Chapter 10

Justice Scalia and Oral Arguments at the Supreme Court

Timothy R. Johnson, Ryan C. Black, and Ryan J. Owens

Supreme Court oral arguments feel lonelier these days without Justice Scalia's booming baritone voice. The conservative wing's interruptions seem less common and, certainly, less piercing. The gallery's laughs seem quieter and less frequent even when humor graces the Court's otherwise dry legal discussions. Justice Scalia cast a long shadow over the law. And for some, a Court without Scalia feels like a once majestic tree shorn of its leaves.

While Scalia's judicial legacy is sure to be discussed by many scholars, across many dimensions, for many decades, we focus on Scalia's influence over the only public part of the Court's decision-making process: oral argument.[1] Scalia's behavior (both good and bad) during oral argument has taken on nearly mythical status. Immediately after his death, Court watchers rushed to describe Scalia's influence on oral argument. For example, former solicitor general (and former Scalia clerk) Paul Clement remarked: "Justice Scalia fundamentally changed oral argument before the Supreme Court" (Clement 2016). Similarly, Harvard Law professor Richard Lazarus suggested: "When you prepared for oral argument, you tended to focus tremendously on him because he could transform an argument" (cited in Kendall and Bravin 2016, n.p.). Carter Phillips, an attorney who argued regularly before the Court, declared: "oral argument . . . changed completely after [Scalia] went on the bench" (Fuchs 2016). Perhaps unsurprisingly, Scalia's colleagues agreed. Justice Alito, no wilting flower himself, asserted that Scalia turned oral argument into "a contact sport" (Alito 2017, 1605).

Is this conventional wisdom correct? Did Scalia really reverse the axis upon which oral argument spun? Did he really have the outsized effects attributed to him? The goal of this chapter is to answer these questions empirically. To do so we examine more than 2,800 oral argument transcripts

from cases before, during, and after Scalia's tenure on the bench. These data yield more than 316,000 justice-speaking "turns" during which a total of 8.7 million words were spoken. Using these data, we seek to document the extent of Scalia's impact on this most public aspect of the Court's work. More specifically, we ask:

- How often did Scalia speak compared to his colleagues, how verbose was he?
- How often did Scalia interrupt his colleagues and the attorneys as compared to his colleagues?
- How humorous and harsh was Scalia during oral argument as compared to his colleagues?
- Did Scalia's behavior have an effect on his colleagues and, if so, how?

Answering these questions adds a key layer to scholarly accounts of how and why oral arguments play an important role in the decisions Supreme Court justices make. Indeed, research demonstrates that information gathered from these proceedings affects the policy justices set in their opinions (Johnson 2004), that justices may signal how they will decide based on the number of questions they ask (Johnson et al. 2009) and by the tone of those questions (Black et al. 2011), and that justices can and do strategically interrupt their colleagues when asking questions or making comments (Black et al. 2012). If the dynamic changed when Scalia joined the bench in 1986 than his presence certainly had an effect on each of these phenomena. In turn, when he died midway through the 2015 term, the dynamics then changed again—in terms of who dominates the proceedings and who interrupts whom. Thus, understanding perhaps the most loquacious justice to ever sit on the bench provides insight into how oral arguments ultimately affect case outcomes.

This chapter unfolds as follows. First, in an effort to provide readers a sense of the role Scalia might have played at oral arguments, we begin by describing how these proceedings generally operate. We then delineate the reasons justices ask questions and make comments during these public hearings. Next, we transition to our empirical examination of Scalia's behavior and whether his 1986 appointment altered how the justices behaved during oral arguments. To do so, we address the four bullet points displayed above. So that there is no confusion about our results, we state up front that the data show Scalia played a significant role in oral arguments and had an effect on his colleagues in several areas. He asked more questions, displayed more humor, interrupted more often, and used more unpleasant words than his colleagues. And, an initial assessment of the justices' behavior in his absence

suggests that his remaining colleagues are seeking to fill the void left when Scalia departed.

ORAL ARGUMENT AT THE U.S. SUPREME COURT

The U.S. Supreme Court normally sits for oral arguments between the first Monday in October and the last week in April. It schedules cases for oral argument in two-week sittings. During each sitting, the Court hears two (although sometimes one or three) arguments per day on Mondays, Tuesdays, and Wednesdays. It hears the first case of the day at 10:00 a.m. and the second at 1:00 p.m. Generally, the Court allots one hour of argument time for a case, with the petitioner and respondent attorneys each speaking for thirty minutes. In highly salient cases, the Court sometimes sets a case for more than an hour (e.g., oral argument in *Bush v. Gore* [2000] lasted an hour and a half, while oral argument in *National Federation of Independent Business v. Sebelius* [2012] lasted six and one-half hours). In addition to the attorneys who argue for each litigant, the Court occasionally allows an interested non-party (*amicus curiae*, or "friend of the Court") to share oral argument time.

At precisely 10:00 a.m. on argument days, the justices enter the Courtroom through the red velvet curtains behind the bench. The Court Marshal then rises to proclaim:

> The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court![2]

After the Court announces any opinions and concludes motions for admissions to the bar, the chief justice bangs his gavel, calls the first case to order, and invites the petitioner's attorney to begin his or her argument. This attorney does so by declaring: "Mr. Chief Justice, and may it please the Court." To prevent attorneys from exceeding their allotted time, the lectern shows two lights: a white light and a red light. The white light illuminates when the attorney has five minutes left to argue. When the red light illuminates, it signals the attorney's argument time is finished. At that point, the attorney must quickly complete his or her thought and stop. Occasionally, such as when the justices have been particularly loquacious in their questioning, the Chief may extend counsel's time by a few minutes.

Once the attorney begins an argument, justices can interrupt to ask questions as often as they want. In fact, sometimes they interrupt immediately. Consider *City and County of San Francisco v. Sheehan* (2015). Counsel said one word before Justice Scalia interrupted:

> *Christine Van Aken*: Thank you, Mr. Chief Justice, and may it please the Court. This—
>
> *Antonin Scalia*: Ms. Van Aken, before you go any further.

In most cases, justices interrupt counsel with near impunity. For example, in *Elonis v. U.S.* (2015), Justice Breyer interrupted attorney John Elwood six times in a row. However, after Breyer's sixth interruption, Elwood had enough:

> *John Elwood*: Well, the thing is, though—
>
> *Stephen Breyer*: I wouldn't have asked it if I didn't want your view, so what is your view?
>
> *John Elwood*: I'm trying hard to give it to you.

So curious are the justices that the Supreme Court's own guide for counsel advises:

> It has been said that preparing for oral argument at the Supreme Court is like packing your clothes for an ocean cruise. You should lay out all the clothes you think you will need, and then return half of them to the closet. When preparing for oral argument, eliminate half of what you initially planned to cover. Your allotted time passes quickly, especially when numerous questions come from the Court. (Clerk of the Court 2015, 5)

Firsthand accounts from attorneys arguing before the Court suggest that even he "take half" advice is overly optimistic. One first-time attorney was advised to have prepared only a five-minute presentation for his case (i.e., the quivalent of packing only one-sixth of his suitcase). As for how his ocean oyage went, "about fifty seconds into my presentation I was interrupted by question, and after that the questions continued to come, one after another, or the next twenty-eight minutes. I never did get to say what I wanted to say. he five-minute presentation went unused" (Riback 2003, 148).

The modern bench is quite different from the Court's early days when great awyers such as Daniel Webster, John Calhoun, William Pinkney, Francis cott Key (the same man who wrote the Star Spangled Banner), and Henry lay often appeared before the justices. Then, oral arguments were elaborate

oratories. More importantly, they provided the justices with their only source of information about a case because attorneys rarely, if ever, submitted written briefs (Black and Owens 2012; Johnson 2004). Consequently, following English practices, the justices placed no time limitation on the argument sessions. The result of this norm was that advocates sometimes spoke for many hours over multiple days.[3] In *McCulloch v. Maryland* (1819) for instance, Daniel Webster and five other attorneys argued for a full nine days. The justices rarely interrupted the advocates with questions or comments (Johnson et al. 2009, but see Warren 1922). They learned primarily from the information given to them by the attorneys at oral argument.

