2023

Supreme Court Interruptions and Interventions: The Changing Role of the Chief Justice

Tonja Jacobi
Emory University School of Law, tonja.jacobi@emory.edu

Matthew Sag
Emory University School of Law, msag@emory.edu

ARTICLE

SUPREME COURT INTERRUPTIONS AND INTERVENTIONS: THE CHANGING ROLE OF THE CHIEF JUSTICE

TONJA JACOBI* **& MATTHEW SAG****

ABSTRACT

Interruptions at Supreme Court oral argument have received much attention in recent years, particularly the disproportionate number of interruptions directed at the female Justices. The Supreme Court changed the structure of oral argument to try to address this problem. This Article assesses whether the frequency and gender disparity of interruptions of Justices improved in recent years, and whether the structural change in argument helped. It shows that interruptions decreased during the pandemic but then resurged to near-record highs, as has the gender disparity in Justice-to-Justice interruptions. However, although the rate of advocate interruptions of Justices also remains historically high, for the first time in years it no longer shows any gender disparity. Thus, the structural change to oral argument had mixed results.

The problem of gendered interruptions at Supreme Court oral argument has led to calls for the Chief Justice to take a more active role at oral argument. This Article also addresses whether and how Chief Justice Roberts has responded to this call. It shows the Chief intervened more, not in response to the increasing number of interruptions, but in response to the gender disparity growing more severe. Further, he directed his interventions at supporting those most interrupted, disrupting those making the most interruptions, and, significantly, using his interventions to recognize and combat interruptions of the female Justices. When it comes to interruptions at the Court, the Chief Justice is no longer simply the first among equals but has a new role, as a referee, attempting to address a social and institutional problem.

* Professor of Law and Sam Nunn Chair in Ethics and Professionalism, Emory Law School; Tonja.Jacobi@Emory.edu.

** Professor of Law in Artificial Intelligence, Machine Learning, and Data Science, Emory Law School; MSag@Emory.edu. Our thanks to Allison Lee and Matthew Choi for diligently coding transcripts of Supreme Court oral argument, to Cara Waite for her excellent assistance with research, and to Ben Farley, Matt Lawrence, Kay Levine, Jonathan Nash, Mark Nevitt, George Shepherd, Martin Sybblis, and Sasha Volokh for their comments and suggestions.

CONTENTS

Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.
—then-Judge John Roberts, Jr.[1]

INTRODUCTION

When then-Judge John Roberts Jr. famously likened his role as a judge to that of a baseball umpire, he was taken to mean that he would be a neutral referee in contests between parties that came before the Court.[2] He probably did not foresee the extent to which he would be called upon to referee interactions between his fellow Justices. And yet, that is what transpired.

Until relatively recently, it was exceedingly rare for the Chief Justice to intervene at Supreme Court oral argument to say which of two Justices should speak first, or which Justice's question should be addressed first. Chief Justice Roberts' predecessor and his former boss, Chief Justice William Rehnquist, rarely intervened as a referee at oral arguments—only once per Term on average.[3] In contrast, until the Supreme Court began hearing oral argument telephonically in response to the COVID-19 pandemic, Chief Justice Roberts was intervening almost fifteen times per Term.[4] This increase in interventions was not due to a difference in personality or style between Roberts and his former mentor[5]: in his first four years as Chief, Roberts intervened less than four

[1] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005).

[2] *See, e.g.*, Chris Cillizza, *John Roberts, Umpire.*, WASH. POST (June 28, 2012, 12:59 PM), https://www.washingtonpost.com/blogs/the-fix/post/john-roberts-umpire/2012/06/28/gJQAx5ZM9V_blog.html ("Today, in serving as the swing vote in 5-4 ruling that largely upheld President Obama's health care law and, in so doing, handing the incumbent a major political boost, Roberts made good on his pledge to referee the game not play it."); Richard Primus, *John Roberts Finally Gets His Day as Umpire*, POLITICO (Jan. 20, 2020, 8:14 AM), https://www.politico.com/news/magazine/2020/01/20/john-roberts-trump-impeachment-101114 [https://perma.cc/PXK2-893E] ("Roberts's comment about balls and strikes probably reflected an aspiration. To the extent that the Court can be perceived (rightly or wrongly) as acting with principled neutrality, its reputation as an arbiter floating above the political scrum is strengthened.").

[3] *See infra* Part III.A.

[4] *See infra* Part III.A.

[5] Not only did Roberts serve as Rehnquist's clerk at the Supreme Court, but he admired him greatly as both a man and a judge. *See* John G. Roberts, Jr., *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1, 2 (2005) ("The Chief is a towering figure in American law, one of a handful of great Chief Justices. . . . For those of us fortunate enough to have known him, however, he will always be remembered first and foremost as a genuinely kind, thoughtful, and decent man."). Roberts and Rehnquist are also often compared in style and approach, and Roberts was expected to act as Chief much like Rehnquist. *See, e.g.*, Melissa Block, *Roberts Nominated for Chief Justice*, NPR: ALL THINGS CONSIDERED, (Sept. 5, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=4833625 [https://perma.cc/8DV6-22BY] (statement of Professor Jeffrey Rosen) ("There's every reason to believe he'll look a lot like Chief Justice Rehnquist. They have a similarly pragmatic

times per Term on average, resembling Rehnquist more than his own later self.[6] What changed was the need for interventions: interruptions between the Justices, as well as interruptions of the Justices by the advocates, skyrocketed during Roberts' tenure as Chief Justice.[7] And those interruptions were not random: they had increased dramatically as more female Justices joined the Court,[8] and were disproportionately aimed at the female Justices—both by the male Justices and by the advocates, mostly the male advocates.[9] There came to be a much greater need for a referee at Supreme Court oral argument.

This Article examines these two phenomena: interruptions and interventions at Supreme Court oral argument. It shows how the need for the Chief Justice to intervene arose, with growing attention on interruptions of the Justices at oral argument—and particularly the gendered nature of those interruptions. It assesses whether the rate of interruptions and the disproportionate gender effect have improved since attention was drawn to the issue. It also examines whether and how Roberts responded, changing his role as Chief Justice, and likely expectations of other chief justices going forward. In doing so, it explores how institutional change at the Court itself can change the interactions between the players—the Chief, the Associate Justices, and the advocates. And it tests whether, and to what extent, the institutional changes made in response to the problem of gendered interruptions actually solved the problem.

In 2017, Tonja Jacobi and Dylan Schweers showed that "even though female Justices speak less often and use fewer words than male Justices, they are nonetheless interrupted during oral arguments at a significantly higher rate."[10] Subsequently, Justice Sonia Sotomayor commented that "[p]eople paid attention" to this study and that it caused the Justices to assess their own

conservative disposition. They don't believe that original understanding of the constitution is the be-all and end-all.").

[6] *See infra* Part III.A.

[7] *See* Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1211 (2019); *infra* Part II.A.

[8] Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1459–60 (2017).

[9] *Id.* at 1437; *see also infra* Part I.B.

[10] Jacobi & Schweers, *supra* note 8, at 1383. Subsequently, other studies showed support for this finding and scholars have also shown that interruptions of advocates by the Justices are also highly gendered. *See, e.g.*, Adam Feldman & Rebecca D. Gill, *Power Dynamics in Supreme Court Oral Arguments: The Relationship Between Gender and Justice-to-Justice Interruptions*, 40 JUST. SYS. J. 173, 187 (2019); Dana Patton & Joseph L. Smith, *Lawyer, Interrupted: Gender Bias in Oral Argument at the US Supreme Court.*, 5 J.L. & CTS. 337, 337 (2017).

behavior,[11] with some of the male Justices apologizing to her.[12] Other Supreme Court Justices also commented on the findings.[13] Jacobi and Schweers called for the Chief Justice to intervene more and act as a "referee."[14] Justice Sotomayor also reported that the Chief Justice did exactly that after the study came out, saying in 2018 she gave "credit to the Chief Justice" and "'noticed [the Chief Justice] being more of a referee during arguments,' striving to make sure interrupted questions get answers";[15] she reiterated in 2021 that the Chief was now "playing referee when interruptions happened."[16] Perhaps most notably, Justice Sotomayor reported the change to the structure of oral argument the Court introduced in the 2021 Term—which allowed both a free range discussion among the Justices and advocates, as was the norm prior to 2019, as well as a new stage in which each Justice has uninterrupted time to have a colloquy with the advocate[17]—was an attempt by the Court to combat interruptions and, particularly, the gender disparity involved.[18]

Accordingly, there is now impetus to address not only whether gendered interruptions improved at Supreme Court oral argument in the last five years, but also whether the Chief Justice changed his behavior, intervened more, and

[11] Melissa Quinn, *Sotomayor Says Supreme Court Adjusted Argument Format Partly Over Interruptions of Female Justices*, CBS NEWS (Oct. 14, 2021, 7:38 PM), https://www.cbsnews.com/news/supreme-court-justice-sonia-sotomayor-oral-arguments-female-justices-interruptions/ [https://perma.cc/S5WV-YSLC] (reporting Justice Sotomayor describing study as having "enormous impact" on how oral argument is conducted, leading to alteration in structure of Supreme Court oral argument); Ariane de Vogue, *SCOTUS Changed Oral Arguments in Part Because Female Justices were Interrupted, Sotomayor Says*, CNN POLITICS (Oct. 13, 2021, 9:41 PM), https://www.cnn.com/2021/10/13/politics/sotomayor-oral-arguments/index.html [https://perma.cc/Q9WT-5YSU].

[12] Andrew Hamm, *Sotomayor Promotes New Law Clerk Hiring Plan at ACS Convention*, SCOTUSBLOG (June 8, 2018, 6:07 PM), https://www.scotusblog.com/2018/06/sotomayor-promotes-new-law-clerk-hiring-plan-at-acs-convention/ [https://perma.cc/4EFL-8WQR] (discussing Justices' reaction to study regarding gender discrimination in Supreme Court oral argument).

[13] *See infra* Part I.B.

[14] Jacobi & Schweers, *supra* note 8, at 1485 ("The Chief Justice should also enforce the existing rule that prohibits advocates from interrupting the Justices . . . . [T]he Chief Justice could referee the floor more to make sure the interruptee's question is addressed."). See *infra* Part I.B for further discussion.

[15] Hamm, *supra* note 12.

[16] Quinn, *supra* note 11.

[17] This latter approach was introduced when the Court heard arguments telephonically during the COVID-19 pandemic. For a more detailed description of the introduction of the hybrid approach and the events which led up to it, see *infra* Part I.B.

[18] *See* Quinn, *supra* note 11; Kaelan Deese, *Supreme Court Changes Oral Argument Format Because Female Justices Were Being Interrupted*, WASH. EXAM'R (Oct. 14, 2021, 3:39 PM), https://www.washingtonexaminer.com/policy/courts/supreme-court-changes-oral-argument-format-female-justices-were-interrupted [https://perma.cc/V9GX-43MR] ("The Supreme Court altered its oral argument format after research indicated female Justices were interrupted more by male justices and advocates, according to Justice Sonia Sotomayor.").

whether those interventions were directed at reducing the gender imbalance of those interruptions. Our study is both timely and novel. Enough time has now passed since Jacobi and Schweers established in 2017 the existence of the gender imbalance in how Justices are interrupted at Supreme Court oral argument that we can begin to address the question of whether anything has changed.

In spite of the vast literature on the internal dynamics of the Supreme Court,[19] and the extensive discussion of John Roberts' tenure as Chief Justice,[20] no one has ever made a systematic study of the Chief Justice's interventions at oral argument. This is despite the fact that the Chief Justice playing referee is a recognized phenomenon—the Chief himself has been asked about it and described it as an unfortunate part of his job.[21] In part, we attribute the uniqueness of our study to the difficulty of gathering the relevant data. The Chief's interventions consist of varied statements such as "I think Justice Ginsburg's question is still pending";[22] simply naming a Justice, for example

[19] *See generally* Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729 (2006) (arguing that the Chief Justice uses strategic opinion assignment to influence case outcomes); Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008) [hereinafter *Super Medians*] (explaining why ideological differences among Justices leads some median justices to be more powerful than others); Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341 (2010) (summarizing literature on strategic behavior by justices); Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671 (2016) (showing that there are two dimensions of judicial decision making); Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021) (finding a surge in behavior consistent with weaponizing of en banc review from 2018 to 2020).

[20] *See, e.g.*, Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 764-66 (2013) (explaining Chief Justice Roberts' vote in the first decision on the constitutionality of the Affordable Care Act, in terms of his long term strategy). *But see* Eric J. Segall, *Chief Justice John Roberts: Institutionalist or Hubris-in-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107, 108-09 (2021) (challenging conventional wisdom of John Roberts as an institutionalist who cares deeply about both his personal legacy and Supreme Court prestige).

[21] Asked about this "refereeing" role by Judge J. Harvie Wilkinson, Chief Justice John Roberts acknowledged: "Part of my job, and I'm sorry that it has to be part of my job, is that I do try to, you know, moderate between my colleagues when they're, uh, asking questions . . . ." Federal Judicial Conference, *Supreme Court Chief Justice John Roberts on 2017-18 Term*, C-SPAN, at 11:17 (June 29, 2018), https://www.c-span.org/video/?447323-1/interview-supreme-court-chief-justice-john-roberts (transcription by the authors).

[22] Transcript of Oral Argument at 33, Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255 (2017) (No. 16-466). Approximately two minutes prior, advocate Thomas Goldstein was answering Justice Ruth Bader Ginsburg's question when Justice Anthony Kennedy interrupted. *See id.* at 31-32. After some back-and-forth, Justice Elena Kagan asked a short question, and then Chief Justice Roberts intervened to bring the argument back to Justice Ginsburg's question. *See id.* at 32-33.

saying "Justice Alito";[23] or saying to a particular Justice, "[g]o ahead."[24] As such, interventions are far more difficult to code reliably, compared to laughter[25] or interruptions,[26] which can be determined using automated scripts. Identifying interventions required extensive hand-coding of argument transcripts and the development of a rigorous coding protocol.[27] Yet, this endeavor is worthwhile, as studying interventions is equally important to the topic of oral argument as are interruptions. The Chief's interventions are important both in terms of being one effect of interruptions, but also independently, as a measure of the power of the Chief and how he chooses to exercise or reserve that power. Finally, they reveal how, when the Chief exercises his power, he shapes the form and substance of oral argument.

Looking at this question empirically, rather than anecdotally, gives us greater insight into interesting and nuanced questions: namely, whether Chief Justice Roberts' interventions were a response to the gender imbalance in Justice-to-Justice interruptions; alternatively, whether they were a response to public awareness and discussion of that gender imbalance following Jacobi and Schweers' much-discussed article; and finally whether the Chief Justice's interventions and other changes at the Court have had any effect on the frequency of Justice-to-Justice interruptions, or on the gendered incidence of interruptions at the nation's highest court. These questions are important because oral argument matters.[28] Oral argument gives the Justices a chance to learn from the advocates, influence their colleagues, and speak directly to the public. And it is the public's only window into the Supreme Court's decision-making process before opinions are handed down. Without systematic and rigorous analysis of the phenomenon, it can be misunderstood. In fact, the Chief himself reports that

[23] For example, in Transcript of Oral Argument at 37, Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (No. 13-1339), the following exchange took place:

JUSTICE ALITO: In relation to that --

JUSTICE KAGAN: -- that -- that's --

JUSTICE ALITO: Could I just say --

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: [asks his question].

[24] Transcript of Oral Argument at 27, Black v. United States, 561 U.S. 465 (2010) (No. 08-876) (recording Chief Justice intervening against himself after he interrupted Justice Sotomayor).

[25] Tonja Jacobi & Matthew Sag, *Taking Laughter Seriously at the Supreme Court*, 72 VAND. L. REV. 1423, 1481 (2019) [hereinafter *Taking Laughter Seriously*] (showing laughter is part of judicial advocacy and strategy at oral argument).

[26] *See infra* Part I.C.

[27] *See infra* Part I.C.

[28] See *infra* Part I.A for expanded discussion on the history and importance of oral argument.

he referees purely on the basis of seniority[29]: we show that the data, comprehensively analyzed, do not support this claim.[30]

In this Article, we examine all aspects of what Justice Sotomayor reported: Part II looks at whether interruptions have reduced, whether the gender imbalance of those interruptions has reduced, and whether any reduction observed can be related back to the change in the structure of oral argument. Part III examines whether the Chief Justice is intervening more at oral argument, and whether he intervenes in a way to address the gender imbalance of interruptions in particular.

Our findings are nuanced. In Part II we show that, since 2017, when attention suddenly turned to the gender disparity in interruptions of the Justices at oral argument, both the rate of Justice-to-Justice interruptions and the gender disparity in those interruptions decreased, on average. But much of that decrease is driven by the 2020 Term, in which the ability of the Justices and the advocates to interact was artificially constrained. In the 2021 Term, when the new structure was introduced, aimed at discouraging such interruptions, oral argument at the Supreme Court nevertheless had the fourth highest rate of Justice-to-Justice interruptions, and the second highest rate of the gender disparity in Justice-to-Justice interruptions, since 1997, when our data begins. But when it comes to advocate interruptions of the Justices, there was significant improvement. Even though the 2021 Term witnessed the third highest rate of advocate interruption of Justices, for the first time in many years there was no gender difference with regard to whom those interruptions were directed. And, for the first time, we are able to examine how a true conservative female Justice is interrupted, compared to liberal female Justices and male Justices. We show that Justice Amy Coney Barrett is interrupted significantly more often than her male, predominantly conservative brethren but significantly less often than the liberal female Justices. This allows us to show that both ideology and gender independently shape interruptions at Supreme Court oral argument.

In Part III, we show that Chief Justice Roberts' interventions do not track particularly well with the number of interruptions of the Justices occurring at argument. Rather, Roberts began significantly increasing his interventions starting in the 2010 Term, at the same time that the gender imbalance in interruptions rose notably. What is more, those interventions were directed primarily at ensuring the Justices most often being interrupted get to have their say, and stopping the Justices who most commonly interrupt their colleagues. Furthermore, we show there is a statistically and substantively significant relationship between gendered interruptions and the Chief Justice's interventions. In short, Chief Justice Roberts is addressing the gender imbalance in interruptions at Supreme Court oral argument.

[29] *See infra* Part III.B; Federal Judicial Conference, *supra* note 21 at 11:30 ("When two Justices are sorta trying to talk at the same time . . . like everything else in the building, we go by seniority . . . .").

[30] *See infra* Part III.B.

Together, these findings suggest the change to the structure of oral argument was effective in combating the long-standing gender imbalance in advocates' interruptions of the Justices but that the Justices, in their superior, tenured positions, showed themselves to be much more recalcitrant. Advocate interruptions of Justices stayed remarkably high, but the gender difference has disappeared. Justice-to-Justice interruptions have not improved, but the Chief Justice is playing his part, addressing, if not overcoming, the gender imbalance in interruptions at oral argument.

I. BACKGROUND, RELEVANT LITERATURE, AND SETUP

A. *The Importance of Oral Argument*

Oral argument may be the Court's most important ritual. The tradition and theater of oral argument—the raised bench, the robes, the "Oyez Oyez" mantra, and the incantation of "Mr. Chief Justice and may it please the Court"—all serve to tie the present to the past and situate current controversies within a historical framework that bolsters the Court's legitimacy.

Beyond the ritual, oral argument serves a vital information function. Justices benefit from seemingly endless briefing from the parties and amici curiae.[31] However, the information the Justices obtain from oral argument is different.[32] No longer passive recipients of information, the Justices use oral argument to resolve factual ambiguities, explore the merits of both grand ideas and specific legal tests, and ferret out the policy implications of their potential rulings.[33] The value of oral argument to the Justices in this regard is clear. Justice John Harlan testified that "there is no substitute" for oral arguments in "getting at the real

[31] *See, e.g.*, Paul M. Collins, Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RSCH. Q. 55, 63 (2007) (showing amicus curiae briefs influence the ideological direction of the Court's decisions); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RSCH. Q. 468, 476-77 (2008) (showing that language used in parties' briefs shapes the language of Supreme Court opinions, contingent on brief quality, ideological compatibility with the Court, and the political salience of a case).

[32] Indeed, information seeking is the stated purpose of oral arguments. *Oral Arguments*, SCOTUS, www.supremecourt.gov/oral_arguments [https://perma.cc/M8LU-YXRN] (last visited Sept. 30, 2023) (describing 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"). *See generally* TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (2004) (arguing that Justices use oral arguments to direct the content of information they obtain when making decisions).

