6 ~ The Chief Justice and Oral Arguments at the U.S. Supreme Court

TIMOTHY R. JOHNSON AND CHARLES GREGORY

Senator Strom Thurmond (R-SC) described the Chief Justice of the United States as holding "the second most powerful position in the world, second only to the Presidency of the United States."[1] Interestingly, Thurmond is not the only senator to suggest the extraordinary power chief justices wield. Senate floor speeches and confirmation hearings are replete with statements that allude to the chief's powerful position in American politics. Indeed, senators view the internal and external prerogatives attached to the chief justiceship as reservoirs of power. Internally, chiefs initiate the Court's agenda-setting process,[2] preside over conference,[3] and assign opinions when they are in the majority.[4] Externally, the chief justice chairs the Judicial Conference, the Federal Judicial Center, and the Supreme Court Historical Society.[5] In addition, chiefs supervise the Administrative Office of the U.S. Courts and are a board member of the National Gallery of Art, the Hirshhorn Museum and Sculpture Garden, and the Smithsonian Institution.[6] These prerogatives and responsibilities supposedly enable the chief justice to exercise substantial leadership over the Supreme Court, the federal judiciary, and beyond.

While senators may perceive the chief justiceship as a powerful institution, scholars and justices doubt the day-to-day power of this position. In fact, beyond the limited internal powers we explicate above, it is unclear whether the associate justices treat the chief as simply one among equals or whether they defer to the chief as the leader of the Court. The reason this distinction is unclear is that the vast majority of the Court's decision-making process is shrouded in secrecy. Data simply do not exist to make this determination. Here we employ data from the one public aspect of this

process—oral arguments—to gain leverage on this intriguing question. Specifically, we compare how chief justices and associate justices act during these proceedings. We also compare how associate justices interact with (and treat) the chief in open court. To do so, we analyze data from a sample of oral arguments during the Warren E. Burger, William H. Rehnquist, and John G. Roberts Court eras.

Our analysis leads us to two broad conclusions. First, chief justices attempt to exercise leadership. Specifically, we find that chiefs talk more than associate justices during oral argument and ask more questions. We believe that by talking more, chief justices attempt to send signals to the other justices and to control the debate during oral argument. This is, as Zorn and Rice argue in a subsequent chapter, an indication of task leadership. In addition, chiefs attempt to make these signals even stronger by using more emotional language when interacting with attorneys. Again, as Zorn and Rice argue, this is akin to social leadership. Second, we find that while the chief talks more, his colleagues interrupt him less often than they do other justices. That is, associate justices do not cut off the chief in midsentence as often as they interrupt their other colleagues. This indicates they are generally willing to give chief justices at least some leeway when he speaks during these proceedings.

To flesh out these main findings, we begin by explaining why we believe the Court's oral arguments help us assess the chief's relationship with the associate justices. We then discuss the data we analyze, present an empirical assessment of these data, and discuss the implications of this analysis for understanding the relationship between associate justices and the Chief Justice of the United States.

Chiefs, Associates, and Supreme Court Oral Arguments

As the introduction to this volume (and various chapters of it) indicates, scholars recognize the potential for influence inherent in the office of the chief justice. Scholarly interest in leadership styles focuses on determining the extent to which chief justices successfully lead the nation's court of last resort. For example, Danelski suggests a chief's leadership style affects the behavior of associate justices.[7] Specifically, chiefs engage in two forms of leadership that may influence norms of behavior: task leadership and social leadership. Task leaders provide guidance on complex cases, make suggestions, and are more likely than their colleagues to frame discussions. Ultimately, task leaders present their "views with force and clarity and de-

fend them successfully."[8] They are therefore able to secure the support and confidence of the eight associates. In contrast, social leaders soothe tension by "inviting opinions and suggestions" and by attending to the emotional needs of other justices, particularly those in losing coalitions.[9]

The primary difference between the two leadership styles is that task leaders concentrate on the Court's decisional process while social leaders focus on maintaining social cohesion and a collegial working environment. Applying this dichotomous conception to examine the William Howard Taft, Charles Evans Hughes, and Harlan Fiske Stone Courts, Danelski argues the leadership styles of Taft and Hughes maintained cohesion on the Court. In contrast, during Stone's tenure as chief justice the Court became embroiled in conflict, and its cohesiveness clearly disintegrated.

Unfortunately, styles of, and opportunities for, leadership occur primarily behind closed doors and therefore out of sight from Court watchers, scholars, and interested spectators. This makes it difficult to determine whether associate justices defer to chief justices as the latter attempt to exert influence. The Court's decision-making process does, however, have one public aspect—the oral arguments in each case granted plenary review—that may provide purchase on this phenomenon. These proceedings may, therefore, provide a rare opportunity to examine whether associate justices defer to chief justices and whether chief justices are able to exercise leadership. Indeed, oral arguments allow us to answer the following questions: Are chief justices willing to exercise leadership during oral arguments? How do associate justices respond to or interact with the chief justice during oral arguments? Are associate justices more willing to defer to a chief justice during these proceedings? To answer these questions we turn to an examination of the role oral arguments play generally in the Court's decision-making process.

As with the other aspects of the Court's decision-making process, evidence establishes that, generally, the oral arguments in cases the Court hears play an integral role in how the justices decide cases they hear.[10] Specifically, there are myriad ways in which this one-hour conversation between Court and counsel, as well as between the justices themselves, may influence case outcomes. Justices, for example, use these proceedings to gather additional information not contained in litigants' briefs.[11] Such information includes the facts of the case, the policy consequences of a decision, pertinent precedent, and how Congress or the president might respond if the Court decides in a particular way.[12]

Beyond providing information to the Court, scholars demonstrate that, during oral arguments, justices often foreshadow how they will decide the

cases they hear.[13] Such signals come from the questions they ask the attorneys as well as from the emotive tenor of these questions. The key to this line of research is that when justices make these proceedings more difficult for one side (by asking that attorney more questions with less pleasant language), that side is more likely to lose.

Although the justices ostensibly speak to the attorneys during oral arguments—and while they clearly telegraph their views about the case—evidence from the academy, justices, attorneys, and keen Court watchers also suggests these questions may actually be conversations between the justices. In fact, the evidence is increasingly clear that the justices utilize these proceedings to learn about their colleagues' preferences and to make legal or policy points to one another rather than to simply ask questions of the attorneys. In so doing, they begin the coalition-building process that culminates in a majority opinion.[14] Justice Kennedy explained how this process works: "When the people come . . . to see our arguments, they often see a dialogue between the justices asking a question and the attorney answering it. And they think of the argument as a series of these dialogues. It isn't that. As [Justice] John [Paul Stevens] points out, what is happening is the court is having a conversation with itself through the intermediary of the attorney."[15]

It is these intra-bench conversations that provide the data we need to determine whether the chief acts as the leader of the Court and whether, at the same time, associate justices pay deference to the chief. To assess the former, the analysis below focuses on each justice's speech patterns during oral arguments and how the chief's penchant for asking questions and making comments compares with the associates. Additionally, we compare the degree to which the chief and the associates use language that may be classified as pleasant or unpleasant toward the attorneys arguing before them. If the chief exhibits leadership during oral arguments ***we expect him to speak more often than the associates***. At the same time ***we expect the chief to take the lead on hindering arguments that may stop the Court from reaching a particular outcome and to be more likely to help draw out arguments that may help the Court reach a desired outcome.***

