

GENDER DYNAMICS AND SUPREME COURT ORAL ARGUMENTS

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ABSTRACT

Scholars demonstrate that speakers engaged in social interactions can impede other participants by speaking over them and by specifically using negative language during conversations. In addition, females are more likely to fall prey to these tactics and to be adversely affected by them. To test these claims, we turn to Supreme Court oral arguments to determine whether female attorneys appearing at the nation's highest court are treated differently than their male counterparts by the Justices. Our findings demonstrate that female attorneys do not get to speak as often as their male counterparts and they also face more negative language from the bench than do male attorneys who appear at the nation's highest court.

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INTRODUCTION

The U.S. Supreme Court's decision in *Maryland v. King*¹ was a major victory for law enforcement and prosecutors alike. The Court held that conducting a DNA swab test as part of the arrest procedure does not violate the Fourth Amendment because the test serves a legitimate state interest and is not so invasive so as to require a warrant. In short, the Court created another clear exception to the warrant requirement. This may have major future implications for the rights of the criminally accused.²

Beyond the substantive impact of *King*, the oral arguments in this, potentially landmark, case also exemplify another key issue—specifically how female attorneys are treated by the Court compared to their male counterparts. Consider Katherine Winfree's argument. As she began to make Maryland's position by citing statistics supporting the practice of the DNA collection of arrestees, and even before she got through twenty seconds of her argument, Justice Antonin Scalia interjected with a joke: "I'll bet you, if you conducted a lot of unreasonable searches and seizures, you'd get more convictions, too."³ This remark produced laughter from the gallery as Justice Scalia made his opinion even clearer: "That proves absolutely nothing."⁴ As these statements indicate, Scalia did not agree with Winfree's view of the case and ultimately voted with three others against Maryland.⁵

In contrast, Deputy Solicitor General Michael R. Dreeben, also arguing for the petitioner, relayed facts about the privacy of the arrestees for nearly a full minute before Chief Justice John Roberts interjected.⁶ In response to Dreeben's statement that arrestees are not free citizens, Roberts made a clarifying statement: "Yes, but that doesn't mean, for example, that you can go into their house without a warrant."⁷ Roberts ultimately voted in support of the petitioner.⁸

1. 133 S. Ct. 1958, 1980 (2013).

2. Richard Lempert, *Maryland v. King: An Unfortunate Supreme Court Decision on the Collection of DNA Samples*, BROOKINGS (June 6, 2013), <https://www.brookings.edu/blog/up-front/2013/06/06/maryland-v-king-an-unfortunate-supreme-court-decision-on-the-collection-of-dna-samples/> [https://perma.cc/ND9T-P62S].

3. Transcript of Oral Argument at 3, *King*, 133 S. Ct. 1958 (2013) (No. 12-207).

4. *Id.*

5. *King*, 133 S. Ct. at 1965.

6. Transcript of Oral Argument, *supra* note 3, at 14-15.

7. *Id.* at 15.

Interestingly, Scalia did not speak until almost fifteen minutes of Dreeben's argument had passed.⁹

The question that piques our interest is why were these two attorneys, both arguing for the same side in *King*, treated so differently as they began their arguments? Are the differences in treatment due to differences in experience or argument style, or might they be attributed to another factor including the gender of the two attorneys appearing at the bar? And, if it is the latter, is this difference an anomaly or a pattern of behavior at the U.S. Supreme Court? To investigate these questions, we test several hypotheses about how female attorneys may be treated differently when arguing at the nation's highest court.

The results indicate, consistent with existing literature, that female attorneys do not get to use as much of their time as their male colleagues. This, however, is not all; female attorneys also receive fewer positive emotional signals from the Justices in the form of more negative, emotional language infused in questions from the bench. Combined, these findings reaffirm prior literature that shows the treatment of women in political deliberations is not always equal to the treatment of men. More generally, this demonstrates that even in front of the Supreme Court—an institution we would expect to be more sensitive to the fair treatment of litigants—female attorneys face an uphill battle.

This Article proceeds as follows. In the next Part we explicate our theoretical argument that leads us to expect women to be treated differently than their male colleagues during the Court's oral arguments. To do so we first discuss how women within the political and judicial systems are often treated during political discussions. Second, we turn to a general discussion of how individuals, specifically females engaged in group discussions, may be affected by speakers who do not allow them to speak as much and how, in particular, females may be affected by such negative treatment. Third, we turn to the existing works that suggest that understanding how Justices act during Supreme Court oral arguments provides a key indicator of what they think about a case. Next, based on these literatures, we lay out the main hypotheses we seek to test. Finally, we describe our data and modeling strategies, delineate our results, and then make several concluding remarks.

8. *King*, 133 S. Ct. at 1980.

9. Transcript of Oral Argument, *supra* note 3, at 14, 27.

I. GENDER, POLITICAL DISCUSSIONS, AND APPELLATE ARGUMENTS

Women's widespread participation in political and judicial spheres over the past half century raises questions about their role and treatment within these institutional structures. The picture is not always pretty. As Karpowitz and Mendelberg¹⁰ note, women are less likely than men to try to convince others to agree with their opinions and are also less likely than men to believe they are "capable of speaking up and effectively contributing" to a political discussion.¹¹ A similar pattern emerges among law students: Men at Yale Law School were shown to outtalk their women counterparts at similar rates in both 2012 and 2002.¹² Such inequalities suggest this gender disparity pattern may not be changing, even though women are key players in the political and judicial arenas.