[33] JOHNSON, *supra* note 32, at 45. For early accounts of these proceedings, see Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975); E. Barrett Prettyman, Jr., *The Supreme Court's Use of Hypothetical Questions at Oral Argument*, 33 CATH. U. L. REV. 555 (1984).

heart of an issue and in finding out where the truth lies."[34] Numerous other Justices have concurred.[35] Scholars have also supported the view that oral argument is important, finding that oral arguments can "focus the minds of the justices and present the possibility for fresh perspectives on a case."[36]

Oral argument also has a communicative function. In addition to extracting information and testing arguments with the advocates, the Justices use oral arguments as a kind of "preconference." Oral argument is a chance for the Justices to learn about each other's views, potentially alter those views, and even engage in preliminary negotiations about a final decision.[37] The preconference role of oral argument is apparent from the archival papers of Justice Lewis F. Powell and Justice Harry A. Blackmun, which indicate they listened to their colleagues' comments with an ear towards determining how coalitions might form and particularly how their ideological allies and opponents might vote.[38] Comments from the Justices over the years also confirm this role of oral argument, with Justice Anthony Kennedy describing the Court as "having a conversation with itself through the intermediary of the attorney" during oral argument, or as Justice Antonin Scalia describes, using oral argument to

[34] John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 7 (1955).

[35] For instance, Justice John Harlan argued that "oral argument gives an opportunity for interchange between court and counsel" to engage in a joint effort to "search out the truth, both as to the facts and the law." *Id.* Chief Justice Rehnquist posited that oral arguments allow Justices to evaluate counsels' "strong points and . . . weak points, and to ask . . . some questions [about the case]." William H. Rehnquist, *"Oral Advocacy: A Disappearing Art,"* 35 MERCER L. REV. 1015, 1025 (1984).

[36] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 241 (7th ed. 2005); Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 99 (2006); 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, 1011. One illustration of the importance of oral argument is in its impact on case outcomes suggested by empirical studies showing that advocate quality and experience in oral argument affect how the Justices vote. Johnson, et al., *supra*, at 109 (showing that attorneys with greater experience are more likely to present high quality oral argument and that the relative quality of oral argument influences Justices' vote choices); Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 495 (2007) [hereinafter *Oral Advocacy*] (showing Justices' votes are responsive to the quality of oral argument and that responsiveness changes depending on the salience of the case).

[37] *See, e.g.*, RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 17-84 (2012) (demonstrating how Justices specifically interact with one another during argument sessions, including interrupting one another (chapter 2) and listening to what other Justices say (chapter 3)). For an early observation to this effect, see Stephen L. Wasby, Anthony A. D'Amato & Rosemary Metrailer, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 410-22 (1976) (showing, anecdotally, that Justices speak to one another during these proceedings).

[38] *See generally* JOHNSON, *supra* note 32, at 67-70; BLACK, ET AL., *supra* note 37, 50-51.

"exchange . . . information among the Justices themselves."[39] In Justice Elena Kagan's words: "There's no doubt . . . that part of what oral argument is about is a little bit of the justices talking to each other with some helpless person standing at the podium who you're talking through."[40] The Justices do not just use oral argument to communicate across the bench; they also try to control the discussion to influence their colleagues. Specifically, the Justices sometimes get involved when they think that the argument is proceeding down the wrong path, in an effort to keep their colleagues focused on the issues they deem most likely to produce the "correct" outcome.[41] Although not the focus of this Article, oral argument can also be unintentionally revealing of the attitudes and intentions of the Justices.[42]

Beyond these informational and preconferencing functions, oral argument has a critical role in preserving the institutional legitimacy of the Supreme Court. Oral argument shows the public that the Court practices rule-of-law values—particularly transparency in decision making and equal consideration of arguments in a neutral forum. Oral argument is symbolically important because it is the one part of the Supreme Court's decision-making process that is in any

[39] *See* Tonja Jacobi, Timothy R. Johnson, Eve M. Ringsmuth & Matthew Sag, *Oral Argument in the Time of COVID: The Chief Plays Calvinball*, 30 S. CAL. INTERDISC. L.J. 399, 406 (2021). Or, as Justice Sotomayor put it, one purpose of oral argument "is for judges to hear what's bothering each other." Adam Liptak, *Sotomayor Reflects on First Years on Court*, N.Y. TIMES (Jan. 31, 2011), https://www.nytimes.com/2011/02/01/us/politics/01sotomayor.html. Justice Sotomayor also explained that she uses information from oral argument in conference, noting that "she tailors her own reasoning [during conference] to take account of what she has heard from her colleagues at arguments." *Id.*

[40] Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES (Oct. 7, 2013), https://www.nytimes.com/2013/10/08/us/inquisitive-justices-no-argument-there.html.

[41] *See* Jacobi & Sag, *supra* note 7, at 1176 (quoting Justice Alito's discussion of the purpose of some Justice-to-Justice interruptions).

[42] Empirical studies have shown that case outcomes and the votes of individual Justices can be predicted based on judicial behavior at oral argument. For example, Tonja Jacobi and Matthew Sag found that not only do the Justices speak more to the advocates against whom they ultimately rule, but that this "disagreement gap" increased since the mid-1990s as the Justices spoke more during oral argument. *Id.* at 1226-27; *see also* Timothy R. Johnson, Ryan C. Black, Jerry Goldman & Sarah A. Treul, *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, 256 (2009) (showing that the side receiving more attention from the Justices during oral argument is more likely to lose the case). This "disagreement gap" is such a strong predictor of voting behavior that it applies to literal speech episodes, aggregate word counts, or even just comments that adduce laughter from the gallery. *Taking Laughter Seriously*, *supra* note 25, at 1429. The "disagreement gap" model is also predictive in other jurisdictions. *See, e.g.*, Tonja Jacobi, Zoë Robinson & Patrick Leslie, *Comparative Exceptionalism? Strategy and Ideology in the High Court of Australia*, 70 AM. J. COMPAR. L. (forthcoming 2023) (manuscript at 37) (available at https://ssrn.com/abstract=3913448) (concluding that Australian Justices are more active when in opposition to the dominant ideological regime or when facing likely failure to convince their colleagues in the case at hand).

way public or transparent.[43] Every other aspect of that process is opaque: the Justices select the cases, hear them, deliberate on them, and write their opinions, all in secret.[44] The recent attention given to the Supreme Court's "shadow docket" demonstrates the importance of oral argument in illustrating the Court's commitment to the rule of law. The shadow docket is controversial precisely because decisions are made without full briefing or oral argument—that is, decisions are made "in the shadows."[45] The very publicness of oral argument adds to the legitimacy of the Court by demonstrating that the competing positions of the parties have been heard and considered.[46] 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.[47]

The Court holds itself out as a custodian and arbiter of the rule of law and its underlying norms of equality, transparency, and fairness. The recent literature on interruptions at oral argument must be assessed in this light, as well with a view to the informational and communicative functions of oral argument discussed above. As Jacobi and Schweers demonstrated in their landmark study of interruptions at oral argument, even at the apex of the legal establishment, gender appears to play a role in judicial behavior and interactions.[48] Jacobi and Schweers showed that between 2004 and 2015, female Supreme Court Justices were consistently interrupted more often than male Justices—up to three times as often in some Terms[49]—mirroring gender roles in other parts of society.[50] When a Justice is interrupted at oral argument, her attempt to extract information or concessions from the advocate, communicate with her peers, or lay down a

[43] Jacobi & Sag, *supra* note 7, at 1167 ("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.").

[44] Jacobi et al., *supra* note 39, 409-10.

[45] *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) (describing the dramatic rise of the shadow docket, "that is, the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument").

[46] *See* Jacobi & Sag, *supra* note 7, at 1168; Sullivan & Canty, *supra* note 36, at 1011.

[47] Jacobi & Sag, *supra* note 7, at 1168.

[48] Jacobi & Schweers, *supra* note 8, at 1460 (showing that even at the Supreme Court, men interrupt more than women and men particularly interrupt women); *see also* Feldman & Gill, *supra* note 10, at 173; Patton & Smith, *supra* note 10, at 338 (showing gender disparities in advocate behavior at Supreme Court oral argument).

[49] Jacobi & Schweers, *supra* note 8, at 1437.

[50] *See, e.g.*, Don H. Zimmerman & Candace West, *Sex Roles*, *Interruptions and Silences in Conversation*, *in* LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE 105, 116 (Barrie Thorne & Nancy Henley eds., 1975) (studying public conversations between mixed-gendered groups and finding men were responsible for forty-six of forty-eight interruptions); Lyn Kathlene, *Power and Influence in State Legislative Policymaking: The Interaction of Gender and Position in Committee Hearing Debates*, 88 AM. POL. SCI. REV. 560, 565, 573 (1994) (showing men disproportionately interrupt women in the state legislative arena).

marker in public discourse is also disrupted.[51] The importance of Justice-to-Justice interruptions at oral argument is underscored by the finding that such interruptions reduce the ability of the Justices involved to form coalitions in the eventual decisions and opinions produced by the Court.[52] This suggests that although some interruption is inevitable in any unscripted conversation,[53] interruptions represent conflict between the Justices.[54] Moreover, although some interruptions are innocuous, when the incidence of interruption is systemically unequal, be it in terms of gender, race, or ideology, then equal access to the informational, communicative, and symbolic functions of oral argument is necessarily undermined.[55]

B. *The Impact of Interruptions*

The Supreme Court is famously slow to change its practices and procedures.[56] Until 2019, and for reasons we will address shortly, the outward formal structure of oral argument was the same since at least 1955,[57] other than a gradual reduction in the length of time allowed for argument.[58] However, despite this

[51] Jacobi & Schweers, *supra* note 8, at 1459.

[52] Tonja Jacobi & Kyle Rozema, *Judicial Conflicts and Voting Agreement: Evidence from Interruptions at Oral Argument*, 59 B.C. L. REV. 2259, 2297 (2018) ("[I]nterruptions are associated with disagreement and the relationship is substantially and statistically significant.").

[53] By the letter of the law, advocates at least are meant to avoid interruptions at all costs. *See* CLERK OF THE CT., GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 9 (2015) (instructing advocates to "[n]ever interrupt a Justice who is addressing [them]," to "[g]ive [their] full time and attention to that Justice," and to "cease talking immediately and listen" if Justice interrupts advocate while they are speaking). However, in the modern Supreme Court when Justices sometimes barrage counsel with questions every few words, that injunction seems somewhat unrealistic.

[54] Jacobi & Rozema, *supra* note 52, at 2308.

[55] *See* Jacobi et. Al., *supra* note 42 (manuscript at 5-6) (summarizing various purposes scholars have identified for oral argument and how interruptions interfere with each one); *see also* Zimmerman & West, *supra* note 50, at 105, 123 (describing psychological and sociological studies showing "interruptions are a violation of a current speaker's right to complete a turn").

[56] *See, e.g.*, Eve M. Ringsmuth, Matthew Sag, Timothy R. Johnson & Tonja Jacobi, *SCOTUS in the Time of COVID: The Evolution of Justice Dynamics During Oral Arguments*, 45 LAW & POL'Y 66, 76-77 (2023) (showing Justices adapted to the new telephonic setup but it took time); *see also* Jacobi et al., *supra* note 39, at 400 (referring to the Supreme Court as a "slow-moving institution").

[57] The Court began recording oral argument in the 1955 Term. *See Argument Audio*, SCOTUS, https://www.supremecourt.gov/oral_arguments/argument_audio/2010 (last visited Sept. 30, 2023) for more information about the Court's recording policies.

[58] From 1970 until 2020, oral argument was generally one hour, with each side ordinarily permitted thirty minutes. SUP. CT. R. 28(3) ("Unless the Court directs otherwise, each side is allowed one-half hour for argument. . . . Additional time is rarely accorded."). From 1925 until 1970, oral argument was generally allotted two hours: one hour per side. *See* CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 126-28

formal rigidity, the nature and tenor of oral argument has in fact changed significantly over the last few decades. The burgeoning empirical literature on Supreme Court oral argument has shown that judicial activity during oral argument increased significantly since the 1960's.[59] In the modern era, the Justices "interrupt more, speak more, and leave far less time for the advocates to present their case."[60]

To some extent, the increase in Justice-to-Justice interruptions noted in several studies of the Court is merely a byproduct of a more active bench. However, Jacobi and Schweers' 2017 study showed that female Justices were interrupted during oral argument at a significantly higher rate than male Justices, both by their fellow Justices and by the advocates.[61] At its peak, the female-male disparity in Justice-to-Justice interruptions reached a factor of three, meaning the average female Justice could expect to be interrupted three times as often as the average male Justice.[62] The Jacobi and Schweers study drew extraordinary attention,[63] in part because of its eye-catching findings, but also because, following hot on the heels of the #MeToo movement, it confirmed and validated so many women's lived experiences.[64] As one headline summarized, "It Doesn't Get Better—Women Supreme Court Justices Get Interrupted Too."[65] The subheading for the same story continued: "No matter how educated, how important you become, women still get interrupted."[66] Or, as Jacobi and Schweers summarized "[o]ur findings that female justices are consistently interrupted more than their male counterparts in this setting show that gender

(2011). From 1911 to 1925, each side was permitted one and a half hours. SUP. CT. R. 22(3) (1911) (repealed 1925). Prior to 1911, each side was permitted two hours, or more by special leave of the Court. SUP. CT. R. 53 (1848) (repealed 1858); *see also* CUSHMAN, *supra*, at 138-40. Prior to 1849, arguments were unlimited in duration. SUP. CT. R. 53 (1849) (repealed 1858); *see also* CUSHMAN, *supra*, at 142.

[59] *See, e.g.*, Jacobi & Sag, *supra* note 7, at 1202-06. *See generally* JOHNSON, *supra* note 32 at 14-17.

[60] Jacobi & Sag, *supra* note 7, at 1163. Jacobi and Sag attribute this increase in "judicial advocacy" to increasing political polarization. *Id.* at 1203, 1205, 1211.

[61] Jacobi & Schweers, *supra* note 8, at 1384.

[62] In 1990, Justice Sandra Day O'Connor was interrupted 2.9 times as often as the average male justice; in 2002, the average female justice was interrupted 2.9 times as often as the average male justice; and by 2015, the ratio had risen to female justices being interrupted 3.9 times as often as male justices. *Id.* at 1462-63 (analyzing data regarding gender disparity in oral argument interruptions); *see also infra* Part II.B.

[63] Over fifty periodicals, podcasts, and law fora featured writeups on the findings within months of publication. For a nonexhaustive list, see *Media*, TONJA JACOBI, https://tonjajacobi.com/media/ [https://perma.cc/A2V6-3ZM8] (last visited Sept. 30, 2023).

[64] E-mails from various persons to one of the authors (on file with authors).

[65] Kathryn Rubino, *It Doesn't Get Better—Women Supreme Court Justices Get Interrupted Too*, ABOVE L. (Apr. 6, 2017, 12:44 PM), https://abovethelaw.com/2017/04/it-doesnt-get-better-women-supreme-court-justices-get-interrupted-too/ [https://perma.cc/C8JQ-ZBQ4].

[66] *Id.*

dynamics are robust enough to persist even in the face of high levels of power achieved by women."[67]

Although the Justices regularly cite law review articles,[68] Chief Justice Roberts has expressed skepticism as to their influence on the Court.[69] Certainly it is uncommon for the Justices to comment on specific academic studies outside the context of written opinions, and rarer still when the subject of those studies is the Court itself. And yet, Justices have commented at length on the Jacobi and Schweers study and its impact on the Court. As noted in the Introduction, Justice Sotomayor commented in 2018 that the Jacobi and Schweers study precipitated some Court introspection.[70] In 2021, she followed up, characterizing the study as having an "enormous impact" on the Court's oral argument procedures and saying that it caused Chief Justice Roberts to be "much more sensitive" to ensuring people are not interrupted in future proceedings.[71] In a similar vein, Justice Ruth Bader Ginsburg said the Jacobi and Schweers study "got[] her attention" and predicted that it might affect the Justices' behavior.[72] A conversation between Chief Justice Roberts and Judge J. Harvie Wilkinson III in 2018 indicates the Chief was at least aware of the Jacobi and Schweers study, and the attention those findings received.[73]

In their 2017 study, Jacobi and Schweers called for the Chief Justice to intervene more and to act as a "referee":

---

[67] Jacobi & Schweers, *supra* note 8, at 1484.

[68] *See, e.g.*, Adam Feldman, *Empirical SCOTUS: With a Little Help from Academic Scholarship*, SCOTUSBLOG (Oct. 31, 2018, 5:22 PM), https://www.scotusblog.com/2018/10/empirical-scotus-with-a-little-help-from-academic-scholarship/ [https://perma.cc/873K-Y98P] (counting the Justices' citations of law reviews over two terms); Richard M. Re, *The Chief Justice Reads Law Reviews*, PRAWFSBLAWG (Mar. 16, 2015, 8:25 AM), https://prawfsblawg.blogs.com/prawfsblawg/2015/03/the-chief-justice-reads-law-reviews.html [https://perma.cc/RBG9-FZXS] (providing examples of the Chief discussing law review articles to counter his claim that he does not consider them).

[69] Jonathan H. Adler, *Chief Justice Roberts Reads Law Reviews, After All*, WASH. POST (Mar. 21, 2015, 4:24 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/chief-justice-roberts-reads-law-reviews-after-all/ (quoting Chief Justice Roberts speaking to judicial conference as saying, "[i]f the academy wants to deal with the legal issues at a particularly abstract, philosophical level, that's great and that's their business, but they shouldn't expect that it would be of any particular help or even interest to the members of the practice of the bar or judges").

[70] Hamm, *supra* note 12.

[71] Quinn, *supra* note 11; *see also* de Vogue, *supra* note 11.

[72] Adam Liptak, *On Tour with Notorious R.B.G., Judicial Rock Star*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/2018/02/08/us/politics/ruth-bader-ginsburg.html.

[73] Mark Walsh, *Chief Justice Roberts Slides into the High Court's Ideological Middle with the Retirement of Justice Kennedy*, ABA J. (Sept. 1, 2018, 2:15 AM CDT), https://www.abajournal.com/magazine/article/roberts_kennedy_scotus_swing_vote ("The amiable conversation between Wilkinson and Roberts continued for about 40 minutes, with Wilkinson asking about an academic study of interruptions on the bench . . . .").

> [T]here could be better enforcement by the Chief Justice, something that also would be aided by the Chief Justice being aware of the phenomenon. The Chief Justice should also enforce the existing rule that prohibits advocates from interrupting the Justices, as this would set an example for the advocates, the public who watches or listens to the argument, and quite possibly even the other Justices. The Chief Justice could also be more assertive in preventing an interrupter—even an interrupting Justice—from continuing with his question and could direct the advocate back to the interruptee, or could allow the interrupter to ask his question but, after the advocate answers, give the floor back to the interruptee. Either way, the Chief Justice could referee the floor more to make sure the interruptee's question is addressed.[74]

Starting in 2019, the Supreme Court began what turned out to be a series of changes to the structure of oral argument. At the beginning of the 2019 Term, the Court introduced a new rule dedicating the first two minutes of each primary advocate's time to be uninterrupted by the Justices.[75] Then in 2020, the Court was forced to make another structural change in response to the COVID-19 pandemic.[76] On April 30, 2020, the Court announced that it would hear argument via telephone conference in ten select cases still pending in the 2019 Term.[77] At the same time, the Chief Justice decided to restructure oral argument so as to have the Justices speak in order of seniority.[78] An empirical study of the Court's

[74] Jacobi & Schweers, *supra* note 8, at 1485.

[75] CLERK OF THE CT., U.S. SUP. CT., GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 7 (2019) https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf [https://perma.cc/67NN-K98X] (introducing a new guideline that advocates would generally be given two minutes of uninterrupted time at the beginning of their presentation). Early data suggested that the rule change had effects beyond the newly established quiet zone. *See* Tonja Jacobi, Timothy R. Johnson, Eve Ringsmuth & Matthew Sag, *Look Who's Talking Less: Supreme Court Justices*, WASH. POST (Nov. 1, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/11/01/look-whos-talking-less-supreme-court-justices/ (suggesting that the two-minute rule changed not only how the first two minutes of oral argument were conducted, but impacted the entire hour of oral argument). However, the two-minute rule did not fundamentally change the overall character of oral argument as an "exercise in structured disorder." *See* Jacobi & Sag, *supra* note 7, at 1167.

