emotional distress damages for fear of cancer under the Federal Employers' Liability Act[39] to retirees who were suffering from asbestosis, but who presented no evidence of additional physical symptoms that resulted from their fear of cancer; and (2) not apportion damages among the defendants. The Court affirmed, holding first that a railroad worker may recover emotional-distress damages for the fear of developing cancer, and second, that FELA expressly allows a worker to

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31. *Id.* at 327 (quoting 28 U.S.C. §2253(c)(2)).

32. 537 U.S. 418 (2003).

33. *Id.* at 433-34.

34. These cases were decided in March 2003, but I analyzed them when they were still pending in order to use my theory to predict their outcomes. Part Five of this Article compares my predictions to the actual decisions.

35. 538 U.S. 11 (2003).

36. 538 U.S. 63 (2003).

37. *Ewing*, 538 U.S. at 31; *Andrade*, 538 U.S. at 77.

38. 538 U.S. 135 (2003).

39. 45 U.S.C. § 51 (available at http://uscode.house.gov).

recover his entire damages from any one of the entities whose negligence jointly caused an injury, thus placing the burden of seeking contribution from the other defendants on the railroad funding the worker's recovery.[40]

III. SUMMARY OF FINDINGS[41]

Overall, Justice Ginsburg asked the most questions, whereas Justices Thomas and O'Connor asked the fewest. However, while Justice Ginsburg spoke most often, she was usually the least hostile. Justice Breyer asked the most hostile questions of all the Justices, and he was, on average, equally hostile to both parties.

All nine of the Justices asked more hostile questions than they did helpful questions. However, their questions were less hostile (and sometimes even helpful, depending on the Justice) when posed to the party who would eventually prevail. While this may seem obvious, it is not always clear whether a Justice is playing devil's advocate by asking one party a hostile or argumentative question, or if he or she really disagrees with that party's position. Thus, each question must be analyzed individually.

All nine Justices seemed to ask fewer total questions of the party in whose favor they would ultimately decide. For example, *Bean* was unanimously decided in favor of the petitioner, yet the Justices asked more questions of the respondent. In *NextWave*, they asked almost twice as many questions of the petitioner, and the decision was eight-to-one in favor of the respondent. The one exception was *Moseley*, in which the Justices asked slightly fewer questions of the respondent, but unanimously held for the petitioner.

The Justices' questions were also more hostile than helpful overall, with an average score of 3.38 (three being neutral, five

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40. *Ayers*, 538 U.S. at 157 (addressing fear-of-cancer claim), 165-66 (addressing joint and several liability).

41. Note that these findings do not account for oral arguments in which the Solicitor General (or a Deputy or Assistant Solicitor General) argued on behalf of the United States. However, it is important to note that the Justices' questions often increase in number and hostility when they are addressed to the Solicitor General. My numbers may in consequence be skewed in cases in which the United States was a party or an amicus.

most hostile) for questions asked of both parties. On average, however, they asked much more hostile questions of the parties against whom they would ultimately decide—3.80 for the losing parties compared to an average score of 2.87 for the winning parties. For example, in *Bean*, whereas the respondent's questions scored a 3.90, the petitioner faced questions with an average content score of 2.67, and it was the petitioner who ultimately prevailed. In *NextWave*, the petitioner faced mostly hostile questions with an average score of 3.78, whereas the respondent faced mostly helpful questions with an average score of 2.77; the decision was eight-to-one in favor of the respondent. The exception again was *Moseley*, in which the petitioner's and respondent's questions had average content scores of 3.32 and 3.20 respectively, although the Court unanimously decided in favor of the petitioner.

In many instances, the Justice asking the most questions wrote the opinion for the majority. The two exceptions were *Yellow Transportation*, in which Justice O'Connor asked the fewest questions, but wrote the opinion for the Court, and *Bean*, in which Justice Thomas asked no questions, but wrote for a unanimous Court.

