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SPEAKING OFF THE BENCH

Analyzing the Extrajudicial Appearances of Supreme Court Justices

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C-SPAN's *America and the Courts* program often begins with the jubilant first movement of Johann Sebastian Bach's Harpsichord Concerto No. 2 in E major.[1] The piece is well regarded by Bach scholars, but they disagree on its original and proper key, correct octave, and intended concerto and solo instruments (Butler, 2016; Wolff, 2001, 2016). It is fitting that a piece of music entangled in compositional debate serves as the overture for the program that televises the extrajudicial activities of America's judges. Indeed, disagreements about Bach's piece reflect present day debates on the proper off-bench behavior of the justices of the U.S. Supreme Court.

Justices Clarence Thomas and Samuel A. Alito are currently under fire in the media and in Congress for taking lavish trips with conservative billionaires and Republican donors. Details about both justices' trips were first published by ProPublica in April of 2023 (Elliott et al., 2023; Kaplan et al., 2023) and demonstrate that both Thomas and Alito traveled with people who had legal and financial interests before the Court (Marimow & Brown, 2023; Tillman, 2023). Shortly after ProPublica's report was released, a bipartisan coalition of senators called for the Court to establish a code of ethics (VanSickle, 2023). Chief Justice John G. Roberts responded by reassuring the American public and Congress that the justices were working toward a solution to their ethical problems (Barnes, 2023). In November of 2023, the Court adopted its first ethics code. The code does not include any enforcement mechanisms for its rules, however, leaving the future of extrajudicial behavior up in the air (VanSickle & Liptak, 2023)

The evidence presented against Thomas and Alito raises the question of whether their trips influenced their decisions on the Court. Alito argued in an

unprecedented op-ed that it is impossible to establish a connection between the justices' off-bench behavior and their judicial decisions (Alito, 2023). While it would indeed be challenging to collect the type and amount of extrajudicial data needed to draw a causal relationship between the justices' off-bench activities and their decisions on the bench, some extrajudicial data are within reach. Transcripts and recordings of the justices' public remarks are accessible, making these remarks some of the only sources of mineable data of off-bench behavior.

Judicial politics research has yet to exact sufficient empirical scrutiny on the "understudied activity of off-the-bench speech" and the extent to which it encapsulates strategic judicial behavior (Krewson, 2019, p. 696). The tragedy of this literature gap is compounded by research demonstrating the frequency in which the justices speak publicly and the reflection of the justices' goals in their speeches (Black et al., 2016b; Farganis & Wedeking, 2011; Glennon & Strother, 2019; Krewson, 2019; Murphy, 1964). While scholars have identified initial goals and effects of the justices' speeches (Krewson, 2019; Strother & Glennon, 2021), they have yet to determine how this rhetoric differs from the justices' speech during their judicial duties. Uncovering this difference may allow scholars to determine the extent to which the justices' public rhetoric is strategically based. But the question remains: Do justices speak differently off the bench from how they speak on the bench?

To answer this question, I developed a theoretical argument for why justices might speak differently off the bench than they would speak on the bench. I expected that variation in institutional rules and norms will produce differences in linguistic content between judicial and extrajudicial speech. To test my theory, I conducted a comparative analysis of the justices' public remarks and their speech during the Court's oral arguments by examining five types of linguistic content. Within all categories of linguistic content, I found evidence indicating that many justices speak differently off the bench than on the bench, suggesting that variation in rules and norms influence the justices' speaking behavior.

The goal of this study is to provide empirical evidence demonstrating variation in the justices' speaking behavior based on the setting they are in. By directly comparing the justices' speech during oral argument to off-bench speech, my findings demonstrate variation between certain justices' judicial and extrajudicial behavior, variation that should be considered and studied in future lines of research. Highlighting this variation helps inform the normative debate about extrajudicial behavior and brings scholars one step closer to uncovering the extent to which justices behave strategically off the bench.

THE JUDICIAL BULLY PULPIT

In rejecting a request to give public remarks in the 1930s, Justice Benjamin N. Cardozo wrote that a justice "may not talk about events of the day. They may indicate his judgment as to problems that will come before him as a judge! He may not talk about the past . . . he may not talk about the future" (Hellman, 1940, p. 271). While those in the judicial profession see Cardozo as a model judge (e.g., Posner, 1993), his contentions do not reflect the norms of extrajudicial speech. Indeed, since the early days of the republic "the tradition among the Justices has been one of wide-ranging and frank out-of-court commentary" (Westin, 1962, pp. 635–636).

The norms and purpose of the justices' public remarks has changed significantly over time (Creamer & Jain, 2020; Davis, 2011; Glennon & Strother, 2019; Schmidt, 2013; Westin, 1962). What remains consistent, however, is that the justices have always had motivations for speaking publicly (Schmidt, 2013). Prior to the Civil War, the justices gave overtly political and partisan speeches. It is hardly surprising that these early justices spoke in partisan terms, however. After all, some of them were "in the room where it happened" as delegates at the Constitutional Convention in 1787 or participants in the ratifying conventions of their respective states (Miranda, 2015).

Early extrajudicial remarks featured the justices arguing in favor of candidates for elected office, giving stump speeches about their own political campaigns, reacting to the actions of Congress and the president, and expressing views on public policy (Westin, 1962, pp. 637–647). At this point, the justices' goals were purely political. After the Civil War, the justices began to abstain from directly discussing political or partisan issues, shifting their priorities to informing the public on legal matters, their roles as justices, and "the Court and its inner conflicts" (Creamer & Jain, 2020; Westin, 1962, p. 656). In the 1940s, the justices continued to focus their speeches on discussing legal issues and their work on the Court but began to provide the public with more biographical information about themselves (Schmidt, 2013; Westin, 1962). Contemporary justices primarily use their remarks to educate the public and benefit the Court. Schmidt (2013) finds that the dominant focus of the justices' public remarks has been to educate their listeners about civic government and to defend the Court as an institution. Glennon and Strother (2019, p. 252) demonstrate that the justices' off-bench speech overwhelmingly covers "legitimacy-reinforcing topics that deemphasize the partisan or political aspects of the Court's work." In other words, the justices are focused on speaking apolitically with the goal of bolstering the Court's legitimacy.

Davis (2011) concurs and adds that the justices hope to use their speeches to make personal connections with the public.

The literature recounted here suggests that the norms and goals of the justices' public speeches have shifted over time but are presently aimed at shoring up institutional legitimacy and appearing apolitical (Glennon & Strother, 2019). Similar to how presidents can strategically use their bully pulpit to draw up support for their judicial nominees (Johnson & Roberts, 2004), empirical evidence suggests the justices possess similar pulpit power and may use it strategically to support the Court. Krewson (2019) finds that members of the public who attend a justice's speech perceive them more favorably and have more positive views on the role of law in judicial decision-making. While the justices' speeches likely "do not reach the ears of many," they are still able to increase personal favorability and cultivate institutional support through press reports about their remarks (Krewson, 2019, p. 688). Strother and Glennon (2021) offer similar findings but uncover novel effects of the content of the justices' speech. When the justices use rhetoric that legitimatizes the Court, listeners perceive the Court as less political and have increased feelings of institutional legitimacy toward the Court. This finding suggests that the justices can strategically use public rhetoric at a pulpit to influence perceptions about the Court.

The present era of "celebrity justices," epitomized by a plethora of merchandise promoting Justice Ruth Bader Ginsburg as the "Notorious RBG" and praise for conservative justices from the Federalist Society, has been driven, in part, by an influx of public appearances from contemporary justices (Hasen, 2016, pp. 1–2). From a data standpoint, the justices' public remarks present a unique opportunity for examining modern extrajudicial behavior. Between 1960 and 1999, the justices made a total of 769 extrajudicial appearances. Between 2000 and 2014, that number nearly doubled to a total of 1,353 extrajudicial appearances (Hasen, 2016, p. 5).[2] Further, Black et al. (2016b) demonstrate that most of the justices' extrajudicial trips are taken to give speeches. They find that these trips can be predicted by ideological, personal, and legal factors, suggesting that the justices' decision to give public remarks may be similarly motivated by their judicial goals (Black et al., 2016b, p. 375).[3]

An implication of these studies is that the justices' extrajudicial speeches may provide useful insights into under-tapped elements of strategic judicial behavior. Indeed, Murphy (1964, p. 126) argues that the justices may use public speeches to achieve their goals, such as maintaining institutional legitimacy (Epstein & Knight, 1998). That the content of the justices' speech can help them achieve

legitimacy-based goals (Strother & Glennon, 2021) invites a deep analysis to determine how the justices' speak off the bench. While speaking off the bench is likely motivated by strategic goals similar to those undertaken during the judicial process, giving public remarks is not a part of the justices' duties on the bench. Institutionalist theories would suggest that the justices will speak differently based on their setting and the rules and norms of that setting (Epstein & Knight, 1998; Murphy, 1964). To account for the influence of institutional setting, I will provide a theoretical argument that helps explain how the content of justices' off-bench remarks relates to their speech on the bench, and then present evidence indicating differences between these two settings.

ORAL ARGUMENT VS. PUBLIC REMARKS

In their official duties, the justices are limited to two main methods of public communication: oral argument and written opinions (Johnson, 2004; Maltzman et al., 2000). Because oral argument speech is vocal, it provides a better comparison with the justices' public remarks and will be the focus of my comparison. Institutionalist theory holds that variation in rules and norms is strongly linked to variation in behavior (North, 1990; Schelling, 1960, 1978; Shepsle, 2017). These theories have been successfully applied to the study of the Supreme Court (Epstein & Knight, 1998; Murphy, 1964) and help inform predictions related to judicial behavior during the judicial process (e.g., Black & Owens, 2009; Johnson, 2004; Maltzman et al., 2000). Following studies that demonstrate how variation in rules and norms can lead to variation in judicial behavior, I theorize that the justices' speaking behavior will differ between oral argument and their public remarks due to the differences in the rules, norms, and purpose of these two settings.