[76] Initially, the Court simply delayed hearing cases. Press Release, SCOTUS (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20 [https://perma.cc/5MJZ-WR6A] ("In keeping with public health precautions recommended in response to COVID-19, the Supreme Court is postponing the oral arguments currently scheduled for the March session (March 23-25 and March 30-April 1).").

[77] Press Release, SCOTUS, Media Advisory Regarding May Teleconference Argument Audio (Apr. 30, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20 [https://perma.cc/2MP7-VECN].

[78] Joan Biskupic, *Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court*, CNN (July 27, 2020, 4:28 PM), https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html [https://perma.cc/5BDR-RPE5] (reporting that the Chief unilaterally

initial plunge into "telephonic" oral argument concluded that this institutional change dramatically shifted power toward the conservative Justices[79] on the Court.[80] The same study also confirmed findings by Professor Leah Litman that the Chief used his discretion to interrupt Justices to end their turn, to the advantage of the male Justices over the female Justices.[81] This illustrated the potential of institutional changes to affect the interactions among the Justices and the advocates,[82] and particularly to change power dynamics, which are closely associated with interruption behavior.[83] The Court continued with the telephonic format in the 2020 Term.[84] When the Court returned to hearing cases

decided on the forum and rules of telephonic oral argument, over some objections of other justices).

[79] Throughout this Article, when we use the terms "conservative" and "liberal" to describe individual Justices, or discuss more or less conservative or liberal Justices, we rely on the standard measure of judicial conservatism and liberalism at the Supreme Court, the Martin-Quinn scores of judicial ideology. Martin-Quinn scores Justices on a spectrum of conservatism and liberalism according to whether they are above or below zero, respectively, where zero represents the approximate historical average of the Court over time. 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, 145-51 (2002); *see also Project Description*, MARTIN-QUINN SCORES, https://mqscores.lsa.umich.edu/ [https://perma.cc/CK3P-9TTV] (last visited Sept. 30, 2023). Martin-Quinn scores tend to render largely the same results as other measures of judicial ideology, such as the party of the appointing president; however, they appear to be more nuanced. *See* Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 839 (2009) (comparing the two scores as applied to intellectual property cases and finding the Martin-Quinn scores to be more sensitive).

[80] Jacobi et al., *supra* note 39, at 434 ("On average, each of the conservative Justices gained more than 454 words per argument whereas the liberal Justices lost more than 26 words per oral argument."). Note that this translated into greater opportunity for judicial advocacy by the conservative Justices. *See id.* at 439 (showing that conservative Justices asked 1.6 more questions per oral argument but made 8.2 more comments per argument, whereas liberal Justices, other than Justice Ginsburg, "registered fewer questions and made fewer comments").

[81] Leah M. Litman, *Muted Justice*, 169 U. PA. L. REV. ONLINE 134, 153-55 (2020)); *see also* Leah Litman & Tonja Jacobi, Opinion, *Does John Roberts Need To Check His Own Biases?*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/john-roberts-supreme-court.html ("[O]n 11 occasions, the chief justice interrupted or cut off another justice. Every one of those 11 occasions involved justices who were appointed by Democratic presidents, and nine of the 11 involved female justices.").

[82] *See generally* Ringsmuth et al., *supra* note 56.

[83] Research shows that interruptions are attempts by speakers to maximize their power positions in group settings through assertions of dominance. *See, e.g.*, Julia A. Goldberg, *Interrupting the Discourse on Interruptions: An Analysis in Terms of Relationally Neutral, Power- and Rapport-Oriented Acts*, 14 J. PRAGMATICS 883, 884-87 (1990) (classifying interruptions as being power-driven or neutral displays of rapport).

[84] Adam Liptak, *The Supreme Court Will Hear Arguments by Phone. The Public Can Listen in.*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2020/04/13/us/politics/supreme-court-phone-arguments-virus.html .

in person in the 2021 Term, it adopted a new format yet again.[85] The Court resumed devoting the majority of each oral argument to the opened-ended conversation it had always previously adopted but it kept the structured seriatim order of oral argument for an additional part of the argument.[86]

The Supreme Court does not elaborately explain its actions, but there is a logical connection between the two-minute rule, the new hybrid oral argument format, and recognition of the problem of excessive interruptions and the uneven distribution of those interruptions. Both changes were rightly understood as an attempt to take down the temperature of oral argument and allow advocates and Justices at least a small window to speak without interruption.[87] This is not mere speculation. In a 2018 discussion with Judge Wilkinson, Chief Justice Roberts drew a link between interruptions and the intensity of oral argument in his response to a question about studies showing that the female Supreme Court Justices were interrupted disproportionately:

> You know, I read some of the . . . articles. . . . First of all, I don't know if many of you . . . have seen our arguments and the difficulty of getting a word in edgewise, for the justices, let alone the counsel, it is a serious problem. Putting aside the problem of who is interrupting whom, we do need to do a better job and I hope we will going forward of giving the lawyers a chance to participate. [Laughter] I'm a little sensitive to it since I made my living before I went on the bench arguing in front of them. It has gotten worse since then.[88]

In widely reported remarks in 2021, Justice Sotomayor confirmed that the new oral argument format was in fact adopted to address the issue of interruptions in general, and specifically the gender disparity in those interruptions.[89] Justice Sotomayor said multiple times that things changed after the 2017 study showed how differently male and female Justices were treated at

[85] Press Release, SCOTUS (Sept. 8, 2021), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-08-21 [https://perma.cc/XNG3-YR65] ("The Court will hear all oral arguments scheduled for the October, November, and December sessions in the Courtroom. Courtroom access will be limited to the Justices, essential Court personnel, counsel in the scheduled cases, and journalists with full-time press credentials issued by the Supreme Court.").

[86] Ariane de Vogue, *SCOTUS Revises Oral Argument Format Ahead of Blockbuster Term*, CNN POLITICS (Sept. 21, 2021, 12:20 PM), https://www.cnn.com/2021/09/21/politics/supreme-court-oral-arguments-format/index.html [https://perma.cc/Z89P-CJ87] ("While the Court will maintain the traditional practice of allowing justices to engage in questioning in no particular order—the traditional free for all—there will now be an opportunity, once an attorney's time has expired, for the justices to ask specific questions in order of seniority.").

[87] *Id.* ("When the justices asked questions in order of seniority during the height of Covid, the process was more stilted, but it had the advantage of giving a justice the opportunity to fully probe a line of inquiry. Sometimes the justices . . . would forecast how they would eventually rule.").

[88] Federal Judicial Conference, *supra* note 21, at 10:37.

[89] Quinn, *supra* note 11; *see also* Deese, *supra* note 18.

the Court—that subsequently, interruptions decreased, Court culture improved, and the Chief did his part, including by refereeing interruptions. If Justice Sotomayor is right that the frequency and/or gender disparity in interruptions at oral argument reduced after 2017, then that is to be celebrated. But if the female Justices are still being disproportionately interrupted, then each of the negative effects of interruptions—interfering with the capacity of the Justices to have their say, to form coalitions, to shape public attitudes, and to enjoy other benefits of oral argument[90]—remain gendered and thus unequal. It is time to systematically look at whether, five years later, interruptions are still high and highly gendered at the highest court in the land, and what is being done about it.[91]

The fact the Supreme Court changed its otherwise rigid structure in response to the problem of gendered interruptions shows it takes the issue seriously. Assessing whether that structural change had a meaningful impact on the problem is equally deserving of attention.

C. *Methods: Illustrating and Identifying Interruptions and Interventions*

Identifying interruptions is quite easy. To measure an interruption, we need only utilize the highly reliable notations in the official Court reporter's transcript, whereby an interruption is indicated by a "--" at the end of the speech episode.[92] The appearance of a "--" elsewhere in a speech episode indicates a stumble or stutter. Some illustrations make this clear:

JUSTICE SOTOMAYOR: Do you think --

JUSTICE KENNEDY: Would your rules --

JUSTICE SOTOMAYOR: -- but you're not --

JUSTICE KENNEDY: -- apply equally in a criminal case?[93]

The "--" appearing at the end of both of Justice Sotomayor's speech episodes in this example indicates that she is interrupted by Justice Anthony Kennedy; that is, her speech episode ends as Justice Kennedy becomes the next speaker. She then interrupts back, as indicated by the "--" at the end of Justice Kennedy's first speech episode, as Justice Sotomayor becomes the third speaker. But not to be put off, Justice Kennedy interrupts once more, as indicated by the final "--" at the end of Justice Sotomayor's second speech episode. The "--" at the

[90] *See supra* Part I.A.

[91] Studies have followed up on the issue by looking at the first partial Term in which the Court heard arguments telephonically, when only the Chief Justice could realistically interrupt another Justice, and showed the effect was still highly gendered. *See generally* Jacobi et al., *supra* note 39; Litman, *supra* note 81; Litman & Jacobi, *supra* note 81. But there has been no comprehensive follow-up study, until now.

[92] On the reliability of the court reporters' notations more generally, and on topics such as laughter, see *Taking Laughter Seriously supra* note 25, at 1452-54.

[93] Transcript of Oral Argument at 29-30, Dietz v. Bouldin, 579 U.S. 40 (2016) (No. 15-458).

beginning of the third and fourth speech episodes simply indicate that the Justice is continuing, midsentence, despite the interruption.

This is a fairly representative example, as Justice Kennedy was a regular interrupter and Justice Sotomayor is the most commonly interrupted Justice.[94] It also illustrates that Justices are not always successful in asserting themselves in the face of such interruption by a fellow Justice, without intervention by the Chief. The following example also suggests the need for an intervention:

> MR. LAMKEN: . . . But it has been one case with one caption, ruled upon by one judge with one decision.
>
> JUSTICE GINSBURG: Is there -- are there any --
>
> JUSTICE KENNEDY: Well, suppose there were three unrelated cases.
>
> MR. LAMKEN: Pardon?
>
> JUSTICE KENNEDY: Suppose there were three unrelated cases. Would the statute pass?
>
> MR. LAMKEN: Yes. So if Congress had identified three unrelated cases and -- and said that for these unrelated cases --
>
> JUSTICE KENNEDY: Yes, it specifies them by number and so forth.
>
> MR. LAMKEN: By number. We believe that the result would be the same. That Congress crosses the threshold from legislation to adjudication when attempts to pass a law which has no effect and no existence apart from specified cases pending before the Supreme --
>
> JUSTICE KENNEDY: I -- I inadvertently interrupted Justice Ginsburg, but in the -- in the 19 cases here, you don't find that principle?
>
> MR. LAMKEN: No, Your Honor. There aren't 19 cases here.[95]

Here, Justice Ginsburg begins asking the advocate a question but only gets five words in before being interrupted by Justice Kennedy. Eventually, after a back-and-forth exchange between Justice Kennedy and the advocate, Justice Kennedy interrupts the advocate to acknowledge that he previously interrupted Justice Ginsburg, but rather than ceding the floor to her, he continues with his inquiry. Jacobi and Schweers found that this, too, is a gendered pattern: when Justices realize they have interrupted one another, only sometimes do they acknowledge it, and of that subset of instances, only in some does the interrupting Justice cede the floor to the person interrupted. Overwhelmingly, whether Justices acknowledge or cede the floor is predictable based on gender, with interruptions of men more likely to result in acknowledgments and transfer of the floor.[96] Hence, without some sort of intervention by the Chief Justice, and

[94] Jacobi & Schweers, *supra* note 8, at 1434.

[95] Transcript of Oral Argument at 3-4, Bank Markazi v. Peterson, 578 U.S. 212 (2016) (No. 14-770).

[96] Jacobi & Schweers, *supra* note 8, at 1461 ("[M]en do not simply interrupt women more; they are also more likely to ignore their own interruptions than to acknowledge them when interrupting a woman than a man.").

so relying only on each Justice's own sense of decorum, even when Justices realize they have interrupted a colleague, they perpetuate the gender difference by disproportionately deferring to men who have been interrupted.

Note that the first instance of a "--" in Justice Ginsburg's speech episode indicates repetition of a word, a small verbal stumble, similar to Justice Kennedy's final speech episode. Thus, the only real complexity in identifying an interruption is to write an algorithm that differentiates between a "--" appearing within a speech episode versus one at the end of a speech episode.

In contrast, characterizing an intervention by the Chief Justice requires interpretation and involves considerable time and resources. In contrast to the ease of identifying interruptions, identifying what amounts to an intervention requires considering infinite possibilities of language in context to determine the speaker's intention and effect. From listening to hundreds of oral arguments,[97] we observed the Chief Justice using a variety of words and phrases to intervene; but identifying interventions cannot be fully automated by simply searching for these phrases. Instead, our process of identifying interventions leveraged a combination of code-driven and manual review. We began by identifying potential interventions consisting of short statements by the Chief Justice (less than fifteen words) in which he said the word "Justice" or one of three key alternative phrases we saw in the transcript: "are you finished," "there was a question," or "question pending." It is almost certain that there were some phrases we missed,[98] which is why, in addition to these highly likely interventions, we also identified a second set of lower probability potential interventions, consisting of every speech episode in which the Chief Justice spoke directly after another Justice. In these exchanges, we found the Chief Justice was either interrupting another Justice, making a short quip before the advocate had a chance to speak, attending to housekeeping by letting the advocate know how much time was left, or, sometimes, intervening. We compiled all of these candidates into a review set containing the two speech episodes before and after each potential intervention.

We asked two separate research assistants, working independently, to review each potential intervention in context to determine whether it was a "real intervention" (i.e., a true positive), or not. This review was conducted according to a detailed codebook that defined the variable of interest, an intervention by the Chief Justice, and gave a series of examples and counterexamples. We also

[97] One of us has taught a course on Supreme Court Oral Argument for a decade and both of us have listened to more oral arguments than we can count. In the context of one project alone, we read and listened to ten years of every instance of laughter at Supreme Court oral argument. *Taking Laughter Seriously*, *supra* note 25, at 1481.

[98] Missing some data should not bias our results as long as there is no reason to expect the phrases we missed would correlate with our variable of interest, gender. For a more detailed description of why this is the case, see Tonja Jacobi, *The Role of Theory in Empirical Legal Studies*, COMPAR. CONST. STUD. (forthcoming 2023) (available at https://ssrn.com/abstract=4238112) (describing why undercounting is not problematic in this context as long as missing phrases do not co-vary with the dependent variable).

asked the research assistants to identify the "winners" and "losers" of each true intervention: i.e., to identify which Justice benefited from the intervention and which, if any, lost out. The research assistants were encouraged to review the transcript on the oyez.com website and to listen to the accompanying audio if necessary. Accordingly, we also asked the research assistants to identify the basis of their decision as being based on the transcript alone, or the transcript and the audio. One of us then reviewed each episode identified as a true intervention by either of the research assistants to resolve any conflicts.

Reviewing some examples will help clarify our process and what we mean when we say the Chief Justice intervened. One of the easiest potential interventions to identify is an instance where a Chief Justice names a particular Justice. Once that potential intervention is identified, we looked to see whether that naming was an acknowledgment of a Justice being interrupted. In such cases, the Chief Justice typically either directed the advocate to answer the interrupted Justice's question or else directed the Justice to finish his or her question. Some examples illustrate:

> MR. CARVIN: [speaking at length].
>
> JUSTICE GINSBURG: But it's a --
>
> JUSTICE KAGAN: I don't know think that's quite right, Mr. Carvin.
>
> CHIEF JUSTICE ROBERTS: Justice Ginsburg.
>
> JUSTICE GINSBURG: It's a tax code provision that's an implementation provision. It tells you how you compute the individual amount.[99]

In this example, Justice Ginsburg and Justice Kagan spoke nearly simultaneously, but it is clear that Justice Ginsburg spoke first and Justice Kagan interrupted her. Chief Justice Roberts intervened by simply naming Justice Ginsburg. This was enough to indicate that it was Justice Ginsburg's turn to speak next and both Justice Ginsburg and Justice Kagan responded accordingly. Prior to the Chief Justice's intervention, Justice Kagan appeared to be winning out, with Justice Ginsburg stopping speaking. Thus, the intervention remedied the interruption.

Sometimes, the Chief Justice will intervene against himself, as in this example:

> JUSTICE KAGAN: But the --
>
> CHIEF JUSTICE ROBERTS: Well, then --
>
> JUSTICE KAGAN: The -- I'm sorry.
>
> CHIEF JUSTICE ROBERTS: Please, follow up.
>
> JUSTICE KAGAN: [asks her question].[100]

---

[99] Transcript of Oral Argument at 23-24, King v. Burwell, 576 U.S. 473 (2015) (No. 14-114).

[100] Transcript of Oral Argument at 10, Murr v. Wisconsin, 582 U.S. 383(2017) (No. 15-214).

The direction of the Chief Justice's interventions is not automatic. The Chief Justice does not always intervene on behalf of the Justice who is interrupted. As seen in the following example, he sometimes instead gives the floor to a Justice who interrupted, rather than to the Justice who is interrupted, as here:

JUSTICE KAGAN: That's --

JUSTICE ALITO: In relation to that --

JUSTICE KAGAN: -- that -- that's --

JUSTICE ALITO: Could I just say --

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: [asks his question].[101]

In this example, the Chief Justice's intervention makes Justice Samuel Alito the "winner," even though it was Justice Kagan who was interrupted.

Although the Chief exercises considerable agenda-setting power, the Justices do not always follow his directions when he intervenes. As illustrated below, sometimes the Justices effectively ignore the Chief's direction and sort out contested speaking order among themselves:

MS. KONRAD: [addresses Justice Alito]

JUSTICE BREYER: Is it -- now let's get to that -- I'd like to get --

JUSTICE KAGAN: Well, maybe to the extent that you can't --

CHIEF JUSTICE ROBERTS: Justice Kagan, I think it's your turn.

JUSTICE KAGAN: Please, go ahead.

JUSTICE BREYER: [speaks at length]

MS. KONRAD: That is correct, Justice Breyer.[102]

And sometimes the Chief Justice's interventions take the form of more complex agenda setting, going beyond simply refereeing who gets to speak next. Consider the following exchange synthesized from the official transcript:

> JUSTICE SOTOMAYOR:Well, I thought the most significant part of this alleged error by you in your briefs were that it assumed that things like poverty, poor nutrition, poor performance in school were not attributable to intellectual functioning, but to his lack of a good home, essentially. Why is that clinically wrong?

---

[101] Transcript of Oral Argument at 37, Spokeo, Inc. v. Robins, 578 U.S. 330 (2015) (No. 13-1339).

[102] Transcript of Oral Argument at 23-25, Glossip v. Gross, 576 U.S. 863 (2015) (No. 14-7955). Here, the Chief Justice was seemingly intervening on Justice Kagan's behalf because her prior question was not answered by the advocate after Justice Alito jumped in—although without interrupting as such—to comment on Justice Kagan's question, "but that's not the point" and ask what he deemed to be the more pertinent question. *See id.* Nonetheless, Justice Kagan decided to give Justice Breyer the floor. For more on this, see *infra* note 110 and accompanying text.

> MR. SLOAN: Because, Your Honor -- so in terms of the causation requirement, which is, I think, what Your Honor is referring to -- and there are -- there are three major problems with the way the court dealt with causation from --
>
> JUSTICE ALITO: Well, I think the court's -- would you say something about the adaptive behavior? Because I think that may be a stronger leg.
>
> CHIEF JUSTICE ROBERTS: Why don't you deal with Justice Sotomayor's question first and then Justice Alito's.[103]

In the previous examples, the Chief Justice stepped in when one Justice interrupted another. In contrast, in the episode immediately above, the Chief Justice intervened when the advocate's answer to Justice Sotomayor's question was interrupted. This kind of intervention is important because cutting off an advocate's answer prematurely has much the same result as interrupting a fellow Justice—much of the value of being able to ask a question is compromised if the Justice is denied the benefit of hearing the answer.

Sometimes, the Justices "help" the Chief Justice in this agenda setting as refereeing enterprise, as here:

> JUSTICE SOTOMAYOR: Counsel, let's assume --
>
> JUSTICE ALITO: I'd like, Mr. Wall, I'd like you to finish your answer, but I have a question I'd like to get in before your time expires, if I could just note that.
>
> MR. WALL: So --
>
> JUSTICE SOTOMAYOR: Go ahead.
>
> MR. WALL: So just to quickly finish the answer [speaks at length]
>
> JUSTICE KAGAN: Mr. Wall, can I interrupt you because --
>
> CHIEF JUSTICE ROBERTS: Justice Alito, maybe this would be a good time --
>
> JUSTICE KAGAN: Justice Alito has one and then I do.
>
> CHIEF JUSTICE ROBERTS: I'm sorry, maybe it's a good time for Justice Alito, if you like to --
>
> JUSTICE ALITO: [asks his question]
>
> MR. WALL: [speaks at length] As we --
>
> JUSTICE GINSBURG: Yes. If --
>
> CHIEF JUSTICE ROBERTS: Justice, maybe Justice Kagan can proceed now.