IV. THE JUSTICES

A. Justice Breyer

Justice Breyer will tell you in no uncertain terms what bothers him about your case, especially in slippery-slope situations:

> I mean, in 1976, Congress extended the term from 28 years, renewable once, to life of the author plus 50 years. Now they're extending it life of the author plus 70. If the latter is unconstitutional on your theory, how could the former not be? And if the former is, the chaos that would ensue would be horrendous.[42]

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42. Transcr. of Oral Argument at 6-7, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (considering effects of holding 1976 copyright extensions unconstitutional) (available at 2002 WL 31309203).

Or,

> When the people who really get the cancer come into court,
> the cupboard will be bare, and I think that's a serious policy
> problem, and it's worrying me quite a lot, and that's why I
> keep coming back to the open nature of this.[43]

Justice Breyer is fairly quiet when he agrees with the party
speaking; however, when addressing the party he will ultimately
decide against, his questioning can be brutal. On average he
asked almost three times as many questions of the party whose
position he opposed, and in *NextWave*, he asked five times as
many questions of the respondent, ultimately writing a
dissenting opinion in favor of the petitioner.[44]

Justice Breyer, like Justice Scalia, often uses hypotheticals
to test the limits of an advocate's argument. As most
experienced Supreme Court practitioners can attest, his
hypotheticals often digress to the bounds of relevancy and yet
they manage to convey his point rather precisely:

> *Justice Breyer*: —but I learned the second year of law
> school, I learned the second year of law school—and
> obviously many of my colleagues don't agree with me, but
> I learned the second year of law school that when you have
> a text which says "all," that there are often implied, not-
> written exceptions. All animals in the park. No animals in
> the park doesn't necessarily apply to a pet oyster, okay, and
> so—
>
> *Justice Scalia*: Well, it's not an animal.
>
> *Justice Breyer*: Thank you. An oyster in my course in
> biology is an animal, all right. (Laughter)
>
> *Justice Breyer*: Maybe in yours it was a rock, or a
> vegetable or a mineral. But regardless, you see my point,
> and my question, of course, is that since that's how I read
> statutes—not everybody—is that I find exceptions implicit
> in statutes where to fail to read that exception is to destroy
> the purpose of the statute . . . .[45]

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43. Transcr. of Oral Argument at 44, *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135 (2003)
(speculating about what would happen if all persons afraid of getting cancer from asbestos
were compensated for their fears) (available at 2002 WL 31497282).

44. *NextWave*, 537 U.S. at 310-21 (Breyer, J., dissenting).

45. Transcr. of Oral Argument at 28, *F.C.C. v. NextWave Personal Commun., Inc.*, 537
U.S. 293 (2003) (available at 2002 WL 31309185).

In general, Justice Breyer rarely asks helpful questions. He will take the problem that concerns him about each side's argument and try to hash it out with the lawyer giving the argument. On average, he asked the most hostile questions of all the Justices, earning a score of 4.0. One major difference between Justice Breyer and the other Justices is that he will ask equally hostile questions of both sides. He averaged a score of 4.0 for questions he asked of both successful and unsuccessful parties. Thus, the one way to predict how Justice Breyer might decide a case is not by judging the content of his questions, but by judging the number of them.

B. Justice Ginsburg

Justice Ginsburg asks the most questions out of all the Justices, and she asks, on average, 1.65 times as many questions of the party she opposes than of the party she supports. In *Bean*, she asked 3.5 times the number of questions of the respondent than she did of the petitioner, ultimately joining the unanimous majority opinion in favor of the petitioner.

Justice Ginsburg also asks the least hostile questions on average, with many helpful questions in the mix. While she asks mostly helpful questions of the party she agrees with, Justice Ginsburg will not hesitate to switch sides and ask a hostile question of that same party or a helpful question of the party whose position she opposes. For example, in *Yellow Transportation*, while she ultimately decided for the petitioner, she did not hesitate to challenge its lawyer:

> But you're suggesting there's a possibility that somebody would be penalized for early payment, for prompt payment.[46]

This might make Justice Ginsburg, along with Justice Souter, one of the most objective questioners on the bench, but her questions are still 1.5 times more hostile when posed to the party she opposes.

