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## Gender, Ideology, and Dominance in Supreme Court Oral Arguments

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### ABSTRACT

Gender bias in political discourse has been demonstrated in many settings, including the US Supreme Court. We investigate the effects of ideology and gender in verbal interactions during Supreme Court oral arguments. We theorize that *all* justices possess unconscious gender schemas that lead them to speak more during presentations by women but that liberal and female justices likely have conscious egalitarian values that diminish the manifestation of gender schemas. We find that conservative justices speak more when female lawyers are arguing but that liberal justices show no such effect, suggesting that consciously held attitudes can mitigate the expression of unconscious gender schemas.

### KEYWORDS

US Supreme Court; oral arguments; gender schemas

Efforts to promote gender equality in the United States court system date to 1980 with the National Organization for Women's National Judicial Education Program to Promote Equality for Men and Women in the Courts. By the mid-1990s, documentation of gender bias in state courts increased, with survey data finding that gender bias was a "pervasive problem" (Riger et al. 1995, 466; see also Schafran 1987). The effect of the gender of judges and lawyers on decision making has also been a theme in court studies, though findings have been mixed (e.g., Boyd, Epstein, and Martin 2010; Collins and Moyer 2008; Hahn and Clayton 1996; Peresie 2005; Segal 2000).

Examination of gender bias and the courts, hence, is not a new topic of study. We argue, however, that gender bias has been underresearched at the court system's highest level. Lower-level courts provide the advantage of large numbers of judges and lawyers and greater diversity compared to the Supreme Court. We suggest, however, that examining gender bias at the US Supreme Court provides the most robust test of the presence of workplace gender discrimination due to the unique rules and rigid institutional features of the Supreme Court.

A small but growing number of studies have examined gender bias and the US Supreme Court. Patton and Smith (2017) find that female lawyers experience greater gender bias than their male counterparts in the form of more frequent and longer interruptions by justices during oral arguments before the US Supreme Court. In their law review article, Phillips and Carter find that conservative justices attempt to exert more “verbal control” over their interactions with female attorneys than liberal justices do (2009, 643). Szmer John, Sarver, and Kaheny (2010) find that conservative justices are less likely to support litigants represented by female lawyers, except when the case being argued involves a “women’s issue.” These studies represent three distinct approaches to examining the issue of gender bias and lawyers presenting oral arguments at the Supreme Court, with all finding such bias.

Other studies have focused on justice-to-justice interruptions and interruptions of justices by the arguing attorney. Jacobi and Schweers’s (2017) research, published in the *Virginia Law Review*, examined justice interruptions of other justices and interruptions of justices by lawyers. They found that male justices were more likely to interrupt female justices and that male lawyers were more likely to interrupt female justices than male justices. In a working paper, Feldman and Gill (2017) also find that male justices interrupt female justices more often than the other way around. Jacobi and Sag similarly find that “interruptions of female justices are positive, highly statistically significant, and substantively meaningful” (2019, 74).<sup>1</sup>

Justice ideology has also been examined in relation to gender bias at the Supreme Court. Phillips and Carter (2009) show that conservative justices posed different types of questions to female lawyers, and Szmer John, Sarver, and Kaheny (2010) found that conservative justices exhibited a propensity to vote against female lawyers in most types of cases. In an article published in the *Loyola Law Review*, Johnson, Black, and Wedeking find that “justices who take opposite ideological positions more frequently interrupt each other” (2009, 350). Jacobi and Schweers examine justice-to-justice interruptions, finding that conservative justices interrupt more often than liberal justices and, furthermore, that “the most common interruptions was of conservatives interrupting liberals” (2017, 1481). In their *Notre Dame Law Review* article, Jacobi and Sag report similar findings, noting, “Conservatives have been consistent throughout the six decades examined here in having a stronger tendency to interrupt their colleagues” (2019, 58). They find that after 1995, liberal justices significantly increased their interruptions, while conservative justices’ interruptions decreased, though not at a statistically significant level.

In this paper, we examine the effect of justice gender and justice ideology on gender bias toward lawyers during oral arguments.<sup>2</sup> We argue that the disparate treatment experienced by female lawyers is influenced by the justices’ unconscious and conscious attitudes. We assert that all justices are likely to hold unconscious gender schemas that classify the

court as a male domain, but that female and liberal justices are more likely than male and conservative justices to hold conscious egalitarian attitudes that contradict their implicit biases. We also examine how the manifestation of gender schemas may be influenced by the type of issue being litigated.

## Gender bias in political discourse

American political institutions were developed as, and largely remain, male domains. Perhaps due to the Year of the Woman in 1992 and a modest increase in the percentage of women elected to state legislatures, research examining facets of women in politics such as bill sponsorship, roll call voting, and representation on legislative committees flourished in the 1990s (e.g., Bratton and Haynie 1999; Burrell 1996; Dolan and Ford 1997; Swers 1998; Thomas 1994; Thomas and Welch 1991). An overriding theme in these studies and others was the masculine environment women encountered in political spaces. Political institutions were gendered, and men occupied preferred positions of power (Kenney 1996; Sapiro 1991).

The tendency to categorize people by sex, regardless of other roles or positions of power they might hold, activates gender stereotypes and in-group favoritism (Reskin 2000; Ridgeway and England 2007). This categorization, whether conscious or not, results in discriminatory behavior (Bobbit-Zeher 2011). When women are in occupations dominated by men, there is a greater chance of discrimination for violating gendered expectations (Burgess and Borgida 1999). Experiments have shown “stereotypes and in-group favoritism influences people’s perceptions and evaluations of others” and the application of role-incumbent schemas (Gorman 2005, 703). Role-incumbent schemas, importantly, may overlap with gender stereotypes. For example, a particular role (or job or political office) may be associated with “an abstract schema representing the characteristic traits and behaviors of successful role incumbents” (Gorman 2005, 704). When a role-incumbent schema overlaps with gender stereotypes, “jobholders are expected to be men or women, and the position is said to be “sex-typed” or “sex-labeled” (Gorman 2005, 704). We refer to this type of psychological construct as a “gender schema.”

Mattei argues, “Masculinity ... permeates politics and cultural definitions of leadership [and] ... men can use gender power to maintain their predominance in the public sphere” (1998, 441). One way to maintain predominance is through speech. Gorman (2005) argues that although role-incumbent schemas cannot be directly observed, they can be indirectly observed through language. Mattei notes, “One way in which a dominant group can maintain control is through the conscious or unconscious use of discourse” (1998, 442). Fairclough (1989) argues that power relations through language may occur in subtle ways without the subjects or participants being explicitly aware.

