

THE NEW ORAL ARGUMENT: JUSTICES AS ADVOCATES

Tonja Jacobi & Matthew Sag***

This Article conducts a comprehensive empirical inquiry of fifty-five years of Supreme Court oral argument, showing that judicial activity has increased dramatically, in terms of words used, duration of speech, interruptions made, and comments proffered. The Court is asking no more questions of advocates; instead, the justices are providing conclusions and rebutting their colleagues. In addition, the justices direct more of their comments and questions to the side with whom they ultimately disagree. Furthermore, “losing” justices, be it ideological camps that are outnumbered on the Court or dissenters in specific cases, use oral arguments to push back against the dominant group, reasserting an opposing narrative through oral argument. These forms of judicial behavior constitute advocacy, rather than judging. These are not trends that have gradually emerged over time: rather, we predict and establish that oral arguments changed dramatically in 1995, in response to the rapidly growing political polarization in Congress and the public at large. Partisan division, anger at political opponents, and disappearing middle ground all affect not only political players, but shape how Supreme Court justices behave at oral argument, the one public part of the Court’s decision-making process.

INTRODUCTION

Oral arguments before the U.S. Supreme Court now receive sustained attention from popular commentators,¹ expert Court watchers,² legal schol-

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* Northwestern Pritzker School of Law, t-jacobi@law.northwestern.edu.

** Georgia Reithal Professor of Law, Loyola University of Chicago Law School, msag@luc.edu. We thank Jerry Goldman and the Oyez Project for making Supreme Court transcripts more accessible. We thank Dr. Linda Rice and Dr. Michael Zost, without whom this project would have been impossible. We also thank John Hart, Timothy O’Neil, Kyle Rozema, Barry Sullivan, Scott Sundby, Michael Heise, participants at the Conference on Empirical Legal Studies at Michigan Law School, 2018, and the faculties of John Marshall School of Law, the University of Miami Law School, and Northwestern Pritzker School of Law for their invaluable comments and constructive criticism.

1 See, e.g., Nina Totenberg, *Justice Antonin Scalia, Known for Biting Dissents, Dies at 79*, NPR (Feb. 13, 2016), www.npr.org/2016/02/13/140647230/justice-antonin-scalia-known-for-biting-dissents-dies-at-79; *Why Women of the Supreme Court Get Interrupted More Than Men*, KUOW (Aug. 21, 2018), <https://www.kuow.org/stories/why-women-of-the-supreme-court-get-interrupted-more-th>.

ars, and social scientists.³ Although some characterize oral arguments as just a “dog and pony show,”⁴ scholars have shown that they constitute an important part of the judicial decision-making process, even changing the outcome of cases.⁵ Recently, empirical studies have shown that case outcomes can be predicted in part based on judicial behavior at oral argument.⁶ There is a popular view among Court watchers that the nature of oral argument has changed in terms of how substantive the discussion is, how influential the process is, and whether oral argument is an effective vehicle for delving into the substance of the nation’s most contested legal conflicts.⁷ Beyond the notion that *something* has changed, however, there is no real consensus as to whether oral argument in the current era is more rather than less substantive, or more rather than less influential, than in previous eras. Theories as to exactly when oral argument changed and what caused that change are also fragmented, although they tend to focus on the arrival of certain strong personalities to the bench; most commonly commentators point to the entrance of Justice Scalia,⁸ others focus on the retirement of Justice Stevens,⁹ or even the recent arrival of Justice Gorsuch.¹⁰

In this Article, we test an alternative theory about how, when, and why Supreme Court oral argument has changed. Our prediction is that oral argument is more than simply a window into the Court’s processes; we predict that changes in oral argument reflect changes in society more broadly. In particular, we hypothesize that as American politics and society became dis-

2 See, e.g., Dahlia Lithwick, *Amicus with Dahlia Lithwick*, SLATE, www.slate.com/articles/podcasts/amicus.html (last visited Nov. 18, 2018); SCOTUSBLOG, www.scotusblog.com (last visited Nov. 18, 2018); SCOTUS OA, ScotusOA.com (last visited Nov. 18, 2018).

3 See *infra* Section I.D.

4 James C. Phillips & Edward L. Carter, *Source of Information or “Dog and Pony Show”?: Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963–1965 & 2004–2009*, 50 SANTA CLARA L. REV. 79, 169 (2010) (noting that the “information-seeking value” of oral arguments has diminished since the 1960s).

5 See, e.g., Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 AM. POL. RES. 331, 331–33 (2001); see also *infra* notes 201–04 and accompanying text.

6 Tonja Jacobi & Kyle Rozema, *Judicial Conflicts and Voting Agreement: Evidence from Interruptions at Oral Argument*, 59 B.C. L. REV. 2259 (2018) (showing interruptions between pairs of justices significantly decrease their chances of being in agreement in the ultimate outcome of the case); see Bryce J. Dietrich, et al., *Emotional Arousal Predicts Voting on the U.S. Supreme Court*, 27 POL. ANALYSIS 1 (2018) (showing emotional arousal in the justices’ voices provides information about subsequent votes).

7 See *infra* Section I.D.

8 See *infra* Section I.D.

9 Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301.

10 Dahlia Lithwick, *On the Supreme Court’s Delicious Cake Case: An Amicus Podcast Transcript*, SLATE (Dec. 13., 2017), <https://slate.com/news-and-politics/2017/12/amicus-on-the-masterpiece-cakeshop-case-a-transcript.html>.

tinctly more polarized in the mid-1990s, so too did the Court.¹¹ U.S. politics witnessed a sharp and sustained increase in political polarization with the landslide Republican victory in midterm congressional elections in 1994. The “Republican Revolution” that began in the 104th Congress brought an enormous number of freshmen congressional representatives to Washington in 1995 who were unwilling to be bound by traditional norms of seniority and bipartisan cooperation.¹² Subsequently, partisan polarization within Congress massively increased¹³ and, mirroring this, the American public also became more ideological and more polarized—studies show that the Republican Revolution marked the beginning of greater ideological division, less cross-party agreement,¹⁴ and greater antipathy between partisan groups.¹⁵

The theory we develop in this Article has three key claims: first, that judicial activity at oral argument has increased significantly; second, that the nature of that activity is directed toward greater judicial advocacy; and third, that this shift in behavior constitutes a new paradigm that can be dated as beginning in 1995 as a result of the political polarization in the other branches of government and the public at large. To explore the first claim, we develop five key measures of judicial activity: the number of words used by the justices, the duration of judicial speech during oral argument, the number of questions asked by the justices, the number of what we call “non-questions” posed, and the number of interruptions. We find that justices in the modern era interrupt more, speak more, and leave far less time for the advocates to present their case.¹⁶ In addition, a significant increase in non-questions also provides initial evidence of the second claim, as this indicates that the justices are now arguing positions rather than querying advocates. We also establish our second claim by showing that the justices do not pursue these activities in a neutral fashion: rather, they systematically direct their challenging comments to their “foes” and their leading questions to their “friends.” They step in to protect the advocate whom they ultimately support

11 One other study has observed the effect of political polarization on the Court outside the context of oral arguments. See Devins & Baum, *supra* note 9, at 303 (arguing that “today’s Court is different from past Courts in the linkage between party and ideology”); see also Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), www.nytimes.com/2014/05/11/upshot/the-polarized-court.html (summarizing Devins & Baum).

12 See *infra* Section I.C.

13 See *infra* Section I.C.

14 PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (June 12, 2014), <http://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf> (noting that “Republicans and Democrats are more divided along ideological lines” and “ideological overlap between the two parties has diminished” since 1994).

15 *Id.* (finding that, in 2014, “partisan antipathy [was] deeper and more extensive—than at any point” since the Republican Revolution).

16 For an earlier but less comprehensive study showing this, see Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958–60 and 2010–12*, 2015 UTAH L. REV. 1005, 1067 (showing an increase in judicial interruptions of advocates between three terms in the late 1950s and three terms in the early 2010s).

from tough challenges from their colleagues, or directly answer or rebut those tough questions and comments themselves. We establish the third claim by showing that in every single measure we employ but one,¹⁷ there has been a statistically significant and dramatic change starting in 1995, corresponding with the well-established societal shift toward greater political polarization. This is not merely a question of increased judicial activity in the abstract; 1995 marks the beginning of a sustained increase in judicial behavior that can only fairly be characterized as advocacy.

By their nature, our descriptive claim and our causal claim can only be established using sophisticated empirical analysis over a broad sweep of history, taking into account justice characteristics, advocate characteristics, and case specific features. We are able to systematically account for the effect of gender, ideology, and experience of both the justices and the advocates; the political and legal salience of the cases; and outcome variables, such as judicial votes, opinion authorship, and being in the dissent or the majority. We constructed a dataset of the text of every Supreme Court oral argument from 1960 to 2015, supplemented with other sources of biographical information about advocates and justices, as well as case outcome votes. We analyze over 1.4 million separate speech episodes in over 6000 cases over the last fifty-five years of oral arguments. We demonstrate that oral argument has changed fundamentally since the 1960s and that this change corresponds with the sudden increase in political polarization in the U.S. Congress and public opinion that began in earnest in 1995. The essential nature of this change is that in the modern era, justices behave more like advocates.

We conduct multivariate regression analysis to test that judicial activity has significantly increased, and that judicial advocacy has displaced judicial inquiry at oral argument. We also perform structural break analysis on our key judicial activity variables to confirm that 1995 marked a genuine discontinuity and was not simply part of a gradual historical transformation. Prior to conducting our detailed statistical analysis, we demonstrate all of our key effects with graphical analysis. This provides an accessible way for the reader to visually confirm that important changes were occurring in 1995. Throughout, we pay close attention to whether a similar change is discernable in 1986, since two separate competing hypotheses suggest that year should be significant in explaining the change in oral argument.¹⁸ Justice Scalia joined the Court in 1986 and that was also approximately when the Supreme Court bar began to be manifestly more concentrated and professionalized. We find

17 The exception is that the level of questioning has barely increased between the 1960s and the present, even though the justices now speak much more at oral argument; as such, the increase in activity is driven almost entirely by additional judicial comments, and so this lack of finding an increase in judicial questioning further contributes to the evidence of advocacy. See *infra* Section II.B (emphasizing Figure 8 and Figure 10).

18 In addition, in 1987, President Reagan's nomination of Judge Robert Bork was rejected after a confirmation hearing so controversial that "bork" became a verb used to refer to ending a nominee's prospects. See, e.g., *Bork*, OXFORD ENG. DICTIONARY, en.oxforddictionaries.com/definition/bork (last visited Dec. 29, 2018).

no evidence for significant changes at oral argument associated with 1986, except for some changes to the gender and experience of the Supreme Court bar; there is no indication that this explains the changes in judicial behavior at oral argument.¹⁹ These graphs allow readers to make their own assessment of competing claims as to when the new oral argument began, such as 2010, with the retirement of Justice Stevens, or 2002, with the start of the influential commentary site, *SCOTUSblog*, which could conceivably create an observer effect,²⁰ or with the gradual development of Oyez archive of Supreme Court cases which, by making transcripts and recordings of oral arguments far more accessible, could have increased the attention paid to the Court, and so increase the incentive for justices to be more performative and less deliberative.²¹

Individually, these findings answer many specific questions about oral argument; collectively, they tell us something vitally important about the broader changing judicial role. Political scientists and legal realists long ago established that politics influences the courts to a large degree.²² This view is tempered, but not contradicted, by more recent empirical work that shows that law matters too.²³ If the judiciary is to avoid being seen as nothing more

19 See *infra* Section II.B.

20 See *About Us*, SCOTUSBLOG, www.scotusblog.com/about (last visited Nov. 18, 2018). Other possibilities include the early- or mid-1970s, with the growth in business-oriented public litigation, inspired in part by “the Powell memo” to the director of the U.S. Chamber of Commerce in 1971, see ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 283–89 (2018), or the increase in the number of clerks available to each justice from two to three in 1970 and from three to four in 1976, see DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 130 (7th ed. 2005).

21 This thesis is more difficult to test because the Oyez website developed over many years, starting in the late 1980s as a complex HyperCard stack, “The Hitchhiker’s Guide to the Supreme Court,” developed into a website, “Oyez, Oyez, Oyez” with a small selection of constitutional law cases in 1996. By 2003, the website had become *Oyez.com*, publishing approximately 800 cases, still all constitutional law cases. Since 2010, traffic at Oyez has increased approximately ten percent to fifteen percent per year, reaching 3.3 million unique users in 2011, with 6.9 million sessions; by November 2018, it had been accessed by 7.2 million unique users in 14.2 million sessions. See Tonja Jacobi & Matthew Sag, *How SCOTUS Argument Transcripts and Recordings Became Widely Available*, SCOTUS OA (Jan. 21, 2019), <https://scotusoa.com/oyez-history/>; *The History of Oyez*, OYEZ, <https://www.oyez.org/history> (last visited Dec. 29, 2018).

22 See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (documenting the “attitudinal model” whereby ideology predicts Supreme Court cases); Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL’Y 81, 85 (2006) (“[I]n virtually all political science accounts of Court decisions, ideology moves to center stage”); Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 804–09 (2009) (reviewing the literature on the effect of judicial ideology on decisionmaking and its application to intellectual property cases).

23 See Alexandra Dunworth et al., *The Myth of Policy Voting: What Amici Tell Us About Law* (Oct. 30, 2009) (unpublished manuscript) (on file with author); see also Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1709 (2016) (showing that a second dimension of judicial decisionmaking,

than a collection of politicians in robes, it must retain the appearance of propriety and impartiality.²⁴ The finding that judges are acting more and more as advocates of particular views, rather than arbitrators of a contest between the parties' representatives, may be unsettling to some. The finding that they have taken up this role in response to the partisan contests roiling the rest of the country, doubly so. Each of these conclusions presents a new challenge to the notion of judicial impartiality. They show that political division is shaping not only judicial votes but also how the justices conduct the information-gathering process itself. The justices are not simply becoming more active at oral argument, they are advocating. That conclusion requires a rethinking of the judicial role.

In Part I, we explore background issues and literatures relevant to our investigation and describe the setup of our inquiry. First, we briefly describe the significance of oral argument and how it has changed from the 1960s to the present. Then, we set out when and why the nature of oral argument changed, presenting our polarization thesis and our empirical approach. Finally, we describe our data and approach. In Part II, we show how judicial activity has changed over time, with the justices becoming increasingly active at the expense of advocate speaking time. In Part III, we show that this activity can be fairly described as advocacy by showing how it interacts with judicial ideology in general and with whether the justice agrees with the side that the advocate represents in the case at hand. In Part IV, we undertake multivariate regression to determine the size and significance of the effects we identify in the previous Parts, and control for numerous factors that could affect the analysis. We conclude by suggesting how our analysis could shed light upon current and future trends in Supreme Court oral argument.

I. BACKGROUND

A. *Oral Argument*

There is a vast and growing literature devoted to understanding the U.S. Supreme Court and its decision-making process.²⁵ That process is largely opaque: the justices select the cases they hear, deliberate, and write their opinions, all in secret.²⁶ Once published, written opinions tell us what the

which they interpret as legal methodology, is significant but secondary to the first dimension, ordinarily accepted as judicial ideology).

24 See, e.g., THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES 147 (2014) (acknowledging that if the sort of partisan divide that he documents "is widespread across the federal judiciary, it hardly seems accurate to describe judges as neutral umpires").

25 See Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341, 342 (2010) (summarizing the extensive literature of strategic judicial behavior).

26 Even compared to other courts, the Supreme Court lacks transparency in its decision-making process. The Court's jurisdiction is largely discretionary and it usually chooses which cases it will hear without explanation. The justices are not governed by a published code of ethics and issues such as whether a justice should recuse him or herself are made on an ad hoc basis. See Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A*

justices decided, but not necessarily how the decision was reached. Historical records, such as Justice Blackmun's unusually candid and detailed notes of his tenure on the Supreme Court, have given scholars invaluable insights as to the mechanics of the justices' interactions,²⁷ but such records are necessarily available, if at all, only years after the fact. The very public spectacle of Supreme Court oral argument stands in marked contrast to the veil of secrecy placed over every other aspect of Supreme Court decisionmaking. Oral argument is open to the public and the transcripts and audio recordings of argument are made freely available to the public.²⁸

Oral argument is an exercise in structured disorder. The modern Supreme Court rules clearly signal that oral argument will be an interactive affair and expressly discourage advocates from reading from prepared texts.²⁹ Except in unusual cases, the advocates are given only one hour in total to present their arguments, with that time ordinarily divided equally between the petitioner and the respondent.³⁰ At any time during their half hour, the advocates can be questioned by any or all of the justices, and are frequently interrupted.

That interactive process between the justices and the advocates serves both informational and reputational purposes. Before written briefs became a standard part of appellate practice,³¹ oral argument was essential for the parties to inform the justices as to matters of fact and law. Now that written briefs are the primary mechanism for parties to convey information to the Court, oral argument still plays a vital supplementary role.³² It gives the advocates a chance to make their best case directly to the justices and to respond to the Court's concerns.³³ It also allows justices to test out ideas, confront advocates with hard questions about the application of their proposed rules to future cases, and to ask for support for propositions of fact and

Response to Professor Lubet, 47 VAL. U. L. REV. 907, 912, 914–16 (2013). For a rare glimpse behind the scenes of Supreme Court decisionmaking, see, for example, BOB WOODWARD AND SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

27 See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005) (providing a detailed examination of Justice Blackmun's notes from oral argument and conference).

28 See *Oral Arguments*, SUP. CT. U.S., www.supremecourt.gov/oral_arguments (last visited Nov. 18, 2018) (providing links to audio and transcripts of oral argument).

29 SUP. CT. R. 28(1) ("Oral argument read from a prepared text is not favored.").

30 *Id.* 28(3) ("Unless the Court directs otherwise, each side is allowed one-half hour for argument. . . . Additional time is rarely accorded."). From the 1920s until 1970, oral argument was generally allotted two hours. See CLARE CUSHMAN, *COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY* 126 (2011).

31 Parties were not required to file written briefs in the U.S. Supreme Court and the federal courts of appeals until well into the nineteenth century. See Stephen L. Wasby et al., *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 412 (1976).

32 See William L. Benoit, *Attorney Argumentation and Supreme Court Opinions*, 26 ARGUMENTATION & ADVOC. 22 (1989) (describing an information gathering benefit to the justices in oral arguments); Timothy R. Johnson et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOY. L. REV. 331, 331–33 (2009); see also Wasby, *supra* note 31, at 413.

33 See Sullivan & Canty, *supra* note 16, at 1011.

law. More subtly, oral argument also provides a venue for the justices to communicate among themselves and begin the process of coalition formation.³⁴

Beyond its informational role, oral argument also plays an important role in the legitimacy of the Supreme Court as an institution. In a narrow sense, the public spectacle of oral argument assures the parties in the case at hand that their arguments have been heard and considered.³⁵ More broadly, oral argument allows the public to see the Court as an impartial tribunal exploring issues of national importance through a balanced adjudicative process.³⁶

B. *The New Oral Argument*

As the character of the Roberts Court has taken shape over the last decade, leading Supreme Court commentators and advocates have remarked upon a fundamental change in the nature of oral argument.³⁷ Most neutrally, they observe that the justices on the current Court are far more active during argument and seem impatient to get down to the essential issues;³⁸ more critically, some see the current justices as discourteous, combative, and attention seeking.³⁹ In this telling, whereas oral argument in the past was a sedate and dignified affair where advocates “got up and told their story” relatively free from interruption,⁴⁰ in the present it is a disjointed and fractious affair.⁴¹

In their 2015 comparison of oral arguments from the October Terms of 1958–1960 and 2010–2012, Barry Sullivan and Megan Canty analyzed the arguments from 170 cases drawn from the October Terms of 1958–1960 and

34 See Wasby, *supra* note 31, at 417 (noting that justices sometimes “debate each other either directly or indirectly through counsel, using what is ostensibly a question to counsel to get a point across to” other justices).

35 Sullivan & Canty, *supra* note 16, at 1011.

36 *Id.* at 1012.

37 See, e.g., Wendy McGuire Coats, *A Conversation with Solicitor General Donald B. Verrilli, Jr.*, APP. ISSUES, Jan. 2014 at 1, 7 (providing interview with former Solicitor General Donald B. Verrilli, Jr., contrasting his experience as a clerk for Justice Brennan in the mid-1980s with the present, noting that “advocates before the Court could usually speak for quite a long time before being interrupted but that is very different from the experience today”). Maureen E. Mahoney, a former Justice Rehnquist clerk and Deputy Solicitor General, Mahoney draws a similar contrast. Maureen E. Mahoney, Remarks, *Texas A&M University School of Law’s Distinguished Practitioner Speaker Series Keynote Speaker*, 1 TEX. A&M L. REV. 801, 805 (2014) (“First of all, oral arguments were not filled with questions. Advocates got up and told their story. They would get interrupted now and then, but it was not constant interruption.”).

38 CUSHMAN, *supra* note 30, at 127 (attributing the “barrage[]” of questions to the justices’ collective desire to “get at the crux of the question as quickly as possible”); Coats, *supra* note 37, at 7 (providing a description by Verrilli of the justices as “eager to get their questions out for the advocate and each other”).

39 See Sullivan & Canty, *supra* note 16, at 1075.

40 Mahoney, *supra* note 37, at 805.

41 See Sullivan & Canty, *supra* note 16, at 1076.

2010–2012 using both quantitative and qualitative metrics.⁴² They collected data on the number of words spoken by the advocates, including the length of the attorneys’ opening remarks, and the length of the longest attorney monologues. They also counted the words, speaking turns, questions, interruptions, and noninterrogatory statements of the justices. These data points supported their general impression that in the earlier period, advocates were given substantial time to develop their arguments, largely free from interruption; whereas in the modern era, justices speak much more, interrupt much more, and appear to do so “strategically, with the fairly obvious intention of influencing colleagues by bolstering (or deflating) certain arguments.”⁴³

Sullivan and Canty’s comparison between these two snapshots, 1958–1960 and 2010–2012, is one of the most perceptive analyses of the change in oral arguments, strongly suggesting that oral argument changed at some point over the last fifty years. However, the obvious limitation of a two-period comparison of only six terms is it cannot test whether the change they identify is significant, and if it is, when it occurred and why. What is needed, and what this Article provides, is a longitudinal study with data from the entire period from the 1960s to the present. The thesis of this Article goes well beyond Sullivan and Canty’s observations. We present three related theses: that Supreme Court justices have become more active at oral arguments, that they are doing so in a way that involves them behaving more like advocates, and that this change in behavior occurred in response to the polarization within the political branches and the public generally, beginning in 1995. The first and third of these argument prongs cannot be illustrated through specific case examples—they require a macro look at changes over time, which we conduct in the empirical sections of this Article. We also undertake an empirical exploration of the second proposition, that the justices are behaving like advocates, but this question can also be illustrated through a more micro examination of specific examples of judicial behavior at oral argument, which we pursue in the remainder of this Section.

In contrast with our subsequent empirical analysis, which ranges from the 1960 to the 2015 Terms, in this Section we examine case illustrations from the 2016 and 2017 Terms. We identify a range of behaviors that involve the justices performing like advocates: first, making comments and giving conclusions, rather than asking questions; second, asking leading questions of advocates in order to help them and protect them from difficult challenges from their colleagues; third, providing information to one another in an effort to persuade; and fourth, rebutting both the advocates and occasionally their colleagues in an effort to persuade others or to disrupt disliked lines of inquiry.

42 *Id.* at 1018–19.

43 *Id.* at 1045. James Phillips and Edward Carter take a similar snapshot approach, contrasting a selection of arguments from the 1963–65 period with those of the 2004–09 period. Phillips and Carter arrive at a similar conclusion to Sullivan and Canty, noting specifically that the “information-seeking value” of oral arguments has diminished since the 1960s. Phillips & Carter, *supra* note 4, at 80, 169.

The Supreme Court's website describes oral arguments as "an opportunity for the Justices to ask questions directly of the attorneys representing the parties to the case, and for the attorneys to highlight arguments that they view as particularly important."⁴⁴ This description may once have been accurate, but it only captures a small part of what the justices have been doing at oral argument in recent years. Now, the justices often provide comments and conclusory arguments, rather than pose questions.

Examples of judicial comments at oral argument free from any suggestion of an actual question are not hard to find. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*⁴⁵ during the 2017 Term, the Court heard argument over whether prohibiting a commercial bakery from refusing to sell a wedding cake to a same-sex couple impermissibly compelled the baker's speech.⁴⁶ Justice Sotomayor had already spoken twenty-nine times during the time allotted to Petitioner's side of the argument and five times during Petitioner's allotted five-minute reply⁴⁷ when the following exchange took place:

Justice Sotomayor: Counsel, the problem is that America's reaction to mixed marriages and to race didn't change on its own. It changed because we had public accommodation laws that forced people to do things that many claimed were against their expressive rights and against their religious rights.

It's not denigrating someone by saying, as I mentioned earlier, to say: If you choose to participate in our community in a public way, your choice, you can choose to sell cakes or not. You can choose to sell cupcakes or not, whatever it is you choose to sell, you have to sell it to everyone who knocks on your door, if you open your door to everyone.

Ms. Waggoner: Mr. Chief Justice?

Chief Justice Roberts: You can respond, if you'd like.

Ms. Waggoner: Justice Sotomayor, I think that the gravest offense to the First Amendment would be to compel a person who believes that marriage is sacred, to give voice to a different view of marriage and require them to celebrate that marriage.

The First Amendment --

Justice Sotomayor: Then don't participate in weddings, or create a cake that is neutral, but you don't have to take and offer goods to the public and then choose not to sell to some because of a protected characteristic. That's what the public anti-discrimination laws require.⁴⁸

44 See *Oral Arguments*, *supra* note 28.

45 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

46 Brief of the Colorado Civil Rights Commission in Opposition at i, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

47 See Transcript of Oral Argument at 4-47, 99-110, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No.16-111).

48 *Id.* at 103-04.

With her time up, the advocate could only respond with a brief two-sentence statement and sit down, largely giving Justice Sotomayor the final opportunity for meaningful advocacy at the oral argument.⁴⁹

Similarly, in *Gill v. Whitford*,⁵⁰ a case in the 2017 Term about the constitutionality of partisan gerrymanders, Justice Alito gave an even longer statement—one too lengthy to transcribe here, and noteworthy in being so long that the advocate actually called him out on his lack of inquiry. Justice Alito began by asking the advocate if he could “say something” and then corrected himself to “ask you a question.”⁵¹ He then spoke for over two and a half minutes, at the end of which Appellees’ advocate Paul M. Smith responded cheekily, “Is there a question there, Your Honor?”⁵²

That Justice Alito corrected himself from “say something” to “ask” something indicates a desire to be seen to be conforming to the ideal judicial role of objective inquiry. Similarly, Chief Justice Roberts found himself needing to correct an advocate who characterized the Chief Justice as commenting rather than asking in *Minnesota Voters Alliance v. Mansky*,⁵³ a First Amendment case on the question of whether legislative prohibition on displays of paraphernalia in and around the voting booth unconstitutionally creates a speech-free zone. When Petitioner’s advocate David Breemer argued that all of the government’s interests justifying the legislation were already met by other legislation, particularly anti-intimidation laws, Chief Justice Roberts noted that the government also asserted an interest in maintaining decorum, which is not the same as freedom from intimidation, because “[d]ecorum, obviously, reaches further than you can’t intimidate someone.”⁵⁴ Subsequently, when Chief Justice Roberts commented to the Respondent’s advocate Daniel Rogan that the regulation “does reach quite a bit beyond what I think a reasonable observer would think is necessary” to maintain decorum, Rogan referenced Chief Justice Roberts’s prior statements, saying “it’s for the reasons that -- that you discussed, which is the intimidation that it -- that can occur,” and “it’s a prophylactic measure designed to prevent the type of intimidation that you talked about.”⁵⁵ Chief Justice Roberts curtly corrected the advocate, saying: “Well, I don’t know if I discuss the issues. I ask questions.”⁵⁶ Our empirical analysis is to the contrary.⁵⁷

49 *Id.* at 104–05.

50 138 S. Ct. 1916 (2018).

51 Transcript of Oral Argument at 42, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

52 *Id.* at 44–45.

53 138 S. Ct. 1876 (2018).

54 Transcript of Oral Argument at 9–10, *Minnesota Voters Alliance*, 138 S. Ct. 1876 (No. 16-1435).

55 *Id.* at 32–33.

56 *Id.* at 34.

57 To give just one more example, in 2017 Term’s employee arbitration dispute, a comment by Justice Ginsburg consisted of eighty words without a question, and another by Justice Sotomayor took up 154 words, lasting for over a minute until the impatient advocate, Paul D. Clement, interrupted her. *Petition for a Writ of Certiorari at i*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285) (addressing whether “an agreement

Judicial advocacy at oral argument is also evident in the justices' choice of which advocates to question, what type of question to ask, and which advocates to confront with commentary. There are three ways that the justices do this. First, *selective confrontation*: where the justices pose more challenging comments and questions of the side that they ultimately oppose. Of course, challenging the advocates is what oral argument is supposed to be about, so we do not provide examples here, but in our regression analysis, we show that the justices generally direct their questions to the side they support and their comments to the side they oppose.⁵⁸ Second, *supplying answers through leading questions*: where the justices actively assist the side that they support by making their points in the form of leading questions. Third, *deflection and rebuttal*: where the justices protect advocates they agree with from difficult lines of interrogation, particularly by providing the answer the advocate is looking for or by shifting the discussion to a new topic. Here we examine the strategies of supplying answers through leading questions and of deflection and rebuttal.