In addition to understanding who controls the arguments from the bench, we are also interested in whether associate justices pay deference to the chief justice due to his position as first among equals. Our data also allow us to make this assessment because justices sometimes thwart a colleague's line of questioning during oral arguments by interrupting them with their own questions.[16] This may affect a justice in two ways. First, interruptions can keep a speaking justice from sending a signal about her

intentions and preferred outcome in the case. That is, interrupting a justice stops her in her tracks and allows the interrupter to move the discussion to another topic. Second, interruptions may keep a speaker from sending signals to those with whom she hopes to coordinate when the Court reaches a final decision. The bottom line is that interrupting a justice while she is asking a question or making a comment may be an effective strategy to follow during oral arguments. But if the associate justices actually view the chief as the leader of the Court, ***we expect them to defer to him by interrupting him less often during oral arguments than they interrupt their associate colleagues.***

Data

To examine the extent to which the chief exercises leadership and how associate justices interact with the chief justice, we employ oral argument data from the Burger, Rehnquist, and Roberts Courts. Specifically, we downloaded all available oral argument transcripts for three time periods: 1970 to 1979, 1998 to 2004, and 2005 to 2009.[17] Thus, we analyze almost 1,000 cases heard by the Burger Court, more than 470 cases heard by the Rehnquist Court, and more than 350 cases heard by the Roberts Court.

Initially, we focus on the average number of times each justice speaks during these proceedings. In particular, we compare speaking patterns between associates and chiefs (the number of questions or comments made by each justice) during the first four terms of the Roberts Court and during nine terms of the Burger Court (1970–1979). As we note above, we argue this measure serves as a proxy for justices' willingness to shape policy and to move cases toward their desired outcome during oral arguments. We expect leaders—in this case the chief—to exhibit leadership by speaking more often during these proceedings.

In addition to the general speech patterns of the justices, we are also interested in the linguistic nature of the questions and comments they make, whether they are meant to help or hinder one of the arguing attorneys. Here we turn specifically to the more than 350 cases decided during the first four terms of the Roberts Court. With these data we examine how pleasant (or unpleasant) justices act toward attorneys representing the federal government, toward attorneys representing litigants other than the federal government, and toward attorneys they are predisposed to support on the merits.

Finally, we analyze how justices interact with one another during oral arguments. To do so we focus on the last six terms of the Rehnquist Court

and the first three years of the Roberts Court.[18] Specifically, we examine how frequently justices interrupt one another in open court. In so doing, we seek to determine whether associate justices and chief justices behave similarly at oral argument and the extent to which associates defer to the chief during these proceedings.

Who Exhibits Leadership during Oral Arguments?

Our contention is that the Court's oral arguments are the only public opportunity for justices to shape judicial outcomes and to potentially exercise leadership in a public way. But who is most likely to attempt to shape outcomes and to exercise leadership during these proceedings? Figure 6.1 provides the data to answer this question. It compares the average number of questions asked by justices at oral argument for the first four terms of the Roberts Court (2005–2008). Specifically, we construct separate plots to compare the behavior of each associate justice with Chief Justice Roberts.[19]

The plot in the top left panel of figure 6.1 displays the average number of utterances by Chief Justice Roberts (solid bold line) compared to the average number of utterances by the associate justices collectively (dashed line).[20] The seven remaining plots depict the mean number of questions asked by Roberts (solid bold line) along with the mean number of questions asked by each associate justice (dashed line). Presented in this way, figure 6.1 provides visual data to assess our first phenomenon of interest.

Although conclusions based on visually examining plots require care, two patterns emerge from these data. First, with few exceptions, Roberts asked more questions than the associate justices. On average, he asked almost twenty-two questions per case while the average associate justice asked only about fifteen questions. This is a statistically significant difference of seven questions ($t = -8.59, p < .05$). More specifically, both the sign and magnitude of the t statistic indicate that Roberts asked significantly more questions than the average associate justice, a pattern that holds to varying degrees with the individual associate justices.

Certainly, some associate justices speak more often than does Roberts. For instance, during the 2005 term Justice Stephen G. Breyer asked just over twenty-four questions at oral argument, approximately three questions more than Roberts. This difference, however, is not statistically significant ($t = 1.37, p > .05$). In addition, during the 2005 and 2006 terms, Justice Scalia asked an average of twenty-eight and twenty-four questions respectively. That is, Scalia asked, on average, seven questions more in 2005 ($t = 3.35, p < .05$) and four questions more in 2006 ($t = 1.72, p < .1$)

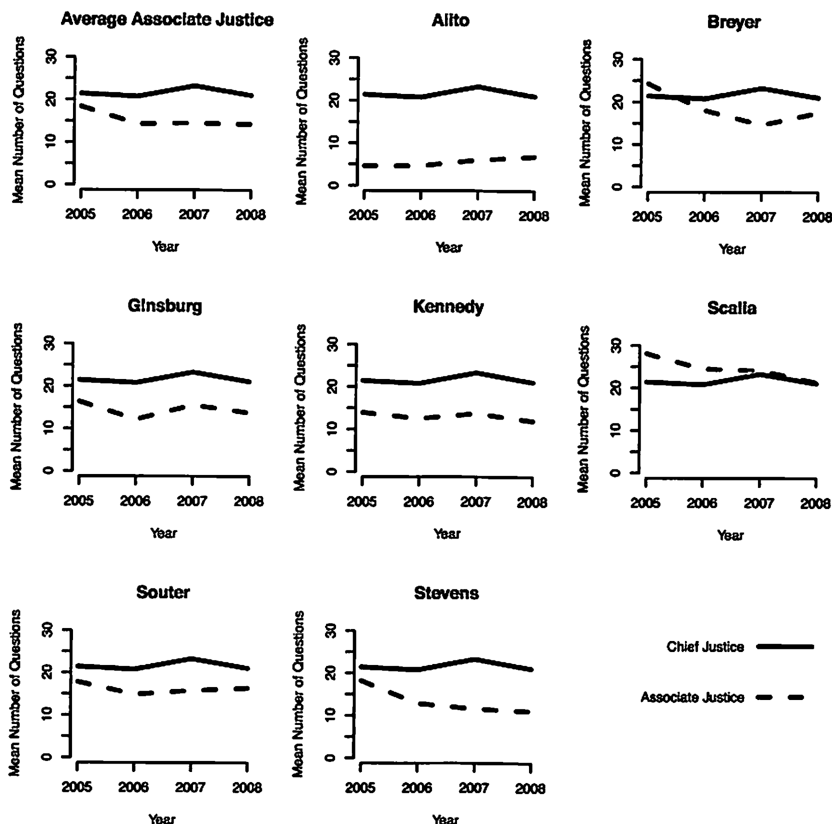

Fig. 6.1. Average number of questions asked during oral argument, 2005–2008

than Roberts asked during those two terms. On the other hand, the average number of utterances by Scalia, Breyer, and Stevens decreases during Roberts's tenure as chief. For example, both Breyer and Stevens ask almost seven fewer questions in 2008 than they did in 2005. Overall, figure 6.1 suggests that Chief Justice Roberts is willing to attempt to exercise leadership by speaking more often during oral arguments. His behavior seems to have had an effect on the behavior of the associate justices. Indeed, they have become less talkative with Roberts in the center chair.