A number of studies spanning several decades, analyzing both observational and experimental data, have focused on speech and interruptions in political institutions to examine gender bias in political discourse. The findings are consistent: Women, in almost all cases, face significant obstacles in political discourse. Mattei found that women testifying before an all-male Senate committee were interrupted more frequently than men, and the questions directed at them were “more likely to undermine the authority of female witnesses than that of males” (1998, 459). These “gatekeeping” behaviors were displayed by senators of both parties. More recently, Karpowitz and Mendelberg confirm the elevated role of men over women in discussions of masculine subjects, such as politics, where men are “perceived as more competent and enjoy a higher status” (2014, 116). Speaking is an opportunity to establish authority, but the speaker is dependent on the reactions of others to confer that status. Mendelberg, Karpowitz, and Oliphant argue, “Interruptions are a communication signal ... [d]ifferences in patterns of interruptions are thus an indicator of, and reinforce, status inequality in conversation” (2014, 20–21).

Mendelberg, Karpowitz, and Oliphant (2014) go beyond examination of interruptions, speaking time, and tone of discourse. They theorize that the gender inequality in speech depends on a group’s decision rules and procedures. They find women benefit under two scenarios: 1) in groups with more women in which the decision rule is majority rule and 2) in groups with fewer women in which the decision rule is unanimous rule. Women in groups in which they were the minority and the decision rule was majority rule fared the worst, experiencing interruptions and lack of affirmation when they spoke.

### **Speaking time and the Supreme Court**

There is, perhaps, no better example of a male-dominated US political institution than the US Supreme Court. It was not until 1981 that a woman, Sandra Day O’Connor, was nominated and subsequently confirmed as a justice. Four more men would be appointed to the court before Ruth Bader Ginsburg was appointed by President Clinton in 1993. Justice O’Connor was replaced with a male justice by President George W. Bush, leaving only one sitting female justice on the court. Between the confirmation of Justice Ginsburg and the next female nominee, 16 years passed and three additional men were appointed. President Obama nominated two women in two years—Sonia Sotomayor in 2009 and Elena Kagan in 2010—bringing the composition of the Supreme Court to six men and three women.

The lawyers who argue before the court are no more diverse. Most are men, many are former clerks of the justices (McGuire 1993), and a handful are appearing more and more often before the court. A recent analysis of

Supreme Court records revealed that about 20% of all oral arguments made before the court over the course of a decade were made by just eight men. Further, only 66 of the 17,000 lawyers who petitioned the court accounted for 43% of the cases accepted. Of those 66 lawyers, only eight were women (Biskupic, Roberts, and Shiffman 2014). The gender imbalance among lawyers arguing before the court is declining over time, albeit slowly. Jacobi and Sag (2019) note that during the 1960s, 97% of the lawyers arguing before the court were male. By the 2010s, this share had fallen to about 83%.

Because the personnel of the court are overwhelmingly male, it is likely that the justices harbor role-incumbent schemas for lawyers appearing before the court that overlap with gender stereotypes. Appearances by female lawyers are inconsistent with these gender schemas, and therefore likely to activate unconscious biases resulting in behavior aimed at maintaining traditional gender roles. These behaviors include more frequent and prolonged interruptions of female lawyers compared to male lawyers (Patton and Smith 2017).

The possibility of role-incumbent schemas, gender stereotypes, and majority-rule decision making with a minority of women participating is likely to result in disparate treatment of female lawyers. Previous research has found evidence of disparate treatment of female lawyers arguing before the Supreme Court in the form of interruptions, type of questions asked, and vote patterns, with the latter two specifically linked to justice ideology (Patton and Smith 2017; Phillips and Carter 2009; Szmer John, Sarver, and Kaheny 2010). The strict rules surrounding oral arguments—enforced time limits for both sides and a familiar format of arguments modeled after the submitted briefs—should create a gender-neutral terrain for lawyers arguing before the court. We know this is not borne out, with the exception that when female lawyers argue women's issues the justices engage in less interrupting behavior (Patton and Smith 2017). Even when female lawyers are on the winning side of a case, they suffer interruptions as if they were a male lawyer on the losing side (Patton and Smith 2017). These are important findings because lawyers who endure more and longer interruptions are more likely to lose (Epstein, Landes, and Posner 2010; Jacobi and Sag 2019; Johnson, Black, and Wedeking 2009).

Speaking time, or “volubility,” is an indicator of dominance in social interactions. Dominance in conversation is an indicator of the speaker's higher status compared to other participants, and higher volubility is a way of expressing power and being perceived as powerful (Mast 2002). “In social encounters, dominant people are energized. They are assertive and decisive, and they speak and interrupt others more often. This, in turn, affords power to the dominant person” (Guinote 2017, 361).<sup>3</sup> The same person may feel more or less dominant depending on the perceived status of the people with whom they are interacting. Speaking a lot is a way of establishing dominance and demonstrating higher status compared to other participants in an interaction (Brescoll

2011). If justices feel more powerful relative to female lawyers, especially when compared to male lawyers (because of unconscious gender schemas), this feeling may well be expressed through more volubility during oral arguments.

While we agree with Patton and Smith (2017) that nonconscious cognitive processes, rather than explicit gender bias, push all justices to verbally dominate female lawyers more than male lawyers, we argue that the gender or ideology of the justices may also condition these interactions. Consciously held values can interact with and, to a certain extent, override subconscious biases (Mo 2015). Liberal judges tend to place a higher value on gender equality than conservative judges (Boyd, Epstein, and Martin 2010). Although there is reason to believe that all justices have absorbed gender schemas that would lead them to speak more during presentations by female lawyers, liberal justices will be less likely to interrupt female lawyers because their heightened *conscious* commitment to equal treatment may lead them to recognize and check differences in how they interact with men and women. There is empirical support for the proposition that conservative justices are more likely to manifest traditional gender schemas in carrying out their duties: Conservative justices are less likely than liberal justices to hire female law clerks. Peppers (2006), Kaheny et al. (2015), and Kromphardt (2017) all find that conservative Justices systematically hire fewer female law clerks than liberal justices do. This suggests that traditional ideas of the Supreme Court as a male domain are more influential among conservative justices than liberal ones.

