

Utah Law Review

Volume 2015 | Number 5

Article 2

2015

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Recommended Citation

Sullivan, Barry and Canty, Megan (2015) "Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958–60 and 2010–12," *Utah Law Review*. Vol. 2015 : No. 5 , Article 2. Available at: <https://dc.law.utah.edu/ulr/vol2015/iss5/2>

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INTERRUPTIONS IN SEARCH OF A PURPOSE: ORAL ARGUMENT IN THE SUPREME COURT, OCTOBER TERMS 1958–60 AND 2010–12

Barry Sullivan* and Megan Canty**

*I think it would be an intellectual feast just to be there*¹

*[T]hey're so prepared, they're so smart, they're so thorough, they're so engaged, their questioning is rapid-fire. You're really seeing an institution of government at work, I think, in a really admirable way.*²

*The Justices joke and clown, interrupt each other, give the impression of playing to the crowd—and certainly seem to be having a good time.*³

I. INTRODUCTION

During the last several decades, the Supreme Court of the United States has experienced many significant changes, both with respect to the Court's internal

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** © 2015 Megan Canty. Assistant Director of the Dan K. Webb Center for Advocacy, Loyola University Chicago School of Law. The authors would like to thank Joseph Weishampel, who was principally responsible for compiling the empirical data contained in this Article; Conor Desmond, who assisted us with some of the statistical analysis; Jeffrey Gordon, Ghirlandi Guidetti, John Klinker, and David Lakin, who provided additional research assistance and helped prepare the Article for publication; and Julienne Grant, Loyola Reference Librarian, who provided additional research guidance. We are also grateful to Mary Ellen Becker, Robert P. Burns, Erwin Chemerinsky, Zelda Harris, Alfred S. Konefsky, H. Jefferson Powell, Zoë Robinson, Matthew Sag, Jay Tidmarsh, Winnifred Fallers Sullivan, and Michael Zimmer, as well as participants in a faculty seminar at the School of Law at Trinity College Dublin, for helpful comments on an earlier draft. The authors are also grateful to Marcia Coyle, who generously responded to a question we raised. Some of the work on this Article was accomplished while Professor Sullivan was Arthur Cox Visiting Research Fellow and Visiting Professor at Trinity College Dublin. He would like to thank Arthur Cox and Trinity College, as well as the Loyola Faculty Research Fund and the Cooney & Conway Chair Fund, for their support.

¹ *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 854 (1987) (testimony of Judge Robert H. Bork).

² *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 83 (2010) [hereinafter *Kagan Confirmation Hearing*] (testimony of Solicitor General Elena Kagan).

³ LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 314 (2013).

practices and in the larger context within which the Court does its work: Congress has virtually eliminated the Supreme Court's mandatory jurisdiction,⁴ while the Court itself has drastically reduced the size of its discretionary review docket, thereby producing a merits caseload about half the size that it was in the 1980s;⁵ the lower federal courts have experienced a significant increase in filings and dispositions, and Congress has authorized many additional judgeships to accommodate that growth;⁶ Congress has doubled the authorized complement of Supreme Court law clerks;⁷ the Court's membership has become more diverse in

⁴ See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 391–95 (2004) (detailing the gradual erosion of mandatory jurisdiction through legislation from the late nineteenth century to the late twentieth century, culminating in the enactment of Supreme Court Case Selections Act, Pub. L. No. 100-352, 102 Stat. 662 (1988), which gave the Court virtually complete (albeit not total) control over its docket).

⁵ See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 950 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)) (“[T]he Supreme Court’s plenary docket has plunged over the last two decades, from 153 signed opinions in 1986 to a comparably paltry seventy-four signed opinions in 2002 and 2003.”) (citation omitted). The Court’s output has remained at about that level. See *Opinions*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/opinions/slipopin/14> (last visited May 26, 2015), archived at <http://perma.cc/GVY5-4DRU>. As recently as the 1980s, the Supreme Court’s caseload was generally regarded as overwhelming. See, e.g., David M. O’Brien, *Managing the Business of the Supreme Court*, 45 PUB. ADMIN. REV. 667, 667 (1985) (“All of the justices now agree that they are overworked by deciding too many cases.”).

⁶ See RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 37–38 (2013). Since 1960, the caseloads of the federal courts of appeals have grown elevenfold. *Id.* at 37. According to Judge Posner, “There has been a parallel increase in the number of cases in the district courts, but the increase in the courts of appeals has been larger in percentage terms because the appeal rate has risen.” *Id.* The number of authorized judgeships has increased 177% at the district court level, from 241 to 667, and 163% at the court of appeals level, from sixty-eight to 179. *Id.* at 38. Congress has also sought to relieve the burden on judges by increasing the number of lower-court clerkships and providing for staff attorneys. See *infra* note 7.

⁷ See WARD & WEIDEN, *supra* note 5, at 45. Congress increased the number of authorized law clerks from two to three in 1970 and from three to four in 1974. *Id.* Significantly, Congress also has increased the number of lower-court clerkships. In 1960, a federal court of appeals judge could employ two law clerks, while a federal district judge was authorized to have one law clerk. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139 (1999). Today, federal appellate judges may hire up to five clerks if they forego employment of a judicial assistant or secretary, while district judges may hire up to three. *Inside the Federal Courts, Who Does What*, FED. JUDICIAL CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/352> (last visited June 11, 2015), archived at <http://perma.cc/8CSK-PXLU>.

some respects, such as gender, but less so in others, with all of the current Justices having graduated from Harvard or Yale, and a plurality having been law professors at elite institutions;⁸ the Court has reduced by half the time allotted for oral argument;⁹ the Court's post-argument conference reportedly has become shorter and more perfunctory;¹⁰ the Court's opinions have increased in length;¹¹ the exchanges in the Justices' opinions are often more tendentious;¹² and the Justices seem to savor

Additional resources have been provided to appellate judges through the development of "staff attorney" offices. *See id.*

⁸ *See Weekend Edition Sunday: The Harvard-Yalification of the Supreme Court*, NPR (May 16, 2010, 9:01 AM), <http://www.npr.org/templates/story/story.php?storyId=126802460> [hereinafter *Weekend Edition Sunday*]. Justices Breyer, Ginsburg, Kagan, and Scalia were all full-time law professors earlier in their careers. *See Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 23, 2015), *archived at* <http://perma.cc/CG6S-YUFE>. In addition, Justice Kennedy taught constitutional law at the McGeorge School of Law from 1965 to 1988. *See id.* Some observers have also commented on a shift in religious affiliations. Whereas most Justices of the past were Protestants, the Court is now composed entirely of Roman Catholics and Jews. Indeed, six of the twelve Catholics ever to have served on the Court are currently serving. Nina Totenberg, *Supreme Court May Soon Lack Protestant Justices*, Morning Edition, NPR (Apr. 7, 2010), <http://www.npr.org/templates/story/story.php?storyID=125641988>; Sarah Posner, *Does the Supreme Court's Religious Composition Matter?*, RELIGION DISPATCHES, (Apr. 7, 2010), *available at* <http://www.religiondispatches.org/does-the-supreme-courts-religious-composition-matter/>, *archived at* <http://perma.cc/M5S6-7JUF>.

⁹ *See infra* note 121.

¹⁰ *See* RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 13 (2012).

¹¹ *See, e.g.,* Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Hous. L. Rev. 621, 630, 634–35 (2008). In the 1950s, the median length of Supreme Court opinions was about 2,000 words. *Id.* at 634. In October Term 2009, the median length was 8,265 words. *See* Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <http://www.nytimes.com/2010/11/18/us/18rulings.html>, *archived at* <http://perma.cc/L6E2-KZJ4>.

¹² *See* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 386, 399–400 (2000) (expressing concern about one justice's rhetoric and the example it sets for law students and lawyers as to what counts for acceptable advocacy); Linda Greenhouse, *Name-Calling in the Supreme Court: When the Justices Vent Their Spleen, Is There a Social Cost?*, N.Y. TIMES (July 28, 1989), <http://www.nytimes.com/1989/07/28/us/law-bar-name-calling-supreme-court-when-justices-vent-their-spleen-there-social.html?smid=pl-share>, *archived at* <http://perma.cc/TGQ4-CS22>; Tony Mauro, *Supreme Court Justices Need to Regain Civility*, USA TODAY (May 14, 1991); Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan.–Feb. 2007, *available at* <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>, *archived at* <http://perma.cc/P8CY-KUG8>. *But see* David A. Yalof et al., *Collegiality on the U.S. Supreme Court: An Early Assessment of the Roberts Court*, 94 JUDICATURE 12 (2011).

a degree of public celebrity that was shunned by even their recent predecessors.¹³ Even the confirmation process has changed in recent years.¹⁴

Yet another significant change was noted by then-Judge John G. Roberts, Jr., in 2004. Speaking to the Supreme Court Historical Society, shortly before his appointment as the nation's seventeenth Chief Justice, he observed that one of the most significant changes during his professional lifetime had been the increased

¹³ RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA* 27–28 (2011). But one commentator has observed that the Justices seem to be selective in choosing their venues and seem to prefer appearing before friendly audiences. See Adam Liptak, *Justices Get Out More, But Calendars Aren't Open to Just Anyone*, N.Y. TIMES (June 1, 2015), http://www.nytimes.com/2015/06/02/us/politics/justices-get-out-more-but-calendars-arent-open-to-just-anyone.html?hpw&rref=politics&action=click&pg_type=Homepage&module=well-region®ion=bottom-well&WT.nav=bottom-well&_i=0 (“Tracking the public appearances of the justices is surprisingly hard. They are public officials and public figures, and they seem to like the acclaim and influence that come from appearances before friendly audiences. But many of them appear wary of more general public scrutiny.”). That commentator has also noted that, “As the court’s workload has dropped, the justices have found time for more outside appearances.” *Id.*

¹⁴ The confirmation process has become more protracted, and perhaps more adversarial on average, in recent years. It is unimaginable, for example, that a Justice could be confirmed today after a Senate hearing that lasted only ninety minutes—including only eleven minutes of testimony by the nominee—as was the case with Justice Byron White in 1962. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 330–31 (1998). Observers may disagree about the extent to which the confirmation process has become more contentious, or when the change, if any, occurred, but President Lyndon Johnson’s attempted elevation of Justice Abe Fortas to the Chief Justiceship, and the subsequent nominations by President Richard Nixon of Judge Clement Haynsworth, Jr., and Judge G. Harrold Carswell, may have marked a turning point in the modern period. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1155–56 (1988); see RICHARD HARRIS, *DECISION* 25–35 (1971) (detailing the history of the Carswell nomination); see generally Elena Kagan, *Review: Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 919 (1995) (book review) (discussing the “brutalization and the politicization of the [confirmation] process”); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203 (1988) (explaining that “the Senate’s role in the appointment of Supreme Court judges is properly viewed as largely ‘political’”). The process certainly became more bare-knuckled with the nominations of Judge Robert Bork and Judge Clarence Thomas. See, e.g., Edward M. Kennedy, *Robert Bork’s America*, 133 Cong. Rec. S9188 (daily ed. July 1, 1987) (floor statement of Sen. Edward M. Kennedy on the nomination of Robert Bork); ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 191 (1st ed. 1989) (explaining that Bork’s strong association with the right had to be played down); CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* 217 (2007) (“All I knew was that I was about to face a battle far worse than anything I’d ever before experienced. ‘You know that some of my opponents are going to try to kill me,’ I told Virginia as we drove home from Andrews Air Force Base.”). From the very beginning of our history, however, many nominations have failed through inaction, withdrawal, or Senate rejection. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 142–51 (1985).

“professionalization” of Supreme Court advocates and the “re-emergence of a Supreme Court Bar.”¹⁵ The Chief Justice thus described the recent ascendancy of a small cadre of lawyers who regularly appear before the Justices,¹⁶ not unlike the Supreme Court bar of the early nineteenth century when a large number of cases was argued by a small group of lawyers—including such luminaries as William Pinkney, Thomas A. Emmet, Daniel Webster, William Wirt, and Horace Binney.¹⁷ Although Chief Justice Roberts recognized that the desirability of this development might be questioned by some as yet another indication of the triumph of elitism at the Court

¹⁵ John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 68 (2005) (“Over the past generation, roughly the period since 1980, there has been a discernible professionalization among the advocates before the Supreme Court, to the extent that one can speak of the emergence of a real Supreme Court bar.”); see also Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490 (2008) (explaining that “what has gone wholly unrecognized by all, including legal scholars, is how the re-emergence of a Supreme Court Bar of elite attorneys similar to the early-nineteenth-century Bar in its domination of Supreme Court advocacy is quietly transforming the Court and the nation’s laws”).

¹⁶ Most observers would have included the Chief Justice in that group prior to his appointment to the bench. MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 63 (2013) (“John Roberts was a leading member of the new Supreme Court bar.”).

¹⁷ MAURICE G. BAXTER, *DANIEL WEBSTER AND THE SUPREME COURT* 17–35 (1966). As recently as 1987, Chief Justice Rehnquist observed that “[t]here is no such Supreme Court bar at the present time.” WILLIAM H. REHNQUIST, *THE SUPREME COURT* 249 (1987).

and in the nation,¹⁸ he found it a salutary development because of what he took to be the improved quality of advocacy that accompanied it.¹⁹

¹⁸ Roberts, *supra* note 15, at 79. As Chief Justice Roberts noted, “the re-emergence of a Supreme Court bar” means that more cases originating around the country will be briefed and argued by Washington lawyers. *Id.* at 68. In addition, since the Court grants certiorari far less often than it did a generation ago, oral argument actually occurs in far fewer cases. Because even the most distinguished Supreme Court advocates need to demonstrate to paying clients that they have a continuous presence at the Court, many “chase” cases in which certiorari has been granted or seems likely to be granted. These advocates often volunteer to brief a case for free, provided that they present the oral argument. Adam Liptak, *Specialists’ Help at Court Can Come with a Catch*, N.Y. TIMES (Oct. 9, 2010), http://www.nytimes.com/2010/10/10/us/10lawyers.html?pagewanted=all&_r=0, (on file with the Utah Law Review). The perceived need to maintain one’s image as a “player” may also provide part of the explanation for the proliferation of amicus curiae briefs. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 770 (2000) (detailing the rise of amicus briefs since World War II). Of course, the Court itself has become more “elite,” with all of the current Justices having graduated from Harvard or Yale. *Weekend Edition Sunday*, *supra* note 8. Moreover, the United States is a far different country today than it was in the days of the early Republic. In what might be called the Age of Webster, the United States had a relatively homogeneous population numbering fewer than ten million people (a number that included slaves and others barred from full participation in civic life), 1820 Census, CENSUS RECORDS, https://www.censusrecords.com/content/1820_Census, archived at <http://perma.cc/92P7-Q2HW>; transportation and communication were difficult; and the whole country had only about 6,000 lawyers of widely divergent ability and training. *Intelligence*, 2 AM. JURIST & L. MAG. 400, 400 (1829). An elite Supreme Court bar might have seemed desirable in that context, but circumstances are far different today, when the United States boasts a diverse population numbering more than 320 million, *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, U.S. DEP’T OF COMMERCE, <http://www.census.gov/popclock/>, sophisticated transportation networks allowing for the rapid and efficient movement of people and goods, diverse communication networks permitting instantaneous communication across the nation and the world, and immense human capital, including 1.3 million of the world’s most highly educated lawyers. *Lawyer Demographics*, A.B.A. (2014), available at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf, archived at <http://perma.cc/T8T9-YWEH>.