As previous research demonstrates, chief justices differ in their willingness to exert leadership and in their ability to actually lead the Court.[21] To determine whether the Roberts Court patterns are similar to previous

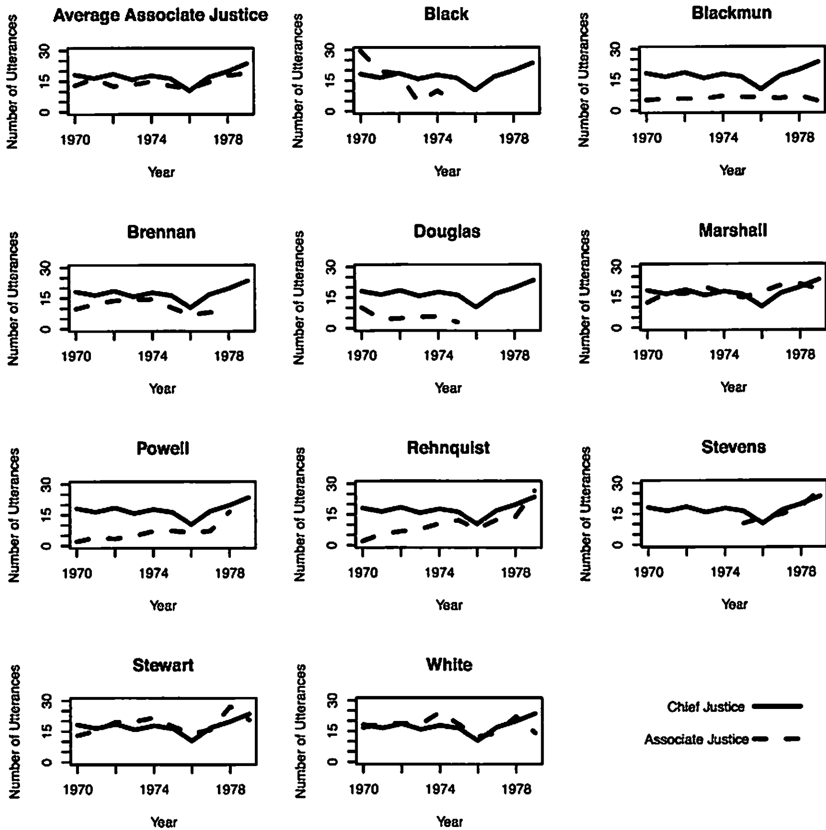

Fig. 6.2. Average number of questions asked during oral argument, 1970–1979

Courts, figure 6.2 depicts the average number of utterances made by justices during oral arguments under Chief Justice Burger. It is structured the same as figure 6.1. While variation exists in justices' utterances during the Burger Court era, it is clear that, like justices during the Roberts Court era, these justices also sought to shape policy as they sat during oral arguments.

We turn first to the chief justice. On average, Burger spoke the most often during oral arguments in our sample of cases. In fact, he spoke slightly more than sixteen times per case while the associate justices who served with him spoke slightly fewer than fourteen times. This difference suggests Burger was significantly more willing than the eight associate justices to exercise leadership and to seek to shape the policy options available to the

Court ($t = -5.93, p < .01$). Just as during the Roberts Court era, however, there were terms when some associates spoke more often than the chief. Indeed, for at least one term, Justices Black, Marshall, Stewart, and White spoke more often on average than did Burger.

Overall, similarities clearly exist between how justices acted during oral arguments on the Burger and Roberts Courts. That said, justices on the Burger Court demonstrated more variation in their speaking patterns. In addition, there was a relatively steady decline in utterances across justices from 1970 to 1976 and a steady increase from 1976 to 1979.[22] Despite these patterns, figures 6.1 and 6.2 generally suggest that chief justices are more willing than are associate justices to exert effort to shape policy during oral argument.

Who Takes the Lead on Probing Litigant Arguments?

Analyzing justices' utterances in different Court eras provides a first step toward examining who attempts to exercise leadership during oral arguments. Such an analysis, however, does not indicate how exactly justices attempt to do so. Therefore, we next examine how they actually treat different litigants during oral arguments. Note, initially, that the justices generally use more unpleasant language than they do pleasant language.[23] In fact, across our sample of cases, only Justice O'Connor and Chief Justice Roberts used more pleasant than unpleasant language. We speculate that the reason for this phenomenon is that, as Black and his colleagues argue, the justices often use these proceedings to knock down arguments from the side with which they disagree.[24]

Our interest lies, however, in how associate justices' behavior compares with the chief's. To make this determination we turn to figures 6.3 through 6.6, which depict the linguistic nature of the questions they posed to attorneys representing the federal government, to attorneys unaffiliated with the federal government, and to attorneys who represent the side with whom we would expect a justice to agree. Several patterns merit discussion.

First, Chief Justice Roberts uses more unpleasant and pleasant language toward attorneys representing the federal government as well as toward those unaffiliated with the federal government. Consider government attorneys first (usually the solicitor general or an assistant solicitor general). Roberts uses slightly more than twenty-four unpleasant words per case while associate justices use fewer than nineteen unpleasant words when discussing cases at oral argument with federal government attorneys. This difference is statistically significant ($t = -3.53, p < .05$), which indicates that

the chief justice is likely to be harder on attorneys representing the federal government. Second, it is clear that that Roberts treats nonfederal attorneys similarly to their government counterparts. Indeed, he certainly probes into their arguments by hammering home points with more unpleasant language. Indeed, he uses nineteen unpleasant words on average toward nongovernment attorneys while associates use thirteen. This difference is also significant ($t = -4.14$, $p < .05$).[25]

We interpret our general finding on unpleasant language to suggest chiefs exercise leadership during oral arguments because they are more likely to be critical of arguments attorneys forward. This holds for both federal attorneys and nonfederal attorneys. At the same time, the chief is more likely than his colleagues to use pleasant language toward attorneys. This too indicates a level of leadership for Roberts because he lends a helping hand and steps up to lighten the atmosphere in tense argument sessions. Ultimately, it is not a surprise to us that Roberts uses both pleasant and unpleasant language more often than his junior colleagues.

In addition to showing that when Chief Justice Roberts interacts with attorneys during oral arguments, he is more willing than his colleagues

TABLE 6.1. Average Overall Levels of Pleasantness and Unpleasantness by Justice, 2005–2008

	Pleasant Words	Unpleasant Words
Alito	4.974	8.217
	(4.59)	(7.415)
Breyer	26.208	36.327
	(14.732)	(19.174)
Ginsburg	14.107	21.625
	(14.107)	(13.74)
Kennedy	11.416	13.884
	(8.287)	(10.891)
O'Connor	8.516	8.462
	(5.652)	(6.389)
Rehnquist	6.9	6.9
	(4.003)	(6.019)
Roberts	19.733	26.199
	(10.561)	(12.251)
Scalia	19.575	33.303
	(12.793)	(20.061)
Souter	18.902	27.219
	(12.708)	(16.894)
Stevens	9.358	12.986
	(6.94)	(10.512)
Thomas	0.017	0.026
	(0.201)	(0.361)