The rules and norms of oral argument constrain the justices' speaking behavior (Johnson, 2004). For example, in the 2019 term, the justices introduced a "two-minute rule" that instructs them to remain silent during the first two minutes of an advocate's argument (Jacobi et al., 2019). Traditional norms of oral argument allow for a free-for-all questioning environment, in which the justices are free to "ask questions at any time, but they try to not interrupt one another" (Johnson et al., 2009; Ringsmuth et al., 2023, p. 68). Evidence suggests, however, that some justices are more likely than others to ignore norms related to interruption (Jacobi & Schweers, 2017). The Court established new rules for oral argument

during the COVID-19 pandemic. The justices moved to telephonic arguments where the they were required to ask questions in order of seniority (Jacobi et al., 2021; Johnson et al., 2021; Ringsmuth et al., 2023). Under these new rules, Chief Justice Roberts became, likely to his delight, the umpire of oral argument by moderating the justices' speaking time and ensuring each justice got a chance to ask questions (Jacobi et al., 2021). When the justices returned to in-person argument in 2021, they reinstated the free-form questioning format but retained the option for a second round of questions moderated by Roberts (Ringsmuth et al., 2023, p. 76). This research demonstrates that modifications to the rules and norms of oral argument led to changes in the justices' speaking behavior.

Empirical evidence demonstrates that oral argument helps the justices make decisions. Indeed, the justices rely, in part, on the information the advocates provide them at oral argument and the quality of the arguments they make to help them decide cases (Johnson, 2004; Johnson et al., 2006). In fact, the justices may broadcast their preferences toward one advocate over the other, or even tip their hand as to how they will vote in a case based on how they speak during oral argument (Black et al., 2011; Johnson et al., 2009). As such, the purpose of oral argument is to provide the justices with information and arguments that aid and influence their decision-making.

When the justices speak off the bench, their speech is largely unconstrained. There are no special rules as to what the justices can or cannot say in their speeches. While Canon 4 of the 2023 Code of Conduct for Justices discourages some speaking behavior, the lack of enforcement and the looseness of the code's language may allow the justices to skirt Canon 4's guidelines. Because of these two prominent features of the code—the limited guidelines and lack of enforcement (VanSickle & Liptak, 2023) —it is likely that the justices' extrajudicial behavior will continue to be governed by norms. As described above, these norms have changed over time. As these norms have changed, so too has the content of the justices' public speeches. The justices have transitioned from being perfectly comfortable making partisan speeches to a general abstention from remarks that wander into the "political thicket" (Glennon & Strother, 2019; Westin, 1962).[4]

The purpose of the justices' public remarks is just beginning to be uncovered. Today's justices speak to educate the public and shore up support for the Court (Glennon & Strother, 2019; Krewson, 2019; Schmidt, 2013; Strother & Glennon, 2021). By using their speeches to bolster institutional legitimacy, the justices engage in "strategic institutional maintenance" by attempting to increase their legitimacy in the eyes of the public by using legitimizing language in their public

speeches (Keck, 2007; Strother & Glennon, 2021, p. 438). Maintaining institutional legitimacy is an essential component for the Court to operate in modern American politics (Bartels & Johnston, 2013, 2020), incentivizing the justices to speak to legitimize.

In summary, the constraints and purposes of oral argument and the justices' public remarks are different. During oral argument, the justices must abide by rules and longer held norms (Jacobi et al., 2019; Ringsmuth et al., 2023). The Court's 2023 Code of Conduct, on the other hand, provides guidelines for extrajudicial speech that will likely be ignored due to a lack of enforcement procedures, suggesting that loose, self-imposed norms will continue to govern the content of the justices' public remarks (Creamer & Jain, 2020; Westin, 1962). While justices use oral argument to help them decide cases by gathering information and evaluating arguments (Johnson, 2004; Johnson et al., 2006), they tend to use public remarks to bolster legitimacy and cultivate public support (Davis, 2011; Glennon & Strother, 2019; Krewson 2019; Schmidt, 2013; Strother & Glennon, 2021). The variation between the rules, norms, and purpose of oral argument and justices' public speaking environments broadly suggests that their speech will be different in these two settings. Thus, I expect that the content of the justices' public remarks will differ from their oral argument speech. To tease out the specifics of this relationship, I offer an examination of five different types of linguistic content.

First, I examine gendered language. Roberts and Utych (2020) argue that political elites will strategically use gendered language to pursue their goals. This ties into how justices behave off the bench: they strategically give public remarks to try to increase the Court's legitimacy (Strother & Glennon, 2021). Institutional settings can be pressured by gender dynamics, however, and will often constrain gendered language within those settings (Karpowitz et al., 2012; Mendelberg et al., 2014). Both oral argument and the justices' public speaking environments exhibit pressures of gender dynamics that constrain speakers to comply with gendered norms of language (Gleason, 2020; Gleason & Smart, 2022; Glennon & Strother, 2019, p. 255). Consistent between these two settings is that pressures of gender dynamics come from multiple sources. During oral argument, these pressures come from the attorney arguing the case and the gender composition of the Court (Gleason & Smart, 2022). During the justices' public remarks, these pressures come from individuals that constrain the justices' speech, such as interviewers (Glennon & Strother, 2019). However, the speeches I examine in this study are podium-style speeches given by the justices alone without any moderators. As a result, the level of constraint will be lower in this speaking environment

relative to what it is during oral argument. Thus, I expect that the justices will use more gendered language during their public remarks than during oral argument.

Next, I look at emotional language. Multiple studies have identified variation in the justices' use of emotional language during oral argument (Black et al., 2011; Dietrich et al., 2019; Treul et al., 2009). This literature suggests that the justices will use emotional language when they are pursuing goals (Black et al., 2011, p. 573). During their speeches, the justices are actively pursuing their goal of bolstering institutional legitimacy and shoring up support for themselves and the rule of law (Krewson, 2019; Strother & Glennon, 2021). During oral argument, on the other hand, the justices are more concerned with gathering information used to help them make decisions (Johnson, 2004; Johnson et al., 2006). Accordingly, I expect the justices to use more emotional language during their public remarks than during oral argument.

Third, I examine drives. Language that includes drives allows scholars to understand the motivations underlying behavior (Pennebaker et al., 2015, p. 21). During their public speeches, the justices are pursuing broad goals, such as shoring up legitimacy (Glennon & Strother, 2019; Krewson, 2019; Strother & Glennon, 2021). During oral argument, the justices are gathering information used to help them make decisions (Johnson, 2004; Johnson et al., 2006). Because the justices use language in their public remarks to help achieve their goals (Strother & Glennon, 2021), I expect them to use language that includes drives more often during their public remarks than during oral argument.

Fourth, I examine cognitive language. This type of language offers insights into how someone thinks and processes information (Boyd et al., 2022, p. 17). During public remarks, the justices presumably have prepared remarks, allowing them to exert less cognitive effort. Comparably, because the justices are deciding cases that will influence national legal policy, oral argument is a higher-stakes setting, where the rapid-fire questions from the justices to the advocates can produce intense exchanges (i.e., Black et al., 2011) and the arguments presented can affect the decisions the justices make (i.e., Johnson et al., 2006). The difference in setting and stakes may therefore lead to a difference in the justices' cognitive effort and language. More specifically, because a speech is a lower-stake setting than oral argument, I expect that the justices will use less cognitive language during their public remarks than during oral argument.

Finally, I examine political language. The primary goal of contemporary justices is to shore up institutional legitimacy (Glennon & Strother, 2019; Krewson, 2019; Strother & Glennon, 2021). To achieve this goal, the justices want to

speak in a way that separates the Court from politics and legitimizes it as an institution. This behavior has an effect. When the justices use more legitimizing speech, the Court is perceived as less political (Strother & Glennon, 2021). Using overtly political language would work contrary to achieving legitimatizing goals. It is even less probable, however, that the justices would make overtly political comments during oral argument. As such, I expect that the justices will use more political language in their public remarks than in their oral argument speech (Liptak, 2020).

The justices speak publicly at vastly different rates (Glennon & Strother, 2019; Hasen, 2016). Based on theories of the public remarks as strategic behavior (Krewson, 2019; Murphy, 1964; Strother & Glennon, 2021), this variation suggest that the justices put different strategic premiums on public remarks as a means of achieving their legitimacy-based goals. A justice may modify their speech depending on whether they see public remarks as an efficient means to attaining their legitimacy-based goals (Glennon & Strother, 2019; Strother & Glennon, 2021). Therefore, I expect the content of the public remarks to vary between justices.

DATA AND MEASURES

To test my hypotheses, I analyzed the linguistic content of the justices' speech during their non-interview public remarks and the Court's oral argument. Specifically, I examined five types of linguistic content: gendered language, emotional language, cognitive language, political language, and expressed drives. I began by compiling the transcripts of all of the justices' public remarks available in C-SPAN's Video Library. The aggregate data included 169 public remarks made by 14 justices between 2002 and 2022 with a corpus of just over 316,000 words.[5] Next, I gathered all oral argument transcripts from the years in which a justice gave public remarks. These data came from Walker Boyle and Azeem Bande-Ali's oral argument transcript database.[6] I removed the advocates' speech from these transcripts, so I was left with exclusively the justices' oral argument speech. These data included nearly 800 cases and a corpus of just over 3.4 million words.

Gendered Language

Transcripts at the ready, I employed Roberts and Utych's (2020) dictionary of gendered words (hereafter DGW) to measure the gendered language content of

the justices' speech. Using the DGW diverges from recent studies that analyze gendered language in the justices' speech (e.g., Gleason, 2020; Gleason & Smart, 2022). To measure gendered language, these studies rely on gender stereotypes associated with affective language content (i.e., Newman et al., 2008). However, "linguists have shown that individual words can be classified as gendered and have substantial impacts on a conversation depending on the word choice of its participants" (Roberts & Utych, 2020, p. 41). Therefore, "rather than analyzing gender stereotypes and similar phenomenon," Roberts and Utych argue that "determining *which* words are more masculine or feminine . . . is a methodologically important approach to determining the consequences of masculine and feminine language in politics" (2020, pp. 40, 43, emphasis in original). To ensure that my analysis captures the unique gendered qualities of individual words, I apply Roberts and Utych's analytical process.