¹⁹ A recent empirical study has focused additional attention on this issue by suggesting that a small group of lawyers may well dominate the Court’s work to an even greater extent than previously supposed. Joan Biskupic et al., *Special Report: At U.S. Court of Last Resort, Handful of Lawyers Dominate Docket*, REUTERS (Dec. 8, 2014, 6:01 AM), <http://www.reuters.com/article/2014/12/08/us-scotus-elites-special-report-idUSKBN0JM0ZX20141208?feedType=RSS&feedName=everything&virtualBrandChannel=11563>, archived at <http://perma.cc/9GKA-WKRJ>. Some commentators have expressed concern about this concentration of influence. *E.g.*, The Editorial Board, *The Best Lawyers Money Can Buy*, N.Y. TIMES (Dec. 25, 2014), <http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html>. On the other hand, Justice Kagan has recently suggested that more criminal defense lawyers should turn over more of their cases to members of this

In Chief Justice Roberts's view, the Justices know what they want from advocacy in general—and from oral argument in particular—and seasoned Supreme Court practitioners are most likely to give it to them. Traditionally, oral argument has been valued for several reasons. Oral argument has been thought important as a way to assist the Justices in reaching a fully informed decision; to provide counsel with the opportunity to make his or her best case directly to the Justices; to assure the parties to the litigation that their concerns have been fully heard and fairly considered by those with the power to decide; and, not insignificantly, to provide the public with an understanding not only of what is at stake in a particular case, but also of the process by which the case law that binds us all is made.²⁰ All of those purposes seem essential to an institution whose function is not simply to announce legal principles, but also to decide real cases and controversies. Indeed, the Court's duty to decide real disputes is the only source of its authority to announce legal principles.²¹ In general, however, what seasoned Supreme Court practitioners bring to the table—and what is particularly valued by clients, especially when the Court

elite group, thus signaling her belief than an even greater concentration of Supreme Court advocacy would be desirable. Tony Mauro, *Kagan Dishes on Supreme Court Bar, State of the Union and Law Schools*, NAT'L L.J. (Feb. 4, 2015), <http://www.nationallawjournal.com/id=1202716979048/Kagan-Dishes-on-Supreme-Court-Bar-State-of-the-Union-and-Law-Schools?slreturn=20150517222930>, archived at <http://perma.cc/3FLU-3A7E>. The idea of an elite bar is no doubt psychologically satisfying to those involved.

²⁰ See, e.g., Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 11 (1986) (noting that “[a] principal justification for oral argument . . . is that the governmental processes should, to the extent possible, be conducted in public, to assure the public and the participants in the process that decisions are based on publicly acknowledged considerations and interests”). That purpose is particularly important in a constitutional system that looks to the courts to “say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Indeed, given the place of judicial review in our constitutional system, transparency in constitutional interpretation is as important to citizens as the accessibility of the constitutional text. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public.”).

²¹ *United States v. Windsor*, 133 S. Ct. 2675, 2699 (2013) (Scalia, J., dissenting) (“[D]eclaring the compatibility of state or federal laws with the Constitution is not only not the ‘primary role’ of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become ‘the province and duty of the judicial department to say what the law is.’”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (“Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.”) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)).

is deeply divided, with one or two so-called “swing” Justices—is an intimate understanding of each Justice’s predilections and a sense of the precise argument that is needed to secure an individual Justice’s vote without losing those of the others.²² In some sense, that may well count as an improvement in the quality of advocacy, but it also raises larger questions about the nature of advocacy and the reality of judicial decision-making.²³

Exactly what the Justices want from oral argument may be somewhat unclear. For Justice Kagan, it seems to be the frisson of “rapid-fire” questioning.²⁴ On the other hand, Justice Thomas would like to hear a coherent presentation by counsel without unnecessary interruptions by his colleagues.²⁵ Others seem to relish the opportunity for public exposure and the promise of “a good time” or perhaps having the opportunity to demonstrate their own cleverness or erudition, not infrequently at the expense of counsel.²⁶

Whatever the Justices may or may not want from oral argument, it is not immediately clear that the conditions necessary for the satisfaction of those desires necessarily correspond with the conditions required to ensure that the parties be afforded a full and fair hearing, let alone that the Court reach the best possible decision. Nor is it necessarily clear that what the Justices want has much to do with promoting the transparency and other qualities that might be thought indispensable to the Court’s legitimacy, given the vast, unreviewable power that this unelected body exercises in our democratic society. Clearly, justice must not only be done, but be seen to be done, and both sides must be afforded an equal hearing before a tribunal that is impartial both in fact and in appearance.²⁷ It also seems clear that litigants and

²² See Michael Zimmer, *The Employer’s Strategy in Gross v. FBL Financials*, CONCURRING OPINIONS (Nov. 4, 2009), <http://www.concurringopinions.com/archives/2009/11/the-employers-strategy-in-gross-v-fbl-financials.html>, archived at <http://perma.cc/HT9A-CKEX> (detailing late-in-the-game, winning strategy decision made when seasoned Supreme Court advocate joined employer’s legal team).

²³ See, e.g., H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 39 (2008) (explaining the constraints that guide judicial decision-making and the courts’ need to abide by those constraints).

²⁴ *Kagan Confirmation Hearing*, *supra* note 2, at 83.

²⁵ Ilya Somin, *Observing Clarence Thomas at Oral Argument*, WASH. POST, (Feb. 25, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/25/observing-clarence-thomas-at-oral-argument/>, archived at <http://perma.cc/XR2A-55V5> (“Thomas has a reasonable counterargument when he suggests that the justices would do better to listen to the arguments of counsel rather than take up much of [the] time . . . with their own points.”).

²⁶ EPSTEIN, LANDES & POSNER, *supra* note 3, at 314.

²⁷ As Stuart Hampshire has observed, “No one is expected to believe that [the Court’s] decisions are infallibly just in matters of substance; but everybody is expected to believe that at least its procedures are just because they conform to the basic principle governing adversary reasoning: that both sides should be equally heard.” STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 95 (2000). Professor Hampshire has further noted that equality of hearing is the essential hallmark of proceedings that are distinctively judicial: “In parliaments, councils, and governmental bodies of all kinds, the two elements of procedural justice are differently

their concerns should be treated seriously and with respect. The excellence of oral argument as an institution may therefore depend on something more than a particular kind of technical virtuosity.²⁸ At the very least, a tension exists between the idea of a court that exists for the people and one whose proceedings are transparent in practice only to the cognoscenti.

In his address to the Supreme Court Historical Society, Chief Justice Roberts also remarked on one aspect of Supreme Court practice that he thought not to have changed in recent years, namely, the “level of questioning” at oral argument. “Over the last generation,” he observed, “one thing that has remained fairly constant has been the level of questioning.”²⁹ Comparing fourteen cases from October Term 1980

balanced. The requirement that both sides in the conflict should be equally heard always needs to be stressed because it is not obviously guaranteed, as it is in a court of law.” *Id.* at 96. According to Professor Hampshire, the judicial procedures necessary for “the fair weighing and balancing of contrary arguments bearing on an unavoidable and disputable issue” are “all subject to the single prescription of *audi alteram partem* (‘hear the other side’).” *Id.* at 8.

²⁸ That is especially true if virtuosity is mainly defined as the ability to withstand “rapid-fire” questioning. But technical virtuosity is not irrelevant: oral argument is rightly perceived as an art form. *See, e.g.*, REBECCA WEST, *THE MEANING OF TREASON* 46 (Phoenix Press 2000) (1949) (“There in the House of Lords [in the treason case of William Joyce] there was being given a performance far finer than the highest level of the proceedings in the Court of Appeal: as far superior to that, as that had been to the Old Bailey. When these four old Judges had a passage with counsel, it was as good as first-class tennis.”). Justice Blackmun actually graded the performance of advocates. *See, e.g.*, LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 215 (2005) (discussing grades that Justice Blackmun gave his future colleague, Justice Ruth Bader Ginsburg). *See also* Timothy R. Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justices’ Decisions?*, 85 WASH. U. L. REV. 457, 524–25 (2007) (finding a positive correlation, even controlling for other variables, between the perceived quality of an argument and the outcome in a case).

²⁹ Roberts, *supra* note 15, at 75. Although a substantial body of literature addresses “questioning” by Supreme Court Justices, comparing the data in the various studies is somewhat difficult because there appears to be little consensus as to what counts as a “question” or how the “number of questions” is to be calculated. For example, Chief Justice Roberts did not explain what, exactly, he took the term “question” to mean, or how precisely he counted them up, but the number of questions he reports—an average of eighty-seven per case in 1980 and ninety-one in 2003—is lower than the numbers reported by others for similar periods, as noted below. The discrepancy may be related to the Chief Justice’s relatively small sample. Alternatively, it may suggest that he was using a more conservative definition of “question,” perhaps one that captured only true interrogatories and thereby excluded other utterances, statements, interjections, and interruptions. If so, the Chief Justice may have missed an important issue: whether counsel is being interrupted more frequently, in whatever form and for whatever reason, than was previously the case. It may also be that his lower total count could be attributable to having treated multiple questions (e.g., “QUESTION: ‘Do we know what the contemporaneous understanding of ‘cruel and unusual’ was? Are we bound by that? If not, why is that the case?’”) that occur within a “speaking

with fourteen cases from October Term 2003, the Chief Justice concluded that the average number of questions had increased only slightly—from eighty-seven per case in 1980 to ninety-one per case in 2003.³⁰ The Chief Justice also observed, however, that his data confirmed what others had noted previously: the lawyer who faces the greater number of questions at oral argument is more likely to lose.³¹ Recalling that John W. Davis, the great Supreme Court advocate,³² long ago counseled advocates to “rejoice” when the Court asks questions,³³ the Chief Justice quipped that that advice might warrant reconsideration.³⁴

Chief Justice Roberts’s claim—that the “level of questioning” did not increase significantly between 1980 and 2003—seems surprising at first blush. Many knowledgeable (if somewhat casual) Court watchers have the opposite impression. One cannot read press accounts of recent Supreme Court arguments, let alone read or listen to the arguments themselves, without being impressed by the assertiveness

turn” (that is, any intervention by a Justice preceded and followed by an intervention by counsel or another Justice) as one question, whereas others might treat the same speaking turn as containing three questions. In addition, the Chief Justice did not consider whether the length of questions had changed between the two periods. On the other hand, the Chief Justice’s conclusion about the relatively constant “level of questioning” has been partially corroborated by Lee Epstein and her coauthors, who concluded that the number of questions per case increased only minimally between 1979 and 2007. *See* Lee Epstein et al., *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433, 442 (2010). However, those authors also found that the number of words per question had doubled during that period. *Id.* at 442–43. Another study concluded that the number of questions per case changed significantly between 1978 and 1996. Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL’Y 241, 251–52 (2009) [hereinafter Johnson et al., *Inquiring Minds*]. Timothy Johnson and his coauthors found that the Court asked about 120 questions per case in 1980, slightly more than eighty per case in 1985, and 147 per case in 1995. *Id.* at 252. Significantly, the Epstein study relied in part on the data compiled by the Johnson team, which “counted the number of times each Justice spoke during oral arguments.” Timothy R. Johnson et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices’ Behavior During Oral Arguments*, 55 LOY. L. REV. 331, 337 (2009) [hereinafter Johnson et al., *Pardon the Interruption*]. Thus, whereas Chief Justice Roberts may have compared only true interrogatories, Johnson (and Epstein) appear to have included all “speaking turns.” Johnson’s *Inquiring Minds* supports this inference. *See* Johnson et al., *Inquiring Minds*, at 250–51.

³⁰ Roberts, *supra* note 15, at 75.

³¹ *Id.*

³² *See generally* WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* xv–xvi (1973) (discussing Davis’s prominence as an advocate).

³³ Roberts, *supra* note 15, at 75 (quoting John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940)).

³⁴ Roberts, *supra* note 15, at 75.

of the Justices.³⁵ Indeed, even some of the Justices (including Chief Justice Roberts) have commented on the difficulty that lawyers face in making their points,³⁶ and Justice Thomas has justified his own silence by pointing to the loquacity of his colleagues.³⁷ Was it ever thus? No less a Court watcher than Judge Richard A.

³⁵ In some cases, the Justices' assertiveness is directed toward each other, with one Justice interrupting another or asking counsel a question before counsel can answer the last question posed by another Justice. Despite the popular perception that the Justices frequently interrupt each other, one study, which recorded an "interruption" whenever the utterance of one Justice immediately followed that of another, found that only 6% of Justice utterances were interruptions. Johnson et al., *Pardon the Interruption*, *supra* note 29, at 338. In addition, that study discerned no longitudinal change between 1998 and 2006, but found a strong correlation between interrupting and being interrupted, suggesting that "Justices who 'dish it out' to their colleagues must also be able to 'take it.'" *Id.* at 347–48. Finally, some data suggested at least the possibility that ideology plays a role in the Justices' decisions to interrupt. *Id.* at 349.

³⁶ See, e.g., Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES, Oct. 8, 2013, at A14 ("Over the summer, several [Justices] . . . acknowledged that things had gotten out of hand in their courtroom, with their barrage of questions sometimes leaving the lawyers arguing before them as bystanders in their own cases."). Even the Chief Justice has suggested that the Justices may talk too much. See Andrew Cohen, *The Chief Justice Wants the Supreme Court to Stop Talking So Much*, ATLANTIC, July 1, 2013, <http://www.theatlantic.com/national/archive/2013/07/the-chief-justice-wants-the-supreme-court-to-stop-talking-so-much/277385/>, archived at <http://perma.cc/LTM6-EWTK> ("The Chief Justice . . . in a rare but routine public event at the end of this tumultuous term, politely acknowledged Saturday that he believes he and his colleagues on the bench ask too many questions during oral argument. 'It is too much,' John Roberts told a friendly audience at the Fourth Circuit Judicial Conference held at the luxurious Greenbrier resort in West Virginia.").

³⁷ E.g., Josh Gerstein, *Clarence Thomas Defends Silence in Supreme Court Health Care Arguments*, POLITICO (Apr. 6, 2012), <http://www.politico.com/blogs/under-the-radar/2012/04/clarence-thomas-defends-silence-in-supreme-court-health-119823.html>, archived at <http://perma.cc/9ZY2-X5Y6> ("Thomas suggested that by repeatedly interrupting lawyers his colleagues are depriving advocates of their chance to make their best case. 'We have a lifetime to go back in chambers and to argue with each other,' he said. 'They have 30, 40 minutes per side for cases that are important to them and to the country. They should argue. That's a part of the process. . . . I don't like to badger people. These are not children. The court traditionally did not do that. I have been there 20 years. I see no need for all of that. Most of that is in the briefs, and there are a few questions around the edges.'"). See also Jeffrey Toobin, *Clarence Thomas's Disgraceful Silence*, NEW YORKER, Feb. 21, 2014, <http://www.newyorker.com/news/daily-comment/clarence-thomass-disgraceful-silence>, archived at <http://perma.cc/Z4A3-FETP> ("But the process works only if the Justices engage. The current Supreme Court is almost too ready to do so, and sometimes lawyers have a hard time getting a word in edgewise Thomas has said [at law schools] that his colleagues talk too much, that he wants to let the lawyers say their piece, and that the briefs tell him all he needs to know. But this—as his colleagues' ability to provoke revealing exchanges demonstrates—is nonsense. Thomas is simply not doing his job."). Of course, Justice Thomas has also said that he regularly prepares an "outline form of the disposition" before

Posner has noted that the Justices are far more assertive at oral argument today than they were when he regularly observed the Court as a law clerk and Justice Department lawyer in the 1960s—about fifteen years before the start date of the Chief Justice’s study.³⁸

These somewhat conflicting observations suggest the need for further inquiry. If, for example, we take the Chief Justice’s point to be the more general one that oral argument has not changed much in the recent past, it might be useful not only to look at a data set somewhat larger than the Chief Justice’s twenty-eight cases, but to go back a little further in time than 1980, since many significant changes affecting the Court and its work had already occurred by that date.³⁹ It might also be useful to look not just at “the level of questioning” (by whatever metric we might measure that), but at other aspects of oral argument. For example, since the Justices (like all judges) necessarily stand in a significant power relationship with respect to the lawyers who appear before them, it might be interesting to know, given the arguably coarser and less dignified quality of our present public life, whether the Justices’ treatment of lawyers at oral argument has changed since the time of the Warren Court.⁴⁰ Has there been a change in the Justices’ understanding of what is required

hearing oral argument. MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 105 (2013).