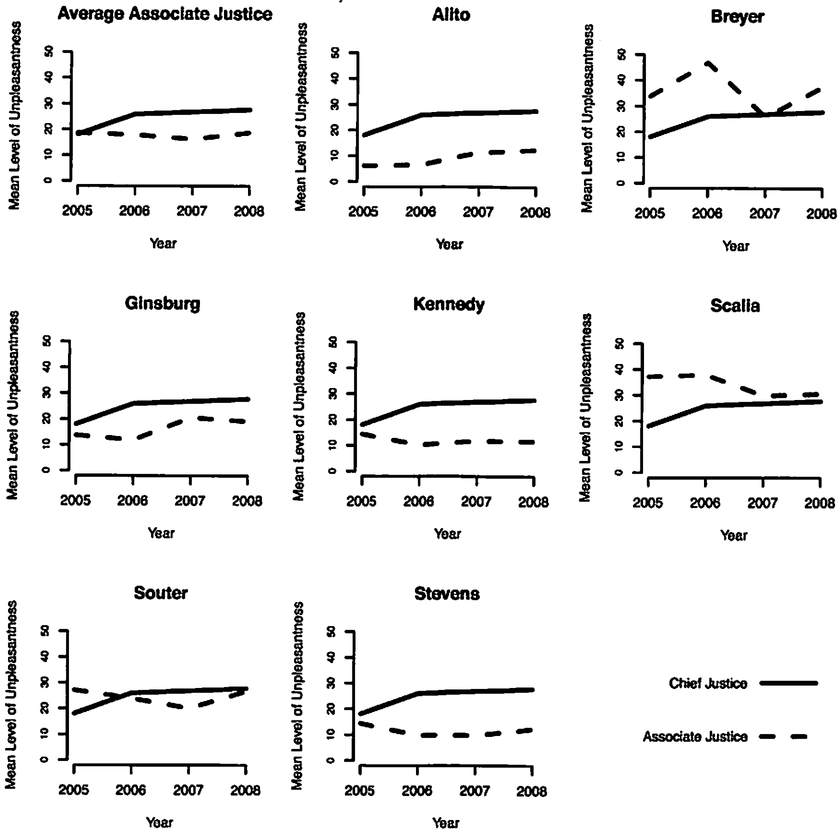

Fig. 6.3. Unpleasant questions directed at the federal government, 2005–2008

to use emotional language; the four figures indicate that Roberts's interactions with attorneys across terms has changed in his short tenure on the bench. Since his first year as chief, Roberts increased the amount of emotional language he used to interact with attorneys. The increase, however, remains more noticeable when he speaks to attorneys who do not represent the federal government. For example, in 2005 Roberts directed approximately twenty-one unpleasant words toward nongovernment attorneys. This number increased to twenty-seven during the final term in our sample.[26]

Similar patterns occur in Roberts's use of pleasant words, but the increase is not as large. This change in behavior comports with research that suggests that justices behave differently after they acclimate themselves to

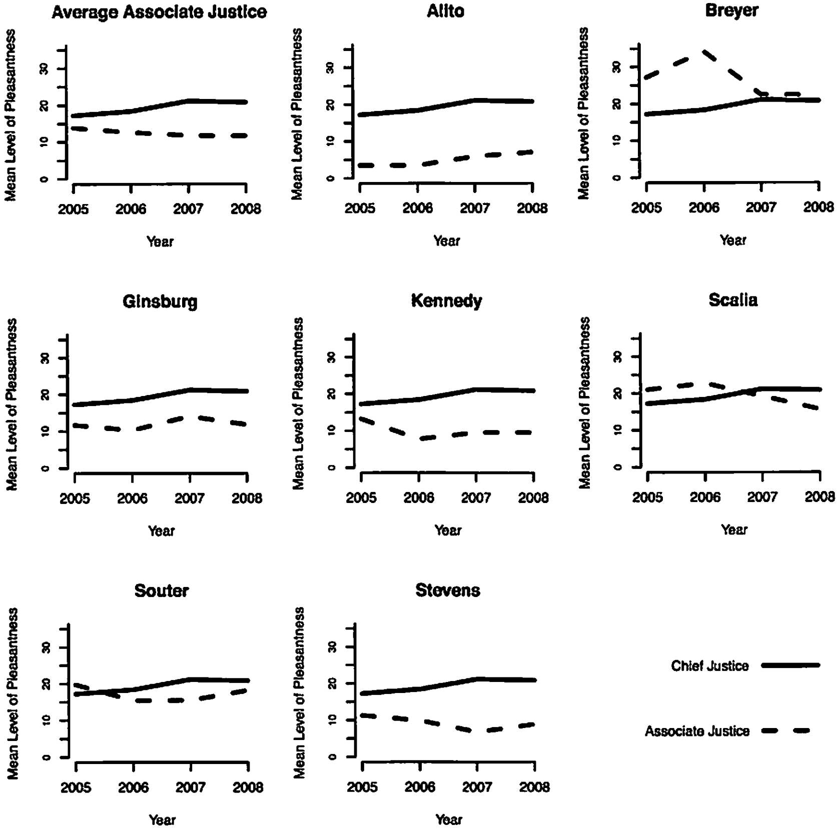

Fig. 6.4. Pleasant questions directed at the federal government, 2005–2008

their new positions.[27] As for associate justices, no single pattern accurately describes their interaction with litigants. Justices Kennedy, Scalia, and Stevens appear to use less emotional language across our sample. Justice Alito, who joined the Court at approximately the same time as Roberts, shows a similar increase, albeit a smaller one. Interestingly, Justices Ginsburg and Souter exhibit the greatest variation across terms.

Finally, because oral arguments provide justices an opportunity to shape judicial outcomes, we examine the ideological relationship between attorney's arguments and justices' use of affective language during these proceedings. In particular, as the leader of the Court, we expect chiefs to take the lead on helping attorneys who represent the side with whom they may agree and to lead the way in dissecting arguments forwarded by at-

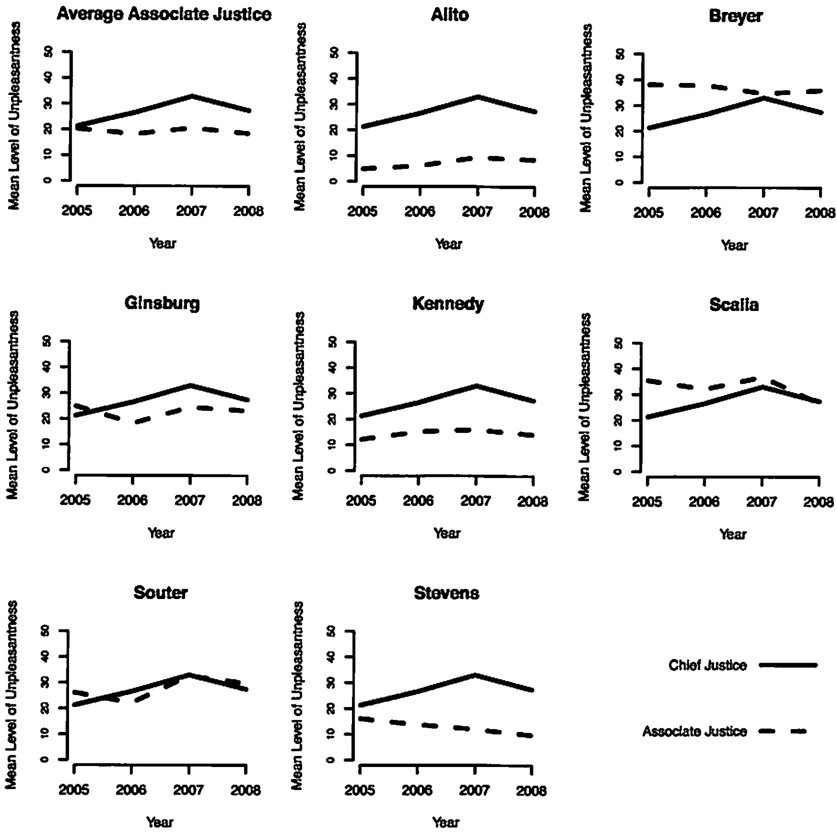

Fig. 6.5. Unpleasant questions directed at attorneys not representing the federal government, 2005–2008

