

SCOTUS Interruptus: Speech Patterns and Opinion Authorship of Female U.S. Supreme Court Justices

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September 1, 2018

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Scholars who study Supreme Court oral arguments have long acknowledged that these proceedings are important in that they affect case outcomes, constitute the only opportunity for outsiders to directly witness the behavior of the justices, and provide an opportunity for the justices to converse amongst themselves almost as much as with the attorneys standing before them. Not only are oral arguments an opportunity for the justices to engage one another in dialogue about the case at hand, but they also provide a unique opportunity with which to evaluate how the justices interact with one another professionally. Because oral arguments are an opportunity for the justices to initially influence how their colleagues view a case before moving into the conference stage of the decision making process, oral arguments allow for an examination of how justices compete for influence. The relatively unstructured nature of oral arguments provides an opportunity for the justices to vie for opportunities to speak, often at the expense of their fellow justices. In this paper, we examine how gender influences dynamics at oral arguments and opinion authorship.

Recently during the Supreme Court’s oral arguments about crisis pregnancy centers¹, Justice Sonia Sotomayor introduced a long line of questions by saying she had recently visited the website of one of the clinics that is a party to the suit. Justice Kennedy interrupted his colleague’s line of questioning to both pose his own question, and insinuate that Justice Sotomayor should not have conducted her own research beyond the record submitted to the Court,

“Well, in this case I didn’t go beyond the record to look on the Internet because I don’t think we should do that, but I do have a hypothetical ... What would happen if an unlicensed entity, unlicensed center, just had a billboard that said “Choose Life.” Would they have to make the disclosure?”

This example of interactions between justices during oral arguments is interesting for many reasons. Not only is it one of many examples in which a male justice interrupts a

¹*National Institute of Family and Life Advocates. v. Becerra*, No. 16-1140 March 20, 2018

female justice, but here, Justice Kennedy is also criticizing his colleague for engaging in independent research, something that other justices, including Justice Kennedy, have done in other cases.² What this excerpt from a recent oral argument provides is that the gender inequalities that exist in society more generally (?), also exist within the judicial branch and manifests during oral arguments.

As the Court becomes more gender diverse, it creates an opportunity to analyze the impact of women on the U.S. Supreme Court. Specifically, we expect that despite the collegiality of the Supreme Court, as the number of female justices increases, the number of interruptions during oral arguments will also increase. Additionally, we anticipate that an increase in interruptions during oral arguments will result in an increase in the number of separate opinions authored by the justices being interrupted by their colleagues.

This paper proceeds as follows. First, we review the literature on women in political institutions and explain how patterns of behavior in state and federal legislatures can spillover into the judicial branch, an area where less attention has been paid to gender dynamics. We then discuss the significance of oral arguments, and why interruptions during oral arguments restrict the ability of female justices to enter into the same strategic behavior as their male colleagues. Next, we incorporate the use of text analysis of oral argument transcripts to test our expectations regarding interruptions and post-oral argument behavior of the justices. We conclude by discussing the implications of these results and future directions for our scholarship.

²Chief Justice Roberts using information from the Citizens Clean Elections Commission website in questioning an attorney during oral arguments for *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011), Justice Alito including independent research on violent video games in his concurring opinion in *Brown v. Entertainment Merchants Association* (2010), and Justice Kennedy citing a letter from the Bureau of Prisons in his opinion in *Graham v. Florida* (2010) (?).

Women in Political Institutions

In a recent New York Times article discussing Senator Mitch McConnell's silencing of Senator Elizabeth Warren on the Senate floor³, Susan Chira asked:

“Was there a woman who didn't recognize herself in the specter of Elizabeth Warren silenced by a roomful of men? ...[this event] resonates with so many women precisely because they have been there, over and over again. At a meeting where you speak up, only to be cut off by a man. Where your ideas are ignored until a man repeats them and then they are pure genius—or, simply, acknowledged.”

Chira's point was that this act of a male silencing a female was performed on the United States Senate's floor, suggesting that the Legislative Branch is not immune to the gender inequalities that exist in society generally. Further, this recent example points to the undercurrent that most scholarship on gender and politics brings to the surface: political institutions themselves are gendered, which influences the behavior and interactions between members of that institution.

What does it mean for an institution to be gendered? As ? enumerates, first, it means that all people within the institution have a gender. There is no universal category of foreign service officer, reporter, law partner, or legislator, and women report clearly being seen as and treated as women holders of a role. More specifically, “work is part of the construction of masculinity for many workers. Jobs, as well as institutions, have gender, and institutions will mount enormous efforts to contain threats to the gendered identity of the institution” (?, p.456). Second, the experience of participants within an institution will vary according to gender. Not only will women most likely have fewer opportunities than men, but their perceptions of the obstacles and the existence of circumscribed opportunities will vary by gender (?, p. 214). Finally, political institutions produce, reproduce, and subvert gender.