Today's justices, on the other hand, have little patience for rhetorical flashes and extended discussion. They want attorneys to get to the nub of the problem quickly. Justices ask many questions for a variety of reasons. What are some of these reasons? Surely they ask questions to learn about the facts and relevant precedents pertaining to a case but are there other motivations for questions? It is to this topic that we now turn.

The Purpose and Strategy of Oral Argument

Justices can ask any question, or make any comment they would like, at any time during oral argument.[4] Despite the attorneys' best efforts at making a coherent and persuasive argument, the justices often interrupt them with questions, comments, and hypothetical scenarios related to the case. Across the more than 2,800 cases in our thirty-five years of data (1982–2017), justices averaged about 112 speaking turns per argument (this comports with previous findings including Black, Johnson, and Wedeking 2012; Johnson 2004). Given that the vast majority of arguments are sixty minutes long, this means a justice is speaking roughly once every thirty seconds for the entire hour. Put plainly, today's Court is a hot bench.

Why justices on today's Court speak so often is no great mystery. We posit four common sense reasons for such behavior. First, justices want information about the facts and law involved in cases (Johnson 2004). They decide cases of national importance but often have limited information relevant to such cases. In many cases the facts are unclear and need explication. Other times a precedent is not clear and needs further discussion. During oral argument, the justices have time to ask attorneys questions about such issues and demand answers on the spot. Consider Justice Kennedy's comments in *McDonnell v. U.S.* (2016):

> *Anthony Kennedy:* Can you tell me the posture of the case with reference to under Virginia law, the government the Governor's authority or lack of authority to tell the university, you will engage in this research or you will not engage?

Noel Francisco: Sure, Your Honor. He—

Anthony Kennedy: What is the state of the law, and do—do the parties agree on this point?

Oral arguments offer justices a useful tool to examine the facts of cases and the relevant legal doctrine closely during a time when attorneys can provide answers to their questions.

Second, justices ask questions to learn about the policy implications of a decision (Johnson 2004). The policy ramifications of cases are often unclear, as are the unintended consequences of a ruling. By following up with attorneys about the logical implications (and limiting principles) of their arguments, justices can better determine the consequences of their votes. Consider the following exchange between an exasperated Justice Breyer and petitioner's counsel in *Hernandez v. Mesa* (2017):

Stephen Breyer: . . . you have a very sympathetic case. We write some words. And those words you're delighted with because you win. That isn't the problem. The problem is other people will read those words, and there are all kinds of things that happen . . . what are the words that we write that enable you to win, which is what you want, and that avoid confusion, uncertainty, or decide these other cases the proper way? That's the question you've been given three times, and—and I certainly [would] like to know your answer.

Breyer wanted to know what would happen in numerous cases down the road if the Court ruled in favor of Hernandez. In essence, what would the policy implications and unintended consequences be? Like asking facts about the case, justices will try to extract such information from the attorneys.

Third, oral arguments allow justices to ask questions about the preferences of the executive and legislative branch officials (Ringsmuth and Johnson 2013). The solicitor general often participates in these proceedings—even when the United States is not a party to the case. In this capacity, justices can ask questions to learn what the executive branch thinks of a case. Such information is important to the justices because it is often the federal executive branch that is charged with implementing the Court's decisions. Justices can likewise ask attorneys questions about Congress and public opinion. For example, in *INS v. Chadha* (1983), Justice O'Connor asked Eugene Gressman, counsel for the House of Representatives, a question about how Congress used its powers over aliens; another justice asked about the executive's involvement in the process (Johnson 2004). Even when government lawyers do not argue the case, justices can ask private counsel questions about Congress, the president, and other political actors. Such information better allows

justices to place themselves within broader policy and legal debates, and understand how key political actors will respond to their decisions. And for a branch of government that relies so heavily on the others, that information can be useful.

Finally, justices use oral arguments to learn what their colleagues think about a case. It is no secret that justices begin thinking about how they will vote on a case early—usually well before oral argument (Black et al. 2012; Ringsmuth and Johnson 2013). By asking questions during oral argument, justices can test drive arguments to see how they work with their colleagues. They can play devil's advocate to observe their colleagues' responses. In addition, they can directly rebut a colleague's point by answering for the attorney. Justices use oral argument like low orbit military satellites, collecting information about others in preparation for a future event.

Perhaps it is no surprise, then, that most contemporary justices find it useful to participate regularly at oral argument. And no one seemed to relish this part of the Court's decision-making process more than Justice Scalia. He once quipped that "things can be put in perspective during oral argument in a way that they can't in a written brief" (O'Brien 2000, 260). Elsewhere he suggested that, "[oral argument] provides information and perspective that the briefs don't and can't contain" (Scalia and Garner 2008, 139). So let us now move to Justice Scalia's behavior at oral argument. How did it compare to his colleagues? Did Scalia have the effects commonly believed? We describe the data we utilize to answer these questions.

Studying Oral Argument

To gain empirical leverage on oral argument, Justice Scalia's behavior during it, and his possible influence on it, we downloaded the voice-identified oral argument transcripts from the Oyez Project (www.oyez.org) from the 1982 term to the 2016 term. We began in 1982 because it provides us with four terms worth of data prior to Scalia's ascension to the bench. This process generated a total of just over 316,000 justice turns across around 2,800 cases. In total, we examine all orally argued cases for the four terms before Scalia joined the bench, the thirty terms in which Scalia sat on the bench, and the term and a half of cases since his death.

Beyond our counts of the utterances and words used by the justices, we returned to the transcripts and used two dictionary-based approaches to determine the number of words and the emotional nature of those words.[5] First, we employed the *Dictionary of Affect in Language* (hereafter DAL) (Whissell et al. 1986; Whissell 1989) to gauge the emotional content of the justices' words. Whissell (1989) argues that emotion in language can be described

adequately and efficiently in terms of a two-dimensional space defined by the pleasantness and activation of words (see also Plutchik 1994; Russell 1978). This continuum allows scholars to determine the overall emotive nature of words.[6] Very unpleasant words are defined as those words in the tenth percentile (or lower) of pleasantness. Some representative examples include chaos, failed, hostile, nightmare, and phony. By contrast, very pleasant words are defined as those words in the ninetieth percentile (or higher) of pleasantness. Examples include confidence, favorable, quality, and respect. (Whissell et al. 1986). The DAL includes a total list of 8,743 words, of which 11 percent are coded as very unpleasant and 10 percent are coded as very pleasant. It is "an accurate description of English word-usage patterns" (Whissell 1999) and has proven a highly reliable and valid way to capture affect in language (Sigelman and Whissell 2002a; Dubois 1997). Contemporary research has also applied to show that the use of emotional language during oral argument by the justices helps forecast their eventual votes (Black et al. 2011). Finally, it provides an objective and replicable measure of the emotional content of language.[7]

Second, we utilize a similar list of words that comes from the Linguistic Inquiry and Word Count (LIWC) program (Pennebaker and King 1999; Tausczik and Pennebaker 2009). LIWC analyzes "attentional focus, emotionality, social relationships, thinking styles," and other features of language (Tausczik and Pennebaker 2009, 24). LIWC is also a dictionary-based approach, which is to say it counts the number of words in a document that fall into one of a number of categories. The internal and external validity of LIWC has been established in a series of publications (see, e.g., Pennebaker and King 1999; Tausczik and Pennebaker 2010; Frimer et al. 2015), and it has also been used in judicial politics scholarship (Owens and Wedeking 2011). Our analysis focuses on LIWC's affective language category, which includes a total of 919 words or word stems. Specifically, we examine the amount of positive emotion and negative emotion words Scalia and his colleagues used at oral argument. We examine two indicators from LIWC: the percent of positive and negative words used at oral argument.