More specifically, scholars suggest the way women act in political discussions is a product of gendered stereotypes that continue to persist within our culture and particularly within the political system.¹³ For instance, women politicians are typically preferred for handling issues relating to care (like social welfare and education) while men are preferred for issues in the "men's domain," like economics, crime, and foreign policy.¹⁴ Additionally, these issues are typically seen as those which are important for good leadership. When women break societal expectations and display leadership characteristics, it often "backfire[s] by presenting women as anomalies in the masculine domain of power."¹⁵ The result for Karpowitz and Mendelberg is that "[s]ociety may be continually sending such signals to women and thereby creating the sense that leadership is . . . not valued for women."¹⁶

We are particularly interested in whether how women are treated in political discussions generally translates into how attorneys are treated when they appear in front of the federal judiciary. Szmer, Kaheny, Sarver, and DeCamillis¹⁷ examine this question as it relates

10. CHRISTOPHER E. KARPOWITZ & TALİ MENDELBERG, *THE SILENT SEX: GENDER, DELIBERATIONS, AND INSTITUTIONS* (2014).

11. *Id.* at 39.

12. *Id.* at 44.

13. *Id.* at 33-34.

14. *Id.* at 47.

15. *Id.* at 47.

16. *Id.* at 48.

17. John Szmer et al., *The Impact of Attorney Gender on Decision Making in the United States Courts of Appeals*, 34 J. WOMEN, POL. & POL'Y 72, 72 (2013).

to the U.S. Court of Appeals. Their analysis is consistent with Karpowitz and Mendelberg's general findings.¹⁸ Indeed, while Szmer and his colleagues find female attorneys are more likely to win cases even if the cases have nothing to do with "women's issue[s,]" they also find that when the lower court is reversed by a circuit, women attorneys are less likely to find support from appellate court judges.¹⁹ The point is that female attorneys are at a disadvantage "in the very cases in which advocacy might be most crucial at the circuit court level."²⁰

While Szmer et al. focus on the federal circuits, Phillips and Carter turn to our court of interest—the U.S. Supreme Court.²¹ To determine how women are treated in the nation's highest court, they focus on five terms of oral argument data (2004–2009). Specifically, they analyze the total words spoken by the attorneys as well as how many questions and comments Justices aim at each side in a case.²² Their findings are consistent with the literature but must be heeded with caution given the small number of terms they analyze. In particular, and consistent with Johnson et al.,²³ who show that Justices ask more questions to the side with which they disagree, Phillips and Carter find that Justices tend to speak to female attorneys more often (even when controlling for ideology).²⁴ That said, liberal Justices generally seem to speak less often to female attorneys. Overall, Phillips and Carter suggest female attorneys may simply fare less well at the Court because of how they are treated at oral arguments.²⁵

Most recently, Patton and Smith reveal female attorneys are affected greatly by the unconscious gendered treatment by Supreme Court Justices.²⁶ They find women are interrupted more often than men, for longer periods than men, and overall speak about 350 fewer

18. KARPOWITZ & MENDELBERG, *supra* note 10, at 33-50.

19. Szmer et al., *supra* note 17, at 72.

20. *Id.*

21. James C. Phillips & Edward L. Carter, *Gender and U.S. Supreme Court Oral Argument on the Roberts Court: An Empirical Examination*, 41 RUTGERS L.J. 613, 643 (2010).

22. *See id.* at 643.

23. *See generally* Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?* 29 WASH. U. J.L. & POL'Y 241 (2009).

24. Phillips & Carter, *supra* note 21, at 643.

25. *See id.* at 643.

26. Dana Patton & Joseph L. Smith, *Lawyer, Interrupted: Gender Bias in Oral Arguments at the U.S. Supreme Court*, 5 J.L. & CTS. 348 (2017).

words during oral argument than men.²⁷ Interestingly, even as the number of women on the Supreme Court increases, this effect has not dissipated. Perhaps most important for Patton and Smith is that the typical benefit of being on the winning side—meaning being interrupted less often—is not afforded to women. Instead, “[f]emale lawyers are treated like losers whether they are on the winning side or not.”²⁸

II. SPEAKING TIME AND NEGATIVE TREATMENT DURING DISCUSSIONS

The question is how do these signals manifest themselves in women’s behavior? Here we focus on signaling through social interactions, as these interactions often play a large part in reinforcing the idea that women are less powerful than men. For our purposes, we suggest this phenomenon reveals itself through Justices speaking more than female attorneys (while they do not take the same tack with male attorneys) and through the use of negative interruptions specifically during discussions.

We turn first to the general idea of how speakers interact with one another in order to accomplish goals in a decision-making context. Sociologists, economists, and psychologists have long studied the way in which humans interact toward, and react with, one another in a group decision-making context. We are particularly interested in how actors treat speakers who are charged with providing information within group discussions. Consider that when a person speaks in a group context she does so to accomplish interactional goals or to block others from accomplishing theirs.²⁹

27. *Id.*

28. Patton & Smith, *supra* note 26, at 352. Scholars have also addressed this question comparatively. For instance, an analysis of the High Court of Australia finds that the justices are less likely to vote for the side represented by a female attorney when that side is the appellant but not when that side is the respondent. See Russell Smyth & Vinod Mishra, *Barrister Gender and Litigant Success in the High Court of Australia*, 49 AUSTL. J. POL. SCI. 1, 3 (2014). Mishra and Smyth also find that this negative effect can be remedied with additional female justices and additional liberal justices on the bench, though this has yet to fully offset the effects (as Smith and his colleagues find). *Id.* at 7-8. This suggests that women and liberal justices may behave more favorably toward female attorneys although this has yet to be empirically tested.