[103] Transcript of Oral Argument at 18, Moore v. Texas, 581 U.S. 1 (2017) (No. 15-797). On listening to the recording, Justice Ginsburg can be heard speaking briefly, interrupting Justice Sotomayor, which explains the Chief Justice's first intervention on behalf of Justice Sotomayor. As discussed, *supra* note 92, the Court reporters are highly accurate, but cannot be perfect.

JUSTICE KAGAN: [asks her question].[104]

So here we see Justice Sotomayor was interrupted by Justice Alito, but she cedes the floor to him nonetheless, presumably because she had asked a series of questions immediately prior and received some answers from the advocate, whose time was running out (a sign of collegiality that is easy to forget about when examining interruptions). Justice Kagan then tries to jump in, technically interrupting the advocate but effectively interrupting Justice Alito's exchange with the advocate. At this point, the Chief Justice intervenes in favor of Justice Alito and then later hands the metaphorical speaking stick to Justice Kagan.

Sometimes the Chief Justice intervenes without referring to another Justice by name. A further complication is that we looked for and found cross-references that did not involve the Chief Justice naming a Justice at all. For instance:

> MR. LOEB: The police were under the same exact scenario if I am borrowing a friend's car and given permission to use the car and the trunk. The exact same scenario. The same difficulties apply in the rental situation as the friend scenario.
>
> CHIEF JUSTICE ROBERTS: No --
>
> JUSTICE ALITO: Well, you mentioned the rental situation.
>
> CHIEF JUSTICE ROBERTS: Go ahead.
>
> JUSTICE ALITO: What about this: A homeowner is going away for a long weekend, arranges with a teenager in the neighborhood to come in and walk and feed the cat and spend quality time with the cat -- (Laughter.)[105]

We found 179 instances during the Roberts Court of the Chief Justice saying the words "go ahead";[106] on further examination, thirty-seven of these proved to be interventions of one form or another,[107] most typically, the Chief ceding the floor to another Justice—another form of collegiality among the Justices.

---

[104] Transcript of Oral Argument at 29-32, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2017) (No. 16-285).

[105] Transcript of Oral Argument at 16, Byrd v. United States, 138 S. Ct. 1518 (2018) (No. 16-1371).

[106] There were 210 in the entire database, forty-one instances uttered by Chief Justice Rehnquist.

[107] To understand how we differentiated true interventions from other similar statements, consider Transcript of Oral Argument at 58, Boyer v. Louisiana, 569 U.S. 238 (2013) (No. 11-9953). In this oral argument, advocate Richard Bourke, describing what could have been said to his client, said: "You can choose, Mr. Boyer, do you want to *go ahead* now with this guy? Or do you want to wait?" *Id.* at 9 (emphasis added). Later in the argument, Justice Kagan posed a question to advocate Carla S. Sigler, asking "Well, did you ever say to Mr. Boyer, you know -- you can *go ahead*, right now, with this single counsel that you have?" *Id.* at 37 (emphasis added). Neither of these are interventions. Whereas later again in transcript, Chief Justice Roberts intervened, ceding the floor to Justice Kagan, who had said "Mr. Boyer why would --" and was interrupted by Roberts himself; the Chief Justice said, "[g]o ahead," and Justice Kagan finished her question, saying "-- Why would we get to that question?" *Id.* at 58.

Finally, it is worth noting that not all the Chief Justice's interventions were as collegial as the examples cited above; for instance, sometimes the Chief would actually interrupt one Justice to hand the floor to another, as here:

> JUSTICE SOTOMAYOR: Because you don't --
>
> MR. LIU: -- I don't think so. I mean, if you -- if you use the Court's opinion in St. Cyr as its own dictionary, you'll see on page 293, the Court itself uses "application" to describe the pure question of law in that case. And then, in Part III, where the Court actually addresses that question, it uses the word "apply" or "applied" or "application" no fewer than 18 times to describe the retroactive application --
>
> JUSTICE SOTOMAYOR: Except --
>
> CHIEF JUSTICE ROBERTS: Mr. Liu, I think Justice Kagan had a question on the table.
>
> JUSTICE KAGAN: Have you finished?
>
> MR. LIU: Yep. Sure.
>
> JUSTICE KAGAN: [asks her question].[108]

The fact that phrases such as "go ahead" are clear interventions by the Chief Justice even without stating a Justice's name illustrates the far more complicated process involved in capturing interventions than of identifying interruptions. This process was time consuming, but we believe it was worthwhile because studying interventions by the Chief Justice is important, not just in answering the question of how interruptions are combated, but also in understanding how the Chief Justice uses his power to shape a central part of the Supreme Court's decision-making process.

Our study of interventions by the Chief Justice was limited to instances of the Chief intervening to referee between the Justices, rather than between the Justices and the advocates.[109] Despite the fact that interruptions by the advocates are more common than Justice-to-Justice interruptions,[110] we made this choice because the power dynamics of advocate interruptions are quite different to

This one case illustrates neatly why qualitative analysis is required to identify interventions, in addition to algorithmic, quantitative analysis.

[108] Transcript of Oral Argument at 50-51, Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020) (No. 18-776).

[109] When it comes to interruptions, however, we examine interruptions of Justices both by other Justices and by the advocates.

[110] This pattern holds in other jurisdictions also. For instance, at the Australian High Court, Justices are interrupted approximately one in every twenty speech episodes; advocates are interrupted at roughly one in four speech episodes; and Justice-to-Justice interruptions occur on average only roughly one in 200 speeches, with the far larger remainder made up by advocates interrupting Justices. Tonja Jacobi, Zoë Robinson & Patrick Leslie, *The Predictability of Judicial Interruptions at Oral Argument in the Australian High Court* (2022) (unpublished manuscript) (on file with authors); *see also* Tonja Jacobi, Zoë Robinson & Patrick Leslie, *Querying the Gender Dynamics of Interruptions at Australian Oral Argument*, U. NEW S. WALES L.J.F. 2020 at 1, 10-11 (2020).

those of Justice-to-Justice interruptions. Justices can, and do, stand up for themselves against advocates in a way that is not always possible, effective, or diplomatic when dealing with a fellow Justice. For instance:

> JUSTICE SOTOMAYOR: I -- I -- I-- what you're saying, basically, is, is this is what the Fifth Circuit concluded and which the school basically agrees, okay? If you don't consider race, then holistic percentage, whatever it is, is going to be virtually all white.
>
> MR. REIN: And that is incorrect.
>
> JUSTICE SOTOMAYOR: All white.
>
> MR. REIN: And that is an assumption --
>
> JUSTICE SOTOMAYOR: And to say -- no --
>
> MR. REIN: -- that has no basis in this record.
>
> JUSTICE SOTOMAYOR: Oh, but there is --
>
> MR. REIN: It's a stereotypical --
>
> JUSTICE SOTOMAYOR: No, it's not --
>
> MR. REIN: -- assumption. That is what it is.
>
> JUSTICE SOTOMAYOR: It's not, because the reality --
>
> MR. REIN: With all deference --
>
> JUSTICE SOTOMAYOR: -- that Justice --
>
> CHIEF JUSTICE ROBERTS: Mr. Rein --
>
> JUSTICE SOTOMAYOR: -- Alito wants to rely on. Let me finish my point. He's right. For their educational needs, there are competing criteria.[111]

In this example, Justice Sotomayor was repeatedly interrupted by an advocate—and interrupted right back, as is her right.[112] Eventually, there were so many ongoing interruptions by the advocate that the Chief Justice did step in, seemingly to referee, but Justice Sotomayor did the refereeing herself, telling Mr. Rein to stop interrupting (never a sign that an advocate is impressing a Justice).[113] Indeed, Justice Sotomayor does not always wait so long before correcting an advocate, as here:

---

[111] Transcript of Oral Argument at 91-92, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016) (No. 14-981).

[112] The formal instructions of the Supreme Court command an advocate: "If you are speaking and a Justice interrupts you, cease talking immediately and listen." CLERK OF THE CT., *supra* note 53.

[113] Justices interrupting advocates repeatedly is associated with a significantly higher likelihood of the Justice ultimately voting against the side the advocate represents, as is the Justice speaking more during the time of one advocate than another, an effect Jacobi and Sag call "the disagreement gap." Jacobi & Sag, *supra* note 7, at 1234, 1239.

> JUSTICE SOTOMAYOR: Except -- except, counsel, it created a whole lot of exceptions to finality, and this -- CUE is one of them. So --
>
> MR. YANG: This is one of them.
>
> JUSTICE SOTOMAYOR: Please let me finish my question, okay? This is one of them . . . .[114]

In contrast, it would be extremely difficult for Justice Sotomayor to say the same thing to a Justice who interrupted her. Doing so would constitute a breach of etiquette and constitute a sign of lack of collegiality on the Court which would no doubt get significant media attention. In fact, the Court so insists on the supposed collegiality of the Justices that it sometimes defies belief. For instance, Justice Sotomayor publicly stated she had no problem with Justice Neil Gorsuch refusing to wear a mask during the COVID-19 pandemic when the Court returned to in-person oral argument, even though Justice Sotomayor has pre-existing medical issues and stayed away from in-person oral argument for some time during the pandemic, reportedly because of that.[115]

In fact, one of the few times a Justice intervened in a manner similar to the way the Chief intervenes between the Justices, it drew astonishment from court commentators. In *Santos-Zacaria v. Garland*,[116] after Justice Brett Kavanaugh interrupted Justice Barrett and they each tried to cede the floor to one another with that familiar phrase "go ahead," Justice Kavanaugh asked his question.[117] But upon finishing, he then said "Justice Barrett," in a way that made it clear he was handing her the floor.[118] This was described by the Strict Scrutiny podcast as Justice Kavanaugh "playing Chief" and displaying "weird wannabe Chief vibes" that illustrate Justice Kavanaugh thinks "it [is] now his role to direct the oral argument" given the media coverage of the Court being the "Kavanaugh Court"[119] and revealing his "weird super fan boyness over the Chief Justice."[120]

---

[114] Transcript of Oral Argument at 55-56, George v. McDonough, 142 S. Ct. 1953 (2022) (No. 21-234). Note that Justice Sotomayor's question that followed was 374 words long.

[115] Nina Totenberg, *Gorsuch Didn't Mask Despite Sotomayor's COVID Worries, Leading Her To Telework*, NPR (Jan. 21, 2022, 2:11 PM), https://www.npr.org/2022/01/18/1073428376/supreme-court-justices-arent-scorpions-but-not-happy-campers-either [https://perma.cc/VP3Z-7AKJ] (reporting that Justice Sotomayor, who has diabetes, "did not feel safe in close proximity to people who were unmasked," according to Court sources, yet Justice Gorsuch, who sits next to Justice Sotomayor, went unmasked, which resulted in Justice Sotomayor attending oral argument by telephone). Justice Sotomayor and Justice Gorsuch, and then the Chief, issued statements stating that Justice Gorsuch was not asked to wear a mask, to which NPR responded "NPR stands by its reporting." *Id.*

[116] 598 U.S. 411 (2023).

[117] Transcript of Oral Argument at 48, Santos-Zacaria v. Garland, 598 U.S. 411 (2022) (No. 21-1436).

[118] *Id.* at 49.

[119] Note that commentators also refer to the Court as "the Thomas Court." *See infra* Part III.

[120] Strict Scrutiny, *Cosplaying an Investigation*, CROOKED, at 13:32 (Jan. 23, 2023), https://crooked.com/podcast/cosplaying-an-investigation/.

Finally, we note the Chief sometimes intervenes against himself when he has interrupted, but we do not include those in our analysis because, as we have seen, many of the Associate Justices also voluntarily self-correct in this way. For instance, in the example just mentioned, after Justice Barrett began to speak and Justice Kavanaugh interrupted, not only did Justice Barrett say "-- oh, go ahead," to which Justice Kavanaugh responded "Go ahead. Go ahead," but then Justice Barrett explained her deference to Justice Kavanaugh, saying, "Well, I was going to switch to waiver or forfeiture, so --" and Justice Kavanaugh responded "Okay," and began his question.[121] We are interested in the role of the Chief in refereeing oral argument—in particular making rulings that the current speaker should not have the floor, and giving it to the original speaker—not corrections resulting from the goodwill of the interrupter.

Although the Chief Justice is the highest-ranking officer of the U.S. federal judiciary, the Chief is generally regarded as the first among equals.[122] The position of Chief Justice comes with surprisingly few formal powers,[123] and all of the Chief's powers relating to the other Justices are a matter of history and convention.[124] Chief Justice Roberts' assertion of his prerogative to guide the course of oral argument is undoubtedly an assertion of his power as Chief. Given his strong partisan leanings[125] and his—some would argue—equally strong desire to preserve the legitimacy of the Court,[126] it is natural to question how he

[121] Transcript of Oral Argument at 48, *Santos-Zacaria*, 598 U.S. 411 (No. 21-1436).

[122] Timothy R. Johnson & Charles Gregory, *The Chief Justice and Oral Arguments*, *in* THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE 151, 154 (David J. Danelski & Artemus Ward eds., 2016) (discussing the Chief Justice's status as first among equals, especially during oral argument).

[123] The only explicit mention of the Chief Justice in the Constitution is in relation to the impeachment trial of the president. U.S. Const. art. I, § 3, cl. 6. ("When the President of the United States is tried, the Chief Justice shall preside . . . .").

[124] The Chief Justice is the most senior member of the Court and thus has the powers of seniority in opinion assignment. FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 7 (2000) (describing opinion writing procedure); Forrest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POL. RSCH. Q. 551, 551 (2004) (describing the Chief Justice's opinion assignment authority).

[125] Over the course of his tenure on the Court, Chief Justice Roberts has a Martin-Quinn judicial ideology score of 0.91, which is 0.53 standard deviations to right of the historical average of the Court. *See* Martin & Quinn, *supra* note 79 and accompanying text.

[126] In Chief Justice Roberts' own words, protecting the Court as an institution is his highest goal. Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan./Feb. 2007, at 105 (quoting Roberts as saying, "I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution"). Some observers have noted that there is evidence that the Chief follows through on this principle. *See, e.g.*, Jacobi, *supra* note 20, at 763 ("Although Roberts was clearly pursuing legal policy goals, his willingness to uphold the individual mandate [of the Affordable Care Act] without a clear majority for his conservative jurisprudential innovations suggests that his dominant interest was not doctrinal, but rather institutional."); Tom Goldstein, *The John Roberts Method*, NEW REPUBLIC (June 30, 2009),

uses this power and whether he is truly a neutral referee in contests between the Justices.

II. INTERRUPTIONS AT SUPREME COURT ORAL ARGUMENT

As discussed, prior empirical work shows that Justice-to-Justice interruptions at Supreme Court oral argument increased significantly since the 1990s.[127] More troubling, that research demonstrated a significant gender disparity in those interruptions—that female Justices are interrupted as much as three times as often as the male Justices, and sometimes more.[128] Our first broad empirical objective is to see whether both of those trends have continued, or whether, as Justice Sotomayor suggested,[129] they have significantly improved since attention began being paid to the topic. As will soon become apparent, answering those questions is complicated because of other changes occurring at the Court. In the period after the question of gendered interruptions became so prominent, the Supreme Court temporarily but dramatically changed the way it heard oral argument due to the COVID-19 pandemic.[130] The Court not only held arguments remotely for a time, but it temporarily also changed the structure of argument to be much less dynamic, and thus less prone to interruption.[131] These potentially confounding developments leave us with data that is open to different interpretations. We present our own views as to whether the gender imbalance concerning Justice interruptions has improved, but we do not suggest that our conclusions are definitive.

A. *The Problem of Supreme Court Interruptions Persists*

Despite the much-vaunted role of collegiality at the Supreme Court, the Justices regularly interrupt one another at oral argument, and the rate of such interruptions increased dramatically since the mid-1990s. Figure 1 provides the evidence of this trend. We look at all interruptions that occur at oral argument among the Justices, from the 1997 Term[132] up to and including the 2021 Term (calendar years October 1997 to June 2022).

---

https://newrepublic.com/article/63513/the-john-roberts-method ("The Chief's professional life is defined by the Court—as a clerk, Principal Deputy Solicitor General, private practitioner, and now the Chief Justice—and his institutional commitment to it, including ensuring that it is regarded as an institution of integrity rather than a political football . . . is profound.").

[127] *Supra* Part I.B.

[128] Jacobi & Schweers, *supra* note 8, at 1462-63.

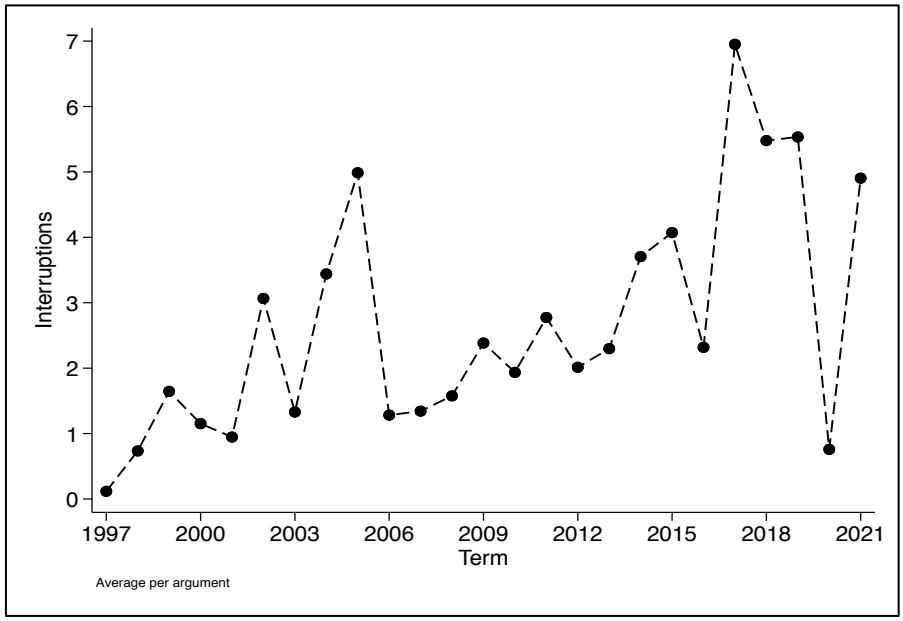
[129] *Supra* Part I.B.

[130] *Id.*

[131] Jacobi et al., *supra* note 39, at 426 ("The telephonic oral arguments . . . lacked the back-and-forth dynamism of the free-flowing arguments in which Justices jump in at any time. Instead, the telephonic cases featured more plodding questioning where the Justices' chance to interact as the argument progressed was limited.").

[132] As discussed *infra* Part II.B, interruptions are largely a modern phenomena, increasing significantly after 1995, following the political polarization that accelerated after the 1994

Figure 1. Justice-to-Justice Interruptions, Average Per Argument, 1997-2021 Terms.



In this graph and those that follow, the average number of Justice-to-Justice interruptions occurring each Term are displayed on the y-axis, and time, represented by Term (i.e. not calendar year), is shown on the x-axis. Each solid circle shows the average interruption rate for the given Term; the dashed line connecting the circles is included merely for ease of understanding.

It is quite clear that from a low in 1997 of approximately zero Justice-to-Justice interruptions per argument, on average, there was a significant increase in interruptions over time, with more than four such interruptions occurring on average per case by the 2021 Term. This does not appear to be a product of the Roberts Court in particular: interruptions were increasing fairly steadily during the last eight terms of the Rehnquist Court. The average for that period was 1.55 interruptions per case per term, but in Chief Justice Rehnquist's final term, 2004, interruptions reached a peak of approximately 3.5 Justice-to-Justice interruptions per term.