An Empirical Analysis of Questions and Verbosity

According to many Court watchers, oral argument changed on the first Monday of October 1986. When Antonin Scalia joined the high court it was immediately clear he would be no wallflower during oral arguments. In his first session on October 6, 1986, Scalia waited just fifteen minutes to ask a question. And, as was often the case during his time on the Court, his question focused on something that had escaped his colleagues' attention. He wondered aloud about standing—and whether one of the parties enjoyed it.[8] In his line of questioning, Scalia repeatedly forced the attorney in *Hodel v. Irving* (1987) to respond to the standing question, so much so that Justice Blackmun noted Scalia was "hung up" on it (Johnson 2009).

This anecdote demonstrates how, even early on, Scalia played the role of the indefatigable hound dog during oral arguments. In his first term he asked more questions than any of his colleagues. One study counted the number of questions each of the justices asked in a two-week session during the 1986 term (Adler 1987; Alito 2017). Even though Scalia was the junior justice, he asked 30 percent (126 total) of *all* the questions. In comparison, Justice Powell, who had been on the Court nearly fourteen years, asked only one question in these cases (Adler 1987, 18).[9] Our data affirm these earlier findings in a broader context.

Consider figure 10.1, which depicts the distribution of speaking turns of each justice in our sample of cases. The horizontal lines identify the average for a justice. For the most part, the number of times each of the justices in our sample spoke comports with conventional wisdom about their oral argument behavior. Scalia spoke significantly more often than each of his colleagues but, while he was the most active questioner during oral argument, he also had the most variation in terms of his *expected* level of activity. For instance, in *FEC v. Wisconsin Right to Life* (2006), he asked 119 questions; in *BP America v. Burton* (2006) he asked 102 questions. Despite this variation, even a "slow" day for Justice Scalia eclipsed many of his colleagues. Scalia's twenty-fifth percentile value—roughly eighteen questions—is approximately equal to former Chief Justice Rehnquist's median level of questioning and is equivalent to the seventy-fifth percentile value for Justice O'Connor. What is more, we note that a session of eighteen questions asked by Justice Alito would be deemed a low outlier for Scalia. The point is that Scalia was quite prolific.

Figure 10.1 places Scalia in perspective and demonstrates that justices from various parts of the Court's ideological spectrum have spoken quite often in the past quarter century. Indeed, Chief Justice John Roberts is a close second to Scalia while Justices Byron White, Stephen Breyer, and Sonia Sotomayor round out the top five speakers by turn. These four represent, respectively, members of the conservative wing (Roberts), the moderate wing (White), and the liberal wing (Breyer and Sotomayor). Being voluble does not correlate with justices' ideological leanings.

Bear in mind that the *number of turns* is not a mirror image of the *number of words spoken*, though there is a correlation. That is, turns and words are not the same. Figure 10.2 shows that, while Scalia spoke the most often (i.e., had the most turns), Justice Breyer was slightly more garrulous, using the most

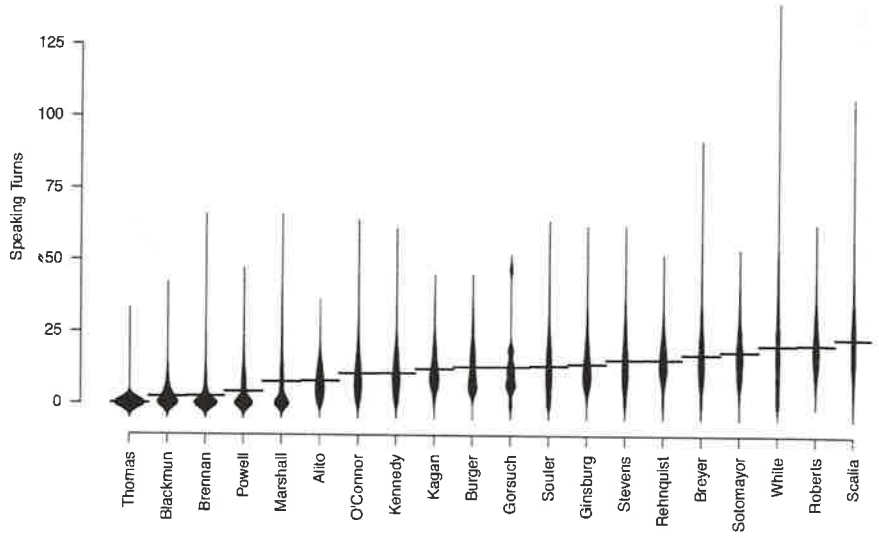

Figure 10.1. Violin plots of the number of speaking turns per justic per case (1982–2017). The solid horizontal bars within a specific density estimate provide the means for a specific justice.

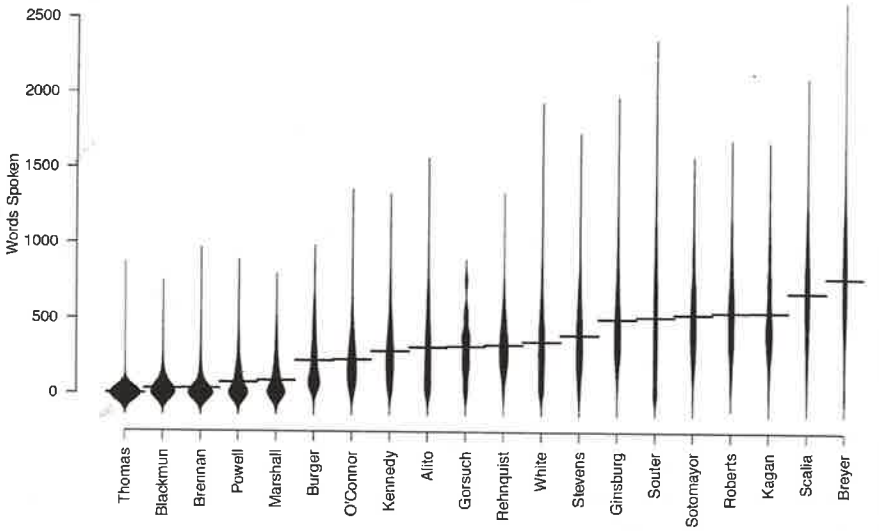

Figure 10.2. Violin plots of the number of words spoken per justice per case (1982–2017). The solid horizontal bars within a specific density estimate provide the mean for a specific justice.

words per oral argument. Not surprisingly, Justice Scalia was a close second to Breyer. Chief Justice Roberts and Justice Sotomayor again come in the top five. Justice Elena Kagan, however, supplants Justice White.

Understanding how his colleagues' speaking patterns compare to Scalia is important, but we are even more interested in whether Scalia's oral argument behavior affected his colleagues' behavior. In other words, did his penchant for questioning rub off on his colleagues? Did Scalia push so hard that his colleagues responded in kind? Kendall and Bravin (2016) suggest "Justice Scalia's active questions from the conservative side have been balanced out in recent years by the court's liberal members, including Sotomayor and Kagan." More generally, Lazarus (cited in Kendall and Bravin 2016) is certain that: "Spurred on by Scalia, the number of questions asked by the justices has steadily increased during oral argument." Totenberg (2016) agrees and suggests that, because of Scalia, his colleagues "took a more active approach to questioning."

Figure 10.3 allows us to answer this question. During the Roberts Court era, Alito spoke more often in Scalia's absence, as did Kagan, Breyer, and Sotomayor. Other justices spoke less. Roberts and Kennedy spoke somewhat less than they had prior to Scalia leaving and, surprisingly, Ginsburg spoke significantly less after Scalia's departure. Perhaps this is an indication of her strong friendship with Scalia, or perhaps it is a function of her age. Whatever the reason, she was much less active after Scalia left the Court.