While Justice Ginsburg is difficult to predict because she asks many questions of both sides, you can usually tell where

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46. Transcr. of Oral Argument at 22, *Yellow Transp., Inc. v. Mich.*, 537 U.S. 36 (2002) (available at 2002 WL 31309187).

she is leaning by how helpful or hostile her questions are. She asks questions scoring 2.40 of the party she supports, compared to questions scoring 3.79 of the party she opposes.

C. Justice Kennedy

Justice Kennedy does not stand out as being very predictable. He asks the most neutral questions out of all the Justices when he agrees with a party (3.0), and he asks questions with only an average level of hostility of the party whose position he opposes (4.0). Next to Justice Ginsburg, he asks the most neutral questions overall with an average score of 3.17. Many of them are clarifying or informational questions:

> Well, perhaps I misunderstood. I thought the whole thrust
> of your argument was that there is a great First Amendment
> force here that's being silenced, that's being thwarted.[47]

Next to the Chief Justice and Justice Scalia, Justice Kennedy asks almost the same number of questions of the party whose position he opposes as he does of the favored party, by a ratio of 1.3 to 1. But two cases revealed a slight increase in Justice Kennedy's questioning. In *Miller-El*, he asked twice as many questions of the respondent, ultimately writing the majority opinion in favor of the petitioner, and in *NextWave*, he asked five times more questions of the petitioner, ultimately joining the majority opinion in favor of the respondent.

Justice Kennedy asks only slightly more hostile questions of the party he will decide against than he does of the party he favors, with average scores of 4.0 and 3.0, respectively. For example, in *Yellow Transportation*, he posed questions with an average content of 4.0 to both the petitioner and the respondent.

Overall, it is very difficult to determine the slant of many of the questions that Justice Kennedy asks. However, probably the best way to predict a Kennedy decision is by analyzing both the content and number of his questions, as combining the scores from these categories seemed to be much more revealing than was assessing either category alone.

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47. *Eldred* Transcr., *supra* n. 42, at 8.

D. Justice O'Connor

Next to Justice Thomas, Justice O'Connor is the quietest member of the Court. She asked almost three times fewer questions than Justice Ginsburg did. However, she asked three and a half times more questions of the parties she decided against than of the parties she ultimately supported. In *Eldred*, for example, she asked five times more questions of the petitioner before joining the majority in favor of the respondent.

Of all the Justices, Justice O'Connor asks the fewest questions when she supports a party. Her record over ten arguments also exhibits the largest discrepancy between the number of questions she asks when she supports a party and the number of questions she asks when she does not. For example, in *Barnhart*, Justice O'Connor ultimately joined the dissenting opinion favoring the respondent's position, and she asked the petitioner six times more questions than she asked the respondent.

Justice O'Connor falls somewhere in the middle when her questions are evaluated on the basis of content. She ranks fifth overall in hostility or argumentativeness, third in asking helpful questions of the party she supports, and sixth in asking hostile questions of the party she opposes. For example, in *Peabody Coal* she asked the petitioner (against whom she decided):

> Counsel, would you explain to us the real world consequences at the end of the day for the respective positions of the parties? Apparently the miners will be covered one way or another.[48]

In other words, her questions are neither very hostile nor very helpful. Justice O'Connor asked few questions overall in *Yellow Transportation*, and while her questions were only 1.25 times more hostile of the respondent, she ultimately wrote the majority opinion for the Court in favor of the petitioner.