The DGW was created by asking survey respondents to rate words on a scale of 1 (very feminine) to 7 (very masculine). The DGW includes a total of 700 words, of which approximately 6% are classified as very feminine and 11% are classified as very masculine. Very feminine words are defined as being rated 3 or lower; some examples include "adorable," "glimmer," "exquisite," "soothe," and "sassy." Very masculine words are defined as being rated 5 or higher; examples include "jock," "ravage," "handsome," "thug," and "swagger" (Roberts & Utych, 2020, p. 45). I subsetted the DGW to include the most feminine and most masculine words. I also remove all words from the DGW that implied a legal context. Including these words may result in inflated estimates of gendered language because these words are more likely to appear in legal speech (Black et al., 2016a).[7] The subsetted dictionary includes a total of 120 words, 45 of which were very feminine words and 75 were very masculine words.

Using the subsetted dictionary, I counted the total number of very feminine and very masculine words within the justices' public remarks and oral argument speech per case. Next, I calculated the rate of feminine words and the rate of masculine words for each of the justices' public remarks and oral argument speech per case by dividing the total number of feminine or masculine found in each speech type by the total number of words from that speech type and multiplied that value by 1,000. I computed these rates for each opinion per 1,000 words so I could control for the variation in total speech within and between the justices' public remarks and oral argument speech (Roberts & Utych, 2020, p. 45). Greater values indicate higher rates of feminine and masculine language within a given speech type.

Emotional Language

To measure Emotional Language and the three other categories of linguistic content, I employed the Linguistic Inquiry and Word Count (hereafter LIWC) program (Pennebaker & King, 1999; Tausczik & Pennebaker, 2010). The LIWC is a text analysis software that uses a dictionary-based word search approach to examine the content of language within text (Tausczik & Pennebaker, 2010). Several studies have demonstrated the external and internal validity of the LIWC, and it has been successfully employed in Supreme Court scholarship (e.g., Black et al., 2016a). The program searches a text for specific words based on a variety of linguistic variables and counts the number of words that fall into a given variable. I use LIWC's Affect category to determine the percentage of emotional words used by each justice within each transcript in my data (Boyd et al., 2022, p. 18). Examples of words include "good," "new," "love," and "well."

Drives

I examined the extent to which the justices discuss their drives, needs, and motivations using the LIWC's Drives category. Scholars who study judicial behavior are primarily interested in explaining why the justices behave in certain ways by analyzing their preferences and goals (e.g., Baum, 2006). Examining my data using LIWC's Drives category allowed me determine the percentage of words during oral argument and public remarks that implicate the justices' drives and motives (Pennebaker et al., 2015, p. 21). Common example words implicating drives and motives include "our," "we," "us," and "work" (Boyd et al., 2022, p. 11). This analysis will demonstrate in which setting the justices discuss their drives more and potentially points scholars toward the spaces where the justices defined their drives, motives, and needs.

Cognitive Language

I expected the justices to exert a greater amount of cognitive effort during oral argument than they do during public remarks. To estimate cognitive engagement, I used LIWC's Cognition category, which provides the percentage of words used in a text that imply how someone thinks and processes or recalls information (Boyd et al., 2022, p. 17). Example words include "is," "are," "but," and "was" (Boyd et al., 2022, p. 11). Using the LIWC, I was able to derive the percentage of words that imply cognitive functions used by each justice during oral argument and public remarks.

Political Language

The justices repeatedly assert that their decisions are absent from politics and are based on the facts and the law. While judicial politics studies have shown that numerous factors often outweigh the law in the justices' decision-making (e.g., Black et al., 2020; Epstein & Knight, 1998; Hazelton et al., 2023; Segal & Spaeth, 2002), it is likely the justices would avoid being overtly political during their public oral arguments to preserve the idea that justices are apolitical actors. Even though the justices may tip their hands during oral argument as to how they will vote ideologically (Black et al., 2011; Johnson et al., 2009), speaking in blatant political terms is unlikely. During public remarks, however, the justices are not performing their judicial duties, leaving more room for discussing politics or speaking in political terms. To test this possibility, I use LIWC's Politics category, which measures the percentage of words used by each justice within each transcript in my data that are common in political and legal discourses (Boyd et al., 2022, p. 19). Examples of words include "democratic," "congress," "president," and "govern" (Boyd et al., 2022, pp. 12, 19).

Finally, it may be the case that the justices speak differently depending on whom they are speaking to. For example, a justice may speak differently when they are giving remarks in front of other judges than how they speak when they are giving a college commencement address. To account for this possibility, I control for whether the justices are speaking to a legal audience (other judges, bar associations, law schools) or a nonlegal audience (members of the public, historical foundations, college students) by including a dummy variable that is coded as 1 when a justice is speaking to a legal audience and 0 when they are speaking to a nonlegal audience.

METHOD AND FINDINGS

Figure 9.1 displays a distribution of total percentage of linguistic content present in the justices' oral argument speech and public remarks. For example, approximately 20% of Justice John Paul Stevens's total oral argument speech contained cognitive language, while his total public remarks speech contained approximately 13.5% cognitive language. At face value, the distribution suggests that the linguistic content of the justices' oral argument speech is different from that of their public remarks speech. This distribution, however, does not control for the

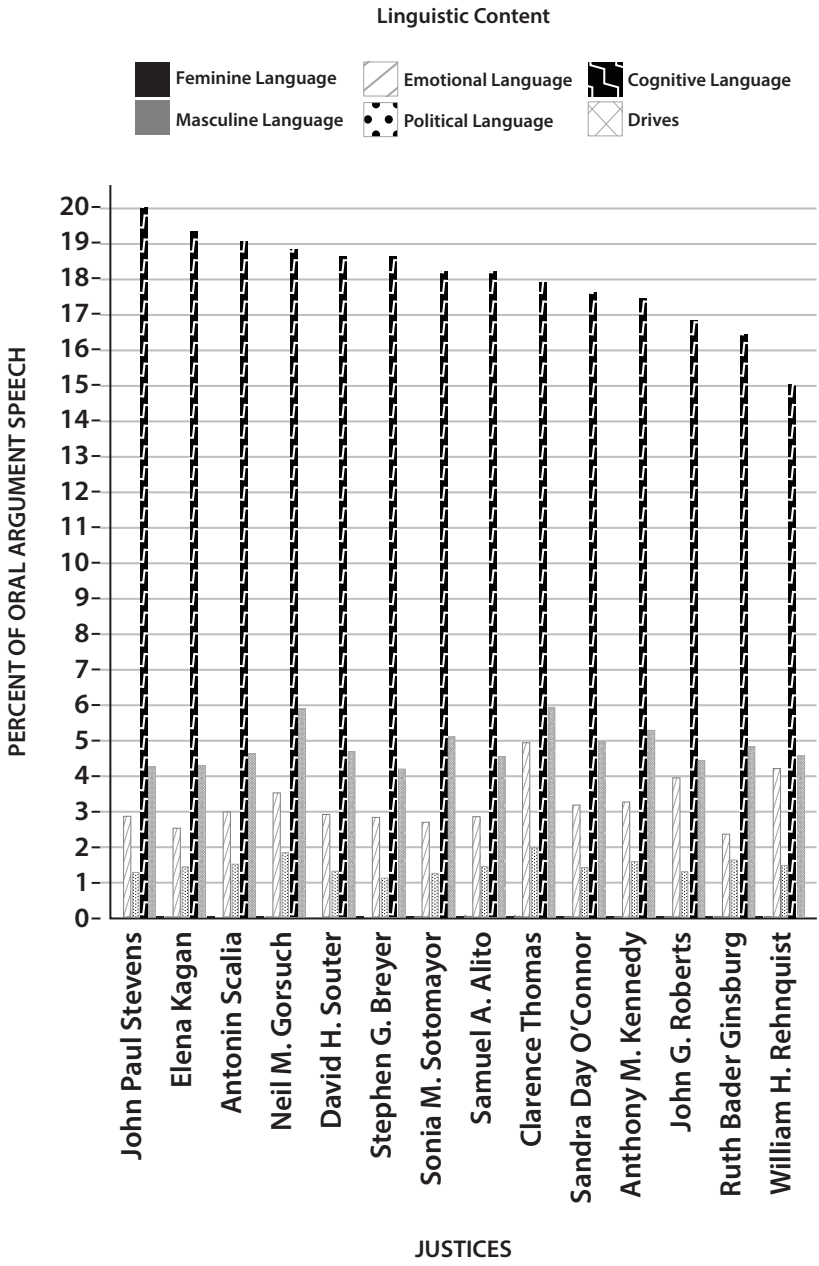


FIGURE 9.1a Total percentage for all types of linguistic content between oral argument speech by justice.
(*Figure continued*)

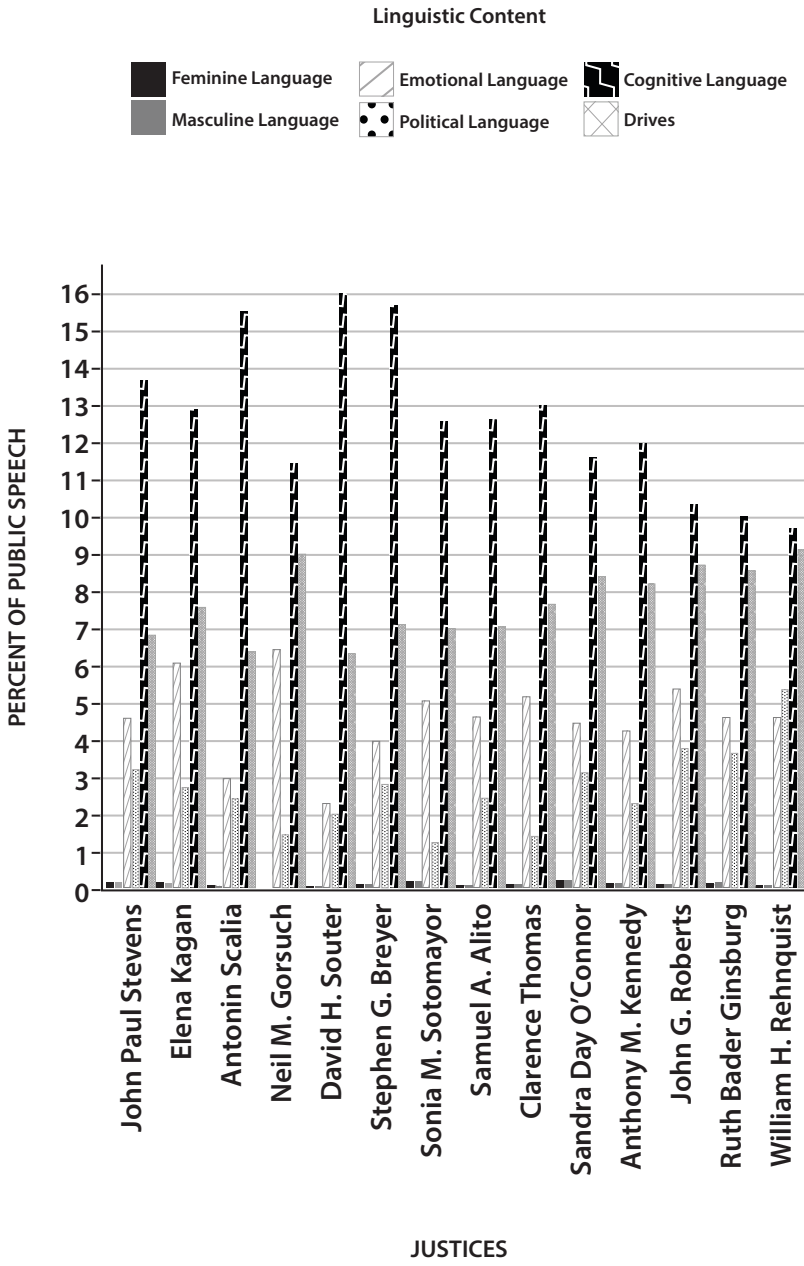


FIGURE 9.1b Total percentage for all types of linguistic content between public remarks by justice.