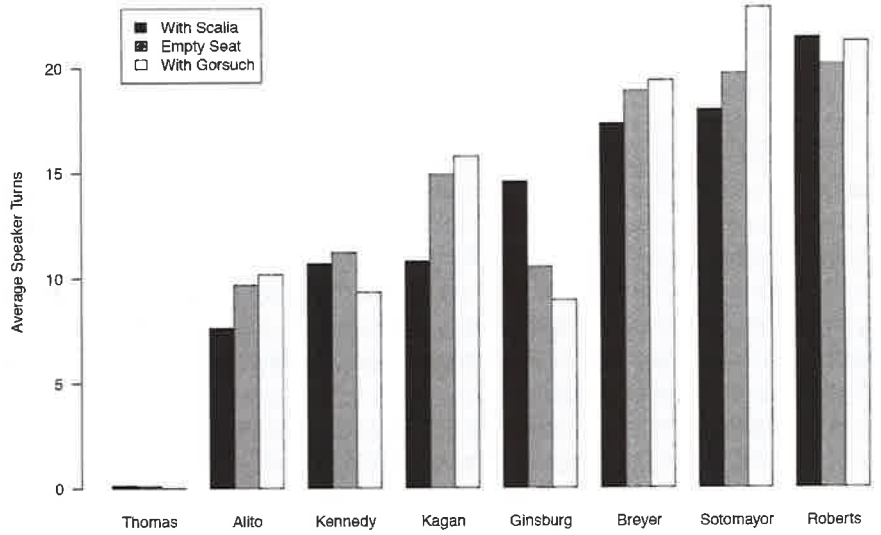

Figure 10.3. Bar graph of the average number of utterances per justice per case with Scalia on the bench (1986–2016), after he left the bench (February 2016–April 2017), and with the addition of Justice Neil Gorsuch (April–June 2017).

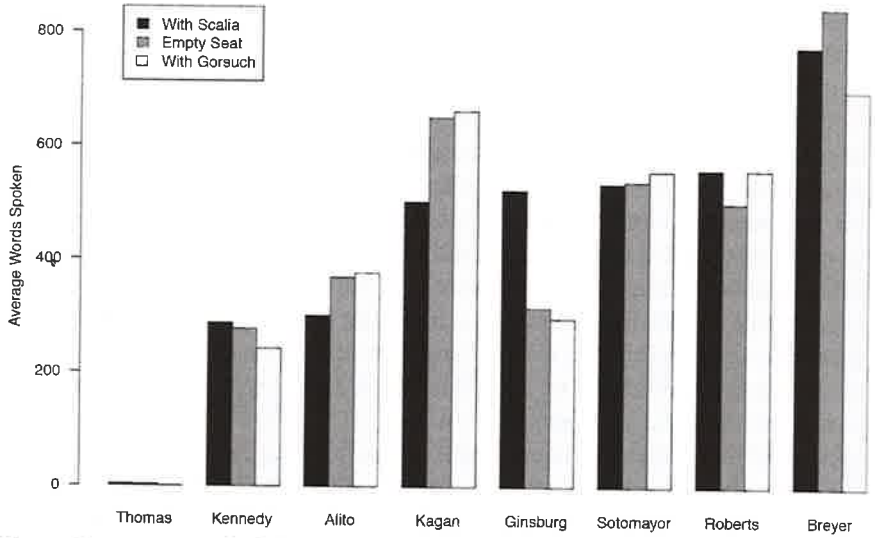

Figure 10.4. Bar graph of the average words spoken per justice per case with Scalia on the bench (1986–2016), after he left the bench (February 2016–April 2017), and with the addition of Justice Neil Gorsuch (April 2017–June 2017).

What is more, figure 10.4 shows a similar dynamic in terms of the number of words each justice used during oral argument. Indeed, this figure shows the emerging dominance of Kagan at oral argument. Not only did she speak more often after Scalia's death, she also used more words. The same could be said about Alito, who may have believed he should lend assistance to the suddenly quieter conservative bloc on the Court.

To understand Scalia's effect more generally, figure 10.5 depicts the interaction of turns and words and highlights three "states of the world" for each justice: (a) the justice's behavior prior to Scalia's departure; (b) the justice's behavior after Scalia's death but before Justice Gorsuch joined the Court; and (c) the justice's behavior after Gorsuch joined the Court. The arrows show the progression through those three states. For example, Justice Breyer's activity went up after Scalia died but then dropped back down to a bit below his "with Scalia" levels after Gorsuch joined.

Strikingly, figure 10.5 highlights just how significant the Scalia departure was for Kagan and Ginsburg. Kagan seemed to take off after Scalia's passing. It is becoming clear that she has taken on a considerably more important role in oral argument than before Scalia's death. Indeed, her number of turns increased as did her number of words used. Conversely, Ginsburg seems still to be in mourning. She asks fewer questions and employs fewer words since her good friend left the bench. Interestingly, while Breyer has not backed down in terms of the number of speaking turns (in fact, he's actually increased), he

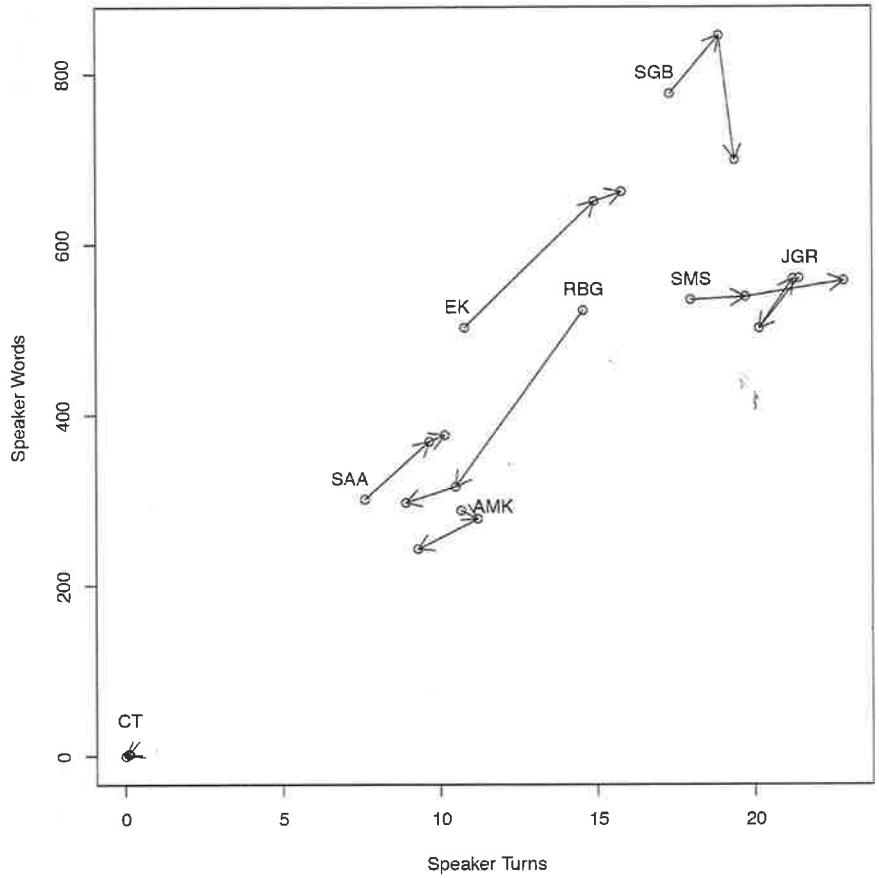

Figure 10.5. The interaction of the average number of turns per justice per case with the average number of words spoken while Scalia was on the Court, after his death, and after Gorsuch replaced him.

seems to have become less wordy in his questions. Time will tell whether or not he continues this trend.

Taken together, these findings demonstrate that Scalia had a significant impact by how he behaved during oral arguments and in terms of his colleagues' speaking turns and words spoken. For some, he had the effect of making them speak more while for others he seemed to quiet them with his willingness to speak so often. In the aggregate, this section makes clear Scalia's presence went a long way toward making the U.S. Supreme Court a hot bench.