We argue that all justices likely hold the unconscious cognitive association that the Supreme Court is a male domain, but that liberal and female justices would be more likely to consciously evaluate that association. Gender schemas and occupational stereotypes, or at least their manifestations, can be modified by conscious values. Gawronski and Bodenhausen (2006) describe an associative-propositional model of attitudes (see also Rydell and McConnell 2006). The associative process is an automatic response to some stimulus (Gawronski and Bodenhausen 2006). In our context, the automatic association is the role of “lawyer at the Supreme Court” with men, and the corollary that women are out of place in that role. The propositional process takes the automatic associations as input and compares them to consciously held values. The associative process is the basis for implicit attitudes, while the propositional process is the basis for explicit attitudes.

The automatic, associative response may be modified or counteracted through a process of cognitive elaboration (Gawronski and Bodenhausen 2006), which is a comparison of the automatic response to consciously held beliefs. If people have beliefs that are in conflict with the association, they may reject the association. Gawronski and Bodenhausen summarize: “Whether people consider their automatic affective reaction to be a valid basis for an evaluative judgment depends on the consistency of this



evaluation with other propositions that might be relevant for an evaluative judgment” (2006, 696).

In addition, the topic of a discussion may influence the way a gender schema is manifested. Szmer John, Sarver, and Kaheny (2010) found that justices were more likely to vote in support of a side represented by a woman in disputes involving “women’s issues.” Patton and Smith (2017) found that justices’ manifestation of bias against female lawyers disappeared when the case concerned an issue closely identified with women. Gender-related disputes may remind justices of the potential for discrimination against women, or may cause the justices to view women as authoritative on those subjects and, therefore, mitigate the manifestation of gender schemas.<sup>4</sup>

In the context of our research, a justice’s reaction to a female lawyer making a novel argument might be, “this doesn’t make sense,” whereas, the justice’s reaction to a male lawyer making the same argument might be, “that’s an argument I haven’t heard before.” These would be automatic responses. The propositional process might then take over, evaluating this automatic response in light of other propositions, such as “women are often falsely considered incompetent in political matters.” If liberal and female justices are more likely to subscribe to propositions that counter the automatic association of the Supreme Court with men, such justices would be more likely to reject their automatic response to a female lawyer’s argument.

Our main goal in this paper is to evaluate whether male and conservative justices show more gender bias than female and liberal justices in their interactions with lawyers during oral arguments. We test three hypotheses (H):

H1: Male justices, compared to female justices, show a greater tendency to speak more during presentations by female lawyers.

H2: Conservative justices, compared to liberal justices, will show a greater tendency to speak more during presentations by female lawyers.

H3: Justices’ tendencies to speak more during presentations by female lawyers will be mitigated when the dispute involves a gender-related issue.

## **Data and methods**

To evaluate these hypotheses, we analyze transcripts of Supreme Court oral arguments. We downloaded the transcripts from Lexis-Nexis and processed them through computer scripts that recorded the gender and other characteristics of the lawyers making oral arguments, the identities of each speaking justice, and the number and length of each justice’s speeches. We merged the resulting data with the Supreme Court Database (Spaeth et al. 2014) to



identify the legal issue involved in each case, the ideological orientations of the competing litigants, and the voting behavior of the justices. Our data covers 11 Supreme Court terms between 2004 and 2014.<sup>5</sup> The unit of analysis is an individual justice during an individual presentation by an attorney during oral argument. The oral argument for a particular litigant may be broken up into different presentations. This could happen when a single lawyer presents the entire argument but uses only a portion of his or her time in the initial presentation and saves the remainder for rebuttal or when two (or more) different lawyers appear for the same litigant. After splitting up the oral arguments by segment and by justice, our data set consists of 20,459 useable observations. [Table A1](#) presents summary data on all variables used in the analysis.

### Dependent variable

Our dependent variable, *Proportion of Words*, is the proportion of total words spoken during a presentation by an individual justice. To calculate this value, we divided total words spoken by the justice during the presentation by the sum of all words spoken during the presentation (by the lawyer and all the justices combined). For example, if Justice Alito spoke 250 words during a presentation in which 5,000 words were spoken, the value of *Proportion of Words* for this observation would be 0.05, or 5.0%.<sup>6</sup>

### Independent variables

The independent variables we are most interested in are *Female Lawyer*, *Male Justice*, and *Justice Ideology*. Recall that we expect all justices to speak more when female lawyers are presenting arguments due to nonconscious cognitive processes. However, we expect conservative justices, compared to liberal justices, to show a greater tendency to speak more when female lawyers are presenting. We also investigate whether male justices, compared to female justices, tend to speak more when female lawyers are presenting and whether treatment of female lawyers is different when the legal dispute concerns an issue related to women's rights.

*Female Lawyer* is a dummy variable that equals one if the lawyer making the presentation is a woman. We identified the gender of the lawyer by recording the title used in the transcript (e.g., "Mrs.," "Ms.," "Mr.," "Miss").<sup>7</sup> *Male Justice* is a dummy variable coded one for male justices. Our measure of *Justice Ideology* is the Martin-Quinn score (Martin and Quinn 2002). In our data, these scores range from approximately -2 to 2.5, with higher scores indicating more-conservative voting on the court.<sup>8</sup>

We include several control variables based on the extant literature. Multiple researchers have noted that justices tend to ask fewer questions of