The justices regularly ask remarkably inviting questions of advocates in order to help them persuade their colleagues, leaving the grateful advocates only able to vehemently agree with the justice. *Epic Systems Corp. v. Lewis* is illustrative. After tough questioning from Justice Alito that involved a back and forth with the advocate for almost four minutes,⁵⁹ Justice Kagan stepped in to help out the advocate for Petitioner:

Justice Kagan: Mr. Griffin, is this one way to think about the question? Of course, Section 7 doesn't extend to the ends of the Earth. If there are three employees who go out jointly rioting in the streets, they run up against anti-riot laws and they go to jail just like everybody else.

What Section 7 does and what Section 8 does is to establish a set of rules that deal with how employers can deal with employees. And one of the things that Section 7 and Section 8 say in concert, if you will, is that employers can't demand as conditions of employment the waivers of concerted rights. And that's all you're saying here.

Mr. Griffin: That's -- that's entirely correct, Your Honor.⁶⁰

For an illustration of deflection and rebuttal, consider the recent argument in *Carpenter v. United States*,⁶¹ addressing whether police need a warrant to ping a cell tower for location information on a suspect's cell phone.⁶² In *Carpenter*, Justice Gorsuch stressed the importance of a property-focused approach to the Fourth Amendment issue in addition to a reasonable-expec-

that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act"); Transcript of Oral Argument at 5–6, 13–14, *Epic Systems*, 138 S. Ct. 1612 (No. 16-285).

58 See *infra* Section III.B and Part IV.

59 Transcript of Oral Argument, *supra* note 57, at 41–45.

60 *Id.* at 45–46.

61 138 S. Ct. 2206 (2018).

62 *Id.* at 2211.

tation-of-privacy approach.⁶³ He then asked Deputy Solicitor General Dreeben to engage in a hypothetical that assumed that suspects have a property interest in the cell phone location data gathered by cell phone providers.⁶⁴ Dreeben repeatedly resisted the hypothetical.⁶⁵ An increasingly heated interchange took place, with Justice Gorsuch repeatedly reprimanding Dreeben for resisting the hypothetical.⁶⁶ After almost three minutes of this, Justice Alito stepped in to rescue the advocate of the side that he seemed very likely to support, and in fact did ultimately support:⁶⁷

Justice Alito: Yeah, Mr. Dreeben, along those lines, I was trying to think of an example of a situation in which a person would have a property right in information that the person doesn't ask a third-party to create, the person can't force the third-party to create it or to gather it. The person can't prevent the company from gathering it. The person can't force the company to destroy it. The person can't prevent the company from destroying it.

And according to Petitioner, the customer doesn't even have a right to get the information.

Mr. Dreeben: So, Justice Alito, those are a lot of good reasons on why this should not be recognized as a property interest.⁶⁸

Justice Alito provided a list of responses that the advocate could give to rebut the premise of Justice Gorsuch's challenge. Undeterred, Justice Gorsuch returned to the same line of questioning;⁶⁹ once again the advocate resisted, and once again Justice Alito stepped in to indirectly rebut his colleague, by addressing the advocate, saying:

Justice Alito: Yeah, Mr. Dreeben, I would read the -- the -- the phrase "customer proprietary information" to mean that it is proprietary to the cell phone company and, therefore, not to the customer. It's customer information, but it's proprietary information about the cell phone company because, if you got that information in the aggregate, you could tell a lot about the company's operation.

I assume that -- that that kind of information would be available to the FCC. And so, if the FCC obtained it, they would have to treat it as proprietary information of the company.⁷⁰

63 Transcript of Oral Argument at 38–39, 52, *Carpenter*, 138 S. Ct. 2206 (No. 16-402).

64 *Id.* at 52.

65 *Id.* at 52–56.

66 *Id.* at 53 (“-- let's stick with my hypothetical, counsel, okay? I know you don't like it.”); *id.* at 54 (“Well, that's fighting the hypothetical, counsel. And I know I -- I didn't like hypotheticals, too, when I was a lawyer sometimes, but I'm asking you to stick with my hypothetical.”).

67 *Carpenter*, 138 S. Ct. at 2223 (Kennedy, J., dissenting) (criticizing the majority for its “stark departure” from precedent in finding historical cell phone records are not knowingly shared under the third-party doctrine, and thus remain constitutionally protected).

68 Transcript of Oral Argument, *supra* note 63, at 56.

69 *Id.* at 57.

70 *Id.* at 60–61.

After some clarification, Dreeben responded, unsurprisingly: “That’s precisely my point.”⁷¹

During the same argument, Justice Sotomayor also came to the rescue, but for the other side, intervening repeatedly and at length on behalf of the defendant’s lawyer.⁷² In one instance, she spoke for over two minutes, with 259 words, describing both the facts and legal arguments that could be made for that side,⁷³ to which the grateful advocate responded, “Your Honor, first, you’re absolutely correct”⁷⁴ In another episode, she spoke for almost two and a half minutes, with 291 words, again making the case for the advocate she was speaking to,⁷⁵ and once again the advocate responded “Absolutely, Your Honor. We agree”⁷⁶

The advocates who benefit from deflection and rebuttal do not always fully understand the help being offered, requiring the justice to spell out the implication of his or her efforts. For instance, returning to *Masterpiece Cakeshop*, after Justice Sotomayor queried, “So that begs the question, when have we ever given protection to a food? The primary purpose of a food of any kind is to be eaten.”⁷⁷ Justice Alito stepped in with an example of something that is both functional and expressive to help the advocate:

Justice Alito: What would you say about an architectural design? Is that entitled to -- not entitled to First Amendment protection because one might say that the primary purpose of the design of a building is to create a place where people can live or work?

Ms. Waggoner: Precisely. In the context of an architect, generally that would not be protected because buildings are functionable [sic], not communicative.⁷⁸

The advocate did not seem to understand that the example worked in her favor, so Justice Alito tried again, asking “You mean an architectural design is *not* protected?”⁷⁹ Now the advocate was on notice that she was looking a gift horse in the mouth; she hesitated for a full two seconds before uncertainly sticking with her original answer.⁸⁰

The justices’ advocacy is not limited to dealing directly with the advocates. In addition, they often talk to one another during oral argument, sometimes providing information and at other times attempting to persuade.

71 *Id.* at 61.

72 *Id.* at 7–8; *see infra* notes 73–76 and accompanying text.

73 Transcript of Oral Argument, *supra* note 63, at 13–14.

74 *Id.* at 14.

75 *Id.* at 22–24.

76 *Id.* at 24.

77 Transcript of Oral Argument, *supra* note 47, at 14–15.

78 *Id.* at 17.

79 *Id.* (emphasis added) (the emphasis is not in the original transcript, but it is apparent in the recording).

80 *Id.* at 18 (“No. Architect -- generally speaking, architecture would not be protected.”). This was a strange concession given that architectural works have been protected under U.S. copyright law since 1990. *See* 17 U.S.C. § 102(a)(8) (2012) (including architectural works as a work of authorship in which copyright subsists).

For instance, in another case during the 2017 Term, *Patchak v. Zinke*,⁸¹ the Court addressed whether “a statute directing the federal courts to ‘promptly dismiss’ a pending lawsuit” but that does not amend the underlying substantive or procedural laws “violate[s] the Constitution’s separation of powers principles?”⁸² After Justice Breyer asked counsel for the Respondent, the Secretary of the Interior, why he did not bring his suit in state court, the following ensued:

Chief Justice Roberts: Well, can the tribe be sued in state court?

Justice Breyer: Yeah, general jurisdiction.

Chief Justice Roberts: Can the federal government be sued in state court?

Justice Breyer: You can. Yeah.

Chief Justice Roberts: I’m asking you.

(Laughter.)

Mr. Gant: I don’t want to get in the way of a good discussion.

(Laughter.)⁸³

Sometimes, the justices’ comments to each other are less well received and perhaps less well intended, particularly when one justice is correcting or rebutting another justice. For instance, returning to the 2017 Term’s employee arbitration dispute, *Epic Systems*, Justice Ginsburg interrupted Justice Kennedy with this clarification, challenging the premise of his question to the advocate:

Justice Kennedy: The question Justice Breyer asked is different than my question. My question is that many of the advantages of concerted action can be obtained by going to the same attorney. Sure, the cases are considered individually, but you see if -- if you prevail, it seems to me quite rational for many employers to say forget it, we don’t want arbitration at all. I don’t think you’ve done employees much -- much --

Justice Ginsburg: In that event, you would --

Justice Kennedy: -- much of an advantage.

Justice Ginsburg: You would have a judicial forum, if the employer doesn’t want arbitration. In fact --

Justice Kennedy: I fully understand that. But the point is you’re saying that the employers are now constrained in the kind of arbitration agreements they can have.⁸⁴

Justice Kennedy’s tone suggested he did not appreciate being corrected. Interruptions at oral argument have been shown to be associated with disagreement in the ultimate case outcome;⁸⁵ clearly then, interruptions like those of Justice Ginsburg here are unlikely to persuade her colleague Justice Kennedy.⁸⁶ Why, then, engage in this behavior? When Justice Alito was

81 138 S. Ct. 897 (2018) (plurality opinion).

82 Brief for Petitioner at i, *Patchak*, 138 S. Ct. 897 (No. 16-498).

83 Transcript of Oral Argument at 28–29, *Patchak*, 138 S. Ct. 897 (No. 16-498).

84 Transcript of Oral Argument, *supra* note 57, 39–40.

85 See generally Jacobi & Rozema, *supra* note 6.

86 Justice Ginsburg also rebutted Justice Kennedy, along with Justice Gorsuch, in *Mastertpiece Cakeshop*, helping out the advocate repeatedly, who gratefully responded, “That’s

teaching at Loyola University of Chicago School of Law's Summer Program in Rome, he was asked about this kind of conduct, and he explained that sometimes he and other justices will step in when they do not like the direction that an oral argument is taking, or when they think a particular argument is one that might lead some justices to a conclusion with which they disagree.⁸⁷ That is, the justices, just like the advocates, attempt to drive an argument in a particular direction.

Occasionally, the justices explicitly recognize judicial advocacy behavior at oral arguments—in one another, if not in themselves.⁸⁸ One such instance occurred in *County of Los Angeles v. Mendez* in the 2016 Term.⁸⁹ In that case, police entered a residence without a search warrant, which caused the resident, Angel Mendez, to reach for his weapon, which in turn led the police to repeatedly shoot him and his pregnant girlfriend, a use of force that was deemed to be reasonable.⁹⁰ The question was whether the reasonable use of force broke the chain of causation of an otherwise clearly unconstitutional entry into a residence.⁹¹ Chief Justice Roberts repeatedly questioned Respondent's advocate about whether the failure to get a warrant could be considered a proximate cause because Mendez had no knowledge of whether or not the police had a warrant (rather, Mendez took up his weapon because of the failure of police to knock and announce).⁹² The Chief Justice kept asking how the failure to get a warrant caused the entry, eventually admitting: "Well, I'm asking the same thing over and over again."⁹³ When again the advocate's answer clearly did not satisfy the Chief Justice, he stated:

Chief Justice Roberts: Exactly. So I don't know why the failure to get a warrant matters.

Justice Kagan: Well, can I suggest why it might matter? I mean, there are two kinds of entry: One is -- let's -- for these purposes, one is an authorized entry and one is an unauthorized entry.

Now the question is, what kind of conduct does each of those kinds of entries provoke? If you're an authorized entry, you don't really think that it's going to provoke violence. But if you're an unauthorized entry, you do think it's going to provoke violence. So the --

Mr. Feldman: Well --

precisely correct" to two of her interjections and, "Absolutely not. That's correct." to the third. Transcript of Oral Argument, *supra* note 47, at 74.

87 Justice Samuel Alito, Lecture at the John Felice Rome Center (July 14, 2017) (responding to a question by Tonja Jacobi).

88 Although Justice Ginsburg did make such an admission. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999) ("Sometimes we ask questions with persuasion of our colleagues in mind, in an effort to assist counsel to strengthen a position.").

89 137 S. Ct. 1539 (2017).

90 *See id.* at 1544–45.

91 Brief for Petitioner at i, *County of Los Angeles*, 137 S. Ct. 1539 (No. 16-369).

92 *See, e.g.*, Transcript of Oral Argument at 31, 37–40, *County of Los Angeles*, 137 S. Ct. 1539 (No. 16-369).

93 *Id.* at 41.

Justice Kagan: -- proximate cause -- the -- the proximate results of each of those two different kinds of entry are very different.

Chief Justice Roberts: Counsel, if I could interrupt you to ask a question.

(Laughter.)⁹⁴

Chief Justice Roberts was acknowledging what Justice Kagan herself has acknowledged on several occasions, that the justices' speech patterns at oral argument do not entirely consist of information gathering through questions.⁹⁵

Another such recognition came in the 2017 Term's argument in *Dean v. United States*,⁹⁶ which concerned whether a trial judge, when imposing mandatory consecutive mandatory minimum terms, may reduce the sentence for each underlying predicate offense due to the severity of the mandated consecutive sentences.⁹⁷ Justice Sotomayor had asked Petitioner's advocate a series of questions that appeared directed at helping him make a persuasive argument:

Justice Sotomayor: Counsel, during the time the guidelines were mandatory, but afterwards, many, many court[s] of appeals basically told district courts you can't impose a sentence simply because you disagree with the guideline. You can impose it for independent reasons to ensure a just result, but you can't impose it merely because you don't like the guideline. And they monitored that pretty well.

That's basically what -- this district court didn't say it didn't like the mandatory minimum. It said instead that it thought a fair sentence was, and that -- that would have been one day, if it could have done it, given that the rest of the sentence, 30 years, was even further beyond what the judge thought was adequate for punishment, deterrence, and all the other factors under 3553, correct?

Mr. Stoler: Correct.

Justice Sotomayor: So it's not negating Congress's purpose if a district court gives one day; correct?

Mr. Stoler: I would -- I would say not, no.

Justice Sotomayor: And one day is a day of punishment, isn't it?

Mr. Stoler: No question as to that, Your Honor. Yes.

Justice Sotomayor: Isn't that your point?

Mr. Stoler: Basically it is that.⁹⁸

Subsequently, Stoler confused Justice Sotomayor with Justice Kagan. Justice Kagan responded:

94 *Id.* at 41–42.

95 See *Conversation with Supreme Court Justice Elena Kagan*, C-SPAN (Sept. 20, 2012), www.c-span.org/video/?308291-1/conversation-supreme-court-justice-elena-kagan (quoting Justice Kagan stating “[s]ometimes there is a conversation among the justices, that’s kind of happening through the lawyer, but where the objective is less to really ask for the lawyer’s views or explanation, and more to try to make a point to your colleagues”).

96 137 S. Ct. 1170 (2017).

97 Brief for Petitioner at i, *Dean*, 137 S. Ct. 1170 (No. 15-9260).

98 See, e.g., Transcript of Oral Argument at 6–7, *Dean*, 137 S. Ct. 1170 (No. 15-9260).

Justice Kagan: She's Justice Sotomayor. . . . She was the one helping you.⁹⁹

The only thing unusual about this recognition that a justice was helping one side of the argument was its frankness. In our empirical analysis, we show that this behavior is increasingly common and systematically biased; for instance, the justices intervene more during the time of the side they ultimately oppose than the side they support.¹⁰⁰ These behaviors can be documented in a more systematic way through a large empirical analysis spanning multiple decades than these illustrations can show, but the results are consistent with what we have shown here: that the justices are embracing their new roles as advocates.

C. *Political Polarization and the Republican Revolution as the Cause of the New Oral Argument*

Scholars are in “virtually full agreement . . . that political parties and politicians, in recent decades, have become more ideological and more likely to take extreme positions on a broad set of political issues.”¹⁰¹ Modern politics is described as “bitterly divisive,” partisan disagreement is extraordinarily high, the public has become “socially polarized,” and strong partisans are likened to warring sporting teams with “members of the two parties increasingly disliking each other.”¹⁰² With Democrats at one extreme and Republicans at the other, and diminishing numbers of independents and moderates in the middle, this is political polarization. Polarization manifests in multiple ways that political scientists have comprehensively measured in both Congress and public opinion; only recently have scholars considered the effect of political polarization on the Supreme Court. We analyze these three trends in turn and how the Republican Revolution of 1994 heralded this new era of polarization.

1. The Republican Revolution in Congress

The congressional election in 1994 ushered in the “Republican Revolution” with a fifty-four-seat swing that gave the Republicans control of both houses of Congress for the first time in four decades.¹⁰³ When the 104th Congress was seated in 1995, there were eighty-six House freshmen and eleven freshmen Senators who resisted the traditional norms of Congress, unwilling to follow norms of seniority that would leave them potentially wait-

99 *Id.* at 8.

100 *See infra* Section III.B and Part IV.

101 Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 410 (2008).

102 Patrick R. Miller & Pamela Johnston Conover, *Red and Blue States of Mind: Partisan Hostility and Voting in the United States*, 68 POL. RES. Q. 225, 225 (2015).

103 *1994 Midterm Elections*, U.C., BERKELEY BANCROFT LIBR., <http://bancroft.berkeley.edu/ROHO/projects/debt/1994midtermelection.html> (last updated Mar. 7, 2011).

ing decades to chair powerful committees.¹⁰⁴ They developed a ten-point legislative plan called the “Contract with America,”¹⁰⁵ to remake the federal tax system, the budgetary process, and to massively reform social welfare programs; all but one platform—a constitutional amendment establishing term limits for members of Congress—were passed within the first 100 days.¹⁰⁶ The leader of the Republican Revolution was Newt Gingrich, who became House Speaker and whose role in shaping polarization in Congress and the public has been recognized in the popular press, with Gingrich being labeled the “House speaker who made Congress dysfunctional”¹⁰⁷ and the man “who manufactured the hyper-partisanship that defines modern politics.”¹⁰⁸

Gingrich personified a massive change to the party system that, while not solely attributable to the Republican Revolution, was perfectly captured and made manifest in that dramatic partisan realignment. Historically, Congress has largely “been characterized by weak partisanship.”¹⁰⁹ In the 1950s, ideological cohesion within the two main political parties was so lacking that reports were written by political scientists to determine how the parties could best be forced to develop shared policy positions and commitments.¹¹⁰ In the 1970s, party cohesion was still so lacking that “many members of Congress voted more frequently with the opposition than with their own party colleagues,”¹¹¹ and the parties frequently voted together on issues.¹¹² After the Republican Revolution, goodwill between the parties was replaced by “overt partisan hostility” and in the 104th Congress, two-thirds of recorded votes pitted Republicans against Democrats, with Republicans voting with their party more than 90% of the time.¹¹³ Before too long, the Democrats

104 See MILDRED AMER, CONG. RESEARCH SERV., RS20723, FRESHMEN IN THE HOUSE OF REPRESENTATIVES AND SENATE BY POLITICAL PARTY: 1913–2005, at 1 (2005).

105 This was relabeled “the Contract on America” by Senator Robert Byrd and other Democrats. See Edward Luce, *Republicans Shape up for Midterm Attack*, FIN. TIMES (Sept. 22, 2010), <https://www.ft.com/content/6ab225e6-c5ad-11df-ab48-00144feab49a>.

106 See generally JEFFREY B. GAYNER, HERITAGE FOUND., THE CONTRACT WITH AMERICA: IMPLEMENTING NEW IDEAS IN THE U.S. (1995), <https://www.heritage.org/political-process/report/the-contract-america-implementing-new-ideas-the-us>.

107 Michelle Cottle, *Newt Broke Politics—Now He Wants Back In*, ATLANTIC (July 14, 2016), <https://www.theatlantic.com/politics/archive/2016/07/newt-broke-politicsnow-he-wants-back-in/491390/>.

108 Steven Gillon, *The Gingrich Revolution and the Roots of Republican Dysfunction*, HUFFINGTON POST, (Oct. 12, 2015 6:26 PM), www.huffingtonpost.com/steven-m-gillon/the-gingrich-revolution-a_b_8272054.html.

109 See JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY 1–7 (1963) (arguing that the Republican-Democrat divide combined with the congressional-presidential divide, effectively creates four separate centers of power, diminishes presidential leadership, and creates gridlock); Richard Fleisher & Jon R. Bond, *Congress and the President in a Partisan Era*, in POLARIZED POLITICS 1, 2 (Jon R. Bond & Richard Fleisher eds., 2000).

110 See ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER, at ix (2010).

111 BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING 3 (2006).

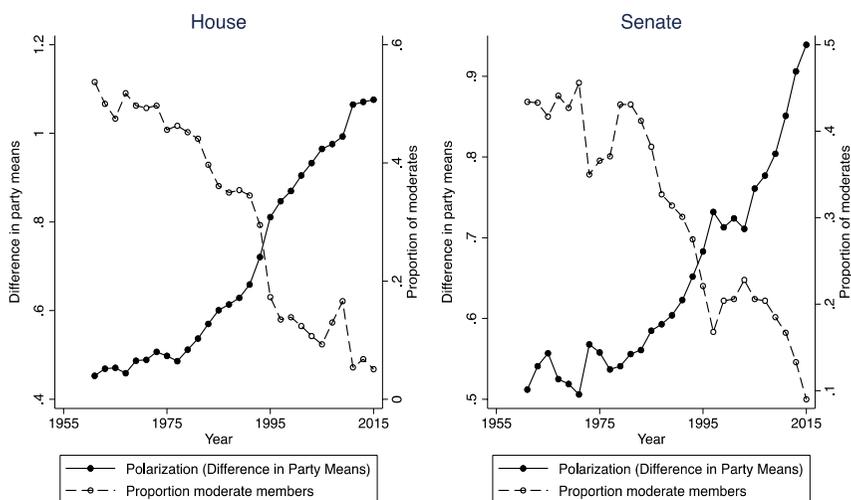
112 *Id.* at 4–5.

113 *Id.* at 5.

followed suit.¹¹⁴ The effect of the Republican Revolution continues to the present day: now, “American voters choose between ideologically cohesive parties with sharply contrasting positions on many of the leading issues of the day” with minimal bipartisan action, and a polarized public, particularly among the most informed and active citizenry.¹¹⁵

Political scientists use a variety of measures of political polarization, including the decrease in the number of competitive House seats.¹¹⁶ The most common measure of polarization is how distant the two parties are from one another. One of the hallmarks of polarization is the displacement of moderates by extremists: between the 95th and 108th Congresses, the moderate bloc shrank from 30% to 8%, and strong liberals and conservatives combined grew from 27% to 57%.¹¹⁷ The distance between the two parties was at a low in the Ninety-First Congress of less than forty in the House and less than fifty in the Senate on a roughly 100-point scale; by the 108th Congress, it had reached eighty-five for both chambers.¹¹⁸ Figure 1 graphs the ideological distance between the parties.

FIGURE 1: HOUSE AND SENATE POLARIZATION, DIFFERENCE IN PARTY MEANS AND PROPORTION OF MODERATES



114 See ABRAMOWITZ, *supra* note 110, at 92.

115 *Id.* at ix–x.

116 Competitive seats dropped from almost 180 in 1980 to less than 120 in 2002, with the House becoming overwhelmingly dominated by safe seats, rising from less than 140 to more than 200 in the same period. *Id.* at 147.

117 *Id.* at 141 (referring to the five categories including strong liberal, moderate liberal, moderate, moderate conservative, strong conservative).

118 SINCLAIR, *supra* note 111, at 7. Party distance is a product of the difference between the mean Democratic and Republican party voting scores, normalized on a scale from 1 to 100. *Id.*

Figure 1 uses data from Keith T. Poole and Howard Rosenthal, the standard-bearers of measuring polarization, who have developed a comprehensive database on political polarization and have established in a series of articles the trend across a number of indices.¹¹⁹ Using this data, we here represent some of the key variables: for each chamber, with the House on the left and the Senate on the right, we show the increase in polarization as a product of the difference between the party means in each chamber in the solid circles and the decrease in the proportion of moderate members in the hollow circles. The further apart the party means are, and the fewer moderates in each chamber, the less likely they are to find common ground on legislative policy, to develop bipartisan policies, or to avoid stalemates during times of divided government. As illustrated, there were changes occurring prior to the mid-1990s, but the enormous distance between the parties and the virtual disappearance of moderates most strongly developed in 1995 and shortly thereafter.¹²⁰

Some scholars argue the parties began moving apart in the early 1970s, based on changes in “congressional roll-call voting, interest groups’ ratings, and other sources.”¹²¹ In particular, reforms passed in 1974 that began to erode seniority and length of service as sufficient conditions for committee chairmanships had the effect of increasing party voting discipline.¹²² Nevertheless, scholars generally agree that the gap between the parties’ ideological positions became “dramatic[]” in the 1990s.¹²³ Polarization came about from numerous changes, including: the increase in southern Republicans who joined the GOP’s ranks after Nixon ran his successful Southern strategy; at the same time, conservative southerners moved away from the Democrats in response to the passing of the Civil Rights Act; this increased once Ronald Reagan began courting those southern votes; all of which eventually contributed to the Republican Revolution in 1994.¹²⁴ Despite these antecedent

119 Keith T. Poole & Howard Rosenthal, *The Polarization of the Congressional Parties*, VOTEVIEW, https://legacy.voteview.com/political_polarization_2015.htm (last updated Jan. 30, 2016).

120 Polarization was more delayed in the Senate than the House due to staggered senatorial terms and lower turnover.

121 Baldassarri & Gelman, *supra* note 101, at 413 (citations omitted) (starting in the early 1970s, “members of Congress have aligned at opposite ends of the liberal-conservative spectrum, and the number of moderate representatives has steadily decreased”). But those scholars note that “[t]his trend became even more prominent in the early 1990s.” *Id.*

122 See Gary W. Copeland, *Seniority and Committee Transfers: Career Planning in the Contemporary House of Representatives*, 49 J. POL. 553, 555 (1987); Sara Brandes Crook & John R. Hibbing, *Congressional Reform and Party Discipline: The Effects of Changes in the Seniority System on Party Loyalty in the U.S. House of Representatives*, 15 BRIT. J. POL. SCI. 207, 221–24 (1985).

123 Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in POLARIZED POLITICS, *supra* note 109, at 9, 11.

124 See *id.* at 15; see also Baldassarri & Gelman, *supra* note 101, at 413. On all of these trends, see generally EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002), for a description of how the South went from a one-party region to a two-party region, as conservatives turned to the Republican Party after decades of distrust following the Civil War, which led to more competitive national elections and eventual party division.

causes and continuing effects, the mid-1990s is clearly the point at which polarization manifests most clearly.

Furthermore, the Republican Revolution contributed to the increasing influence of campaign fundraising in determining congressional power. By significantly eroding norms of seniority, the Republican Revolution promoted fundraising prowess over seniority in the distribution of committee chairs, with chairmanships increasingly being given to those who contributed most to each party's central committees.¹²⁵ The congressional campaign committees of each of the two major parties have also contributed to the centralization of party power through increasing central control of campaign fundraising. Part of the Republican Revolution reforms was to call for each member to contribute to the Republican Congressional Campaign Committee through voluntary, but expected, contributions, making fundraising a prerequisite of the leadership structure of the House of Representatives.¹²⁶ Both of these reforms further cemented central party power, and thus contributed to polarization, both directly and indirectly. Other factors, such as the increasing accuracy of gerrymandering, particularly since the 2010 census, have further contributed to the extent of political polarization.¹²⁷

The Republican Revolution both reflected and accelerated an increase in polarization; it also marked a time at which extreme political division became a topic of public discourse, and thus would have been apparent to the Court. Most obviously, the investigation and impeachment of President Clinton began in 1994 with the lawsuit by Paula Jones against the President¹²⁸ and the appointment of Kenneth Starr to the position of independent counsel to investigate Whitewater,¹²⁹ which gradually ballooned into a broader investigation of the Democratic President by the Republican Congress, culminating in his impeachment in 1998.¹³⁰ The Republican Revolu-

See generally NELSON W. POLSBY, *HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE* (2005) (arguing that the development of air conditioning allowed moderate Northerners to move south, which also contributed to the change of alignment of southern conservatives to the Republican Party, which in turn increased part of the division between Republicans and Democrats).

125 *See* Eric S. Heberlig, *Congressional Parties, Fundraising, and Committee Ambition*, 56 *POL. RES. Q.* 151, 157 (2003) (finding that two different “measures of party loyalty—a member’s level of campaign contributions and party voting—are significantly associated with moves to prestige committees”).

126 *See* MARIAN CURRINDER, *MONEY IN THE HOUSE: CAMPAIGN FUNDS AND CONGRESSIONAL PARTY POLITICS* 35 (2009).

127 Fred Dews, *A Primer on Gerrymandering and Political Polarization*, *BROOKINGS INSTITUTION* (July 6, 2017), <https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/>.

128 *Clinton v. Jones*, 520 U.S. 681 (1997).

129 Starr was appointed independent counsel pursuant to the reauthorized Ethics in Government Act. *See* 28 U.S.C. § 593(b) (2012)).