There is then a significant drop off, starting in the 2006 Term. Note this could give the impression that interruptions decreased significantly when Roberts became Chief Justice, but in fact the high peak in the first half of the graph was the 2005 Term, the first Term with Roberts as Chief Justice. Even though there

Republican Revolution in Congress. Jacobi & Sag, *supra* note 7, at 1211-12. The same is true of interventions, as will be seen *infra* Part III. Accordingly, we begin our analysis in the 1997 Term.

is that sharp drop after the 2006 Term, the first seven years of the Roberts Court[133] were nevertheless significantly higher on average than Chief Justice Rehnquist's final eight years: at 2.30 for the Roberts Court, almost one interruption more per case per Term than during the Rehnquist era.

That increase continues, quite dramatically, until the present day. From the 2011 Term to the 2018 Term, the average was 3.39 intrajudicial interruptions per case. Once again, just looking at the graph in aggregate could be misleading, as there appears to be another drop-off in recent years. The peak of interruptions was reached in the 2017 Term. This is significant for our first question, as the study which drew attention to the issue was published in 2017. However, it is important to remember that each Supreme Court Term begins in October of the designated year and goes through June of the following year; as such, the bulk of the interruptions counted in Figure 1 for each Term largely occur in the subsequent calendar year. Thus, the peak of interruptions reached in the 2017 Term mostly occurred *after* the initial interruptions study started getting attention—which we discuss more in the next Subpart, because most of that attention focused on the gendered nature of those interruptions.[134]

There is a very significant decrease in Justice-to-Justice interruptions in the 2020 Term. In that Term, there was slightly less than one such interruption per argument, an outcome not observed since the 1990s. It may seem, looking at the graph, that since 2017 there was a drop-off, with the 2021 Term an aberration. However, we believe this is an incorrect reading of the data, for two reasons.

First, it is much more likely that the 2020 Term is the aberration, rather than the 2021 Term, because the 2020 Term was the only full Term argued telephonically under the strictly circumscribed structure of oral argument wherein each Justice spoke in an exclusive time period designated for each Justice's questions. As discussed, Jacobi et al. showed the telephonic cases were unusually stilted and lacking the usual oral argument interactions.[135] Even though Ringsmuth et al., in follow-up analysis, showed the liberal Justices in particular adapted to the telephonic format, participating at higher rates than in the ten 2019 Term telephonic oral arguments, nevertheless the 2020 Term was much less interactive and disrupted by interruptions.[136]

Second, despite the exceptionally low level of interruptions in the 2020 Term, the average rate of Justice-to-Justice interruptions from the 2019 Term through the 2021 Term was 3.73 per argument, significantly higher than the prior era, even with the extraordinarily low 2020 Term rate of less than one Justice-to-Justice interruption per case bringing down the average.[137]

A final point to note is that since the pandemic, oral arguments have been significantly longer than previously, averaging closer to ninety minutes than the

[133] See *infra* Part II.B for further discussion of these era demarcations.

[134] *Id.*

[135] *See* Jacobi et al., *supra* note 39, at 426.

[136] *See* Ringsmuth et al., *supra* note 56, at 70-73.

[137] *See id.*

traditional sixty minutes.[138] While this could account for the increase in interruptions in the 2021 Term, there are two things to note about this. First, the format was introduced, at least in part, to combat the problem of interruptions, and so if the longer duration accounts for the increase, then it is not working as intended. Second, more specifically, the format was introduced to combat the problem of the gender disparity in interruptions, and as we will see in the next Subpart, the gender disparity in interruptions was extremely high under the new format.

B. *The Problem of Gendered Interruptions Persists*

We now turn to the more central question of whether the gender imbalance that Jacobi and Schweers first identified at Supreme Court oral argument continues. That study addressed both Justice-to-Justice interruptions and advocate interruptions of the Justices. We also look at both, not only because both impact whether oral argument is fair, equal, and addresses the purpose of oral argument,[139] but also because the data on advocate interruptions is revealing about some of the more difficult to measure aspects of Justice-to-Justice interruptions: disentangling the effect of ideology and gender.[140] Our new data shows that the gender gap persists. Whether it is possible to conclude that the gap is closing depends, as above, on what the outlier Term is. This, we concede, is a matter of interpretation.

[138] *See* Jacobi et al., *supra* note 39, at 426 (showing that the ten telephonic cases heard in the 2019 Term lasted, on average, eighty-five minutes, in contrast to in-person cases, which were all less than sixty-three minutes).

[139] *See* Jacobi & Sag, *supra* note 7, at 1167.

[140] *Infra* Part II.C.

Figure 2. Proportion of Gendered Justice-to-Justice Interruptions, Normalized to a Gender-Balanced Court.

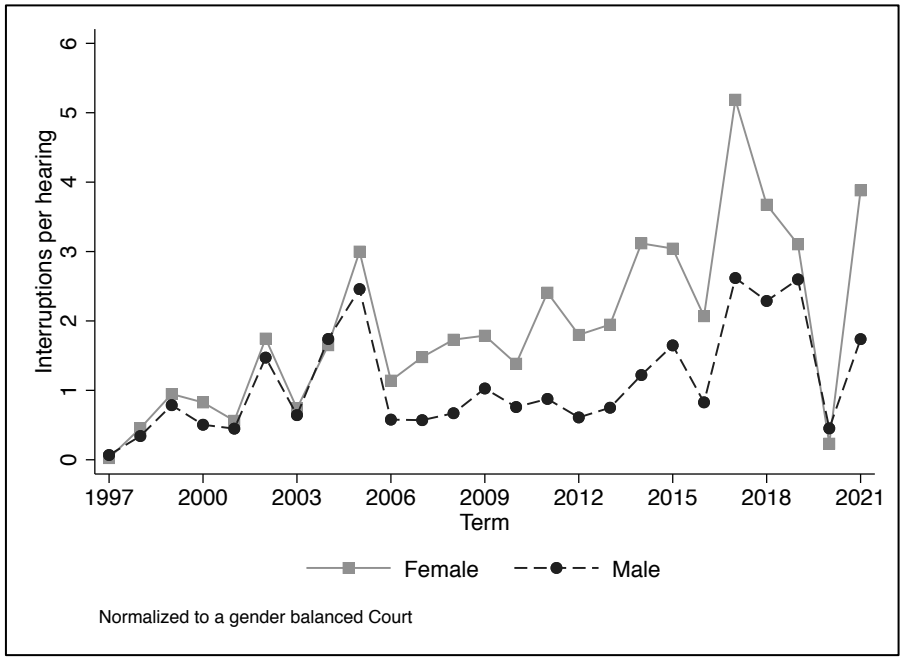


Figure 2 shows the overall results in the same fashion as presented in Figure 1, looking at the average number of Justice-to-Justice interruptions per case per term, but now divided between interruptions of female Justices (gray squares connected by a solid line) and interruptions of male Justices (black circles connected by a dashed line). Even though female Justices faced as many as 1.7 times as many interruptions as male Justices prior to the 2006 Term, that effect was dwarfed after 2006 (with one exception, the 2020 Term, discussed below). After the 2006 Term, female Justices were consistently interrupted at least twice as often as male Justices, and sometimes significantly more often.

There are three key takeaways from Figure 2. First, Figure 2 shows that there has always been a gender problem at the Supreme Court in terms of Justice-to-Justice interruptions, even when the number of interruptions was much lower, as seen in Figure 1. This is consistent with Jacobi and Schweers, who showed that even when there was only one female Justice on the Court, be it Justice Sandra Day O'Connor (who served in Terms 1981–2004 and was the sole woman on the Court during Terms 1981–1993) or Justice Ginsburg (who served Terms 1993–2020, and was the sole woman on the Court during Terms 2004–2010), they were each consistently the most interrupted Justice. For instance, in both the 2007 and 2008 Terms, Justice Ginsburg, the sole woman on the Court, was interrupted more than 2.5 times as often as the average of the eight male Justices on the Court. But even though there was always a gender disparity in

Justice-to-Justice interruptions, the significant upward shift in the ratio starting in the 2006 Term is very significant.

Second, Figure 2 largely mirrors Figure 1, even though they illustrate quite different phenomena, showing all interruptions versus the incidence of those interruptions by gender, respectively.[141] Comparing the two figures, it is evident that as interruptions increased over time, the size of the difference between the rates at which male and female Justices are interrupted also increased. This trend correlates with the increasing number of female Justices. That is, the more women who serve on the Court, the more interruptions each woman appears to face, which we discuss further *infra*.[142]

Third, directly addressing the question of whether the gender imbalance of Justice-to-Justice interruptions on the Court improved in recent years, as in Figure 1, the peak in Figure 2 of the gender difference in Justice-to-Justice interruptions was reached in the 2017 Term. However, it is closely followed by the second highest difference in the rate of interruptions, which occurred in the Court's most recent completed Term, the 2021 Term. In the 2021 Term, there were approximately 2.23 times as many interruptions of female Justices as male Justices. Thus, while Figure 2 shows, like Figure 1, that there was an overall drop after the 2017 Term, the Term with the second highest number of interruptions was also associated with the biggest divergence in male to female interruptions, the 2021 Term.[143] As such, it is hard to claim that things improved significantly since attention was brought to the issue.

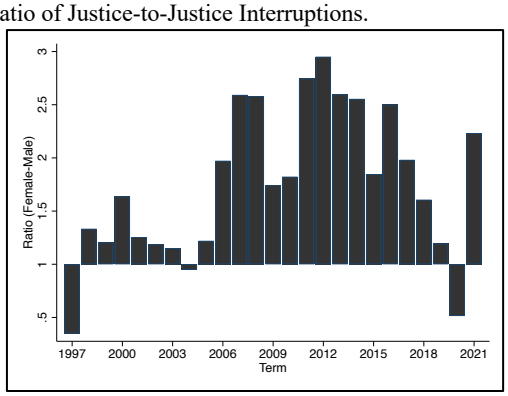
[141] Note that Figure 1 is not simply the sum of the data in Figure 2, because the data in Figure 2 has been normalized to reflect a hypothetical gender-balanced Court. We do not wish to imply that gender is exclusively male or female, although that has been the history of the Court to date as far as is known publicly. One can think of our hypothetical gender-balanced Court as comprised of nine individuals with an even blend of the average attributes of the extant male and female Justices, respectively.

[142] *See infra* Part II.C. This fits with the literature showing that men's tolerance of women decreases as their numbers increase beyond a token presence, as expressed through interruptions, a dominance behavior. *See generally* Goldberg, *supra* note 83.

[143] The data in Figure 2 can be recast in terms of the ratio of female compared to male Justices being interrupted. A ratio of one means that the rates of interruption were equal. Ratios are informative, but we caution that they are highly sensitive to small changes when the underlying numbers are small.

Furthermore, we need to be precise about when exactly the claimed effect may have arisen. The initial Jacobi and Schweers study was published by the Virginia Law Review in November 2017 but, as is common in legal scholarship, a full draft was published on SSRN (the Social Science Research Network, the leading forum for publishing drafts of articles prepublication[144]) in March 2017.[145] The authors wrote up their findings in a SCOTUSblog scholarship highlight on April 5, 2017,[146] and the Washington Post[147] and Harvard Business

Figure 3. Gender Ratio of Justice-to-Justice Interruptions.



As seen in Figure 3, when looked at as a ratio, the biggest divergence between Justice-to-Justice interruptions of male versus female Justices was in 2012, with female Justices being subjected to close to three times as many interruptions as male Justices. The 2021 Term looks like a fairly typical post-2006 Term. Note that there were only three terms in which male Justices were interrupted more than female Justices—the 1997, 2004, and 2020 Terms—but in all three terms, the difference is not statistically significant—that is, there is statistical means of differentiating the effect from zero, i.e., no difference between male and female Justices.

[144] *Tomorrow's Research Today*, SSRN, https://www.ssrn.com/index.cfm/en/ [https://perma.cc/F5M3-7QMJ] (last visited Sept. 30, 2023). SSRN aims to promote "the rapid worldwide dissemination of research." *Id.* Its eLibrary boasts "1,274,541 research papers from 1,390,490 researchers in more than 70 disciplines" as of September 30, 2023. *Id.*

[145] Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, SSRN (Mar. 16, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933016 [https://perma.cc/Z524-P449] (showing that the article was posted March 16, 2017 as Northwestern Law & Econ Research Paper No. 17-03).

[146] Tonja Jacobi & Dylan Schweers, *Legal Scholarship Highlight: Justice, Interrupted—Gender, Ideology, and Seniority at the Supreme Court*, SCOTUSBLOG: LEGAL SCHOLARSHIP HIGHLIGHT (Apr. 5, 2017, 10:10 AM), https://www.scotusblog.com/2017/04/legal-scholarship-highlight-justice-interrupted-gender-ideology-seniority-supreme-court/ [https://perma.cc/7CC6-EEG5].

[147] Tonja Jacobi & Dylan Schweers, *If Gorsuch is Like His Colleagues, He'll Constantly Interrupt the Female Justices*, WASH. POST (Apr. 11, 2017, 9:51 AM), https://www.washingtonpost.com/posteverything/wp/2017/04/11/if-gorsuch-is-like-his-colleagues-hell-constantly-interrupt-the-female-justices/. The piece was republished in multiple fora. *See, e.g.*, Tonja Jacobi & Dylan Schweers, *Men Interrupt Women at the Supreme Court Too: Washington Post Opinion*, OREGONIAN (Apr. 12, 2017, 1:00 PM),

Review[148] each on April 11, 2017; within two weeks, dozens of fora had written about the results, from the New York Times[149] to Glamour.[150] By February 2018, Justice Ginsburg was commenting on the study, saying she hoped it changed behavior at the Court,[151] and by June 8, 2018, Justice Sotomayor made her first statement that the Court had changed as a result of the study.[152] So, before the end of the 2017 Term—the Term with the highest rate of interruptions recorded at the Supreme Court—Justice Sotomayor was saying that things improved at the Court, suggesting that peak could have been even higher.

To more closely examine whether there was an improvement in the gender imbalance of interruptions at Supreme Court argument, we break our analysis down into four eras of particular relevance to analyzing the gendered nature of interruptions.

Era 1: 1997–2004 Terms. This covers the final eight years of the Rehnquist Chief Justiceship. As is apparent from Figure 1 and Figure 2, interruptions are largely a modern phenomenon—Jacobi and Sag showed interruptions massively increased after 1995, as the Court became polarized, following a vast increase in polarization within Congress and among the public.[153] The same is true of interventions, as will be seen below.[154] Accordingly, we begin our analysis in the 1997 Term to capture a meaningful number of years of the Rehnquist Court, without going back to an era where interruptions were relatively insignificant. Importantly, during this era, there were two female Justices on the Court—Justice O'Connor and Justice Ginsburg. Significantly, Justice O'Connor was

https://www.oregonlive.com/opinion/2017/04/men_interrupting_women_happens.html [https://perma.cc/29XN-8XSA]; Tonja Jacobi & Dylan Schweers, *If Neil Gorsuch Is Anything like His Male Colleagues, He Will Constantly Interrupt the Female Justices* , CHI. TRIB. (Apr. 11, 2017, 3:00 PM), https://www.chicagotribune.com/opinion/commentary/ct-men-interrupt-women-talking-supreme-court-20170411-story.html; Tonja Jacobi & Dylan Schweers, *Justice Interruptus: Female Supreme Court Justices More Likely To Be Talked Over*, DENVER POST (Apr. 11, 2017, 1:40 PM), https://www.denverpost.com/2017/04/11/justice-interruptus-female-supreme-court-justices-more-likely-to-be-talked-over/ [https://perma.cc/FV4M-WZEN].

[148] Tonja Jacobi & Dylan Schweers, *Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates*, HARV. BUS. REV. (Apr. 11, 2017), https://hbr.org/2017/04/female-supreme-court-justices-are-interrupted-more-by-male-justices-and-advocates.

[149] Adam Liptak, *Why Gorsuch May Not Be So Genteel on the Bench*, N.Y. TIMES: SIDEBAR (Apr. 17, 2017), https://www.nytimes.com/2017/04/17/us/politics/why-gorsuch-may-not-be-so-genteel-on-the-bench.html.

[150] Maggie Mallon, *Here's How Frequently Women Supreme Court Justices Are Interrupted by Men*, GLAMOUR (Apr. 6, 2017), https://www.glamour.com/story/how-frequently-women-supreme-court-justices-are-interrupted-by-men [https://perma.cc/HA93-8A45].

[151] Liptak, *supra* note 149.

[152] Hamm, *supra* note 12.

[153] Jacobi & Sag, *supra* note 7, at 1244.

[154] *Infra* Part III.

moderately conservative and Justice Ginsburg was liberal.[155] As we show below, it is important to have ideological variety within our gender categories in order to disentangle the effect of ideology and gender.[156]

Era 2: 2005–2008 Terms. This era covers the first four years of the Roberts Chief Justiceship, when Justice Ginsburg was the only female Justice on the Court. This is important because Jacobi and Schweers showed the gendered nature of interruptions appears to rise with an increasing number of women on the Court,[157] consistent with the literature on interruptions in the nonjudicial context, which demonstrated that men tend to interrupt more when the representation of women reaches a certain threshold (which is still typically a minority).[158]

Era 3: 2009–2018. In direct contrast to the previous era, this era captures the timeframe in which Justice Sotomayor and shortly thereafter Justice Kagan joined the Court and for the first time in history there were three female Justices serving on the Court. Note, however, that all three were liberal Justices. This era extends up until the time that the Court suspended its usual practice of oral argument in response to the COVID-19 pandemic.

Era 4: 2019–2021 Terms. This era captures a time when two important format changes occurred at Supreme Court oral argument, when the Court started significantly changing its structure, starting with the minor change of the introduction of the two-minute rule, and then the more major change in response to the COVID-19 pandemic, as discussed above.[159] Also, importantly, in this era there were still three female Justices on the Court, but for some of this time we can observe the effect of a conservative female Justice, Justice Barrett. This is

[155] Over the course of her tenure on the Court, Justice O'Connor had a Martin-Quinn judicial ideology score of 1.02, which is 0.59 standard deviations to the right of the historical average of the Court; Justice Ginsburg had a Martin-Quinn judicial ideology score of -1.75, which is 1.02 standard deviations to the left of the historical average of the Court. *See generally* Martin & Quinn, *supra* note 76.

[156] *Infra* Part II.C.

[157] Jacobi & Schweers, *supra* note 8, at 1459 ("[T]he rate at which women are interrupted [is] a product of the number of women on the Court . . . . [T]he more women on the Court, the more frequently they are interrupted.").

[158] *See, e.g.*, AARON A. DHIR, *Laying a Foundation: Why the Board, Why the Statistics, and Why Diversification?*, *in* CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 24, 53-54 (2015) (describing how traditional directors resisted calls for diversification in corporate boardrooms and sought to protect their privileged status). Note, however, that when numbers rose sufficiently, some of the ill effects of gender, power, and interruptions were mitigated. *See* Tali Mendelberg & Christopher F. Karpowitz, Opinion, *More Women, but Not Nearly Enough*, N.Y. TIMES (Nov. 8, 2012, 8:52 PM), https://campaignstops.blogs.nytimes.com/2012/11/08/more-women-but-not-nearly-enough/ (describing findings that female legislators "were more likely to be rudely interrupted . . . [and] were less likely to strongly advocate their policy preferences," but noting once women comprise 60% or more of a group, "they spoke as much as men . . . [and] encountered fewer hostile interruptions").

[159] *Supra* Part I.B.

important, given that there have been significant differences shown between conservative and liberal Justices in terms both of being interrupted and of interrupting.[160]

Table 1 presents the results in terms of these four eras.

Table 1. Incidence of Justice-to-Justice Interruptions per Justice, by Era and by Gender.

Era (by Chief & Term)	Female Justices	Male Justices	Difference (FJ>MJ)	Percent Difference
Rehnquist 1997–2004	0.19	0.16	0.03	16%
Roberts 2005–2008	0.41	0.24	0.17	70%
Roberts 2009–2018	0.57	0.28	0.30	108%
Roberts 2019–2021	0.54	0.36	0.19	53%

Whereas Figure 1 shows the actual average rate of Justice-to-Justice interruptions per argument per Term, Table 1 shows the average rate of Justice-to-Justice interruptions for the average female and male Justice, and the difference between those two. The final column of Table 1 indicates by what percentage the average female Justice was interrupted more than the average male Justice. The differences between each category in each era are statistically significant.[161]

Looking at the entire period of our study, the average female Justice was interrupted by another Justice 0.41 times per hearing, or more than one and a half times a day on a typical Supreme Court hearing day of four separate oral arguments. The comparable figure for the average male Justice was 0.24 times a hearing, less than once a day on average. But this overall comparison understates just how differently male and female Justices are treated in the modern era.