Interruptions from the Bench

Scalia also was considered to be a "serial interrupter" of his fellow justices (Black et al. 2012) and was known to even speak over his colleagues who

were in mid-sentence of their own questions. One study indicates more than 7 percent of Scalia's utterances interrupted another colleague who was trying to ask a question or make a point to counsel (Black et al. 2012). This penchant for interruptions did not go unnoticed by his colleagues, as a number of anecdotes demonstrate suggest. Consider *Tulsa Professional Collection Services, Inc. v. Pope* (1988). Roughly one-third of all Scalia's comments during these oral arguments interrupted counsel. Perhaps not surprisingly, Blackmun recorded the following in his notes: "Scalia is interrupting intolerably again!" In *Stansbury v. California* (1994) Chief Justice Rehnquist had to play traffic cop to deal with Scalia's interruption:

> *Anthony Kennedy*: The problem I have is that at eleven different points it engages in a discussion of matters that are quite irrelevant to that standard, and I'm not quite—
>
> *Antonin Scalia*: —Well, I hope you don't concede it's irrelevant. Do you concede it's irrelevant? It can't be conveyed if it doesn't exist, can it? How can you convey that he is the focus of the investigation, if in fact he is not the focus of the investigation? It is not a sufficient condition, but it is a necessary condition, isn't it, and that makes it relevant, it seems to me.
>
> *William H. Rehnquist*: Why don't you first answer Justice Kennedy's question, and then Justice Scalia?

Sometimes, Rehnquist was more aggressive and actually rebuked Scalia for his behavior. In one case, Rosen (2007) suggests Rehnquist shook his finger at Scalia for interrupting Kennedy. In another case—*U.S. v. R.L.C.* (1992)—Rehnquist was, himself, Scalia's victim. When Rehnquist began to ask counsel a question, Scalia blurted over the top of him. Chief Justice Rehnquist admonished him: "Just a minute, Justice Scalia, I think I started before you did." In his oral argument observations of the case, Blackmun noted the Chief's irritation, writing: "CJ tells AS t[o] shut up while he is asking a q[uestion]."[10] While the Chief actually used tamer language, the same point obtains: Scalia sometimes annoyed his colleagues with his penchant to speak over them.

The question is, though, were these cases outliers, or did Scalia regularly interrupt his colleagues and the lawyers? The data, which we present in figure 10.6, may be surprising. To generate these data we again mined the argument transcripts for the presence of an interruption. We follow Black, Johnson, and Wedeking (2012) and Johnson, Black, and Wedeking (2009) to define an interruption as when two (or more) consecutive turns are from a justice, with no intervening participation by an attorney.

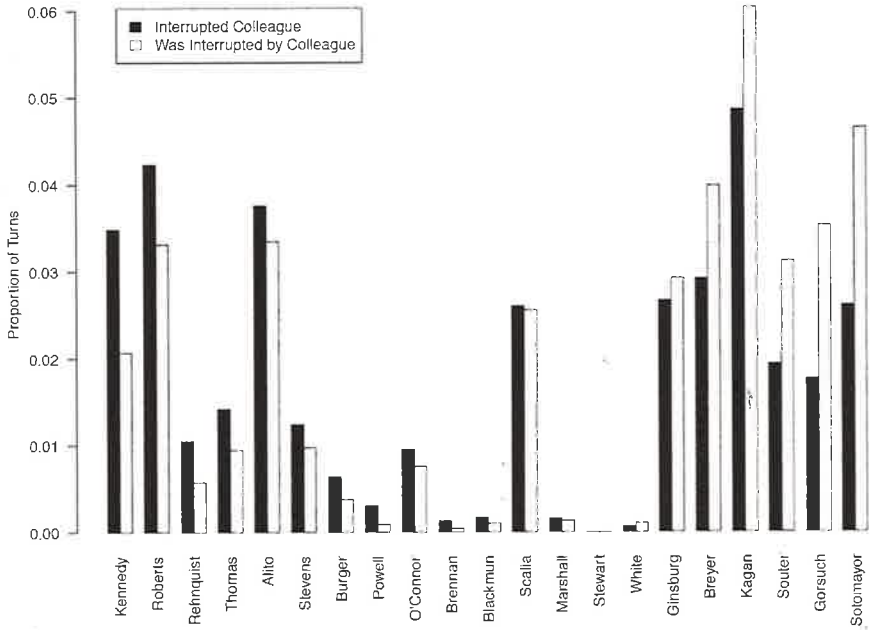

Figure 10.6. Bar graph of the proportion of utterances where a justice either interrupted (black bars) a colleague or was interrupted (white bars) by another colleague.

To be sure, Scalia interrupted his colleagues a fair amount of time. Roughly 3 percent of his speaking turns interrupted one of his colleagues. How to interpret this, of course, lies in the eye of the beholder. On the one hand, *when he spoke*, Scalia did not interrupt his colleagues as much as some other justices, including Roberts, Kennedy, Alito, Breyer, and Kagan. On the other hand, figure 10.6 reflects the *proportion* of turns in which the justice interrupted a colleague. For someone like Scalia, who spoke frequently, 3 percent reflects a large raw number of interruptions.

More generally, our data also allow us to examine whether Scalia's presence changed the culture on the bench with regards to interrupting behavior. That is, once the genie was out of the bottle, did Scalia's colleagues follow suit and start interrupting at a higher rate than before he was on the Court. The data, which we show in the two panels of figure 10.7, say no. The horizontal axis in both figures shows the Court term. The vertical axis in the top panel portrays the proportion of cases where at least one interruption took place. In the bottom panel we show the relative frequency of interruptions, as a proportion of the total number of speaking turns across an entire term. In other words, the top panel shows the basic prevalence of

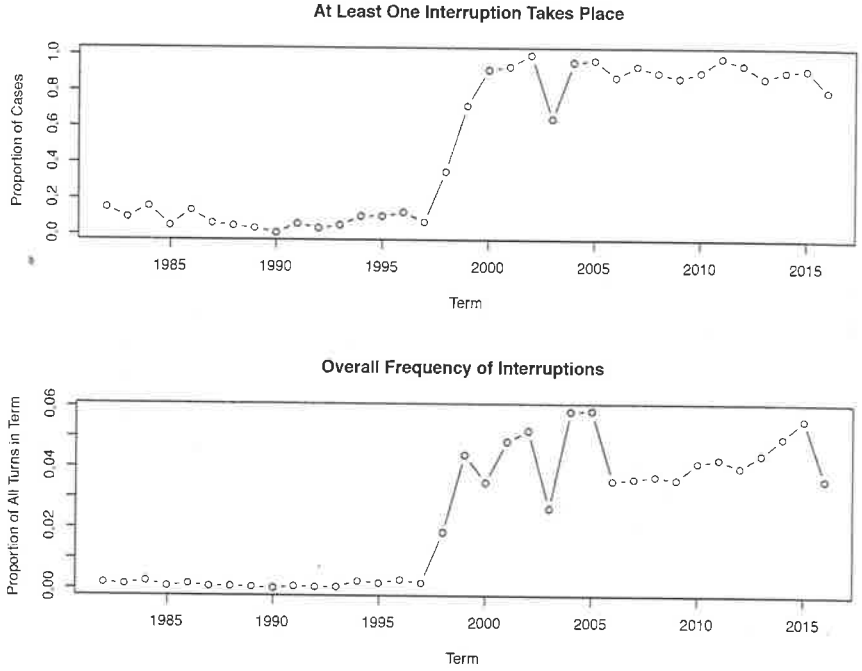

Figure 10.7. Proportion of cases with at least one interruption between the justices (top panel) and proportion of all turns in a term that were interruptions (bottom panel) from (1982–2017).

any interruptions whereas the bottom panel provides additional data on the magnitude of interruptions.

Quite interestingly, prior to the late 1990s, interruptions were not common on the Court. To wit, before the Court's 1998 term, they never occurred in more than 20 percent of the orally-argued cases. Starting in 1998, however, both their prevalence and magnitude increased dramatically. In the span of just three terms, at least one interruption was occurring in the vast majority of cases. Lest the reader think the Court had devolved into chaos and knife fights, however, it is important to bear in mind, per the bottom panel, that the overall proportion of justice speaking turns that constituted interruptions is still low—at most only 6 percent. We are, so far as we know, the first to identify this dramatic change in the Court's behavior. Although a full accounting of the causes of this change are beyond the scope of this chapter, we suspect it might have something to do with the increased ideological polarization on the Court taking place in the late 1990s. This mirrors, of course, what was happening with the elected branches of government with the impeachment of President Clinton in December 1998.