130 President Clinton was impeached by the Gingrich Republican revolutionaries despite “every one of the myriad national polls taken” throughout the process showing the public opposed to the process “typically by margins of about two to one.” Jacobson, *supra* note 123, at 11–13.

tion may have been the manifestation of a change that was already taking place, but in making that change clearly manifest to the public and to other institutional players such as the Court, it marked a clear dividing line between politics as usual and the new, increasingly divided partisan lines.

2. Polarization in Public Opinion

Polarization is not confined to political elites. Since 1987, the Pew Research Center has been conducting polls approximately every two years. On some issues Pew covers, such as the social safety net, there were already significant partisan gaps by 1987, but those partisan gaps have “widened considerably”; other divisions were quite modest in 1987 and are now quite significant.¹³¹ A 2014 Pew poll showed that public views have come to mirror the division in Congress, with partisanship correlating strongly with ideological division and ideological overlap between voters of the two parties diminishing since 1994.¹³² It confirmed that party division among Republican and Democrat voters has become more divided, and partisan antipathy is “deeper and more extensive . . . than at any point in the last two decades.”¹³³

A 2012 Pew poll showed that Americans were “more polarized along partisan lines than at any point in the past 25 years.”¹³⁴ Even while the effect for gender, age, race, and class division remained stable, the average partisan gap nearly doubled, from 10% in 1987 to 18% in 2012;¹³⁵ this increased to 21% two years later, and the number of moderates shrunk from 49% to 39%.¹³⁶ As at the congressional and elite level, polling shows that at the voter level, the parties have become more ideologically homogenous, with the Republican Party increasingly dominated by conservatives and the Democratic Party increasingly dominated by liberals, a trend that has continued to increase since 2000.¹³⁷ By 2014, “92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican.”¹³⁸

Scholars have confirmed that these effects are robust. Alan Abramowitz documented the increasing polarization in the populace. He observed a steep decline in ticket splitting, with a large majority of the populace instead aligned with one of the two major parties, and reported high loyalty to the

131 PEW RESEARCH CTR., PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS: TRENDS IN AMERICAN VALUES: 1987–2012, at 4 (2012), <http://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/06-04-12-Values-Release.pdf>.

132 See PEW RESEARCH CTR., *supra* note 14, at 6 (finding that “ideological thinking is now much more closely aligned with partisanship” since 1994).

133 *Id.*

134 PEW RESEARCH CTR., *supra* note 131, at 1.

135 *Id.*

136 PEW RESEARCH CTR., *supra* note 14, at 9.

137 See *id.*

138 *Id.*

party of choice.¹³⁹ The turnout rate among self-declared independents fell from close to 80% in the 1950s to just over 50% in the 2000s.¹⁴⁰ Abramowitz also reported that the correlation between ideological division and partisan division increased to an unprecedented level: in 1972 the correlation was .32, in 1992 it was .44, by 2004 it was .63, a doubling of the effect.¹⁴¹ Thus, there was a significant increase in polarization between the early-1970s and the mid-1990s, but a much greater escalation between the mid-1990s and the mid-2000s.

Polarization is also apparent in the phenomenon of party identification, with the increasingly strong correlation between party identification and issue variables, “ranging from the government’s economic role, to race, to women’s role in society, to abortion policy.”¹⁴² For instance, in 1980, only 30% of voters who opposed abortion “under all circumstances” identified as Republicans; by 1998, that number was 71%.¹⁴³ During the same time, voters’ positions on various scales based on the issues just mentioned could be predicted in 1972 using party identification with 62% accuracy; that number had risen to 74% in 1998,¹⁴⁴ a phenomenon that political scientists call “partisan sorting.”

Not only is there a large ideological distance between voters of each party, but this division translates into anger and bitterness: partisan animosity has “increased substantially” since 1994, with a more than doubling of highly negative views of the opposing party.¹⁴⁵ Political scientists and pollsters have shown this significant increase applies across most issue areas,¹⁴⁶ resulting in a resorting among the public of party labels that is particularly strong among strong partisans and politically sophisticated voters.¹⁴⁷ All of these polarization effects manifest most strongly among those who are the most engaged

139 See ABRAMOWITZ, *supra* note 110, at 109. For example, in the 1970s, Democratic identifiers and leaners were three times as likely to defect to vote for Republican presidential candidates than Republicans were, but now they are equally or more loyal. *Id.* at 92; see also Jacobson, *supra* note 123, at 19–21 (showing party loyalty in both congressional and presidential elections is up and ticket splitting is significantly down).

140 ABRAMOWITZ, *supra* note 110, at 87.

141 *Id.* at 45.

142 Jacobson, *supra* note 123, at 17.

143 *Id.* at 18.

144 *Id.*

145 PEW RESEARCH CTR., *supra* note 14, at 6.

146 See *id.* at 6–7; Baldassarri & Gelman, *supra* note 101, at 427 (“[I]ssue partisanship has increased in all issue domains, although at different speeds, and . . . citizens now divide along ideological lines not only on economic and civil rights issues but also on matters of morality.”). See generally Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563 (2008) (summarizing the literature in polarization and identifying a strong effect for resorting party labels among the public).

147 See Baldassarri & Gelman, *supra* note 101, at 441. Unsophisticated and less educated voters largely follow the lead of the elite. *Id.* (“[S]ince the parties are now more clearly divided—and on a broader set of issues—it is easier for people to split accordingly, without changing their own views . . .”).

and active in the political process.¹⁴⁸ Voters with the strongest party identity display “affective polarization”—negative views of the other side and feeling angry when the other side wins elections¹⁴⁹—and the stronger the partisan identity, the “greater sense of partisan hostility—specifically, party rivalry and anger” and a higher likelihood of participating in elections.¹⁵⁰

In summary, the divisions that have become manifest in Congress that have been so pronounced since the Republican Revolution are not just confined to that institution. We have also observed marked divisions in the public at large and especially among elites and party activists. Given that the justices are part of the elite they are unlikely to be immune from the social forces driving political polarization and the extent to which their professional role would insulate them from such forces is difficult to assess directly. Indeed, the next Section argues that the effects of polarization are likely to be more pronounced looking at the justices as a cohort: in addition to the fact that individual justices may become more polarized over time, new members of the Court are chosen by a more polarized appointments process.

3. Polarization of the Court

The growing polarization has been acknowledged by the justices themselves at times. For instance, Justice Scalia said:

When I was first in Washington, and even in my early years on this court, I used to go to a lot of dinner parties at which there were people from both sides Katharine Graham used to have dinner parties that really were quite representative of Washington. It doesn't happen anymore.¹⁵¹

How polarization affects the Supreme Court has also become a topic of interest to scholars, at least in recent years.¹⁵²

Previously, an enormous literature was developed showing that Supreme Court judicial voting is ideological,¹⁵³ particularly showing how votes are predictable based on political variables such as the party of the appointing president and the political affiliation of the home state senators of a judicial nominee.¹⁵⁴ The key difference in the nascent polarization literature is

148 See SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 128 (2008); see also PEW RESEARCH CTR., *supra* note 14, at 6–7.

149 Miller & Conover, *supra* note 102, at 227, 231 (showing even the mean partisan, contrasted to the extreme partisan, displays anger, rivalry, and incivility to political opponents).

150 *Id.* at 225.

151 Liptak, *supra* note 11.

152 See, e.g., KECK, *supra* note 24, at 149 (showing that the Supreme Court and the federal appellate courts are polarized along partisan lines, though less so than the House and Senate); Tom S. Clark, *Measuring Ideological Polarization on the United States Supreme Court*, 62 POL. RES. Q. 146 (2009) (considering a variety of measures of polarization on the Court and stressing the importance of the question in future models of judicial behavior).

153 See *supra* note 22.

154 See Cass R. Sunstein et al., Essay, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304–05 (2004) (showing that the political party of

whether those ideological divisions coincide with partisan divisions.¹⁵⁵ There is a small but growing literature on the effect of political polarization on the judiciary, as well as on doctrine.¹⁵⁶ Richard Hasen has provided an overview of that literature and identified four ways in which the judicial system has been affected by polarization.¹⁵⁷

Hasen describes how polarization is shaping the most fundamental elements of the judiciary as an institution. First, polarization affects judicial selection of both appointed and elected judges by encouraging the prevalence of more extreme candidates who reflect the extreme positions of polarized political actors. Delays on judicial confirmations during periods of political division have increased, most notably with the Republican Senate's refusal to consider the nomination of Judge Merrick Garland, respect for cross-partisan "blue slip" vetoes of lower federal court nominees has waned, and party-line voting on nominees has dramatically increased.¹⁵⁸ Second, polarization influences judicial decisionmaking, particularly on divisive political issues,¹⁵⁹ with judges and justices dividing ideologically more reliably and in ways that now mirror partisan division.¹⁶⁰ Illustratively, in election law cases, both elected and appointed state court judges tend to favor their own political party.¹⁶¹ Third, polarization jeopardizes judicial legitimacy, as polarized judicial decisions in turn cause the public to view courts and their decisions through a partisan lens.¹⁶² Public approval of the Court has been dropping in recent decades at the same time as the American public increas-

the appointing president was a good predictor of how individual judges vote in nine of the twelve issue areas in almost 15,000 individual judge votes at the federal courts of appeals).

155 See Clark, *supra* note 152, at 146 (noting this difference).

156 See e.g., Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018) (arguing that a significant increase in state preemption of local government legislation is closely connected to increased political polarization between the parties, with several states adopting deliberately punitive preemption laws and even "nuclear preemption, effectively blowing up the ability of local governments to regulate without affirmative state authorization").

157 Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132088.

158 *Id.* (manuscript at 6–8).

159 Note, however, that we find an effect of polarization on judicial behavior even when controlling for various measures of salience of cases and issue area, suggesting that the effect is more widespread. See *infra* Part IV.

160 See Hasen, *supra* note 157 (manuscript at 9–13). As has been aptly illustrated by the highly controversial appointment of Justice Kavanaugh. See Tonja Jacobi & Matthew Sag, Nielsen v. Preap Forecast: *Kavanaugh Shows His Colors and They Are Bright Red*, SCOTUS OA (Oct. 15, 2018), <https://scotusoa.com/nielsen-v-preap-forecast-kavanaugh-shows-his-colors-and-they-are-bright-red/>.

161 See Hasen, *supra* note 157 (manuscript at 14); Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016) (finding a strong effect for Republican judges and a weak effect for Democratic judges).

162 See Hasen, *supra* note 157 (manuscript at 2).

ingly considers the Court a political institution.¹⁶³ Fourth, polarization influences the separation of powers balance between the judiciary and the other branches by empowering courts vis-à-vis legislatures gridlocked due to increased polarization, as evidenced by the decreasing rate of congressional overrides of Court decisions.¹⁶⁴

None of this literature has focused on the effect of polarization on oral arguments, however an important article by Neal Devins and Lawrence Baum has recognized the role of political polarization in turning the Supreme Court into a far more partisan institution in numerous other aspects. Devins and Baum describe the effect of political polarization in recent decades in the political arena as making the Court into an institution in which party and ideology are closely linked, to an unprecedented extent.¹⁶⁵ They identify two key manifestations of political polarization at the Court: ideological views and partisan identification are more closely related than previously; and “affective polarization,” the tendency of each camp to see themselves in opposition to the other and hold negative views toward the other, has also increased.¹⁶⁶ These mirror two of the main effects of polarization at the congressional level and among the public, as discussed. Devins and Baum do not examine oral argument; our results¹⁶⁷ comport with Devins and Baum’s findings of Court behavior in other contexts.

Devins and Baum argue that polarization on the Court results from two primary causes. First, nominations to the Court have become much more extreme: nominees reflect the preferences of the appointing president more exactly, and presidential disappointments no longer occur. Partisan sorting among the political actors is greater today than in any other time in history—even more so than during the Civil War and in 1936;¹⁶⁸ that leads to more ideologically homogenous nominees being considered¹⁶⁹ and growing ideological consciousness among the political actors selecting the nominees and the justices themselves.¹⁷⁰ Since the political branches are more partisan,

163 See *id.* (manuscript at 15). But see James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 520–22 (2007) (finding no evidence that polarization has undermined the legitimacy of the Court and showing that the Supreme Court “enjoys an extraordinarily wide and deep ‘reservoir of goodwill’” compared to other apex courts).

164 See Hasen, *supra* note 157 (manuscript at 18). This suggests an increase of judicial power relative to the legislature, however, elsewhere Hasen argues that another consequence of polarization is that “we may see either an erosion of the use of the filibuster in the Senate or a compromise which would weaken the power of the judiciary, such as term limits imposed upon future Supreme Court Justices.” Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 210 (2013).

165 See generally Devins & Baum, *supra* note 9.

166 See *id.* at 321.

167 See *infra* Part II–III.

168 See Devins & Baum, *supra* note 9, at 313, 316.

169 See *id.* at 303.

170 See *id.* at 303–04.

their nominees are more partisan, and, for the first time in history,¹⁷¹ all of the Democrat-appointed justices are to the left of all of the Republican-appointed justices.¹⁷²

Second, the social environment of the justices has become more polarized: the justices are emerging from more ideologically homogenous social networks, which groom and identify nominees to the federal courts as well as the Supreme Court, and in which the justices have their networks.¹⁷³ This influence is particularly strong because the Court is more responsive to elites than the public, and both party elites are more extreme than the public.¹⁷⁴ In addition, the rise of law firms representing conservative and liberal positions¹⁷⁵ and the growing influence of the Federalist Society and the American Constitution Society shape the views of the justices in polarized directions. Finally, within this social environment category, Devins and Baum point to the now-distinct career paths that exist for conservatives and liberals in the legal profession, including clerkships.¹⁷⁶

Both the selection effect and the socialization effect that Devins and Baum identify create more divided voting patterns among the justices, mirroring their partisan roots. In civil liberties cases, for example, conservatives are much more consistently voting against civil rights now than during the Warren and Burger Courts.¹⁷⁷ We would add that in addition, the justices are deciding some of the most divisive social issues that the nation faces, such as abortion rights, First Amendment rights, and ultimately, even presidential elections—as in the case of *Bush v. Gore*¹⁷⁸—which lend themselves to polarized positions. Furthermore, the justices are making these decisions based on briefs and oral arguments presented by parties who come out of a polarized political environment, often involving arguments by governments represented by solicitors general who, like the justices, are chosen by more polarized political actors.

Devins and Baum's description is entirely consistent with our thesis; however, Devins and Baum argue that this change occurred in 2010.¹⁷⁹ How can it be that Devins and Baum identify the same effect as us, but argue that it occurred one and a half decades later? In fact, the two accounts are consistent, but they are just measuring the impact of polarization in different ways.

171 There was little evidence of partisan division prior to 1937, possibly due to being suppressed through norms of unanimous opinions and suppressing dissenting views. See *id.* at 310. After 1937, Devins and Baum describe the relationship as “complicated.” *Id.* at 315.

172 *Id.* at 301.

173 *Id.* at 304.

174 *Id.* at 325–26.

175 *Id.* at 329.

176 *Id.* at 329–30.

177 *Id.* at 349–50 (comparing Table 1 and Table 2).

178 531 U.S. 98 (2000) (per curiam).

179 Devins & Baum, *supra* note 9, at 301.

First, these days the justices serve on the Court for an average of 25 years.¹⁸⁰ That means if the change began in earnest in 1995, it is not surprising that the Court did not fully separate ideologically until many years later—not only because justices serve for a long time, but because it takes multiple replacements for the two camps to fully ideologically diverge—as a *Court*—even if judicial nominations started changing much earlier. Second, Devins and Baum describe 2010 as the beginning a new era of polarization because that was the point at which Justice John Paul Stevens, a primarily liberal-voting Justice appointed by Republican President Ford, was replaced by Justice Elena Kagan, a liberal-voting Justice appointed by Democrat President Obama.¹⁸¹ Justice Stevens was the last of his kind, a moderate Justice leaning contrary to the ideological proclivity of his appointing president. However, what Justice Stevens’s departure signifies is the very *end* of the last traces of *nonpolarization*, rather than the beginning of polarization. Devins and Baum have identified the point at which the Court became *perfectly* polarized, whereas we are describing the point at which the justices started behaving in a noticeably polarized fashion.¹⁸² When Devins and Baum look at output rather than Court personnel, one factor of Court polarization they utilize is the homogeneity of the two ideological groups, as measured by the decreasing standard deviation of each group.¹⁸³ Their analysis shows that on the Democratic side, the standard deviation had a massive drop from twenty-three to four from 1986–1993 to 1994–2000, and stayed at that level since.¹⁸⁴

180 Linda Greenhouse, *How Long Is Too Long for the Court’s Justices?*, N.Y. TIMES (Jan. 16, 2005), <https://www.nytimes.com/2005/01/16/weekinreview/how-long-is-too-long-for-the-courts-justices.html>.

181 Devins & Baum, *supra* note 9, at 309.

182 We think it is better to focus on the extent of polarized behavior—which both we and Devins and Baum do in terms of measuring the effect of political polarization—than purely the ideology of the personnel on the Court. Even in an increasingly polarized political context, we might see a move away from polarization on Devins and Baum’s measure because presidents are sometimes more or less constrained when making nominations. See Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1069 (1999) (showing the effect of divided government and how confirmations will depend on the relative position of the president, the Senate, as well as the median of the eight-person remaining Court). Accordingly, future appointees may be compromise candidates, even under highly polarized political conditions. Yet the appointment of more moderates may not lead to less partisan behavior by the justices, either in voting or in advocacy at oral argument, under those highly politically polarized circumstances. We propose that a better measure of polarization than simply whether a Republican-appointed justice has a liberal voting record or vice versa could be to look at decreases in disordered voting, where justices cross ideological boundaries and vote with each other, see, e.g., Paul H. Edelman et al., *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129, 135 n.10 (2012), or an increase in the size of the ideological gap between the camps of Republican- and Democrat-nominated justices, and the extent of the overlap between them. See, e.g., Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008).

183 Devins & Baum, *supra* note 9, at 317–18.

184 *Id.* at 319. The standard deviation of the Republicans more gradually decreased. *Id.*

And so Devins and Baum provide initial evidence that polarization on the Court, while it may have reached new heights in 2010, began to significantly increase around 1995.

We agree with Devins and Baum that political polarization manifests in both personnel changes and behavioral changes within existing personnel—i.e. both selection and socialization effects are at play. However, we consider that the socialization effects that Devins and Baum identify are overly narrow: our argument is that judicial behavior will be affected not only by elements directly impacting the Court, but also by the broader shift in the political climate in the era of political polarization. The executive and Congress not only choose more polarized nominees, but their own increasingly extremist positions can be expected to affect the justices in numerous other ways. In a polarized era, the executive will take more extreme positions before the Court, arguing for the justices to choose between more starkly divided options. Congress will write more extreme legislation, and when it is gridlocked, be more divided between hostile camps. Those more extreme positions will come before the Court, either directly in the form of legislation or more generally in terms of associated policy questions. The justices themselves are affected by political polarization in the same way that the public is, but even more so because they are highly educated and politically sophisticated; political scientists have shown such persons to be the most likely candidates to become more extreme in their own views.¹⁸⁵ The Court also operates in a context where the public sees more issues as more politically salient and views public issue litigation losses as more devastating, leading to greater ire at the Court.¹⁸⁶ As such, we expect to see both changes within the behavior of justices already serving on the Court in 1995, as well as to see different justices being appointed after 1995. Both effects will reflect the era of political polarization. The remainder of this Article examines these numerous manifestations of the effect of political polarization on the Court at oral argument also.

D. Alternative Theories and the Need for an Empirical Approach

There are many theories as to when and why Supreme Court oral argument changed. Lawyers in particular seem drawn to personality-driven explanations as opposed to institutional ones, and there is no doubt that the late Justice Scalia was one of the Court's most notable personalities in recent decades. Preeminent Supreme Court advocate Carter Phillips describes oral argument as having changed completely after Justice Scalia's appointment, noting that whereas "the normal argument might generate 10–15 questions in 30 minutes. Sometimes even fewer. He [Scalia] would ask 10–15 questions by himself."¹⁸⁷ More colorfully, veteran Court watcher Nina Totenberg

185 Baldassarri & Gelman, *supra* note 101.

186 Hasen, *supra* note 157.

187 Erin Fuchs, *Lawyer Who's Argued 73 Cases in Supreme Court Says Oral Arguments 'Changed Completely' After Scalia*, BUS. INSIDER (Feb. 13, 2016) (alteration in original), www.

recently observed that when Justice Scalia “came to the court, the justices asked few questions during oral argument. And Scalia, the junior justice, jumped in, pummeling lawyers relentlessly with questions. Soon other justices took a more active approach to questioning, so that most lawyers could get less than a sentence out of their mouths. . . .”¹⁸⁸ Although there is tremendous value in such first-hand accounts, a more systematic and objective methodology is required. With regard to the Scalia hypothesis in particular, it seems likely that his recent death in 2016 may have led to an outsized estimation of his role as an agent of change on the Supreme Court.¹⁸⁹

An alternative institutional account of the transformation of oral argument since the 1960s links it to the professionalization and concentration of the Supreme Court bar that began in the mid-1980s.¹⁹⁰ On this theory, the justices changed because the advocates changed.¹⁹¹ Richard Lazarus argues that this trend began with the decision of Sidley Austin to hire former Republican Solicitor General Rex Lee in 1985 and create a Supreme Court and appellate practice at the firm’s Washington, D.C. office.¹⁹² Law firms such as Mayer, Brown & Platt, Jenner & Block, and Kirkland & Ellis quickly followed suit by recruiting talent from the U.S. Department of Justice and recent Supreme Court clerks.¹⁹³ Since then, the Supreme Court bar has increasingly seen advocates who were former Supreme Court clerks.¹⁹⁴ From the mid-1980s onwards, private firms began to imitate the boutique practice of the Solicitor General on behalf of private clients. This professionalization of the Supreme Court bar was sustained by the business community’s increased appetite for Supreme Court litigation in light of the perceived business-friendly attitude of the Rehnquist Court.¹⁹⁵ Our empirical analysis supports the claim that from the mid-1980s to the present day, advocacy at the Supreme Court has become more and more concentrated in repeat players, usually former employees of the U.S. Department of Justice, former Supreme Court clerks, and quite commonly both.¹⁹⁶ However, we show that it cannot

.businessinsider.com/scalia-death-oral-argument-supreme-court-2016-2 (quoting Carter Phillips, a partner at Sidley Austin).

188 Totenberg, *supra* note 1.

189 A classic example of the availability heuristic at work. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

190 See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1487 (2008).

191 *Id.*

192 See *id.* at 1498.

193 *Id.* at 1498–500.

194 See *infra* Figure 7. In one case in the 2017 Term, *City of Hays v. Vogt*, 138 S. Ct. 1683 (2018) (per curiam), Justice Ginsburg faced three advocates all of whom had previously been her clerks. See Tony Mauro, *An RBG Trifecta—A SCOTUS First?*, NAT’L L.J. (Feb. 20, 2018), <https://www.law.com/nationallawjournal/2018/02/20/an-rbg-trifecta-a-scotus-first/>.

195 See Lazarus, *supra* note 190, at 1503.

196 See *infra* Section II.A.

explain the other significant changes that we identify in increased levels of judicial activity and judicial advocacy. Both the Supreme Court bar theory and the Scalia theory point to 1986 as being the pivotal Term, but we show that the data does not support either of these claims.

Our theory about political polarization, theories focused on particular personnel changes in the Court, and the competing explanation that begins with changes to the Supreme Court bar all have one thing in common: they are amenable to empirical testing. Despite being a vital part of the Supreme Court's decision-making process, oral arguments are surprisingly understudied. Although it is true that the details of oral argument in particular cases are often subject to detailed review,¹⁹⁷ an empirical literature that attempts to study the content of oral argument is only just emerging.¹⁹⁸ Yet an empirical analysis of oral argument is essential to understanding both its nature and the changes taking place in the process.

Prior empirical studies of oral argument have either relied on a detailed study of a very small number of cases—small to the point that they can only be considered as pilot studies with suggestive results¹⁹⁹—or have undertaken much narrower studies of larger fields of data.²⁰⁰ In that second category, a few contributions particularly stand out. In 2006, Johnson et al. used archival material from the “Blackmun Papers” to show that oral argument really does matter.²⁰¹ Johnson and his coauthors combined Justice Blackmun's assessment of the quality of the advocates appearing before the Court with other sources of data to show that the quality of advocates' performances at oral argument influence justices' votes on case outcomes.²⁰² In 2009, Johnson et al. confirmed the findings in two earlier pilot studies that the more the jus-

197 See, e.g., LAWRENCE S. WRIGHTSMAN, *ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH* 4–7 (2008) (analyzing a variety of Supreme Court oral arguments).

198 For nonempirical work on oral argument, see Benoit, *supra* note 32, at 22, 33 (describing an information gathering benefit to the justices in oral arguments); Johnson, *supra* note 5, at 331–33 (same); Wasby et al., *supra* note 31, at 418–19 (same).

199 See, e.g., James C. Phillips & Edward L. Carter, *Gender and U.S. Supreme Court Oral Argument on the Roberts Court: An Empirical Examination*, 41 *RUTGERS L.J.* 613, 613 (2010); Phillips & Carter, *supra* note 4, at 81; John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 *J. SUP. CT. HIST.* 68, 75 (2005); Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 *J. APP. PRAC. & PROCESS* 271, 273 (2004).

200 Articles published since this Article was accepted for publication include Ryan C. Black et al., *Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court's Bench Reduced Interruptions During Oral Argument*, 43 *J. SUP. CT. HIST.* 83, 83 (2018).

201 Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 *AM. POL. SCI. REV.* 99, 99 (2006).

202 *Id.*; see also Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 *LAW & SOC'Y. REV.* 259, 259 (2007) (finding previous litigation experience and oral argument performance are a significant predictor of votes overall, but finding no evidence of these effects in salient cases).

tices speak to the petitioner, the more likely the petitioner is to lose.²⁰³ Providing more evidence that oral argument contains information about the intentions of the Court, Black et al. used the emotional content of the justices' words at oral argument to predict voting behavior.²⁰⁴ Dietrich et al. have recently confirmed this effect using emotional arousal, as measured by the vocal pitch of the justices' words in oral argument as a predictor of voting behavior.²⁰⁵ Jacobi and Rozema provide further evidence of the importance of oral argument, showing that inter-justice conflict at oral argument in the form of interruptions is predictive of future breakdowns in voting agreement, even controlling for ideology, issue area, and the standard menu of variables political scientists use to try to predict judicial behavior.²⁰⁶ Finally, Jacobi and Schweers demonstrate that there is a distinct gender dimension to the Supreme Court's hearings, reporting that female justices are interrupted up to three times as often as male justices, normalized for the number of justices on the Court.²⁰⁷

The abovementioned empirical studies all make important contributions to our understanding of oral argument; however, other than Sullivan and Canty, none of them tries to understand how the nature of oral argument has changed over time.²⁰⁸ Nor do they take full advantage of the richness of the data available in the transcripts of oral argument. Even the prior works that claim to study such vital aspects of judicial behavior at oral argument as the occurrence of questions and interruptions only rely on rough proxies. For example, Johnson et al. and Black et al. count any instance of two justices speaking sequentially as an interruption.²⁰⁹ This counterintuitive definition has the striking implication that advocates never interrupt jus-

203 Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 259–60 (2009). In a study of just ten cases from the 2002 Term, Shullman found that justices ask more questions of advocates whom they ultimately vote against. Shullman, *supra* note 199, at 273, 292. In a study of twenty-eight cases, Roberts also found that eighty-six percent of the time the party receiving the most inquiries from the bench ultimately loses the case. Roberts, *supra* note 199, at 75.

204 Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 572 (2011).

205 Dietrich et al., *supra* note 6, at 12.

206 See generally Jacobi & Rozema, *supra* note 6.

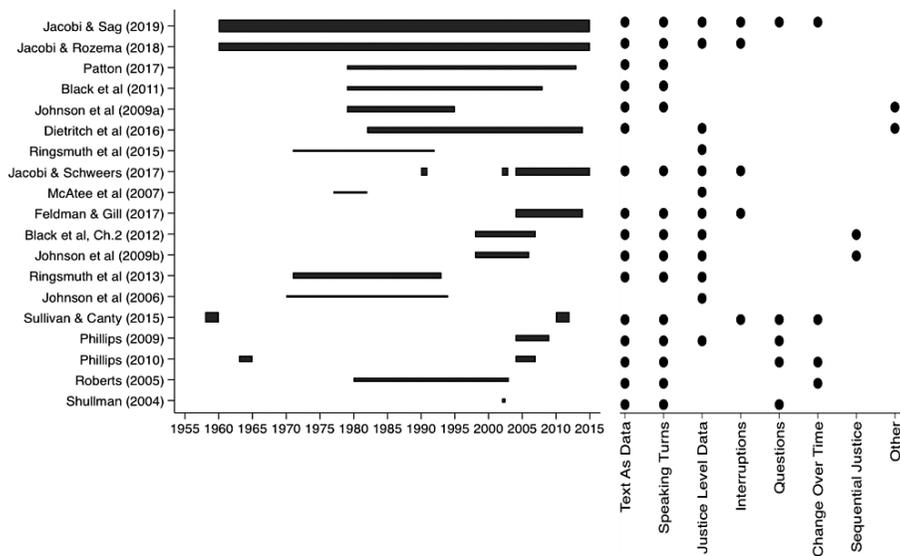
207 Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1462 (2017); see also Adam Feldman & Rebecca Gill, *Echoes from a Gendered Court: Examining the Justices' Interactions During Supreme Court Oral Arguments 1* (Mar. 16, 2017) (unpublished manuscript), ssrn.com/abstract=2906136; cf. Dana Patton & Joseph L. Smith, *Lawyer, Interrupted: Gender Bias in Oral Arguments at the U.S. Supreme Court*, 5 J.L. & CTS. 337, 337 (2017). See *infra* note 307 for our revised estimations of this effect.