On average, Justice O'Connor was fairly predictable. She posed questions with an average score of 2.50 to the party she supported, and questions with an average score of 3.67 to the party she opposed. The best way to predict an O'Connor

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48. Transcr. of Oral Argument at 20, *Barnhart v. Peabody Coal*, 537 U.S. 149 (2003) (available at 2002 WL 31309196).

decision, however, is by calculating the number of questions she asks: The party facing the fewest questions from Justice O'Connor is almost sure to have her vote.

E. Chief Justice Rehnquist

Surprisingly, the Chief Justice is the third quietest member of the Court. He is also only the fourth most hostile questioner, with an average score of 3.43.

The Chief Justice tends to ask approximately the same number of questions of both parties, and the questions he asks of the party whose position he opposes are only 1.25 times more hostile than the questions he asks of the party he supports. In *NextWave*, he asked the petitioner (against whom he decided):

> But this doesn't sound at all like the question presented, which says at auction, automatically cancel upon the winning bidder's failure to make timely payments to fulfill its winning bid. It—when you were drafting that question, it sounds like your perception of the thing was quite different than it is now.[49]

Although his questions of the unsuccessful party are generally more hostile, on average the Chief Justice asks as many questions of the party whose position he supports as he does of the party whose position he opposes. For example, in *Peabody Coal*, he asked five times more questions of the petitioner, even though he joined the majority opinion in its favor, while in *NextWave*, he asked four times the number of questions of the petitioner before joining the majority's opinion in favor of the respondent. And in *Yellow Transportation*, the Chief Justice was more hostile to the petitioner when he in fact joined the majority's decision in its favor.

The Chief Justice has been known to add a little humor to his intense interrogations:

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49. *NextWave* Transcr., *supra* n. 45, at 9-10. While the Chief Justice's question was only moderately hostile, the other Justices were much less forgiving about the petitioner's shift in views. *See e.g. id.* at 13 (*"Justice Scalia:* That is not one of the questions presented. I frankly don't want to decide that question, because that is not one of the things I've given a lot of attention to. It sounds to me very, you know, at least quite arguable whether they ought to have that authority.").

> Mr. Wallace, our records reflect that this is your 157th argument before the Court. . . I extend to you our appreciation for your many years of quality advocacy and dedicated service in the Solicitor's Office—Solicitor General's Office—on behalf of the United States. That doesn't mean we're going to rule in your favor. (Laughter).[50]

But overall, without already knowing his stance on particular issues (such as copyright law or miners' benefits), an observer evaluating only his style of questioning might find the Chief Justice to be one of the least predictable members of the Court.

F. Justice Scalia

Justice Scalia is by far the most colorful questioner. And while he asks the second highest number of questions, behind only Justice Ginsburg, his are easily the most entertaining.

Justice Scalia could also be called the "hypothetical king," taking the issue in a given case and twisting it just enough so that even the most experienced Supreme Court advocates have trouble with it:

> *Question*: Well now, wait a minute. You say when they do ask the same questions and they ask them in a way that's acknowledged to be different, that seems like a contradiction just starting out.
>
> *Mr. Waxman*: I think I—I managed to confuse even myself.
>
> *Question*: Good. (Laughter.).[51]

He also tends to be the most humorous:

> *Mr. Denvir*: And in fact, if anything, Mr. Ewing seemed to be doing everything he can to be—to get out of there undetected, if that—if you look at the facts of this crime. . . .

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50. Transcr. of Oral Argument at 15-16, *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (available at 2002 WL 31643067); *see also* David J. Bederman, *A Chilly Reception at the Court*, 5 J. App. Prac. & Process 51, 58 (2003) (quoting from oral-argument transcript in *Smith v. U.S.*, 507 U.S. 197 (1993)).

51. Transcr. of Oral Argument at 16, *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (available at 2002 WL 31415973).

> *Question*: I'm curious about one thing. Was he really a very
> tall man, or were these irons rather than wood?
> (Laughter).[52]

Justice Scalia asks almost the same number of questions of each party, but his questions can be extremely hostile when he is concerned, or has doubts, about a particular proposition. He is almost twice as hostile to the unsuccessful party as he is to the party in whose favor he will decide. But while he does tend to play devil's advocate with the party he supports, Justice Scalia can often be quite helpful to that party as well.