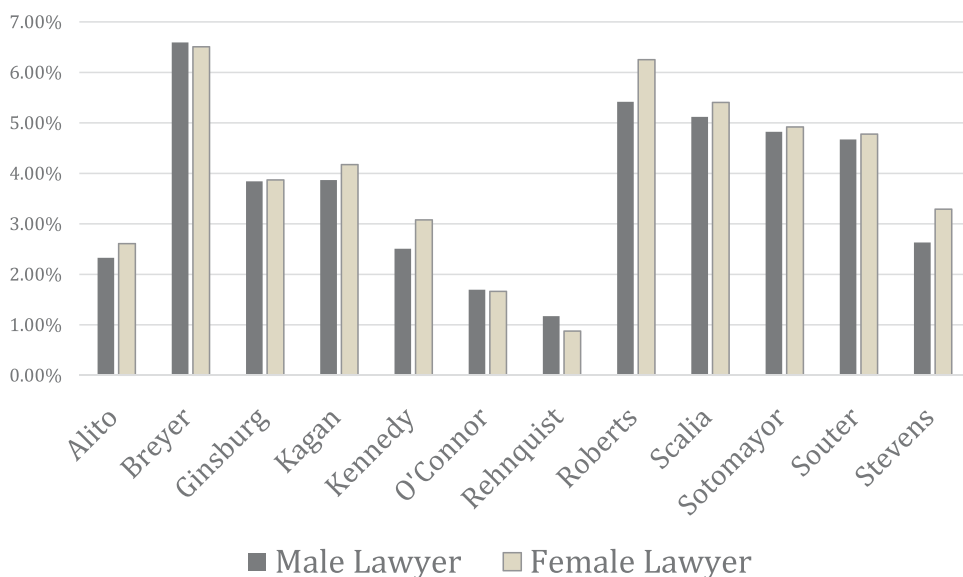
the side they support (see Epstein, Landes, and Posner 2010; Johnson, Black, and Wedeking 2009). *Ideological Alignment* measures the extent to which the ideology of the justice (per *Justice Ideology*) is consistent with the ideological implications of the outcome sought by the litigant. *SG's Office* and *Private Lawyer Based in DC* reflect the status of the lawyer making the presentation (McGuire 1995): *SG's Office* indicates that the lawyer is representing the Federal Solicitor General's Office and *Private Lawyer Based in DC* is a dummy variable reflecting the high status of lawyers based in Washington, DC, who appear before the Supreme Court (McGuire 1993). Justices tend to speak more during arguments over highly salient issues and particularly complex disputes (Black, Sorenson, and Johnson 2013). To control for these factors, we include Collins and Cooper's (2012) Case Salience Index<sup>9</sup> and a measure of case complexity, which is the sum of the number of legal issues and legal provisions involved in the dispute, as presented in the Supreme Court Database. *Gendered Issue* is a dummy variable indicating that the issue being argued implicates issues related to gender<sup>10</sup> (namely, contraception, abortion, and gender discrimination).<sup>11</sup>

We describe our analyses below. After a brief discussion of justice speaking times, we present two separate analyses of the data. The results of these analyses are consistent and show that conservative justices speak more during presentations by female lawyers compared to presentations by male lawyers, but show no systematic differences between male and female justices. First, we present the results of a treatment effects analysis, in which the "treatment" is a presentation by female lawyers. Second, we present the results of a tobit regression showing that *Justice Ideology* systematically affects justices' interactions with male and female lawyers, respectively, and that the effects of *Justice Ideology* are reversed for *Gendered Issues*.

### Average words spoken by justice

Figure 1 depicts the average words spoken by each justice during arguments presented by male and female lawyers, respectively. The height of each bar shows the average percentage of the total words spoken during a presentation for each justice. For example, Justice Breyer speaks the most, uttering over 6.5% of the words spoken per presentation. Justices Roberts, Scalia, Sotomayor, and Souter each contribute about 5% of the total words. In general, the conservative justices seem to speak less than the liberal ones. Conservative justices Alito, Kennedy, O'Connor, and Rehnquist all speak less than the median justice.

Moving on to differences in speaking time by gender of lawyer, the dark gray bars in Figure 1 indicate words spoken during presentations by male lawyers while the light gray bars indicate words spoken during presentations by female lawyers. For most justices, the light gray bar extends above the



**Figure 1.** Percentage of Total Words Spoken.

darker bar, indicating that most justices tend to speak more when women are presenting. All justices except Breyer, O'Connor, and Rehnquist speak more when female lawyers are presenting.<sup>12</sup> The data presented in [Figure 1](#) are simple averages and do not reflect controlling for any factor except lawyer gender. Below, we evaluate the effects of lawyer gender, justice ideology, justice gender, and gendered issue on the words spoken by the justices, while controlling for the other variables described above.

### Treatment effects analysis

Treatments effects analysis utilizes matching pairs of observations that are similar in all relevant respects except that one has received the treatment and one has not (Smith 1997). It then estimates, for each observation, (a) the value of the dependent variable if the observation belonged to the other (treated or untreated) group (called the unobserved potential outcome) and (b) the difference between the observed outcome and the unobserved potential outcome. The difference between these two values (a and b) is the effect of the treatment on the dependent variable.<sup>13</sup> The key output of treatment effects analysis is the Average Treatment Effect (ATE), which indicates the average effect of the treatment on the value of the outcome variable. We estimate separate ATEs for each justice. Our analysis includes all the independent variables described above.

### Results of treatment effects analysis

Figure 2 shows the means and 95% confidence intervals of the ATE for the justices.<sup>14</sup> For example, Justice Kennedy’s vertical bar extends up to 0.84%, indicating that his share of the total words spoken during a lawyer’s presentation increases 0.84% when that lawyer is a woman. Given that Justice Kennedy normally contributes around 2.5% of the words in a presentation, an increase of 0.84% means that when a woman is arguing before the bench, he contributes about 3.34% of the words spoken in a presentation. This is a dramatic increase for Justice Kennedy, speaking about 34% more during presentations by female lawyers compared to during presentations by male lawyers.

The results in Figure 2 suggest an ideological pattern. Four conservative justices but only one liberal justice speak significantly more when a woman is presenting arguments. After controlling for other factors, Justices Alito, Kennedy, Roberts, Scalia, and Stevens are shown to speak substantially more (i.e., increases of at least 0.50%) when female lawyers are presenting compared to when male lawyers are presenting. The differences are statistically significant for all these justices. None of the other justices show any substantial tendency to speak more when a woman is presenting.