variation in speech length within oral argument and public remarks or the differences in corpus size within my data. Indeed, the ratio difference in corpus size between my public remarks and oral argument data is approximately 1 to 10. To determine whether significant differences exist between the linguistic content of the justices' oral argument speech and their public remarks, I ran a series of difference-in-means tests via linear regression to compare each justice's oral argument speech to their public remarks speech while controlling for word count and audience type. To calculate the difference in each type of linguistic content between the two speech settings, I subtracted the average amount of linguistic content present in each justice's oral argument speech from the average amount of linguistic content present in their public remarks. Tables 9.1 and 9.2 in the Appendix to this chapter provide the coefficient estimates for the effect on linguistic content when moving from oral argument speech to extrajudicial speech. Table 9.1 reports the change in rate of gendered language per 1,000 words, and Table 9.2 presents the percentage change in linguistic content.

Consistent with my hypotheses, the linguistic content is significantly different between oral argument speech and public remarks for certain justices. Figure 9.2 displays two coefficient plots of the estimated effect moving from oral argument speech to extrajudicial speech had on Feminine and Masculine Language at the 95% confidence interval. Figure 9.3 displays four coefficient plots of the estimated effect moving from oral argument speech to extrajudicial speech had on Emotional, Cognitive, and Political Language and Drives at the 95% confidence interval.

Starting with gendered language, the coefficient plots displayed in Figure 9.2 demonstrate that all justices except Neil M. Gorsuch use more gendered language overall in their public remarks than during oral argument. Results are statistically significant for a majority of justices in my data. Similar to Roberts and Utych's (2020) findings, the substantive effects of moving from oral argument to public remarks on the gendered language content of the justices' speech is somewhat small. For example, the data show that Justice Sandra Day O'Connor, who had the strongest effect for Feminine Language, used, on average, approximately two more feminine words during her public remarks than in her oral argument speech. Justice Gorsuch, who had the strongest effect for Masculine Language, used, on average, approximately six more masculine words during his public remarks than in his oral argument speech. Overall, these data demonstrate differences in the gendered language use between oral argument speech and public

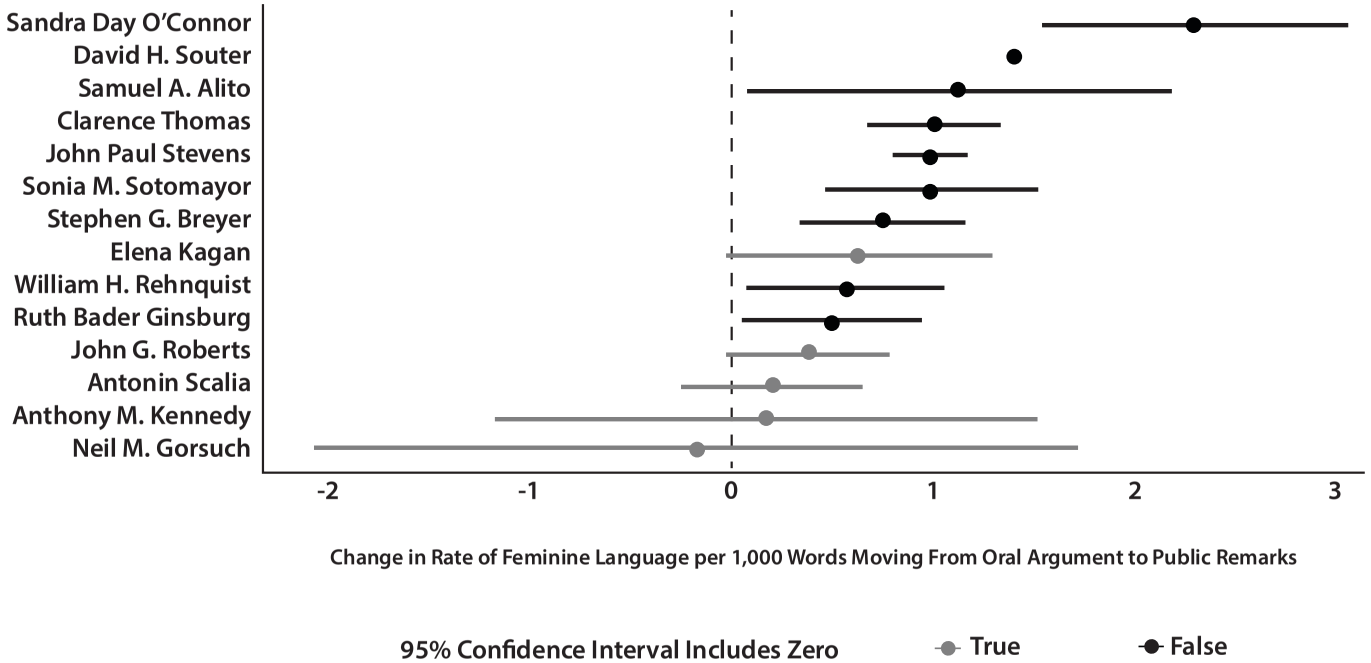


FIGURE 9.2a Effect on gendered language (feminine) moving from oral argument speech to public remarks.

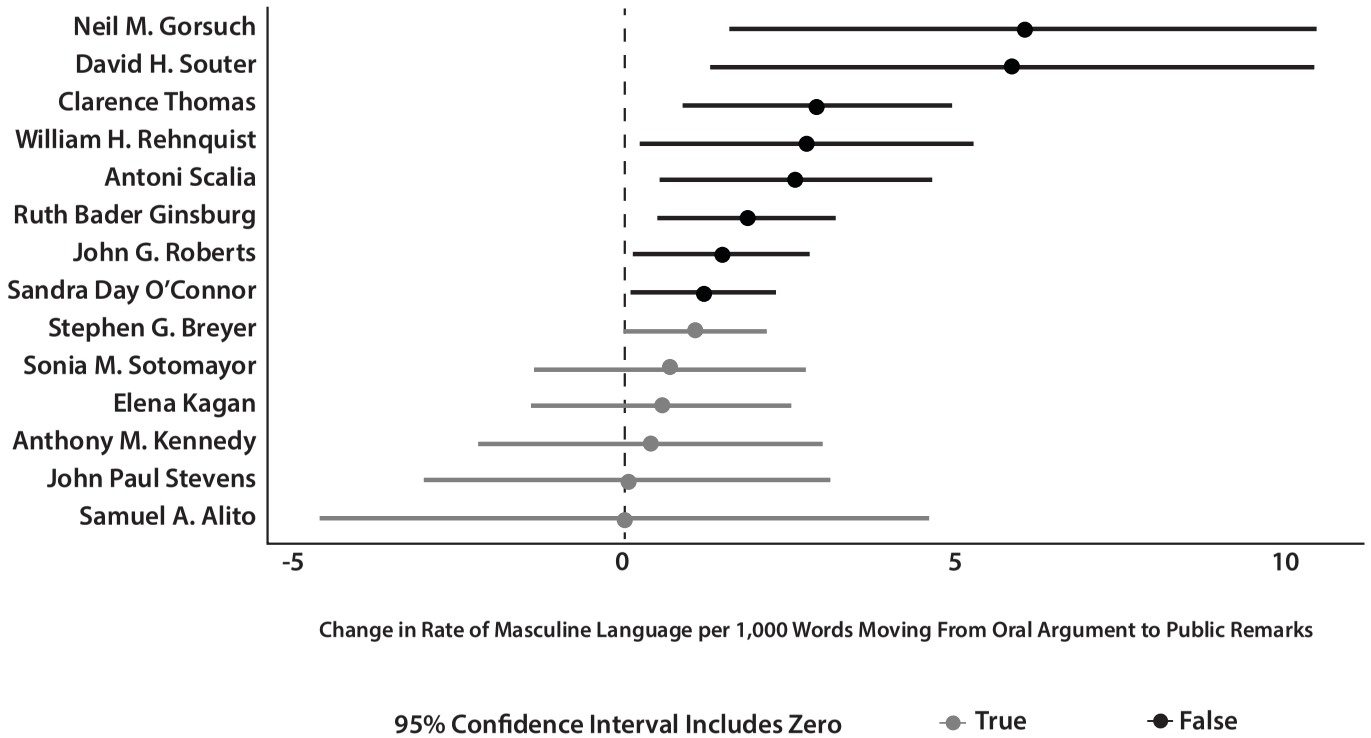


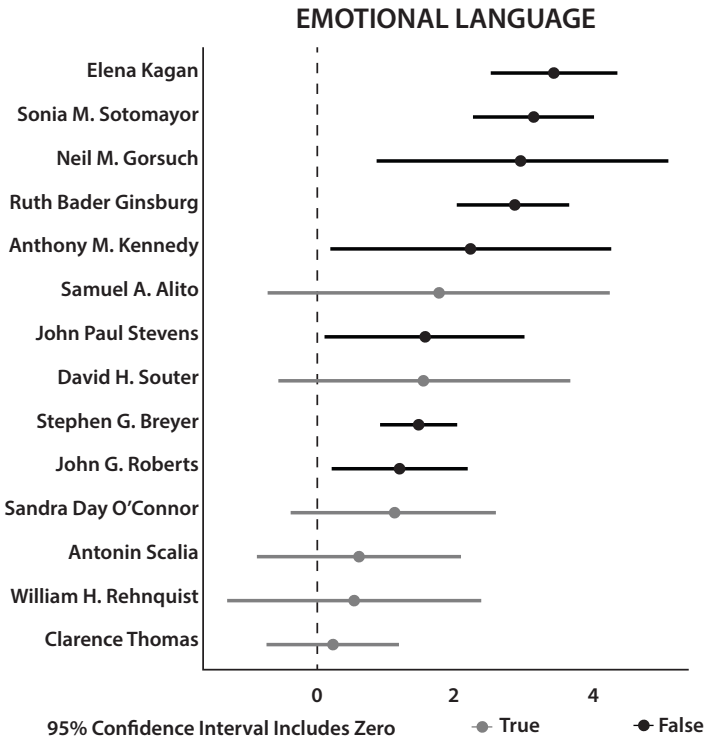
FIGURE 9.2b Effect on gendered language (masculine) moving from oral argument speech to public remarks.