³⁸ See POSNER, *supra* note 7, at 21–23. Judge Posner clerked for Justice Brennan in October Term 1962 and worked as an Assistant to the Solicitor General of the United States from 1965 to 1967. *Id.* Judge Posner has argued that judges “should be aggressive at oral argument” and that “tendentious questioning . . . is an important method of communication with the other judges on the panel.” See POSNER, *supra* note 6, at 129.

³⁹ See, e.g., Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 782–84 (1981) (describing pre-1980 changes in the administration of justice in the federal courts).

⁴⁰ Other aspects of the judiciary’s attitudes toward members of the bar—and the role of the judiciary—also may have changed. For example, Judge Charles E. Wyzanski wrote with apparent admiration that Judge Augustus Hand’s intended audience for his opinions was “not the bench, bar, or university world in general, but the particular lawyer who was about to lose the case and the particular trial judge whose judgment was being reviewed and perhaps reversed.” CHARLES E. WYZANSKI, JR., *WHEREAS—A JUDGE’S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW* 71 (1965). Justice Brandeis had a somewhat broader view; he frequently alluded to the Court’s teaching role and argued that the Court has a duty to speak directly to the people. SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* 295 (1956) (“‘We are teachers,’ Brandeis would occasionally say to his colleagues. He was apparently quite serious in urging that the Tribunal had a responsibility to teach and uphold moral principles.”). That was consistent, of course, with Justice Brandeis’s oft-stated assertion “that the highest office a person could aspire to in a democracy was that of citizen,” and that citizenship carried with it the responsibility to be informed and to act in an informed way. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 238–39, 400–01 (2009). See also JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 12–13 (1976) (discussing John Austin’s failure to grasp the teaching function of law); Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*,

for realizing the parties' interest in having their case fully and fairly heard? Does the current approach to oral argument signify an increased tendency on the part of the Justices to treat the issues presented in cases as interesting intellectual puzzles, rather than real-life problems that are important to the parties and the public?⁴¹ Does the Justices' penchant for "rapid-fire" questioning and for interrupting counsel and each other really constitute the most effective form of reasoned inquiry or best promote reasoned decision-making? Is it a reflection of professionalization or self-indulgence? Likewise, does the Court's current approach to oral argument signify any change in the Court's understanding of its relationship to the public or of oral argument as a public event—not simply in the sense that it is formally open to citizens, but in the additional sense of affording citizens a real opportunity to learn what a dispute involves and how the Court's resolution of that dispute might affect individual rights or the operation of government? For example, does the Court's current approach, whereby the Justices usually seize center stage from the outset, without allowing counsel to sketch even the skeleton of a narrative,⁴² truly satisfy this objective? More broadly, is the Court's apparent preference for a particular kind of technical virtuosity, even to the exclusion of public accessibility, really consistent with the Court's role in our democratic society? Is it appropriate, notwithstanding the admitted complexity of modern legal issues, that citizens should be required to witness a Supreme Court argument in the same way that they might witness brain surgery, that is, with little understanding except for the recognition that experts appear to be at work? A proceeding may be open to the public, but lacking in real transparency; that is not an insignificant point, since oral argument is an important part—and necessarily the most transparent part—of the adjudicatory process⁴³

60 TUL. L. REV. 314, 325, 340 (1985) (arguing that Judge Wisdom's landmark civil rights opinions were meant to speak to the citizens whose lives were affected by them).

⁴¹ Judge Noonan long ago caused us to focus on the relative invisibility of individuals in our legal process and tradition. *See* NOONAN, *supra* note 40, at 6. "Yet to regard law only as a game is to forget that in the process human opportunities and liberties and life itself may be taken." *Id.* at 14. Even great judges sometimes tend to undervalue the interests and concerns of litigants, while overvaluing the significance of their own work. *See* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 35 (1921) ("[A]s a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped."). The tendency to disembodify litigants may be related to the process of professional socialization that begins in law school. *See* ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 22 (2007) ("If students entering the medical profession must endure a breaking down of everyday beliefs about the body, physicality, and death, students entering the legal profession undergo a linguistic rupture, a change in how they view and use language.").

⁴² Counsel may have little or no opportunity to say at the outset what he or she thinks the case involves. In that event, it may be impossible even for observers who are legally trained (but lack specific knowledge of the case), let alone for the general public, to understand what the dispute is about. *See infra* notes 75–85 and accompanying text.

⁴³ Various empirical studies have explored other aspects of oral argument. For example, James C. Phillips and Edward L. Carter have posited an inverse relationship between the

through which binding law will ultimately be made.⁴⁴ To be sure, oral argument does not exist simply, or even mainly, to inform the public about the issues involved in a particular case, or about the judicial process more generally. But that is an important purpose of oral argument nonetheless, and a full appraisal of the current practice of oral argument necessarily requires consideration of how well the present conception of oral argument satisfies that purpose.

This Article consists of six parts. In Part II, we discuss the history and purposes of oral argument in the Supreme Court. We briefly review the development of the adjudicatory process in the Supreme Court from its beginnings, when the Court had no control over its docket, written submissions barely existed, and the time for oral argument was unlimited, to the present, when the Court has virtually total control over its docket, written submissions are voluminous, and the time for oral argument is severely limited. We also detail possible changes in the Justices' views as to the value and purpose of oral argument and the possible relationship of differences in the conduct of the post-argument conference, at which tentative results are generally reached, to perceived differences in the conduct of oral argument.

In Part III, we generally describe the quantitative and qualitative aspects of our study, which compares various aspects of oral argument in sets of cases from October Terms 1958–60 and October Terms 2010–12. We also situate our study in relationship to prior studies and summarize our findings. For both the quantitative and qualitative parts of our study, we limited our data set to cases that were partially or fully argued on Tuesdays during each of the six terms. In this way, we examined

number of words that a Justice speaks and the amount of information that Justice is seeking. James C. Phillips & Edward L. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325, 330–32, 336 (2010) [hereinafter Phillips & Carter, *Oral Argument*]. According to Phillips and Carter, the most talkative Justices (Breyer and Scalia) tend to seek less information by their interventions, while Justice Alito (the most taciturn Justice, except for Justice Thomas) most frequently uses his interventions to seek information. *Id.* at 337–38. They also found that the Justices typically seek more information from the side with which they disagree. *See id.* at 388. That study therefore concluded that the Justices use statements most frequently to support counsel and persuade their colleagues, while they use questions to express doubt. In a second study, Phillips and Carter compared the information-seeking practices of the Justices during the period 2004–2009 with those reflected in twelve cases from the period 1963–1965. *See* James C. Phillips & Edward L. Carter, *Source of Information or “Dog and Pony Show”?: Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963–1965 & 2004–2009*, 50 SANTA CLARA L. REV. 79, 169–71 (2010) [hereinafter Phillips & Carter, *Source of Information*]. Phillips and Carter concluded that the Justices in the earlier period sought more information and spoke fewer words than the Justices in the later period. *Id.* at 158. While not disproving Chief Justice Roberts's claim, their study suggested that the Justices' behavior had changed in a way that will not be discovered solely by counting questions. *Id.* at 169–71.

⁴⁴ *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law.”).

approximately 170 cases (approximately ninety cases from the earlier period and approximately eighty cases from the later period). In the quantitative part of our study, we focused on several simple and straight-forward criteria: the total number of words spoken by the Justices and counsel; the number of speaking turns of the Justices; the number of questions asked by the Justices; and the number of noninterrogatory statements made by the Justices. We then compared the various Terms according to these criteria.⁴⁵ In the qualitative part of our study, we analyzed selected oral argument transcripts from the relevant periods to look more closely at the structure of oral argument, the precise nature of the Justices' interventions, the length of the attorneys' opening remarks, and the length of the longest attorney monologues. The point of the qualitative analysis was to give some flesh through concrete examples to the more general statistical analysis contained in the quantitative part. We also looked at particular argument transcripts with a view toward understanding the dynamics of the argument from a qualitative perspective, noting such factors as the Justices' apparent efforts to help out one side or the other, the interruptions occasioned by the Justices' jokes, and the apparent harshness with which the Justices sometimes treat counsel.

In Part IV, we provide a fuller description of our quantitative methodology, and, in Part V, we describe in detail the results of our quantitative comparison of the two data sets from October Terms 1958–60 and October Terms 2010–12. The portrait of oral argument that emerges from the second period is quite different from that of the first. Although the amount of time generally allotted for oral argument in the second period was only half the time allotted in the earlier period, the Justices actually increased their total words per case by almost 24%, while the number of words spoken by counsel decreased by about 46%. The extent to which the Justices seemed to dominate oral argument in the later cases was striking.

In Part VI, we report on the results of our qualitative comparison. For example, the Justices in the older cases typically allowed counsel a substantial amount of time at the beginning of the argument to explain the background of the case and their

⁴⁵ The principal aim of our study was to determine whether the nature and conduct of oral argument had changed in the last half century or so. For that reason, we looked to a period (October Terms 1958–60) antedating the earliest reference period chosen by Chief Justice Roberts (October Term 1980) and were not specifically interested in proving or disproving the precise point made by Chief Justice Roberts—that is, that the level of questioning had not changed since 1980. Nonetheless, curiosity caused us to look closely at October Term 1980, the earlier of the two Terms he had studied, using the same methodology and criteria that we used to analyze the six Terms in our data set. We found that there were forty-six cases argued on Tuesdays during October Term 1980. The Justices spoke a total of 108,551 words in those cases, while the attorneys spoke 173,522 words. Thus, the ratio of Justice words to attorney words was 0.625. That ratio compared favorably with the ratio we found for the October Terms 2010–12 cases (0.627) and was much higher than the ratio we found for the October Terms 1958–60 cases (0.275). In other words, the Chief Justice's conclusion seems to be supported by the evidence insofar as the ratio of Justice words to lawyer words is concerned. Also, according to our count, the Justices asked ninety-five questions per case and took 131 speaking turns per case in the October Term 1980 cases. *See infra* notes 102–104 and accompanying text.

understanding of the issues presented for decision, whereas the Justices in the later cases typically began their questioning almost immediately—sometimes beginning as soon as counsel had identified herself for the record. In addition, the tone of the Justices’ interactions with counsel in the later cases is substantially different from that of the earlier cases. Among other things, the Justices appear more likely to speak harshly to counsel or to interrupt counsel with jokes, often at counsel’s expense. In Part VII, we restate the findings of our empirical study, draw some conclusions from those findings, and offer some observations about what our quantitative and qualitative analyses suggest concerning the current state of oral argument in the Supreme Court and its implications for our democracy.

Our data, though admittedly limited, strongly suggest that oral argument is a far different enterprise today than it was in the earlier period we studied. It is not clear that oral argument now serves all of the purposes that it served in the past, and it is not clear that the change in oral argument is one that reflects any conscious purpose on the part of the Justices. We therefore conclude that the Justices should give appropriate consideration to what they collectively deem to be the purposes of oral argument and to what they wish to accomplish at oral argument. In particular, the Court needs to consider whether its current approach to oral argument is consistent with the traditional purposes and objectives of oral argument, particularly from the perspectives of the parties’ and the public’s interests, but also from the Court’s own perspective. We also suggest that the Court, given its greatly reduced caseload, might wish to reconsider the amount of time allotted for oral argument, give serious consideration to the ways in which the Justices interact, and consider whether the apparent use of oral argument as a substitute for direct communication among the Justices is the best use of the only time available for counsel to interact with the Justices.

II. THE AIM OF ORAL ARGUMENT AND THE POST-ARGUMENT CONFERENCE

In the beginning, the Supreme Court’s appellate caseload was relatively light,⁴⁶ and the Court followed the “oral tradition” that was brought from the mother country.⁴⁷ The Justices mainly learned about a case through oral presentation, and

⁴⁶ See, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 34–35 (1928) (stating the Court’s appellate caseload rose “[f]rom fifty-one cases docketed in the February Term, 1803 . . . to ninety-eight in the February Term, 1810”). The Justices’ heavy workload mainly resulted from their circuit-riding duties. *Id.* at 14–17; see also James M. O’Fallon, *Marbury*, 44 STAN. L. REV. 219, 223–24 (1992) (discussing the Justices’ circuit-riding duties as part of the controversy surrounding the Judiciary Act of 1801).

⁴⁷ See R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482, 483 (1994) (“A brief has no [sic] always been ‘a necessity’ in the United States. Following English practice, early appellate practice in this country was ‘an essentially oral medium,’ something that surprises many who first encounter descriptions of successive days of oral argument in early cases.”)

an unlimited amount of time was allowed for oral presentations. Oral arguments in the Marshall Court went on for days at a time, for example, and the Justices rarely asked questions.⁴⁸ Written submissions were scant or nonexistent, and cases were heard on the original record, with only one set of the papers available to the

(quoting G. EDWARD WHITE, *THE MARSHALL COURT & CULTURAL CHANGE, 1815–1835*, at 203 (1988)). As Cozine points out, however, “from very early in its history the Court required some form of written submission.” *Id.* at 486. In 1795, the Court required that lawyers submit “a statement of the material points of the case.” *Id.* (citing SUP. CT. R. 30, 19 U.S. (6 Wheat.) v (1821). In 1821, the Court required the filing of a “printed brief or abstract . . . containing . . . points of law and fact.” *Id.* As Cozine notes, however, it would be a mistake to assume that such a filing necessarily would contain “legal argument,” as we understand that term. *Id.*; see also 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 467 (1922) (discussing the typical method for oral argument before the Supreme Court); William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 1–2 (1999) (discussing the history of oral arguments before the Supreme Court); Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, 1985 SUP. CT. HIST. SOC’Y. Y.B. 22, 22–23, available at http://supremecourthistory.org/assets/pub_journal_1985.pdf, archived at <http://perma.cc/2F FL-LLUV>. Until recently, the “oral tradition” in England meant that appellate judges heard the whole case orally, sometimes for many days, and then delivered their judgments from the bench. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 2–3 (2008); J.R. SPENCER, *JACKSON’S MACHINERY OF JUSTICE* 91–92 (8th ed. 1989). The point was to ensure the transparency of the judicial process. POSNER, at 2–3.

⁴⁸ G. Edward White has described the importance of oral argument in the Marshall Court:

Advocacy before the Marshall Court was essentially an oral exercise, and, because of the unlimited time given to arguments and the absence of interruptions from Justices, an exercise in oratory. Oral arguments were the chief source of the Justices’ information about a case: the Justices sat silently, taking notes, because their notes would often be their sole source of information in rendering a decision.

G. EDWARD WHITE, *THE MARSHALL COURT & CULTURAL CHANGE, 1815–1835*, at 781 (abridged ed. Oxford Univ. Press 1988). Currently, only the most exceptional circumstances can tempt the Court to grant additional time. In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Affordable Care Act case, for example, the Court heard six hours of argument over a three-day period. Order Allocating Oral Argument Time, Order issued 2-21-12. Similarly, in *Obergefell v. Hodges*, 135 S.Ct. 2574 (2015), the same-sex marriage case, the Court allowed two and a half hours for oral argument. Order of Argument, 135 S.Ct. 2584 (2015). In *Sebelius*, the Court had consolidated several lower court cases for argument, and the Court consolidated three separate petitions for certiorari in *Obergefell*. Of course, both cases also presented novel and important questions of federal constitutional law.

Justices.⁴⁹ As the country grew, however, so did the Supreme Court's caseload,⁵⁰ and unlimited oral argument eventually became a luxury that the Court could not afford.⁵¹ In 1849, the Court limited oral argument to two hours to the side.⁵² That remained the case through the 1920s.⁵³ Since then, the time for oral argument has been reduced further, first to one hour and then to thirty minutes to the side, which remains the norm today.⁵⁴ Written submissions, which have become easier and cheaper to reproduce, have taken on greater importance, particularly as the time allotted for oral argument has shrunk.⁵⁵ In recent years, nonparties increasingly have

⁴⁹ See, e.g., Letter from Joseph Story to Samuel P.P. Fay (Feb. 24, 1812), in 1 LIFE AND LETTERS OF JOSEPH STORY 216 (William Wetmore Story ed. 1851) (noting that the argument in one then-recent case had proceeded for five days, while a 230-page brief had also been filed). Story noted that, "The mode of arguing causes in the Supreme Court is excessively prolix and tedious; but generally the subject is exhausted, and it is not very difficult to perceive at the close of the cause, in many cases, where the press of the argument and of the law lies." *Id.* at 215.