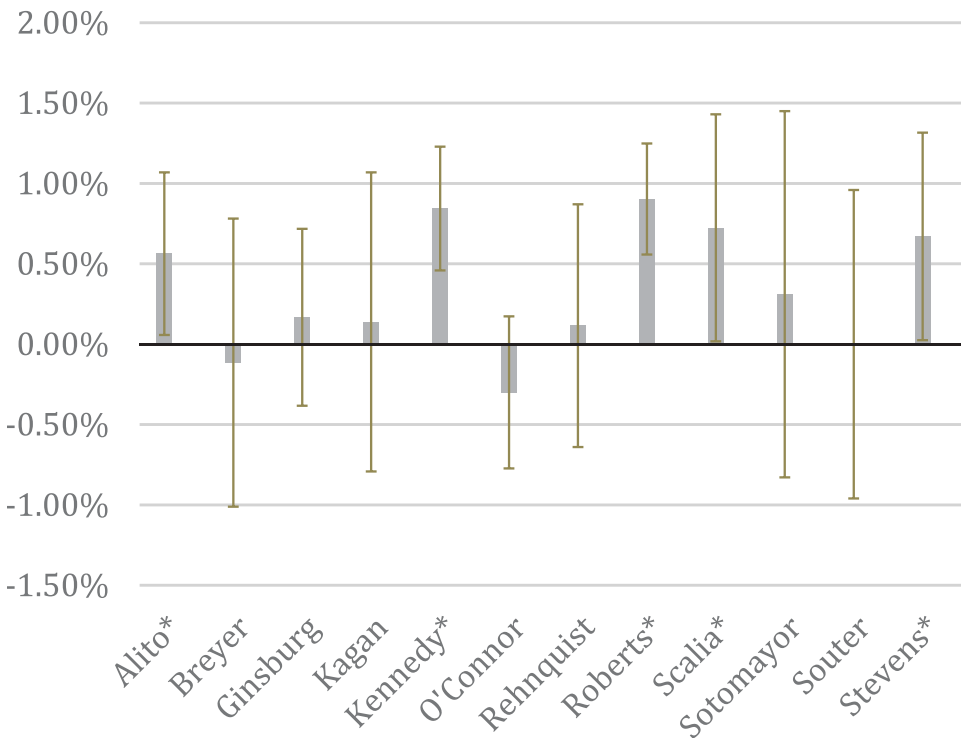


Figure 2. Effect of Female Lawyer on Words Spoken by Individual Justices.

The treatment effects analysis gives some hints about the effect of a justice's gender on how he or she interacts with male and female lawyers. Among female justices, only Justice O'Connor speaks less when female lawyers are presenting, while Justices Ginsburg, Kagan, and Sotomayor speak slightly more. None of these differences are statistically significant. The results of the treatment effects analysis, however, do support our theoretical argument that justice ideology is related to the justices' interactions with male and female lawyers. Conservative justices talk more during presentations by female lawyers and liberal justices generally do not.

We focus on the differences between categories of justices in Figure 3. These results are also from treatment effects analysis, controlling for the same independent variables. Figure 3 presents three separate comparisons. The first two vertical bars on the left compare the effect of *Female Lawyer* on speaking behavior by female and male justices. The words spoken by female justices decrease by a trivial amount when a female lawyer is presenting, while male justices speech increases by nearly 0.6%. The effect is statistically significant for male justices. The middle two bars of Figure 3 compare the effect of *Female Lawyer* on the speaking behavior of liberal and conservative

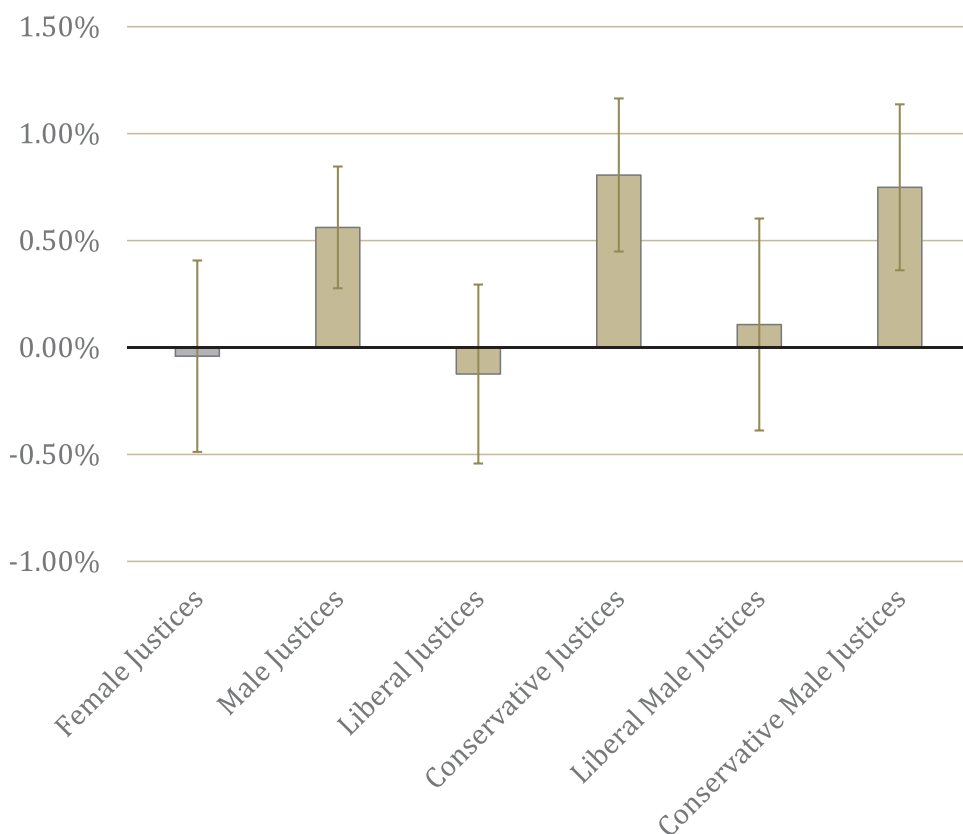


Figure 3. Effect of Female Lawyer on Words Spoken by Categories of Justices.

justices, respectively.<sup>15</sup> Liberal justices' speech decreases by about 0.12% when female lawyers are presenting. In contrast, conservative justices' speech increases by about 0.8% when female lawyers have the floor, and this difference is statistically significant. The effect of *Justice Ideology* (middle two bars) is dramatically larger than the effect of a justice's gender (left-most two bars). The two bars on the right show data on only the male justices. They show that, among male justices, conservative justices speak an additional 0.75% when female lawyers are presenting, while liberal justices speak only an additional 0.10% when female lawyers have the floor.

The results shown in [Figures 2](#) and [3](#) suggest that the way justices interact with male and female lawyers, respectively, is systematically related to *Justice Ideology*, with conservative justices talking more when women are presenting. Justice ideology seems to be driving this effect much more than a justice's gender. Among male justices, conservatives speak significantly more when female lawyers are presenting while liberals speak only slightly more. This seems to indicate that *Justice Ideology*, more than the justice's gender, is driving their interactions with female lawyers.