208 For a discussion of the differences between our study and Sullivan & Canty, see *supra* notes 41–43 and accompanying text.

209 RYAN C. BLACK ET AL., *ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE* 20–21 (2012); Johnson et al., *supra* note 32, at 337.

tices, and that justices never interrupt advocates—two things we know to be false.²¹⁰ Likewise, several articles fail to differentiate between questions and statements made by the justices. Some acknowledge this limitation,²¹¹ while others insist on describing everything said by a justice as a question.²¹² To concisely summarize the contributions as well as the limitations of the existing literature, Figure 2 provides two summaries of all of the works that attempt to empirically measure one or more aspects of oral arguments.

FIGURE 2: EMPIRICAL LITERATURE ON SUPREME COURT ORAL ARGUMENT



The articles in Figure 2 are arranged in order of sample size, with the largest at the top and the smallest at the bottom. The lengths of the horizontal bars on the left side indicate the time period of each study, and the widths of the horizontal bars indicate the richness of the data. So, for example, Chief Justice Roberts’s study shortly before his entrance to the bench covers over twenty years but takes into account only one aspect of judicial activity—judicial statements—and covers only twenty-eight cases, and so appears second from the bottom with a relatively thin bar. Ours is the only empirical study that combines a rich set of data with a broad historical sweep to assess how oral argument has changed over time. The only other studies that consider change over time are Phillips and Carter, Roberts, and Sullivan and Canty, all of which rely on data that is either sparse or fragmented.²¹³ Using

210 Jacobi & Schweers, *supra* note 207, at 1429–30.

211 Black et al., *supra* note 204, at 575 n.9 (using the term “utterance”).

212 See Johnson et al., *supra* note 32, at 337; Eve M. Ringsmuth et al., *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RES. Q. 429, 430 (2012).

213 See Phillips & Carter, *supra* note 4; Roberts, *supra* note 199; Sullivan & Canty, *supra* note 16.

more detailed and more complete data, we are able to determine whether there has been an objectively identifiable, quantifiable, and verifiable change in the nature of oral argument. In addition, we are also able to identify when this change occurred and to present our theory, and evidence supporting it, of why the change occurred. That is, we are able to show that there is a new oral argument, that it began in 1995, and that it was caused by the Court responding to the partisan polarization in the political branches and society at large.

Our empirical analysis of oral argument is based on data derived from the text of every Supreme Court oral argument from 1960 to 2015, supplemented with data from other traditional sources and biographical information about advocates and justices. Transcripts of oral argument going back to 2000 are freely available on the Supreme Court's website and the research service LexisNexis has a more complete set dating back at least to 1979.²¹⁴ In addition, the Oyez multimedia archive of Supreme Court cases features a complete set of transcripts from 1960 to the present.²¹⁵

Although arguments before the Court are public and the transcripts are freely available online, there is no publicly available dataset that provides a meaningful insight into oral argument. We derived such a dataset by extracting the relevant data from the Oyez multimedia files. Using Oyez as our foundational resource posed some technical challenges but it enabled us to analyze the transcript data at a much greater level of detail than would have been otherwise possible. In particular, the Oyez transcripts identify each speaker at oral argument by name for the entire period of our study, whereas the transcripts available from the Court's own website and LexisNexis only do so from 2004 onward.²¹⁶ The Oyez multimedia archive synchronizes the transcript of oral argument to the relevant sound recording. Not only does this make listening to oral arguments more satisfying, it also means that there are time stamps encoded in the Oyez metadata that allow us to harvest data on the duration of individual speech episodes in addition to their text.²¹⁷ These timestamps are accurate to the 0.001 of a second.

The data we harvested from the Oyez archive consists of "chunks" of text and associated metadata indicating the name of the case, who was speaking, and the time stamps for the beginning and end of that chunk of text. Beginning with over 3.2 million such chunks of text and their associated metadata, we were able to derive a database organized at the level of individual speech

214 *Argument Transcripts*, SUP. CT. U.S., www.supremecourt.gov/oral_arguments/argument_transcript/2000 (last visited Nov. 18, 2018); LEXISNEXIS, <https://advance.lexis.com/usresearchhome/> (last visited Nov. 5, 2018).

215 OYEZ, <https://www.oyez.org/> (last visited Nov. 18, 2018).

216 Oyez's speaker identification is based on computer analysis of the original recordings of oral argument and is generally reliable, although occasionally erroneous. In particular, it overidentifies Chief Justice Burger in the 1981 term to such an extent that we drop 1981 from most of our analysis.

217 Our dataset is derived from the same initial scraping of the Oyez website that was used in a related project focusing specifically in interruptions at oral argument. See Jacobi & Rozema, *supra* note 6.

episodes.²¹⁸ By speech episode, we mean all of the words spoken by a speaker until a new speaker speaks: these episodes can be very short, or they may be extremely long. Our dataset consists of 1.4 million separate speech episodes in over 6000 cases across a time span of fifty-five years between 1960 and 2015.

We further refined this data by using text mining to determine the number of words within a given speech episode, whether the speech episode contained no questions, a single question, or more than one question. We use similar techniques to determine whether a speech episode terminated with an interruption. The official transcripts of Supreme Court oral argument are created by professional court stenographers who follow certain stylistic conventions; most importantly for our purposes, the transcripts identify questions with a question-mark and interruptions with the use of two dashes (--) at the end of a speech episode.²¹⁹ Based on these conventions we are able to characterize individual speech events as questions, multiple questions, non-questions (i.e., comments), or as interruptions.

The data derived from the transcripts and associated metadata are just the beginning of our analysis. We integrated biographical information about the justices and the advocates derived from public sources.²²⁰ Furthermore, we combined our data with the detailed records of the Spaeth Supreme Court Database.²²¹ The most useful features of the Spaeth Database for our purposes is that it classifies cases into issue areas, categorizes case outcomes as either liberal or conservative, and contains information on individual justices' votes.²²² The Spaeth data is a widely used, indispensable resource for empirical studies of the Supreme Court.²²³ Finally, our primary measure of judicial ideology are the Martin-Quinn scores, developed by Andrew Martin and Kevin Quinn.²²⁴

218 The metadata in Oyez synchronizes the transcript with the sound recording; as such, Oyez divides the transcript into chunks that are usually smaller than the entire speech episode.

219 The court stenographers also use two dashes in the middle of a speech episode to indicate hesitation; we are able to rigorously distinguish interruption indicators at the end of a speech episode.

220 Wikipedia contains several useful lists with rich biographical information, including a list of justices, law clerks, Solicitors General, and a more idiosyncratic list of "notable" Principal Deputy Solicitors General. See WIKIPEDIA, https://en.wikipedia.org/wiki/Main_Page (last visited Nov. 19, 2018); see also *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 18, 2018); *Office of the Solicitor General*, U.S. DEP'T JUST., <https://www.justice.gov/osg/historical-bios> (last visited Nov. 18, 2018).

221 *The Supreme Court Database*, WASH. U.L., supremecourtdatabase.org (last visited Nov. 19, 2018).

222 HAROLD SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK, VERSION 2016 RELEASE 01, at 35, 37, 48 (2016), supremecourtdatabase.org/_brickFiles/2016_01/SCDB_2016_01_codebook.pdf (describing the criteria for the identification of issues).

223 See, e.g., Sag et al., *supra* note 22, at 808 n.38.

224 Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 135 (2002).

II. TRENDS OVER TIME IN ORAL ARGUMENT

A. Context

A central thesis of this Article is that the justices have become much more active during oral argument in numerous ways. Before we discuss these changes in detail, it is important to note the context in which they occurred. From 1960 to 2015, the Court has dramatically reduced the number of cases that it hears every term. In the first thirty years of our study, from 1960 to 1990, the number of cases heard fell by more than forty percent from approximately 175 to 100 per term. In the next quarter century, from 1990 to 2015, this decrease slowed but continued, and since 2010, the Court has heard fewer than seventy-five cases per term.

FIGURE 3: NUMBER OF SUPREME COURT ORAL ARGUMENTS

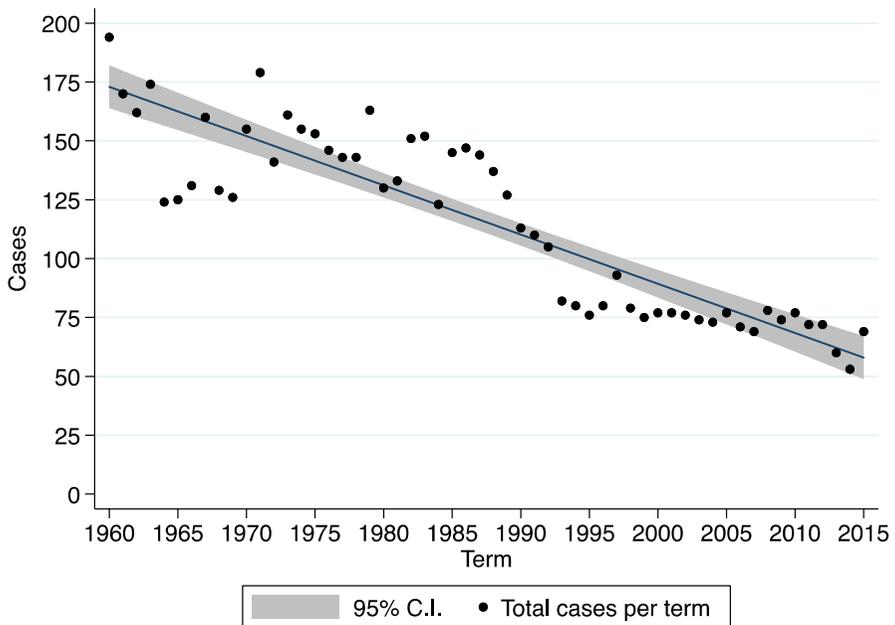


Figure 3 summarizes this trend, graphing the total number of cases per term, including a line of best fit and a gray 95% confidence interval. The confidence interval indicates that the downward trend is statistically significant: there is white space between the bottom of the confidence interval at 1960 and the top of the confidence interval at 2015. We use this technique throughout the Article to give a preliminary indication of whether changes

Updated data is available at *Martin-Quinn Scores: Measures*, U. MICH. C. LITERATURE, ARTS & SCI., mqscores.wustl.edu/measures.php (last visited Nov. 6, 2018). For an extended explanation of the Martin-Quinn scores, see Sag et al., *supra* note 22, at 831–33.

presented graphically are significant, which we then confirm in the multivariate regressions.

The Supreme Court receives 7000–8000 petitions for review each year, but only chooses approximately one percent for full review.²²⁵ Earlier in its history, the Court increased the number of cases it heard, from 98 in 1810 to 253 by 1850, most of which arose out of its obligatory jurisdiction.²²⁶ In 1891 and numerous times in the twentieth century, Congress gave the Court increased control over its own docket, yet the Court continued to register its docket as overloaded at approximately 150 cases per term.²²⁷ During the period studied in this Article, the Court's caseload dropped by almost half in the late 1980s and early 1990s after the promotion of Chief Justice Rehnquist,²²⁸ who sought to limit the Court's caseload.²²⁹

The length of oral arguments also decreased during our period of study. Prior to 1970, the Court heard argument in most cases for two hours,²³⁰ whereas now it allots only one hour per case.²³¹ This is the most recent in a series of changes that gradually reduced the length of oral argument—the two-hour rule emerged in 1925;²³² prior to that, as of 1911, each side was permitted ninety minutes per side;²³³ and earlier, each side was permitted two hours, or more by special leave of the Court.²³⁴ And before 1849, arguments were unlimited in duration.²³⁵ Those earlier changes went hand-in-hand with significant increases in the number of days devoted to oral argument, extended from forty-three in 1825 to ninety-nine in 1845.²³⁶ Figure 4

225 See *The Supreme Court at Work*, SUP. CT. U.S., www.supremecourt.gov/about/courtatwork.aspx (last visited Nov. 18, 2018).

226 Stephen M. Shapiro, Partner at Mayer, Brown & Platt, Address at the Supreme Court Historical Society: Oral Argument in the Supreme Court: The Felt Necessities of the Time, www.mayerbrown.com/en-US/Oral-Argument-in-the-Supreme-Court-The-Felt-Necessities-of-the-Time/.

227 Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 276 (2006).

228 For a breakdown of the reduction in both paid and *in forma pauperis* cases granted and denied, see *Federal Judicial Caseloads, 1789–2016*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015> (last visited Nov. 18, 2018).

229 Linda Greenhouse, *Ease Load on Courts, Rehnquist Urges*, N.Y. TIMES (Jan. 1, 1992), www.nytimes.com/1992/01/01/us/ease-load-on-courts-rehnquist-urges.html (describing the Chief Justice's year-end report calling for a limited federal court role "reserved for issues where important national interests predominate" (quoting Chief Justice William Rehnquist)).

230 See *supra* note 30 and accompanying text.

231 SUP. CT. R. 28(3) ("Unless the Court directs otherwise, each side is allowed one-half hour for argument.").

232 SUP. CT. R. 26(4), 266 U.S. 653 (1925) (repealed 1928).

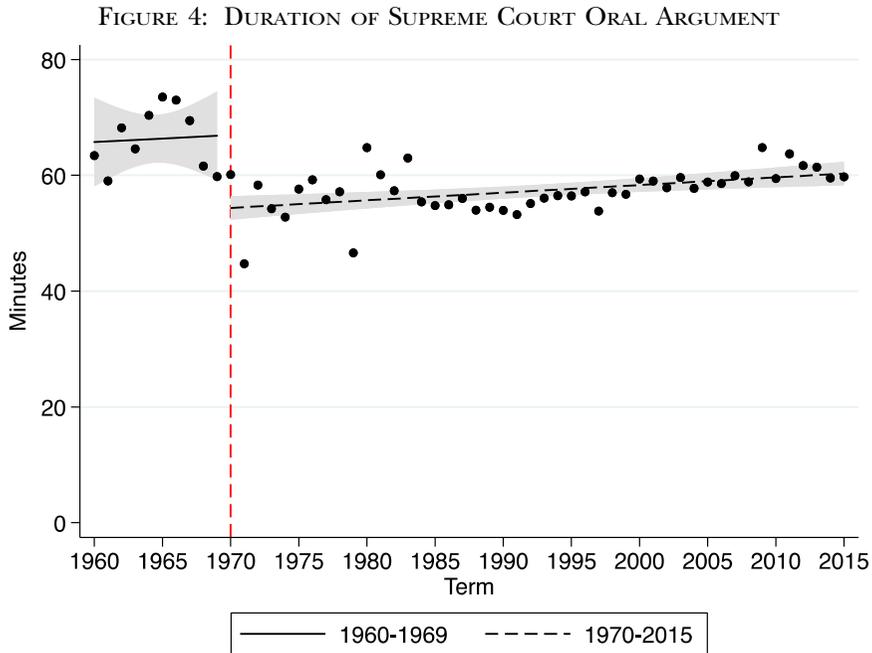
233 SUP. CT. R. 22(3), 22 U.S. 586 (1911) (repealed 1925).

234 SUP. CT. R. 53, 48 U.S. (7 How.) v (1849) (repealed 1858).

235 See Shapiro, *supra* note 226.

236 *Id.* These changes were justified by the exhaustion of the justices, who reported feeling strained by the amount of work, particularly when their responsibilities included riding circuit. *Id.*

shows the change in duration in oral argument since 1960. The only significant shift occurred in 1970, coinciding with the most recent rule change, indicated by the vertical dashed line.



Next, we consider the extent that public attention is paid to cases. Figure 5 shows the change over time in the salience of the Court’s docket, measured in two different ways. First, to capture the political salience of a given case, we use a proxy developed by Lee Epstein and Jeffrey Segal of whether a case is mentioned on the front page of the *New York Times*.²³⁷ Such prominent attention being given to a case in a prestigious journal is a good way to assess the level of public interest in the case. Second, to capture the legal salience of a case—the extent to which it may be important to the justices and the legal community, even if not to the public—we use a measure of whether the case is published in the *Congressional Quarterly*. This measure “is based on experts’ retroactive assessment of whether a case was a landmark decision.”²³⁸ Scholars have used both measures as proxies for important Supreme Court cases.²³⁹

²³⁷ Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72 (2000).

²³⁸ Adam Bonica et al., *Influence and Ideology in the American Judiciary: Evidence from Supreme Court Law Clerks* 18 n.21 (Coase-Sandor Working Paper Series in Law and Econ., Working Paper No. 790, 2017), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2449&context=law_and_economics.

²³⁹ See, e.g., Bonica et al., *supra* note 238; James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS

FIGURE 5: POLITICAL SALIENCE AND LEGAL SALIENCE OF SUPREME COURT CASES²⁴⁰

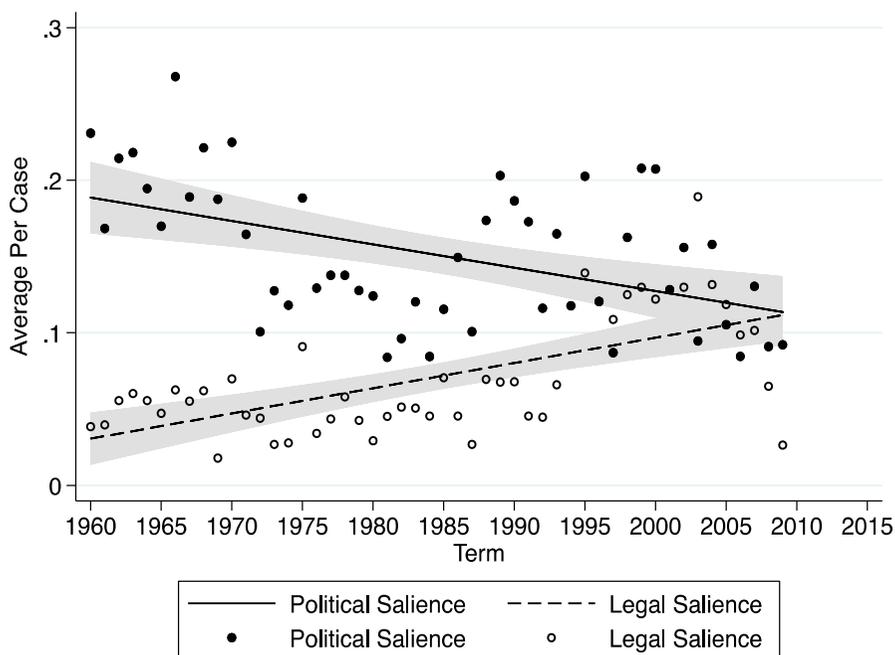


Figure 5 shows that there has been a small but statistically significant drop in the number of cases that the *New York Times* deems worthy of featuring on its front page, suggesting somewhat surprisingly that the Court's docket has become slightly less politically salient over time. At the same time, there has been a substantially significant as well as statistically significant increase in legally salient cases. These changes suggest it will be important to control for both political and legal salience in our regressions.

The final piece of context it is important to consider relates to changes in the Supreme Court bar. As illustrated in Figure 6, the pool of advocates who appear in speaking roles before the Supreme Court was over 97% male in the 1960s, dropping steadily over time to about 83% male in the current decade.²⁴¹ The important point for our purposes is that the trendline has been quite consistent, with no significant break in 1986 or 1995.²⁴²

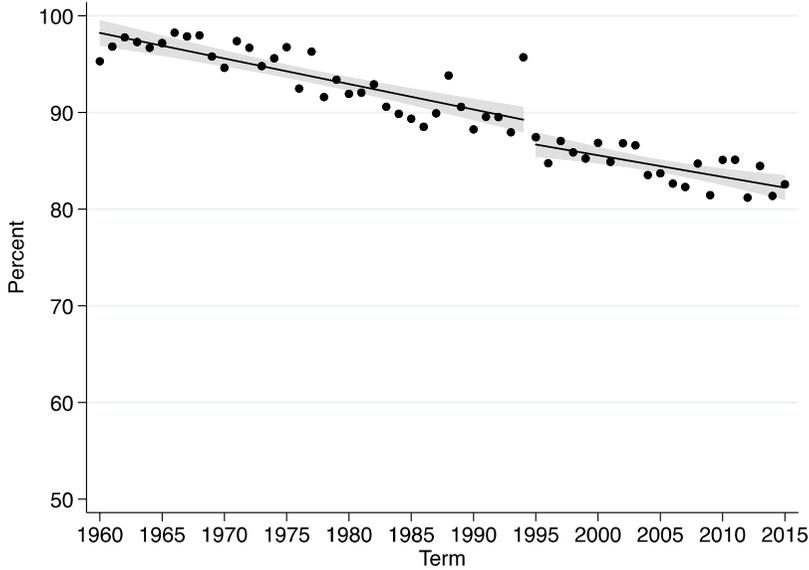
324, 324–25, 338 (2007) (constructing a network of 26,681 Supreme Court majority opinions and the cases they cite from 1791 to 2005 and dynamic rankings that can be used to predict the future citation behavior of state courts, courts of appeals, and the Supreme Court).

240 The data on salience is only available up to the 2009 Term.

241 Whether we should see this class as 17% full or 33% empty is a question for the reader.

242 We include more detailed information on the leading Supreme Court advocates in the Appendix.

FIGURE 6: GENDER OF SUPREME COURT ADVOCATES, BY PERCENTAGE MALE



As already noted in Section I.D, the Supreme Court bar became increasingly concentrated and professionalized in the mid-1980s. The concentration of Supreme Court advocacy is illustrated in Figure 7. The figure shows the number of unique advocates each term, represented by solid circles, and the number of unique former Supreme Court clerks each term, represented by hollow circles.

FIGURE 7: NONREPEATING SUPREME COURT ADVOCATES AND CLERKS

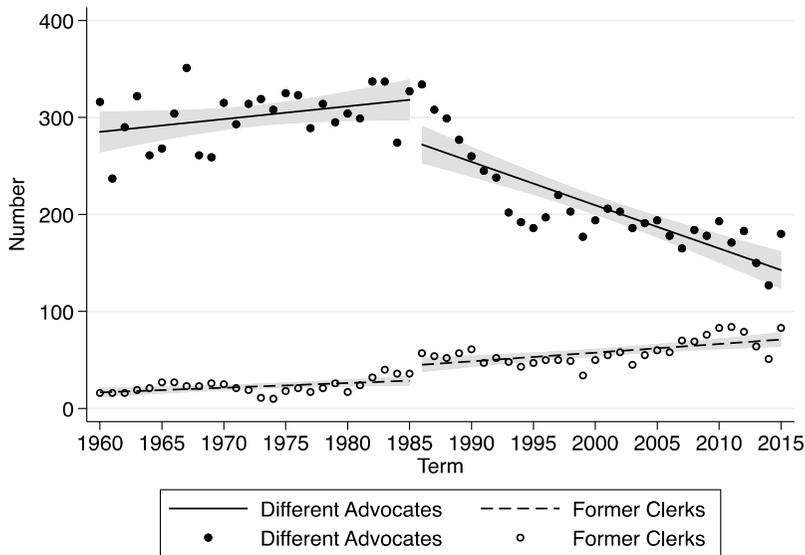


Figure 7 clearly illustrates the precipitous decline in the number of unique advocates beginning in 1986 and the steady increase in the appearance of former clerks. Consistent with Lazarus's account,²⁴³ the fundamental transformation in the Supreme Court bar appears to begin in the mid-1980s and level out in the mid-1990s. In our regression analysis in Part IV, we examine a number of advocate characteristics in combination with different aspects of judicial behavior at oral argument. If the root cause of the changing nature of oral argument were the increasing concentration and professionalization of the Supreme Court bar, we would expect the change in judicial behavior to manifest more clearly in the mid-1980s or the late-1980s at the latest, not the mid-1990s. Moreover, we would also expect to see stronger results for our attorney experience variables in our multivariate regressions.

There is more to be said about the changing nature of the Court's docket, but these five trends paint a broad-stroke picture of the context in which the remainder of our analysis takes place. The rest of this analysis focuses in more closely on oral arguments themselves.

B. *Judicial Activity*

In the remainder of Part II, we develop our key measures of judicial activity over time, and show how, across the entire range of different types of activity at oral arguments, the justices have become significantly more active since 1960. As discussed, we hypothesize that the broader political polarization in the nation that was accelerated by the Republican Revolution of 1994 is part of the cause of this increasing judicial oral argument activity. As such, throughout, we divide our lines of best fit into a range covering prior to and including 1994, and post-1995. In addition, as we have seen, the 1970 rule change was also influential in some, although not all, Court activities. Where appropriate, then, we also split our line of best fit before and after 1970. We pay attention to, although we do not divide the data yet further, to before and after 1986, when Justice Scalia joined the Court and the Supreme Court bar started becoming more exclusive.

Oral argument, by definition, is an investigation driven by verbal engagement. As such, our first step is to look at whether the justices are talking more at oral argument. Because the arguments are limited, ordinarily to one hour, additional judicial speech must come at the cost of the advocates' speaking time. Figure 8 graphs the number of words spoken at oral argument, separated between the justices and the advocates—that is, how much of the time the justices spend speaking relative to listening.

243 Lazarus, *supra* note 190, at 1498.

FIGURE 8: WORDS SPOKEN AT ORAL ARGUMENTS

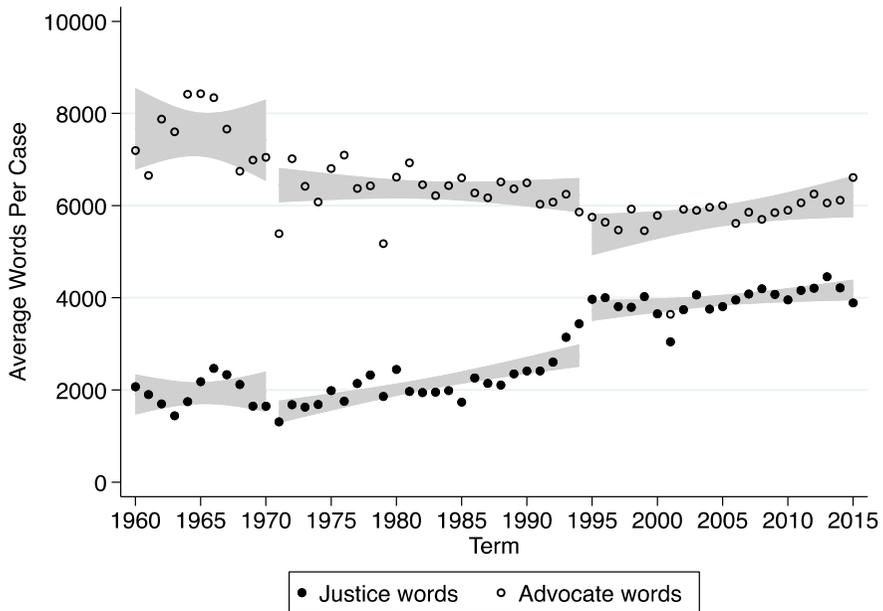


Figure 8 shows the average number of words spoken by the advocates in any given term, represented in the hollow circles, and the average number of words spoken by the justices in each term, as seen in the solid circles. Later, we break down this analysis more specifically to each justice; the present analysis is a macro look at the Court as a whole.

Figure 8 reveals that there is a distinct and consistent time trend—the advocates have been consistently speaking less over time and the justices are speaking more. There is a largely monotonic time trend for the advocates, but even within that downward trend there is still a distinct downward shift in 1995. The two confidence intervals on advocates are not entirely separated, suggesting that this trend is only of borderline statistical significance. The effect for the justices is far starker: whereas from 1960 to 1994 there was no clearly identifiable trend, there was a very large and highly statistically significant shift upward around 1995. In fact, the rate of justice words almost doubled from around 1980 to the post-1995 period. Note, however, that this trend seemed to begin slightly before 1995—as discussed, the Republican Revolution was the most salient manifestation of the polarization occurring in the political elite and the country at around that time. But importantly, there was no significant upward shift in 1986, or in the years following the entrance of Justice Scalia and the narrowing of the Supreme Court bar. Figure 8, then, provides preliminary support for our hypothesis that judicial activity is increasing, and is particularly increasing in the post-1995 period; it also undermines the persuasiveness of the Scalia/professionalization hypothesis. We confirm the significance of the post-1995 effect in our regression

analysis.²⁴⁴ We also tested it with a structural break analysis and confirmed that it is highly significant.²⁴⁵

We also assess whether the time the justices spend speaking, rather than the number of words used, shows the same trend. We measure duration as the number of seconds between the time stamps in the Oyez transcripts.²⁴⁶ Figure 9 shows the trend in duration of speech at oral arguments over time. The results mirror the results for words used as indicating judicial activity, with the justices considerably increasing the amount of time they spend speaking at oral argument. The only significant difference from Figure 8 is that looking at duration makes clear that the decrease in speaking time permitted to the advocates since 1995 is significant. Generally, our analysis of duration of arguments generally tracks very closely to the words used throughout our analysis;²⁴⁷ as such, subsequently we do not report duration, but the results are the same.