29. Peter Kollock, Philip Blumstein & Pepper Schwartz, *Sex and Power in Interaction: Conversational Privileges and Duties*, 50 AM. SOC. REV. 34, 35 (1985). See generally Barbara G. Kanki, Valerie Greaud Folk & Cheryl M. Irwin,

Communication also enables people to state their intentions and to send and receive information between others in the group.³⁰

Put in political science terms, actors speak in an effort to move conversations toward their preferred outcome or to at least ensure a decision will not be moved toward a least desirable outcome. For instance, Supreme Court Justices sitting at oral arguments may attempt to control the direction of a discussion by asking questions or by making statements toward the arguing attorney about how they view the case. In so doing, the Justices are able to help or hinder an attorney arguing a case before the High Court.

While we are interested in how speaking can move a discussion in a specific direction, we are more interested in how, if a person wants to move a discussion toward issues he or she prefers to discuss, interrupting another participant is often an effective strategy. Indeed, Smith-Lovin and Brody³¹ explain that interruptions are meant to prevent a particular speaker from completing a thought or from accomplishing interactional goals (which, for our purposes, means an attorney trying to convince the Court to rule in a particular way). Additionally, interruptions may serve to disorganize a person's speech, and ultimately, her ideas.³²

The key to this literature is that, by interrupting a speaker, another member of a group can change the entire dynamic of a decision-making process.³³ In other words, while communication is generally meant to convey specific information in a group decision-making process, interruptions are meant to alter the topic or overall dynamic of the conversation.

Beyond general interruptions, we suggest this strategy can sometimes be interpreted as a negative signal based on the language used by an interrupter.³⁴ In fact, scholars argue that those who interrupt others have more power and dominance than the speaker

Communication Variance and Aircrew Performance, 1 INT'L J. AVIATION PSYCHOL. 149, 150 (1991).

30. Rick van der Kleij et al., *Effects of Time Pressure and Communication Environment on Team Processes and Outcomes in Dyadic Planning*, 67 INT'L J. HUMAN-COMPUTER STUD. 411, 412 (2009).

31. See generally Lynn Smith-Lovin & Charles Brody, *Interruptions in Group Discussion: The Effects of Gender and Group Composition*, 54 AM. SOC. REV. 424 (1989).

32. See generally Candace West, *Against Our Will: Male Interruptions of Females in Cross-Sex Conversation*, 327 ANNALS N.Y. ACAD. SCI. 81 (1979).

33. *Id.*

34. KARPOWITZ & MENDELBERG, *supra* note 10, at 202.

who has been interrupted.³⁵ The consequences of such behavior are great. Indeed, when members of lower-status groups are interrupted, the negative communication tends to silence them.³⁶ This negative communication also has a negative effect on overall brain function. According to Newberg and Waldman, the stress hormones released when a person experiences something negative immediately “interrupt the normal functioning of your brain, impairing logic, reason, language processing, and communication.”³⁷ Research by Spalek et al. shows that women react to negative emotions more strongly than men.³⁸ These stronger emotions produce increased amounts of stress hormones, which in turn, further impair brain function.³⁹

This intuition stems from research that ties emotion expressed through language to people’s feelings, intentions, and psychological thinking.⁴⁰ The claim that words carry emotional content is neither new nor controversial among decision-making scholars.⁴¹ Further, individuals use emotions with the greatest frequency when they are concerned about an outcome from a decision-making process.⁴² In short, the language one uses when interrupting another speaker may

35. Lyn Kathlene, *Power and Influence in State Legislative Policymaking: The Interaction of Gender and Position in Committee Hearing Debates*, 88 AM. POL. SOC. REV. 560, 564 (1994).

36. KARPOWITZ & MENDELBERG, *supra* note 10, at 202.

37. Andrew Newberg & Mark Waldman, *The Most Dangerous Word in the World*, PSYCHOL. TODAY (Aug. 1, 2012), <https://www.psychologytoday.com/blog/words-can-change-your-brain/201208/the-most-dangerous-word-in-the-world> [<https://perma.cc/2DLA-HKX3>].

38. *See generally* Klara Spalek et al., *Sex-Dependent Dissociation Between Emotional Appraisal and Memory: A Large-Scale Behavioral and fMRI Study*, 35 J. NEUROSCIENCE 920 (2015).

39. *Id.*; *see also* Newberg & Waldman, *supra* note 37.

40. *See* Yla R. Tausczik & James W. Pennebaker, *The Psychological Meaning of Words: LIWC and Computerized Text Analysis Methods*, 29 J. LANGUAGE & SOC. PSYCHOL. 24, 37 (2010).

41. *See generally, e.g.*, NICO H. FRIJDA, *THE EMOTIONS* (1986); Richard P. Bagozzi et al., *Cultural and Situational Contingencies and the Theory of Reasoned Action: Application to Fast Food Restaurant Consumption*, 9 J. CONSUMER PSYCHOL. 97 (2000); *see also* James W. Pennebaker, Matthias R. Mehl & Kate G. Niederhoffer, *Psychological Aspects of Natural Language Use: Our Words, Our Selves*, 54 ANN. REV. PSYCHOL. 547, 571-72 (2003); Rik G. M. Pieters & W. Fred Van Raaij, *Functions and Management of Affect: Applications to Economic Behavior*, 9 J. ECON. PSYCHOL. 251, 259 (1988).