⁵⁰ During most of the nineteenth century, the Court was required to hear all of the cases that fell within its jurisdiction, which made the Court's caseload increasingly burdensome as the nation and its commercial activities expanded. See FRANKFURTER & LANDIS, *supra* note 46, at 86; see also Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 742–43 (2001) (recounting course of legislative enactments whereby Congress reduced the Supreme Court's mandatory jurisdiction by transferring some classes of cases to the discretionary docket). As early as 1824, the Court permitted cases to be submitted without oral argument. Cozine, *supra* note 47, at 487 n.28. The Court also fashioned other shortcuts to facilitate its work. See, e.g., *Newell v. Norton*, 70 U.S. 257, 267–68 (1865) (affirming the judgment, without any searching review of the record, where there was "ample testimony to support the decision"). In 1891, Congress passed the Evarts Act, which created the regional courts of appeals and granted the Court some discretion to decline to hear cases within its jurisdiction. See Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826 (1891) (current version at 28 U.S.C. § 43 (2012)).

⁵¹ See Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 907, 912 (2013).

⁵² SUP. CT. R. 53, 48 U.S. (7 How.) v (1849); see also David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. SUP. CT. HIST. 1, 13 (2005).

⁵³ See CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION* 61 (1928).

⁵⁴ See SUP. CT. R. 44, 398 U.S. 1058 (1970). The Court has occasionally enlarged the time for oral argument in a particular case or set of related cases, as in *National Federation of Independent Business v. Sebelius*. See *supra* note 48.

⁵⁵ As previously noted, Justice Ginsburg has observed that briefs are much more important than oral argument in the decision of a case. Robert P. Burns & Steven G. Calabresi, *A Conversation with Justice Ruth Bader Ginsburg*, C-SPAN (Sept. 15, 2009), <http://www.c-span.org/video/?288900-1/conversation-justice-ruth-bader-ginsburg>, archived at <http://perma.cc/E6KF-FGNT>; see also Adam Liptak, *Similar Justices, Far Different Job Paths*, N.Y. TIMES, Feb. 11, 2014 at A14. Indeed, Justice Thomas has stated that he generally knows how he will vote in a case before he hears the oral argument. See *supra* note 37 (stating

sought to influence the Court through the filing of amicus curiae briefs, scores of which may be filed in high-profile cases.⁵⁶ Except for the United States and state governments, however, amici are rarely granted the opportunity to present oral argument.⁵⁷ Finally, the Court's caseload has decreased substantially in the last thirty or forty years, both because Congress has eliminated most of the Court's mandatory jurisdiction and because the Court has significantly reduced its discretionary review docket.⁵⁸ As the Court's merits docket has shrunk, however, the Court has not increased the time allotted for argument.⁵⁹

that Justice Thomas typically prepares a pre-argument outline of his decision). That would not have been the case when briefs and other papers could not easily be reproduced. Even in fairly recent times, before the widespread availability of inexpensive photocopying, for example, *in forma pauperis* petitions were initially reviewed only by the Chief Justice's law clerks—a practice that gave the Chief Justice considerable influence over the case selection process and the restatement of issues presented in *pro se* submissions. See, e.g., BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 65–69 (1983) (describing the process for reviewing petitions and Justice Frankfurter's concerns about it).

⁵⁶ See, e.g., COYLE, *supra* note 37, at 160–61. In *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, and 14-474 (June 26, 2015), for example, approximately 140 amicus curiae briefs were filed at the merits stage. Supreme Court of the U.S., *Amicus Briefs on the Merits*, <http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/> (last updated Aug. 11, 2015); *archived at* <http://perma.cc/X4N3-X49G>. According to a recent study by Paul M. Collins, Jr., one or more amicus curiae briefs were filed in 23% of Supreme Court cases on average from 1946 to 1960; the proportion rose to 31% in 1961 and to 44% in 1969. Paul M. Collins, Jr., *Interest Groups and Their Influence on Judicial Policy*, in *NEW DIRECTIONS IN JUDICIAL POLITICS* 221, 226 (Kevin T. McGuire ed., 2012). The average was 60% in the 1970s and 80% in the 1980s. By the mid-1990s, the average exceeded 90%, with the proportion reaching 98% in 2007. *Id.*

⁵⁷ See EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 765 (9th ed. 2007).

⁵⁸ During the last quarter of the twentieth century, the number of cases on the Court's oral argument calendar shrunk by about 50%, from approximately 150 cases each year to 75. Cordray & Corday, *supra* note 50, at 738. The Court's merits docket has remained at about the same size since then. See *Opinions*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/opinions/opinions.aspx> (last visited Aug. 11, 2015), *archived at* <http://perma.cc/5R6M-RCXU>. With only half the cases to consider, the Justices obviously can be far better prepared than previously, but the decline in the Court's caseload has had other consequences as well. As Chief Justice Roberts has suggested, for example, the United States is more likely to participate in cases to which it is not a party. See Roberts, *supra* note 16, at 79 (noting the Solicitor General's presence in more than 80% of argued cases).

⁵⁹ Throughout the Court's history, the practice of oral argument has been affected by other factors, including the personalities, backgrounds, and relative influence of individual Justices, as well as their living and working arrangements. For example,

The questioning of advocates . . . during [Chief Justice] Vinson's tenure reflected the particular personalities of [the Justices]. On occasion, Justice Rutledge returned to chambers after argument quite obviously pleased with the fact that an

At its best, oral argument serves a variety of important purposes. Oral argument provides the Justices with an opportunity to ask counsel questions, which facilitates informed decision-making.⁶⁰ Similarly, oral argument provides counsel with their only opportunity to hear and respond to the Justices' questions and concerns—concerns that may not be self-evident and can be answered only if they are expressed. Oral argument also allows counsel to emphasize to the Court what they think is important about their case and to explain the parties' arguments in ways that

experienced lawyer had been unable to make an effective response to his question [T]he Justice who was by far the most active in posing questions to counsel . . . was Felix Frankfurter. Sometimes I received the impression that he had not yet read the briefs and was relying on counsel to identify the exact issue in dispute. On other occasions he treated the advocate in a way that reminded me of a law professor dealing with a student who needed to be told what earlier cases had decided.

JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 71 (2011); *see also* SCHWARTZ, *supra* note 55, at 64–65 (describing Justice Frankfurter's tendentious manner at oral argument). The Justices' living arrangements also have had an influence, if not on oral argument directly, on the way in which the Court has accomplished its work. Thus, the members of the Marshall Court had ample opportunity to discuss cases informally because they lived in the same boardinghouse while in Washington. *See* THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 31 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE (1940–1985)] (“In 1801, Marshall arranged for the Justices to live together at Conrad and McMunn’s boardinghouse on Capitol Hill [T]he Justices [later] roomed together at . . . other Washington boardinghouses and residential hotels.”); R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 78 (1985) (“Boardinghouse living . . . worked to overcome the sectional and ideological divisions among the justices, fusing their work and leisure and strengthening their sense of institutional identity.”). Later Justices, who likewise lacked individual government offices but maintained private residences in the capital, did most of their work at home; that did not change until after the completion of the Supreme Court Building in 1935. *See* STEVENS, at 30–31; *see* SCHWARTZ, *supra* note 55, at 67 (noting that most of the Justices continued to work at home even after the building was completed).

⁶⁰ For several reasons, the level of questioning may be greater in some cases than in others. For example, the level of questioning (and the number of words spoken by the Justices) will normally increase as the number of Justices who are present at oral argument increases. *See* EPSTEIN, LANDES, & POSNER, *supra* note 3, at 324. The identities of present or absent Justices may also be significant because some Justices may be more or less inclined to ask questions, and some Justices may be better questioners—or at least able to ask questions more succinctly—than others. The perceived importance of a case may also increase the level of questioning. *Id.* The level of questioning may also increase when one or both parties have not adequately briefed the case. In addition, it has been suggested that the Justices' need for information is likely to increase in less salient cases. *See* Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 *LAW & SOC'Y. REV.* 259, 259 (2007).

sometimes cannot be easily accomplished in written form. Oral argument allows counsel, after all the briefs have been filed, to crystallize or distill the relevant issues and thus provide the Court with their most mature and considered understandings. Oral argument also serves to assure the parties that their claims are being fully and fairly considered, and it performs a significant public function by exposing the Supreme Court's adjudicatory process—a process that creates binding law—to the public. Oral argument allows the parties to explain to the public, as well as the Justices, what they think the case is about, and it provides the Justices with the opportunity to show the public, as well as the parties, that they take the parties' concerns seriously, and that they have personally engaged and seriously considered the issues, be they momentous or mundane. Oral argument also allows the Justices to show that they “do their own work,”⁶¹ as Justice Brandeis put it, rather than leaving it all to law clerks or other functionaries.

Of course, oral argument also provides the Justices with an opportunity to test the implications or limitations of the parties' arguments, to seek clarification, and to acquire additional information.⁶² It provides the Justices with an opportunity to

⁶¹ See WYZANSKI, *supra* note 40, at 61 (“I well remember a remark . . . Justice [Brandeis] made to me when I first entered the public service: ‘The reason the public thinks so much of the . . . Supreme Court is that they are almost the only people in Washington who do their own work.’”).

⁶² For example, one study has suggested that the Justices typically ask more questions in less salient cases, presumably because they are less certain about how they should vote and therefore need more information. See McAtee & McGuire, *supra* note 60, at 260–62. The same study shows that the Justices ask fewer *questions*—but make more *statements*—in more salient cases, presumably because their interventions in such cases are more likely to be motivated by a felt need to influence their colleagues than by a need to inform themselves. See *id.* at 273. Thus, if salient cases represent a higher percentage of the total than they did in the past, the Justices' overall ratio of statements to questions is likely to be higher now. That conclusion might not follow, however, if the Justices have also become more talkative in general, or alternatively, if their questions are aimed at persuading their colleagues, rather than simply eliciting information. Another factor might be the Court's attitude toward its own role in information gathering. The Justices may be less likely to ask questions for the purpose of information gathering at oral argument if they are inclined to seek information on their own. Thus, in 1975, Arthur Miller and Jerome Barron argued that the Court appeared to have become more “willing to inform itself,” as opposed to depending on the parties for relevant information. 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). Whether that continues to be the case remains to be seen. Since the time of the Miller and Barron study, however, the number of amicus curiae briefs has greatly expanded and much “untested” information is typically presented to the Court in such briefs. See, e.g., Adam Liptak, *Seeking Facts, Justices Settle for What Briefs Tell Them*, N.Y. TIMES (Sept. 1, 2014), http://www.nytimes.com/2014/09/02/us/politics/the-dubious-sources-of-some-supreme-court-facts.html?_r=2 (“The [C]ourt is inundated with 11th-hour, untested, advocacy-motivated claims of factual expertise.”) Moreover, at least some lower court judges have thought it proper to search the web for information or seek to establish facts by having their law clerks conduct experiments. See

communicate with each other about the case (which they generally do at oral argument for the first time since the grant of certiorari), test their own positions, highlight the weaknesses in alternative views, and seek support for the outcomes they may prefer.⁶³ In recent years, several Justices have emphasized the importance

Lubavitch-Chabad of Ill., Inc. v. Nw. Univ., 772 F.3d 443 (7th Cir. 2014) (Posner, J.); Mitchell v. JCG Indus., Inc., 745 F.3d 837 (7th Cir. 2014) (Posner, J.). If the Justices have already gathered information to the extent they deem necessary, the nature and tone of their interventions at oral argument are likely to be different than they would be if “information-seeking” were actually the goal. See POSNER, *supra* note 7, at 134–39.

⁶³ The federal courts of appeals decide many cases without hearing oral argument. See, e.g., MAYER BROWN LLP, FEDERAL APPELLATE PRACTICE 440–41 (Philip Allen Lacovara ed., 2008) (noting, for example, that the Fifth Circuit may grant oral argument in fewer than 20% of its cases, the Tenth Circuit hears argument in fewer than 30% of the cases it decides, and the Second Circuit still hears argument (of some length) in virtually all of its cases); see also THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 108–17 (1994) (discussing elimination of oral argument in many cases in the courts of appeals). The value of oral argument is contested. Martineau, *supra* note 20, at 22 (“[I]ts real contribution to sound decisionmaking is questioned by an increasing number of commentators.”). Even in relatively recent times, however, some of the Supreme Court’s most important decisions have been rendered in cases in which briefs were filed on the eve of oral argument, with decisions being rendered shortly thereafter. See, e.g., Bush v. Gore, 531 U.S. 98 (2000); New York Times Co. v. United States, 403 U.S. 713 (1971); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See also Bush v. Gore, No.00-949, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/search.aspx?file_name=/docketfiles/00-949.htm, archived at <http://perma.cc/X5QW-REKL> (detailing the chronology in the Supreme Court of *Bush v. Gore*); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive ‘Right to Know’*, 72 MD. L. REV. 1, 45–46 (2012) (detailing the chronology in the Supreme Court of *New York Times Co.*); MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 149–77 (1977) (detailing the chronology in the Supreme Court of *Youngstown Sheet & Tube Co.*). At least in those cases one may fairly assume that oral argument played an important role. Moreover, the Justices have routinely vouched for its importance. See, e.g., Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 U. RICH. L. REV. 285, 298 (2000) (quoting Justice Blackmun) (“Many times confusion (in the brief) is clarified by what the lawyers have to say [at argument].”); Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 254 (West 1975) (quoting Justice Brennan) (“[There were] many occasions when my judgment of a decision has turned on what happened in oral argument”); Johnson et al., *supra* note 29, at 245 (quoting Justice Lewis F. Powell, Jr.) (citation omitted) (“[O]ral argument . . . contribute[s] significantly to the development of precedents.”); John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 7 (1955) (noting that the importance of oral argument for “getting at the real heart of an issue.”); Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L.Q. 1, 2 (1951) (“[T]he Justices would answer unanimously that . . . they rely heavily on oral presentations.”). As one study has suggested, judges (including the Justices) may not be reliable informants when it comes to the subject of judging. See

of oral argument, not as an opportunity for the parties to make their best case to the Court, for counsel to answer the Justices' questions or concerns, or for the Justices to acquire additional information from counsel, but as an opportunity for the Justices to persuade each other. As Chief Justice Rehnquist noted,

oral argument . . . is the only time before conference discussion of the case later in the week when all of the judges are expected to . . . concentrate on one particular case. The judges' questions, although nominally directed to the attorney . . . may in fact be for the benefit of their colleagues.⁶⁴

EPSTEIN, LANDES, & POSNER, *supra* note 3, at 1–2 (discussing that despite the prominent role played by judges, “the determinants of their decisions” are “not well understood by lawyers, law professors, or even many judges.” On the other hand, social scientists increasingly have used social science methods to “penetrate self-serving judicial rhetoric, go beyond judges' limited self-understanding, and place the study of judicial behavior on a scientific basis”). It is not surprising that the Justices would speak approvingly of oral argument, which is dear to the hearts of lawyers. Moreover, the Justices may be sincere in their praise of oral argument, while valuing it for reasons quite different from those that motivate the practicing bar. On the other hand, Justice Ginsburg recently voiced her opposition to the videotaping of oral arguments on the ground that the public might attribute undue weight to the oral argument, as opposed to the more important components of the Court's decisional process—the written submissions and private discussion, reflection, and writing. *See* Liptak, *supra* note 55. Justice Ginsburg explained that:

What the public will see is two people with a half-hour a side having a conversation with the [J]ustices, and they come away with the idea that, well, the best debater is going to win that contest . . . It would leave a false impression of the appellate process to think that the oral argument is what is decisive in the cases.