### Tobit model

Our final analysis is a tobit regression model combining observations from all justices. Tobit is suited for data in which the dependent variable is censored. In our case, the data is left censored, in that there are no values lower than zero but nearly a third of the observations of the dependent variable are zero. Zeroes indicate that the justice was present for but did not speak during the segment of the oral argument. Our data includes a total of 20,459 observations, of which 13,972 reflect that a justice spoke. [Table A3](#) in the appendix displays the numerical result from the tobit analysis.<sup>16</sup>

Our goal in this analysis is to examine the impact of justices' gender, *Justice Ideology*, and *Gendered Issue* on justices' interactions with female lawyers. The empirical evidence is generated by three interaction variables: *Male Justice \* Female Lawyer*, *Female Lawyer \* Justice Ideology*, and *Female Lawyer \* Justice Ideology \* Gendered Issue*. Our analysis shows no significant relationship between *Male Justice* and how justices treat female lawyers. The interaction variable *Male Justice \* Female Lawyer* is not statistically significant (see [Table A3](#)), so we cannot conclude that male and female justices react differently to female lawyers.<sup>17</sup>

The second interaction, between lawyer gender and *Justice Ideology*, is statistically significant<sup>18</sup> while controlling for the interaction *Male Justice \* Female Lawyer* (see [Table A3](#)). Interpretation of interactions in which at least one of the base variables is continuous is best done through graphics. [Figure 4](#) shows the marginal effect of *Female Lawyer* on *Words Spoken* as justice ideology moves

from liberal to conservative: the difference in speaking when a woman is arguing before them compared to when a man is arguing.

The line in Figure 4 slopes upward, showing that the effect of *Female Lawyer* is higher for conservative justices than for liberal justices. Note that at the left side of the figure, the line is very close to zero, indicating that very liberal justices speak no more when a woman is presenting than they do when a man is presenting. On the right side of the figure, the line is at +0.79%, indicating that very conservative justices speak an additional 0.79% when a woman is presenting.

To understand the substantive impact of these results, we can locate our current justices on the ideology scale. Justice Alito’s 2014 ideology score was 2.04. The model predicts that a justice with this ideology would contribute an additional 0.72% of the words to an oral argument when a female lawyer is presenting. The proportion of total words he would speak would increase from 2.6% to 3.3%, an increase of 28%.<sup>19</sup> At Justice Roberts’ 2014 ideology, the model predicts a 21% increase in words spoken when a woman is presenting. If only one justice interrupted at this increased rate of speech when a female lawyer argued before the court, we may conclude that these percentages, while statistically significant, may not make a substantive impact. However, these effects are cumulative, and in a typical oral argument it is more likely that four or five justices speak more when a female lawyer is presenting. Thus, their combined

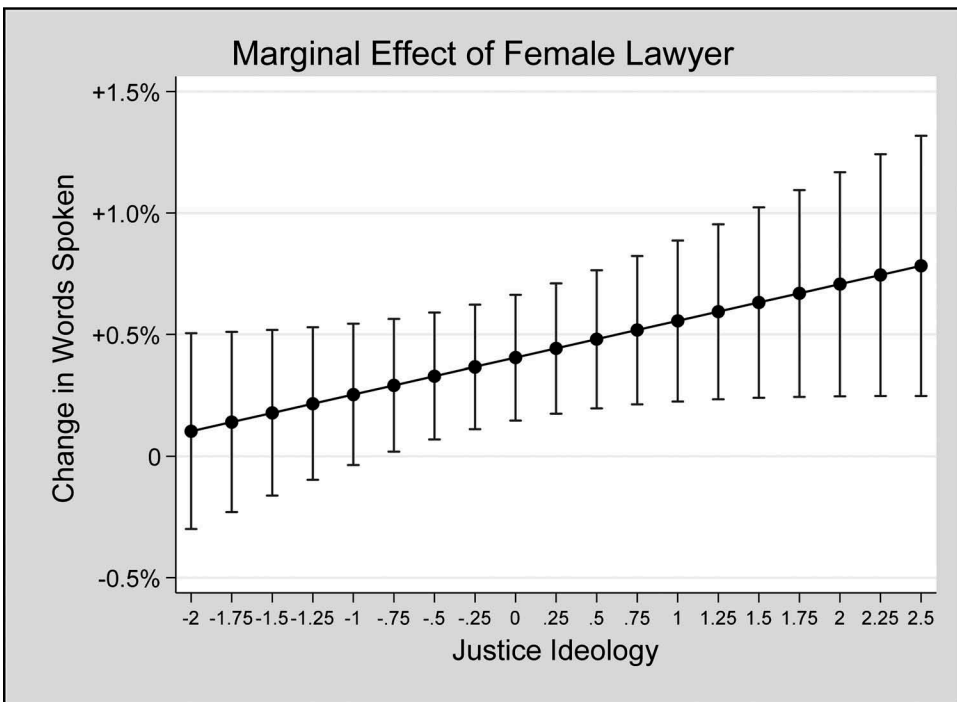


Figure 4. Marginal Effect of Female Lawyer.



speech will substantially diminish the female lawyer's speaking time and, hence, the opportunity to present her full argument.

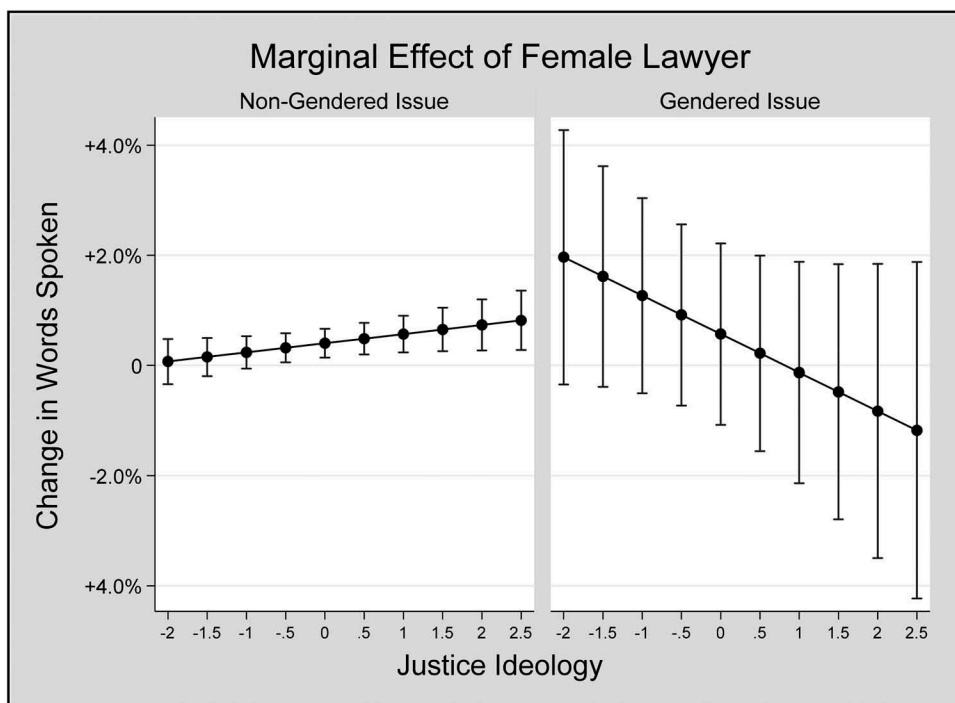
The error bars in [Figure 4](#) show the 95% confidence interval of the estimate. For justices near the liberal end of the scale, there is no statistically significant increase in speaking when a woman is presenting. The confidence interval includes zero for ideology scores less than about  $-0.75$ . All the justices commonly considered liberal have ideology scores less than  $-0.75$ . For example, Justice Breyer's ideology scores average  $-1.42$  and Justice Souter's scores average  $-1.58$  for the period covered by our data. Thus, there is no evidence that liberal justices are contributing to the special challenge faced by female lawyers at the Supreme Court.