42. *See* Marcel Zeelenberg et al., *On Emotion Specificity in Decision Making: Why Feeling Is for Doing*, 3 JUDGMENT & DECISION MAKING 18, 20 (2008).

affect the degree to which a speaker is able to make a point or convince others to make a decision.

In turn, if there is an emotional element to language a political actor uses, and if the political actor has a preference over an outcome, then the actor's emotions indicate what decision she will make. Zeelenberg and his colleagues explain this relationship: "We propose that emotions commit decision makers to certain courses of action by providing control precedence (Frijda, 1986) which means that the experience of an emotion brings forward an associated goal that may overrule other goals"43 Linguists,44 sociolinguists,45 discourse analysts,46 and communications scholars47 reach similar conclusions. They demonstrate that words, and the emotions behind them, provide valuable insight into people's intentions, motives, and desires. In turn, Zeelenberg et al. conclude, "emotions can be understood as programs for intuitive decision-making, imposing upon the decision maker inclinations for action that, in a given situation, most adequately serve current strivings."⁴⁸ Ultimately, understanding emotions is important,⁴⁹ by systematically analyzing people's words—and thus their desires and intentions—it is possible to predict their actions.⁵⁰

The question is whether women face more negative treatment than do men, especially when men interrupt women during conversation. Karpowitz and Mendelberg find they do. In their analysis of negative interruptions—what they define as an interruption that "claims the floor from the speaker to express disapproval or opposition"⁵¹—they demonstrate that such

43. *Id.* at 19.

44. *See, e.g.,* Cynthia M. Whissell & Michael R.J. Dewson, *A Dictionary of Affect in Language: III. Analysis of Two Biblical and Two Secular Passages*, 62 PERCEPTUAL & MOTOR SKILLS 127, 131 (1986).

45. *See, e.g.,* Penelope Eckert & Sally McConnell-Ginet, *New Generalizations and Explanations in Language and Gender Research*, 28 LANGUAGE SOC'Y 185, 199-200 (1999).

46. *See, e.g.,* Deborah Schiffrin, *The Textual and Contextual Basis of Discourse*, 102 SEMIOTICA 101, 101-02 (1994).

47. *See, e.g.,* Laura K. Guerrero, Jess K. Alberts & Brian Heisterkamp, *Discrepancy Arousal Theory and Cognitive Valence Theory*, in THE NEW HANDBOOK OF LANGUAGE AND SOCIAL PSYCHOLOGY 57, 68-69 (W. Peter Robinson & Howard Giles eds., 2001).

48. Zeelenberg et al., *supra* note 42, at 24.

49. *See generally* Pennebaker, Mehl & Niederhoffer, *supra* note 41.

50. Zeelenberg et al., *supra* note 42, at 19.

51. Tali Mendelberg & Christopher F. Karpowitz, *Power, Gender, and Group Discussion*, 37 ADVANCES POL. PSYCHOL. 1, 14 (2016).

interruptions undermine a speaker's authority as they engage in the conversation.⁵² Such negative interruptions, in turn, affect females in a more adverse way than they affect males. Karpowitz and Mendelberg find that men make more negative interruptions than women do and that women are three times more likely than men to stop speaking and yield to the person interrupting them.⁵³ When such negative interruptions are received, women are more likely than men to be negatively affected because they typically come into a discussion with a lower level of assumed authority.⁵⁴ The bottom line is that women are more often interrupted than are men during discussions, and when done so negatively, such behavior has clear effects on their ability to make a strong argument.

III. SUPREME COURT ORAL ARGUMENTS

Based on the multidisciplinary findings in the previous Part, we posit there are two components of language (interruptions and negative emotion) that may help us understand a speaker's view of a particular topic. Recognizing this, we turn to U.S. Supreme Court oral arguments to gain insight into how the language Justices invoke during these proceedings may allow us to predict individual votes and aggregate case outcomes. We first place our study within existing works.

Oral arguments are an important component in the Supreme Court's decision-making process. In particular, they provide Justices with information and offer a "fresh perspective[]" when deciding cases.⁵⁵ On this account, these proceedings influence case outcomes because they give Justices an opportunity to clear up lingering questions from the briefs and to gauge their colleagues' views.⁵⁶ Research also demonstrates the quality of arguments influences Justices' decisions.⁵⁷ A growing body of evidence also suggests oral

52. *Id.*

53. KARPOWITZ & MENDELBERG, *supra* note 10, at 203.

54. *Id.*

55. *See, e.g.*, DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 246 (8th ed. 2008); *see also* JEFFREY A. SEGEL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 280 (2002).

56. *See, e.g.*, TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 21 (2004); Stephen L. Wasby, Anthony A. D'Amato & Rosemary Metraier, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 418-19 (1976).

57. *See, e.g.*, Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI.

arguments may provide a barometer of how Justices will rule in a given case. For example, Chief Justice John Roberts has suggested that the number of questions asked during oral arguments can be used to predict case outcomes.⁵⁸ Before joining the Court, Roberts tested this hypothesis by tallying the number of questions asked of advocates in a small number of arguments. Across a sample of twenty-eight cases selected from two terms, he found that 86% of the time the party receiving the most inquiries from the bench ultimately lost the case.⁵⁹

Court watchers extend the Chief Justice's findings. Greenhouse proposes it may be possible to predict the outcome of cases because the "tenor of the argument" often reveals Justices' intentions.⁶⁰ For instance, when the Court heard oral arguments in *Crawford v. Marion County Election Board*,⁶¹ she speculated the Justices' "questioning indicated that a majority did not accept the challenger's basic argument—that voter-impersonation fraud is not a problem."⁶² For Greenhouse, the Justices' behavior also meant they wanted to dismiss the case. Additionally, she pointed out that Justice Scalia spoke "with evident disapproval" during his questioning.⁶³ Ultimately, Greenhouse suggests the tone of oral argument questions can be used to predict outcomes—or at least some Justices' votes.