Id. Justice Kagan, who also was interviewed for the story, acknowledged Justice Ginsburg's concerns, as well as “the possibility [that the Justices might be tempted to engage in] grandstanding,” but emphasized the importance of transparency and suggested that ““for the most part the court would look pretty good.”” *Id.*

⁶⁴ WILLIAM H. REHNQUIST, *THE SUPREME COURT* 244 (new ed. 2001). Likewise, Justice Ginsburg has suggested that “oral argument is a time when Justices seek to persuade each other.” Phillips & Carter, *Source of Information*, *supra* note 43, at 90 (citation omitted). Justice Stevens has explained that “you have a point in mind that you think may not have been brought out in the briefs well [and] want to be sure your colleagues don't overlook [it].” *Id.* And Justice Kennedy has stated that, “oral argument [is not] a series of dialogues between attorneys and Justices, . . . ‘what is happening is the court is having a conversation with itself through the intermediary of the attorney.’” *Id.* at 91. Although the ordinary appellate process is different in many respects from that of the Supreme Court, a distinguished federal appellate judge has made a similar point about oral argument in the intermediate courts. *See* FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 133 (1994) (“Oral argument is really the first stage of the conferencing among the judges.”). On occasion, as in *Bush v. Gore*, 531 U.S. 98 (2000), the Justices have departed from their usual practice of not

The apparent growth of the “colleague persuasion” aspect of oral argument has coincided with certain changes in the format of the post-argument conference. In earlier times, the Justices apparently spoke twice on each case at the conference: they would first give their views of the case, speaking in descending order of seniority, and then register their votes in the opposite order.⁶⁵ That practice apparently changed at some point, so that the Justices now speak only once; each Justice gives his or her view of the case and votes at the same time, speaking in order of seniority, with the Chief Justice speaking and voting first.⁶⁶ The contemporary conference is thought to have become very formally structured, with little, if any, give-and-take; the Justices do not interrupt each other or talk out of turn.⁶⁷ There is

communicating about a case prior to argument. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 199 (2007) (“It was not a usual conference. Because of the urgency, the Justices had already exchanged several memos on the case, even before oral argument.”). When Justice Brandeis was on the losing side of a conference vote, he sometimes sent his colleagues a post-conference memorandum further arguing his position during the interval between the vote and the circulation of a draft opinion, but “[t]he ploy rarely worked.” See LEWIS J. PAPER, *BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA’S TRULY GREAT SUPREME COURT JUSTICES* 250 (1983). Justice Scalia also reportedly sends post-argument memos (sometimes referred to as “ninograms”) to his colleagues. See JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* 27 (2006).

⁶⁵ STEVENS, *supra* note 59, at 154–55; JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 210 (1993).

⁶⁶ Segal and Spaeth believe that the change happened in either the Vinson or the Warren era. *Id.* However, Justice Stevens thinks that it most likely happened under Chief Justice Burger. STEVENS, *supra* note 59, at 155.

⁶⁷ Chief Justice Rehnquist said that he was surprised when he joined the Court to find out that there was no conversation, let alone persuasion, at the conference: the Justices simply explained their reasons and voted. See SEGAL & SPAETH, *supra* note 66, at 211. That has not always been the case. Chief Justice Hughes may have led the conference with the authority of a “strict teacher in the classroom,” but his successor, Chief Justice Stone, preferred “a freewheeling discussion in which [he] was more a participant than a leader.” BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 247 (1993). Ironically, it was Chief Justice Stone who actually was the nineteenth-century schoolmaster. See ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 65 (1956) (describing Stone’s early career as a high school teacher and vice principal). In any event, Chief Justice Stone was “eager[] to have all issues thoroughly explored,” did not follow the tradition of requiring that the Justices speak in turn, and relished doing battle with anyone who disagreed with him. SCHWARTZ, at 247. According to Professor Schwartz, “Discussion became wrangling and the Justices emerged from these interminable meetings irritated and exhausted, their [personal and professional] differences inflamed from excessive argument.” *Id.* at 247–48. Chief Justice Vinson, Stone’s successor, “was even more inept . . . in leading the conference.” *Id.* at 254. Chief Justice Warren, on the other hand, provided strong leadership to the conference and helped steer cases because of the way in which he framed the issues. *Id.* at 269. In his

little opportunity for conversation, let alone persuasion.⁶⁸ In addition, and perhaps because the conference under Chief Justice Burger had become a meandering affair, Chief Justice Rehnquist was intent on moving things along, so that the conference became shorter and more streamlined.⁶⁹ Chief Justice Roberts reportedly has placed more emphasis on the Justices' actually talking and listening to each other.⁷⁰

Some commentators have suggested that the very formal, modern conference, whether brief or protracted, is simply unsuited to genuine discussion or collegial deliberation.⁷¹ Judge Posner, who believes that deliberation is vastly overrated in any event (because judges rarely change their minds based on further reflection or

memoirs, Chief Justice Warren explained the way in which he guided the conference in *Brown v. Board of Education*, following its re-argument in November 1953:

To return to our method of handling the school segregation cases, we were all impressed with their importance and the desirability of achieving unanimity if possible. Realizing that when a person once announces he has reached a conclusion it is more difficult for him to change his thinking, we decided that we would dispense with our usual custom of formally expressing our individual views at the first conference and would confine ourselves for a time to informal discussion of the briefs, the arguments made at the hearing, and our own independent research on each conference day, reserving our final opinions until the discussions were concluded.

EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 285 (1977). The Court "followed this plan until the following February, when it was agreed that [they] were ready to vote." *Id.*

⁶⁸ Chief Justice Rehnquist came to believe that it would not make sense to allow for a more freewheeling discussion. See SEGAL & SPAETH, *supra* note 66, at 211. His view may have been a reaction, in part, to Chief Justice Burger's apparently inept leadership of the conference. See STEVENS, *supra* note 59, at 155. Justice Scalia had the same initial reaction, but he has remained more critical of the contemporary conference, saying that "to call our discussion of a case a conference is really something of a misnomer." SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 304 (2005). According to Justice Scalia, the conference is "more a statement of the views of the nine Justices, after which the totals are added and the case is assigned." *Id.*

⁶⁹ BLACK, JOHNSON & WEDEKING, *supra* note 10, at 13.

⁷⁰ *NPR News, Roberts' Court Produces More Unanimous Decisions*, NPR NEWS (May 22, 2006, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=5421326>, on file with the Utah Law Review.

⁷¹ See EPSTEIN, LANDES & POSNER, *supra* note 3, at 306–07 ("At the conference judges speak their piece, usually culminating quickly in a statement of the vote they're casting. They speak either in order of seniority, as in the Supreme Court, or in reverse order of seniority, as in many of the federal courts of appeals. Often there is no discussion at all but merely statements of the judges' votes. It is a serious breach of etiquette to interrupt a judge when he has the floor at the post-argument conference, and this too discourages free give-and-take.").

in response to their colleagues' arguments),⁷² has suggested that the purpose of the conference is simply to record the Justices' votes and thereby determine the result.⁷³

⁷² See POSNER, REFLECTIONS, *supra* note 6, at 171. Judge Posner has expressed the view that individual judges have little difficulty deciding cases: "It is not a protracted process unless the judge has difficulty making up his mind, which is a psychological trait rather than an index of conscientiousness." POSNER, HOW JUDGES THINK, *supra* note 47, at 299. In other words, unless a judge is psychologically challenged, he will have little difficulty in deciding for himself on the correct outcome in a case and will then be relatively impervious to the persuasion of others. "In such situations the principal effect of arguing is . . . to drive the antagonists farther apart—or at least to cause them to dig in their heels." *Id.* at 302. *But see* POSNER, REFLECTIONS, at 129 ("When trying to make up his mind about how to vote, a judge should remind himself of his limitations Not that it is wrong, let alone possible, to judge without biases."). Historians suggest that, at least in the early Republic, the Justices may have been open to persuasion by their colleagues. *See* NEWMYER, *supra* note 59, at 78 ("Story remembered the interchanges in conference as freewheeling, a 'pleasant and animated interchange of legal acumen.' Judicial conferences took place 'at our lodgings and often come to a very quick, and I trust, a very accurate opinion in a few hours.'"); CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 15 (1996) ("In both courtroom and conference chamber, Marshall was a patient and attentive listener [T]he key to his leadership lay in his openness to argument and persuasion, his willingness to subordinate his own views if necessary to obtain a single opinion of the Court. If the Court most often spoke through the chief justice, the opinion was the product of collaborative deliberation, carried out in a spirit of mutual concession and accommodation."). Others have disagreed with Judge Posner about the degree to which serious discussion currently takes place among federal appellate judges. *See, e.g.,* Evan C. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2310 (1999) (discussing the benefits that arise when members of multimember courts share views and increase the likelihood that all plausible positions will be explored); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1360 (1998) ("[W]e do spend a great deal of time listening to each other's views and considering arguments each of us makes."); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1951 n.197 (2009) (expressing disagreement with Judge Posner's assertion that judges do not deliberate very much and that deliberation is overrated); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1646 (2003) (noting that judges in a collegial atmosphere are more likely to "go back and forth in their deliberations over disputed and difficult issues until agreement is reached."). Pauline Kim has written insightfully about the dynamics of panel decision-making in the courts of appeals. *See* Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1319 (2009). Ironically, Judge Posner has recently suggested that his opinion for a divided court in *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008), was mistaken, and that Judge Terrence Evans's dissenting opinion was correct. *See* POSNER, REFLECTIONS, at 84–85; Josh Gerstein, *Judge: My Key Voter ID Ruling Was Wrong*, POLITICO, <http://www.politico.com/blogs/under-the-radar/2013/10/judge-my-key-voter-id-ruling-was-wrong-174890.html> (Oct. 11, 2013) *archived at* <http://perma.cc/C9LS-RC2Z>. According to Judge Posner, the panel would have

Like other students of the Court, Judge Posner has suggested that the Justices typically use questions or other statements at oral argument, either to make points they want to make sure their colleagues are thinking about or to squash positions that they think a colleague might otherwise find appealing. By using counsel as foils, the Justices are able to challenge their colleagues' views without violating norms of collegiality—which they might be perceived as doing if they confronted their colleagues directly in a frank give-and-take in the conference room.⁷⁴ Thus, interaction with counsel at oral argument substitutes for candor in the conference room.⁷⁵

Finally, oral argument is important because it provides the public with an opportunity to observe their government in action and to be assured that important questions of public law are being considered in a rigorous, dignified, fair, and dispassionate way.⁷⁶ This aspect of oral argument recognizes the seemingly anomalous role of an unelected judiciary in a democratic society and follows from the recognition that Supreme Court decisions not only give specific shape to the rights and responsibilities of citizens, but frequently elaborate the rules by which the affairs of government are conducted. For these reasons, it is essential that Supreme Court proceedings be accessible and understandable to the public and as transparent as is consistent with the nature of adjudication and with the other purposes to be served by oral argument.⁷⁷

decided the case correctly “if the lawyers had provided us with a lot of information about the abuse of voter identification laws.” *Id.*

⁷³ See THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 59, at 117 (“The nature of the conference continued to evolve under Burger’s leadership. The Justices became less interested in using the conference to exchange ideas, debate, or persuade others. Instead, they began to view the conference merely as an opportunity to declare their individual positions and count votes.”); POSNER, THE FEDERAL COURTS, *supra* note 7, at 308–09.

⁷⁴ See POSNER, THE FEDERAL COURTS, *supra* note 7, at 308; WILLIAM DOMNARSKI, THE GREAT JUSTICES, 1941–54: BLACK, DOUGLAS, FRANKFURTER, AND JACKSON IN CHAMBERS 119 (2006) (“Frankfurter . . . felt the strength of Black’s convictions and resistance when, on one occasion at least, they nearly came to blows at conference.”).

⁷⁵ See, e.g., EPSTEIN, LANDES & POSNER, *supra* note 3, at 307, 309. Among other things, Epstein and her coauthors argue that the Justices are reluctant, because of concerns about collegiality, to challenge their colleagues’ ideas directly when they have the opportunity to do so in conference, and that they therefore use oral argument as a way of doing so indirectly. *Id.*

⁷⁶ See, e.g., Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 179 (“One of the reasons Congress persisted in requiring members of the Supreme Court to ride circuit in the nineteenth century was a fear of the political consequences of isolating the Court from its public. The argument that was made pointed perhaps as much to judges’ learning as to judges’ teaching.”).

⁷⁷ *Id.* at 180 (“Whether the Justice should teach the public is not and cannot be in question since teaching is inseparable from judging in a democratic regime.”).

John W. Davis had it right when he suggested that a cold bench is not an advocate's friend;⁷⁸ there are few things more unsettling than arguing before a silent bench, hearing only one's own voice and wondering what the judges are thinking. In the best of circumstances, a Justice's questions can provide an advocate with "a perfect window" into the Justice's mind, and "tell[] you exactly what is bothering [him or her]."⁷⁹ But not all interruptions are questions, and not all questions are equal. Some interruptions are strategic, some tactical. They do not invariably provide a "perfect window" into the Justice's mind.

Although the ideal oral argument is often described as a "conversation" among judges and lawyers,⁸⁰ an oral argument is seldom, if ever, a "conversation" among equals. It is a defining characteristic of the courtroom that judges not only rule, but make the rules; and lawyers are supplicants who must follow the rules—even when the judges do not.⁸¹ Tough questions are an essential part of oral argument,⁸² and most judges do not abuse their position. But the relationship of judge and counsel is not one of equality; sarcasm, rudeness, sharp questioning, and other aggressive judicial tactics can easily become an abuse of the power relationship that necessarily exists in any courtroom.⁸³ That potential for abuse is enhanced when a Justice openly

⁷⁸ See John W. Davis, *The Argument of An Appeal*, 26 A.B.A. J. 895, 897 (1940).

⁷⁹ See Carter G. Phillips, *Advocacy Before the United States Supreme Court*, 15 T.M. COOLEY L. REV. 177, 190 (1998).

⁸⁰ See, e.g., Liptak, *Similar Justices*, *supra* note 55 (noting Justice Ginsburg's reference to oral argument as "a conversation with the justices").

⁸¹ For example, the Clerk's guidebook for attorneys contains many admonitions with respect to the conduct of attorneys at oral argument, including the observation that, "Attempts at humor [by counsel] usually fall flat." SUPREME COURT OF THE U.S., GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 11 (Oct. Term 2014), available at http://www.supremecourt.gov/oral_arguments/guidefor_counsel.pdf, archived at <http://perma.cc/FKB9-3N3D>. However, several of the Justices frequently interrupt counsel's arguments with jokes or make jokes at the expense of counsel. See, e.g., Liptak, *A Most Inquisitive Court?*, *supra* note 36, at 2 ("When the justices are not making points, they are cracking wise and keeping score 'It turns out that the conservatives dominate, even carrying the silence of Justice Thomas, with 207 instances of laughter, or 41 instances per justice,' the study found. 'The liberal justices trail with 136 instances—the same number as Justice Scalia on his own.'").

⁸² See POSNER, REFLECTIONS, *supra* note 6, at 129.

⁸³ *Id.* Chief Justice Warren E. Burger is often credited with beginning the contemporary conversation about professional civility in a 1971 speech to the American Law Institute. See Warren E. Burger, *The Necessity of Civility*, 52 F.R.D. 211 (1971). Not surprisingly, much of that conversation has focused on the civility of lawyers, rather than judges. See Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 667–68, 682–86 (2001). In 1989, however, a survey of over 1,500 lawyers and judges conducted by the Seventh Circuit's Committee on Civility found that many lawyers thought that "judges are sarcastic, arrogant, rude, lack respect for lawyers, lack judicial temperament and needlessly humiliate lawyers in court." *Id.* at 686 (quoting Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 401 (1991)). In the same

disrespects a party or her counsel or adopts an explicitly adversarial posture toward one side or the other. Thus, Supreme Court advocates can be made to resemble minor characters (or mere observers), with the Justices writing the script and commanding the stage. The integrity of the process demands some degree of judicial self-restraint, and there must be some limit to the amount of time that can be taken up by the Justices—in questions, statements, and jokes—before oral argument loses any purpose. Finally, because the Supreme Court sits at the pinnacle of the American judicial system, the Justices necessarily are seen as role models by judges throughout the justice system.⁸⁴ Based on past experience, it seems likely that what passes as appropriate judicial behavior at the Supreme Court will so pass elsewhere. As the Justices behave at oral argument, so, too, will appellate judges throughout the land.

survey, 22% of the responding judges expressed the view that civility problems exist between or among judges in the Seventh Circuit. *Id.* at 682.