remarks. Scholars ought to examine potential factors that lead to variation in gendered language in the Court communicative activities—that is, oral argument and opinion writing—to determine the extent to which theories of gendered language use within groups apply to the Court's group-based decision-making and communication (i.e., Karpowitz et al., 2012; Mendelberg et al., 2014).

Moving to Emotional Language, results in Figure 9.3 demonstrate statistically significant differences in emotional content for 9 out of the 14 justices in my data. The coefficient estimates presented in Table 9.2 offer a tangible substantive effect for each justice by providing the percent change in emotional language when moving from oral argument to public remarks. Justices Elena Kagan's and Sonia M. Sotomayor's speech demonstrate the two strongest effects: Within these data, the emotional content of Kagan's and Sotomayor's speech increased by 3.43% and 3.13%, respectively, when moving from their oral argument speech to their extrajudicial speech. Because emotional language "provide[s] valuable insight[s] into people's intentions, motives, and desires" (Black et al., 2011, p. 573), the significant increases in the emotional content of certain justices' public remarks may allow future scholars to derive theses justices' preferences and motives from their extrajudicial speech.

Multiple studies have observed that Justice Antonin Scalia stands out from his colleagues when it comes to emotional speech (Black et al., 2011; Wexler, 2005, 2007). My results concur with these findings by demonstrating that Scalia did not speak differently during oral argument compared to the way he spoke to the public when it came to emotional language. Since he joined the Court, Scalia was identified as a unique character on the bench (Murphy, 2015). My results reveal another unique feature about him: When Scalia spoke to a public audience, his use of emotional language was no different than it was when he was speaking during oral argument.

Results from the Drives category demonstrate that all justices discuss their drives, needs, and motivations more during their public remarks than during oral argument. Results are statistically significant for all but three justices. These results harmonize with studies that note the importance of goals and preferences in judicial decision-making (e.g., Baum, 2006; Black & Owens, 2016). That justices express their motives and drives to a greater extent during their off-bench remarks suggest that an all-encompassing analysis of the content of the justices' extrajudicial appearances may reveal that both their judicial and extrajudicial decision-making are motivated by diverse or similar preferences and goals. For



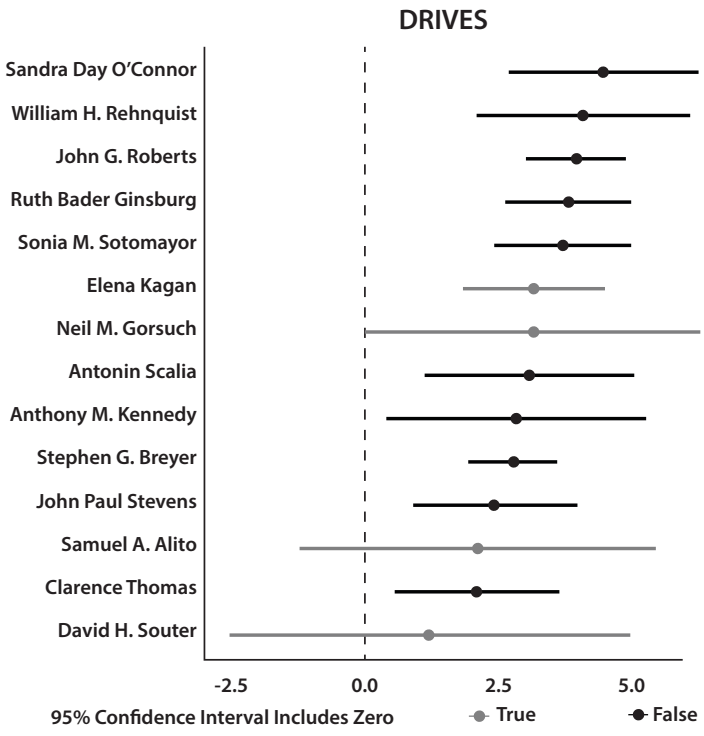
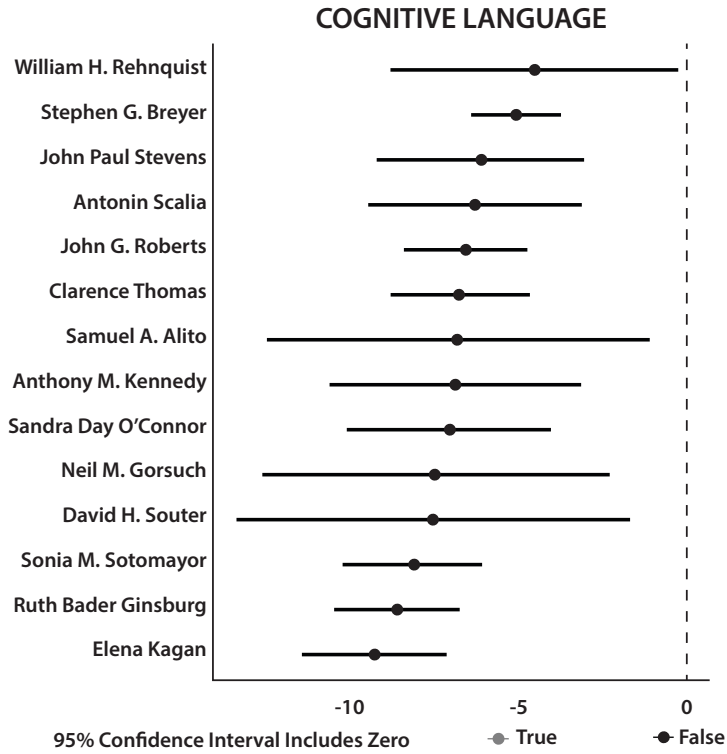


FIGURE 9.3a
Effect of moving from oral argument speech to public remarks on emotional language and drives. (*Figure continued*)



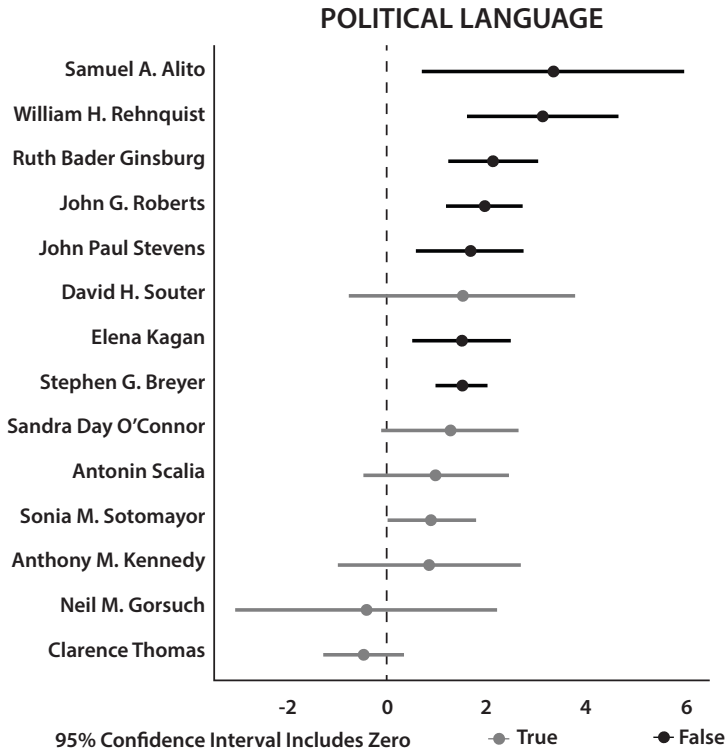


FIGURE 9.3b
Effect of moving from oral argument speech to public remarks on cognitive and political language.

example, in one of his final public speeches as sitting justice, Stephen G. Breyer stated the following: "[When deciding cases,] I keep in mind the fact that we are a nation of nearly 330 million people of every race, every religion, many different national origins, holding virtually every possible point of view." It can be inferred from this statement that a motivation for Breyer's decision-making rests on his recognition of the nation's diversity. Even though justices seem to hint at their decisions in their speeches, it may be difficult to model judicial decision-making based on the justices' public statements. Nevertheless, these data suggest, at the least, that the justices' public remarks are worth exploring as a source for deciphering their motives, goals, and preferences.

Estimates for Cognitive Language in Figure 9.3 demonstrate that all justices use less cognitive language during their public remarks. Results are statistically significant for all justices. These data suggest the justices are more cognitively engaged and may be exerting more cognitive energy during oral argument as they work through cases, hurl questions at advocates, and, in Justice Breyer's case, pose amusing and complex hypotheticals about tomato children and marshmallow guns (see Liptak, 2022). All justices use at least 4.5% less cognitive language during their public remarks, suggesting that they are more cognitively engaged during their judicial duties than during their extrajudicial activities. Collins (2011) demonstrates that cognitive dissonance, which is a "state of psychological discomfort that arises when an individual behaves in a manner that is inconsistent with that individual's beliefs or prior actions," can affect a justice's decision to author a separate opinion (p. 362). It may be the case that the justices' decision-making is influenced by other cognitive processes or psychological states. Indeed, these data suggest that most justices are more cognitively engaged during oral argument than during their extrajudicial remarks. To better understand the effects of cognition on judicial decision-making, scholars should explore the justices' judicial behavior as a function of their cognitive processes.