Evidence across cases, Justices, and time supports these anecdotes. In her response to the Supreme Court Forecasting Project,⁶⁴ Greenhouse reexamined her oral argument stories from the 2002 term and reviewed her predictions in sixteen cases.⁶⁵ What she found was not a surprise to her but may have been to the other participants in the project. Indeed, Greenhouse predicted the

REV. 99, 99 (2006); see generally, e.g., Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259 (2007).

58. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75 (2005).

59. *Id.*

60. Linda Greenhouse, *Justices Indicate They May Uphold Voter ID Rules*, N.Y. TIMES (Jan. 10, 2008), <http://www.nytimes.com/2008/01/10/washington/10scotus.html> [<https://perma.cc/8RSV-7VPP>].

61. 553 U.S. 181 (2008).

62. Greenhouse, *supra* note 60.

63. *Id.*

64. See generally Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

65. Linda Greenhouse, *Press Room Predictions*, 2 PERSP. ON POLS. 781, 781-84 (2004).

outcomes of more cases and votes of individual Justices, based on her assessment of questions asked during arguments, than either side of the forecasting project. She attributes her advantage over the computer based or expertise approach to the fact that hers were “postargument predictions.”⁶⁶

Two additional studies extend these analyses and further hint at a role for the emotional content of Justices’ questions. Analyzing a sample of ten cases from the Court’s 2002 term, Shullman finds initial evidence to suggest that Justices’ language may be related to Court decisions.⁶⁷ Having coded whether the Justices’ questions were either helpful or hostile in nature, Shullman notes that “[m]any 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.”⁶⁸ Wrightsman uses a different coding scheme and a sample of twenty-four cases to reach a similar conclusion.⁶⁹

We draw two lessons from the literature in these two Parts. First, females will speak less than their male colleagues during discussion and in appellate arguments in particular. Second, evidence demonstrates the emotional content of Justices’ language at oral arguments may help scholars predict how they will vote. Thus, female attorneys are likely to be treated differently than their male counterparts in terms of the negative language they face from the bench. Here we seek to test these two conjectures.

IV. DATA

To test these hypotheses, we analyze transcripts of all cases argued orally before the Supreme Court from 1986 to 2010. Because cases involve petitioners and respondents, we include an observation for each Justice for each attorney that presents arguments before the Court. To better illustrate, consider oral arguments for *Gonzales v. Carhart*, a case that concerned a federal law banning partial-birth

66. See *id.* at 782.

67. See generally Sarah Levien Shullman, *The Illusion of Devil’s Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271 (2004) (arguing that the frequency and content of Justices’ questions to counsel during oral arguments could be predictors of how Justices will vote).

68. See *id.* at 292.

69. LAWRENCE WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH 138-41 (2008).

abortions.⁷⁰ The proceedings began with the U.S. Solicitor General, Paul D. Clement, presenting arguments for the United States. This produced seven observations because we include an observation for each Justice that interacted with the Solicitor General during these important proceedings. After he concluded, Priscilla J. Smith presented arguments for the respondent, Dr. LeRoy Carhart et al. Likewise, her argument also produced seven observations. In total, *Gonzales v. Carhart* yields fourteen observations. We repeated this coding scheme for all cases in our sample. Ultimately, this yields a total of more than 31,000 observations.

A. Dependent Variables

To examine how Justices interact with attorneys, we employ two sets of dependent variables. First, we estimate the amount of time attorneys are allowed to speak during oral arguments. To do this, we compare the speaking times of Justices with the speaking times of attorneys. That is, we compare the amount of time Justices and attorneys speak. More specifically, we divide the amount of time each individual Justice talks by the amount of time each individual attorney talks. Larger values indicate Justices are speaking more during arguments. This measure serves as a useful proxy for the degree to which Justices allow attorneys to have their say. It also comports with recent analyses, including Patton and Smith's.⁷¹

Second, we examine the positive and negative content Justices employ when addressing attorneys. More specifically, we examine the percentage of language Justices direct toward an attorney that is positive (pleasant) or negative (unpleasant). This is not the first study to analyze the emotive content displayed at oral arguments. In fact, examinations of emotive content are becoming prominent features of research investigating oral arguments.⁷² The reason for this is intuitive. These measures provide unique opportunities to better understand these highly public and important proceedings. For us, the emotive content displayed at oral arguments provides a quantifiable measure for analyzing how Justices address attorneys.

70. *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007).

71. Patton & Smith, *supra* note 26, at 341-42.

72. See, e.g., WRIGHTSMAN, *supra* note 69, at 131-32; Greenhouse, *supra* note 60; Shullman, *supra* note 67, at 273; see generally, e.g., Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572 (2011).