torneys with whom he may disagree.[28] Again, we turn to the pleasantness of the language the chief and his associates use. We note initially that both the chief and associates are more willing to use language laced with emotional content when dealing with attorneys they oppose than with attorneys the support. On average, associate justices use approximately thirteen pleasant words when interacting with attorneys they support at the merit stage but they use approximately eighteen unpleasant words when dealing with attorneys they oppose. The chief, on average, uses approximately eighteen pleasant words while interacting with attorneys he is most likely to support at the merit stage and twenty-five unpleasant words toward attorneys he opposes at the merit stage. That is, the chief justice uses significantly more unpleasant words toward attorneys he is likely to oppose at the merit stage

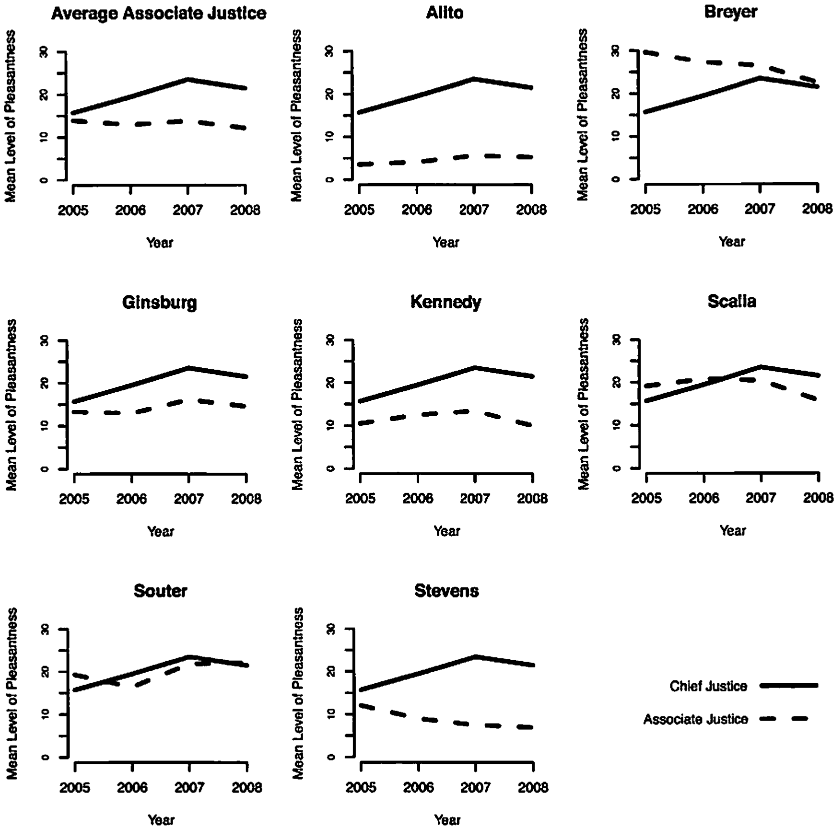

Fig. 6.6. Pleasant questions directed at attorneys not representing the federal government, 2005–2008

($t = 4.54$, $p < .05$) and significantly more pleasant words toward attorneys he is likely to support at the merit stage ($t = -6.49$, $p < .05$).

Beyond the general use of language, our interest is in the variance between the types of emotional language the chief uses versus the language associates use and at whom they direct that language. Figure 6.7 and figure 6.8 allow us to make this determination. With few exceptions, Roberts is more pleasant toward attorneys he supports than is the average associate justice. As predicted, he is also more unpleasant than are associates toward attorneys he is likely to oppose. Specifically, Roberts uses approximately eighteen pleasant words when interacting with attorneys he supports, while associate justices use approximately thirteen pleasant words

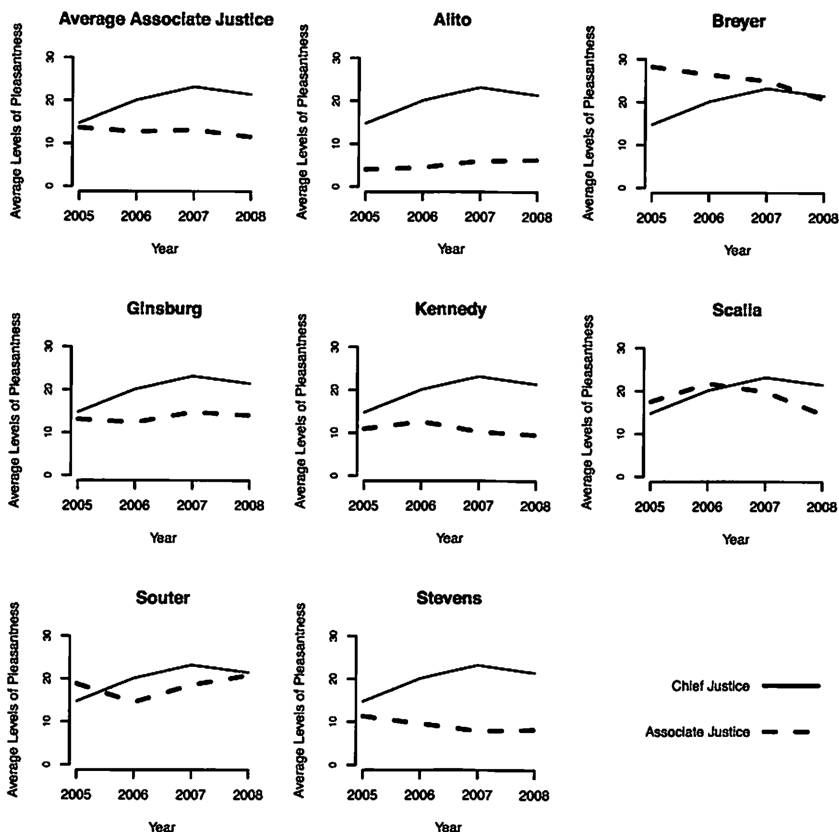

Fig. 6.7. Average number of pleasant questions directed at a side with which a justice agrees, 2005–2008

toward the side with whom they agree. At the same time he uses much more unpleasant language than the associates toward the party with whom he is predisposed to disagree. We interpret these data to indicate the chief "leads the charge" in bolstering arguments on his preferred side and in using more critical language toward the side he opposes. In short, on the affective side of justice utterances the chief clearly attempts to demonstrate leadership during oral arguments.