### The effect of gendered issues

Our final hypothesis suggests that justices will treat female lawyers differently when the case being argued is a women's issue: abortion, contraception, or gender discrimination. [Figure 5](#) shows the effect of *Female Lawyer* on gendered and nongendered issues. The left side of [Figure 5](#) depicts nongendered issues and shows the same pattern as [Figure 4](#): Conservative justices talk more when a female lawyer is arguing before the court. The right side of [Figure 5](#) shows the effect of *Female Lawyer* on gendered issues. The line slopes sharply down, indicating that contrary to the pattern seen in nongendered cases, conservative justices speak less than liberal justices in this situation. At values of *Judicial Ideology* greater than one (approximately the value of this variable for Justice Roberts), the effect of *Female Lawyer* is actually negative in these types of cases. Notice, however, that the confidence interval of this effect includes zero all across the range of *Judicial Ideology*, so these effects are not statistically significant. The large confidence intervals are due to the small number of cases concerning gendered issues. Only about 1.7% of the observations involve gendered issues. Because of these large confidence intervals, we cannot conclude that our hypothesis is supported, but the results of our analysis are consistent with the findings of Patton and Smith (2017).

### Discussion and conclusion

Speaking time during oral arguments is important for many reasons. Oral arguments allow justices to probe and criticize the legal arguments made by lawyers and allow lawyers to lay out their arguments directly to the justices and respond to any questions or objections the justices may have (Jacobi and Sag 2019; Johnson 2004). The more of a lawyer's time the justices use, either through frequent interruptions or by lengthy questions, the more fragmented and truncated the lawyer's presentation will be. The perceived quality of the



**Figure 5.** Marginal Effect of Female Lawyer, Gendered vs. Non-Gendered Issue.

lawyer's oral presentation has been shown to influence the justices' votes (Johnson, Wahlbeck, and Spriggs 2006) and the lawyer who is subjected to more and longer interruptions and questions from the justices most often ends up losing the case (Epstein, Landes, and Posner 2010; Jacobi and Sag 2019; Johnson, Black, and Wedeking 2009; Roberts 2005; Shullman 2004; Wrightsman 2008).

Oral arguments can also influence the content of the court's opinions (Johnson 2001). Opinions articulate the legal policy associated with its decisions and guide lower court implementation of the law. It follows that if a lawyer's presentation is disrupted, it can affect both who wins the case and legal policy more broadly. Our results reinforce previous research indicating that the gender of the lawyer exerts a systematic effect on how freely that lawyer is allowed to present his or her case to the Supreme Court. The justices' manifestation of bias against female lawyers, therefore, may well affect both the immediate decision and legal policy made by the court.

Our primary finding of importance is that conservative Supreme Court justices speak more when female lawyers are presenting arguments compared to when male lawyers are presenting. Indeed, the differences identified by Patton and Smith (2017) in justices' behavior during presentations by female lawyers compared to presentations by male lawyers appear to be driven

entirely by conservative justices, at least for the time period examined here. The difference in words spoken may not exhaust the effects of the different treatment faced by women. These disruptions can derail an argument or confuse the other justices. If the connection between judicial ideology and treatment of female lawyers holds for the new justices, the appointment of Justice Gorsuch to replace Justice Scalia will likely continue this pattern and the appointment of Justice Kavanaugh to replace the relatively moderate Justice Kennedy promises to increase the disparity faced by women arguing before the court.

Our results support our theoretical argument that the justices' political values condition the manifestation of implicit biases. This indicates that consciously held values can overcome implicit biases, even in situations in which the person is reacting in real time. Our research is the first to show this relationship between justice ideology and gender bias during oral arguments. The fact that conscious values can override implicit impulses strikes us as good news for those who would like to see judges and other political decision-makers avoid reactions based on stereotypes or other unexamined inclinations. Our findings suggest that learning about the prevalence of such bias can reduce it. This conclusion, that the manifestation of implicit bias is conditioned by other factors, is consistent with our finding (and that of Patton and Smith 2017) that justices do not verbally dominate female lawyers when the legal dispute focuses on a gendered issue. The cognitive framework of "gendered issue" apparently causes the justices to suspend the gender schemas that would otherwise influence their behavior.

We examined gender bias in one elite political institution, finding that conservative justices speak more when a woman is the arguing lawyer compared to when a male lawyer is presenting before the court. Our findings, however, have wide-ranging implications beyond the Supreme Court. Traditional gender schemas imply that major roles in politics should be held by men. These gender schemas have been shown to structure verbal interactions at the US Supreme Court (Feldman and Gill 2017; Jacobi and Schweers 2017; Patton and Smith 2017; Phillips and Carter 2009; Szmer John, Sarver, and Kaheny 2010), despite institutional rules and attention to the law that would suggest gender discrimination would be less likely to occur in that setting. Verbal domination is a way of expressing and reinforcing social hierarchy. This suggests something women in workplaces have long known: Biased behavior in the workplace is not restricted to overt and conscious actions, and attention should also be given to other biased behaviors that perpetrators may not be aware they are engaging in. We assume that the gender bias shown here and in other work is not purposeful or even conscious. But, importantly, our results suggest that the manifestation of gender schemas can be checked if implicit biases are at odds with conscious values.