B. Independent Variables

Our primary expectation is that Justices will treat female attorneys differently than male attorneys. To account for this, we include a dichotomous variable, *Female Litigant*. We code this variable by investigating how Supreme Court Justices address litigants participating in oral arguments. Specifically, we employ the honorifics—“Mr.”, “Mrs.”, and “Ms.”—Justices use when addressing litigants to determine gender. Female attorneys are coded 1, and male attorneys are coded 0.⁷³

In addition to *Female Litigant*, we include a number of control variables. First, we include a variable to control for whether cases involving gendered issues affect judicial behavior during these important proceedings. To determine whether a case involves a gendered issue, we follow the coding guidelines of the Supreme Court Database.⁷⁴ Specifically, we demarcate all cases that concern gender discrimination, abortion, or contraception as gendered issues.⁷⁵ These issues have been employed in existing research that analyzes the relationship between gender and judicial decision making⁷⁶ and dovetail with existing research on the difference women make on legislative policy making.⁷⁷ Cases involving gender discrimination, abortion, or contraception are set equal to 1 and 0 otherwise.

In addition to gendered issues, we account for the salience of a case. To capture the salience of a case, judicial scholars have relied on the salience measure created by Epstein and Segal.⁷⁸ However, we

73. We took a random sample of attorney names from the transcripts to spot check the accuracy of this approach. Our results were highly accurate.

74. Harold J. Spaeth et al., *Supreme Court Database*, WASH. U. L. (2017), <http://supremecourtdatabase.org> [<https://perma.cc/T4VN-M3K3>].

75. In the Supreme Court Database, we use the *Issue* variable to identify gendered issues, and we code the following *Issues* 20130 (gender discrimination), 20140 (abortion), and 50020 (contraception) as gendered issues.

76. Phillips & Carter, *supra* note 21, at 643; Szmer et al., *supra* note 17, at 72; Patton & Smith, *supra* note 26, at 337.

77. See, e.g., Michele L. Swers, THE DIFFERENCE WOMEN MAKE: THE POLICY IMPACT OF WOMEN IN CONGRESS 2, 5 (2002); see generally, e.g., Michele L. Swers, *Pursuing Women's Interests in Partisan Times: Explaining Gender Differences in Legislative Activity on Health, Education, and Women's Health Issues*, 37 J. WOMEN, POL. & POL'Y 249 (2016).

78. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72-81 (2000).

employ the Case Salience Index created by Collins and Cooper.⁷⁹ This index was created to handle the limitations that accompany measures that use front-page stories of *The New York Times* to estimate the salience of cases before the Supreme Court. Instead of relying exclusively on whether a case was covered on the front page of *The New York Times*, the Case Salience Index develops estimates based on news coverage of four newspapers from four regions of the United States.⁸⁰ It estimates the salience of cases as follows: cases that are reported on the front page of a paper are given a value of 2, cases that are covered anywhere in the paper are given a value of 1, and cases that are not reported on are given a value of 0.⁸¹ These scores are summed together and range from 0 to 8.

Since judicial scholars consistently find ideology influences all aspects of judicial behavior, we account for ideological predilections. This requires ideological estimates for Justices and attorneys. For Justices, we use Martin and Quinn⁸² scores to represent their ideological preferences. For attorneys, unfortunately, estimates are nonexistent. We overcome this limitation by using the median of the Supreme Court as a proxy for the side preferred by a majority of Justices and the losing side is set equal to -1 multiplied by the Court's median Martin Quinn Score for that case. Once we obtain ideological estimates for attorneys, we simply take the absolute difference between a Justice's ideological estimate and an attorney's estimate. Higher values represent greater distances between Justices and attorneys.

We also include two variables to represent participation by the Office of the Solicitor General. First, we include a dichotomous variable to indicate whether the Office of the Solicitor General participated in oral arguments. If a litigant is either the Solicitor General or Assistant Solicitor General, then this variable is equal to 1 and 0 otherwise. Second, we include a dichotomous variable to indicate whether the *Actual Solicitor General* participated in oral arguments. When this occurs the *Actual Solicitor General* is equal to 1 and 0 otherwise.

79. See generally Todd A. Collins & Christopher A. Cooper, *The Case Salience Index, Public Opinion, and Decision Making on the U.S. Supreme Court*, 37 JUST. SYS. J. 232 (2016).

80. *Id.* at 235.

81. *Id.* at 236.

82. See generally Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

Importantly, we include two other dichotomous variables. First, we include *Petitioner*, which denotes whether the attorney represents the petitioner or the respondent. When an attorney represents the petitioner, this variable is set equal to 1 and 0 otherwise. Second, we include a dichotomous variable to indicate whether the Justice is female, *Female Justice*. This variable is set equal to 1 when the Justice is Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, or Elena Kagan, and 0 otherwise. Finally, we control for how Justices interact with opposing counsel. In Model 1 this is simply the positive emotive measures for opposing counsel, and in Model 2 this is the negative emotive content for opposing counsel.

V. RESULTS

Because our first dependent variable is operationalized on a continuous scale, we employ ordinary least squares to study how an attorney's gender affects oral arguments. Initially we demonstrate the willingness of Justices to allow attorneys the ability to speak during these important proceedings and then turn to the factors that affect the emotive content Justices direct toward litigants arguing before the Court.

We begin with the analysis of whether Justices treat male and female attorneys differently in terms of speaking time. Table 1 displays our results and indicates a positive and significant relationship between female litigants and the degree to which Justices allow them to speak less often. Specifically, the positive and significant effect demonstrates Justices have a greater propensity to talk over female attorneys than to speak over male attorneys. This is clearly in line with our theoretical expectation and comports with the existing literature.