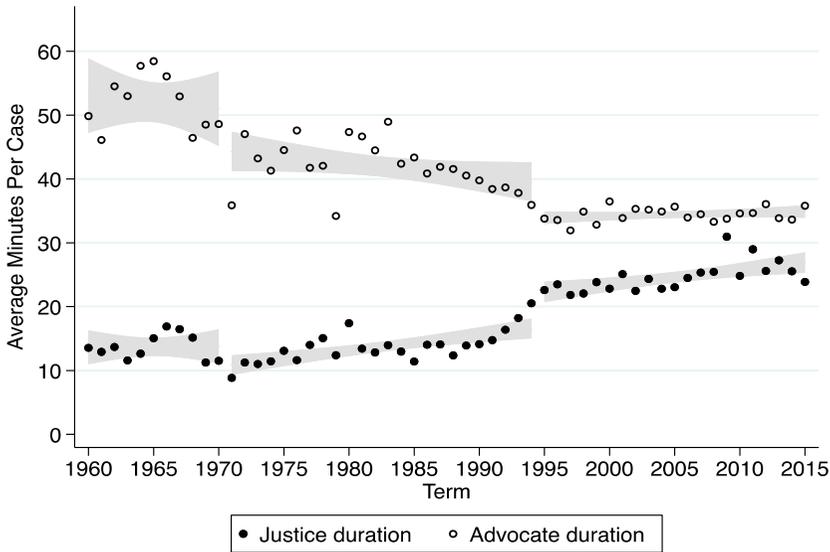
244 See *infra* Part IV.

245 We performed a structural break analysis on the average number of justice words per case. As a preliminary matter, we rejected the null hypothesis that there was no break using the Wald test. We then confirmed our hypothesis that there was a break in 1995 using the Wald test for a structural break with a known date. The results of both of these tests were significant at the 0.00 level. As expected, we found the same results for the duration of the justices' speech, the number of non-question statements made by the justices, and the number of times the justices interrupt the advocates. Also as expected, we could not reject the null hypothesis that there was no structural break at 1995 for the number of questions asked by the justices—justices asking more genuine questions is not a feature of the new oral argument. The only hypothesis we expected to be significant for which we were unable to reject the null hypothesis that there was no structural break at 1995 was for the number of times justices interrupt other justices.

246 The timestamps are precise to one-thousandth of a second and are part of the Oyez metadata that synchronizes the recordings of the argument with the scrolling transcript on the Oyez website.

247 The number of words per second varies by term. Justices and advocates spoke faster in the 1960s than in any other decade, at a rate of 3.87 and 4.19 words per second, respectively. From the 1970s to the current era, justice word speed varied between a low of 3.18 and a high of 3.37 words per second. Advocate word speed dropped to about 3.0 words per second in the 1980s, 1990s, and 2000s, but jumped to 3.76 words per second in the current decade.

FIGURE 9: DURATION OF SPEECH EPISODES AT ORAL ARGUMENT



We have shown that measured literally, the justices are doing more at oral arguments, but the effect goes beyond the mere physical activity of talking. Listening to oral arguments, we have observed that much more than just the relative speaking time between the justices and the advocates has changed: it seems that the content of the justices' speech has also changed. As we showed in Part I, in examples such as *Masterpiece Cakeshop*, *Whitford*, and *Epic*, in many instances the justices appear to be advocating for a particular side. One way they do this is by making statements and providing their own conclusions, rather than asking questions.²⁴⁸

A look at the time trend in the use of questions and comments confirms our impression: not only do the justices speak more, the content of the justices' speech has also changed considerably. Perhaps most importantly, even while the justices are talking more, they are not asking significantly more questions. Rather, they are posing what we call "non-questions"—that is, they are making statements and comments. Figure 10 graphs these two measures of judicial activity. To determine whether a particular speech episode should be categorized as a question, we used an algorithm to search every episode for the appearance of a question mark.²⁴⁹ Having studied the transcript from hundreds of oral arguments, we are confident that the court reporters use question marks in an appropriate and consistent manner. We note, how-

248 See *supra* Section I.B.

249 We also checked to see whether the use of more than one question within a speech episode has changed over time, on the theory that multiple questions directed at an advocate before giving the advocate a chance to speak may be different in nature to single questions. We found that, like single questions, there was no significant change over time in double questions.

ever, that our method will only count questions that are not cut short by an interruption. The number of interruptions is a small enough proportion of speech episodes that this explanation cannot fully account for the declining proportion of questions.

FIGURE 10: JUSTICES' QUESTIONS AND NON-QUESTIONS AT ORAL ARGUMENTS

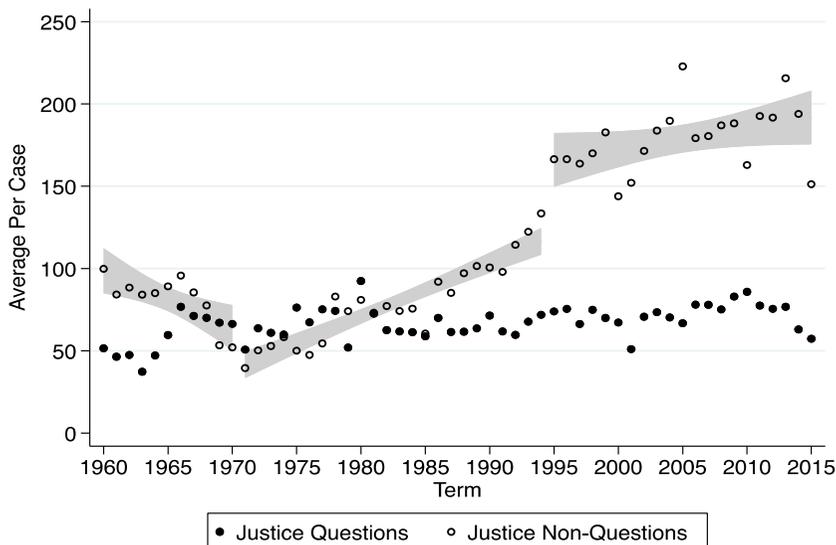


Figure 10 now uses hollow circles to show justice non-questions and solid circles to show justice questions. The difference is very stark: even as the number of words used by the justices has risen significantly, the number of questions has remained remarkably constant. The extra words are being devoted to comments and statements, not to inquiries of the advocates. Both the slope on the rate of non-questions is considerably upward, indicating the overall trend, and the upward break at 1995 is very large. In the post-1995 period, with the justices as a whole still averaging approximately seventy-five questions per case, they now pose almost (and occasionally more than) 200 non-questions per case; that is, the justices now devote only one-third of their speech activity to questions, and well over double that to making comments.

This alone is strong evidence that oral argument has changed dramatically in character. Even though oral arguments are no longer the justices' main means of gathering information, oral arguments are still meant to be an interrogatory or inquisitive process, by which the justices "provide counsel with the opportunity to make his or her best case directly to the Justices [and] to assure the parties to the litigation that their concerns have been fully heard and fairly considered by those with the power to decide."²⁵⁰ Yet, if the justices are making statements rather than asking questions of counsel, that role is diminished. The ideal of the judge is of an objective, disinter-

250 Sullivan & Canty, *supra* note 16, at 1011.

ested party who is gathering information through inquiry; it is not that of a person communicating his or her opinions or revealing his or her already developed position or conclusion.²⁵¹ We see in Parts III and IV that, in addition to increasingly making statements rather than asking questions, this behavior is dependent on which side the advocate is representing—the justices now increasingly bias their activity against the advocate they ultimately will rule against.

Figure 10 also sheds light on another competing explanation of how oral argument has changed: whether increased judicial activity is a result of more extensive written briefs being available to the justices, leaving them less in need of questioning the advocates at oral argument.²⁵² On this theory, the changes we see are informational, rather than a reaction to politics. This is an attractive explanation, but if it were true, we would also expect to see the number of questions decrease, whereas in fact the justices' questioning rate remained remarkably constant. The change is a result of comments increasing, on top of that stable level of questioning. This suggests to us that the new oral argument is not a product of better briefing leading to better-informed justices, but of justices who seek to add advocacy to inquiry.

If the justices are advocating, the question then becomes to whom are they directing this process of persuasion. One reason that the justices are commenting rather than inquiring may be that they are advocating their positions to each other, attempting to persuade each other to their points of view. Interestingly, the overall trend did begin to show a small increase in 1986, suggesting that perhaps the Justice Scalia and the Supreme Court bar professionalization theories have some merit. However, at least with the Scalia hypothesis, the argument is that he brought in a new era of tough questioning of the advocates, whereas Figure 10 suggests that if he had any effect, it was to increase judicial commenting, with no apparent increase in questioning, tough or otherwise. Additionally, any effect that either Justice Scalia or the increased professionalization of the Supreme Court bar had is dwarfed by the shift that occurred in 1995.²⁵³ Note that the y-axis is the number of questions and non-questions on average per case—post-1995, we observe a massive jump from the low one-hundreds to well over 150 and up to 200 comments on average per case.

251 *Republican Party of Minn. v. White*, 536 U.S. 765, 813 (2002) (Ginsburg, J., dissenting) (“This judicial obligation to avoid prejudgment corresponds to the litigant’s right . . . to ‘an impartial and disinterested tribunal in both civil and criminal cases.’” (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980))).

252 Certainly the justices have access to an increasing number of briefs, with an average of twelve amici briefing the Court per case, with at least one submitted in ninety-eight percent of Supreme Court merits cases. Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, NAT’L L.J. (Aug. 19, 2015), https://www.arnoldporter.com/-/media/files/perspectives/publications/2015/08/record-breaking-term-for-amicus-curiae-in-suprem_/files/publication/fileattachment/recordbreakingtermforamicuscuriaeinsupremecourtr_.pdf.

253 See *infra* Part IV.

This result also sheds light on another alternative theory of how oral argument has changed. The alternative argument is that oral argument looks the way it does now because the justices are trying to persuade one another during the argument itself due to lack of other fora to do so.²⁵⁴ The justices do not interact about a given case before oral argument, and after oral argument they interact directly only at conference, where each justice sets out his or her vote before the next most junior justice has a chance to express his or her opinion of the case. As such, particularly for the junior justices, their only chance to influence their colleagues is during oral argument. However, on this theory, we would expect to see significant change in 1986, when then-Justice Rehnquist was promoted to Chief Justice, and changed the way in which conference was run, making it far more limited,²⁵⁵ a practice that his former clerk, John Roberts, continued as Chief. Thus, to the extent we see an increase in 1986, it could be due to either Justice Scalia or the changing nature of conference, or a combination of the two. Either way, that effect is far smaller than the change we see in 1995, after which the justices began taking more polarized positions, much like political elites and political communities generally. This suggests that the justices may indeed be using oral argument to persuade one another,²⁵⁶ but how they are doing so has changed in the polarized environment. Perhaps, understanding that the ideological camps on the Court are also quite polarized, the justices are not content to leave persuasion to the advocates: the stakes are high enough to require intervention of the very best legal minds in the country—themselves.

Our final measure of judicial activity is the extent to which the justices interrupt. Psychology scholarship defines interruptions as deviations from the social norm of turn taking, by which “only one party should talk at a time.”²⁵⁷ In the context of the Supreme Court, however, this is only partly

254 Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES (Oct. 7, 2013), www.nytimes.com/2013/10/08/us/inquisitive-justices-no-argument-there.html (reporting justices’ admissions that the justices talk to each other at oral argument due to lack of preconference opportunity, including this from Chief Justice Roberts: “When we get out on the bench, it’s really the first time we start to get some clues about what our colleagues think. So we often are using questions to bring out points that we think our colleagues ought to know about.”).

255 Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC (Apr. 2005), <https://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/303820/> (noting Rehnquist “ran an especially tight ship during the justices’ private conferences . . . he refused to let discussion wander. Some colleagues complained that this format discouraged active debate, but Rehnquist argued that because most of the justices had already made up their minds, a protracted colloquy would be a waste of time.”).

256 They may also be advocating as much to external constituencies, speaking to them through the Court reporters. If so, the fact that the male justices regularly interrupt the female justices is ironic, given that three of the four most notable Court reporters in recent years, Nina Totenberg, Linda Greenhouse, and Dahlia Lithwick, are women.

257 RICHARD J. WATTS, *POWER IN FAMILY DISCOURSE* 66 (1991) (quoting Geoffrey W. Beattie, *Turn-Taking and Interruption in Political Interviews: Margaret Thatcher and Jim Callaghan Compared and Contrasted*, 39 SEMIOTICA 93 (1982)); see also Theodore Jacob, *Patterns of*

true: the Court is a formally stratified institution, as reflected in the Supreme Court rules, which dictate that an advocate must stop speaking the moment a justice speaks, including when a justice interrupts an advocate.²⁵⁸ Thus, interruptions of the advocates by the justices are explicitly provided for, an expected part of oral argument. The extent of interrupting behavior is informative, then, of the extent of ordinary judicial engagement at oral argument. Figure 11 tracks the extent of that particular judicial activity over time.

FIGURE 11: INTERRUPTIONS OF ADVOCATES BY JUSTICES OVER TIME

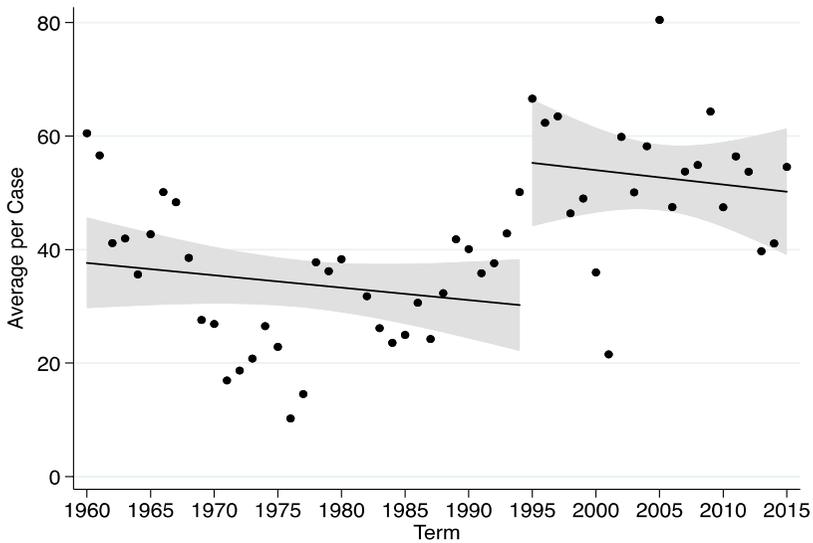


Figure 11 shows that whereas both before and after 1995 the rate of interruptions by justices was flat—although the slopes are slightly downward, these tilts are not statistically differentiable from a slope of zero—there was a significant jump upward in the rate of interruptions in 1995. Looking at a simple contrast with 1995 as the dividing line, the average number of interruptions per case was thirty-six in the earlier period and fifty-five in the latter, an increase of over fifty percent.²⁵⁹ Subsequently, the rate of interruptions

Family Conflict and Dominance as a Function of Child Age and Social Class, 10 DEVELOPMENTAL PSYCHOL. 1 (1974) (showing that interruptions are significantly associated with dominance and conflict patterns in families); Lennard A. Leighton et al., *Patterns of Communication in Normal and Clinic Families*, 36 J. CONSULTING & CLINICAL PSYCHOL. 252 (1971) (showing an association between the number of times a person is interrupted or interrupts and conflict and dominance).

258 “Never interrupt a Justice who is addressing you. Give your full time and attention to that Justice If you are speaking and a Justice interrupts you, cease talking immediately and listen.” CLERK OF THE COURT, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 9 (2015).

259 The average rate of interruptions was just over forty-six per case in the 1960s, but only twenty-five and thirty-two per case in the 1970s and 1980s, respectively. The average rate of interruptions was just under forty-four per case in the early 1990s, in stark contrast

has stayed steady at that higher rate. Clearly, an important change happened at around that time which, once again, made the justices more active at oral argument.

Note that Figure 11 includes both short and long interruptions: Jacobi and Rozema showed that judicial interruptions of more than one second are indicative of conflict and are predictive of significantly higher levels of disagreement between the interrupting justices-pair in the eventual outcome.²⁶⁰ In contrast, short interruptions do not share that relationship with conflict; Jacobi and Rozema call these short interruptions “crossovers,” as they mostly capture unintentional conversational overlaps.²⁶¹ Jacobi and Rozema were concerned with identifying conflict between the justices at oral argument, and this distinction made sense in that context, but we are not concerned with conflict, rather with judicial activity. As such, we are interested in both substantive interruptions and crossovers, because both indicate that the interrupting justice is active and engaged enough to be speaking over another person, regardless of whether the interruption was intentional or not. For this reason, we look at both long and short interruptions throughout our analysis.

Although interruptions of advocates by the justices are a normal part of the cut and thrust of oral argument, interruptions of the justices are another matter. Figure 12 shows the extent to which the justices are interrupted. It shows all interruptions of justices, both by other justices and by advocates—later, we break down in more detail who is interrupting whom. But either way, this activity is a breach of either the rules, as mentioned, when undertaken by advocates, or of social norms, as the psychologists describe interruptions, when undertaken by other justices. Despite being a breach of either rules or social norms, Jacobi and Schweers showed that the justices are interrupted quite frequently, particularly the female justices, by both male advocates and male justices.²⁶² Jacobi and Schweers were looking at the Court Terms 1990, 2002, and 2004–2015.²⁶³ Figures 12A and 12B confirm their impression, but show that interruptions of justices are much more pronounced post-1995.

to fifty-nine per case in the late 1990s. Thereafter, it was over fifty-three per case in the 2000s and fifty-two per case in the period from 2010 to 2015.

260 Jacobi & Rozema, *supra* note 6, at 2269, 2300. The one-second measure applies both to the original speaker speaking for at least one second and the interruptive speaking for at least one second. This is consistent with the psychology literature in nonjudicial settings, which shows that crossovers are meaningfully different from substantive interruptions, and do not represent the same conflict or attempts at dominance. See WATTS, *supra* note 257, at 67 (describing the history of the psychology research on interruptions and the development of different categories of interruptions); see also Derek B. Roger & Andrea Schumacher, *Effects of Individual Differences on Dyadic Conversational Strategies*, 45 J. PERSONALITY & SOC. PSYCHOL. 700 (1983) (showing that unsuccessful interruptions are also significantly less associated with dominance than successful interruptions).

261 Jacobi & Rozema, *supra* note 6, at 2288.

262 See Jacobi & Schweers, *supra* note 207, at 1437.

263 *Id.* at 1456.

FIGURE 12A: INTERRUPTIONS OF JUSTICES BY OTHER JUSTICES, OVER TIME

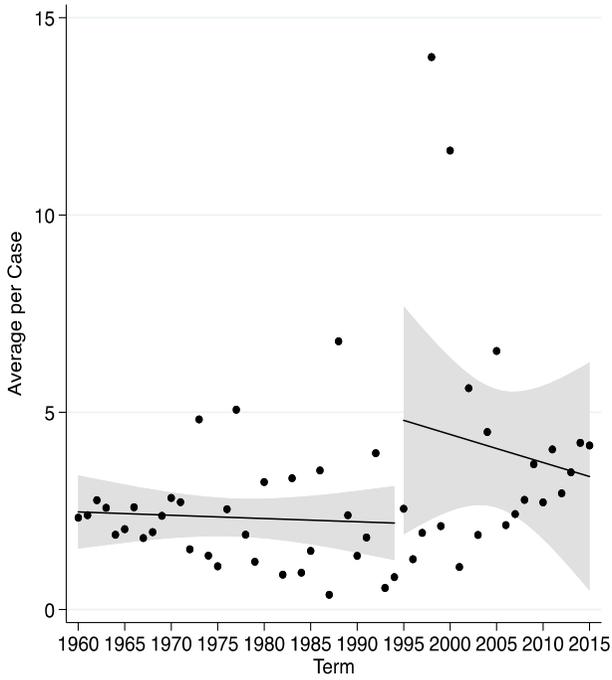


FIGURE 12B: INTERRUPTIONS OF JUSTICES BY ADVOCATES, OVER TIME

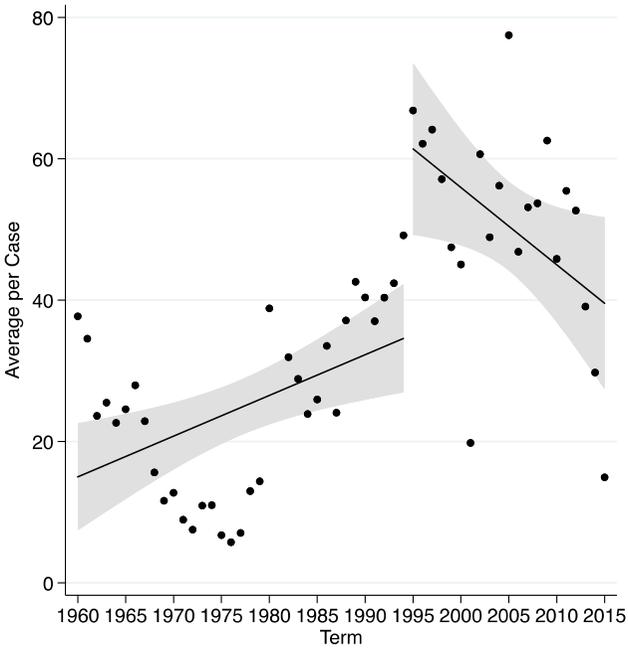


Figure 12A shows that interruptions by justices from their fellow justices increased substantially after 1995, almost doubling from 2.5 per case to closer to 5 per case. Although it is not entirely clear from the simple shaded confidence intervals that we use for illustrative purposes in these graphs, the upward shift is found to be significant in the later regression analysis.²⁶⁴ Thus, even though interruptions are a much less common form of judicial activity than, for example, comments or even questions in the modern era, they display the same pattern as other forms of judicial activity: a significant increase post-1995.

Figure 12B undertakes the same analysis, now looking at interruptions of the justices by the advocates as a bloc. Even though there are eight other justices who can interrupt a justice, versus usually two (or occasionally three or four) advocates, interruptions by advocates of justices are much more common than interruptions of justices by their fellow justices—note the higher scale on the y -axis. Again, we see a very large upward jump at 1995, although here the trend was clearly beginning well before 1995, seemingly as early as 1975, for which we know of no *a priori* theory of what might have changed at that time. Interestingly, whereas the slope on post-1995 justice interruptions of other justices looks a little downward but is not significant, advocate interruptions of justices shows the same trend but much more significantly. This suggests that over time, there has been some return to the pre-1995 conduct of oral arguments; however, importantly, we only see this in relation to interruptions, and only in some categories of interruptions.

C. Variation Among the Justices

So far, this Part has shown that justices as a bloc have become more active at Supreme Court oral arguments, at the cost of the advocates as a bloc having time to develop their arguments. But we can say more about the new oral argument by looking at differences between the justices; when we break down judicial behavior to the individual level, it is apparent that the trend is not just one that manifests *on average* for the Court, but is quite systemic among the justices. This Section shows that whereas there used to be much more variety in judicial behavior at oral argument, the justices are now far more uniform in their high levels of activity.

There is significant variation over time, as well as between justices at any time, in how much they speak. That is still true today: Justice Breyer is by far the most loquacious justice on the Roberts Court, speaking an average of 745 words per case, 239 words above the average of his peers. But Justice Breyer is somewhat exceptional in being exceptional: previously, there was much

²⁶⁴ The reason it appears less so here is that the confidence interval is exceptionally wide due to the two outliers seen high on the y -axis, measuring in the teens. This figure is looking at average interruptions per case by the advocates as a bloc; when we break down interruptions more finely and look at average behavior per justice per case, these outliers have less sway and the effect of the 1995 change is highly significant. Similarly, the downward slope post-1995 is also a product of these overweighted outliers.

more variation among the justices, and it is quite striking how much the level of variation between the justices has reduced.

The casual observer might not realize this because Justice Thomas receives an extraordinary amount of attention for being an outlier at the other end of the spectrum.²⁶⁵ Justice Thomas has spoken an average of only three words per case over the course of his time on the bench, and went for over a decade without speaking at all, making big news when he finally broke his silence.²⁶⁶ However, prior to 1995, it was in no way remarkable when justices remained silent; in fact, it was quite common, as Figure 13 illustrates.

FIGURE 13: INDIVIDUAL JUSTICE SILENCE DURING ORAL ARGUMENT

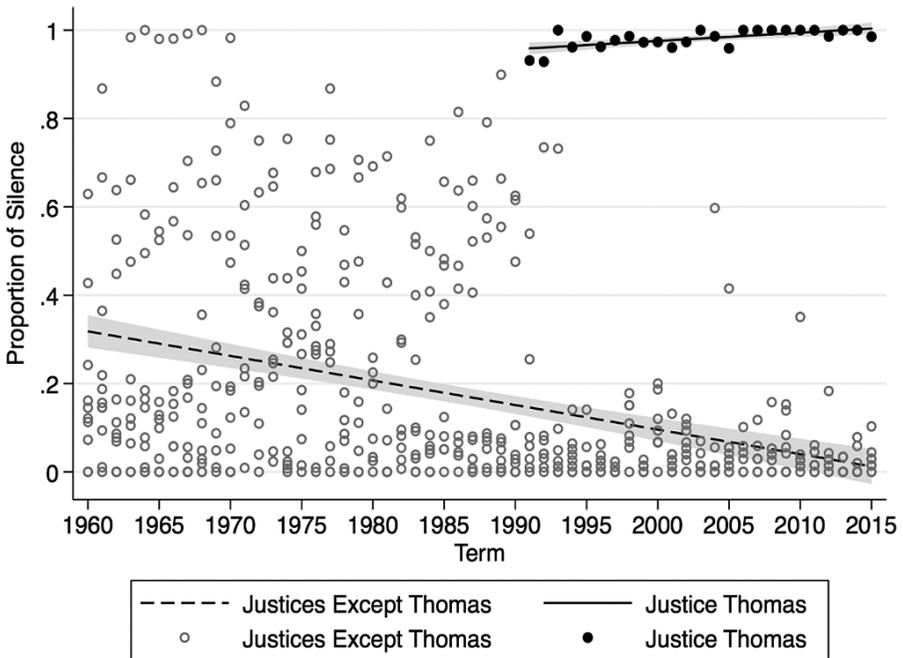


Figure 13 shows the proportion of cases in which each justice is silent in each term. The scale ranges from zero to one: i.e., from speaking at least

265 See, e.g., Jeff Nesbit, *The Real Reason Clarence Thomas Rarely Speaks*, U.S. NEWS (Mar. 30, 2016), www.usnews.com/news/articles/2016-03-30/why-clarence-thomas-rarely-speaks-from-the-supreme-court-bench.

266 See, e.g., Garrett Epps, *Clarence Thomas Breaks His Silence*, ATLANTIC (Feb. 29, 2016), www.theatlantic.com/politics/archive/2016/02/clarence-thomas-supreme-court/471582/ (explaining that “not since Clarence Darrow for the defense called prosecutor William Jennings Bryan himself to the stand has an American courtroom been so startled” as when Justice Thomas spoke for the first time in a decade).

once in every case to remaining silent in every case. The solid circles represent Justice Thomas; the hollow circles represent all of the other justices. It may not be obvious, because many of the hollow circles overlap, but each Justice is represented in each term. Looking at the right side of the graph, it is clear that Justice Thomas is not only an outlier on the Roberts Court, he was also an outlier on the Rehnquist Court after 1995—after 1995 it was rare for other justices to be silent in a significant number of cases in a term. In contrast, looking to the left side of the graph, the situation is dramatically different prior to 1995, when it was quite common for one or two or more justices to be silent in any given case, and not uncommon for justices to be silent in many or even a majority of cases.²⁶⁷ As seen in Table 1, prior to the 1990s, there were more than fifty cases each term, on average, where two justices remained silent.