³(?)

All of the works recognize that gender is not a static thing that inheres in a biological category of women, but rather something that is socially constructed, variable, and subject to negotiation. Each political institution has a distinctively gendered culture and interacts with larger issues of gender being negotiated and renegotiated in the larger society. Or, as ?, p.456 summarizes, “To say that an institution is gendered, then, is to recognize that constructions of masculinity and femininity are intertwined in the daily culture of an institution rather than existing out in society or fixed within individuals which they then bring whole to the institution.”

Within institutions, numbers matter. ?? argues that in order to understand women’s behavior and ability to affect policy change, as well as how other actors in the institution perceive them, and how they perceive themselves, depends on their number in the institution. Which then spills over into understanding how an institution is gendered and the proportion of women within that institution. ? demonstrates how the number of women legislators determines not only whether they can pass their priority legislative agenda items and get members of the dominant group to support their aims, but also whether women have any hope of changing the structures of the institutions and the rules of the game.

Over time, the number of female legislators at the federal and state level have continued to increase. As of the start of the 2017 legislative session, 1,840, or 24.9% of the 7,383 state legislators in the United States are women. Women currently hold 442, or 22.4%, of the 1,972 state senate seats and 1,398, or 25.8%, of the 5,411 state house or assembly seats (CAWP 2017). The rise in female representation has enabled scholars to understand how women behave in political institutions. For example, female U.S. state legislators pursue feminist initiatives; passing and proposing policies related to women’s issues; expressing being a representative to women; and seeking legislation on health, education, and welfare policies (e.g. ?????). Similarly, U.S. congresswomen have voted differently on specific women’s issues than their male counterparts (?), as well as sponsor and co-sponsor women’s issues and caregiver legislation at high rates than men (????).

The Supreme Court is not so different from the legislature, in that women's representation has continued to increase. The first female justice was appointed in 1981, with a second appointed in 1993. On the current Court, three out of the nine seats are occupied by women. Mathematically speaking, the Supreme Court actually has the best proportion of female representation to available seats when compared with either chamber of Congress. However, as ? point out, female justices are interrupted more than their male colleagues at a significantly higher rate by both male justices and male advocates. That the female justices are more likely to be interrupted suggests that numbers might not be as advantageous in an institution where the decision-making is confined to a smaller group than within a legislature. Whether and how the increased number of women on the Supreme Court has influenced dynamic interactions between the justices during oral arguments is what we hope to explain.

The Significance of Oral Arguments

Oral arguments before the Supreme Court present a unique opportunity for information transmission and strategic interaction between the justices and litigants. While some researchers contend oral arguments do not determine which party prevails in a case (e.g., Segal & Spaeth, 2002, 280), many others have found oral arguments can provide insight into the Court's decisional outputs. Johnson (2004, 5) details how justices will "seek new information" during oral arguments in order to steer their votes to preferred outcomes. Additional research corroborates Johnson's findings (e.g., Benoit 1989; Wasby et al. 1992).

The main mechanism through which justices can seek information is through questioning parties' counsel. Studies suggest these questions can serve to predict how the questioning justice will ultimately vote in the case (Epstein et al. 2010; Johnson et al. 2009). These questions can serve not only to develop additional information, but also to assist in coalition formation for the ultimate case outcome (Ringsmuth 2013; Black et al. 2012; Johnson et al. 2007). Indeed, how attorneys handle these questions can impact decisional

predictions. As Johnson et al. (2006) note, counsels' performance before the Court can serve as a predictor for that attorney's success before the Court. In a purely informational sense, the credibility of the informational signal derives from the oratorical success of litigant's counsel.

Information accrual is not the only reason a justice may ask questions, as noted. Questions posed by justices not only serve to increase knowledge or clarify an uncertain point, they also facilitate an individual justice's ability to move the legal argument into areas of discussion that can serve that justice's interest in coalition formation. As an example, a question posed by a justice to counsel may have very little to do with clarifying information contained within the case record; it may be the case the justices are arguing with each other *through* a litigant's attorney in order to drive a coalition on the decisional output. In fact, as Johnson (2004) notes, Justice Powell would pay particular attention to his fellow justices' questions for the subsequent vote on the merits.