## Notes

1. Examination of gender on interruptions is not the primary focus of the Jacobi and Sag (2019) article. They note that their initial finding that female justices are interrupted less was likely due to the researchers' study design. They subsequently excluded the term variable to better approximate the effect of gender on interruptions.
2. Oral argument transcripts did not begin identifying the speaking justice until the 2004 term. Hence, our sample is smaller than Patton and Smith (2017) so that the gender and ideology of the justice could be identified.
3. See also Brescoll (2011): "The more an individual verbally participates, the more likely that individual will be seen as having power. Therefore, volubility not only plays an important role in establishing power hierarchies but also in communicating one's power to others."
4. For more on how the context of a discussion can affect the manifestation of implicit attitudes, see Blair 2002; Blair, Ma, and Lenton 2001; Dasgupta and Greenwald 2001; Karpinski and Hilton 2001; Lowery, Hardin, and Sinclair 2001; Mitchell, Nosek, and Banaji 2003.
5. The Lexus-Nexis transcripts from terms before 2004 do not identify the justices speaking, so we could not conduct justice-level analysis of previous terms.
6. We could not use a more straightforward measure of justices' behavior during oral arguments (such as "number of words spoken" or "number of interruptions") because the presentation lengths overall differ so much that raw numbers are not good measures.
7. Solicitors general and attorneys general are often identified by the title "General." For these cases, we used the first name of the lawyer as listed in the transcript to identify the gender.
8. Justice Thomas' Martin-Quinn score is much more conservative, about 3.5. However, he speaks very rarely during oral arguments and so is not present in our data.
9. Collins and Cooper's measure of case salience is based on the extent and prominence with which the case is covered in four major national newspapers.
10. *Gendered Issues* is coded 1 if the Supreme Court Database Issue code equals 20,130 (sex discrimination), 20,140 (sex discrimination in employment), or 50,020 (abortion and contraception).
11. We also include dummy variables indicating whether the observation is the first segment of an argument by either the petitioner or the respondent. We find that justices speak significantly more during the first segments of each side's argument compared to later segments.
12. Overall, these data show that the justices cumulatively speak 44.7% of the words during presentations by male lawyers but 47.4% of the words during presentations by female lawyers.
13. These analyses were done with Stata's *teffects* estimation. The researcher can choose different methods of matching observations (propensity scoring and nearest neighbor matching) and different estimators for estimating the unobserved potential outcomes. We use propensity score matching, nearest neighbor matching, and logistic estimator for imputing the unobserved potential outcomes.
14. The numerical results of the treatment effects analysis are presented in Table A2.
15. For this analysis, we created a binary version of the justice ideology variable. All justices with Martin-Quinn scores greater than 0 were coded as conservative; all justices with scores lower than 0 were coded as liberal.

16. We have also done these analyses using the two-part model and a hurdle model. The results of these models are substantively very similar. We present the tobit results here at the suggestion of a reviewer and due to ease of explanation.
17. The mere fact that the coefficient of an interaction term is not statistically significant does not necessarily mean that the interaction is insignificant for the whole range of its constituent variables. However, in cases such as this in which the conditioning variable is dichotomous, we can conclude that the relationship is insignificant.
18. The *t* statistic for the interaction term *Female Lawyer* \* *Justice Ideology* is 1.86, which falls just short of conventional levels of statistical significance. However, analysis of the effect of *Female Lawyer* across the range of *Justice Ideology* shows that the effect of *Female Lawyer* is significant for values of *Justice Ideology* above  $-0.75$ .
19. These figures were calculated using Stata's postestimation margins command.

## Disclosure statement

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## Appendix

**Table A1.** Summary Statistics for Observations Used in the Tobit Analyses.

Variable	Mean	Standard Deviation	Minimum	Maximum
Words Spoken	0.043	0.051	0	0.594
Justice Ideology	−0.216	1.726	−2.669	2.566
Female Lawyer	0.151	0.358	0	1
Gendered Issue	0.017	0.130	0	1
Male Justice	0.735	0.441	0	1
Ideological Alignment	0.375	1.748	−2.669	3.868
Private Lawyer Based in DC	0.290	0.454	0	1
Case Complexity	1.133	0.360	1	3
Salience	2.381	2.166	0	8
SG's Office	0.238	0.426	0	1
First Petitioner	0.299	0.458	0	1
First Respondent	0.286	0.452	0	1

Note. Number of Observations = 20,459.

**Table A2.** Treatment Effects Analysis for Individual Justices.<sup>a</sup>

Justice	Coefficient	Standard Error	Z-score
Alito <sup>a</sup>	0.00563	0.00258	2.18
Breyer	-0.00115	0.00457	-0.25
Ginsburg	0.00167	0.00281	0.60
Kagan	0.00139	0.00475	0.29
Kennedy <sup>a</sup>	0.00844	0.00196	4.30
O'Connor	-0.00300	0.00241	-1.24
Rehnquist	0.00115	0.00390	0.30
Roberts <sup>a</sup>	0.00903	0.00329	2.74
Scalia <sup>a</sup>	0.00724	0.00360	2.01
Sotomayor	0.00311	0.00581	0.53
Souter	0.00000	0.00490	0.00
Stevens <sup>a</sup>	0.00671	0.00329	2.04

<sup>a</sup>The treatment effects analysis was conducted using Stata's `teffects` command. We used propensity score as the match criterion and nearest neighbor matching, with the `nn(1)` option. We included the following covariates: *Justice Ideology*, *Ideological Alignment*, *Private Lawyer Based in DC*, *Case Complexity*, *Salience*, *SG's Office*, *First Petitioner*, and *First Respondent*.

**Table A3.** Tobit Analysis of Influences on Justices' Speech during Oral Arguments.

Variable	Coefficient Estimate	Standard Error
<i>Justice Ideology</i>	-0.000262	(0.000350)
<i>Female Lawyer</i>	0.000966	(0.00295)
<i>Female Lawyer * Justice Ideology</i>	0.001665	(0.000894)
<i>Gendered Issue</i>	-0.000660	(0.00412)
<i>Gendered Issue * Justice Ideology</i>	0.002384	(0.00231)
<i>Female Lawyer * Gendered Issue</i>	0.001553	(0.00849)
<i>Female Lawyer * Gendered Issue * Justice Ideology</i>	-0.008641	(0.00484)
<i>Male Justice</i>	0.003349*	(0.00136)
<i>Male Justice * Female Lawyer</i>	0.004309	(0.00346)
<i>Ideological Alignment</i>	-0.01430***	(0.000267)
<i>Private Lawyer Based in DC</i>	-0.00710***	(0.00110)
<i>Case Complexity</i>	-0.00046	(0.00130)
<i>Salience</i>	0.00079***	(0.000219)
<i>SG's Office</i>	0.00950***	(0.00120)
<i>First Petitioner</i>	0.04203***	(0.00117)
<i>First Respondent</i>	0.04151***	(0.00117)
Constant	0.00306	(0.00209)

Note. Number of Observations = 20,459; Uncensored: 13,972; Left-censored: 6,487.

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$