TABLE 1: AVERAGE CASES IN WHICH TWO OR MORE JUSTICES WERE SILENT, BY DECADE

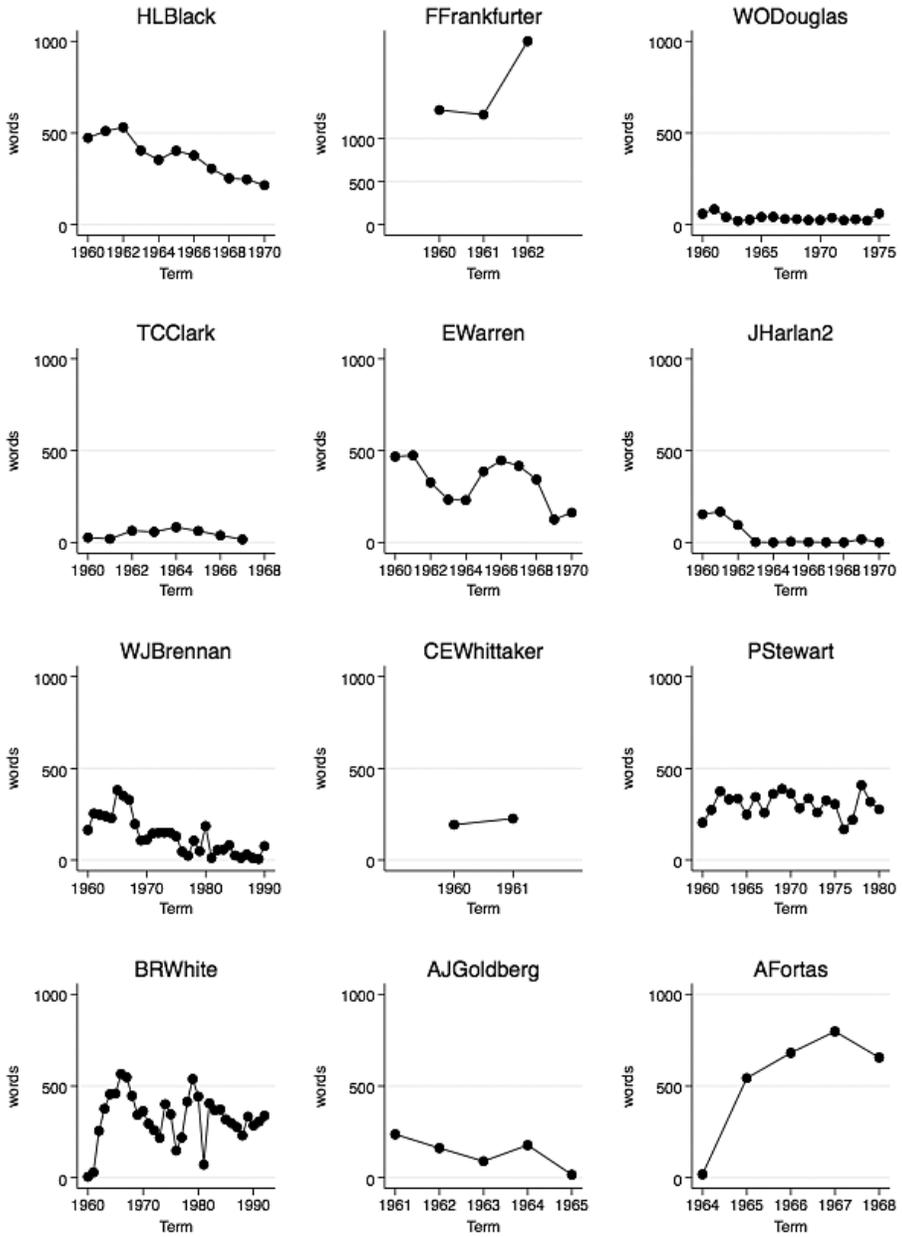
Decade	Cases
1960s	55.1
1970s	68.5
1980s	56.3
1990s	15.0
2000s	5.4
2010s	2.4

Justice Thomas has been criticized for his silence: for instance, Jeffrey Toobin called him “disgraceful,” claiming that his lack of verbal engagement shows disrespect for both his colleagues and the advocates, and constitutes a failure to do his job.²⁶⁸ But for most of the Court’s modern history, judicial silence was quite ordinary; what is unusual is not that Justice Thomas is silent, but that now he is the only justice who is silent. Toobin’s critique illustrates just how much heightened judicial activity has become the norm in the post-1995 era. We can see this not just through the reduction in judicial silence, but by comparing judicial speech, as Figures 14A and 14B do.

²⁶⁷ We note also that Justice Harlan did not speak at all in the 1964 and 1968 Terms.

²⁶⁸ Jeffrey Toobin, *Clarence Thomas’s Disgraceful Silence*, NEW YORKER (Feb. 21, 2014), www.newyorker.com/news/daily-comment/clarence-thomass-disgraceful-silence (describing his unusual silence as having “gone from curious to bizarre to downright embarrassing, for himself and for the institution he represents”).

FIGURE 14A: AVERAGE JUSTICE WORDS PER CASE PER TERM, JUSTICES BLACK TO POWELL



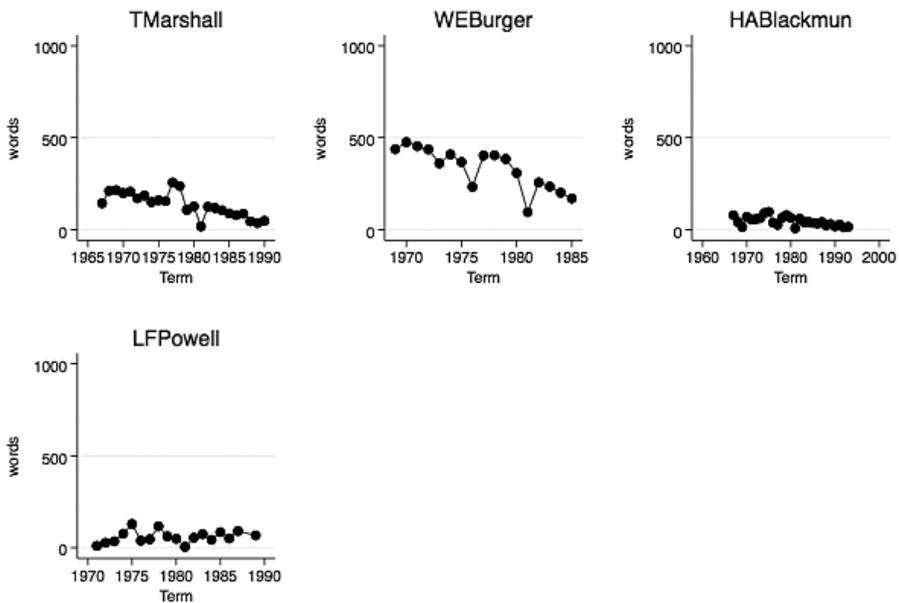
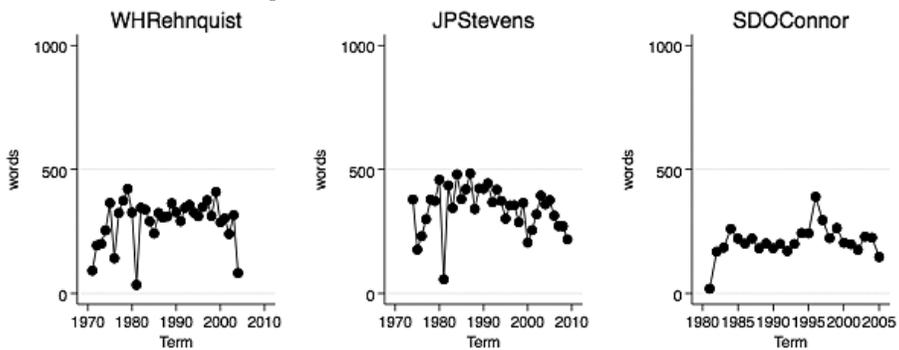
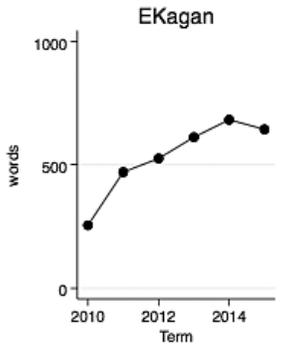
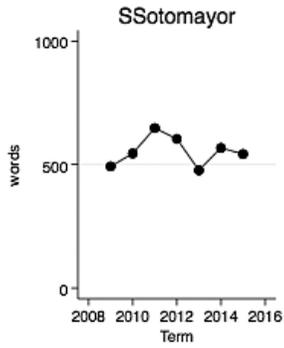
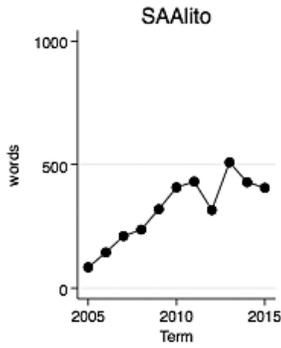
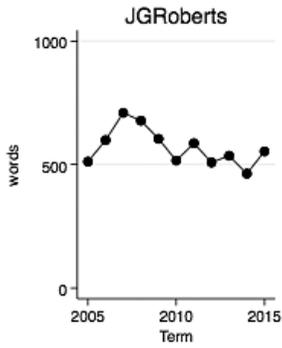
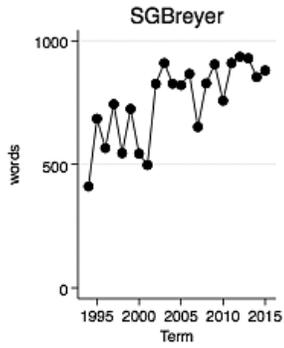
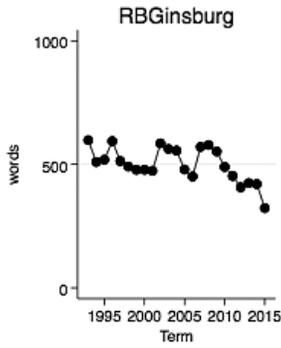
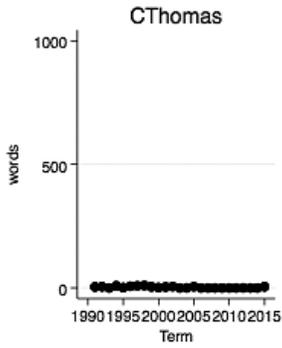
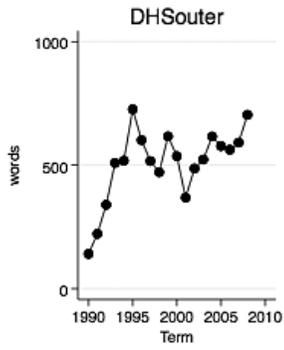
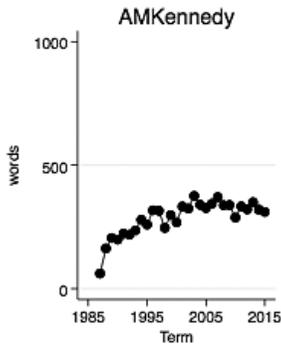
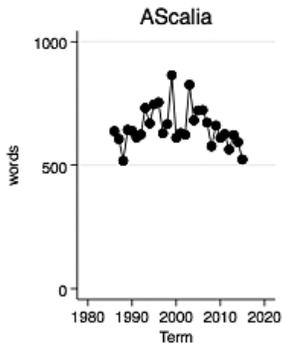


FIGURE 14B: AVERAGE JUSTICE WORDS PER CASE PER TERM, JUSTICES REHNQUIST TO KAGAN





A comparison of Figures 14A and 14B shows both that the level of judicial activity is higher in the post-1995 era, as we previously saw when looking at the Court in aggregate, and also that the variation in the level of judicial activity measured in terms of number of words used on average per case has dramatically reduced since 1995. In the first era, 1960–1994, five of the twenty justices looked a lot like Justice Thomas, barely speaking at all—Justices Douglas, Clark, Harlan, Blackmun, and Powell. There were only two justices who spoke significantly more words on average than justices do in the post-1995 period—Justices Frankfurter and Fortas. Justice Fortas ordinarily spoke 673 words per case, and Justice Frankfurter was off the charts, averaging a whopping 1323 words per case on average,²⁶⁹ though of course both were on the Court prior to the reduction in the time of oral argument in 1970. But Justice Frankfurter’s high level of activity was unusual;²⁷⁰ all of the other justices sat consistently under the 500 words per case mark, only rarely crossing that threshold—Justice Black in his first three years, and Justice White in three scattered years. And it was even fairly uncommon for justices to approach that threshold. In contrast, in the post-1995 range, many justices regularly or even entirely speak more than 500 words per case each year—Chief Justice Roberts, and Justices Scalia, Souter, Ginsburg, Breyer, Sotomayor, and Kagan.²⁷¹ That is, the majority of the Roberts Court speaks more than 500 words on average per case, an achievement of only two of the previous twenty justices.

In addition, in the post-1995 period, we also see a reduction in the variation within each justice’s pattern of behavior. Justice White, for example, varied wildly by year, coming close to silence in some years and crossing the 500-word threshold in others. Similarly, the two Chief justices, Warren and Burger, went through more and less verbose phases. In the post-1995 period, there is hardly any significant variation within each justice’s behavior. One exception is Justice Souter, but his behavior confirms rather than disconfirms our theory: he was far less active before 1995, and then consistently quite active after 1995. The only other meaningful variation after 1995 comes either from justices speaking fewer words early in their tenure or late in their tenure. Regarding the former, we test three theories that some scholars have claimed: that justices with less experience speak less; that justices behave differently in their first decade on the Court;²⁷² or more specifically that justices

269 See *infra* Appendix Table A2.

270 See CUSHMAN, *supra* note 30, at 129, who recounts an occasion when Justice Frankfurter interrupted an advocate ninety-three times during the 120-minute oral argument, prompting Justice Douglas “to come repeatedly to the aid of the hapless advocate. Annoyed, [Justice] Frankfurter snapped: ‘I thought *you* were arguing this case?’ ‘I am,’ replied the attorney, ‘but I can use all the help I can get.’” *Id.*

271 As can be seen in Appendix Table A2, which summarizes the average number of words spoken by each justice over the course of their tenure, only Justices Kennedy and Thomas appear in the bottom half of justices sitting since 1960.

272 This idea comes from the claim that justices’ ideologies shift after approximately a decade on the Court. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. REV. 1483, 1526 (2007) (“[I]f all Justices served

display a freshman effect, speaking less in their first year on the Court.²⁷³ We find some support for a general seniority effect, but little support for these more specific factors being significant.²⁷⁴ We also tested whether there is a drop-off late in some justices' tenures: for instance, Chief Justice Rehnquist's activity dropped off significantly in his final year on the bench, when he was fighting the thyroid cancer that would eventually kill him, and Justice Ginsburg has been showing a slight downward trend in words spoken since hitting her late seventies and early eighties. We found this effect is not significant, and so did not pursue it further. Altogether then, there is little evidence of meaningful variation in post-1995 judicial activity.²⁷⁵

Figures 13 and 14 confirm that when we examine justice behavior at the individual-justice level, we see the same effects as we saw in Section II.B when examining justice behavior at the Court level: justices have been more active since 1995. In addition, it has become very unusual for justices to be verbally inactive since 1995, with Thomas the dramatic outlier; and justices are more consistently active, with inactivity being highly exceptional. Earlier, we showed this is true across a range of activities, from words used to comments substituted for questions to interruptions made. The next Part shows to what end this judicial activity is being put.

III. THE DIRECTION OF INCREASED JUDICIAL ACTIVITY

We have looked at the increase in judicial activity by the justices as a bloc and at an individual level. This Part continues the analysis by breaking down judicial utility into relevant subgroups within the Court. First, it examines the effect of ideology. Second, it explores agreement in the case at hand—that is, knowing how each justice ultimately votes in a case, we can look back at their conduct at oral argument and find patterns that hint of how they will vote. Third, we look at institutional aspects, such as behavioral patterns that hinge on whether a justice is part of the eventual majority, an eventual opinion writer, and other like factors.

for ten or fewer terms, preference change would be less of a concern: it was only by (or close to) the decade mark that we observe behavior significantly different than the first term for nearly ten Justices.”).

273 The “freshman effect” literature asserts a difference between Supreme Court justices' initial and subsequent voting behavior. See Timothy M. Hagle, “*Freshman Effects*” for *Supreme Court Justices*, 37 AM. J. POL. SCI. 1142, 1145 (1993); see also Timothy R. Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 349, 359 (2005) (suggesting that it takes time for the freshman justices to become acclimated with their roles). But see Feldman & Gill, *supra* note 207, at 52 (finding that freshman justices are not interrupted at a significantly higher level than the rest of the justices).

274 See *infra* Part IV.

275 The average variation in words spoken per speaker was 14.55% of the mean in the period from 1960 to 1994 and 12.60% from 1995 to 2015. Justice Thomas inflates this latter number because any statement he makes is a huge deviation from his average of almost zero. If we exclude Justice Thomas, the average variation in words spoken per speaker was 14.2% of the mean in the pre-1995 era and 7.42% in the post-1995 era.

A. *Ideology*

It is well established that ideology shapes judicial behavior, from strategic voting at certiorari,²⁷⁶ to voting on case outcomes,²⁷⁷ to opinion writing.²⁷⁸ In addition, as discussed in Part I, we know judicial ideology impacts behavior at oral argument in the form of interruptions: prior studies have shown that a justice is more likely to interrupt an advocate who is arguing a position to which a justice is ideologically opposed.²⁷⁹ However, the influence of judicial ideology on behavior at oral argument has never been studied over such a long period of time as our data provides, and so it has never before been possible to test how that relationship has changed over time. Because our data has broad historical reach, we are able to examine the effect of ideology at oral argument in eras when the liberal wing of the Court has dominated and then when the conservative wing has been ascendant. We begin this analysis with Figure 15, which illustrates judicial activity in the form of words spoken at oral argument, differentiating by ideology and divided into three distinct eras.

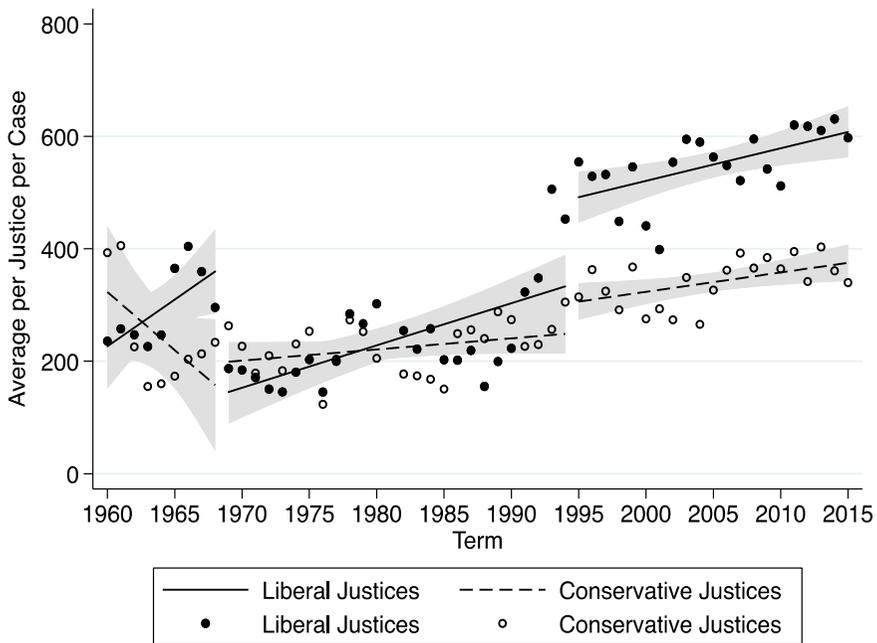
276 See, e.g., Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 825–26, 832 (1995) (showing that justices defensively deny petitions for writ of certiorari to cases if they expect the side they support to lose on the merits); Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 550 (1999) (showing that justices vote to hear cases more frequently in which their preferred litigant or outcome ultimately wins).

277 See *supra* note 22.

278 See, e.g., Forrest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POL. RES. Q. 551, 552 (2004).

279 Jacobi & Schweers, *supra* note 207, at 1446; see also Johnson et al., *supra* note 201, at 110.

FIGURE 15: JUDICIAL WORDS GROUPED BY LIBERAL AND CONSERVATIVE IDEOLOGY



Like previous figures, Figure 15 shows average words per justice per case on the y -axis and the timeline on the x -axis, but now justice behavior is grouped by the ideological leanings of the justices. Justices are categorized as conservative or liberal according to whether they are above or below zero on the Martin-Quinn scale of judicial ideology, respectively, where zero represents the approximate historical average of the Court over time. The analysis is the same when using other measures of judicial ideology, such as the party of the appointing president.

We once again divide the data into three periods: 1960–1969, 1970–1994, and 1995–2015. But here, the 1970 dividing line serves two purposes—as before, it captures when oral arguments became shorter, but also it captures when the Supreme Court became conservative. In 1969, the conservative Chief Justice Burger replaced the liberal Chief Justice Warren, a switch that not only made the head of the Court conservative, but Chief Justice Burger also brought the average Martin-Quinn score for the Court as a whole to above zero for the first time since 1960, one measure of the Court becoming conservative. Arguably, the Court became conservative not in 1969 but in 1970, when Justice Blackmun joined the Court and became the fifth conservative of the nine justices. Either way, putting the cut point at 1970 captures that shift on the Court. And we see at that point that the two ideological camps switch direction in 1970: before 1970, the liberals dominated the Court both in terms of the number of justices and the number of words used, with liberals speaking on average 293 words each compared to

the conservative average of 240 words per justice. After 1970, the numbers are closer but the pattern is reversed; the conservatives dominate in both numbers and in air time, with conservatives speaking an average of 240 words to the liberal average of 224. This suggests that judicial activity at oral argument is associated with an ideological bloc's dominance of the Court. That relationship changed radically in 1995. The conservatives dominated the Court numerically both before and after 1995, however since 1995, the liberals speak considerably more than the conservatives. While 1995 marks a significant upward shift in activity by the conservative justices, moving from 240 words on average to 340 words on average, there was a much more dramatic jump in activity by the liberals at that time, increasing from 224 words to 549 words on average. So once again we see that 1995 marked an enormous shift upward in judicial activity, but in addition, it is clear that the effect is one that is defined by political allegiance, and the effects are varied by political ideology.

We posit an institutional explanation for the change in judicial activity at oral argument—that the justices responded to the change in the political environment. This is strongly supported by the ideological division in the nature of the change we observe. However, as discussed, others have theorized internal explanations for the changes at the Court—theories based on individual characteristics of justices. As we have observed, there is little support for the Scalia theory of the change in oral argument. However, it is worth noting when looking at changes at this time in words used, that Justice Breyer, one of the most talkative justices on the Court, was appointed in August 1994. There are regular changes to Supreme Court personnel, and one can always posit a post hoc theory based on the unique characteristics of individual justices; however, it is worth stopping to query whether this massive increase in judicial speech by the liberal justices could be attributable to Justice Breyer's entrance to the Court.

In fact, in Justice Breyer's first year on the Court, he spoke less than the average justice serving at that time, fewer than 500 words on average per case; he only reached his current rate of talkativeness, almost double that level, in 2003. This alone likely dispels the Breyer explanation. Also, the effect does not look like one arising out of individual nominations more generally: the liberal justices' tendency to talk more has continued to increase, even though two new conservative appointments were made in 2005. And although there was a small upward shift in 2010, coinciding with the appointment of Justice Kagan, no similar effect was associated with the appointment of Justice Sotomayor in 2009. As such, the Breyer thesis does appear to be an ad hoc explanation. To be certain, though, we confirmed that the increase in judicial speech by the liberal justices arises even without Justice Breyer's exceptional contribution, and the effect is significant even without considering his contribution.²⁸⁰

280 Justice Breyer spoke an average of 410 words per case in his first year on the bench and an average of 772 words per case for the 1995 to 2015 Terms. Even if we exclude Justice Breyer from the analysis, the average words per case for the remaining liberal jus-

This suggests that the external change has a bigger effect than an internal change of personnel: the liberal justices as a whole became more active after the Republican Revolution. This supports our theory that the justices became more active in response to the influence of political polarization and the increased political identity associated with that change. The fact that the effect was very strong for liberals but much weaker for conservatives suggests that being on the losing side on the Court made the liberal justices more sensitive to this shift, and so more active. As we see in Part III, there are many different ways in which this tendency, of the 1995 effect interacting with being on the losing side, manifests, and not just when dividing between liberals and conservatives.

Ideological division on the Court also shapes interruptions at oral arguments, in ways that reflect the ideological changes occurring in 1995. Figure 16 examines interruptions among the justices, focusing on the ideology of the justice making the interruption.

FIGURE 16: INTERRUPTIONS OF JUSTICES BY JUSTICES,
GROUPED BY LIBERAL AND CONSERVATIVE

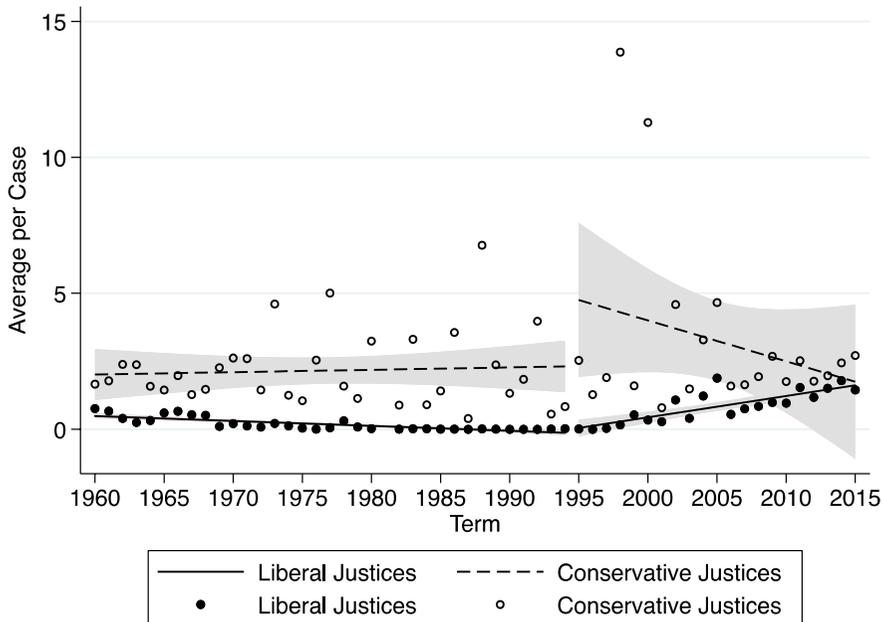


Figure 16 presents the results in the same way as above but showing interruptions by ideological camp. Conservatives have been consistent throughout the six decades examined here in having a stronger tendency to interrupt their colleagues. But interestingly, this effect appears to be

tices was 476 in the period from 1995 to 2015, still significantly above the conservative average of 340. Figure 15 looks almost identical even excluding Justice Breyer.

decreasing since 1995: while the downward trend among conservative interruptions is not significant,²⁸¹ the increasing trend of liberals to interrupt since 1995 is significant. And 2015 marks the first time in which the two camps became equally likely to interrupt. This confirms the finding above that liberals in particular have become more active in response to the 1995 Republican Revolution.²⁸²

FIGURE 17: QUESTIONS BY JUSTICES, GROUPED BY LIBERAL AND CONSERVATIVE

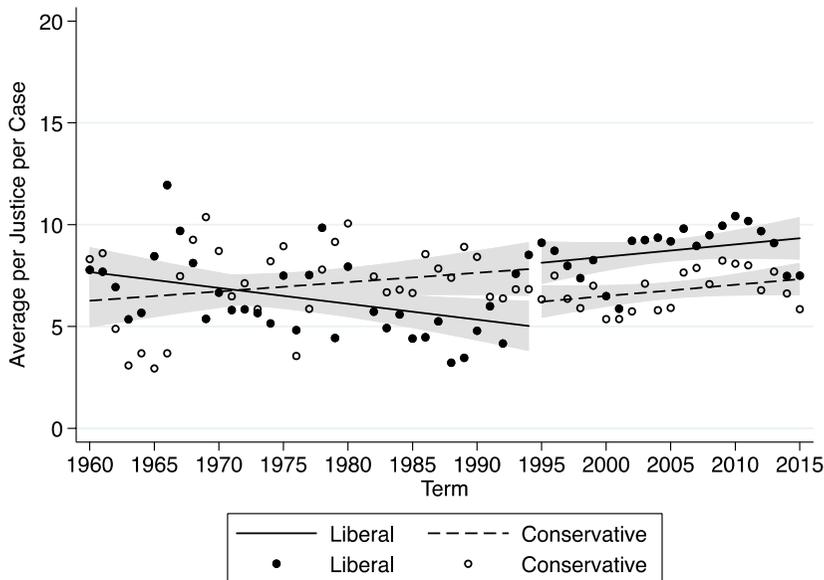


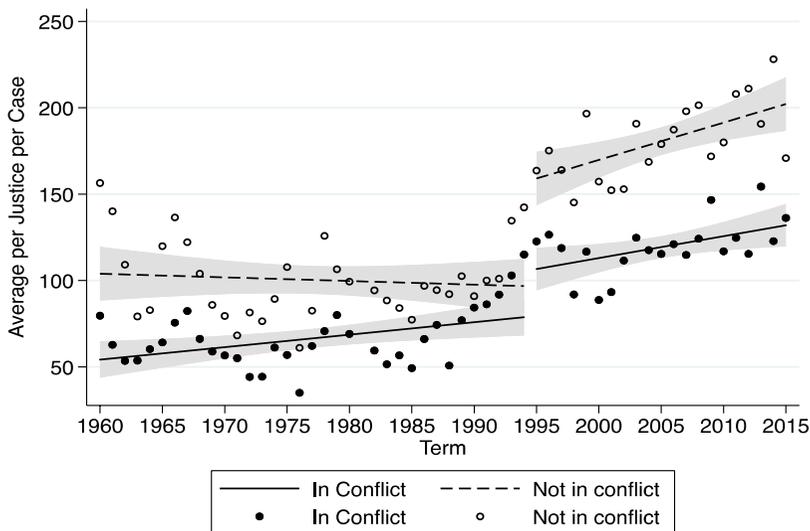
Figure 17 presents judicial activity per justice per case over time for another measure of judicial activity: justices' questions. Remember from Part I that while non-questions increased dramatically after 1995, questions remained largely stable. Figure 17 shows that the effect of the 1995 political change did in fact affect justices' questions, just in a slightly more nuanced way than looking at total numbers revealed. There was a significant shift in questioning behavior in 1995: liberals, who had gradually been asking fewer and fewer questions since 1960, displayed a clear increase in their average level of questioning in the post-1995 era. Since 1995, there has been a clearly distinguishable difference between liberal and conservative questioning levels.