Results from the Political Language category offer insights into the justices' willingness to discuss politics off the bench. Indeed, Figure 9.3 demonstrates that all justices except Thomas and Gorsuch use more political language during their extrajudicial remarks than during oral argument. Results are statistically significant for half of the justices in my data. Justice Alito demonstrates the strongest effect: Within these data, the political content of his speech increased by approximately 3.34% when moving from his oral argument speech to his extrajudicial

speech. That Alito leads his colleagues in the political content of his public remarks speech is somewhat unsurprising. Alito has given overtly political speeches in the past (Liptak, 2010, 2020) and has gone far to defend his extrajudicial behavior (Alito, 2023). What will be interesting is whether Alito will continue to use overtly political language in his off-bench remarks, or whether the Court's adoption of its Code of Conduct will curb the political language within his, and his colleagues', speeches.

Finally, Figure 9.4 demonstrates a frequency distribution of public remarks per justice by audience type. These data demonstrate variation in how often each justice speaks publicly and whom they speak to when they give public remarks. Within my data, Chief Justice Roberts spoke the most frequently and Justice Gorsuch spoke the least frequently.[8] Figure 9.4 also demonstrates that nearly all justices spoke to legal audiences at a greater frequency than they speak to nonlegal audiences. Whether the justices spoke to a nonlegal or legal audience had a minimal effect on their speech content, however. Figures 9.5 and 9.6 demonstrate the effect of the audience type dummy variable on justice speech when moving from nonlegal to legal audiences. Coefficient estimates of this effect are displayed in Tables 9.3 and 9.4 in the Appendix to this chapter.[9]

That the majority of justices within my data present consistent statistically insignificant results indicates that audience type does not have a large effect on how the justices speak during their public remarks. Five justices present statistically significant results, however, which suggests that certain justices modify their speech when speaking to members of the legal profession. Figure 9.5 demonstrates that Justice Ginsburg used more feminine language while speaking to legal audiences, while Justice Thomas used less feminine language. The most interesting finding from Figure 9.5 is that Justice David H. Souter used less gendered language overall when speaking to legal audiences, suggesting that he took a gender-neutral approach when speaking to members of the legal community. Figure 9.6 displays that when talking to legal audiences, Justice Souter used less emotional language, Justice Kagan used more cognitive language, and Justice Sotomayor used less language that indicate her drives. The most substantively interesting finding from Figure 9.6 is that all justices used more cognitive language when speaking to legal audiences, suggesting that they were exerting greater cognitive effort when speaking to fellow judges, lawyers, and law students. Results are statistically significant for Justice Kagan alone, however.

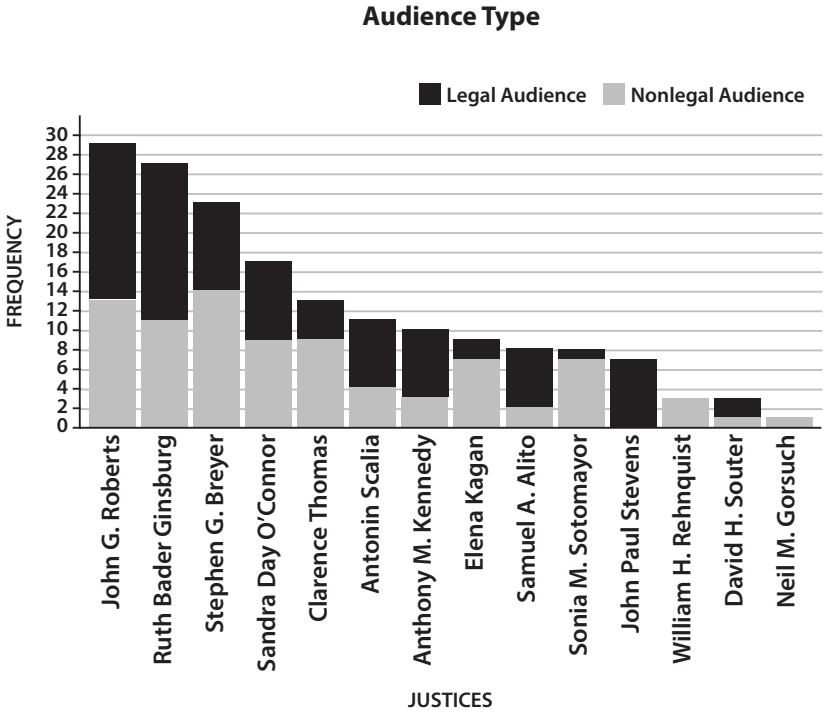


FIGURE 9.4 Frequency of the justices' public remarks by audience type.

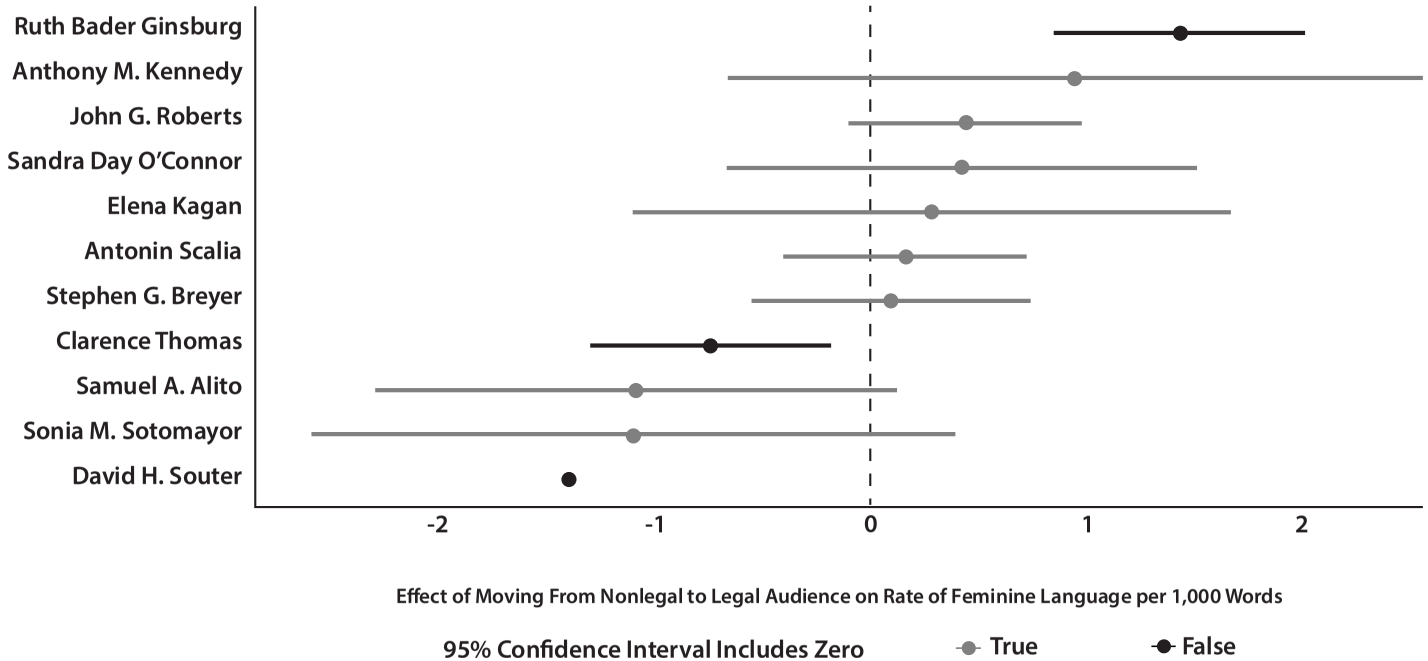


FIGURE 9.5a Effect of moving from nonlegal to legal audiences on gendered (feminine) language.

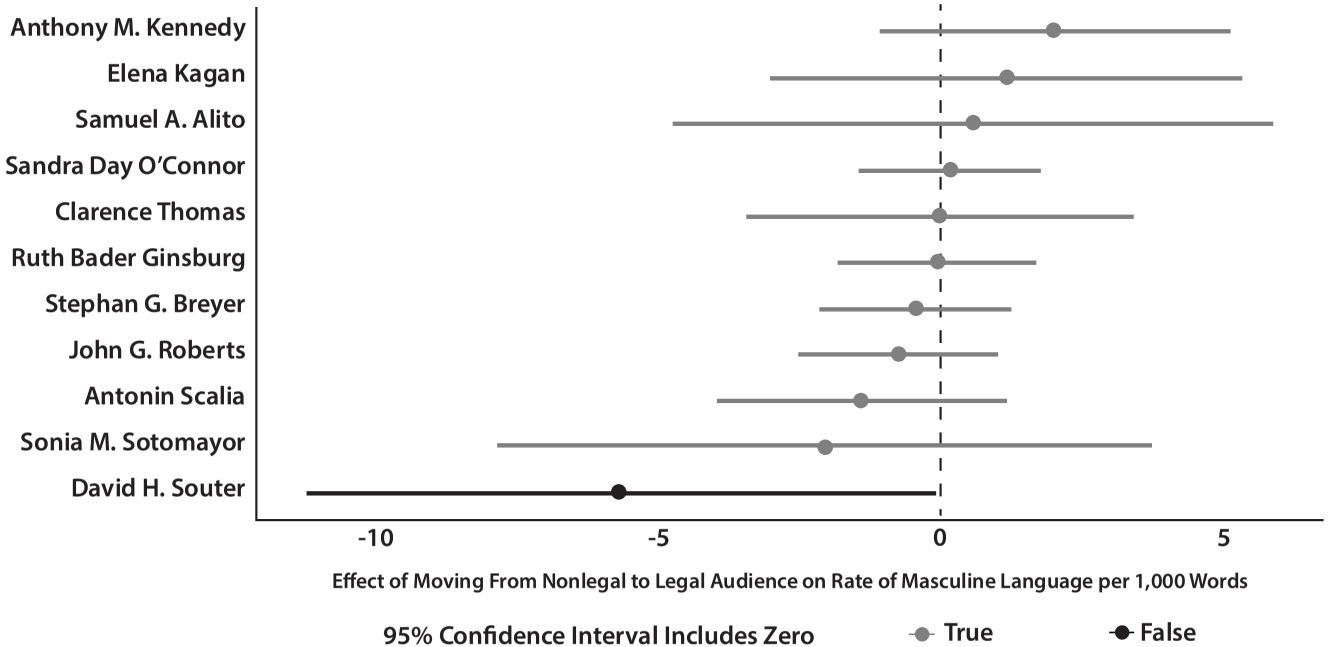
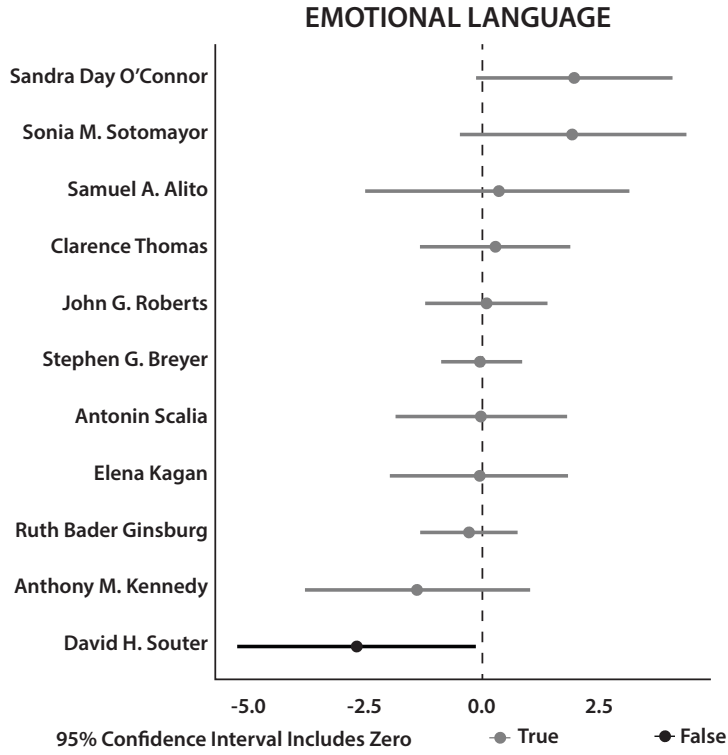