Roberts's leadership seems to take root early in his tenure on the bench. Figures 6.7 and 6.8 demonstrate how Roberts changes across terms and how his interactions with attorneys he supports differs from his interactions with attorneys he opposes. In his first term as chief Roberts uses ap-

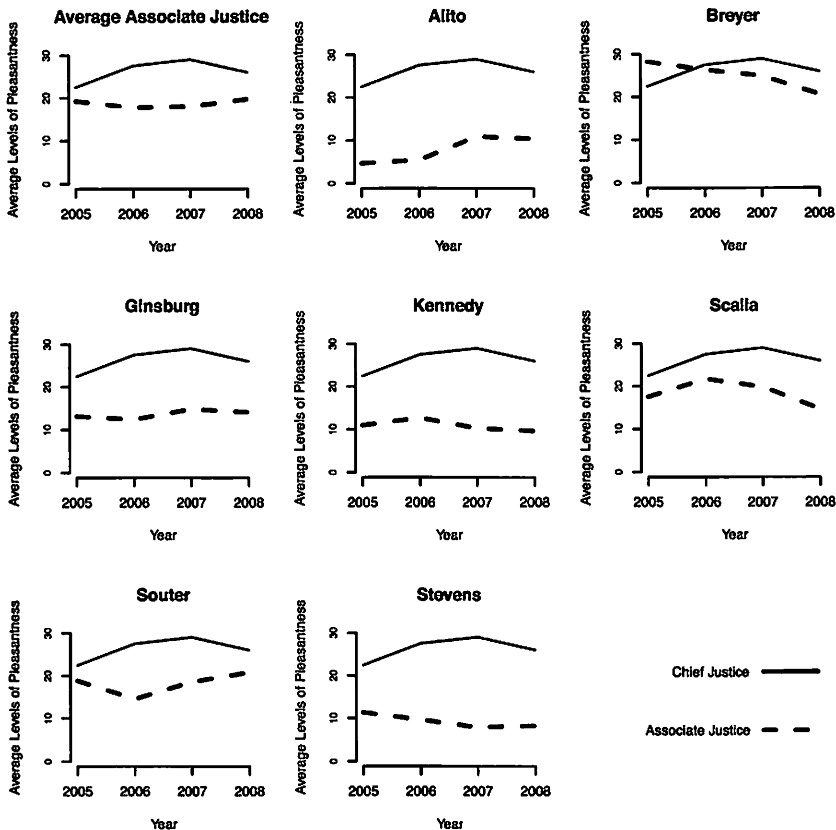

Fig. 6.8. Average number of unpleasant questions directed at a side with which a justice disagrees, 2005–2008

proximately fifteen pleasant words in his questions and comments pointed at attorneys with whom he is predisposed to agree while that average increases to twenty-one in the 2008 term. In contrast, the chief treats much more harshly attorneys with whom he disagrees. Indeed, in his first term Roberts uses approximately twenty-two unpleasant words when interacting with attorneys he opposes. This number increases, hitting a high of twenty-nine in 2007 before decreasing to twenty-five unpleasant words during the 2008 term. It remains to be seen if other chiefs act in the same manner as Roberts. These data will be available in the not-too-distant future, which will make such comparisons possible.

Overall, figures 6.3 through 6.8 offer us two insights. First, chief jus-

tices are more willing to engage actively during oral arguments in order to influence the final outcomes. Both Burger and Roberts consistently talked more during these proceedings than did their associate justices. In addition, Roberts is more willing to use unpleasant words when dealing with attorneys with whom he disagrees ideologically. This behavior indicates that he attempts to frame discussions and send signals about how he believes cases should be decided, both behaviors that indicate he tries to lead the Court.

Do Associates Demonstrate Deference to the Chief?

The previous sections indicate that chiefs (at a minimum) attempt to exercise leadership in open court by speaking more often and by attacking or defending one side of the case. Beyond the chief's own behavior, leadership may manifest itself in how the associate justices treat the chief during oral arguments. Fortunately, we have the data to test this conjecture as well. Specifically, we analyze the number of times each justice interrupts his or her colleagues. We define an interruption as when a justice is speaking (asking a question or making a comment) and another justice speaks (successfully or unsuccessfully) before an attorney can respond. This analysis is akin to the findings of Black, Johnson, and Wedeking, who find that justices use interruptions to forward their own views of the case.[29] While we agree with Black and his colleagues, we also believe interruptions can give us purchase on the degree to which associate justices defer to the chief as the Court leader.

Generally, we examine how frequently justices interrupt their colleagues during oral arguments. Figure 6.10 depicts these data for the 681 cases decided between 1998 and 2007. Two patterns are evident. First, justices rarely interrupt one another. In our sample, they take this tack, on average, less than one time per case. We posit that these data suggest a strong norm against any one justice trying to dominate the argument session. In fact, the justices clearly enforce this norm. In *U.S. v. R.L.C.* (1991), Chief Justice Rehnquist began to ask a question, and almost immediately Justice Scalia began to speak. In his oral argument observations of the case, displayed in figure 6.9, Justice Blackmun noted—on the fifth line of his notes—the chief's irritation: "CJ tells AS t[o] shut up while he is asking a q[uestion]." While Rehnquist actually used tamer language than Blackmun indicated, his point is the same given the tone of his voice; justices are sometimes annoyed by their colleagues' desire to speak over others on the bench.[30]

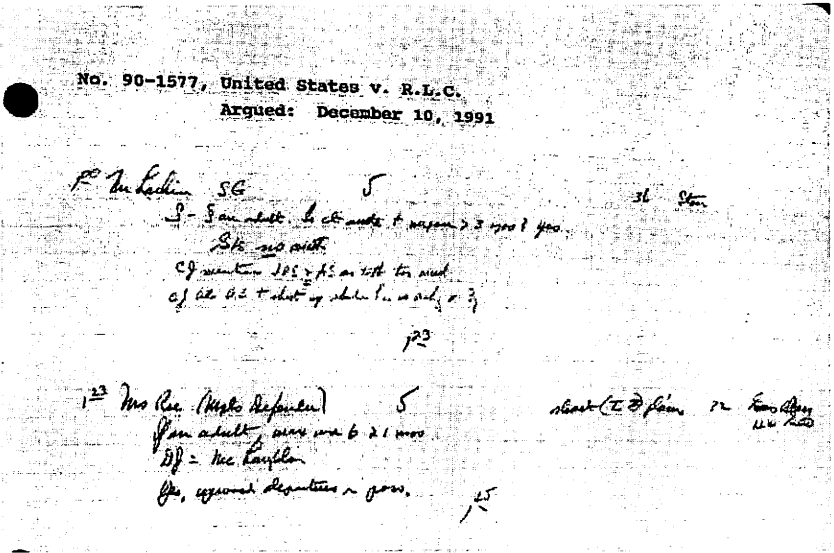
No. 90-1577, United States v. R.L.C.
Argued: December 10, 1991

Fig. 6.9. Justice Harry Blackmun's oral argument notes in *U.S. v. R.L.C.* (1991)

Beyond the observation that justices rarely interrupt one another, figure 6.10 also makes clear that Roberts was, in general, interrupted less often than were the associate justices during this time period ($t = 8.93$, $p < .05$). This suggests that the associate justices' behavior indicates some measure of deference to the chief. In fact, the justices who speak the most often during these proceedings—Breyer and Scalia—are much more likely to interrupt their associate colleagues than they are to interrupt the chief. In addition, while variation exists, the associates all exhibit some level of deference.