As an example of Justice Scalia's style, note that in *NextWave* he asked by far the most questions of both sides, ultimately writing the opinion in favor of the respondent. Predictive of his decision in that case, he asked questions with a content score of 2.50 for the respondent, versus 4.00 for the petitioner. In this sense, even if one doesn't know where he stands on a given issue, Justice Scalia is fairly easy to predict.

G. Justice Souter

Justice Souter falls in the middle as far as the number of questions he asks at argument, ranking fifth between Justices Breyer and Kennedy. Overall, Justice Souter asks the third most hostile questions.

Justice Souter stands out as having the widest range. For example, he asks questions that are almost two times more hostile of the party he does not support than of the party he does, with scores of 4.17 and 2.25, respectively. When he is questioning a party he supports, Justice Souter asks the most helpful questions of all the Justices.

For example, in *Yellow Transportation*, in which he ultimately decided for the petitioner, Justice Souter asked the petitioner questions with an average score of 1.50, versus 4.50 for the respondent:

> *Question*: Let's assume the statute isn't as clear as—as you
> are arguing that it is. Isn't this the point at which you say, if
> it's not that clear, *Chevron* controls the answer?

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52. Transcr. of Oral Argument at 30, *Ewing v. Cal.*, 538 U.S. 11 (2003) (available at 2002 WL 31525401) (pondering how the petitioner was able to fit the stolen golf clubs into his pants).

Mr. Rothfeld: That—that is absolutely correct, Justice Souter.[53]

And as the above analysis indicates, he can be very hostile to the party whose position he opposes:

Question: So are you telling me that the answer to my question is yes? There is only one category known in Michigan and that is the category of a truck?

Mr. Casey: No. There—there—there's a fee of $10 or 0. Some trucks were charged 10. Some were charged 0.

Question: So there are at least two categories.

Mr. Casey: Yes.

Question: And if there are at least two categories, don't you have to do just what Justice Scalia said you have to do? You have to read something into the statute, or you would be reading it in such a way as to charge against a truck in category A what, under the Michigan law, you would have charged against a truck for category B. That can't be right.[54]

Additionally, Justice Souter asks on average almost two times the number of questions of the party whose position he opposes than of the party whose position he supports. In *Bean*, he asked five times the number of questions of the respondent, when he ultimately decided for the petitioner. In *NextWave*, he asked four times the number of questions of the respondent before joining the majority's opinion in favor of the petitioner.

While *Barnhart* presented a closer case for predicting Justice Souter's decision, he ultimately wrote the majority opinion in favor of the petitioner. In most cases, the best way to predict a Souter decision is to look at the number and content of his questions in combination.

H. Justice Stevens

Justice Stevens ranks third in the number of questions asked per argument, behind Justices Ginsburg and Scalia. Justice Stevens asks equally helpful and hostile questions of both sides,

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53. *Yellow Transp.* Transcr., *supra* n. 46, at 13 (addressing petitioner).
54. *Id.* at 32 (addressing respondent).

with a score of 3.33 for the party whose position he supports and 3.25 for the party whose position he does not support. He is the only Justice who, on average, asked more helpful questions of the party against whom he ultimately decided.

In *Yellow Transportation*, his average questions of the respondent scored 2.50 in content, compared to 3.67 for the petitioner, and yet he concurred in the Court's decision in favor of the petitioner:

> Could I ask on that question? The—the point is it should not exceed the fee that was charged. If in the *aggregate* the change from the place of determining which State applies, if the aggregate were to decrease the collections, which theoretically it could be, then there would be no violation of the statute, as I understand it.[55]

In *NextWave*, however, in which he wrote a concurring opinion in support of the respondent, Justice Stevens asked four times as many questions of the petitioner than he asked of the respondent, and they were 1.3 times more hostile than the questions he posed to the respondent:

> [Y]ou've said two different things there. If it's automatic, it happened without whatever happened next. But you're saying it automatically canceled after attempts to collect failed.[56]

Surprisingly, Justice Stevens ranks second behind Justice Breyer in asking the most hostile questions overall, although because he directs these questions at both sides equally, this makes him somewhat more difficult to predict than the other Justices. However, Justice Stevens asks twice as many questions of the party he opposes as of the party he supports, which puts him in third place out of the nine Justices in this category.