FIGURE 9.5b Effect of moving from nonlegal to legal audiences on gendered (masculine) language.



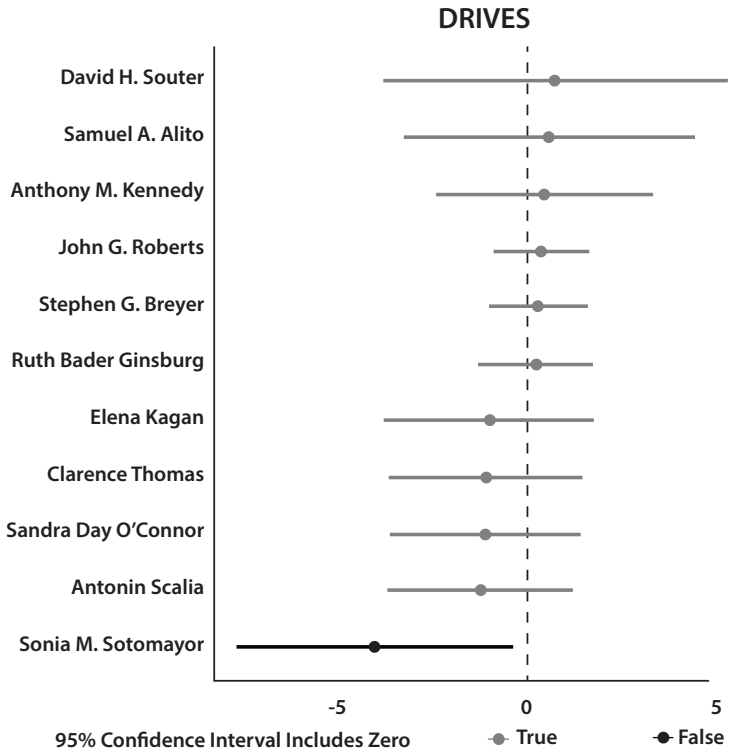
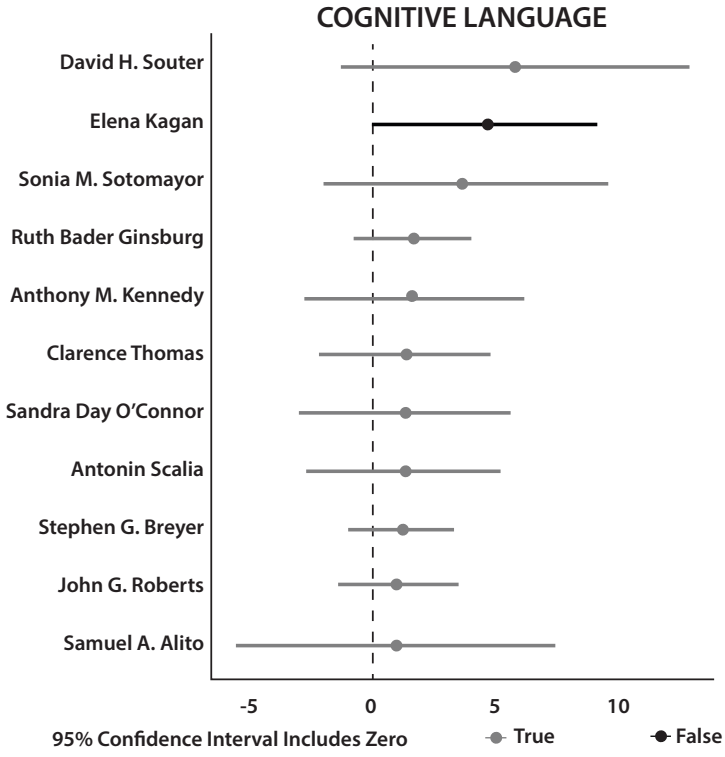


FIGURE 9.6a
Effect of moving from nonlegal to legal audiences on emotional language and drives.



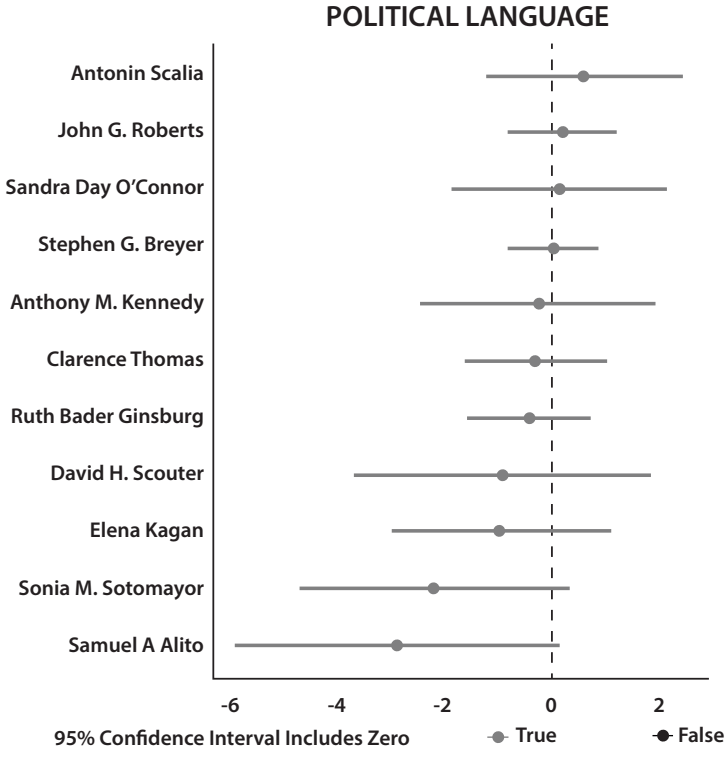


FIGURE 9.6b
Effect of moving from nonlegal to legal audiences on cognitive and political language.

CONCLUSION

The results presented in this chapter demonstrate that certain justices speak differently depending on whether they are speaking during oral argument or speaking to a public audience. That most justices don't vary their language when their audiences are composed of members of the legal profession indicates that the justices speak consistently during their public remarks regardless of whom they are speaking to. My findings have several implications for the study of judicial behavior. First, they suggest that extrajudicial speeches may provide information that can aid our understanding of judicial motives, goals, and preferences (e.g., Baum, 2006; Black & Owens, 2016; Black et al., 2011). Indeed, results related to the justices' emotional language use and discussion of their drives suggest that they express their preferences during public remarks, potentially allowing scholars to examine how these remarks shape judicial decision-making. Second, results related to cognition indicate that the justices apply various levels of cognitive effort to distinct aspects of their lives. Indeed, the significant difference in justices' cognitive language use suggests that cognitive processes and different psychological states factor into judicial behavior (e.g., Collins, 2011). Third, results related to gendered language call for increased attention from judicial politics scholars to analyze the presence and consequences of gendered language in the judicial process. That gendered language use may be a function of pressures brought on by the gender composition of groups (i.e., Karpowitz et al., 2012; Mendelberg et al., 2014) suggests that the environment in which the justices make their decisions and communicate may be pressured by gender dynamics. These pressures should be examined. Should scholars wish to uncover bias in the justices' decision-making, perhaps they can expand the analysis of political language provided here to determine the extent to which the justices express overtly political views, as they once did in the early days of the American republic (Westin, 1962), and whether these views shape their judicial behavior.

The data used in this study do not include all of the justices' extrajudicial remarks. A study by Hasen (2016) demonstrates that the justices appear off the bench at much greater frequencies than demonstrated here. An important distinction, however, is that Hasen's analysis looks at "reported appearances and not actual appearances," whereas my analysis examines actual appearances and the content of their speech during these appearances. Regardless, Hasen's findings are helpful in directing future research in this area. Indeed, the most important next step in this line of research is to collect more data on extrajudicial speech,

which Hasen's study suggests is plentiful. The C-SPAN Video Library has more speeches of justices that could not be included in this study due to the lack of available transcripts, but these speeches are available for transcription by ear and hand. Further, scholarship on extrajudicial speech would benefit from a broadening of data sources to establish a database that includes as many of the justices' public remarks as possible.