Returning to the role of Scalia, although we only have a small sample of cases since Scalia's death, it seems his departure has led to fewer interruptions on the Court in the aggregate. Figure 10.7 shows a modest dip in the number of cases with at least one interruption after Scalia's death and a much bigger drop in the number of all justice utterances defined as an interruption of a colleague. In other words, these two most recent dips coincide with Scalia's death. We caution the reader to not insinuate too much from this finding, because we have little data since his death, but it is suggestive and worthy of future study.

Combined, figures 10.6 and 10.7 suggest that Scalia was among the most ardent interrupters during his time on the bench. This is no surprise given the anecdotes we cite prior to the data. That said, what we take away from the data is that while Scalia might have been the serial interrupter of the 1990s and 2000s, our data show the torch has been passed to Kagan. Regular interruptions now come from justices on the right *and* the left.

Scalia and the Tone of Oral Argument: The Sweet (Humor) and the Sour (Negative Tone)

Because he was known for his dry wit, we examine the emotional tone of Scalia's questions from the bench. He has, after all, been labeled as the wittiest of his colleagues (Wexler 2005) and also as the most sarcastic and biting (Hasen 2015). We first examine his use of humor during oral arguments and then turn to the tone of his utterances.

Scalia and Humor

When it comes to attorneys using humor in the Court, the expression "Do as I say, not as I do" seems appropriate. Most Court experts recommend attorneys do not attempt humor at the austere Court. The justices agree. The Court itself, speaking through the clerk of the court, indicates to attorneys that, "Attempts at humor usually fall flat" (Clerk of the Court 2015, 10). In other words, attorneys are warned to not make jokes before the bench. This does not mean humor is not a part of oral arguments, however. In fact, justices often draw laughter when they ask questions or make comments. Justices, it seems, want to be the only ones to use humor.

Justice Scalia certainly employed humor during oral argument and laced his utterances with wit, such as in a 2010 free speech case when he probed the difference between "normal" violent videogames and "deviant" violent games whose sale had been restricted in California. Violence has long been part of children's entertainment, he suggested, citing Grimms' fairy tales (*Brown v. Entertainment Merchant Association* 2010). While at first blush

such a reference may not seem particularly funny, the exchange between the attorney for California and Justice Scalia did draw laughter:[11]

Zackery P. Morazzini: California asks this Court to adopt a rule of law that permits States to restrict minors' ability to purchase deviant, violent video games that the legislature has determined can be harmful to the development—

Antonin Scalia: What's a deviant—a deviant, violent video game? As opposed to what? A normal violent video game?

Zackery P. Morazzini:—Yes, Your Honor. Deviant would be departing from established norms.

Antonin Scalia: There are established norms of violence?

Zackery P. Morazzini: Well, I think if we look back—

Antonin Scalia: Some of the Grimms' fairy tales are quite grim, to tell you the truth.

Zackery P. Morazzini: —Agreed, Your Honor. But the level of violence—

Antonin Scalia: Are they okay? Are you going to ban them, too?

Zackery P. Morazzini: —Not at all, Your Honor.

As part of his dry wit, Scalia was not averse to engaging in humor about bodily functions. *Glickman v. Wileman Brothers & Elliott Inc.* (1997) was a case focusing on whether a federal law mandating tree fruit growers to pay assessments to the department of agriculture each year violated their free speech rights. While the case focused on an important free speech debate, the oral arguments devolved at one point to a discussion of the different types of fruit grown by the respondents and Scalia was quick to crack a joke about a specific type of fruit—green plums:[12]

Antonin Scalia: And you object to that. You'd be here even if they weren't pushing the Red Jim or whatever this nectarine is.

Thomas E. Campagne: —Absolutely, because that's not truthful. I want to tell—

Antonin Scalia: Well, that . . . but isn't there another reason—

Thomas E. Campagne: —that you ought to buy green plums and give them to your wife, and you're thinking to yourself right now you don't want to give your wife diarrhea, but green plums—

Antonin Scalia: —Green plums? I would never give my wife a green plum.

Whatever the type of humor, it is inarguable that Scalia was the most humorous justice during his tenure on the bench. Figure 10.8 bears out this contention. We examined the proportion of cases where a justice elicited laughter according to the oral argument transcripts. Thus, while he was a serial interrupter, and spoke more often than his colleagues, he was also (in some sense) a serial comedian. His loquacious counterpart Justice Breyer, was a close second in terms of proportion of cases where a justice elicited laughter. From there, perhaps oddly, are the two chiefs under whom Scalia served—Roberts and Rehnquist. Chiefs are usually the ones to keep deco-

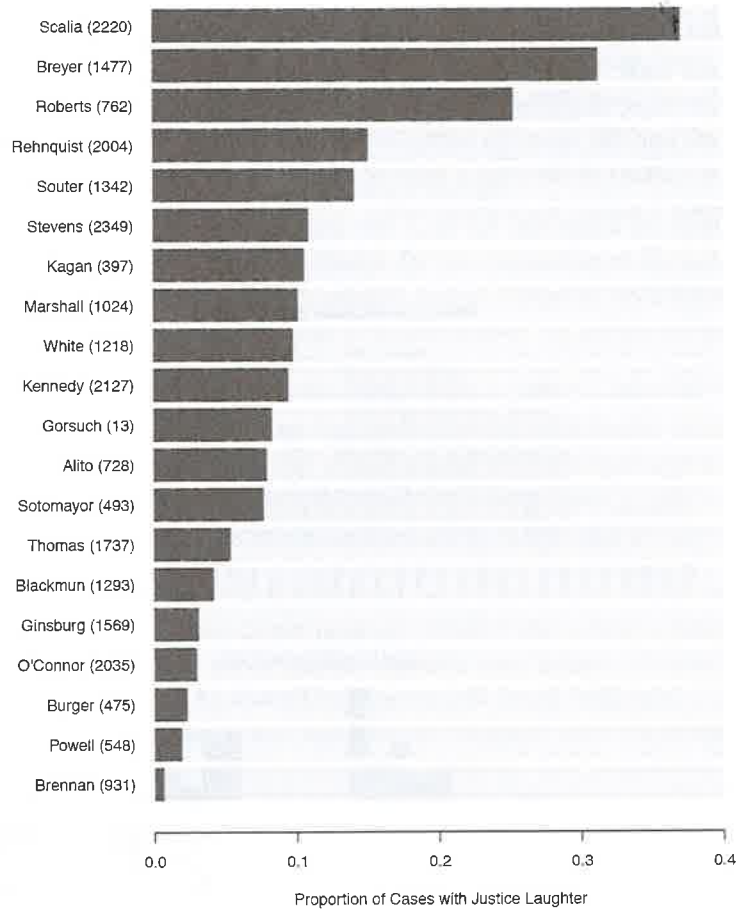

Figure 10.8. Bar graph of the proportion of cases where a justice drew laughter from the courtroom. The number in the parentheses next to a justice's name identifies the number of cases where a justice was at oral argument.

rum in the courtroom, so it is an interesting finding that they too exhibited a good deal of humor. The key finding for us, however, is that Scalia outperformed his colleagues when it came to chuckles from the gallery. While time will tell which justices takes the place as the class clown, readers should keep an eye on Kagan; her quips at oral argument are becoming legendary.

But did Scalia alter the overall tenor of humor in the courtroom during his thirty years on the bench? Figure 10.9 provides the data to answer the question. The proportion of cases with laughter *never* reached beyond 30 percent of the cases from 1982 to 1987. Then, in 1988, the proportion skyrocketed and only dropped a few terms in the early 2000s when the nation was reacting to a contentious presidential election and a devastating terrorist attack. From there, humor enriched more than 60 percent of cases in almost every term since 2004. In addition, as the bottom panel of figure 10.9 shows, there was much more laughter in a given case once Scalia joined the bench (with the caveat that the same dip exists in the early 2000s). Scalia's penchant for witticisms seems to have had a marked impact on the Court in the only public appearance it makes for a given case.