During the late Rehnquist Court, as seen *supra*, Justice-to-Justice interruption rates were lower but the trend was nonetheless consistent: female Justices were interrupted 16% more than male Justices. In the first few years of the Roberts Court, by contrast, that ratio rose to 70%. By the 2009–2018 Terms, when there was one, then two, and then shortly thereafter three female Justices on the Court, that rate rose to 108%. That is, female Justices were being interrupted more than

[160] Jacobi & Schweers, *supra* note 8, at 1446 ("[C]onservatives interrupt liberals at very high rates, liberals interrupt conservatives at much lower rates . . . ."); Jacobi & Sag, *supra* note 7, at 1223 ("Conservatives have been consistent throughout the six decades examined here in having a stronger tendency to interrupt their colleagues.").

[161] The difference between female and male Justices being interrupted is significant using a paired two sample T-test with equal variances, regardless of whether this test is performed at the case level ($p=0.00$), the term level ($p=0.00$), or using the eras set forth in the table above ($p<0.05$).

twice as often as male Justices. Yet, from the 2019 to the 2021 Terms, for the first time, the rate went down, with female Justices being interrupted 53% more than male Justices—still a highly significant difference but also significantly less than previously. But the problem is that there were so few interruptions *possible* in the 2020 Term, due to the temporarily highly controlled structure of oral argument, that we are essentially dividing the effect of two years over three years.

Table 2 breaks down the fourth era, year-by-year, and confirms this impression.

Table 2. Incidence of Justice-to-Justice Interruptions per Justice in 2019–2021, by Gender.

Year	Female Justices	Male Justices	Difference (FJ>MJ)	Percent Difference
2019	0.69	0.58	0.11	19%
2020	0.05	0.10	-0.05	-49%
2021	0.86	0.39	0.48	123%

We can see in Table 2 that the 2019 Term was unusually gender-balanced in interruptions, with female Justices only being interrupted 19% more than male Justices. But ten of the fifty-eight cases heard that Term (17%) were telephonic. This becomes vital to our analysis when we see that the 2020 Term, the one full telephonic term, actually reversed the gender imbalance, with male Justices being interrupted 49% more than female Justices—although that is 49% of almost no interruptions, and is not statistically meaningful. But when the Court returned to in-person oral argument, the usual gender imbalance returned, higher than almost ever, with female Justices being interrupted 123% more than male Justices. This confirms: first, the seemingly reduced rate of female-to-male Justice interruptions in the fourth era was driven by the unique format of oral argument in the 2020 Term, where there were almost no interruptions; and second, the new format is not dampening the gender imbalance in Justice-to-Justice interruptions.

Ultimately, whether the gendered nature of Justice-to-Justice interruptions at Supreme Court oral argument improved is ambiguous. It depends on how you look at the data: if we see the sudden attention being paid to gendered interruptions at the Court starting in mid-2017 as a shock, we might expect the effect to take some time. But that is not what the Justices told us—Justice Sotomayor said the effect was already happening by early June 2017, during the Term that had the highest rate of female to male interruptions of all time at the Court. Whereas, if we just look over time without considering the structural changes to oral argument, that may create a false impression of a lower rate of both interruptions and gendered interruptions, such that on average it looks as if there was some improvement. But the rate of both interruptions and the

disproportionate gender effect within those interruptions returned to very high rates by the 2021 Term. More likely, the 2020 Term is an outlier, and the apparent improvement in the 2019–2021 era is arguably a mirage caused by the exigency of switching to telephonic hearings during the height of the pandemic, and the noninteractive procedure associated with that time. However, that is only one interpretation of the data. There was another important change that occurred at that time which we have not yet addressed that could also explain the apparent improvement. This development, which we turn to next, was the appointment, for the first time, of a very conservative female Justice to the Court.[162] Whether Justice Barrett is treated differently because of her conservative ideology, and whether that somewhat combats the gender effect, is discussed in the next Subpart.

C. *The Difficulty of Disentangling Gender Versus Ideology in Interruptions*

Disentangling the impact of gender and ideology on the behavior of Supreme Court Justices has always been a difficult question because there has been significant crossover between the ideological division and the gender divide on the Court.[163] Justice O'Connor, the first female Justice, was appointed by a Republican President but sat in the ideological middle of the Court. She was a moderate conservative who regularly voted with liberal and conservative Justices alike.[164] Until 2020, the only other female Justices who served on the Supreme Court were all liberal Justices: Justice Ginsburg, Justice Sotomayor, and Justice Kagan. After Justice John Paul Stevens retired in 2010, then, for more than a decade, these three women made up the majority of the liberal bloc of the Court, along with Justice Stephen Breyer. Accordingly, until Justice Barrett's entrance onto the Court, it was difficult to say whether observed behavior by or toward the female Justices was driven by gender, ideology, or some other confounding factor. In this Subpart we present two pieces of evidence indicating that there is a substantial gender component, separate from ideology, in the interruption of Justices at Supreme Court oral argument.

First, thanks to the appointment of Justice Barrett, we can now, for the first time, assess how a truly conservative female Justice is treated by the other Justices. We can compare Justice Barrett's rate of being interrupted to that of her fellow conservatives, who are all men. Second, we can look at how women are treated when they sit on both sides of the ideological divide, by looking at

[162] As discussed, *supra* note 155, Justice O'Connor has a Martin-Quinn judicial ideology score of 1.02, which is 0.59 standard deviations to the right of the historical average of the Court; Justice Barrett has a Martin-Quinn judicial ideology score of 1.28, which is 0.74 standard deviations to the right of the historical average of the Court. *See supra* note 79 and accompanying text.

[163] *See* Jacobi & Schweers *supra* note 8, at 1453 (discussing this difficulty).

[164] *See Super Medians*, *supra* note 19, at 56 (reporting that in the 1999 Term and 2005 Terms, Justice O'Connor ranked in the top ten percent of the most powerful median Justices to have served on the Court on this criteria, voting with the majority in 95% to 100% of the cases decided during those Terms).

the rate of interruptions of Justices by male versus female advocates, who necessarily represent both sides of the ideological divide.

On the first question, in the 2021 Term, Justice Barrett was interrupted by another Justice an average of 0.65 times per oral argument.[165] This figure is notably lower than the other female Justices, who were interrupted at a rate of 0.97 times per hearing—almost 50% more often than Justice Barrett.[166] But the rate of interruption of Justice Barrett was also significantly higher than that of the male Justices, who were interrupted at a rate of 0.39 times per hearing—almost 50% less often than Justice Barrett.[167] That means Justice Barrett is interrupted statistically significantly less than the female liberal Justices, but statistically significantly more than the male conservative Justices.

This indicates the gender effect is real and ongoing and persists across ideological lines. It also confirms that ideology matters. This suggests that earlier findings that female Justices were interrupted more than male Justices and that conservative Justices were interrupted less than liberal Justices[168] were not simply an artifact of the intersection of gender and ideology on the Court. The fact that Justice Barrett, as a conservative woman, is interrupted significantly more than her male ideological brethren, but less than other female Justices who are liberal, strongly suggests that both ideology and gender are significant factors in determining interruption rates.[169]

The next Subpart continues this differentiation between the effect of ideology and gender in Supreme Court oral argument interruptions but also provides an important separate focus: interruptions of Justices by advocates.

D. *The Problem of Advocate Interruptions*

Table 3 explores our second piece of new evidence, examining the rate of interruptions of the Justices by the advocates. It breaks down in detail by era the

[165] We focus on this Term because the 2020 Term was artificially—and measurably—noninteractive and undynamic. *See* Jacobi et al., *supra* note 39, at 426, 434 (explaining interruption rates as well as other measures of interaction—such as rate of speech speed, number of speaking turns, and number of interactions between participants—shows oral argument was significantly less dynamic under the telephonic format at end of 2019 Term). Thus, the 2021 Term is the first full Term where we have a truly conservative female Justice interacting with other Justices and the advocates in a normal environment.

[166] The difference between Justice Barrett and the other female Justices is significant at the 0.05 level.

[167] The difference between Justice Barrett and the male Justices is significant at the 0.05 level. For completeness, we note the difference between liberal female Justices and the conservative male Justices was significant at the 0.00 level.

[168] Jacobi & Sag, *supra* note 7, at 1223; Jacobi & Schweers, *supra* note 8, at 1446 ("[C]onservatives interrupt liberals at very high rates, liberals interrupt conservatives at much lower rates, and moderates are involved in interruptions, either being interrupted or doing interruptions, at lower rates also.").

[169] Ideally, we would test this with a larger, more diverse pool of Supreme Court Justices who were randomly assigned to panels to hear cases. Until the Constitution changes dramatically, we are unable to make robust causal claims without this kind of data.

average per argument rate of interruption by the gender of who is doing the interrupting, comparing male and female advocates' rates of interruption of male and female Justices.

Table 3. Interruptions of Justices by Advocates, by Justice and Advocate Gender, by Era.

Era	Female Just.	Male Just.	Significant Difference	Female Advoc.	Male Advoc.	Significant Difference
Rehnquist 1997–2004	1.33	1.27	no	**3.90**	**4.55**	**yes***
Roberts 2005–2008	**1.99**	**1.54**	**yes****	6.43	5.52	no
Roberts 2009–2018	**1.78**	**1.14**	**yes*****	**3.55**	**4.89**	**yes*****
Roberts 2019–2021	**2.53**	**1.88**	**yes*****	6.39	7.27	no

We indicate levels of significance as follows: * less than .05; ** less than .01, and *** significant at 0.00.

Both the advocates and the other Justices interrupt the Justices at oral argument. In the prototypical Supreme Court hearing, the Justices hear from a set of advocates on one side of the case and another set of advocates on the other side. The appearance of the U.S. Solicitor General as an amici complicates this picture somewhat, but overall, it is reasonable to treat the advocates as a group as ideologically balanced. Thus, by looking at gender differentials in advocate interruptions, we can separate out what is purely a gender effect from any ideological effect.

The left half of Table 3 shows the rate at which Justices are interrupted, broken down by the gender of the Justices. The right half of Table 3 shows the rate at which advocates interrupt, broken down by the gender of the advocate.[170] Note this refers to the rate at which advocates interrupt, not the rate at which they are interrupted, which has also shown to be gendered but is beyond the

[170] We estimated the gender of the advocates using data derived from the U.S. Census. For names that are less common in the United States and names that are often either male or female, we reviewed the transcript to see what pronouns the Justices used and conducted internet searches to resolve ambiguous cases. Nothing in the data suggested that any of the advocates identified as nonbinary, but given that mainstream awareness of the need for nonbinary inclusion is a fairly recent phenomenon, that absence of data does not prove the negative.

scope of this study.[171] For both sides of Table 3, there is an additional column that indicates whether there is a statistically significant difference between the relevant figures.

Table 3 provides five important findings. First, it shows that the same pattern persists in the interruptions of the Justices by advocates as it does for Justice-to-Justice interruptions. Female Justices are interrupted by advocates significantly more often than male Justices are interrupted by advocates. These differences are significant in every era of the Roberts Court.[172]

Second, it shows there are systematic differences between the behavior of the male and female advocates: female advocates interrupt less than male advocates.[173] This difference is significant during the eight years of the Rehnquist Court and during about a decade of the Roberts Court from 2009–2018. This is despite the fact that female representation of parties at the Court increased during that time.[174] This importunate difference suggests that the expectations placed on advocates differ by gender, with the expectation of female advocates to be less disruptive and more polite than male advocates. Would Justice Sotomayor have tolerated a female advocate indulging in the serial interruptions she tolerated for some time from Bert Rein in the example above?[175] How many female advocates would be willing to find out? We do not know the answers to such questions individually, but the data tells a clear story in aggregate.

Third, Table 3 shows that the gender difference in how advocates interrupt the Justices is still very high but may be showing signs of improvement. During the late Rehnquist era, the gender difference among Justices being interrupted by advocates was only 5%. That rose to 30% in the first era of the Roberts Court, then to 57% between 2009 and 2018. In our final era of study, the rate at which interruptions of Justices were differentiated by gender was 35%—still a very high rate of discriminatory treatment of female Justices, but significantly lower than in the previous era.[176]

This raises the question, once again, of whether this positive result is being driven by the uniqueness of the 2020 Term. Table 4 shows that it is not.

---

[171] *See* Patton & Smith, *supra* note 10, at 345-49 (showing gendered patterns in interruptions of advocates by Justices).

[172] The lack of significance of the difference during the Rehnquist Court is likely due to the low number of interruptions in general in that era.

[173] In this context, our references to male and female advocates should be understood as male-identified and female-identified. We have not surveyed the advocates themselves as to their gender identity.

[174] *See* Jacobi & Sag, *supra* note 7, at 1201 (showing representation of women as advocates at Supreme Court argument increased from close to 0% in 1960, but still remained less than 20% by 2015).

[175] Transcript of Oral Argument at 58, Boyer v. Louisiana, 569 U.S. 238 (2013) (No. 11-9953).

[176] The difference is significant at the $P<0.00$ level using a two-sample T-test with equal variances for differences aggregated at the hearing level.

Table 4. Interruptions of Justices by Advocates, by Justice Gender and Advocate Gender, 2019 and 2021 Terms.

Term	Female Just.	Male Just.	Significant Difference	Female Advoc.	Male Advoc.	Significant Difference
2019	3.31	2.27	Yes**	10.13	8.52	No
2021	2.51	2.17	No	6.07	8.60	Yes*

We indicate levels of significance as follows: * less than .05; ** less than .01, and *** significant at 0.00.

Table 4 shows the same breakdown as Table 3, but now just looking in detail at the 2019 and 2021 Terms. Looking within the largely nontelephonic parts of the fourth era of the Court in our study, we see interruptions by advocates of female Justices compared to male Justices dropped from 46% in the 2019 Term to 15% in the 2021 Term. The treatment by the advocates of the male and female Justices is still significantly different in the 2019 Term; but in the 2021 Term, the difference between the two numbers is statistically nondifferentiable from zero.[177] The change from 2019 to 2021 is both a statistically and substantively significant improvement. This is the first piece of truly clear evidence that the disproportionate rate of interruptions of Justices improved in the 2021 Term. It suggests one aspect of the different treatment of the Justices by gender improved due to the structural change to oral argument.

Fourth, Table 3 reveals that there is a gender difference in advocate behavior at the Supreme Court, but it is only statistically significant in our first and third eras of study. During the 2009–2018 Terms in particular, the size of the difference was also large: male advocates interrupted Justices 39% more often than female advocates did, even controlling for the far greater representation of male advocates than female advocates at Supreme Court oral argument.[178] In our most recent era of study, from the 2019–2021 Terms, the difference was only 9% and not statistically significant.

When we look at Table 4 to check whether this is being driven by the unusual 2020 Term, the results are less positive than before. In the 2019 Term, female advocates interrupted the Justices 19% more than the male advocates did. Unfortunately, this does not herald the end of gender discrimination among advocates at the Court—there were very few female attorneys appearing in that Term, only twenty-four of 156 appearances were by female advocates that year, and the reversed gender difference is not statistically differentiable from zero. In contrast, in the 2021 Term, male advocates interrupted the Justices 29% more

[177] I.e., the difference is not significant using a two-sample T-test with equal variances.

[178] The difference in the first era was 15%, in the second era it was 18%, and in the third era it was 9%, but none of these differences are statistically significant.

than the female advocates did and this is a statistically significant difference.[179] In the 2021 Term, forty-two of the 163 appearances were by female advocates, a much higher proportion. It is always unsafe to make inferences from small-n samples, such as the number of female advocates in the 2019 Term. As such, only the 2021 Term is truly informative, which strongly suggests the difference in tolerated behavior by male and female advocates is not improving in terms of the gender divide among the attorneys, even as the female Justices are being treated more fairly compared to the male Justices by the advocates.

The final point of note about these two tables regards the observable trends in the extent to which advocates interrupt the Justices. Jacobi and Sag showed advocate interruptions of Justices to be significantly higher since 1995, but with a downward trend since a large jump observed at that time.[180] Table 3 confirms that finding, showing an increase from the first era to the second era, followed by a decrease from the second era to the third era, at which point the Jacobi and Sag study ended. In the new era examined in this Article, we observe that interruptions by advocates of Justices increased again since 2019. This is perhaps surprising because, since the pandemic, oral argument averages over eighty minutes instead of sixty minutes—we may expect fewer interruptions when there is less time constraint.[181] However, this finding is consistent with Jacobi, Robinson and Leslie, who showed that all of the same patterns of strategic behavior at oral argument arise at the Australian High Court, despite the fact that time is unlimited under the Australian format.[182]

When we look in more detail, term by term, we can put many of these results in a broader context. Figure 4 provides that breakdown.

[179] Significant at the $P<0.05$ level, as indicated in Table 4.

[180] Jacobi & Sag, *supra* note 7, at 1211.

[181] Ringsmuth et al., *supra* note 56, at 69-70. The average oral argument in the 2020 and 2021 Terms lasted for seventy-nine and eighty-three minutes, respectively. *Id.* at 70.

[182] Jacobi et al., *supra* note 42 (manuscript at 16-23).

Figure 4. Gender Proportion of Interruptions of Justices by Advocates, by Term.

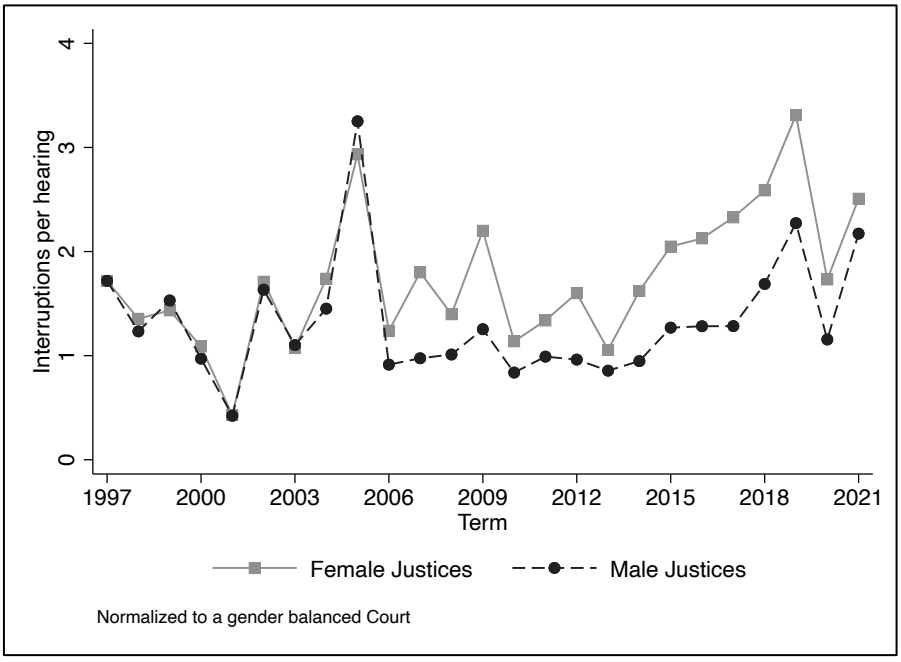


Figure 4 shows the overall trend displayed in both Tables 3 and 4, breaking our eras down by term. It shows the advocates' interruptions of female Justices in squares, joined by the solid gray line, and the advocates' interruption of male Justices in circles, joined by a dashed black line. The size of the gap between the two lines indicates the gender difference in the rate of interruptions of the Justices by the advocates. That gap between how male and female Justices are treated by advocates was largely nondifferentiable until after the 2006 Term, after which a clear gap emerges and continues. But in contrast to our previous results, which showed a considerable drop in the 2020 Term, the size of the gender gap in the 2020 Term is very consistent with the size of the gap in the 2021 Term. Once again, we must caution about drawing inferences from just one year of data, but Figure 4 suggests that on this one variable—the treatment of the female Justices by the advocates, compared to how they treat the male Justices—there was meaningful improvement coinciding with the new structure of oral argument.