Overall, Justice Stevens ranks near Justice Kennedy in being fairly difficult to predict. However, like Justice Breyer, Justice Stevens seems to ask fewer total questions of the party he will eventually support, and thus this is one useful variable for predicting his decision in a given case.

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55. *Id.* at 48 (addressing petitioner).

56. *NextWave* Transcr., *supra* n. 45, at 10 (addressing petitioner).

I. Justice Thomas

Justice Thomas is, as most lawyers know, the quietest member of the Court. In fact, he did not ask a single question in the ten arguments I attended. Yet, once in a while when it is important to him, Justice Thomas will speak up. When he did so in the case about cross burning,

> [i]t was a gripping made-for-television moment—except, of course, for the fact that television cameras are not permitted inside the courtroom. Justice Thomas speaks in a rich baritone that is all the more striking for being heard only rarely during the court's argument sessions. His intervention, consequently, was as unexpected as the passion with which he expressed his view.[57]

Justice Thomas's intervention in that case appeared to be more of a comment than a question:

> Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism . . . and the effect of the cross, the burning cross. . . [M]y fear is that the—there was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear and to terrorize a population.[58]

Because Justice Thomas asks so few questions (and in most cases, asks none), it would be futile to employ my methodology in an attempt to predict how he might decide a particular case. On the other hand, it seems reasonable to conclude that, when he does speak, Justice Thomas might be advocating as much as he is adjudicating.

V. CONCLUSION

A. Preliminary Observation

It has long been debated whether oral argument is useful for the advocate or whether it just gives the Justices an

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57. Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, 151 N.Y. Times A1 (Dec. 12, 2002).

58. Transcr. of Oral Argument at 23-24, *Va. v. Black*, 538 U.S. 343 (2003) (available at 2002 WL 31838589).

opportunity to advance their own points of view. I do not pretend to have resolved that question. However, I hope that my observations challenge the long-held belief that trying to predict a Supreme Court decision is like trying to predict the World Series—both exercises in futility. My research, limited though it was, suggests to the contrary that an observer may be able to predict simply by evaluating their questions how the Justices will decide a particular case.

B. Predictions

In order to test my theory, I made predictions about the three cases that had not been decided when I formulated my theory, and in the following section, I compare my predictions to the actual outcomes.[59]

1. Predictions and Result in Ayers

In *Ayers*, the Justices asked the respondent questions with an overall score of 2.93, whereas the petitioner faced questions with an average score of 3.71. This information by itself suggested that the Court would hold for the respondent. I thus predicted a decision in favor of the respondent, with possible dissenters Justices O'Connor and Rehnquist, and Justice Breyer the swing vote. Two Justices who appeared to be very much in favor of the respondent were Justices Souter and Stevens, and if the majority held for the petitioner instead, I predicted that they would dissent. Justice Kennedy asked the respondent more questions than he did the petitioner (which would normally indicate an adverse position to the respondent), but his questions were more helpful on average than they were hostile. Thus, I predicted that Justice Kennedy might vote with Justices Souter and Stevens in favor of the respondent.