Table 1: Ordinary Least Squares: The Effects of Gender on the Ability of Attorneys to Speak During Supreme Court Oral Arguments

	Amount of Speaking Time
Female Litigant	0.037*** 0.006
Gender Issues	0.119*** 0.016
Case Salience Index	0.0003 0.001

Actual Solicitor General	0.024*** 0.008
Any Solicitor General	0.029*** 0.005
Ideological Distance	0.004* 0.002
Justice Vote for Attorney	-0.004 0.005
Female Justice	0.007 0.005
Petitioner	0.024*** 0.004
Observations	31,887
R-squared	0.005

Notes: * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Beyond our variable of interest there are other factors that affect speaking times during oral argument. Justices not only are more likely to speak more than female attorneys, but are more likely to act in this way even in cases that involve gendered issues. Specifically, cases involving gender discrimination, abortion, and contraception appear to generate more discussion from Justices. In addition, Justices are also more likely to speak over petitioners and ideologically distant attorneys. Indeed, the positive and significant effect for *Petitioner* may reflect the fact that the institutional structure of these proceedings shapes interactions between Justices and litigants. The coefficient for *Ideological Distance* is also positive and significant, which should come as no surprise. In fact, previous research consistently finds Justices are more willing to allow ideologically distant attorneys to speak less often.⁸³ Finally, Justices are more willing to speak over attorneys representing the Office of the Solicitor General. The coefficients for *Actual Solicitor General* and *Any Solicitor General* are both positive and significant. While these findings may suggest Justices are less deferential to Solicitor Generals and their staff, we believe that when taken into consideration with the results in the next model (see Table 2) these findings indicate Justices are potentially seeking information from a trusted and important litigant.

83. See Black et al., *supra* note 72, at 524.

Table 2: Ordinary Least Squares: The Effects of Gender on the Emotional Content of Justice Utterances During Supreme Court Oral Arguments

	Model 1 Positive Emotions	Model 2 Negative Emotions
Female Litigant	-0.071* 0.038	0.046* 0.025
Gender Issues	-0.010 0.092	0.215*** 0.059
Case Salience Index	-0.002 0.006	0.007* 0.004
Actual Solicitor General	-0.005 0.049	0.029 0.032
Any Solicitor General	-0.086*** 0.027	0.003 0.017
Ideological Distance	-0.018 0.012	-0.013* 0.007
Justice Vote for Attorney	0.153*** 0.033	0.012 0.021
Female Justice	-0.311*** 0.031	-0.125*** 0.020
Petitioner	-0.055** 0.025	0.143*** 0.016
Emotion to Opposition	0.110*** 0.005	0.123*** 0.005
Observations	31,965	31,965
R-squared	0.019	0.020

Notes: * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

In addition to the results in Table 1, Table 2 provides support for the expectation that Justices treat female attorneys differently from how they treat male attorneys. Focusing on the first column (Model 1), the negative and significant coefficient for *Female Litigant* provides evidence that Justices employ less positive (pleasant) language when addressing female attorneys. Focusing on the second column in Table 2, the positive and significant coefficient for *Female Litigant* also demonstrates that, when female litigants present oral arguments before the Court, Justices use more unpleasant words toward them. That is, the percentage of unpleasant words directed at a litigant increases when the attorney is female.

While the effect of this finding may seem, at first blush, substantively insignificant, it is anything but trivial. On average, the percentage of a Justice's language directed toward litigants that is negative or unpleasant is approximately 1.5%. However, when Justices interact with female litigants, Justices' negativity or unpleasantness increases to approximately 2%. To put this in perspective, this is an increase of approximately 33%, which suggests the change in negativity is noteworthy.

As in Table 1, a number of control variables are significant in either Model 1 or Model 2. In Model 1, both *Any SG* and *Voted for Attorney* are significant. Somewhat surprisingly, the coefficient for *Any SG* is negative, which suggests attorneys from the Office of the Solicitor General receive less positive language when questioned by Justices. However, when taken in context with Model 1, where the effect for *Any SG* is insignificant, this finding suggests attorneys representing the Office of the Solicitor General receive less positive, and potentially more neutral, language in their interactions with Justices. Also in Model 1, the coefficient for *Voted for Attorney* is positive and significant, which suggests Justices are more pleasant toward litigants they end up supporting. This finding is also in line with previous research.⁸⁴

In Model 2, both *Gender Issue* and *Case Salience Index* are positive and significant.⁸⁵ Model 2 shows that Justices use more negative language when participating in oral arguments in cases involving gender discrimination, abortion, or contraception. The emotive content of Justices' discussions increasingly becomes more negative. Table 2 also shows Justices use more negative language as a case becomes more salient. This may reflect the skepticism of Justices in cases where their preferences are probably more set as well as their willingness to challenge attorneys in such cases. Beyond these variables, the coefficient for *Ideological Distance* is negative and significant in Model 2. This is intuitive—Justices who are ideologically closer to a litigant simply do not treat him or her as poorly as they treat those with whom they may disagree.

Finally, three variables are significant in both models. First, *Female Justice* is not only significant, but also negative in both models. Combined, this suggests female Justices differ from male Justices in how they participate in these proceedings. Specifically,

84. See, e.g., WRIGHTSMAN, *supra* note 69, at 140-41; Black et al., *supra* note 72, at 579; Greenhouse, *supra* note 60; Shullman, *supra* note 67, at 278.

85. See *supra* Table 2.

our results show female Justices are not only less positive (Model 1), but also less negative (Model 2) toward attorneys. Second, *Petitioner* is negative in Model 1 and positive in Model 2, which indicates the institutional structure of oral arguments potentially influences how Justices speak to petitioners and respondents. Third, *Emotion to Opposition* is positive and significant in both models, which indicates Justices treat aspirants before the Court somewhat similarly. Overall, these findings provide more context for Justices' participation throughout oral arguments.