Overall, then, has the gender disparity in interruptions of Supreme Court Justices improved since the issue rose to public attention or since the Supreme Court changed the format of oral argument to address the disparity? The evidence is nuanced. The rate of interruptions as well as the gender disparity in Justice-to-Justice interruptions both decreased, on average, since 2017. But the 2021 Term witnessed the fourth highest rate of such interruptions occurring and the second highest of the gender disparity in such interruptions. To the extent

there was a decline by era, much of the difference was driven by 2020 Term, which was artificially low due to the stilted and highly constrained environment imposed by COVID-19 restrictions.[183] Those oral arguments were criticized for being boring and for stifling the ability of the Justices to truly engage on important policy issues,[184] so that does not seem like much of a solution. Nevertheless, when comparing the conduct of advocates to the Justices, there has been less discrimination by advocates in terms of who they interrupt. Despite advocates continuing to interrupt the Justices frequently, with the 2021 Term seeing the fourth highest number of interruptions of the Justices by the advocates,[185] for the first time in many years, there is no measurable gender difference between who is interrupted.

Jacobi and Schweers called for two reforms to combat the gender discrimination they identified: first, accountability, and second, for the Chief Justice to intervene more.[186] On the first reform proposed, there has certainly been considerable attention paid to the issue by the public, the media, and even the Court itself. Apologies were made by other Justices to the female Justices, according to Justice Sotomayor, and changes were made to the structure of oral argument with an eye to reducing gender differences.[187] Whether these changes had the effect sought is still evolving: there is improvement in advocate behavior, but the Justices seem to have largely reverted to their old ways. We can only speculate whether the rate of Justice-to-Justice interruptions and the gender differential in those interruptions would have been even higher without the reform introduced in the 2021 Term, given the ongoing polarization at the Court. As to the second reform proposed, we now turn to determining whether the Chief changed his behavior. Our findings here are less ambiguous and more hopeful.

III. THE CHIEF'S INTERVENTIONS AT SUPREME COURT ARGUMENT

The power of Chief Justice Roberts is currently being questioned in some quarters, for instance with Court commentators talking about the "Thomas Court," reflecting the ideological influence of Justice Clarence Thomas.[188] But

[183] *See* Jacobi et al., *supra* note 39, at 426.

[184] *Id.* at 423-24 (showing that the pace of argument decreased, the number of speaking turns decreased, and the length of each turn increased, and concluding "[e]ach of the measures discussed above is consistent with the general observation that, on average, the telephonic oral arguments lacked the dynamism of traditional in-person oral argument").

[185] There were 1,295 advocate interruptions of Justices in the 2021 Term. There were 2,244, 1,454, and 1,367, in the 2005, 1997, and 2019 Terms, respectively.

[186] Jacobi & Schweers, *supra* note 8, at 1484-85.

[187] Quinn, *supra* note 11; Biskupic, *supra* note 78.

[188] *See, e.g.*, James Romoser, *John Roberts Is the Chief. But It's Clarence Thomas's Court.*, SCOTUSBLOG (Oct. 2, 2022, 7:00 PM), https://www.scotusblog.com/2022/10/john-roberts-is-the-chief-but-its-clarence-thomass-court/ [https://perma.cc/8243-CMUV] ("To paraphrase Justice Elena Kagan, we're all Thomists now."); David Smith, *The 'Thomas Court': After Biding His Time, Rightwing Justice Finds His Power*, GUARDIAN (July 10, 2022,

although Chief Justice Roberts may no longer be the ideological median of the Court,[189] he still has institutional power as the Chief. This Part looks at one aspect of that power—the ability to intervene and control the structure and atmosphere of oral argument, the one public-facing aspect of the Supreme Court's decision-making process—and examines whether and how Chief Justice Roberts, and Chief Justice Rehnquist before him, chose to exercise it. In this Part, we first examine the extent to which Chief Justice Roberts uses his power to intervene in oral argument, and how that use has changed over time; then we examine how his interventions relate specifically to combating the gender disparity in interruptions at the Court. We show that Chief Justice Roberts is intervening more and, recently, intervening more on behalf of female Justices, who are interrupted disproportionately more often.

A. *Trends in Interventions*

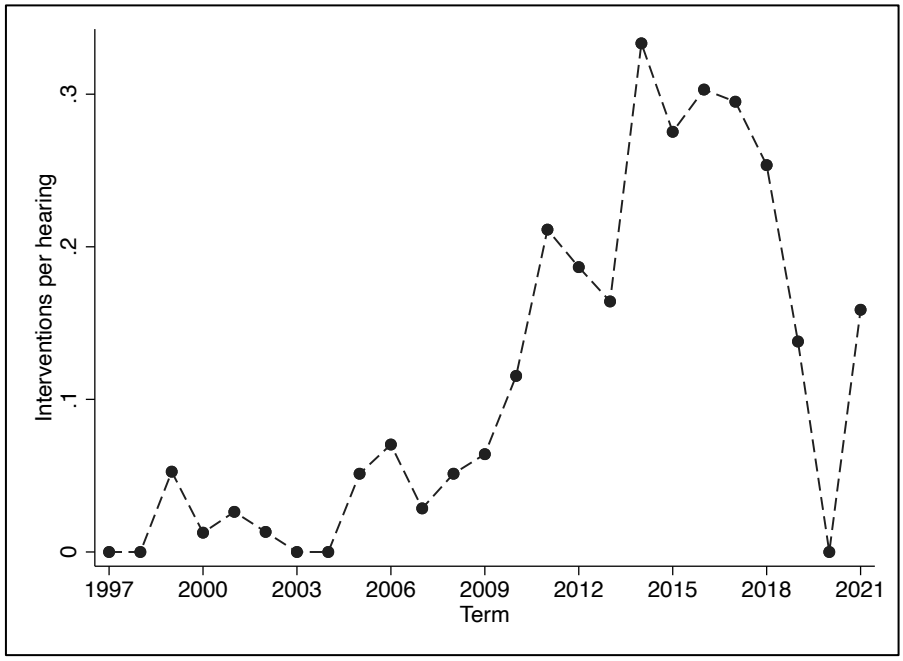
Figure 5 shows the average rate of interventions over time by the Chief Justice. We do not include Chief Justice Rehnquist or Chief Justice Roberts intervening for or against themselves[190] because the Associate Justices also do that to resolve interruptions without the Chief's intervention—we are interested in observing what the Chief is doing in his unique position as Chief.

2:00 PM), https://www.theguardian.com/us-news/2022/jul/10/clarence-thomas-supreme-court-justice [https://perma.cc/7B66-2UWT] (describing the "Thomas court" and quoting scholars noting that "[b]y virtue of the fact that Clarence Thomas has been on the supreme court as long as he has, he has slowly gained much more influence and has now become the dominant ideological leader of the conservatives"). And see discussion, *supra* note 119, about reference to the "Kavanaugh Court," stemming from his arguable role as the median justice.

[189] Arguably, that occurred when Justice Brett Kavanaugh was appointed to the Court. Kalvis Golde, *On a New, Conservative Court, Kavanaugh Sits at the Center*, SCOTUSBLOG (May 13, 2021, 11:59 AM), https://www.scotusblog.com/2021/05/on-a-new-conservative-court-kavanaugh-sits-at-the-center/ [https://perma.cc/DR6L-DG5Y]. *But see* Maveric Searle, *The New Median: Ideology in the Post-Kennedy Court*, SCOTUS OA (June 5, 2019), https://scotusoa.com/new-median/ [https://perma.cc/6GUM-EQWT] ("[T]his method suggests that Chief Justice Roberts will in fact be the Justice to look to as the Court's new median. The early numbers suggest that we really are seeing 'the Roberts Court.'").

[190] For example, in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Chief Justice Roberts and Justice Sotomayor spoke virtually simultaneously at one point and the Chief allowed: "That's true -- that's true even if -- Justice Sotomayor will have the next question, and I'll have this one." *See* Transcript of Oral Argument at 23, McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (No. 16-8255). In a similar scenario, in *Currier v. Virginia*, 138 S. Ct. 2144 (2018), the Chief and Justice Kagan spoke over each other and the Chief signaled for Justice Kagan to proceed with his customary, "go ahead." *See* Transcript of Oral Argument at 11, Currier v. Virginia, 138 S. Ct. 2144 (2018) (No. 16-1348).

Figure 5. Chief Justice Interventions Over Time, Average per Oral Argument.



The change in the frequency of Chief Justice interventions over time is striking. As is immediately apparent from Figure 5, Chief Justice interventions increased considerably beginning in the 2010 Term. Prior to that, as mentioned, Chief Justice Roberts looked a lot like Chief Justice Rehnquist in his final years, intervening less than once per every ten oral arguments.[191] By the 2011 Term, that rate of interventions more than had doubled from the average rate prior to then, and by the 2015 Term, that rate had more than tripled. Given this timing, we see no basis to attribute the increase in interventions to calls made in 2017 for the Chief to intervene more. Rather, the trend looks more like a gradual learning curve, or else a response to changing circumstances. In fact, after the 2017 Term, there is a significant *reduction* in the number of interventions by the Chief—the 2019 and 2021 Terms saw a return to 2010 levels of interventions, and of course the 2020 Term, unsurprisingly, was effectively zero, because Chief Justice Roberts had control over the entire structure of the arguments.

[191] Note that Chief Justice Rehnquist was unwell for the last few years of his chief justiceship, suffering from the thyroid cancer that eventually took his life. But this does not appear to explain the low level of interventions seen during his reign—see Figure 5, in which it is apparent that in the 1997 and 1998 Terms, there were zero interventions, and that was before his illness was manifest.

What may seem curious on this first look at the data is that Chief Justice Roberts' interventions do not seem to closely correlate with the rate of interruptions. Remember that, as we saw in Figure 1, interruptions increased dramatically during Chief Justice Roberts' tenure, but the substantial increase began in the 2015 Term and the most significant increase occurred in the 2017 Term. In contrast, in Figure 5 we observe a substantial increase in interventions in the 2010 Term, a second jump in interventions in the 2014 Term, and a significant drop off in the 2019 Term, when interruptions were still very high. At least on this cursory inspection, the spikes in interventions do not match increases in interruptions per se; however, we will see that they fit more closely with increases in the gender disparity of interruptions, which, as we saw in Figure 2, also began to take off in the 2010 Term. As such, it seems possible that Chief Justice Roberts was responding to the very phenomena Jacobi and Schweers were talking about—the gender imbalance in interruptions—even before it hit the public consciousness. We explore that more thoroughly in the next Subpart.

Before investigating how interventions relate to the gender difference in interruptions specifically, we first assess in more detail the phenomena of interventions and the extent to which they may be a response to the frequency of interruptions in general, as opposed to the gender disparity. This is particularly important, given the drop-off in interventions in the last three Terms. Consistent with our analysis of interruptions in the previous Part, Table 5 breaks down the data by our four eras, looking at the average number of Chief Justice interventions per term, as well as the average number of Justice-to-Justice interruptions per term, in each era, so that we can look at the relationship between those two phenomena.

Table 5. Chief Justice Interventions & Justice-to-Justice Interruptions, Average per Term, by Era.

Era	Justice-to-Justice Interruptions	Chief Justice Interventions
Rehnquist 1997–2004	118.63	1.00
Roberts 2005–2008	174.25	3.75
Roberts 2009–2018	227.50	14.60
Roberts 2019–2021	224.67	6.00

From era one to era three, the rate of Justice-to-Justice interruptions roughly doubled. At the same time, the rate of Chief Justice interventions increased even more dramatically, more than fourteen-fold. Yet, the rate of interventions dropped significantly in the 2019-2021 Terms, despite little overall decrease in interruptions.

The drop in interventions in the 2019 Term could be explicable because the number of cases were reduced, with twenty cases held over until the following term and ten cases heard telephonically under the constrained structure of oral

argument.[192] Thus, there may have been less need for interventions, with the number of cases heard in person that Term down by 26%, from sixty-five in the 2018 Term to forty-eight in the 2019 Term. Then, of course, in the 2020 Term, there were effectively zero interruptions and, unsurprisingly, effectively zero interventions. However, given the resurgence of interruptions in the 2021 Term, one might have anticipated that the Chief would have once again begun to intervene more in that Term. But that logic assumes that all else stayed the same. According to Justice Sotomayor, the new oral argument structure for the 2021 Term was introduced to address interruption levels, and the gender disparity of those interruptions in particular.[193] If the structure is working, there should be less need for the Chief to intervene.

This raises the question of why and when the Chief chooses to intervene, and whether he is "doing it right"—that is, is he intervening to help those most interrupted and reducing the payoff for those who do the most interrupting? If so, then despite the rate of interventions still being low as a percentage of Justice-to-Justice interruptions,[194] he may be doing a good institutional job. We turn to that question next.

B. *Interventions as a Response to the Gender Disparity in Interruptions?*

To assess whether Chief Justice Roberts used his power to intervene to respond directly to the gender disparity in interruptions at oral argument, we consider who benefited and who lost out from the Chief's interventions, and contrast that with Justice-level interruption data. To do so, our coders first identified whether an intervention occurred, then identified the "winner" and the "loser" of each intervention. That is, in whose favor the Chief intervened, and whose interruption he disrupted through his intervention.[195]

Figure 6 shows interruptions and interventions side-by-side for each Justice, excluding the Chief Justice. In each panel, we look at the net effect: that is, for interruptions, on the left, we take the average number of interruptions each Justice made per term and subtract the average number of times they were interrupted per term, to define their net interruption rate. For interventions, on the right, we take the number of times on average that a Justice is the winner of an intervention and deduct the number of times they are a loser of an intervention, creating their net intervention benefit rate. For each, we center the graph on zero, representing equality between interrupting and being interrupted and between winning and losing, respectively. Those Justices who sit to the right

[192] *See* Liptak, *supra* note 84 (describing the ten cases chosen for the telephonic forum as "includ[ing] most of the major ones").

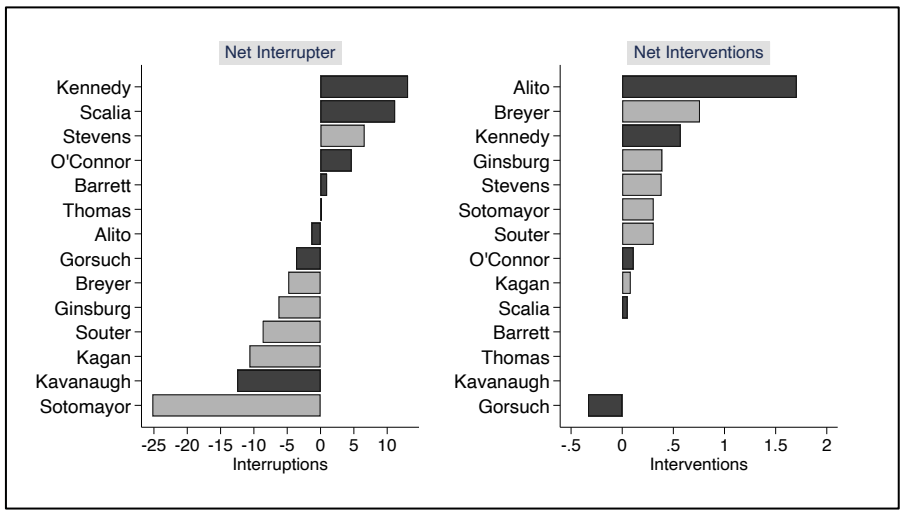
[193] Quinn, *supra* note 11; Deese, *supra* note 18.

[194] Even at its peak, the number of interventions is still quite low, with the Chief intervening in response to only 6.4% of interruptions. By the fourth era, that number had dropped to 2.7%.

[195] *See supra* Part I.C (explaining our methodology for coding the "winner" and the "loser" of each intervention).

of zero on each panel of Figure 6 are net interrupters and net beneficiaries, respectively; those who sit on the left of zero are net interruptees and net losers from the Chief's interventions, respectively.

Figure 6. Net Interventions and Net Interruptions, Winner and Loser, Interrupter and Interruptee, Average per Term.



Viewing the data by Justice does not immediately suggest that Chief Justice Roberts' interventions are motivated by a response to Justice-to-Justice interruptions. As seen in Figure 6, the worst interrupter is Justice Kennedy (top of the left-hand graph), and yet he benefits the third most from Chief Justice Roberts' interventions (near the top of the right-hand graph). At the other end of the scale, Justice Sotomayor is by far the most interrupted Justice, on net, and yet she is only sixth on the list of beneficiaries of the Chief's interventions. Reversing the analysis, starting with who benefits most and least from the Chief's interventions: Justice Alito stands out as the Justice most protected and promoted by Chief Justice Roberts' interventions and Justice Gorsuch the least favored on net by the Chief's interventions. And yet, these two Justices have very similar interruption profiles, as seen in the middle of the left-hand panel of Figure 6.

Another explanation to be considered is the influence of ideology. There is a vast literature showing how various aspects of judicial behavior are explicable in terms of ideology.[196] However, the data in Figure 6 suggest that the Chief

[196] *See, e.g.*, Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 832 ("[T]he judicial decision-making literature illustrates many of the larger themes flowing from the growing development of empirical legal research . . . ."); JEFFREY A. SEGAL &

seems to be fairly even-handed on the ideological front, other than his special treatment of Justice Alito. Conservative Justices are shaded black and liberal Justices shaded gray, making a quick glance at Figure 6 easy to assess in terms of ideological bias. We see that, other than Justice Kavanaugh, the conservative Justices are overrepresented in terms of net interruptions, which is consistent with prior findings.[197] And while this does not translate to the Chief intervening against those conservative interrupters particularly often, his rate of interventions across ideological lines seems fairly randomly distributed and does not especially favor his conservative allies.

Accordingly, this first look at the data does not suggest any obvious relationship between the Chief Justice's interventions in oral argument and which Justices tend to interrupt more on net; nor does it suggest the Chief's decisions about when and how to intervene are a product of simple ideological affinity. However, looking Justice-by-Justice may not be the best way to go about this—how the Chief interacts with any given Justice may be a product of unique personal factors, and so no individual comparison would prove or disprove a more general theory. Certainly, the Chief's special solicitude for Justice Alito has been noted elsewhere,[198] and media reports indicate that several Justices find aspects of Justice Gorsuch's unique personal style off-putting.[199] Thus, these effects could be idiosyncratic. Likewise, looking at raw numbers can

HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 229 (1st ed. 1993) (finding judicial ideology predicts 74% of cases correctly in search and seizure cases).

[197] *See supra* note 169 and accompanying text.

[198] This is consistent with findings that Chief Justice Roberts gave special consideration to Justice Alito in the telephonic hearings in the 2019 Term. Jacobi et al., *supra* note 39, at 431 ("The benefit to Justice Alito of having the Chief Justice, his close ideological ally, controlling the sessions is apparent."). However, any allegiance Chief Justice Roberts feels to Justice Alito may not be reciprocated. *See* Adam Liptak, *Once Close Allies, Roberts and Alito Have Taken Divergent Paths*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/politics/roberts-alito-abortion-roe-v-wade.html ("Once partners, Chief Justice Roberts and Justice Alito are now emblems of a stark divide at the court . . . . 'Justice Alito now appears to have concluded he no longer needs the chief to receive coveted opinion assignments . . . .'").

[199] Justice Gorsuch is said to have irritated both his colleagues and the advocates that make up the elite Bar of the Supreme Court by being patronizing. *See, e.g.*, Jeffrey Toobin, *Ginsburg Slaps Gorsuch in Gerrymandering Case*, NEW YORKER (Oct. 3, 2017), https://www.newyorker.com/news/news-desk/ginsburg-slaps-gorsuch (describing Justice Gorsuch as implying he is only one who cares about Constitution, giving his colleagues a civics lecture, and getting slapped down by Justice Ginsburg); Jeffrey Toobin, *How Badly Is Neil Gorsuch Annoying the Other Supreme Court Justices?*, NEW YORKER (Sept. 29, 2017), https://www.newyorker.com/news/daily-comment/how-badly-is-neil-gorsuch-annoying-the-other-supreme-court-justices (describing how Justice Gorsuch raised the ire of other Justices by giving "dubiously appropriate public speeches"); Linda Greenhouse, *Trump's Life-Tenured Judicial Avatar*, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/opinion/gorsuch-trump-supreme-court.html (criticizing Justice Gorsuch's behavior as "flamboyan[t]").

fail to tell the whole story. We need to look at gender more directly to answer our core question.

When we step beyond the individual Justices and look at the big picture, a broader pattern emerges. Figure 7 shows the Chief's interventions broken down by the gender of the winner of each intervention.

Figure 7. Interventions on Behalf of Female Versus Male Justices, for a Gender-Neutral Court.