⁸⁴ See, e.g., Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 620 (2009) (“As the elite and celebrated institution, or ‘crown jewel,’ of our judiciary, the Supreme Court serves as a model for lower courts.”) As Professors Carrington and Cramton have noted, the lower federal courts have emulated the Supreme Court in numerous ways with respect to the handling of their work. For example, the organizational changes that they have copied have “enabled federal judges to be more selective about their work, to delegate more to subordinates, and to conduct a legal process that is, like that of the Supreme Court, far less transparent than that conducted by their predecessors a few decades ago.” *Id.* at 620. In various ways, “the effect of the Supreme Court as a role model trickles down,” not only to the federal courts of appeals, but also to the federal trial courts. *Id.* at 625. The same is also doubtless true with respect to the state courts, which frequently follow the Supreme Court’s lead, even in matters in which they are not required to do so. See, e.g., Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1067 (1997) (“Specifically, I want to question the uncritical adoption, when giving meaning to state constitutional rights, of verbal formulas that the United States Supreme Court uses to measure federal constitutional rights or powers. Some of this dogma should be laid to rest by the Supreme Court, as federal law scholars agree; it certainly does not deserve a second life, released to stalk the pages of the state reports, where, vampire-like, it sucks the life out of fresh constitutional analysis.”). See also John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (discussing the influence of the Federal Rules of Civil Procedure on the development of state judge-made rules of practice).

III. OUR STUDY, ITS METHODOLOGY, AND ITS RELATIONSHIP TO PRIOR STUDIES

Scholars have addressed many aspects of oral argument in the Supreme Court: the possible relationship between attorney performance and case outcome;⁸⁵ the possible relationship between the number of questions asked of counsel and his or her likelihood of prevailing;⁸⁶ the possible relationship between the Justices' use of extreme words and case outcome;⁸⁷ the Justices' relative use of "questions" and "statements"⁸⁸ in more or less salient cases;⁸⁹ the degree to which the current Justices make more or fewer "statements" (as opposed to questions) than their predecessors;⁹⁰ the degree to which the Justices actually seek information at oral argument;⁹¹ the degree to which the Justices interrupt each other;⁹² the degree to which a Justice's talkativeness may correlate with his or her influence on the outcome of a case;⁹³ the degree to which Justices are more likely to listen carefully to a colleague's interventions based on ideological affinity or the perception that a colleague may occupy the ideological middle ground;⁹⁴ the degree to which the addition of one talkative Justice may alter the behavior of other Justices;⁹⁵ and the degree to which the Justices may lack candor when they continue to affirm the importance of oral argument.⁹⁶

Previous studies have contributed greatly to our understanding of the Supreme Court's decisional processes, and, in particular, to our understanding of oral argument.⁹⁷ But the existing scholarship has not addressed several questions suggested by the Chief Justice's observation that the "level of questioning" in the Court has been fairly consistent in the recent past: (1) whether the same conclusion

⁸⁵ See Johnson et al., *supra* note 28.

⁸⁶ Roberts, *supra* note 15, at 75; Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 272 (2004); Johnson et al., *supra* note 29, at 242.

⁸⁷ Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 572–73 (2011).

⁸⁸ Andrea McAtee and Kevin McGuire give the words "questions" and "statements" their everyday meaning. See *supra* note 60 and accompanying text. We use the words in a slightly different way. See *infra* notes 107–109 and accompanying text.

⁸⁹ See McAtee & McGuire, *supra* note 60, at 273.

⁹⁰ See Phillips & Carter, *Oral Argument*, *supra* note 43, at 327.

⁹¹ See Phillips & Carter, *Source of Information*, *supra* note 43, at 80.

⁹² Johnson et al., *Pardon the Interruption*, *supra* note 29, at 336.

⁹³ Johnson et al., *Oral Advocacy*, *supra* note 28, at 517.

⁹⁴ *Id.* at 517–18.

⁹⁵ EPSTEIN, LANDES & POSNER, *supra* note 3, at 330–31.

⁹⁶ See *id.*

⁹⁷ Empirical studies are particularly useful, as Judge Posner has noted, because judicial decision-making is poorly understood by the bar as well as the public, and even by judges themselves. See Posner, *supra* note 47, at 2. "This unrealism is due to a variety of things, including . . . the fact that most judges are cagey, even coy, in discussing what they do." *Id.*

would apply if one looked at points in time a little earlier and later than those chosen by the Chief Justice; (2) whether the nature of the “interruptions” has changed, and with it, the Justices’ apparent understanding of the nature and purpose of oral argument; and (3) whether any such change is for the good, given the important role that the Court plays in contemporary American society.⁹⁸

Our study looks more closely at the nature of the Justices’ interventions and uses a consistent set of simple and relatively straightforward metrics to compare a sample of cases from a three-year period in the recent past (October Terms 2010, 2011, and 2012) with a sample from a three-year period about twenty years before the earlier period chosen by the Chief Justice (October Terms 1958, 1959, and 1960).⁹⁹ Our study included all cases argued on Tuesdays during each of those six

⁹⁸ Barry Friedman has argued that the constitutional crisis of 1937 produced “a tacit deal,” whereby “the American people would grant the justices their power, so long as the Supreme Court’s interpretation of the Constitution did not stray too far from what a majority of the people believed it should be.” BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 3–4 (2009). The promise of a certain degree of transparency might be thought ancillary to that “deal.”

⁹⁹ According to the Supreme Court website, oral arguments were not routinely transcribed until October Term 1968. Even then, the court reporter did not identify the individual Justice who was speaking, but simply noted each judicial intervention with the word “Question”—without regard to whether the intervention was a true question, a statement, or something else. The court reporter began identifying the speaking Justice by name in October Term 2004. See *Argument Transcripts*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/oral_arguments/argument_transcript (last visited June 18, 2015), archived at <http://perma.cc/UWB8-BW54>. For purposes of the present study, we have used the term “speaking turn” to refer to any intervention by a Justice that is preceded and followed by a statement by counsel or another Justice. The Oyez.org website has a nearly complete set of unofficial transcripts beginning with the late 1950s and partial coverage for earlier periods; the transcripts available on the Oyez.org website identify the Justice who is speaking. See *Cases*, OYEZ, <http://www.oyez.org/cases/> (last visited June 14, 2015), archived at <http://perma.cc/8QMF-8SVD>. We have chosen to study the Court as a whole during both periods and have not attempted to draw any conclusions or comparisons about the relative loquacity of individual Justices in either period. However, in those instances in which we were required to rely on the unofficial Oyez transcripts, we also relied on Oyez’s designations to determine whether the speaker was an attorney or a Justice. Significantly, for both of the periods covered by our study, the membership of the Court remained constant. The Justices who sat on the older cases were Chief Justice Earl Warren and Justices Hugo L. Black, Felix Frankfurter, William O. Douglas, Tom C. Clark, John Marshall Harlan, William J. Brennan, Jr., Charles E. Whittaker, and Potter Stewart. The Justices who sat on the newer cases were Chief Justice John G. Roberts, Jr. and Justices Antonin G. Scalia, Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, Samuel A. Alito, Jr., Sonia M. Sotomayor, and Elena Kagan. Tuesday was chosen more or less at random, but it seemed that something was to be said for picking a day in the middle of the Court’s week, as opposed to one at the beginning or the end. It was not deemed feasible, for purposes of this study, to review all of the arguments given on every day for all six terms.

Terms.¹⁰⁰ Our data set for 1958–60 consisted of 89.642 cases,¹⁰¹ while the data set for 2010–12 consisted of seventy-nine cases. We present our data as essentially two snapshots for two reasons. First, we have no reason to believe that Tuesday cases are not representative of their respective periods, but we also cannot prove that they are, since we have not studied all of the cases argued in all of the terms that we studied. Second, and probably more important, we have not endeavored to study any terms prior to the 1958–60 period, or, except for the 1980 term studied by Chief Justice Roberts,¹⁰² any terms between the 1958–60 and the 2010–12 periods. Thus, we cannot say whether the 1958–60 period is an aberration in terms of what preceded it or whether the differences between the two periods are the result of a trend or are simply differences between two periods.

Our study approached the data from both quantitative and qualitative perspectives. First, we sought to compare what was going on in the two periods through the use of extremely simple quantitative metrics, such as the total number of words spoken by counsel and the Justices, respectively; the number of speaking

¹⁰⁰ The 1958–1960 period was chosen in part because oral argument transcripts were readily available for most cases, which was not the case for some other periods. Transcripts were available for all but three Tuesday cases during the 1958–1960 period. Two of the cases—*Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290 (1959), and *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180 (1959)—were argued on March 3, 1959. The third case—*United States v. States of La., Tex., Miss., Ala. & Fla.*, 363 U.S. 121 (1960)—was an original jurisdiction case argued on October 13, 1959. Transcripts for all other cases for both periods were available through Oyez.org or Supremecourt.gov. Three significant differences between the two periods should be noted. First, the time allotted for oral argument in the earlier period was typically one hour to the side, as opposed to one-half hour to the side in the later period. Second, the Court was hearing oral argument for more hours each day and for more days each week in the earlier period. Third, because of the two hours allotted for oral argument in the earlier period, cases were often argued over a two-day period. In other words, some cases began on Monday and ended on Tuesday, while others began on Tuesday and ended on Wednesday. Our study included all cases fully or partially argued on Tuesdays, but counted the partially argued cases as fractional cases, according to the number of minutes that were argued on Tuesday. For example, if the Tuesday and Wednesday portions of the argument were each sixty minutes long, the case was included in our study as 0.5 cases. We recognized that there might be some distortion if, for example, the Tuesday portion of an argument were very brief, but we thought that including partial arguments of whatever length was less likely to distort the study than not including them. Thus, we chose to compare one day of arguments in the earlier period to one day of arguments in the later period. Consistent with the jurisdictional statutes in effect during the earlier period, the earlier cases also include a larger number of appeals. *See, e.g.,* Cordray & Cordray, *supra* note 4, at 389, 391–95 (describing the process leading to the virtual elimination of mandatory appellate jurisdiction).

¹⁰¹ The number of cases is not an integer because the Court’s daily call often included partial cases in the earlier period, as previously explained. *See supra* note 100 and accompanying text.

¹⁰² Roberts, *supra* note 15, at 75.

turns of the Justices; the number of questions asked by the Justices; and the number of noninterrogatory statements made by the Justices. Second, we analyzed a number of oral argument transcripts from the relevant periods to look more closely at the structure of oral argument and the precise nature of the Justices' interventions during each period. Finally, based on our qualitative and quantitative analyses, we considered what effects any changes in the Justices' behavior might have had on the nature of oral argument and its role in the Court's decisional process. While some previous studies have focused on various time frames and modes of comparison, our study is unique in its combination of quantitative and qualitative methods to understand what is happening in the interactions among the Justices, and between the Justices and counsel; how those interactions appear to be different from what they were a half century ago; and the possible significance of those differences for understanding the Court's role in our constitutional system.

The nature of oral argument in the more recent period appears to be significantly different from what it was in the 1958–60 period. Oral argument seems somewhat chaotic in the later cases, particularly compared with the more orderly arguments of the earlier period. Among other things, the current Justices are far more talkative than their predecessors. That may be the case because the Justices are better prepared (having more clerks and a smaller caseload) and therefore know more about each case, have had the opportunity to form an opinion as to the best outcome, and have a strong incentive to talk—despite the shortening by half of the time available for oral argument. But it is not easy to see what the Justices hope to achieve at oral argument.

While the Justices have long used oral argument as an opportunity to speak to each other, the Justices' extra-curial writings suggest that some may now consider this aspect of oral argument to be its predominant function.¹⁰³ Alternatively, the evidence might be understood to suggest that the Justices sometimes seem to regard oral argument not as a serious or important part of the decisional process, but as an opportunity to demonstrate their quickness or cleverness, or as Professor Epstein and her colleagues have said, to have “a good time.”¹⁰⁴ In the older cases, the Justices appeared to give counsel more leeway in developing their own narratives and in responding to the Justices' concerns. Although substantial parts of the earlier oral arguments may have taken on the character of monologues, the interactions that did occur seemed more like conversations between counsel and the Court, whereby precedents were examined, theories tested, and legal and factual points clarified. To be sure, the Justices asked questions, made points to their colleagues, and emphasized lines of argument they found particularly weak or persuasive, but they also seemed more cognizant that there were other purposes to be served at oral argument: allowing counsel to craft a narrative and emphasize the relative strengths and weaknesses of the parties' positions; providing counsel with an opportunity to make his best case, face to face, to the Court; assuring the parties that their concerns were being fairly and thoroughly considered; and providing the public with an

¹⁰³ See *supra* note 63.

¹⁰⁴ EPSTEIN, LANDES & POSNER, *supra* note 3, at 314.

opportunity, not simply to learn what was at stake in the case, but to see that justice was done. To the extent one can tell, the Justices seemed more likely to ask questions to which they truly desired answers, and they generally gave counsel a reasonable opportunity to answer their questions. Perhaps consistent with the mores of the period, the Justices generally did not appear to be sarcastic or rude toward counsel.

The more recent arguments suggest a different dynamic. The Justices showed little interest in having counsel develop even the outlines of a coherent narrative, and they rarely allowed counsel to do so. On the other hand, they frequently used an advocate's limited time to joke or argue with each other. They sometimes seemed sarcastic or rude to counsel, and their behavior occasionally would qualify as bullying if it occurred in a different context. The Justices were better prepared and seemed more personally invested—perhaps too personally invested—in individual cases.

Various explanations for these differences are possible, and more than one explanation may be necessary to account for all of them. One possible explanation for the seemingly increased emphasis on oral argument as a venue for persuading one's colleagues is that the Justices may now see interactions at oral argument as a substitute for the deliberation or discussion that could occur in a post-argument conference, but apparently does not. The Justices' occasional sarcasm and rudeness may be related to the more general coarsening of social interactions in our society or to an increased level of intellectual elitism—which might also explain the levity with which some of the Justices sometimes seem to approach some of the issues or factual backgrounds of a case. It may also be that the Justices' conduct at oral argument reflects their sense that oral argument no longer serves any real purpose in most cases, but is a practice that cannot be eliminated for political reasons.¹⁰⁵ In this sense, the explanation for the Justices' conduct at oral argument may simply be boredom. In any event, the "new oral argument" is not about the lawyers, who often seem to be props, bystanders, or straight men in the well of the Court. Nor is it about the parties or the public. What goes on at oral argument is often incomprehensible to the public. Oral argument seems to be for and about the Justices.

¹⁰⁵ Oral argument is dear to the hearts of most lawyers. For both the public and the profession, oral argument provides an assurance that the issues presented will actually be considered by those who have the power to decide them. Oral argument is therefore symbolic of the promise that justice will not only be done, but be seen to be done. *See* Roberts, *supra* note 15, at 69 (agreeing with Justice Harlan's view that "your oral argument on appeal is perhaps the most effective weapon you have got").

IV. OUR QUANTITATIVE METHODOLOGY

We reviewed all available transcripts for Tuesday arguments for both periods: October Terms 1958–60 and 2010–12.¹⁰⁶ For each case in our sample, we first attempted to determine the precise number of words spoken by counsel and the Court, respectively.¹⁰⁷ That step was straightforward in most cases. In some cases, however, the court reporter recorded some counsel statements or judicial interventions as “Inaudible.” In such cases, we relied on the oral argument tapes to estimate the number of words included in the “inaudible” statement or intervention.¹⁰⁸ With respect to the Justices’ participation, we counted three additional variables: speaking turns, questions, and statements. By “speaking turn,” we mean every occasion on which a Justice spoke, either without interruption or before being interrupted, whether for one word or several hundred. We used the term “question” to refer to any utterance by a Justice that ended in a question mark or otherwise manifested an interrogatory intent by using words such as “I’d like to know whether”¹⁰⁹ We used the term “statement” to mean any utterance that was

¹⁰⁶ As previously noted, we were unable to locate transcripts for three Tuesday cases during the earlier period. *See supra* note 100 and accompanying text.