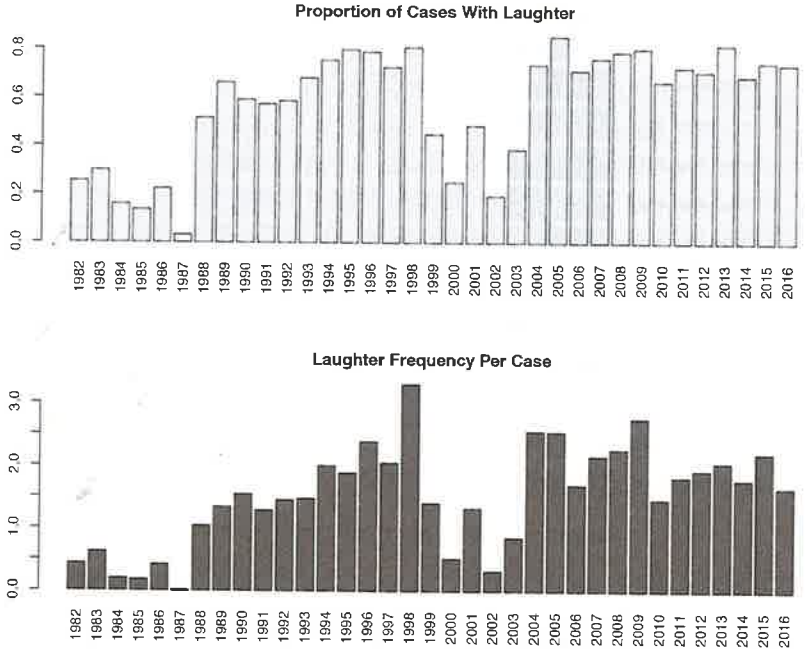

Figure 10.9. Bar graph of the proportion of cases (top panel) and frequency of laughter per term (bottom panel) from 1982–2016.

Justice Scalia and Negative Tone

While Scalia influenced the number of questions justices asked, the number of words they spoke, and the amount of humor at oral argument, he also was known for asking hostile questions that could bring even the strongest attorneys to their knees. Court scholars and analysts agree that Scalia was known for the language he used during oral arguments. For instance, Little (2016) points out that he was known for his "colorful use of language in oral arguments." Rosen (2007) concurs when he suggests that Scalia was known to "dominate oral argument with aggressive questions and showy put-downs." Bryan et al. (2016) argue that Scalia utilized acerbic language when questioning attorneys with whom he disagreed.

A barb from Scalia could quickly turn an attorney's argument into "pure applesauce."[13] For instance, in *Marvin M. Brandt Revocable Trust v. U.S.* (2014), Steven J. Lechner began his oral argument seemingly reading from his prepared notes. Scalia jumped in and remarked: "Counsel, you are not reading this, are you?" After a moment of quiet, Breyer jumped in and said: "It's all right." An awkward oral argument ensued.

While Lechner was admonished for how he presented his arguments, David Friedman was vilified by Scalia for the substance of his arguments in *McCreary v. ACLU* (2005). Certainly Scalia disagreed with Friedman's argument that displaying the Ten Commandments in public schools and courthouses violated the Establishment Clause of the First Amendment and he pulled no punches in making this clear. At one point he quipped, "I don't think they're really saying that the particular commandments of the Ten Commandments are the basis of the Declaration of Independence. That's idiotic." Moments later he used the same harsh language: "If that's what it means, it's idiotic. I don't think anybody is going to interpret it that way. You can't get the Declaration of Independence out of the Ten Commandments."[14] In making these statements to Friedman, Scalia seemed to signal his clear belief that the First Amendment does not prohibit the public display of the Ten Commandments in either public schools or courthouses. He also made it clear that he is willing to dismiss arguments with harsh language.

To determine whether Scalia used harsher language than his colleagues at oral argument, we examine the number of "pleasant" and "unpleasant" words used by the justices during oral argument. To measure these words, we analyzed the transcripts using the two aforementioned dictionaries. As we describe in full detail above, this approach allows us to determine the tone of words people use. We show these data graphically in figure 10.10. Consider, first, the justices' use of positive and pleasant words. Scalia clearly used fewer positive and pleasant words during his tenure than did his colleagues. While the difference is not large, given that only a small percentage of words they use during

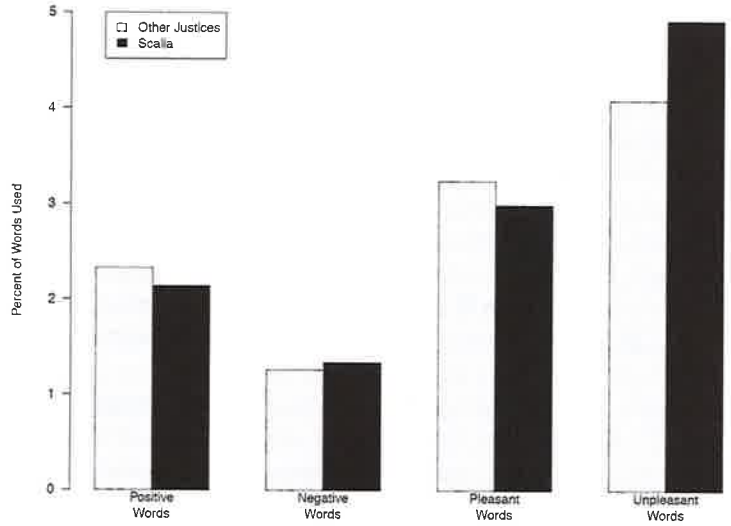

Figure 10.10. Bar graph of the percent of words used by justices that fall into various linguistic categories 1982–2016.

the arguments can be categorized in this manner, it is clear that Scalia's word choices were, to put it bluntly, not as pleasant as the words his colleagues chose to use.

On the other hand, it is even more evident that Scalia could use harsh language when speaking to the attorneys (or to his colleagues) during oral arguments. Although he showed only a slight penchant for using more negative words in his utterances, he used significantly more unpleasant words than his colleagues, including calling an argument idiotic in *McCreary*. This is consistent with the anecdotal accounts at the beginning of this section. Indeed, advocates and Court watchers perceived him as being aggressive and bombastic, the data bear out these claims!

Like our analysis of humor and interruptions, however, the question is whether Scalia's behavior was contagious. That is, did his colleagues use fewer good words when he joined the bench and more good words before and after his tenure? Figure 10.11 allows us to make this determination. The top panel shows the percentage of good words spoken by the justices, broken into positive and pleasant words. There was a slight dip in pleasant words as Scalia joined the bench but then the percentage stayed relatively stable (with some variation) throughout his time on the Court. Then, as his time came to a closer there was an uptick in this percentage. On the other hand, there was a much larger dip in the percentage of positive words once Scalia joined the Court and the downward trend continued throughout his thirty years. While we do not have enough data to make claims about the future of positive words, there has been a slight uptick in the percentage of them used since about 2007.

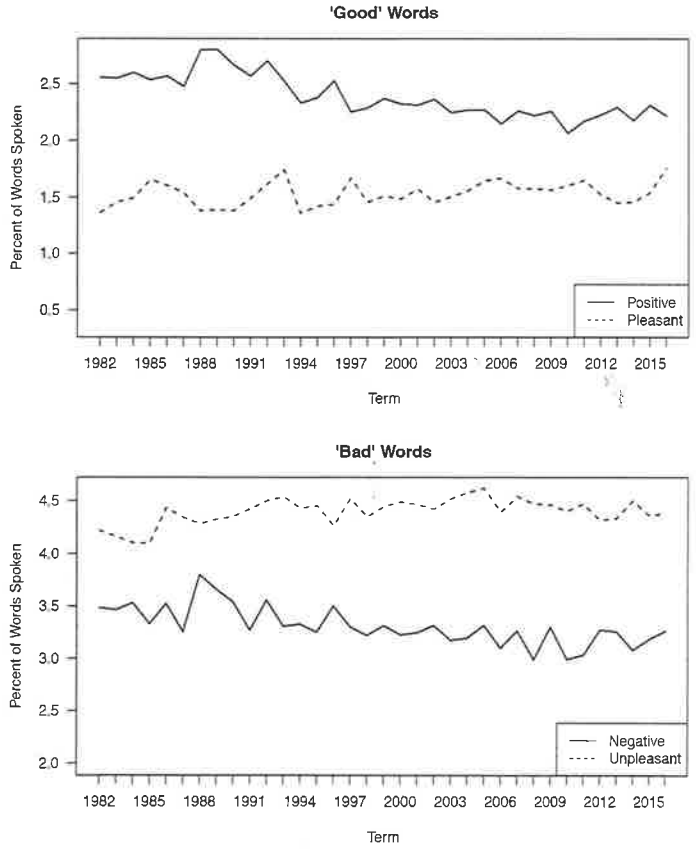

Figure 10.11. Percent of words spoken each term that use good words (top panel) and bad words (bottom panel).