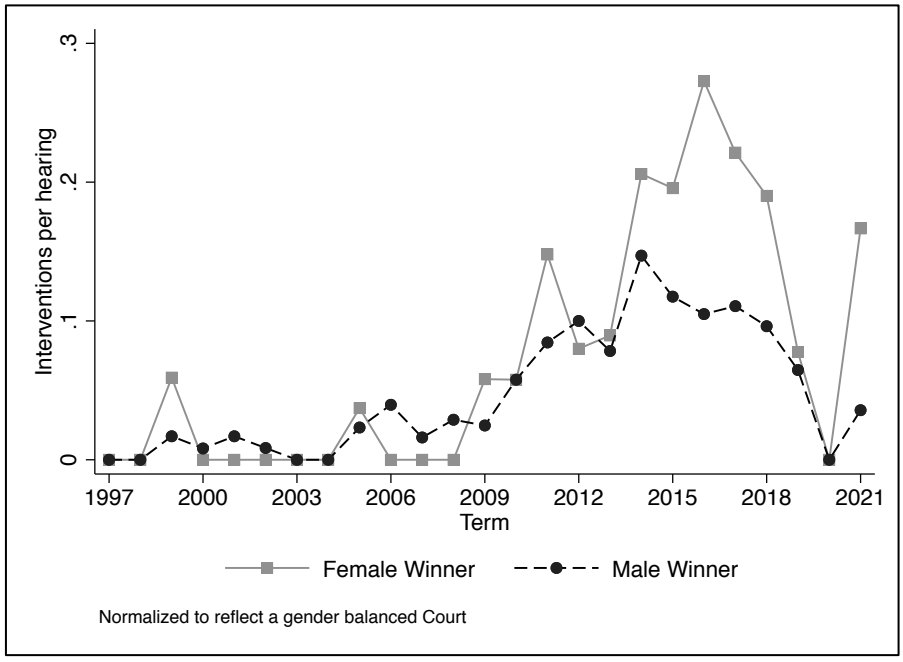


Figure 7 shows the average interventions per oral argument that benefit the female Justices, represented in the gray squares, versus those that benefit the male Justices, represented in the black circles. It adjusts for a gender-balanced Court, so that we can compare like with like. As with Figure 6 in the previous Subpart, which suggested the Chief Justice's rate of interventions rose in tandem with the increase in the gender disparity in interruptions of the Justices, Figure 7 tells a similar story. Recall that the gender disparity became quite stark beginning in the 2010 Term. Figure 7 shows that in the 2011 Term, the Chief was intervening on behalf of the female Justices 57% more often than he was intervening to benefit the male Justices.[200] This dropped to approximate parity

[200] In raw numbers, he intervened seven and eight times for female Justices and male Justices, respectively, in the 2011 Term. Once the gender difference on the Court is taken into account, this translates to 57% in favor of the female justices.

again in the 2012 and 2013 Terms[201]—even though the gender disparity was still high during those terms.[202] But after that, in Terms 2014 through 2018, included, the Chief was intervening twice to two and a half times as often to benefit the female Justices as the male Justices.[203]

After that, as we saw before in the context of interruptions, in the 2019 and 2020 Terms, there was a drop, but this time back closer to parity. The reason for the drop in the 2020 Term is obvious because, as discussed, there were zero interventions and zero Justice-to-Justice interruptions in the 2020 Term.[204] The decrease in the 2019 Term also makes some sense because, as was seen in Figure 2, the extent of the gender disparity in Justice-to-Justice interruptions dropped significantly in that Term. In the 2019 Term, Chief Justice Roberts only intervened in favor of the female Justices 20% more than for the male Justices, but there were far fewer interventions overall, less than half of the interventions that occurred in each of the previous five terms. When the gender disparity in Justice-to-Justice interruptions rose starkly again in the 2021 Term, as was seen in Figure 2, Figure 6 shows that the Chief's interventions that benefited female Justices rose again to a level more than four times that of interventions benefitting the male Justices.[205]

Altogether, although the Chief's interventions may not be perfectly calibrated to the gender disparity in interruptions,[206] the evidence suggests that he intervened more over time and did so more in response to the disproportionate interruption of the female Justices. Overall, in all of the years of our study, and normalized according to the number of female and male Justices sitting in any given hearing, the Chief intervened 54% more to benefit the female Justices than the male Justices.[207] This difference is significant at the $P<0.01$ level (assessed at the case level).[208] But that summary statistic belies how much more responsive

[201] With the gender difference on the Court taken into account, the Chief intervened 25% less often and 13% more often in favor of the female Justices, respectively, in the 2012 and 2013 Terms.

[202] *See supra* Figure 2.

[203] The exact multiples by which he intervened more often on behalf of the female Justices over the male Justices for those terms were: 2014: 1.4 times; 2015: 1.7 times; 2016: 2.6 times; 2017: 2.0 times; 2018: 2.0 times.

[204] This does not include Chief Justice Roberts interrupting the Justices. *See generally* Ringsmuth et al., *supra* note 56.

[205] Chief Justice Roberts's rate of intervention for the average female Justice in the 2021 Term was 4.6 times the rate of the average male Justice.

[206] For instance, in the 2012 Term, the Chief intervened 25% more often in favor of the male Justices, even while the female Justices were being interrupted at approximately three times the rate of each of the male Justices.

[207] There were 187 interventions in total, seventy-nine where a female Justice was the winner and 108 where a male Justice was the winner. Once this is adjusted for the gender disparity on the Court, this translates to 120.5 versus 78.1, or 54% more of the interventions favoring the female Justices.

[208] Significance is calculated using a two-sample T-test with equal variances.

Chief Justice Roberts has become in recent years. The ratio is broken down by era in Table 6.

Table 6. Ratio of Chief Justice Interventions Favoring Female Justices over Male Justices, by Era.

Era	Ratio: female winner over male winner
Rehnquist 1997–2004	1.17
Roberts 2005–2008	0.49
Roberts 2009–2018	1.71
Roberts 2019–2021	2.55

A ratio of more than one indicates a higher rate of interventions benefiting female Justices, a ratio of one indicates parity, and a ratio of less than one indicates a higher rate of interventions benefiting male Justices.

As seen in Table 6, in his first era as Chief (our Era 2), Roberts actually favored male Justices in his interventions. This is despite the fact that in this period Justice Ginsburg was the sole female Justice on the Court and was disproportionately interrupted—sometimes as much as 2.5 times more often than the average male Justice.[209] However, in later periods, when there were more female Justices on the Court and the gender disparity in interruptions became more pronounced, the Chief intervened on behalf of the female Justices more than the male Justices. For the decade that included Justice Sotomayor and Justice Kagan joining the Court along with Justice Ginsburg, the Chief intervened on behalf of the average female Justice 0.7 times more often than for the average male Justice. Note that this figure rose to 1.6 times more often in the 2016 Term, which predated Jacobi and Schweers' call for the Chief Justice to intervene more.[210]

That ratio in favor of the female Justices rose dramatically in the last three Terms, with Chief Justice Roberts intervening on behalf of the female Justices two and a half times as often now as he did for the male Justices. Within the current era, the disparity was highest in the 2021 Term. Indeed, in the most recent Term, the gender ratio of the benefit of the Chief Justice's interventions

[209] For instance, in the 2008 Term.

[210] In terms of the ratio between the rate at which interventions benefited the average female Justice compared to the average male Justice, the figure for the 2016 Term was 2.6.

favored the female Justices—normalized to account for the greater number of male Justices—at a rate of 4.7 to one.[211]

The increasing gender disparity in who benefits from the Chief Justice's interventions is consistent with the theory that the Chief is responding to the gender disparity in Justice-to-Justice interruptions. In other words, it suggests, more and more, that Chief Justice Roberts is responding where there is a need, intervening not just based on the number of interruptions in general but on the gendered nature of those interruptions.

Another way to test this relationship is to look directly at the correlation between interventions and Justice-to-Justice interruptions. We did this by testing the correlation between two different relationships for each Justice. Specifically, we tested the correlation between benefiting from an intervention and having been interrupted and the correlation between losing out from an intervention and interrupting. For each of these relationships, we ran the test for the Justices as a whole and then for the subset of just the female Justices. Table 7 provides that analysis.

Table 7. Statistical Correlations Between Gender, Winning an Intervention, and Being Interrupted, by Term.

Relationship	Subset	Direction	Term-Level Correlation	Case-Level Correlation
Winner & Was Interrupted		positive	0.42***	0.08***
Winner & Was Interrupted	Female Just.	positive	0.61***	0.12***
Loser & Did Interrupt		positive	0.40***	0.13***
Loser & Did Interrupt	Female Just.	positive	0.25	0.15***

*** indicates significant at the 0.00 level.

As shown in the first two rows of Table 7, the correlation between being interrupted and benefiting from the Chief Justice's intervention is positive and statistically significant for all Justices, and for the female Justices as a separate group. But note in the latter case, the relationship is stronger: at the term level, the correlation for the female Justices is 0.61, almost 50% higher than the general category of all Justices at 0.42.[212] In simple terms, the difference between these correlations shows the Chief Justice is more likely to intervene in favor of a female Justice who was interrupted than for a similar male Justice. The implication of this difference is that at least part of the Chief's motivation in intervening seems to be to address and remediate the gender disparity in Justice-to-Justice interruptions.

[211] In terms of the ratio between the rate at which interventions benefited the average female Justice compared to the average male Justice, the figure for the 2021 Term was 4.7.

[212] We tested both at the term level and at the case level. The proportions are similar at the case level, but as expected, the correlations are smaller.

Likewise, if we compare the bottom two rows of Table 7, we see the chances of being a loser in an intervention when a given Justice interrupts is positive and highly statistically significant, with a correlation of 0.40. But for the subcategory of female Justices, the effect is much smaller and is not statistically significant at the term level. Again, the difference between these two correlations shows the Chief Justice is more likely to intervene against a male Justice who interrupts than for a similar female Justice. In other words, the Chief also intervenes against those who interrupt, but it is not as clear that he does so against female Justices.[213] Again, this is consistent with our theory, and we are not surprised that the gender difference is more apparent when a female Justice is being interrupted as opposed to when making an interruption.

Presumably, the Chief mostly feels no need to intervene when one Justice interrupts another, and thus the phenomenon we are addressing in this Part is relatively subtle. Interventions are a rare event, so when the Chief does intervene, it is noteworthy. That he has been doing so increasingly is more noteworthy. That the timing of this increased activity corresponds to periods when the gender disparity in Justice-to-Justice interruptions has also intensified is even more noteworthy. That we can show overall patterns in this comparatively rare event that strongly suggest a connection between the substance of the Chief's interventions and a desire to address the ongoing issue of the gender disparity in Justice-to-Justice interruptions is truly remarkable.

We tested an alternative theory, one suggested by Chief Justice Roberts himself in a 2018 interview.[214] During the interview, Judge Wilkinson asked the Chief whether he was aware of the Jacobi and Schweers study showing "that the female justices were subject to interruption on a more regular basis than the male justices were" and whether he perceived that to be a problem.[215] Chief Justice Roberts responded in part that he had read the articles and continued:

> Part of my job—and I'm sorry that it has to be part of my job—is that I do try to . . . moderate between my colleagues when they are . . . asking questions. And I follow a very *strict rule* on that, when two justices are sorta trying to talk at the same time . . . like everything else in the building, we go by seniority. So I will you know call upon the more senior justice . . . whether it is Justice Kennedy or whether it is Justice Ginsburg . . . I don't know but I mean we have the other women we have on the bench are more junior. So if there is an interruption there when someone else is asking a question, it is more likely to be deferred in favor of the more senior Justice.[216]

[213] Testing these correlations at the case level does not indicate any statistical difference between all Justices and the female Justices; indeed, the coefficients are more or less identical (.13 and .15, respectively) and both are significant. *See supra* Table 7.

[214] *See* Federal Judicial Conference, *supra* note 21, at 11:26 (suggesting that the Chief Justice follows rules when moderating interruptions).

[215] *Id.* at 9:50.

[216] *Id.* at 11:17 (emphasis added).

The notion that the Chief follows a strict or even semistrict rule when intervening in oral argument was intriguing to us. We do not doubt that the Chief Justice believes that he intervenes according to seniority, but the data does not support his claim.[217] Overall, Chief Justice Roberts favored the more senior Justice in 47% of his interventions—a pattern more consistent with tossing a coin than a strict preference for seniority. While there were a few terms when the Chief tended to favor the more senior Justices, the highest percentage was 64% in the 2012 Term. But this term was an outlier: on average, the reverse was true in the majority of terms and in each of the eras we identified.

We are mindful that the data we have presented is sensitive to small changes because interventions are so rare and that this data could be subject to multiple interpretations.[218] We are also mindful that the Court is a dynamic institution and thus the patterns we have identified thus far may not hold in the future. Those caveats notwithstanding, we believe that this final set of results strongly supports the theory that Chief Justice Roberts is fulfilling his new role as referee at oral argument well and using his power to improve the conduct of oral argument by addressing the continuing gender disparity in Justice-to-Justice interruptions.

CONCLUSION

In our previous empirical work on Supreme Court oral argument, we have presented data that cast Chief Justice Roberts in a rather critical light.[219] Notably, we showed that Chief Justice Roberts arguably used the exigency of remote hearings during the pandemic to accrue power to himself and that he wielded that power in the same discriminatory pattern of gendered interruptions that the overall Court had displayed for many years.[220] This study shows that when it comes to intervening at oral argument, Chief Justice Roberts does not always get it right—in his early years of experimenting with interventions, he favored the male Justices even while the sole female Justice, Justice Ginsburg, was being

[217] Human behavior often diverges from self-reported behavior for various reasons, including confirmation bias and social desirability bias. Most of us drink more, tip less, and drive worse than we think we do or say we do. *See, e.g.*, Roy F. Baumeister, Kathleen D. Vohs & David C. Funder, *Psychology as the Science of Self-Reports and Finger Movements: Whatever Happened to Actual Behavior?*, 2 PERSPS. ON PSYCH. SCI. 396, 396-403 (2007) (discussing divergence between self-reported behavior and actual behavior and highlighting limitations of self-report measures in psychological research).

[218] Despite describing the use of seniority as a "strict rule" in determining in whose favor he referees, the Chief went on to add that other factors come into play, such as the length of time a Justice had been speaking on a particular issue and the need for the advocate to get a chance to respond. Federal Judicial Conference, *supra* note 21, at 12:08.

[219] Jacobi et al., *supra* note 39, at 449 (showing Chief Justice Roberts interrupted female Justices during telephonic oral arguments but did not do so for male Justices). That study also showed he terminated the female Justices' interchanges with the advocates disproportionately more than he did for the male Justices. *Id.* at 454.

[220] *Id.*

disproportionately interrupted. But Chief Justice Roberts has learned on the job and is now exercising his role as referee in an appropriate manner, attempting to combat the gendered pattern of interruptions we still see at Supreme Court oral argument. He is now intervening on behalf of female Justices three times as often as he intervenes for the male Justices, which is appropriate as the female Justices are still interrupted significantly more often.

What is more, Chief Justice Roberts deserves credit for doing this in what is largely uncharted territory. His predecessor, Chief Justice Rehnquist, seldom intervened, even though there was gender bias in the pattern of interruptions during his reign.[221] And prior to that, there was not much need, as interruptions of this kind are mostly a modern phenomena.[222] The Chief Justice has power,[223] but it is largely a soft power, with very few formal specified powers.[224] Chief Justice Roberts has been shown to be an institutionalist in many ways, as discussed;[225] now he is figuring out a new institutional role, using the limited tools he has. Like Jacobi and Schweers, we would like to see the Chief intervene more often and hand the floor back to the person interrupted, who is most often a woman. But at the same time, it is hard to prescribe the ideal rate of intervention, given both the soft nature of the Chief Justice's power and that part of the value of oral argument is its dynamism. But at least in terms of the pattern of *when* he is intervening, Chief Justice Roberts is doing the right thing, just as Jacobi and Schweers asked for.

The reason we would like to see more interventions is because Justice-to-Justice interruptions are still frequent and highly gendered. The fact the Supreme Court sought to change its rules in order to address this problem, in addition to the Chief Justice doing more in terms of intervening, is a sign of the Court taking the issue seriously, which is to be lauded. But the results on that side of our inquiry are more opaque. In terms of the initial questions driving this investigation—have interruptions gone down, are they less gendered, and did the change in structure in particular bring about any improvement—our answer is "only somewhat." Interruptions did go down, but largely because of the

[221] *Supra* Part I.C.

[222] Jacobi & Sag, *supra* note 7, at 1239 (showing that interruptions of various kinds—of advocates and by advocates, of Justices and by Justices—burgeoned significantly since 1995).

[223] The Chief Justice of the United States has been referred to as holding power "second only to the Presidency of the United States." 115 CONG. REC. 15179 (June 9, 1969) (statement of Sen. Strom Thurmond).

[224] All of the key powers of the Chief are matters of convention, including the power to set the agenda of the Court, preside over conference, and assign opinions when in the majority. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 90 (1998) (describing the norm that the Chief Justice speaks first at conference); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 82-83 (1964) (describing the authority of the Chief Justice); O'BRIEN, *supra* note 36, at 206 (describing conference procedures); MALTZMAN ET AL., *supra* note 124, at 7 (describing opinion writing procedure); Maltzman & Wahlbeck, *supra* note 124, at 551 (describing the Chief Justice's opinion assignment authority).

[225] *Supra* Part III.A.

pandemic. Once oral argument went back to its dynamic structure, interruptions rose again—and so, largely, did the gendered nature of those interruptions. The 2021 Term brought Supreme Court oral argument back to an average of five Justice-to-Justice interruptions per argument, the equal fourth highest in history, and the second highest rate of interruptions directed specifically to the female Justices by the other Justices. However, in terms of advocate interruptions of the Justices, in the 2021 Term, there was no discernible gender distinction at all. This is a novel result and a very positive one, which is aligned in time with the change in structure of oral argument.

The fact that we did not see a significant improvement in Justice-to-Justice interruptions does not mean there was not a positive effect from the structural change. Given the historic levels of polarization in the country and at the Supreme Court,[226] as well as the exceptionally politically divided and controversial atmosphere surrounding the Court now,[227] we must ask whether we should not expect interruptions to have been worse in the 2021 Term than they were in previous years. The fact that they were not may be a difficult-to-gauge benefit of the change in the structure of oral argument.

The results we found regarding the interruption of Justice Barrett suggest something interesting about the Court's ideological divisions. Previously, it was difficult to discern the effect of gender separate from the effect of ideology at oral argument. This Article was able to disentangle the gender and ideology effects from one another, showing that Justice Barrett, as a female conservative Justice, still gets interrupted significantly more often than her male conservative peers, though less often than her female liberal brethren. In addition, the study of advocate interruptions of Justices allowed us to show that interruptions of the female liberal Justices seen over the last few decades was shaped significantly by gender, separate from ideology.

The Supreme Court is slow to change, but in the last few years it has made quite a few changes, from the two-minute rule to the telephonic area and now to the hybrid approach to argumentation. The hybrid structure is an attempt to have the best of both worlds: enabling the thorough exploration of tough legal issues that the dynamic argument brings, while also having enough dedicated time for each Justice to provide a safe haven from interruptions. Ironically, advocate interruptions have not gone down under the hybrid approach, only the gender bias they previously displayed. But the hybrid approach has other benefits, such as encouraging the participation of Justice Thomas at oral argument, who was

[226] On the polarization of the Court, historically, see Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 321 (2016). *See generally* Jacobi & Sag, *supra* note 7 (arguing that polarization manifested at the Court by Justices behaving more like advocates).

[227] *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ ("Americans' ratings of the Supreme Court are now as negative as—and more politically polarized than—at any point in more than three decades of polling on the nation's highest court.").

overwhelmingly silent during oral argument prior to COVID-19.[228] The structural change does not seem to have had the dramatic effect sought, or it may need more time. Yet, the fact the Court is working on institutional changes to address the social problem of discrimination against women, even when they have achieved the highest pinnacle of a high-status profession, is to be lauded. As discussed, the transparency of oral argument contributes to the Court's legitimacy; in a similar vein, the Court's attempts to address gender disparities at oral argument may also bolster its legitimacy and moral authority.

Like the Court he leads, Chief Justice Roberts was slow to change. Our graphs show him learning over the years. But Chief Justice Roberts is nothing if not an institutionalist. He claims to care about the legitimacy and standing of the Court, and this Article suggests he has been doing more than just talking. Or rather, he has been talking by intervening, trying to address the problem of gendered interruptions. There is still work to be done, but this Article shows he is going about it in the right way.

[228] See Jacobi et al., *supra* note 39, at 415.