Overall, my predictions for *Ayers* were reasonably accurate. The majority did hold for the respondent, with Justices Souter and Stevens joining Justice Ginsburg's opinion. I erred with Justice Kennedy, who concurred in part, but dissented from the majority's principal holding that a worker exposed to

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59. These predictions do not factor in any outside knowledge about the Justices' previous holdings on the issues of asbestos actions or California's three-strikes law.

asbestos could recover for his fear of contracting cancer. The Chief Justice and Justices O'Connor and Breyer joined his opinion. Justice Breyer also filed an opinion concurring in part and dissenting in part.

2. Predictions and Results in Ewing *and* Lockyer

In the California three-strikes cases, I predicted that the Court would hold for the respondent in *Ewing* and the petitioner in *Lockyer*, which would effectively mean upholding the three-strikes law. In *Ewing*, the Justices asked the respondent and petitioner questions with average scores of 2.83 and 3.66, respectively. In *Lockyer*, the Justices asked the respondent and petitioner questions with average scores of 3.93 and 2.67, respectively. My predictions, based on these numbers, were correct.

Although my analysis turned out to be accurate in these cases, I did face some uncertainty. In particular, while Justice Ginsburg appeared to be leaning in favor of the petitioner in *Lockyer*, as she asked almost three times as many questions of the respondent, she actually joined Justice Souter's dissent in favor of the respondent. Yet in *Ewing*, her questions indicated that she was more in favor of the petitioner's position, and she did in fact join the dissent in favor of the petitioner.

Also in *Ewing*, Justice Souter asked more questions of the respondent, which according to my theory would indicate an adverse position to that party; however, he was responsible for the eventual dissent favoring the respondent's position. A close look at the data, however, reveals that he asked questions more hostile in content of the petitioner (with an average score of 4.0 versus 3.67 for the respondent). Thus, the content of Justice Souter's questions, as opposed to the number of questions he asked, would have been a good indicator in that case.

Overall, the remaining Justices proved quite predictable. For example, in *Ewing*, Justice Scalia asked twice as many questions of the petitioner as he did of the respondent, and he also asked the petitioner questions that were 3.8 times as hostile. Illustrating how my theory can work in application, Justice Scalia wrote a concurrence in favor of the respondent. In *Lockyer*, the Chief Justice asked the respondent 4.5 times the number of questions that he asked the petitioner, and the

questions were much more hostile (3.17 for the respondent versus 2.50 for the petitioner). As these statistics led me to predict, the Chief Justice joined the majority in favor of the petitioner.

C. Summary

Of course with Justice Thomas rarely ever asking questions, it is difficult to predict an outcome when the votes are five to four. However, because Justice Thomas is rarely a swing vote, his silence should not pose an obstacle in the majority of cases. In the end, it seems that one can predict—with surprising accuracy—a particular Justice's decision in a given case. And in cases that seem very close, an additional way to ensure a successful prediction is simply to look at the total number of questions asked by all of the Justices. In every case that I reviewed, the party facing the fewest questions was the ultimate victor.

Lawyers preparing to argue in the Supreme Court may wonder if this information can actually be useful, especially considering the reality that the case is out of the lawyers' hands once the questioning ends. But the answer is simple: Both sides have a chance to see which points are troubling the Justices and to address these issues before the argument is over. The respondent hears how the Justices are reacting to the petitioner during opening argument, and the petitioner is entitled to reserve time for rebuttal. In theory, then, the lawyer for each side has the opportunity to mold his or her answers accordingly.

This analysis brings me back to the original question: Do the Justices use oral argument to play devil's advocate by posing questions designed to elicit the strongest and weakest arguments of each side, or do they use oral argument to do some advocacy of their own? My limited research suggests that the answer is a little of both. Many of the Justices pose hostile or argumentative questions to both sides, but it seems that more often they go easy on the lawyer for the party they support and only play devil's advocate to the lawyer for the party they oppose. Essentially, whether they do it by asking more questions or by asking questions that are more hostile in content, the Justices simply give the side they disagree with a harder time. And, regardless

of whether the Justices actually intend to do their own advocating, this information suggests that one might profitably use an analysis of their questions to predict what was previously thought to be unpredictable.