281 The downward slope is driven largely by the two outliers in the late 1990s, where interruptions by conservatives register as exceptionally high, more than ten per case. Otherwise, the slope is largely flat. These two outliers also make the confidence interval very wide, meaning that we cannot be confident that there is any downward slope.

282 Note, however, that justice-to-justice interruptions in our regressions are highly significant when looking at the political ideology of the interrupter, but only marginally significant and substantially quite small when looking at ideology of the interruptee. See *infra* Part IV.

Our final analysis in this Section asks whether there is a limit to the role of ideology in explaining oral arguments. Judicial ideology is “an overarching framework of beliefs, with sufficient consistency among constituent belief elements that knowledge of an individual’s ideology allows for prediction of his or her views on related topics.”²⁸³ Accordingly, knowing a justice’s ideology is highly informative in predicting his or her likely patterns of votes. However, ideology is only a factor in voting; it is not a proxy. For instance, in the canonical work on judicial ideology, judicial ideology accurately predicted seventy-seven percent of the Court’s search and seizure decisions from the 1962 to the 1998 Terms,²⁸⁴ but that still left twenty-three percent unaccounted for.²⁸⁵ Judicial ideology scores are typically based on aggregations of judicial votes;²⁸⁶ we want to see if we can be more accurate than simply looking at a justice’s overall voting patterns and look more specifically at behavior at oral arguments in each case and how it correlates with the subsequent voting outcome in each case. Figure 18 examines the difference between a justice’s ideology and his or her vote outcomes.

FIGURE 18: WORDS SPOKEN BY JUSTICES WHEN OUTCOME VOTES CONFLICT WITH IDEOLOGY, OR NOT



283 Sag et al., *supra* note 22, at 804.

284 JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 318–19 (2002).

285 See BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 192 (2007) (making this criticism and disputing the numbers); Michael J. Gerhardt, *Attitudes about Attitudes*, 101 MICH. L. REV. 1733, 1751 (2003) (reviewing SEGAL & SPAETH, *supra* note 284) (making this criticism).

286 See Sag et al., *supra* note 22, at 804–09 (summarizing the relevant literature).

Figure 18 presents words spoken per justice, grouped according to whether there is a conflict between a justice's general ideology and his or her vote in the case at hand. It is clear from Figure 18 that there is a meaningful distinction to be made between how a justice votes generally, aggregated in the form of judicial ideology, versus in a specific case. It shows the average word count for each justice per case when a justice votes according to his or her ideology is significantly higher than when the justice votes against his or her general proclivities. Furthermore, while both types of activity increased after 1995, consistent with Part I, the distance between conflicted and non-conflicted activity increased significantly after 1995.

It is possible to conclude from Figure 18 that ideology became less important relative to case outcomes after 1995. However, we need to exercise caution when interpreting these graphs: they look only at the relationship of one variable, here, conflict between ideology and voting in the case at hand, and another, here, words spoken over time, and the relationship appears very significant. Regressions, on the other hand, allow us to consider the interrelationship between multiple variables. In the regressions, we find that this conflict is not always significant once characteristics of the ultimate decision are taken into account, particularly whether the justice is in the majority and whether the justice writes an opinion.²⁸⁷ Ideological case conflict is highly significant at predicting interruptions, marginally significant at predicting questions, but not significant at predicting our other measures of judicial activity. We include it here to illustrate the variable that we will utilize in the regressions and also to show that although ideology is very important, it is a broad tool, and examining cases at the individual level can make ideology somewhat redundant (some of the regressions also show a marginal influence for ideology). The next Section focuses in detail on judicial behavior at each oral argument in terms of patterns in the ultimate outcome of the case.

B. Judicial Agreement

In this Section, we turn to a distinction closely related to ideology but a more fine-grained way of distinguishing between judicial camps: we look forward in time to whether justices ultimately agree in the result of the case at hand, and then look back in time to see if patterns emerge between these camps at oral arguments.

287 See *infra* Part IV.

FIGURE 19: JUSTICE WORDS IN AGREEMENT IN RESULT

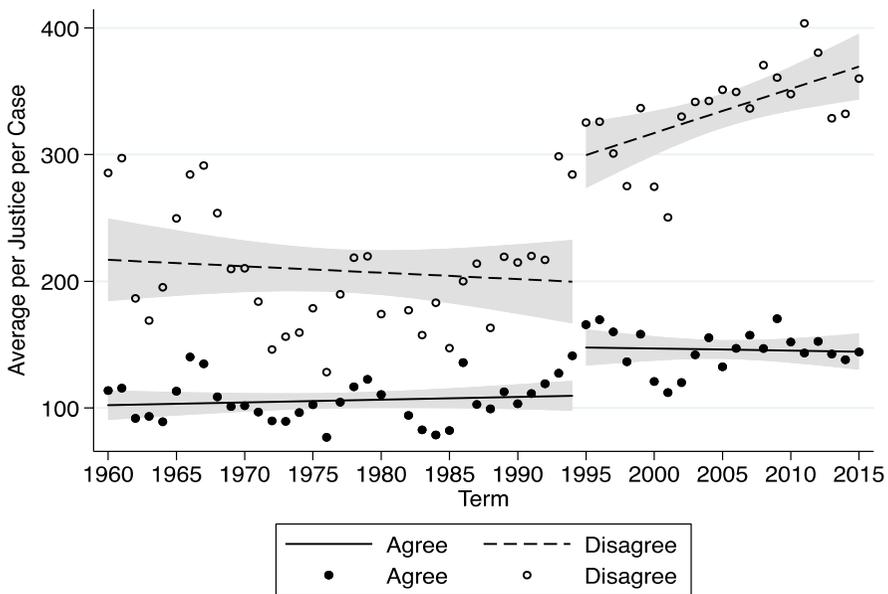


Figure 19 essentially shows judicial activity as measured according to words said to a friend or foe. Agreement in result means that the justice is speaking to the advocate who he or she ultimately concludes should win the case—it is not who does in fact win or lose, as this analysis applies to dissenting justices as well as majority justices. Consistent with our thesis, Figure 19 also shows that the justices are behaving more and more like advocates in the post-1995 era. There has been a consistently negative relationship between the number of words directed to an advocate and that advocate’s likelihood of success. That relationship is stable from 1960 to 1995, with about a 100-word difference per justice between the number of words spoken to the side the justice decides against over the side the justice decides for. In contrast, from 1995 to 2015, that disagreement gap increases sharply and continues to grow.

When Justice Sotomayor visited Northwestern Pritzker School of Law and spoke to the faculty, one of us asked her what was her goal in asking questions of advocates at oral arguments, whether they influence her, or whether she has ordinarily already made up her mind.²⁸⁸ She responded that she often has an idea of how she is likely to vote, based on the briefs, but uses oral argument to put that position to a hard test, probing the advocate for weaknesses in the side she is likely to support.²⁸⁹ Figure 19 suggests that Justice Sotomayor’s description is inaccurate in general, and Table 2 shows

288 Justice Sonia Sotomayor, Address at Northwestern Pritzker School of Law (March 7, 2011) (responding to a question by Tonja Jacobi).

289 *Id.*

that it is inaccurate for each justice on the Roberts Court up to and including the 2015 Term.

TABLE 2: DIFFERENCE IN WORDS SPOKEN IN AGREEMENT AND DISAGREEMENT, ROBERTS COURT

Justice	Words in Agreement	Words in Disagreement	Difference
Breyer	201	558	-357
Scalia	206	441	-235
Kagan	151	377	-226
Roberts	156	378	-223
Ginsburg	147	341	-194
Sotomayor	174	353	-180
Alito	92	239	-146
Thomas	29	143	-114
Kennedy	119	177	-59

Table 2 shows that the justices primarily speak to the advocates whom they ultimately rule against. With the sole exception of Justice Kennedy, the Roberts Court justices all consistently speak more than twice as much to the side they ultimately rule against (Justice Kennedy still speaks more to the side he rules against, just not twice as much). This is even true of Justice Thomas, who rarely speaks, but when he does, the majority of his words are directed against those advocates with whom he ultimately disagrees. Put another way, the justices primarily give a hard time to their foes, not their friends.

The same analysis undertaken for general ideology instead of specific case outcome looks the same. But looking at the individual case sometimes tells us things that cannot be discovered through just looking at judicial ideology, as in Figure 20, which examines words said by the justices when in the dissent versus in the majority in the ultimate case outcome.

FIGURE 20: JUSTICE WORDS IN MAJORITY AND DISSENT

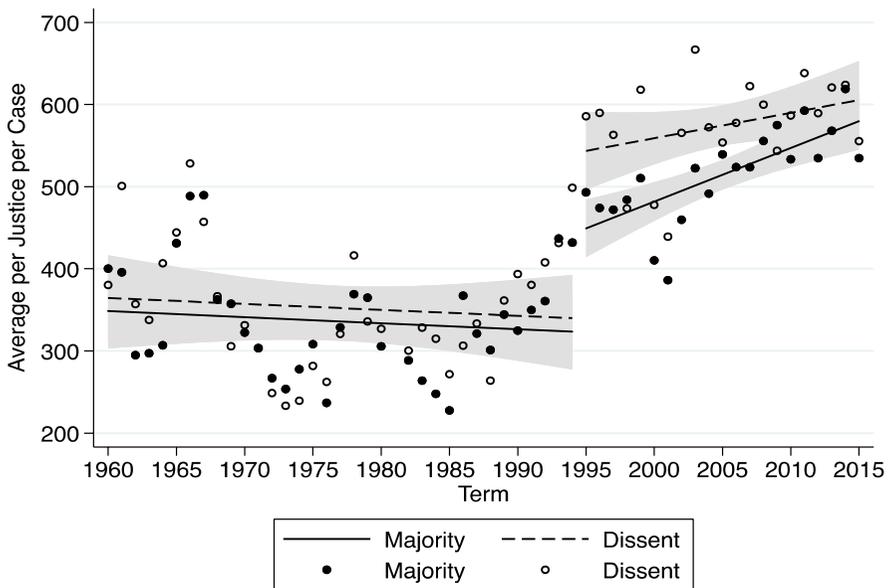


Figure 20 shows the rate of words said by those in the majority compared to those in the dissent. Obviously, it excludes unanimous cases. Once again, caution must be exercised interpreting this graph, since there are more justices in the majority in any given case than in the dissent. Despite that, we see that the rate of words used by majority and dissent justices was indistinguishable prior to 1995, and very consistent, with a flat slope and an average of about 350 words per justice per case. After 1995, the story is very different. There is a large jump upward in both lines, and the slope of each is close to forty-five degrees, with word use continuing to increase steadily ever since, consistent with our findings in Part I.

In addition, there is a statistically significant gap between the two lines, with words said by justices who ultimately dissent significantly outpacing words said by justices who ultimately form the majority. This contributes once again to the discernible trend of justices on the losing side being more active, using oral argument as a sword in the battle for dominance on the Court. Interestingly, the two lines become indistinguishable once again after 2010, but this convergence is not the result of dissenting justices beginning to speak less—the slope on the words used by ultimately dissenting justices continues to increase. Instead, the difference decreases because toward the end of our period of study majority justices start responding in kind. Figure 20 also provides strong support for the justices as advocates thesis: it suggests that dissenting justices are using oral arguments to try to persuade—either to persuade other justices who may be amenable to the argument, or, failing that, to appeal to the Court reporters to sway public opinion.

FIGURE 21: JUSTICE WORDS BY OPINION WRITER AND NONOPINION WRITER

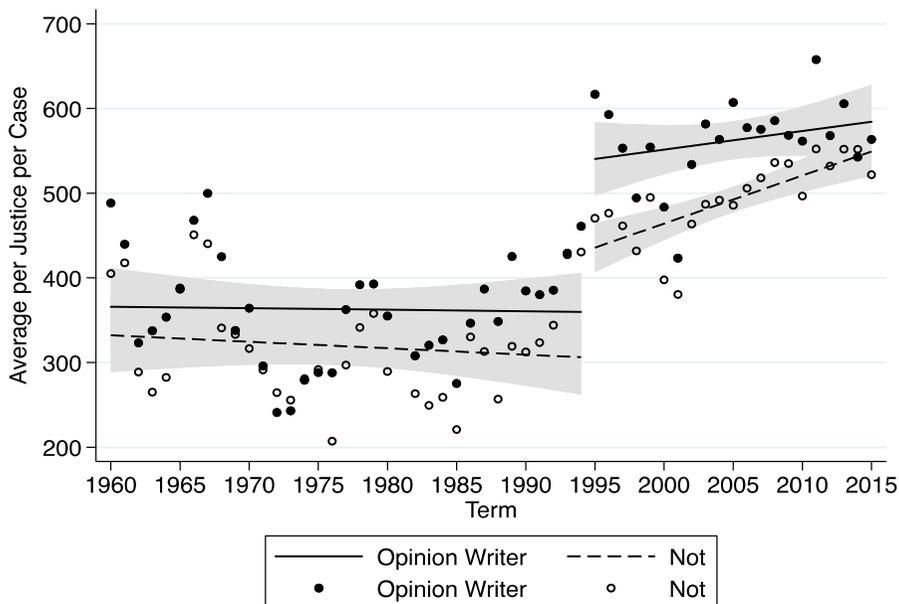


Figure 21 displays the difference in words used by justices who ultimately write an opinion in the case at hand compared to those who do not. This includes all opinion writers: majority, dissent, and concurrence. Once again, it includes only non-unanimous cases, but the analysis looks similar when they are included. It shows that the justices who ultimately write opinions are, after 1995, significantly more active than justices who do not write opinions. Prior to 1995, there was no significant difference between these two groups of justices. After 1995, there was once again a very large upward shift in both lines, but the shift was more significant for opinion writers than nonopinion writers, opening up a 146-word gap between opinion writers and nonwriters that had closed to forty-one words by the 2015 Term.

The figure is informative about the relationship between oral arguments and opinion assignment, but the mechanism is ambiguous. One of three things could be going on here. First, the justices could know who will be likely opinion writers before oral argument, and so the opinion writers, pursuing those responsibilities, are more active at oral argument. This theory is not well supported by the literature on oral argument, which while limited because of the secrecy of the process, shows opinion assignment to be a much more fluid determination, hinging on votes which change before and after oral argument and even after conference.²⁹⁰ Second, the Chief Justice or the senior justice in the majority could assign opinions according to

²⁹⁰ See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 22–55 (1998) (describing the opinion assignment process, which hinges on discussion and votes at conference, and how those votes often change).

whomever is the most engaged at oral argument in the case at hand (subject to the norm of equal distribution of opinions) and justices in turn could signal that they want an opinion by being engaged at oral argument, effectively auditioning for the role. This is possible, but suggests a very neutral opinion assignment process, unaffected by concern for shaping doctrine, which is contrary to both evidence of judicial strategy in general and of strategic behavior in opinion assignment.²⁹¹ Third, the justices who write opinions could be most active at oral arguments because some cases are more salient to them, either due to expertise or strong feeling, and that salience translates both into greater activity at oral arguments and into opinion writing. There have long been theories that justices are assigned cases in part by specific expertise or strong feeling on given topics, and Figure 21 not only gives support to that observation, but shows that the same factors drive increased activity at oral argument. It also supports the justices as advocates thesis: justices are using oral arguments to express their strong feelings about particular cases, strong feelings which they then translate into their ultimate opinions. This third hypothesis also has the advantage of explaining why we see a significant increase not just in judicial activity after 1995, but an increased difference between opinion writers and nonwriters.

Overall, this Section has shown that as well as being significantly more active after 1995, the direction of judicial activity changed at that time. It shows that activity varies significantly when the justices are broken down into different camps, be those camps ideological, coalitions in agreement in a given case, or those for whom the case is particularly salient, translating into opinion writing. It shows that after 1995, the “losers” are often particularly active, be it liberals who are outnumbered by conservatives, or dissenters in the specific case at hand. This suggests that not only have the justices responded to political polarization by becoming more active, and that such activity is visibly ideological as well as outcome driven, but also that judicial activity is a type of pushback, an attempt to reassert an opposing narrative through oral argument.

IV. REGRESSION ANALYSIS: THE INTERPLAY OF JUSTICE, CASE, AND INSTITUTIONAL FACTORS

In this Part we conduct multivariate regression analysis, which allows us to consider all of the variables that may be contributing to the change in oral argument, and examine their effect relative to one another and conditional on one another. Previously, we recommended caution in interpreting some of the graphs of the relationship between one variable and another because other factors could complicate, mediate, or obscure the effects. Multivariate regression enables us to confirm whether the relationships we identified pre-

²⁹¹ See WOODWARD & ARMSTRONG, *supra* note 26, at 66 (describing how Chief Justice Burger would often hold off on revealing his vote at conference so that he could assign himself the majority or assign it to a majority justice who he estimated would do the least damage to the losing side, which he actually supported); *id.* at 64–66 (same).

viously are significant even when accounting for those other factors.²⁹² All of this analysis can be captured in just three tables. Each table uses multiple measures of the outputs that we want to test for.

In our first set of regressions, shown in Table 3, we measure how judicial activity at oral argument varies by numerous different potential causal factors, including our institutional explanation, case characteristics, justice characteristics, and outcome variables. Our institutional explanation is whether the activity occurred after 1995—this is the variable that we expect to be the key explanatory variable in the change in oral argument. The first case characteristic is the term of the case. This is included to differentiate between an overall time trend and a distinct post-1995 effect consistent with our polarization thesis. Other case characteristics include the two different measures of political and legal salience, as well as the issue area of the case. We ran additional tests to break down the issue areas into various categories, but the only result of significance was that economic issues were negative in some specifications and issues relating to constitutional rights and constitutional structure were positive in other specifications;²⁹³ for concision, we include only a variable for issue area. We include this simply as a control—the sign and magnitude of the coefficient has no intuitive meaning.

The justice characteristics include the Martin-Quinn score (labeled “MQ Score”) of ideology—this utilizes the full continuous Martin-Quinn measure, not simply the categories “conservative” and “liberal,” as previously. A one-point movement on this measure is approximately half a standard deviation of the historical average of the Court in the modern era (after 1936).²⁹⁴ We also include an interaction term between ideology and our post-1995 variable: since our hypothesis is that the political environment is shaping judicial behavior, it is important to look at how the effect of judicial ideology may manifest differently after 1995. To interpret the effect of ideology, we need to consider both of these variables together, not simply look at the coefficient of ideology. We also include gender, examined in terms of the effect of being female; years of experience of each justice, which is a continuous variable measured in years; a “less experience” variable, which hinges on whether the justice is in his or her first decade on the Court; and a freshman variable, which captures different behavior in a justice’s first year on the Court.

The outcome variables include our “conflicted” variable discussed in Section III.A, whether there is a conflict in the case between the justice’s

292 We are also able to include special controls to account for the lack of dependence between cases—we use robust standard errors, which err on the side of overestimating standard errors, and thus of underclaiming any statistical relationship, in order to correct for heteroskedasticity. For an intuitive explanation of robust standard errors, see Chris Auld, *The Intuition of Robust Standard Errors*, ECON., ECONOMETRICS, ETC. (Oct. 31, 2012), chrisauld.com/2012/10/31/the-intuition-of-robust-standard-errors/.

293 Contact the authors for more detailed results.

294 For context, in the 2015 Term, that is approximately equivalent to the difference between Justice Breyer and the more liberal Justice Ginsburg; it is also the difference between Chief Justice Roberts and the more conservative Justice Alito.

general ideology and his or her actual vote in the case. We also look at whether the justice is in the majority, and whether he or she is an opinion writer in the eventual decision. Subsequently, we break this final category down into whether the justice writes a majority, dissenting, or concurring opinion.

Each of these variables is factored into four regressions, estimating the effect of the above explanatory variables on the first four of our five measures of judicial activity: words, duration, questions, and non-questions. We expect large positive effects for post-1995 for words, duration, and non-questions, but minimal effect for questions. We also anticipate that salience, ideology, opinion writer, and conflicted will have large positive effects, and that gender (female) and majority will have significant negative effects. Others have theorized that the first experience variable should be positive and the less experienced and freshman variables negative, as judges become more active with time.²⁹⁵

295 There are some seniority-based norms on the Court; for example, justices speak and cast votes in order of seniority at postconference, and the most junior justice has to open the door and take notes at the conference. Lincoln Caplan, *The Junior Justice*, AM. PROSPECT, Spring 2015, at 56, 59 (reporting Justice Kagan's description of being the "Junior Justice"). Jacobi and Schweers found a small but statistically significant seniority effect. Jacobi & Schweers, *supra* note 207, at 1444, 1480.

TABLE 3: JUDICIAL ACTIVITY AS A PRODUCT OF INSTITUTIONAL, CASE, JUSTICE, AND OUTCOME VARIABLES

	Words	Duration	Questions	Non-Questions
Post-1995	203.96***	86.23***	0.59***	11.94***
<i>Case characteristics</i>				
Term	-0.28	-1.04***	-0.05***	-0.03**
Salience (NYT)	41.84***	17.36***	1.01***	1.51***
Salience (CQ)	33.78***	13.56***	0.93***	1.46***
Issue Area	-11.48***	-4.12***	-0.49***	-0.08
<i>Justice characteristics</i>				
MQ Score	14.75***	7.51***	0.27***	0.48***
MQ*1995	-11.86***	-5.41***	0.06	0.46***
Gender (Female)	-99.28***	-15.29***	-1.24***	-6.42***
J Years	-4.39***	-1.61***	0.02**	-0.16***
Less Experienced	-14.53***	-10.98***	-0.06	-1.46***
Freshman	-28.51***	1.52	-0.34	-0.22
<i>Outcome variables</i>				
Conflicted	4.13	0.62	0.12	0.07
Majority	-21.06***	-4.58**	-0.55***	-0.54**
Opinion Writer	47.08***	15.02***	0.95***	1.58***
Constant	959.63	2210.99	115.44	71.93
Observations	33,918	33,918	33,918	33,918
R-squared	0.08	0.05	0.02	0.10

Note: Robust standard errors. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Table 3 shows that, as we hypothesized, in all four regressions, the institutional post-1995 variable is highly statistically significant,²⁹⁶ what is more, it has a very large substantial effect, dwarfing that of all the other variables. The unit of analysis in each of the regressions is words, duration, questions, or non-questions per justice per case.

Each justice on average has spoken over 205 more words in each case after 1995 than before; that translates to over 1800 more words for the Court as a whole, even when controlling for all of the variables described above. The duration of each justice's contribution to oral argument is more than eighty-six seconds longer after 1995, meaning that the justices as a group have taken an additional thirteen minutes of the sixty-minute oral argument after 1995 than before, an increase of twenty-two percent. The effect for questions is significant but small, as expected, approximately two-thirds of a

296 Highly statistically significant means the p -value is less than 0.01, that is, we can be confident that the chance of this relationship showing as a result of random error is less than one percent. The standard benchmark for statistical significance is a p -value of less than 0.05, that is, there is less than a five percent chance of random error creating the result. We use these two terms throughout the following analysis.

question in addition in each case. In contrast, the effect for non-questions is enormous—each justice is making approximately twelve additional comments in each case, accounting for over 100 additional comments for the Court in the average case since 1995. In Section I.B, we provided examples of the justices making long advocacy statements, rather than asking questions. Our regression analysis shows that these examples are representative of the broader trend in new oral argument. It shows, in other words, that judicial advocacy is a broader systemic effect and not just an observation based on a few salient examples.

In contrast to the post-1995 effect, the more general time trend captured by the term variable is negative and very small, and not even significant in relation to the number of words justices use. This supports our polarization thesis and discounts any theory that the new oral argument is a product of more gradual or incremental forces. Where it is significant, the negative sign on the term variable means that while judicial activity as reflected in duration, questions, and non-questions is increasing over time, that change is a result of the large upward shift centered around 1995; once this is accounted for, the overall effect of time is small and actually downward.

Both the political and legal salience variables are highly significant and positive in all of our models, as we would expect—it is uncontroversial to say that justices are likely to speak more, for longer, ask more questions, and make more comments in salient cases than nonsalient cases. However, the size of the effect for the salience variables is overshadowed by the post-1995 variable: the increase in judicial activity in cases that are on the front page of the *New York Times* versus more boring cases is consistently only twenty percent that of the effect of the institutional shift we identify as occurring in 1995. The ratio is only greater for questions, which we did not predict to be higher in the post-1995 period. Although it is statistically significant, legal salience, captured by *Congressional Quarterly* scores, has even less substantive effect relative to our post-1995 variable.²⁹⁷

The justice characteristics are mostly highly significant, including ideology and the interaction term between ideology and post-1995 (except for questions for the latter). The former is positive and the latter is negative, meaning that all other things being equal, a justice who is one standard deviation more conservative than average would speak almost thirty words more per case, except that after 1995, that effect is reduced back to only about six additional words. This comports with our figures in Part III, which showed that while conservatives have dominated the Court for most of the period of our study, since 1995 the liberals have been more assertive, coming close to neutralizing the effect of conservative dominance in terms of words spoken and duration of speech. Questions do not show the same pattern, and the interaction term is insignificant, as expected. Non-questions also do not show the same pattern; rather, the coefficient on the interaction term is

297 For completeness, we note that issue area is significant except for non-questions, and thus remains an important control variable.

positive. That means that a justice who is one standard deviation more conservative than another will on average make one comment per case more, but after 1995 that effect is doubled, to approximately two additional comments per case.

Our regression models reported in Table 3 overall demonstrate three important effects for ideology. First, judicial ideology is a significant influence on judicial behavior at oral argument, as expected. Second, nevertheless it is far less influential than the post-1995 measure that captures the political changes in the Court's broader environment. A one standard deviation shift in ideology accounts for less than fifteen percent of the change captured by the post-1995 variable. Thus, while judicial ideology has been well established as an important influence on the Supreme Court's decision-making process,²⁹⁸ our results show that the political context the Court operates within is significantly more influential on one aspect of that process: judicial behavior at oral argument. Third, the effect of judicial ideology is quite different after 1995, and the response of the liberals to the political changes in 1995 are almost strong enough to overcome the direct effect of judicial ideology on oral argument.

To provide another check that the effects we are identifying relate to political polarization—which rose dramatically in 1995 but also continued in other years—and not a result of some other change occurring in 1995, we also ran regressions using a direct measure of political polarization. In unreported regressions²⁹⁹ we substituted the Poole and Rosenthal measure of polarization in the House of Representatives (“House-Polarization”) for our pre-1995 dummy variable.³⁰⁰ House-Polarization is the difference between the mean ideology scores of the two parties, based on actual voting behavior of House members during the relevant Congress.³⁰¹ As with the regressions reported in Table 3, House-Polarization is highly statistically significant and has a very large substantial effect, dwarfing that of all the other variables in the regressions on words, duration, and non-questions. Also consistent with Table 3, the results for our regressions on questions by the justices are essentially the same regardless of whether we use post-1995 or House-Polarization as an independent variable. The effect for questions remains trivial, although it is statistically significant.

The next most significant variable after post-1995 is gender: female justices speak on average almost 100 words less per case per justice than their male colleagues, they speak for fifteen seconds less, ask one fewer question, and make six fewer comments per case. This confirms Jacobi and Schweers' conclusion that the common trope that women speak more than men is

298 See discussion *supra* note 22.

299 Regressions on file with authors.

300 See Poole & Rosenthal, *supra* note 119.

301 The House year begins on January 3 in even numbered years, whereas Supreme Court terms begin in October of each year. We treat the House-Polarization score as applicable to the following two Supreme Court terms, on the theory that it is better to lag slightly than to treat polarization as *following* Supreme Court activity.

equally false at the Court³⁰² as it is in society generally.³⁰³ Interestingly, experience in terms of overall number of years on the Court is significant and negative, however dummy variables indicating whether the justice is in his or her first decade on the Court and whether the justice is in his or her first year are also negative and significant. Thus, the relationship is clearly not a linear function of time. Instead, it appears that, overall, younger justices are on average *more* active than their senior colleagues, other than their early years on the bench, contrary to the prediction in the literature.³⁰⁴ The freshman effect is only significant for words spoken, but given that the less experienced variable captures a similar effect, this is not surprising.

Our conflicted variable is not significant; this is the one variable that we expected to be significant that is not significant. If the other outcome variables are not controlled for, the conflicted variable appears to be significant—thus our caution was warranted in Part III. Justices are more active across the board at oral argument when they decide contrary to their general ideology, but that effect is a product of whether the justice is in the majority or writing an opinion, not a product of the conflict per se. However, we see later that conflict is relevant in some contexts. Confirming our results in Part III, justices in dissent are more active across the board, and opinion writers are significantly more active in every category.

Overall, Table 3 provides extremely strong support for our hypothesis: the institutional variable of post-1995 is doing by far the most work in explaining the increasing judicial activity many have observed at oral argument. It explains the very large increase in justice words, duration, and non-questions. The dramatic increase in political polarization outside the Court in the mid-1990s did in fact fundamentally alter the justices' behavior at oral argument, and this, more than any characteristic relating to the justices themselves, the specific cases, or the outcomes in these cases, explains not only the level of activity, but elements of advocacy, such as the extraordinary increase in justices' comments.