¹⁰⁷ We created Microsoft Word documents from each original transcript and used the program’s word-counting function to calculate word totals, which we did by highlighting sections of uninterrupted text spoken by counsel or by one of the Justices, respectively. We refined the data by subtracting the number of words in the speaker’s name, the number of nonword characters that Microsoft Word conventionally counts as words (such as double dashes standing alone or at the beginning of words), and a number of other nonwords that the program counts as words (such as the expression “(ph)” used to signify phonetic spelling). We also excluded such ceremonial expressions as “Mr. Chief Justice, and May it please the Court” and “Thank you, counsel. The case is submitted.” Since we mainly limited our study to transcripts, our results are limited in the same way that transcripts are limited. For example, when two Justices speak at the same time, the reporter necessarily records one and then the other. Thus, virtually simultaneous interventions may appear as interruptions. While that fact may distort the data in an absolute sense, we have no reason to believe that it does so disproportionately for one or the other period, except insofar as the Justices generally spoke more in the later cases.

¹⁰⁸ To approximate the “word value” of dialogue that the court reporter recorded as “(Inaudible),” we first tracked the number of times that the word “Inaudible” appeared in each transcript, counting separately for Justices (“JI”) and counsel (“CI”). We then estimated an approximate word value for each JI and CI by listening to the relevant oral argument recordings. Certain Justices, including Justices Brennan, Clark, and Whittaker, were often difficult to hear and sometimes were responsible for relatively lengthy periods of inaudible material. That problem was not present in the newer cases.

¹⁰⁹ We encountered relatively few instances in which the Justices asked questions in that form.

declaratory rather than interrogatory in form.¹¹⁰ For each case, we recorded Justice words (“JW”), counsel words (“CW”), the ratio of JW to CW (“R”),¹¹¹ speaking turns by Justices (“ST”), questions by the Justices (“Q”), statements by the Justices (“S”), and the ratio of Justice statements to Justice questions (“S:Q”).

As our study developed, we noticed significant structural differences between the older and newer oral arguments that suggested the need for developing certain additional metrics. First, we noticed that the Justices in the older cases allowed counsel considerably more time for introductory remarks before they interrupted. To capture this difference quantitatively, we recorded the number of words in the opening statement that each lawyer gave prior to the Court’s first interruption (“O”).¹¹² Second, in both sets of cases, the Justices and counsel engaged in back-and-forth conversation with nearly equal JW and CW. In the older cases, however, the Justices frequently allowed counsel to deliver long non-opening monologues. We therefore decided to record the longest non-opening monologue for each lawyer (“Longest non-O CW (counsel)”). We also decided to record all non-opening

¹¹⁰ The fact that some of the Justices’ utterances were recorded as “(Inaudible),” i.e., “JI,” introduced an additional complication: if the court reporter recorded either the entirety or the end of a Justice’s speaking turn as inaudible, should the speaking turn be considered to end with a question or a statement? In many cases, context resolved the issue: an inaudible intervention was treated as a question if the beginning of the relevant sentence was audible and clearly indicated a question (“Who appeared at the deposition to (Inaudible),” or, alternatively, an audible response clearly appeared to answer a question (“No, these goods were intrastate, your honor.”). Otherwise, we treated such speaking turns as ending with a statement, rather than a question. That default rule was chosen for two reasons. First, statements outnumbered questions in every Term, making it more likely than not that any individual inaudible utterance was a statement. Second, our working hypothesis was that the Justices spoke more declaratively—defined by a higher ratio S for each Q—in the newer cases. Since JI occurred more in the older cases, counting JI as statements increased the ratio of S to Q more significantly in those older cases. This would decrease the change in the S to Q ratio and guard against artificially inflating the data to support our hypothesis. Also, as previously noted, we did not note the identity of individual Justices. We considered words, speaking turns, and other metrics on a Court-wide level only.

¹¹¹ A higher R value signifies greater activity by the Justices. For example, an R of 0.5 indicates that the Justices spoke half the words that counsel spoke; an R of 1.0 indicates an equal number of words; and so on.

¹¹² We recorded this data for each of the arguments in a case: petitioner’s opening argument, respondent’s argument, and petitioner’s reply, if any. In some cases, there may also have been an argument by an amicus curiae (usually the Solicitor General), which was also included. In the older cases, counsel sometimes “started” their arguments twice, because the Court had risen for a midday break or adjourned for the day in the middle of the argument. We treated those “secondary openings” differently, depending on whether they occurred after a midday or overnight break. We thought that an overnight break was a sufficiently long interruption in the argument to warrant treating the beginning of the argument that began the second day as akin to an “opening,” whereas it seemed reasonable to assume that the resumption of an argument after a midday break should simply be treated as a resumption of the argument.

counsel monologues that were 200 words or longer.¹¹³ As we continued to analyze the data, however, we determined that the 200-word benchmark did not capture the magnitude of the differences between the older and newer cases. We therefore decided to record all non-opening counsel monologues that were at least 50, 100, 200, and 500 words.¹¹⁴ We also decided to record and compare the longest non-opening monologues (“Longest non-O CW (case)”) for each case.¹¹⁵

Finally, we noticed that the Justices and counsel seemed to interrupt and “cross talk” each other more often¹¹⁶—and therefore had significantly more one-word or two-word speaking turns—in the older cases. To capture the reality of these exchanges more precisely (and to facilitate a more meaningful comparison between the older and newer cases), we decided that we needed a more precise metric and eventually settled on recording three different categories of speaking turn.¹¹⁷ Thus, we distinguished between speaking turns in which a Justice was able to utter at least

¹¹³ Various sources estimate that the average rate of speech for public speaking is approximately 125 words per minute. See JO SPRAGUE ET AL., *THE SPEAKER’S HANDBOOK* 72 (2014); MICHAEL OSBORN ET AL., *PUBLIC SPEAKING: FINDING YOUR VOICE* 257 (9th ed. 2011); RUTH LIVINGSTON, *ADVANCED PUBLIC SPEAKING: DYNAMICS AND TECHNIQUES* (2015). However, it seems clear from the total number of words spoken in the earlier and later cases, respectively, that the participants were speaking somewhat more quickly in the later cases. See *infra* notes 121–123 and accompanying text.

¹¹⁴ To capture more precisely the reality of the newer cases, we separately recorded all instances in which counsel spoke for fifty words or more and for one hundred words or more. We did so because counsel in the newer cases often spoke for two or three brief paragraphs—a sufficient number of words to warrant being tracked, without reaching the two-hundred-word threshold. We also decided to record all instances in which counsel spoke for five hundred words or more, since that often happened in the older cases, while counsel in the newer cases rarely reached two hundred words. Monologues in the earlier cases sometimes reached or exceeded one thousand words, but not often enough to warrant a separate category. We therefore recorded and analyzed four categories of CW length—50, 100, 200, and 500 words. The categories were overlapping in the sense that a 135-word monologue would be included in both the 50-or-more words category and the 100-or-more words category; a 760-word monologue would count in all four categories. Assuming that the normal rate of speech is 125 words per minute, a normal speaker would speak 50 words in 24 seconds, 100 words in forty-eight seconds, 150 words in one minute and twelve seconds, and 500 words in four minutes.

¹¹⁵ Thus, if petitioner’s longest non-opening monologue was three hundred words in his initial argument, respondent’s was five hundred words in his responsive argument, and petitioner’s was six hundred words in his rebuttal, the value attributed to the case for this metric would be six hundred words.

¹¹⁶ Unlike the later cases, the Justices only rarely interrupted each other in the earlier cases.

¹¹⁷ We initially considered recording the number of “colloquies” between counsel and the Court, meaning extended conversations between counsel and a single Justice, but we rejected that approach because a random sampling of cases showed that colloquies occurred with similar frequency in both time periods. We use examples of colloquies in the qualitative part of our study.

one full sentence (ST(f)) from those in which he or she did not do so (ST(p)), regardless of the precise number of words uttered. We refer to the sum of ST(p) and ST(f) as ST(t).¹¹⁸ We also measured the average number of words the Justices uttered per speaking turn (JW/ST(t)).¹¹⁹ The data relating to speaking turns is described by reference to these terms and set forth in the tables.¹²⁰

V. OUR QUANTITATIVE RESULTS

Application of these metrics to the cases in our data set confirmed the existence of several significant differences between the earlier and later cases with respect to the oral argument behavior of the Justices. These differences include an increase in the average number of words spoken by the Justices in the later cases; a substantial increase in the percentage of words spoken by the Justices (compared with the percentage of words spoken by counsel) in the later cases; a higher average ratio of Justice statements to questions in the later cases; an almost doubling of the average number of words the Justices spoke during each separate speaking turn; and a dramatic shortening of the longest opening and non-opening monologues by counsel in the later cases.¹²¹

¹¹⁸ We were concerned that referring to each one-word or two-word utterance as a “speaking turn” might distort any comparison with the later arguments, which contained less “cross talk” of that kind. Using the categories of ST(p), ST(f), and ST(t) permitted a greater degree of consistency, so that ST(f) would not change, regardless of how a colloquy had been transcribed. For example, if a Justice said, “This issue has been litigated before in several state courts,” this ten-word sentence would represent one ST(f), as well as one ST(t). If counsel interrupted a Justice’s question or statement, however, that could be done in a number of ways (consistent with the number of words in the interrupted sentence), so that the transcript might split a single ten-word sentence into two parts, four parts, or even nine parts. But the ST(f) total would remain at one. Unlike ST(p) and ST(t), ST(f) would provide a reliable variable for a $(Q + S) / ST$ calculation.

¹¹⁹ We used ST(t) rather than ST(f) because many ST(p)s were quite wordy. To use ST(f) would skew the results by excluding these wordy ST(p)s.

¹²⁰ See Appendices A, B, and C.

¹²¹ These differences are reflected in word count spreadsheets available at <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>. Comparisons between the two periods are reflected in Tables 1, 2, and 3, represented in Appendices A, B, and C. Having tested the data reflected in Tables 1 and 2 to determine whether the differences between the periods (October Terms 1958, 1959, and 1960 vs. October Terms 2010, 2011, and 2012) were statistically significant, rather than simply the result of random chance or selection bias, we concluded that the differences were statistically significant. We performed a two sample t-test using Stata Version 13.1. We evaluated each variable by testing its value by the era in which the case was argued (i.e., October Terms 1958, 1959, and 1960 vs. October Terms 2010, 2011, and 2012), using a sample of 197 observations and a 95% confidence level. This number of observations reflects the total number of arguments (partial and full) that were included in the count for October Terms 1958, 1959, and 1960; the number of cases for that period, by contrast, aggregates partial arguments, so that the total number

The first notable difference concerned the quantity of words spoken by the Justices and counsel, respectively, per case. Although the Court reduced by half the time allotted for oral argument (from a default rule of one hour to one-half hour to the side in each case), the Justices *increased* their total words per case by 23.7%.¹²² At the same time, the average words spoken by counsel in each case decreased by 45.8%.¹²³ The fact that the Justices currently dominate oral argument to a much greater degree than they did previously was also illustrated by a significant change in the ratio of words spoken by the Justices to words spoken by counsel (“R”): the older cases saw an R of 0.275, while the newer cases’ R was 0.627.¹²⁴ The ratio of

of cases is smaller than the number of observations. This number of observations was chosen because of the inability to analyze statistically the integer use in t-testing without introducing uncertain biases or changes to the data. The testing or null hypothesis was “the difference between the two groups is not statistically significant.” With respect to all cited variables tested, the null hypothesis was rejected. The other quantitative data about which we report were not tested for significance because of experiment design and the determination that significance testing would not be meaningful. *See* Appendices A, B, and C (Tables 1, 2, and 3). In Table 4, which is available at <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>, we show the results of our study of October Term 1980, which confirm the accuracy of Chief Justice’s observation concerning the apparent lack of change between his two data points.

¹²² On average, the Justices spoke 3,952.962 words per case in the newer cases, over 700 words higher than the 3,195.699 words per case they spoke in the older cases. Two points warrant emphasis here. First, the Court spent somewhat more time hearing oral arguments each day in the earlier period than it did in the later period. That is why our sample includes a total of 89.642 cases for the earlier cases, but only 79 cases for the later period, even though the time allotted for argument was generally twice as long in the earlier period than in the later period. Second, the time allowed for argument in the later cases was less in the later period. The fact that the Justices actually increased their words per case by nearly 25% during the later period is all the more remarkable because the time allotted for argument in the later cases was only half that available in the earlier cases. Given the differences in the number of cases heard each day and the number of minutes of argument time allocated to each case, the most significant data point is not the raw number of Justice words, but the ratio of Justice words to lawyer words. While one might have expected that the ratio of Justice words to lawyer words would have remained constant between the two periods, that was not the case. Presumably, the Justices currently have more to say than they could possibly say if they acted according to the older ratio, given the shorter period of time that is now generally allowed for the argument of each case.

¹²³ On average, counsel spoke 6,300.722 words per case in the newer cases, over 5,000 words fewer than the 11,614.445 they spoke in the older cases. With half the time available for oral argument in the newer cases, counsel spoke slightly more words per minute of argument time in the newer cases, but, again, because of the Court’s shortening of oral argument time, their words per case dropped significantly. *See* Table 1, Appendix A.

¹²⁴ In the older cases, the Justices spoke 286,470.23 words while counsel spoke 1,041,846 words for a ratio of 0.275. (The methodology used to estimate the number of inaudible words is responsible for the fact that the Justices’ word total is not a whole number. To estimate the number of words contained in inaudible sections, we sampled twenty-one of

the newer cases' R to the older cases' R is 2.280. In other words, for a constant number of counsel words, the Justices in the newer cases spoke twenty-two words for every ten that the Justices spoke in the earlier cases. Measured purely by words, the current Justices are 2.280 times more talkative than their predecessors.

An analysis of the Justices' speaking turns shows further differences. In the older cases, the ratio of statements to questions was 1.478,¹²⁵ which rose to 1.907¹²⁶ in the newer cases—an increase of 29.026%. This rise confirms the common perception that the Justices are asking fewer questions and making more declarative statements or pronouncements. Table 2¹²⁷ illustrates the change between the earlier and later cases: the number of statements has increased, the number of questions has decreased, and the ratio of the first to the second has increased substantially. In addition, the completed sentences per full speaking turn increased 73.8%.¹²⁸ Finally, and perhaps most dramatically, the average Justice words per speaking turn increased 92.9%.¹²⁹ Therefore, looking at oral arguments on a per-speaking-turn basis, it is clear that the current Justices are more declarative (as opposed to interrogatory) and more talkative during each speaking turn—facts that would be missed by merely counting questions.

The quantitative data also show dramatic differences between earlier and later cases in the incidence and length of relatively long monologues by counsel. The number of words spoken in the average opening monologue in the newer cases was just 30.6% of the average number spoken in the older cases.¹³⁰ The difference for non-opening monologues was also dramatic, with the average number of words spoken in the longest monologue *by each lawyer* in the older cases being 2.857 times greater than the average in the newer cases.¹³¹ In other words, taking each lawyer's longest non-opening monologue and averaging the longest monologues for both the

the eighty-nine older cases, listened to the tapes for each of those cases, estimated the number of words in each inaudible segment of each tape, added up the total number of words estimated for all the inaudible segments for each tape, and then divided the total number of words contained in all inaudible segments of each tape by the number of inaudible segments.) That gave us an average number of words for inaudible segments for each tape. We did the same for all tapes and then averaged the length in words of the inaudible segments for all tapes. That gave us a number that we could apply to the inaudible segments of the nonsampled cases, which ultimately produced some fractions. In the newer cases, the Justices spoke 312,284 words while counsel spoke 497,757 words for a ratio of 0.627.

¹²⁵ In the older cases, the Justices made 9,990 statements and asked 6,758 questions.

¹²⁶ In the newer cases, the Justices made 12,227 statements and asked 6,410 questions.

¹²⁷ See Table 2, Appendix B.

¹²⁸ The older cases saw 1.288 completed sentences in each full speaking turn, while the newer cases saw 2.239 completed sentences in each full speaking turn.