Oral arguments also perform another function, though one that is most important for the institution as a whole, rather than for an individual justice. That function is the public face of the Court. Given no cameras are permitted in the Supreme Court, the sole visual of the Court "in session" is confined to the Court's operations during oral arguments. Members of the public, members of the Supreme Court Bar, and members of the media are confined in their opportunities to engage the Court. And while the public is generally unaware of the specifics of the Court's activities (such as non-salient decisions), the *perception* of the Court as an institution which bases its decisions upon a careful, methodical manner is important to the Court's legitimacy. This concern does not suggest the public is engulfed within a fog of ignorance about the Court, such that if the public would realize how "politics" factors into the Court's decision-making legitimacy for the institution as a whole would collapse. Indeed, research suggests quite the opposite. As Gibson & Nelson (2014, 211) note:

"The most certain and important conclusion... is that the legitimacy of the US Supreme Court does not depend on the perception that judges merely apply the law in some sort of mechani-

cal and discretionless process. It seems that the American people know that the justices of the Supreme Court exercise discretion in making their decisions. They are also aware that the justices' discretion is guided to at least some degree by ideological and even partisan considerations. None of these understandings seem to contribute to undermining the legitimacy of the Supreme Court. Instead, legitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way."

In other words, "it seems likely that a key source of the belief that judges engage in principled decision making is the association of courts with symbols of fairness and legality" (Gibson & Nelson, 2014, 211; *see also* Gibson & Caldeira 2009).

But what if the only public aspect to the Court's decisional process is imbued with the same type of systemic gendered biases experienced in the rest of society? What if, as alluded to previously in the example of Senator Elizabeth Warren, a female member of the Court were "silenced" by a male colleague? If such gender dynamics existed in the Court's processes, it could call into question more than the capacity of those female justices to engage in the strategic interactions similar to their male colleagues, but also suggest a potential for concerns of institutional legitimacy. It is precisely because questions during oral argument can serve such important purposes that it is noteworthy when these opportunities are circumscribed by gendered dynamics.

Interruptions and Gender

Oral arguments before the Court are scheduled for Mondays, Tuesdays, and Wednesdays between the first Monday in October and the last week in April. It schedules cases for argument in two-week sittings, during which the Court hears two (although sometimes one or three) arguments per day. At 10 o'clock in the morning on argument days, after the justices enter the Courtroom, the Court Marshal stands up to proclaim

"The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business

before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!"

After the Court announces any opinions and concludes motions for admissions to the bar, the Chief Justice calls the first case to order. As explained above, oral arguments provide an opportunity for the justices to discuss the case with one another. These conversations, through questions posed to attorneys, allow the justices to gain additional information not contained in the record and to get a sense of how their colleagues are thinking about a case (???). That oral arguments are really the first time that the justices converse with one another over a particular case highlights the problems inherent in interruptions between justices, especially if female justices are not as able to engage in those initial conversations as their male colleagues due to being interrupted at higher rates.

Understanding the significance of interruptions during oral arguments requires understanding how interruptions serve to undermine communicative paradigms. Generally, interruptions are considered rude as they break into a person's speech and hinder their ability to express their thoughts and preferences. During oral arguments, interruptions make it difficult to determine how the justices are thinking about a case, which make it more difficult to determine who might join the majority or minority coalitions, and what arguments and counterarguments will be effective during the opinion writing process. In a variety of different areas, gender has been found to impact the behavioral act of interrupting. Scholars have found that interruptions are violate a current speaker's right to complete a turn' (??), and that "interruptions are a communication signal. People signal their status and others' through their use of such communication cues" (?, p.20). Viewed from this social psychological lens, as the proportion of women in an institution increases, interruptions might be one way in which men react to the presence of women. ?'s (?) examination of state legislature committee hearing transcripts determined that as the proportion of women in a

legislative body increases, men have a tendency to become more verbally aggressive and try to control the content of the hearing more.

The Supreme Court provides an interesting framework in which to examine the impact of gendered interruptions on institutional behavior. The Court is unique in that its membership is comprised of individuals who have achieved the highest status position in their profession. While the Court is considered to be a highly collegial institution (?), recent research has demonstrated that interruptions persist, and have a gendered component (??), suggesting that even an institution marked by collegiality and equality between members in terms of status of their profession can be marred by society's gender-based hierarchy.

Data and Methods

In order to create the dependent variable we use content analysis to capture the number of times a justice has been interrupted by another member of the court to the number of times they interrupt other justices. We first downloaded the transcripts of Supreme Court oral arguments from the Court's 1975 term (the start of the last natural court before the appointment of a female justice) through the end of the 2015 term from an online repository made available by the Oyez Project. Using a package called readtext (?), we are able to convert all of the individual court cases from a pdf to a text file and load them into R. We do this for each year in order to create observations for each justice in each year.⁴

⁴The analysis below contains a random subsample of cases within our larger time frame. We are currently dealing with some difficulties reading the JSON files from the Oyez repository into Quanteda. However, in order to conduct preliminary tests on our hypotheses, we ran the analyses on the 1975 term, and a sample of cases from the 1981, 2000, and 2005 terms. 1981 was the first term in which a female justice was on the bench. The 2000 term and 2015 term contain two and three females justices, respectively. This limited sample will enable us to determine if the number of women on the bench increases the number of interruptions, as suggested by ?.