Using the content of these speeches, researchers could expand Krewson's (2019) study to determine the extent to which speech content affects personal favorability for the justices based on a variety of treatments, such as exposure to personal facts (i.e., Wolak, 2023), explanations of judicial philosophies, or the overall message of the speech. These inquiries would allow scholars to make causal claims about how exposure to the justices' public remarks shapes individual attitudes of the Court and its personnel. A similar line of research could be to examine the justices' interviews using both observational text-based quantitative methods and qualitative methods for analyzing interviews. Interviewing a justice is a rare opportunity. As such, the most available option for studying interview data related to the Court is to examine the interviews of the few who have gotten to sit down with one of The Supremes.[10]

Finally, future researchers should continue to examine the justices' goals for speaking publicly. With public approval of the Court at a record low (Jones, 2023), the justices motivations' to speak and the content of their speech may be connected to their judicial decisions and their knowledge of how the public perceives them (Baum, 2006; Black et al., 2016c). That the justices can engage in "strategic institutional maintenance" by attempting to shift the public's perceptions of the Court through their public remarks bodes well for the justices' goal of maintaining institutional legitimacy (Strother & Glennon, 2021, p. 438). To contribute to the normative debate surrounding the reflection or influence of the justices' extrajudicial behavior on their judicial preferences, scholars must continue to devote empirical attention to the justices' behavior outside the Marble Palace.

APPENDIX

TABLE 9.1 *Difference-in-Means Tests Via Linear Regression Estimating the Effect on Rates of Gendered Language per 1,000 Words Moving From Oral Argument to Public Remarks*

Justice	Effect	Gendered language type
Anthony M. Kennedy	0.17	Feminine Language
	0.41	Masculine Language
Antonin Scalia	0.21	Feminine Language
	2.61**	Masculine Language
Clarence Thomas	1.01**	Feminine Language
	2.94**	Masculine Language
David H. Souter	1.39	Feminine Language
	5.90**	Masculine Language
Elena Kagan	0.63	Feminine Language
	0.58	Masculine Language
John G. Roberts	0.38	Feminine Language
	1.50*	Masculine Language
John Paul Stevens	0.99**	Feminine Language
	0.07	Masculine Language
Neil M. Gorsuch	−0.17	Feminine Language
	6.06**	Masculine Language
Ruth Bader Ginsburg	0.49*	Feminine Language
	1.89**	Masculine Language
Samuel A. Alito	1.10*	Feminine Language
	0.02	Masculine Language
Sandra Day O'Connor	2.30**	Feminine Language
	1.21*	Masculine Language
Sonia M. Sotomayor	0.98**	Feminine Language
	0.70	Masculine Language
Stephen G. Breyer	0.75**	Feminine Language
	1.08*	Masculine Language
William H. Rehnquist	0.57*	Feminine Language
	2.78*	Masculine Language

*$p < 0.05$; **$p < 0.01$.

TABLE 9.2 *Difference-in-Means Tests via Linear Regression Estimating the Effect on the Percent of Linguistic Content Within Speech Moving From Oral Argument to Public Remarks*

Justice	Effect	Linguistic content type
Anthony M. Kennedy	2.23*	Emotional Language
	2.83*	Drives
	−6.91**	Cognitive Language
	0.87	Political Language
Antonin Scalia	0.61	Emotional Language
	3.08**	Drives
	−6.33**	Cognitive Language
	0.99	Political Language
Clarence Thomas	0.23	Emotional Language
	2.11**	Drives
	−6.82**	Cognitive Language
	−0.46	Political Language
David H. Souter	1.55	Emotional Language
	1.21	Drives
	−7.58**	Cognitive Language
	1.52	Political Language
Elena Kagan	3.43**	Emotional Language
	3.18**	Drives
	−9.35**	Cognitive Language
	1.51**	Political Language
John G. Roberts	1.20*	Emotional Language
	3.95**	Drives
	−6.62**	Cognitive Language
	1.97**	Political Language
John Paul Stevens	1.56*	Emotional Language
	2.45**	Drives
	−6.16**	Cognitive Language
	1.68**	Political Language
Neil M. Gorsuch	2.97**	Emotional Language
	3.16	Drives
	−7.51**	Cognitive Language
	−0.40	Political Language
Ruth Bader Ginsburg	2.84**	Emotional Language
	3.82**	Drives
	−8.68**	Cognitive Language
	2.14**	Political Language

*$p < 0.05$; **$p < 0.01$.

Continued

TABLE 9.2 *Continued*

Justice	Effect	Linguistic content type
Samuel A. Alito	1.76	Emotional Language
	2.13	Drives
	−6.85*	Cognitive Language
	3.34**	Political Language
Sandra Day O'Connor	1.11	Emotional Language
	4.46**	Drives
	−7.10**	Cognitive Language
	1.28	Political Language
Sonia M. Sotomayor	3.13**	Emotional Language
	3.71**	Drives
	−8.19**	Cognitive Language
	0.88*	Political Language
Stephen G. Breyer	1.47**	Emotional Language
	2.78**	Drives
	−5.11*	Cognitive Language
	1.51**	Political Language
William H. Rehnquist	0.54	Emotional Language
	4.08**	Drives
	−4.52*	Cognitive Language
	3.13**	Political Language

*$p < 0.05$; **$p < 0.01$.

TABLE 9.3 *Estimates for the Effect of Moving From a Nonlegal to Legal Audience on Rates of Gendered Language per 1,000 Words*

Justice	Effect	Gendered language type
Anthony M. Kennedy	0.94	Feminine Language
	2.01	Masculine Language
Antonin Scalia	0.16	Feminine Language
	−1.41	Masculine Language
Clarence Thomas	−0.74**	Feminine Language
	−0.02	Masculine Language
David H. Souter	−1.39**	Feminine Language
	−5.66*	Masculine Language
Elena Kagan	0.28	Feminine Language
	1.16	Masculine Language

*$p < 0.05$; **$p < 0.01$.

Continued

TABLE 9.3 *Continued*

Justice	Effect	Gendered language type
John G. Roberts	0.44	Feminine Language
	−0.75	Masculine Language
Ruth Bader Ginsburg	1.43**	Feminine Language
	−0.05	Masculine Language
Samuel A. Alito	−1.09	Feminine Language
	0.57	Masculine Language
Sandra Day O'Connor	0.42	Feminine Language
	0.17	Masculine Language
Sonia M. Sotomayor	−1.10	Feminine Language
	−2.04	Masculine Language
Stephen G. Breyer	0.09	Feminine Language
	−0.44	Masculine Language

*$p < 0.05$; **$p < 0.01$.

TABLE 9.4 *Estimates for the Effect of Moving From a Nonlegal to Legal Audience on Percent of Linguistic Content*

Justice	Effect	Linguistic content type
Anthony M. Kennedy	−1.39	Emotional Language
	0.45	Drives
	1.62	Cognitive Language
	−0.26	Political Language
Antonin Scalia	−0.01	Emotional Language
	−1.23	Drives
	1.25	Cognitive Language
	0.59	Political Language
Clarence Thomas	0.28	Emotional Language
	−1.10	Drives
	1.32	Cognitive Language
	−0.32	Political Language
David H. Souter	−2.70*	Emotional Language
	0.73	Drives
	5.80	Cognitive Language
	−0.92	Political Language

*$p < 0.05$.

Continued

TABLE 9.4 *Continued*

Justice	Effect	Linguistic content type
Elena Kagan	−0.06	Emotional Language
	−1.00	Drives
	4.63*	Cognitive Language
	−1.00	Political Language
John G. Roberts	0.09	Emotional Language
	0.38	Drives
	0.99	Cognitive Language
	0.17	Political Language
Ruth Bader Ginsburg	−0.28	Emotional Language
	0.22	Drives
	1.65	Cognitive Language
	−0.44	Political Language
Samuel A. Alito	0.35	Emotional Language
	0.60	Drives
	0.88	Cognitive Language
	−2.89	Political Language
Sandra Day O'Connor	1.99	Emotional Language
	−1.12	Drives
	1.28	Cognitive Language
	0.14	Political Language
Sonia M. Sotomayor	1.96	Emotional Language
	−4.03*	Drives
	3.71	Cognitive Language
	−2.20	Political Language
Stephen G. Breyer	−0.01	Emotional Language
	0.29	Drives
	1.16	Cognitive Language
	0.03	Political Language

*$p < 0.05$.

NOTES

1. The piece's full title is Concerto for Harpsichord, Strings, and Continuo No. 2 in E Major, BWV 1053: I. (Allegro). Bach scholars refer to this piece as BWV 1053 for short (Butler, 2016; Wolff, 2016).
2. Hasen's (2016) data include reports of appearances in general where the justices did not necessarily give public remarks. My focus is solely on instances when the justices gave a public speech. Importantly, the trends from Hasen's data signal a

dramatic increase in the speaking behavior of the justices between the 20th and 21st centuries.

3. Black et al. (2016b) do not consider whether the justices strategically take trips. It may be the case that they strategically choose locations to give their speeches. At the very least, I would speculate that the justices do not decide where to travel randomly, such as by throwing a dart at a map while blindfolded.
4. Justice Felix Frankfurter coined the term "political thicket" in his opinion in Colegrove v. Green (1946), 328 U.S. 549 at 556.
5. Justices Brett M. Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson did not have speeches on C-SPAN when I was collecting data for this study so they were excluded from this analysis.
6. Boyle and Bande-Ali use oyez.org's API to extract transcript and case data from the Court's oral argument. The link to their GitHub page is https://github.com/walkerdb/supreme_court_transcripts.
7. Removed words: "assault," "authority," "blackmail," "chief," "commander," "crime," "felony," "government," "jail," "lethal," "liberty," "prison," "prisoner," "punish," "supremacy," "terror," "terrorist," "violent."
8. Only one of Gorsuch's speeches was available on C-SPAN, but he is known to rarely give public comments (Biskupic, 2023).
9. Chief Justice William H. Rehnquist, John Paul Stevens, and Neil Gorsuch are excluded from these analyses because within my data they respectively only spoke to either nonlegal or legal audiences and not both.
10. Cahn, D. (Writer), and J. Yu (Director). (2004, March 24). The Supremes (Season 5, Episode 17) [TV series episode]. In A. Sorkin (Executive Producer), *The West Wing*. John Wells Productions; NBC.

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