Figure 6.11 provides a more nuanced picture of these data. It delineates the number of times an associate justice interrupts each justice with whom he or she sits during oral arguments. The bold black line indicates the number of times an associate justice interrupts the chief and each gray line represents interruptions of separate associate justices. For example, Justice Alito (upper left corner) interrupts Justice Scalia (gray solid line) three times in 2005, twice in 2006, and once in 2007. In comparison, Alito interrupts Roberts once in 2005, twice in 2006, and once in 2007. This suggests Alito rarely interrupts the chief or the associate justices with whom he serves. This pattern changes, however, when we turn to justices who regularly speak during oral arguments. For example, Breyer interrupts Scalia

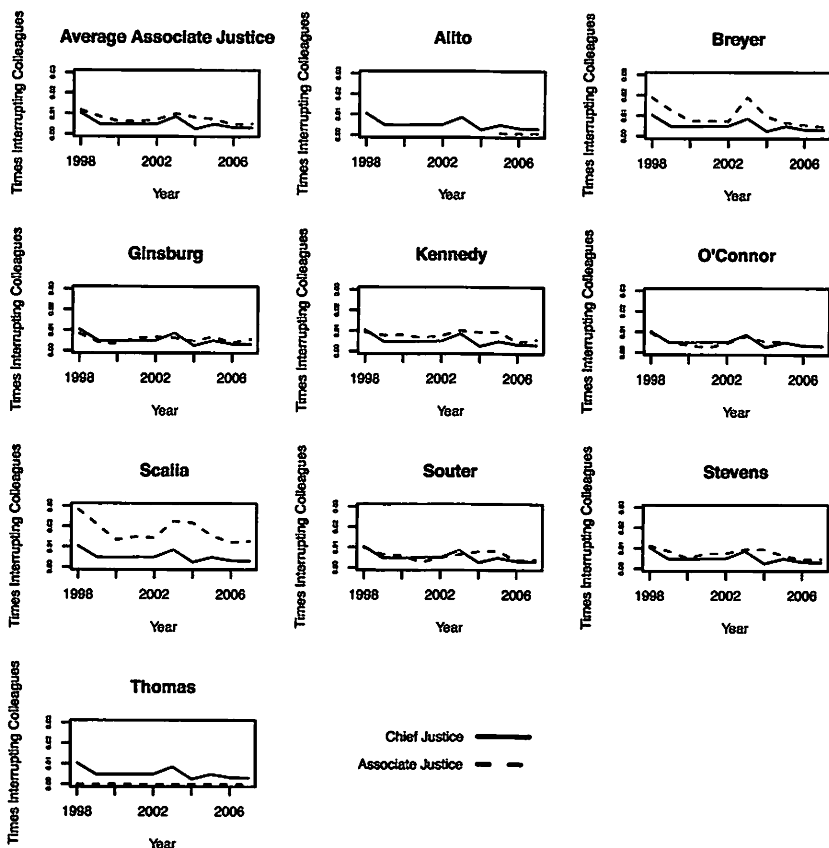

Fig. 6.10. Average number of times justices interrupt their colleagues, 1998–2007

more than sixty times in 1998 and almost fifty times in 2003. Interestingly, after both of these terms Breyer's interruptions of Scalia substantially decreased. The patterns that emerge in the Breyer plot are visible, to varying degrees, among the plots of the other seven associate justices.

Besides the overall ebb and flow of interruptions, Figure 6.11 suggests associate justices interrupt the chief justice less often than they interrupt other associate justices. In 2006 Alito interrupts the chief more than he interrupts any other associate justice. But Alito is the exception; for the most part Figure 6.11 suggests associate justices treat the chief justice as first among equals. Indeed, given that chiefs speak more during these proceedings (as we indicate in figures 6.1 and 6.2) and are interrupted at slightly

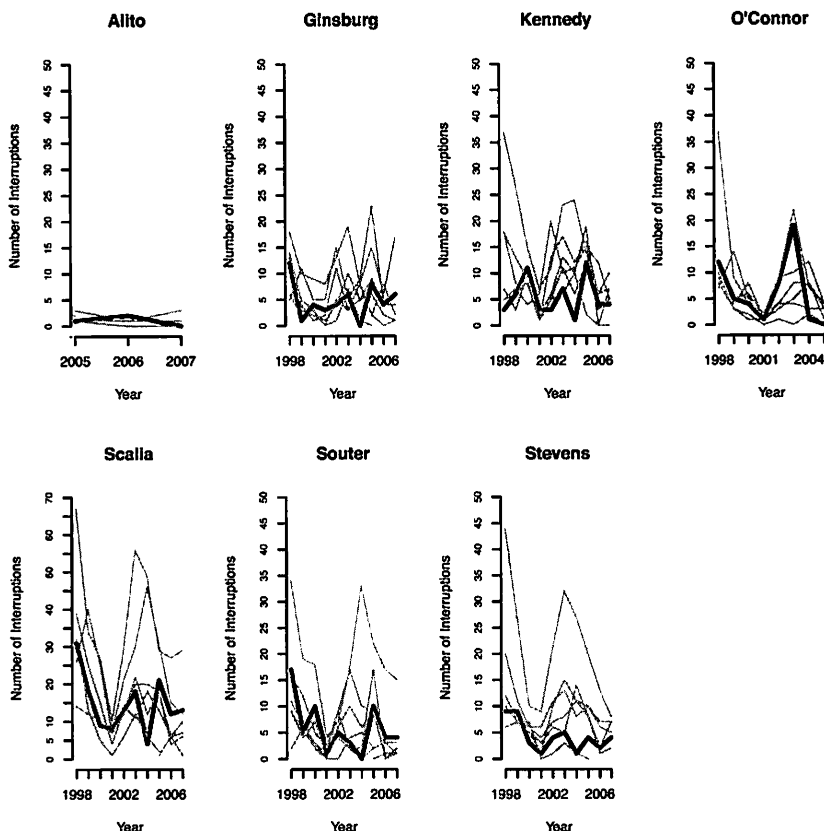

Fig. 6.11. Total number of questions that interrupt other justices by term, 1998–2007

lower rates than associates, figure 6.1 lends support to our deference argument. In fact, our analysis of figure 6.11, combined with our analysis of figure 6.1, suggests that associates interrupt the chief less often during oral arguments. This supports our conjecture that associate justices show deference to the chief.

Conclusion

Opportunities to lead or exert influence accompany the office of the Chief Justice of the United States. For example, chiefs can and do wield influence over the agenda-setting process during conference discussions[31] and when

they make opinion assignments.[32] It is not always clear, however, whether chiefs are able to exercise leadership or whether associate justices treat chief justices differently. As we note from the outset, this is because justices normally interact with one another outside of the public eye. Because of this, we turned to the public part of their decision-making process.

Our analysis of the Court's oral arguments leads us to several conclusions. First, chief justices speak more during oral argument than do associate justices. With few exceptions, both Burger and Roberts asked more questions and made more statements than the other eight justices seated on the bench with them. In addition, the chief is more willing to send signals about how the case should be decided by examining how justices treat litigants during these proceedings. For example, chiefs use more unpleasant language when interacting with attorneys they oppose. Second, we find that associate justices treat chiefs as first among equals, but not all the time. Ultimately, however, chiefs do exhibit public leadership during oral arguments, and the associates often follow his lead.