The bottom panel of figure 10.11 demonstrates that the Court did indeed become slightly more negative when Scalia joined in 1986 but then the percent of negative words actually decreased throughout his tenure. The Court also seemed to increase its use of unpleasant words when Scalia ascended the bench but these percentages generally leveled off (with some variation) after that time. So while the Court became generally less negative with Scalia on the Court it also became less positive.

CONCLUSION

We end where we began—noting that the courtroom seems lonelier since Scalia's death in February 2016. His presence was sometimes larger than life and his biting questions and comments could cut off at the knees attorneys

trying to make their case before the nation's high court. Despite his penchant for intimidation with his wit and intellect, lawyers will indeed miss him. As one advocate put it, "It's really hard to imagine standing at the podium without him there" (Kendall and Bravin 2016). Court watches and scholars agree with this sentiment and the data we presented here show just how strong an influence Scalia was as he sparred with counsel and colleagues alike.

Specifically, we showed that Scalia was one of the most active speakers and was quite verbose when he asked questions or made comments. While we do not show a direct correlation between his behavior and his colleagues' behavior, the data indicate individual justice's behavior was different when he joined the bench and after his death. In addition, Scalia had a penchant to interrupt his colleagues' questions and was sometimes admonished for doing so. Finally, his humor brought levity to the courtroom although his questions were often more negative than positive. While his negativity was not contagious his humor seemed to affect his colleagues' proclivity for eliciting chuckles from gallery. The bottom line is Scalia's presence had an effect on his colleagues' behavior which certainly changed the dynamics of oral arguments. Ultimately, he will be missed as he left his mark on arguments in a variety of ways.

The question is whether oral arguments have really changed since Scalia's death. Some signs indicate they have. For one, while he has not spoken since, just weeks into the new Court Era, Justice Clarence Thomas spoke for the first time in a decade. It is not hyperbole to say that everyone in the courtroom was shocked—to say the least (see Epps 2017). On the other hand, the Court has generally gone back to business as usual. Indeed, the justices have maintained a relatively steady level of questions and comments since his death. In the 38 arguments in which Scalia participated in the 2015 term, the court averaged 121 utterances for each oral argument. Since his death, the Court has averaged 109 utterances (Bishop and Parker 2016). On an individual level, Bishop and Parker (2016) suggest Sotomayor is the most prolific speaker. Specifically, in 31 oral arguments since Scalia's death, she averaged 22.3 questions or remarks per argument which is an increase from her prior average of 18.9 utterances per case. Thus, while things have changed, they, in many respects, have stayed the same since the Court lost one of the most prolific and verbose speakers in the history of its oral arguments.

NOTES

1. Certainly commentators have commented on the outsized influence Justice Scalia exerted on the law. For example, Linda Greenhouse remarked, much less charitably, that Justice Scalia's death "preserved democracy in North Carolina" because he would not be able to rule in the North Carolina redistricting cases (Greenhouse 2016).

2. To listen to an audio clip of this (and confirm for yourself how "Oyez" is pronounced!), navigate to www.oyez.org/about (last accessed October 6, 2017).

3. Sessions during the early part of the nineteenth century were so long (typically 11 a.m. to 5 p.m.) that rather than formally breaking for lunch, justices would take turns to go behind the curtain to take their lunch while oral argument continued in their absence (Cushman 2011, 122).

4. This can include a justice simply seeking to satisfy his or her curiosity about some tangential aspect of a case. For example, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), Justice Scalia, who some have identified as being more of a wine aficionado (Zona 2016), asked an attorney what the difference was between ale and beer.

5. We performed our text analysis using Benoit et al.'s (2017) "quanteda" package in R.

6. Data for the DAL were collected in the latter half of the 1990s. Over 200 volunteers rated words on each of the scales to generate the rating judgments that were used to create the DAL. We note that the types of words we use in this analysis—very unpleasant and very pleasant words—are only scored on the pleasantness continuum. Adding activation would allow us to measure "cheerful" or "nasty" words, but we believe pleasant and unpleasant words most directly tap into a speaker's emotions, which is our latent concept of interest.

7. Whissell (2001) suggests one main limitation to the DAL. Specifically, the scores are created in a context free manner. That is, words are scored individually and not within the passage where they are used. Thus, the DAL is insensitive to complexities in word choice like humor, irony, and sarcasm.

8. In order to invoke a federal court's power, the complainant must have suffered a concrete and particularized injury caused by the defendant that is redressable by the Court. This is the standing doctrine. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

9. Scalia's behavior was remarkable but clearly a double-edged sword. He asked so many questions his colleagues quickly became put out with him. Just two months after Scalia took his seat, Blackmun jotted exasperated comments in his private notes such as: "Too much questioning and arguing by Scalia again!" See *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (Johnson 2009). Similarly, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), Blackmun wrote: "Scalia always arguing with counsel!" In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), Blackmun wrote: "Scalia is insufferable here."

10. While the Chief did not use the exact phrase (shut up) as Blackmun wrote, his point is the same, especially given the tone of his voice. To hear the exchange navigate to http://www.oyez.org/cases/1990–1999/1991/1991_90_1577/argument and click on the clip titled "Chief tells Scalia to cool it."

11. To hear the audio navigate to http://www.scotusblog.com/wp-content/uploads/2016/02/Scalia-Brown-v-Entertainment-Merchants.mp3

12. To hear the audio navigate to https://www.press.umich.edu/special/goodquarrel/Mauro/Mauro-p091–4.mp3

13. *King v. Burwell*, 135 S.Ct. 2480 (2015) (Scalia, J. dissenting).

14. To hear this case navigate to http://oyez.org/cases/2000–2009/2004/2004_03_1693/argument.

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Chapter 11

Justice Scalia's Concurring Opinion Writing

Ryan J. Owens and Christopher J. Krewson

In *Bond v. United States*, 131 S. Ct. 2355 (2014), the Supreme Court faced a monumental constitutional question: Is a federal statute passed to implement an international treaty under Article II constitutional when Congress otherwise would not possess the power to pass it under Article I? The facts of the case were salacious and tailor made for bad television. After Carol Anne Bond discovered her husband had impregnated their neighbor, Myrlinda Haynes, she opted for revenge. On over twenty-four occasions, Bond placed various chemicals on handles (doorknobs, car doors, and the mailbox) all over Haynes's property. The chemicals caused Haynes minor burns and were easily treated by simply washing her hands. But because Bond placed chemicals on Haynes's mailbox, her actions became a federal offense. Shockingly, the United States charged her with violating the Chemical Weapons Convention Implementation Act of 1998, which Congress passed to implement the "international Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction." What began as a run-of-the-mill state crime turned into a federal chemical weapons offense with constitutional implications.

Bond claimed that the Implementation Act was unconstitutional, as Congress lacked the authority under Article I's enumerated powers and the Tenth Amendment to pass such legislation. Crimes like those Bonds committed were state crimes and a province in which the federal government had no business. The United States claimed the constitution's Treaty Clause (Article II, § 2, clause 2) empowers it to pass all legislation that implements federal treaties—even though the legislation would otherwise be impermissible under the Constitution. In other words, the government argued that the Treaty Clause allowed it to accomplish what Article I and the Tenth Amendment precluded. The constitutional question was the stuff of law school exams.