Certainly, the results of the above analysis are compelling. However, to bolster them we perform a *Robustness Check*. We do so because although our dependent variables are measured on a continuous scale, they contain upper and lower bounds. For example, none of our dependent variables can be below 0, and our emotive content variables cannot exceed 100. Because of these constraints we also employ Tobit regression models.⁸⁶ Moreover, because our data are not independent and are identically distributed, we also use robust standard errors clustered on each individual Justice.

Table 3 and Table 4 present results for our robustness check, and we focus exclusively on our primary expectations, which mirror our prior results.⁸⁷ Table 3 displays a positive and significant effect for female litigants, which is similar to our previous results. This finding indicates Justices are more likely to interrupt and talk over females during oral arguments. Additionally, in Table 4, the coefficient for *Female Litigant* in Model 1 is insignificant, but in Model 2 it is positive and significant. This latter finding suggests Justices are likely to employ negative emotive content when addressing attorneys.⁸⁸ Moreover, the effect of *Female Litigant* on the negative content of Justices' utterances in Table 4 is substantially greater than it is in Table 2.

86. RICHARD BREEN, 111 REGRESSION MODELS: CENSORED, SAMPLE-SELECTED, OR TRUNCATED DATA 12 (1996).

87. See *infra* Tables 3 & 4.

88. Black et al., *supra* note 72, at 572.

Table 3: Tobit Regression: The Effects of Gender on the Ability of Attorneys to Speak During Supreme Court Oral Arguments

	Interruptions
Female Litigant	0.040*** 0.008
Gender Issues	0.126*** 0.040
Case Salience Index	0.0002 0.009
Actual Solicitor General	0.030*** 0.009
Any Solicitor General	0.032*** 0.006
Ideological Distance	0.004* 0.013
Justice Vote for Attorney	-0.0008 0.009
Female Justice	0.016 0.037
Petitioner	0.035*** 0.015
Observations	31,887
McKelvey and Zavoina R-squared	0.005

Notes: * p < 0.10, ** p < 0.05, *** p < 0.01

Table 4: Tobit Regression: Robustness Check for the Effects of Gender on the Emotional Content of Justice Utterances During Supreme Court Oral Arguments

	Model 1 Positive Emotions	Model 2 Negative Emotions
Female Litigant	-0.063 0.053	0.083*** 0.020
Gender Issues	-0.019 0.118	0.244*** 0.080
Case Salience Index	-0.001 0.009	0.012 0.007

Actual Solicitor General	0.017 0.064	0.067* 0.040
Any Solicitor General	-0.064 0.060	0.023 0.035
Ideological Distance	-0.019 0.086	-0.012 0.060
Justice Vote for Attorney	0.195** 0.078	0.019 0.032
Female Justice	-0.323 0.315	-0.176 0.179
Petitioner	-0.004 0.115	0.245 0.184
Emotion to Opposition	0.121** 0.050	0.151* 0.031
Observations	31,968	31,968

Notes: * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

VI. DISCUSSION

A growing body of literature reveals that the treatment of women in political deliberations is not always pretty.⁸⁹ In this Article, we have taken the natural step toward better understanding how Justices interact with male and female attorneys by examining this interaction at the individual level. We theorized that gender would affect how Justices address attorneys during oral arguments.

Specifically, we expected Justices to treat male and female attorneys differently during oral arguments. The findings presented above support our expectations. Justices allow female attorneys to speak less. This, however, is not all. Female attorneys also receive less positive emotional content and more negative emotional questions and comments from Justices. Combined, these findings reaffirm prior literature that shows the treatment of women in political deliberations is not always pretty.⁹⁰ Substantively, our findings clearly indicate that an attorney's gender affects how he or she will be treated by Justices during oral arguments. But what else do our findings suggest? When placed alongside existing research more generally, our findings do not present a rosier picture for

89. See generally, e.g., KARPOWITZ & MENDELBERG, *supra* note 10; see, e.g., Patton & Smith, *supra* note 26, at 338; Phillips & Carter, *supra* note 21, at 643; Szmer et al., *supra* note 17, at 73.

90. See generally KARPOWITZ & MENDELBERG, *supra* note 10.

female litigants. After all, it is well documented that attorneys who are treated more unpleasantly and are not allowed to speak as much are less likely to win at the Court.⁹¹ Given female attorneys face both types of negative treatment, it is not a stretch to think female attorneys have an uphill battle in front of the Supreme Court. And this has implications not only for female attorneys, but also for their clients.

Future research has several options for presenting a fuller picture for whether Justices do in fact treat female attorneys differently. For example, scholarship could explicitly model whether female litigants are less likely to win at the Court. In particular, this research could take a step back and examine how aggregate patterns of Justice and attorney interactions influence the likelihood that the Court rules for or against female litigants. In addition, future research could examine under what conditions individual Justices are more likely to vote in favor of female litigants. Finally, future research could go beyond the Supreme Court and examine state or foreign courts to better understand how judges treat and address female attorneys. These avenues of exploration are ripe for future scholarship and could better document the potential uphill battle female attorneys face within and beyond appellate courts.

91. See, e.g., WRIGHTSMAN, *supra* note 69, at 140-41; Black et al., *supra* note 72, at 572; Greenhouse, *supra* note 65, at 782; Shullman, *supra* note 67, at 272.