NOTES

1. 115 Cong. Rec. 15,179 (June 9, 1969) (statement of Sen. Thurmond).
2. Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998); Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).
3. Epstein and Knight, *The Choices Justices Make*; David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: W. W. Norton, 2000); Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* (New York: Holt, Rinehart, and Winston, 1984).
4. Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000); Forrest Maltzman and Paul J. Wahlbeck, "A Conditional Model of Opinion Assignment on the Supreme Court," *Political Research Quarterly* 57 (2004).
5. The chief justice by federal statute oversees the Judicial Conference, the Federal Judicial Center, and the Supreme Court Historical Society (Peter G. Fish, "Judicial Administration and Organization: Chief Justice of the United States," Federal Judicial Center, www.fjc.gov/history/home.nsf/page/admin_04.html, accessed March 25, 2013.
6. Robert J. Steamer, *Chief Justice: Leadership and the Supreme Court* (Columbia: University of South Carolina Press, 1986).
7. David J. Danelski, "The Influence of the Chief Justice in the Decisional Process," in *Courts, Judges, and Politics: An Introduction to the Judicial Process*, 6th ed., ed. Walter F. Murphy et al. (New York: McGraw-Hill, 2006).
8. Ibid., 676.
9. Ibid., 676.

10. Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* (Albany: State University of New York Press, 2004); Lawrence Wrightsman, *Oral Arguments Before the Supreme Court: An Empirical Approach* (New York: Oxford University Press, 2008).

11. Johnson, *Oral Arguments and Decision Making*; Stephen L. Wasby, Anthony A. D'Amato, and Rosemary Metrailer, *Desegregation from Brown to Alexander: An Exploration of Supreme Court Strategies* (Carbondale: Southern Illinois University Press, 1977).

12. The quality of arguments forwarded by attorneys during these proceedings also affects justices' votes (Timothy R. Johnson, Paul J. Wahlbeck, and James F. Spriggs, "The Evaluation of Oral Argumentation before the U.S. Supreme Court," *American Political Science Review* 100 (2006)). Indeed, even justices predisposed to vote for a particular side (based on their ideological predilections) tend to vote more often for the side that offers better arguments in open court.

13. Sarah Levien Shullman, "The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions during Oral Argument," *Journal of Appellate Practice & Process* 6 (2004); John G. Roberts, "Oral Advocacy and the Re-emergence of a Supreme Court Bar," *Journal of Supreme Court History* 30 (2005); Timothy Johnson et al., "Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the US Supreme Court?" *Washington University Journal of Law & Policy* 29 (2009); Ryan C. Black, Timothy R. Johnson, and Justin Wedeking, *Oral Arguments and Coalition Formation on the U.S. Supreme Court* (Ann Arbor: University of Michigan Press, 2012).

14. Johnson, *Oral Arguments and Decision Making*; Timothy R. Johnson, James F Spriggs, and Paul J. Wahlbeck, "Supreme Court Oral Advocacy: Does It Affect the Justices' Decisions," *Washington University Law Review* 85 (2007); Wasby, D'Amato, and Metrailer, *Desegregation from Brown to Alexander*.

15. O'Brien, *Storm Center*.

16. Black, Johnson, and Wedeking, *Oral Arguments and Coalition Formation*.

17. Due to the current data limitations surrounding oral argument transcripts, we used three different datasets. Once all transcripts are available, we can test our conjectures more broadly.

18. We use these data, rather than the data from the previous analyses, because we draw the data from a different source: Black, Johnson, and Wedeking, *Oral Arguments and Coalition Formation*.

19. We exclude Thomas because he rarely speaks at oral argument. And when he does speak, it is national news. For example, when he spoke for the first time in almost seven years during oral argument for *Boyer v. Louisiana*, 569 U.S. ___ (2013), newspaper headlines read "Justice Clarence Thomas Breaks His Silence," "Clarence Thomas Speaks, Finally," and "Clarence Thomas speaks, but does it break his silent streak?" Ultimately, Thomas's statement was not a question or statement directed at litigants before the Court, but an offhand remark about the quality of counsel provided by Ivy League law school graduates. It was barely audible over the laughter of Thomas's colleagues. Adam Liptak, "No Argument: Thomas Keeps 5-Year Silence," *New York Times*, Feb. 12, 2011. Thomas has offered two reasons why he remains largely quiet on the bench. First, Liptak writes that Thomas has admitted to being self-conscious about the way he speaks. Second, Liptak suggests

Thomas simply wants to hear the attorneys argue if the Court has invited them to do so. As Liptak quotes from a speech Thomas gave in 2000, "If I invite you to argue your case, I should at least listen to you." Whatever the reason, Court watchers should not expect much data on Thomas's behavior in the future as he has made it clear he will not speak during oral arguments.

20. By utterance we mean any and all statements spoken during orally argument by a justice. This includes statements and questions.

21. Frank B. Cross and Stefanie Lindquist, "The Decisional Significance of the Chief Justice," *University of Pennsylvania Law Review* 154 (2006); Danelski, "The Influence of the Chief Justice."

22. While it is not clear exactly what led to this change in behavior, there seemed to be a honeymoon period for the chief in the early 1970s. By this we mean the justices spoke less often than did Burger in these early years of his tenure, but they began to speak more as Burger's era moved to its "middle years." Such a shift is also clear in the Roberts Court data. While there may be other reasons for such a change, we await future multivariate analyses to make such a determination.

23. These results are more suggestive than are the results from other sections because they are based on only one Court era. That said, there is little theoretical reason to believe the results would change once we have data from the Burger and Warren Court eras.

24. Black, Johnson, and Wedeking, *Oral Arguments and Coalition Formation.*

25. When we compare Roberts with individual associate justices, only Breyer uses more emotional language (pleasant or unpleasant words) in his interactions with attorneys across terms. Note, however, that Ginsburg, Souter, and Scalia use more affective language in a handful of terms.

26. Roberts's high water mark came in 2007 when he averaged thirty-two unpleasant words.

27. Timothy M. Hagle, "'Freshman Effects' for Supreme Court Justices," *American Journal of Political Science* 37 (1993).

28. To operationalize this concept, we used the fact that a justice voted for a particular side in the final opinion on the merits. With these data in hand, we then counted the pleasant and unpleasant verbiage used toward the side for whom the justice voted as well as toward the side against whom the justice voted. Although there are alternate ways to operationalize this concept, our blunt measure provides us with a fair glimpse of this process.

29. Black, Johnson, and Wedeking, *Oral Arguments and Coalition Formation.*

30. Interestingly, Scalia sounded equally annoyed. To hear the chief's language and Scalia's response, see http://www.press.umich.edu/resources/3_9780472118465_USvRLC.mp3.

31. Timothy R. Johnson, James F. Spriggs II, and Paul J. Wahlbeck, "Passing and Strategic Voting on the U.S. Supreme Court," *Law and Society Review* 39 (2005); Kaitlyn L. Sill, Joseph Ura, and Stacia L. Haynie, "Strategic Passing and Opinion Assignment on the Burger Court," *Justice System Journal* 31 (2010).

32. Forrest Maltzman and Paul J Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," *American Journal of Political Science* 40 (1996); Maltzman and Wahlbeck, "A Conditional Model"; Maltzman, Spriggs, and Wahlbeck, *Crafting Law on the Supreme Court.*