We next turn to look at our fifth measure of judicial activity, interruptions at oral argument. This is included in a separate table because we need to examine by whom and of whom each interruption is made, including both justices and advocates. In addition to our previous variables, we also now include characteristics of the advocates when examining interruptions involving advocates. As well as the characteristics discussed in Section II.A relating to the diversification and professionalization of the Supreme Court bar, we

302 Jacobi & Schweers, *supra* note 207, at 1437.

303 See, e.g., CHRISTOPHER F. KARPOWITZ & TALİ MENDELBERG, *THE SILENT SEX: GENDER, DELIBERATION, AND INSTITUTIONS* 139–40 (2014) (showing that women account for only approximately a quarter of speaking time, and parity is not reached unless women constitute roughly eighty percent of a body); Shân Wareing, *Language and Gender*, in *LANGUAGE, SOCIETY AND POWER* 65, 76 (Linda Thomas & Shân Wareing eds., 1999) (finding that men and boys “talk more in mixed sex groups than women”).

304 This is contrary to the claim of Epstein et al., *supra* note 272, at 1523, that justices behave differently in their first decade than subsequently.

look at an advocate's number of appearances as an explanatory variable, rather than as an outcome variable. Additionally, we include the side that the advocate appears for, in terms of whether the advocate is the petitioner, since it is well established that the Supreme Court reverses approximately two-thirds of the cases that it takes,³⁰⁵ suggesting that the Court is in part acting as a court of last resort. We also include the ideology of the side that the advocate appears for, based on the Supreme Court database's coding of each case as either liberal or conservative, and whether the advocate is ultimately successful in the case. We are also interested to see whether advocates are interrupted more when they manage to speak more words, so we include a variable for that.

Table 4 presents interruptions per person per case. The coefficients when looking at justice behavior will be smaller than looking at advocate behavior, because the unit of analysis is per actor per case, and there are nine justices in most cases and on average 2.45 advocates in each case. As such, to calculate the coefficient for the Court as a whole in an average case, the first and second columns can be multiplied by nine, and the third and fourth columns can be multiplied by 2.45. Each of the columns shows all interruptions, both long and short. The first and second columns look only at interruptions of a justice by a justice, since the third column captures interruptions of a justice by an advocate and the fourth column captures justice interruptions of advocates.

305 Examined by circuit, the median reversal rate is 68.29%, ranging between 55% and 84%. Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan.–Feb. 2010, at fig. 2, www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer.authcheckdam.pdf.

TABLE 4: INTERRUPTIONS AT ORAL ARGUMENT, BY AND OF JUSTICES AND ADVOCATES

	By a Justice	Of a Justice	By an Advocate	Of an Advocate
Post-1995	0.26***	0.26***	4.65***	8.8***
<i>Case characteristics</i>				
Term	0***	0***	0.44***	0.14***
Salience (NYT)	0.02***	0.02***	0.59	0.88**
Salience (CQ)	0.02	0.02	0.55	0.34
Issue Area	-0.01***	-0.01***	-0.18	-0.78***
<i>Justice characteristics</i>				
MQ Score	0***	0*		
MQ*1995	0.01***	-0.01***		
Gender (Female)	-0.04***	-0.02***		
J Years	0***	0***		
Less Experienced	-0.03***	-0.06***		
Freshman	0.05***	0.02		
<i>Outcome variables</i>				
Conflicted	0	-0.01		
Majority	-0.01	-0.01		
Majority Opinion Writer	0	0.01		
Dissenting Opinion Writer	0.02*	0.02		
Concurring Opinion Writer	0.02*	0		
<i>Advocate characteristics</i>				
Gender (Female)			0.44	0.21
Former Clerk			0.61	0.52
Solicitor General			-0.7	-2.49***
PDSG			-2.22**	-1.34
Appearances to Date			-0.01	-0.01
Role (Petitioner)			-1.44***	-2.35***
Ideology (Liberal)			0.14	0
A's Words			0***	0***
Winner			-1.37***	-1.81***
Constant	5.74	5.45	-859.59	-279
Observations	33,918	33,918	8,465	8,465
R-squared	0.05	0.05	0.29	0.19

Note: Robust standard errors. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Table 4 again provides very strong support for our hypothesis. Whether looking at interruptions by a justice, of a justice, by an advocate, or of an advocate, the post-1995 variable is highly statistically significant in predicting the occurrence of each type of interruption at oral argument. What is more, the post-1995 variable provides the most explanatory power in each of the four regressions.

In the first two columns, looking at justice-to-justice interruptions, the post-1995 variable is highly statistically significant and adds 2.3 interruptions per case for the Court. That number is by no means enormous, but remember interruptions are a breach of the norms of the Court, and furthermore that variable is ten times more powerful than any other variable. For instance, judicial ideology and overall judicial experience both register at zero.

In the third and fourth columns, looking at justice-advocate interruptions, the effect of post-1995 is once again highly significant and also much more substantively significant. It is still approximately ten times as powerful as all other variables, except for the role of solicitors general and judicial ideology, for which it is still twice as powerful or more. Post-1995 accounts for more than eleven additional interruptions of justices by advocates in the average case, despite the Supreme Court rule that a justice is never meant to be interrupted by an advocate. And after 1995, we see almost twenty-two more interruptions of advocates by justices per case on average.

Once again, this is not a product of a gradual time trend: the coefficients of term on interruptions are effectively zero for justice-to-justice interruptions. For justice-advocate interruptions, they are positive and significant, meaning that the time trend for interruptions is going up, even accounting for the jump in 1995. This means that in 2015, there are thirty-four more interruptions of justices by advocates per case on average, and twenty-nine more interruptions by justices of advocates per case on average compared to in 1994. Thus, there is a significant change in the interaction between justices and advocates at oral argument that is partly a product of gradual changes over time, but it is significantly and substantially increased by the political changes that began in 1995.

Political salience is once again positive and significant but dwarfed by post-1995, except for interruptions by advocates, where it is not significant. Of interest, legal salience is not significant in affecting interruptions across the board—perhaps the retrospective nature of the measure of legal salience means that it is not obvious at the time of oral argument whether a case will ultimately be considered legally salient. Issue area is small and mostly significant.

Another striking result of Table 4 is that while judicial ideology is significant but with a coefficient of zero it makes no real contribution to predicting interruptions of and by justices. Similarly, the interaction between ideology and the post-1995 variable is substantially tiny, but to the extent that ideology has an effect on judicial interruptions, it is conditional on the effect of the institutional change to the Court's institutional environment that began in 1995.

Gender is also significant and negative for both interruptions by and of justices—this suggests that female justices interrupt less and are interrupted less. The first result is as predicted by previous studies, but the latter is quite surprising and is probably an artifact of our study design. This study focuses on change in judicial behavior over time. This is a problem for looking at

issues relating to the gender of the justices because the number of women on the Court is increasing with time in a way that is hard to disentangle. We suspect that if we differentiate between crossovers and longer interruptions and restructured our data in terms of justice-pair interactions we would see a different result.³⁰⁶ Within the constraints of our current model, we can approximate the true effect of gender on interruptions by excluding the term variable. Without a term variable, interruptions of female justices are positive, highly statistically significant, and sustainably meaningful.³⁰⁷

In terms of experience, Table 4 shows that interruptions have the reverse relationship to experience than other forms of judicial activity, with more experienced justices interrupting more, but the effect, while significant, is very small. The outcome variables are far less important in terms of interruptions than they are in terms of our other measures of judicial activity. Only dissenting and concurring opinion writing is even marginally significant.

Turning to the characteristics of the advocates interrupting the justices, the two meaningful variables other than post-1995 are being a prominent deputy solicitor general, which is significant and negative, with a large coefficient of -2.22, suggesting that whereas being a solicitor general may not be significant, this subgroup has learned to be more restrained at oral argument. Being the petitioner and the ultimate winner are also associated with a lower chance of being interrupted, consistent with the fact that the Court decides more often in favor of petitioners, and justices interrupt those they side with less often. But remember these effects also arose for justices interrupting petitioner advocates and winning advocates, suggesting that the overall tone of the oral argument may be different for the interactions between those advocates and the justices. This is something that is explored in more detail below in Table 5.

All of these variables are secondary to the post-1995 variable, which is at least double and up to four times the impact of the next most significant variable in each column. This confirms that the polarized political environment is manifesting in various forms of increased judicial activity at oral argument, from words used to comments made to interruptions of both justices and advocates.

Finally, we turn to Table 5, which examines in more detail the difference between questions and comments, addressing the issue raised in Part III of the direction of judicial activity—that not only has judicial activity gone up but it is directed against the advocate whom each justice ultimately decides against. We capture this in a variable labeled “agreement,” whether the jus-

306 We did not take that course because our focus is on judicial activity, which manifests in both crossovers and long interruptions, not just conflict, which manifests only in long interruptions. See Jacobi & Rozema, *supra* note 6, at 3.

307 Gender has a coefficient of 0.03, $p < 0.01$. Contact the authors for more detailed results. We also found that, normalizing for the gender ratio of the Court at the time, the female justices were interrupted 82% less than their male peers in the 1990s, 15.5% more in the 2000s, and 64.5% more in the 2010s.

tice ultimately agrees with the side he or she is speaking to. Now we have three key variables: post-1995, agreement, and an interaction term between post-1995 and agreement. We expect once again that post-1995 will have a significant positive effect; to determine that, we need to combine the coefficients on the post-1995 and agreement-post-1995 variable. We expect agreement to have a significant negative effect; to determine that, once again we combine the coefficients of agreement and agreement-post-1995. The interaction term allows us to examine not only whether the justices are more active when speaking to advocates against whom they ultimately rule, but whether 1995 not only increased judicial activity but increased this type of judicial activity in particular.

TABLE 5: QUESTIONS AND NON-QUESTIONS, BY JUSTICE AND ADVOCATE CHARACTERISTICS

	Questions		Non-Questions	
	Justice p.o.v.	Advocate p.o.v.	Justice p.o.v.	Advocate p.o.v.
<i>Agreement</i>				
Agreement	-2.26***	-3.38***	-3.3***	-4.22***
Post-1995	0.33***	-5.09***	7.41***	18.57***
Agreement* 1995	0.18*	0.5	-3.25***	-8.16***
<i>Case Characteristics</i>				
Term	-0.06***	0.17***	-0.02**	0.06**
Saliency (NYT)	0.64***	-0.73**	0.9***	-1.86***
Saliency (CQ)	0.56***	-0.88*	0.86***	-4.61***
Issue Area	-0.18***	-0.49***	0.05	0.65***
<i>Justice characteristics</i>				
MQ Score	0.01		0.04	
Gender (Female)	-0.94***		-3.84***	
J Years	0.01**		-0.09***	
Less Experienced	-0.19**		-0.63***	
Freshman	-0.09		0.28	
<i>Outcome variables</i>				
Conflicted	0.09*		0.14	
Majority	-0.4***		-0.4**	
Majority Opinion Writer	0.44***		1.01***	
Dissenting Opinion Writer	0.58***		1.3***	
Concurring Opinion Writer	0.4***		0.75***	
<i>Advocate characteristics</i>				
Gender (Female)		0.57		-0.73
Former Clerk		-1.4***		-0.73
Solicitor General		-2.33***		-3.05***
PDSG		-1.23*		-4.31***
Appearances to Date		-0.06***		-0.04**
Role (Petitioner)		0.52**		-1.27***
Ideology (Liberal)		0.15		0.42
Did Interrupt		-0.33***		0.27***
Was Interrupted		0.73***		0.72***
Advocate's Words		0		0***
Winner		-0.7***		-1.12***
Constant	119.03	-318.88	45.49	-107.16
Observations	50,048	12,241	50,559	12,432
<i>R</i> -squared	0.06***	0.22	0.10	0.39

Note: Robust standard errors. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

In Table 5, the regression models in the first two columns are variations on a theme. Both of these models investigate whether the number of questions a justice asks an advocate is affected by the justice's agreement with the advocate's position (agreement), political polarization outside the Court (post-1995), and the interaction of these two variables. The models differ by focusing first on the characteristics of the justice asking the question and second on the characteristics of the advocate to whom the question is being asked.

The negative and statistically significant coefficients for agreement in both models confirm our expectation that justices ask more questions of their foes. However, the conflict between the small positive coefficient for post-1995 in the justice-centered model and the much larger negative coefficient in the advocate-centered model makes the effect of post-1995 quite marginal. This opacity is reinforced by the weakly significant interaction term in the justice-centered model and its insignificant counterpart in the advocate-centered model. This lack of any clear result is consistent with our expectations and with our findings in Part II, that questions did not change dramatically after 1995. In other words, it is not questions that were driving the increased judicial activity that otherwise showed across the board. Rather, we expected to see much more change in activity being a result of non-questions, and the models reported in the final two columns of Table 5 strongly support that conclusion.

In Table 5, in both the justice-centered and advocate-centered models, we see the same significant negative relationship between non-questions and agreement as we saw for questions. Moreover, the coefficient on post-1995 is positive and highly significant in both models of non-questions. However, these coefficients cannot be interpreted on their own because of the interaction effect. The models also indicate that there is a significant negative interaction between agreement and post-1995. In the justice-centered model, the average effect of post-1995 is over seven additional comments per justice per case, however the significant negative interaction term tells us that the strength of this effect is about three non-questions less where the justice agrees with the advocate and, conversely, about three comments more when the justice does not agree with the advocate. Thus, on average, we would see an additional sixty-six comments per case in the post-1995 era, but those comments will be unevenly distributed depending on agreement at the individual justice-advocate level, with the vast majority directed at advocates with whom justices do not agree, as predicted.

The interpretation of the advocate-centered model is similar. In this model, the average effect of post-1995 is that each advocate receives over eighteen additional non-questions per case. In unanimous cases, the effect would be reduced by about eight comments per case where all of the justices agree with the advocate, and increased by the same amount when all the justices disagree with the advocate.

In summary, both the justice-centered and advocate-centered models show that justices have become more active after 1995; that they are engaging

in advocacy in the form of presenting their comments and conclusions to the advocates, rather than primarily asking them questions; and that this advocacy behavior increased after 1995. Once again, this is strong confirmation that the justices are behaving more like advocates after 1995.

In terms of our other variables, we see some consistent patterns with the prior tables, in terms of justice characteristics, but also some new patterns. In particular, each of the opinion writing variables is highly statistically significant and positive, for both questions and comments, confirming the impression in Part III that justices are more active when they personally feel strongly enough about an issue to write separately, such as is the case in a concurring or dissenting opinion. Also, there is a positive association between engagement at oral argument and writing the majority opinion. Being in the majority, however, is significant and negative, adding to the trend detected in Part III that, at least since 1995, losing justices are often more active in oral argument than winning justices.

In addition, a number of advocate characteristics are highly significant once agreement is factored in. This includes negative coefficients on former clerks, solicitor generals, as well as prominent deputy solicitors general, and advocates with more appearances to date, for both questions and comments, suggesting that these advocates receive greater deference from the justices than other advocates. In addition to these variables, in Table 5, we included variables for whether the advocate had previously interrupted or was previously interrupted.³⁰⁸ Both variables were highly significant for both questions and comments. All of the coefficients were positive but one, meaning that more questions and comments are directed at advocates who are interrupted, but advocates who interrupt receive fewer questions and more comments. We saw in Table 4 above that advocates who interrupt are less likely to win, and this additional result goes hand-in-hand with that and with the results of our agreement variable, suggesting that comments are associated with justices being opposed to an advocate's position.

Put together, this shows that not only has judicial activity at oral argument dramatically increased since 1995, when the Republican Revolution in Congress began reshaping the political landscape and creating political polarization, but in particular judicial advocacy has also dramatically risen. We see this not only in terms of the enormous number of comments offered by each justice—dozens more by the Court as a whole in the average case—but also by the direction of those comments, as well as questions. Not only do the justices favor at oral argument the side that they ultimately decide in favor of, in terms of being gentler with those advocates, but overwhelmingly this pattern is driven by that same political effect: since 1995, advocacy in this form by the justices has skyrocketed.

308 We also included these variables in additional analysis for Table 4 and found them to be significant, but did not include them in the analysis for fear of collinearity problems. Contact the authors for more detailed results.

CONCLUSION

This Article has shown that judicial activity at Supreme Court oral argument has increased dramatically between 1960 and 2015, in terms of words used, duration of speech, interruptions made, and comments proffered. The only activity that has not increased significantly is the justices asking questions. Court observers are correct to notice that the justices are taking more time at oral arguments and leaving less for advocates, and that they are more disruptive. But no one has previously shown such a large effect over time, that the justices are now taking up twenty-two percent more of the argument than previously. Also, no one has previously recognized that the nature of the justices' contributions has changed just as remarkably, with the proportion of comments to questions rising rapidly. That the justices are providing conclusions and rebutting their colleagues, rather than querying the advocates, is an important element of the justices behaving as advocates. Others have also noticed that the justices direct more of their comments and questions to the side they ultimately disagree with, but no one has previously documented the extent that this second form of advocacy has risen in the last twenty years. Oral arguments are not simply changing over time: oral argument changed dramatically in 1995, as we predicted, in response to the enormous changes occurring in the political branches and the public at large: political polarization.

That the justices are behaving more like advocates, and that this effect has dramatically increased as the political branches become more divided and the public more polarized, is an important finding for conceptualizing the judicial role. Many scholars have shown the influence of ideology on Supreme Court decisions; this result was once controversial—suggesting as it does that the Court is not immune from the push and pull of politics and policy viewpoints—but is now largely orthodoxy.³⁰⁹ Our findings are a novel twist to the understanding of the Court as a political institution. The Court, on our results, is also responsive to the level of partisan polarization affecting the country, with the mutual distrust and affective disharmony, anger, and rivalry that political scientists have shown is associated with such polarization.³¹⁰ These political effects shape judicial behavior, moving justices further away from their idealized role of neutrality, inquiry, and disinterested distance. Perhaps this idealized role was never realistic, and what we see since 1995 is a more transparently politicized Court in action—that is, the change we observe may not be one of the Court becoming more political, but rather of becoming more openly political.

309 See Tonja Jacobi, Essay, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 Nw. U. L. REV. 259, 263 (2006) (summarizing the two central challenges that legal realists and attitudinalists made to the traditional view of the judicial role—on methodology and objectivity—and how those conclusions gradually became difficult to rebut).

310 See Miller & Conover, *supra* note 102, at 225.

Our results are also important for looking ahead. It may be too soon to know whether the 2016 election of President Trump and the earlier rise of the Tea Party may yet lead to a new era of hyperpolarization, but in 2017 polarization reached a new historic high,³¹¹ as did distrust of government.³¹² Understanding the effects that the last big political shift had on the Supreme Court will prepare us to answer that question.

311 PEW RESEARCH CTR., *THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER* 3 (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf> (finding that since 1994, the average partisan gap has increased from fifteen percentage points to thirty-six points).

312 PEW RESEARCH CTR., *PUBLIC TRUST IN GOVERNMENT REMAINS NEAR HISTORIC LOWS AS PARTISAN ATTITUDES SHIFT* 1 (2017), <http://www.people-press.org/wp-content/uploads/sites/4/2017/05/05-03-17-Trust-release.pdf> (finding that trust in government remains near historic lows).

TABLE A2: SUPREME COURT JUSTICES FROM 1960 TO 2015,
SUMMARY INFORMATION

Justice	Avg. words spoken	Avg. vari- ation	Party of appoin- ting president	Tenure start	Tenure end
Felix Frankfurter	1323	79	Dem	20-Jan-39	28-Aug-62
Stephen Breyer	747	11	Dem	3-Aug-94	
Abe Fortas	673	31	Dem	4-Oct-65	14-May-69
Antonin Scalia	650	7	Rep	26-Sep-86	13-Feb-16
John Roberts	572	12	Rep	29-Sept-05	
Sonia Sotomayor	554	16	Dem	8-Aug-09	
Elena Kagan	517	18	Dem	7-Aug-10	
Ruth Bader Ginsburg	504	7	Dem	10-Aug-93	
David Souter	489	10	Rep	9-Oct-90	29-Jun-09
Hugo Black	370	13	Dem	18-Aug-37	17-Sept-71
Earl Warren	367	14	Rep	5-Oct-53	23-Jun-69
John Paul Stevens	347	4	Rep	19-Dec-75	29-Jun-10
Byron White	336	5	Dem	16-Apr-62	28-Jun-93
Warren Burger	326	6	Rep	23-Jun-69	26-Sept-86
Samuel Alito	317	10	Rep	31-Jan-06	
Potter Stewart	302	7	Rep	14-Oct-58	3-Jul-81
William Rehnquist	289	4	Rep	7-Jan-72	3-Sept-05
Anthony Kennedy	273	4	Rep	18-Feb-88	
Sandra Day O'Connor	205	3	Rep	25-Sept-81	31-Jan-06
Charles Evans Whittaker	203	15	Rep	22-Mar-57	31-Mar-62
Arthur Goldberg	141	10	Dem	28-Sept-62	26-Jul-65
Thurgood Marshall	134	3	Dem	2-Oct-67	1-Oct-91
William Brennan	127	4	Rep	15-Oct-56	20-Jul-90
Lewis Franklin Powell, Jr.	57	3	Rep	7-Jan-72	26-Jun-87
Tom Clark	50	4	Dem	19-Aug-49	12-Jun-67
Harry Blackmun	46	2	Rep	9-Jun-70	3-Aug-94
John Marshall Harlan II	40	4	Rep	17-Mar-55	23-Sept-71
William Douglas	36	2	Dem	15-Apr-39	12-Nov-75
Clarence Thomas	3	1	Rep	23-Oct-91	

FIGURE A1: TOP SUPREME COURT ADVOCATES BY DECADE

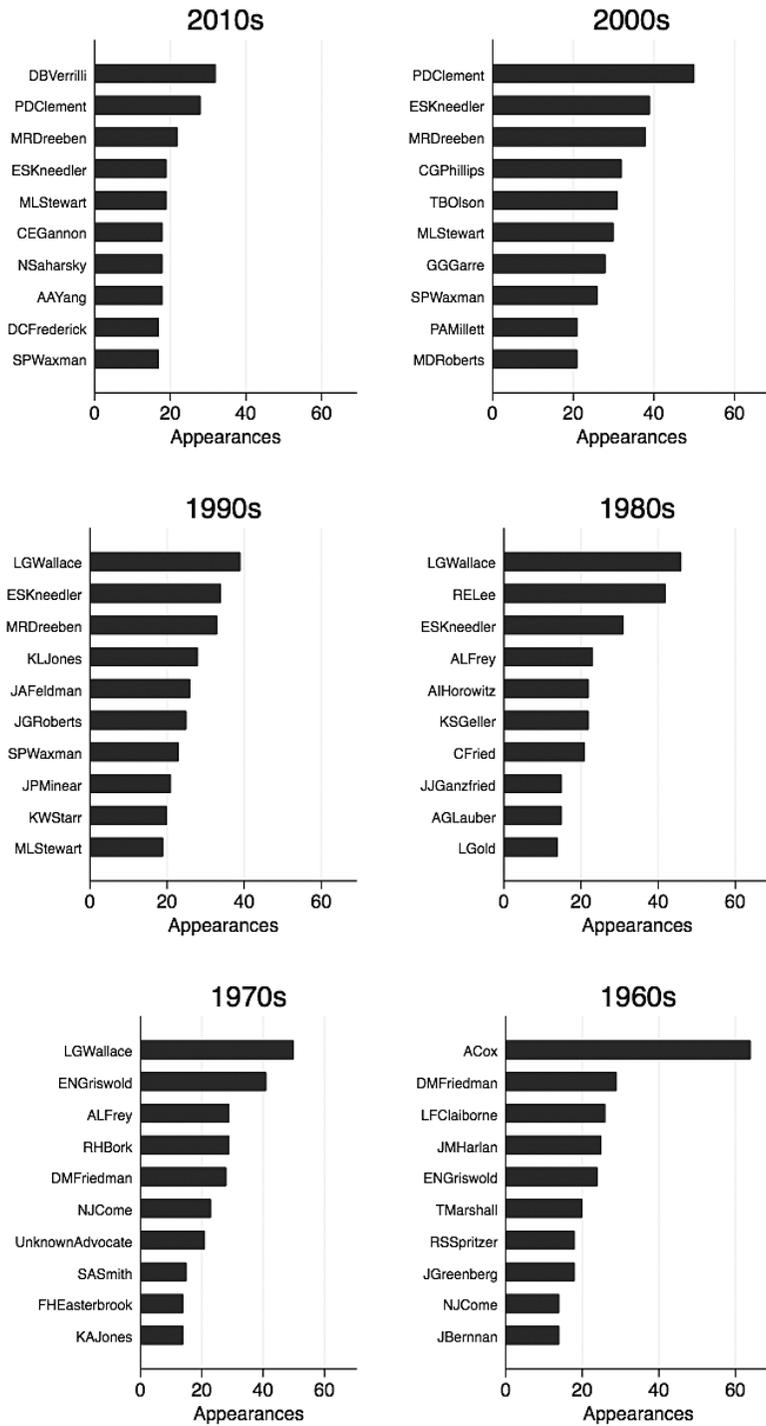


TABLE A3: TOP APPEARING ADVOCATES AND THEIR KEY CHARACTERISTICS

Name	Gen- der	Former Sup. Court Clerk	Solicitor General	Deputy Solicitor General	No. of Appear- ances
Lawrence Gerald Wallace	M	Yes			150
Edwin S. Kneedler	M		Yes		126
Michael R. Dreeben	M				98
Paul D. Clement	M	Yes	Yes	Yes	78
Carter G. Phillips	M	Yes			77
Erwin N. Griswold	M		Yes		70
Archibald Cox	M		Yes		69
Malcolm L. Stewart	M	Yes			68
Seth P. Waxman	M		Yes	Yes	66
Daniel M. Friedman	M				57
Andrew L. Frey	M				57
Rex E. Lee	M	Yes	Yes		54
Theodore B. Olson	M		Yes		49
Louis F. Claiborne	M				48
James A. Feldman	M	Yes			46
Nopton J. Come	M				46
David C. Frederick	M	Yes			44
Jeffrey P. Minear	M				44
Donald B. Verrilli	M	Yes	Yes		43
Kent L. Jones	M				43
Kenneth S. Geller	M				40
Gregory G. Garre	M	Yes	Yes	Yes	39
John G. Roberts	M	Yes		Yes	38
Thomas C. Goldstein	M				37
Irving L. Gornstein	M				36
Laurence Henry Tribe	M	Yes			33
Lisa Schiavo Blatt	F				33
Patricia A. Millett	F				32
Kenneth W. Starr	M	Yes	Yes		31
Charles A. Rothfeld	M	Yes			31

TABLE A4: TOP APPEARING ADVOCATES BY DECADE

Name	Gen-der	Former Sup. Court Clerk	Soli- citor Gen.	Deputy Solicitor General	No. of Appea- rances
The 1960s					
Archibald Cox	M		Yes		64
Daniel M. Friedman	M				29
Louis F. Claiborne	M				26
John M. Harlan	M				25
Erwin N. Griswold	M		Yes		24
Thurgood Marshall	M		Yes		20
Jack Greenberg	M				18
Ralph S. Spritzer	M				18
Nopton J. Come	M				14
Robert W. Ginnane	M				14
The 1970s					
Lawrence Gerald Wallace	M	Yes			50
Erwin N. Griswold	M		Yes		41
Robert H. Bork	M		Yes		29
Andrew L. Frey	M				29
Daniel M. Friedman	M				28
Nopton J. Come	M				23
Stuart A. Smith	M				15
Frank H. Easterbrook	M				14
Keith A. Jones	M				14
Mark L. Evans	M				12
The 1980s					
Lawrence Gerald Wallace	M	Yes			46
Rex E. Lee	M	Yes	Yes		42
Edwin S. Kneidler	M		Yes		31
Andrew L. Frey	M				23
Alan I. Horowitz	M				22
Kenneth S. Geller	M				22
Charles Fried	M	Yes	Yes		21
Jerrold Joseph Ganzfried	M				15
Albert G. Lauber	M	Yes			15
Louis F. Claiborne	M				14

Name	Gen-der	Former Sup. Court Clerk	Soli- citor Gen.	Deputy Solicitor General	No. of Appea- rances
The 1990s					
Lawrence Gerald Wallace	M	Yes			39
Edwin S. Kneedler	M		Yes		34
Michael R. Dreeben	M				33
Kent L. Jones	M				28
James A. Feldman	M	Yes			26
John G. Roberts	M	Yes		Yes	25
Seth P. Waxman	M		Yes	Yes	23
Jeffrey P. Minear	M				21
Kenneth W. Starr	M	Yes	Yes		20
Malcolm L. Stewart	M	Yes			19
The 2000s					
Paul D. Clement	M	Yes	Yes	Yes	50
Edwin S. Kneedler	M		Yes		39
Michael R. Dreeben	M				38
Carter G. Phillips	M	Yes			32
Theodore B. Olson	M		Yes		31
Malcolm L. Stewart	M	Yes			30
Gregory G. Garre	M	Yes	Yes	Yes	28
Seth P. Waxman	M		Yes	Yes	26
Patricia A. Millett	F				21
Matthew D. Roberts	M	Yes			21
The 2010s (2010–2015)					
Donald B. Verrilli	M	Yes	Yes		32
Paul D. Clement	M	Yes	Yes	Yes	28
Michael R. Dreeben	M				22
Edwin S. Kneedler	M		Yes		19
Malcolm L. Stewart	M	Yes			19
Anthony A. Yang	M				18
Nicole Saharsky	F				18
Curtis E. Gannon	M	Yes			18
David C. Frederick	M	Yes			17
Seth P. Waxman	M		Yes	Yes	17