Using the `readtext` package we load all of the court cases for the year into R, and then use `Quanteda` (?) to conduct text analysis on the content of the court cases. Specifically, we convert the individual texts into a corpus of n texts for year x . Next, we clean up the corpus by eliminating all of the urls and the symbols. This allows R to only capture the sustenance of the text. However, we do not remove punctuation or stem words because we are interested in counting the number of interruptions which are indicated by a “- -”, and `Quanteda` considers this punctuation. `Quanteda` allows us to essentially scan the text for a character or word within and across the texts, and in doing so, it will create a count of the times that word or character appears. However, in order to do scan the text, we needed to create a compound character in R in order to look for a “- -” because `Quanteda` treats each dash separately so it is “-” “-”. Furthermore, a “- -” also indicates a pause in the transcript and thus we need some way of distinguishing between a pause and an interruption for the count.

In order to distinguish between a pause and an actual interruption, we create another compound token, an object within the text, where a “- -” is followed by the first name of each Supreme Court Justice.⁵ This allows us to search for any time a justice is interrupted because it indicates they pause and then a new person is speaking. After accounting for these idiosyncracies in Supreme Court oral argument transcripts, using `Quanteda` we create a count of the number of times each justice is interrupted using this compound token, for each justice in each year. We then create a count of the times the justice has interrupted another person using this compound token.. The count of interruptions for two years in our sample, 1975 and 2000, are in Table 1.⁶

⁵Tokenizing the text allows you to split your text into words, sentences, or characters, which assists with empirical analysis of the text.

⁶The number of interruptions for the 2000 term are expected counts, as we are currently working with a random sample of nine cases from that term. In order to determine the expected count, we took the number of interruptions for each justice, and divided by the

Table 1: Number of Interruptions by Justice, 1975 & 2000

Justice	1975	Justice	2000
Burger	452	Breyer	333
Powell	117	Scalia	305
Blackmun	157	Kennedy	333
Brennan	272	Stevens	0
Douglas	0	O'Connor	295
Marshall	503	Souter	333
White	715	Thomas	0
Stewart	548	Ginsburg	200
Rehnquist	304	Rehnquist	324

Note: Douglas resigned in November of 1975
 $n = 151$ for 1975, $n = 86$ for 2000.

The main independent variables in this analysis come from the Supreme Court Database (?). In order to understand how gender affects speech patterns after the conclusion of oral arguments, we include a variety of variables from the merits stage. As research on women in legislatures has demonstrated, women are likely to pursue initiating and sponsoring legislation in different policy areas than men, specifically in regards to health, education, and welfare. To determine whether or not there is a connection between issues championed by women in legislature and judiciary, we include the issue area of the case as an independent variable.⁷ We expect that female justices are interrupted more in areas outside of civil rights and liberties, and First Amendment challenges, as these issue areas are more likely to contain challenges concerning health, education, and welfare.

total number of cases that received oral arguments in that term. We then multiplied that result times 10.5 (nine cases divided by the total number of cases for the term) and rounded to the nearest whole number. These counts will be updated once we have examined all 86 cases for the 2000 term for interruptions by justice.

⁷The Supreme Court Database codes fourteen separate issue areas. These include (but are not limited to) civil rights and liberties, criminal procedure, economic, First Amendment, due process, and judicial power. We rely on their classification of the issue areas.

Additionally, in order to determine if there are any lingering effects from interruptions are oral arguments, we include independent variables which capture the justices' vote and opinion authorship. As we theorize, increased interruptions during oral argument are reduce the ability of female justices to strategically interact with their colleagues, therefore they are more likely to author separate opinions in order to express their preferences and position on an issue. Therefore, we include whether or not the justice was in the majority coalition, as well as whether or not they authored a separate opinion.⁸

Building off of previous work (?) which demonstrates that ideology contributes to the frequency of justice-to-justice interruptions, we also include ideology as an indicator of gendered interruptions on the Court. We introduce ideology using the ? scores, which allow for dynamic evaluations of judicial ideology. In line with ? we believe that ideology alone does not explain the increase in gendered interruptions, rather ideology works with other indicators. Among these other indicators is seniority, so we have included a variable which captures the length of time that a justice has been on the Court. Seniority plays an important role in structuring interactions among the justices. During the justice conferences to discuss petitions for certiorari and discuss the cases after oral argument, the order of both speaking and voting is determined by seniority (e.g., ?). Additionally, when the justices walk into the chamber before oral arguments, the process in with regards to seniority, with the most junior justice holding the door for his or her colleagues. That these norms exist regardless of gender will allow us to determine if seniority mitigates interruptions, especially once the female justices are no longer among the most junior members of the Court.

⁸As coded by the Supreme Court Database, this variable takes the value of "1" if the justice wrote no opinion, "2" if the justice wrote an opinion, or "3" if the justice co-authored an opinion.

References