¹²⁹ In the older cases, the Justices averaged 18.231 words in each speaking turn. In the newer cases, however, the Justices averaged 35.163 words per speaking turn.

¹³⁰ In the newer cases, the average opening monologue was 135.222 words. In the older cases, the average opening monologue was 441.634 words.

¹³¹ In the older cases, the average longest monologue by counsel was 727.282 words; in the newer cases, the average was 254.518 words.

older and the newer cases, the longest monologues in the older cases contained nearly three times as many words as those in the newer cases. An analysis that considers only the longest monologue *in each case* tells the same story: for the older cases, the average length of the longest monologue in each case was 2.849 times greater than for the newer cases.¹³² Table 3 compares these three measures.¹³³

Whether one measures the total words that the Justices and counsel speak during each oral argument, the ratio of statements to questions found in the Justices' interventions during oral argument, or the incidence and length of counsel monologues, the data show that the Justices were far more active during the newer cases.

VI. OUR QUALITATIVE ANALYSIS

For the qualitative part of our study, we examined more closely a number of transcripts from cases in our data sets. These transcripts were not randomly selected, but were chosen because they provided concrete examples of the qualities we observed quantitatively in the two sets of cases and were particularly interesting from the viewpoint of argument structure or the precise nature of the Justices' interventions. Our qualitative comparison of the two sets of transcripts confirmed the existence of significant differences between the older and newer cases. First, the Justices in the older cases typically permitted counsel to make a long opening statement. Usually, a Justice would then ask a question or make a statement containing relatively few words,¹³⁴ at which point counsel would speak again, responding to the Justice's observation or question and beginning another long monologue that typically lasted for several hundred words. During the balance of the argument, the Justices in the older cases tended to allow longer monologues and interrupted counsel only sporadically. Finally, the Justices in the older cases engaged in extended, inquisitive colloquies with counsel, apparently endeavoring to firm up their own understanding of the operative facts, rules, and arguments in each case.

By contrast, the Justices in the newer cases interrupted early, often, and directly. Sometimes they did so to clarify an argument. Often they spoke strategically, with the fairly obvious intention of influencing colleagues by bolstering (or deflating) certain arguments. Not infrequently, they interrupted and talked over each other, indicating the degree to which they valued oral argument as an opportunity to speak. Finally, the Justices in the newer cases simply spoke more—sometimes much more, dominating some arguments in the process. These features of the “new oral argument” suggest that oral argument is very different from what it was in the not-too-distant past and signal that the current Justices may well have very different attitudes toward oral argument than did their predecessors. Whether the Court has

¹³² In the older cases, the average of the longest monologues in each case was 1042.267 words; in the newer cases, the average of that same measurement was 365.861 words.

¹³³ See Table 3, Appendix C.

¹³⁴ Alternatively, a Justice and counsel might engage in a brief colloquy at that time.

any shared, coherent theory as to the purpose or aims of oral argument is another matter.

A. Oral Argument in the 1958–60 Period

1. The Opening Monologue and the Structure of the Argument

Although the precise structure of oral argument naturally varied among the older cases, a general pattern emerged. Counsel typically opened with a lengthy statement of the case, usually exceeding three hundred words.¹³⁵ One of the Justices would eventually interrupt counsel with a question or comment.¹³⁶ Counsel would then typically respond to the question and begin another long monologue—also usually well over three hundred words—either immediately or after a brief colloquy.¹³⁷ The structure of counsel’s argument would thereafter vary considerably from case to case, but, in virtually all cases, counsel would have had an opportunity at the outset to establish the foundation for his or her argument.¹³⁸

¹³⁵ See <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

¹³⁶ *Id.*

¹³⁷ Typically, counsel would set forth the factual background of the case before being interrupted by a Justice’s question or observation. The advocate would then respond to the question or observation, often engaging in a monologue that explained his position and reasoning. These colloquies tended to elucidate the Justices’ doubts and reservations about counsel’s arguments and allowed counsel to address those concerns.

¹³⁸ In the earlier period, the Justices heard more hours of oral argument each week. In 1954, Stern and Gressman advised, “Arguments are heard from Monday through Friday, from noon to 2 PM, and from 2:30 PM to 4:30 PM.” ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE: JURISDICTION, PROCEDURE, ARGUING AND BRIEFING TECHNIQUES, FORMS, STATUTES, RULES FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES* 320 (2d ed. 1954). That practice changed in June 1955, when the Court moved to a four-day-per-week hearing schedule. See SCHWARTZ, *supra* note 55, at 129. Thus, during the period under review, the Court heard oral arguments from 10 a.m. to noon, and from 12:30 p.m. to 2:30 p.m. on Monday through Thursday, reserving Friday for the conference. See ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE: JURISDICTION, PROCEDURE, ARGUING AND BRIEFING TECHNIQUES, FORMS, STATUTES, RULES FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES* 354 (3d ed. 1962). Previously, when the Court heard arguments on Monday through Friday, the conference was held on Saturday. *Id.* Since the Justices spent more time in Court, they presumably had less time to study the briefs and case materials before oral argument. They also had fewer law clerks to assist them, had more opinions to write, and may have spent more of their own time drafting opinions. The long monologues in the earlier cases may have substituted for some part of the Justices’ independent study of the case materials, while they also allowed counsel (particularly in the opening monologues) to construct a compelling factual and theoretical framework in which to situate their argument.

The 1959 oral argument in *Phillips Chemical Co. v. Dumas Independent School District*,¹³⁹ an appeal from the Supreme Court of Texas, is typical of the older cases. Phillips challenged the constitutionality of a Texas statute authorizing the state's taxation of property owned by the federal government, but leased to a private entity.¹⁴⁰ Clark M. Clifford, the well-known Washington lawyer¹⁴¹ who represented Phillips, opened with a 439-word monologue.¹⁴² He began by identifying the parties, noted that both the United States and the State of Texas had "intervened" as amici curiae, and called attention to the relevant Texas statute, which has "to do with the taxing of lessees of federal property."¹⁴³ Clifford then described the salient facts, which were "simple and undisputed":

During World War II, the Federal Government built an ordnance plant in Moore County, Texas and called it the Cactus Ordnance Works. It operated during the war and made explosives there. After the war was over, the Government did not wish to sell the plant, they wanted to keep it in the ownership of the Federal Government in the event that at some future time they might wish to use it again. So they leased the plant. And in 1948, the Federal Government, which owned the fee of the plant, leased the plant to Phillips Chemical Company for a primary period of 15 years with right of renewal. The rental on the plant was in excess of \$1 million per year. Also, the Government can cancel the lease at anytime that it chooses on giving 90 days notice. If it desires to sell the plant, the Government can also cancel a lease on 30 days notice in the event of a national emergency. Now in 1950, the Legislature of Texas passed a law that United States property would be subject to taxation if used by a private party in its business. Now from 1950 to 1954, nothing occurred. Everybody went along in their usual manner. But in 1954, the School District, I'll refer to it as that, levied a tax against Phillips based on the full fee value of the Cactus Ordnance Works. Phillips was operating the plant as an anhydrous ammonia plant which, as Your Honors know, is used in commercial fertilizer. Now after the assessor assessed that tax against Phillips based on the full fee value of the plant, Phillips filed suit in the state court in Texas to have the assessment cancelled and to enjoin

¹³⁹ 361 U.S. 376 (1960). The case was argued on Nov. 17–18, 1959. *Id.* at 376.

¹⁴⁰ *Id.* at 377–81.

¹⁴¹ See, e.g., JOHN ACACIA, CLARK CLIFFORD: THE WISE MAN OF WASHINGTON 168 (2009); CLARK CLIFFORD, COUNSEL TO THE PRESIDENT: A MEMOIR 262, 268 (1991).

¹⁴² Transcript of Oral Argument at 1–2, *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1960) (No. 40), available at http://www.oyez.org/cases/1950-1959/1959/1959_40#argument-1 (last visited June 14, 2015), archived at <http://perma.cc/38PY-27D2>; see <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

¹⁴³ *Id.* at 1.

the collector from collecting the tax. The lower court denied relief as did the Intermediate Court of Civil Appeals.¹⁴⁴

Justice Harlan interrupted: “What if they didn’t know what (Inaudible)?”¹⁴⁵ Clifford responded to the question and continued with his argument, speaking without interruption for an additional 485 words:

We do not know, Your Honor. No explanation appears to that -- of that, as far as I know none appears in the record. The case then after going from the Court of Civil Appeals went to the Supreme Court of Texas. There the validity of the statute was upheld, but at that time, out of the nine judges of that Court, four dissented strenuously and they dissented on the ground that this statute was flagrantly, grossly discriminatory insofar as the Federal Government and its lessees are concerned. Now briefly . . . Phillips showed in the trial below that lessees of nonfederal exempt property paid no tax at all if the lease was for under three years. And they paid the tax based only on the leasehold if the term of the lease was for more than three years. So Phillips said in view of what the other lessees of tax-exempt property were -- were subjected to in Texas that it was invalid and unconstitutional for the legislature to select just the lessees of federal property and subject them to a tax based on the full fee value of the property which they were leasing. We present but two questions here. One, the 1950 Texas law is invalid for it is repugnant to the Constitution of the United States. It discriminates against the United States and those with whom it deals. It imposes a burden on the activities of the Federal Government and infringes upon its sovereignty. It also violates the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. That is our first point. Our second point is the law is invalid for it imposes an ad valorem tax upon the federal property and interferes with the sovereign right of the Government over its property in Texas. Now the argument if you please and I address myself solely to the point number one. Simply point number one is the tax is discriminatory. Now we must refer, if Your Honors will please, to the statute in question or it will be referred to a good many times in the course of the argument. I refer you to page 12 of the appellant’s brief. Briefly it will be noted, it says in substance to this. “The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this type, and such lands and all improvements thereon should be exempt from any taxation under the authority of the state so long as the same are held, owned, used, and occupied by the United States for the purposes expressed in this title and not otherwise.” Let me stop and say that down

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2.

to this point that had been in the law of Texas for many years. But in 1950, the Legislature of Texas amended it to add the following language which appears in -- on the page 12.¹⁴⁶

Patterson v. United States,¹⁴⁷ which was argued in April 1959, also illustrates the general pattern. That case involved the remedies available to civilian employees injured on government-owned merchant vessels.¹⁴⁸ Jacob Rassner, an experienced maritime employment lawyer,¹⁴⁹ began with a 334-word opening statement.¹⁵⁰ Justice Frankfurter then asked a question,¹⁵¹ to which Rassner responded with an 889-word monologue, briefly answering the question and then addressing the history of the Shipping Act and its application from 1916 until 1959.¹⁵² A lively back-and-forth between Mr. Rassner and Justices Frankfurter and Stewart followed.¹⁵³

Similarly, in *Monroe v. Pape*,¹⁵⁴ the landmark civil rights case holding that individual police officers, but not municipal corporations,¹⁵⁵ were amenable to suit under 42 U.S.C. § 1983, Sydney R. Drebin, an assistant Chicago corporation counsel, opened his argument for the respondents with a 901-word monologue.¹⁵⁶ At that point, Justices Frankfurter and Douglas briefly interrupted him,¹⁵⁷ correcting

¹⁴⁶ *Id.*

¹⁴⁷ 359 U.S. 495 (1959). The case was argued on Apr. 21, 1959. *Id.* at 495.

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., Ben F. Small, *Workmen's Compensation, Railroad and Admiralty Law*, 3 OKLA. L. REV. 369, 371–72 (1950) (reviewing the Nat'l Ass'n of Claimant's Comp. Att'ys, NACCA Law Journal 368 (1949)).

¹⁵⁰ Transcript of Oral Argument at 1, *Patterson v. United States*, 359 U.S. 495 (1959) (No. 429), available at http://www.oyez.org/cases/1950-1959/1958/1958_429 (last visited June 30, 2015), archived at <http://perma.cc/B2MJ-82C3>; see <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1–3.

¹⁵³ *Id.* at 3–5.

¹⁵⁴ 365 U.S. 167 (1961). The case was argued on Nov. 8, 1960. *Id.* at 167.

¹⁵⁵ The Court partially overruled *Monroe* in *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658 (1978), which held that municipal corporations were also amenable to suit under 42 U.S.C. § 1983. *Id.* at 658–59.

¹⁵⁶ Transcript of Oral Argument Part 2 at 13–15, *Monroe v. Pape*, 365 U.S. 167 (1961) (No. 39), available at http://www.oyez.org/cases/1960-1969/1960/1960_39#argument (last visited June 30, 2015), archived at <http://perma.cc/PSG7-CVEW>; see <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

¹⁵⁷ *Id.* at 15. Here, as in *United States v. Louisiana*, the Justices were not interrupting with substantive questions. See *infra* notes 165–67 and accompanying text. They were simply correcting counsel, who misattributed the authorship of an opinion. In addition, Justice Douglas used the occasion to inject some levity into the proceeding.

Drebin's account of the Court's holding in *Screws v. United States*.¹⁵⁸ Drebin then spoke for an additional 848 words without interruption.¹⁵⁹

Three cases provide even more extreme examples. In *Carpenters Local v. NLRB*,¹⁶⁰ a case involving a union dues refund remedy, Bernard Dunau, a highly regarded labor lawyer,¹⁶¹ opened with a statement exceeding 2,250 words.¹⁶² After a brief question from Justice Harlan,¹⁶³ Dunau spoke without further interruption for another 873 words.¹⁶⁴ Similarly, in *United States v. Louisiana*,¹⁶⁵ an original action involving the ownership of certain natural resources in the Gulf of Mexico, James P. Hart, Texas's lawyer, opened with a 1,321-word monologue.¹⁶⁶ Justices Black and Harlan then asked a couple of brief questions before Hart resumed with a 417-word monologue.¹⁶⁷ Finally, in *Callanan v. United States*,¹⁶⁸ a Hobbs Act case concerning the permissibility of consecutive criminal sentences, Morris A. Shenker,

¹⁵⁸ 325 U.S. 91 (1945).

¹⁵⁹ Transcript of Oral Argument, *Monroe v. Pape*, *supra* note 156 at 15–17; see <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

¹⁶⁰ 365 U.S. 651 (1961). The case was argued on Feb. 28, and Mar. 1, 1961. *Id.* at 651.

¹⁶¹ Dunau's death was marked by both the Harvard Law Review and the Virginia Law Review. See generally Norton J. Come, *Bernard Dunau: A Friend's Tribute*, 88 HARV. L. REV. 1349, 1350 (1975); Harold Leventhal, *Bernard Dunau: A Judicial Appreciation*, 62 VA. L. REV. 469, 469 (1976). In his tribute to Professor Dunau, Judge Leventhal wrote that, “[h]e was a rare species, a free-lance specialist to whom union house counsel and trial lawyers could turn to handle appeals before the courts of appeals and Supreme Court [He] not only won cases, but his frequent appearances before the Supreme Court helped to shape the development of labor law.” *Id.*

¹⁶² Transcript of Oral Argument Part 1 at 1–4, *Carpenters Local v. Labor Bd.*, 365 U.S. 651 (1961) (No. 68), available at http://www.oyez.org/cases/1960-1969/1960/1960_68#argument (last visited Aug. 17, 2015), archived at <http://perma.cc/NU42-NBU9>; see <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

¹⁶³ Harlan asked: “Do they allow proof to find it there?” Transcript of Oral Argument, *Carpenters Local v. Labor Bd.*, *supra* note 161, at 4.

¹⁶⁴ *Id.* at 4–6.

¹⁶⁵ 363 U.S. 1 (1960). The case was argued on Oct. 12–15, 1959. *Id.* at 1.

¹⁶⁶ Transcript of Oral Argument Part 3 at 9–11, *United States v. Louisiana*, 363 U.S. 1 (1960) (No. 10 ORIG), available at http://www.oyez.org/cases/1950-1959/1959/1959_10_orig#argument (last visited Aug. 17, 2015), archived at <http://perma.cc/33VE-VMA2>; see <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>. In this part of his argument, Hart addressed various aspects of the relevant history, including President Jefferson's correspondence concerning the Louisiana Purchase as well as certain relevant facts surrounding the annexation of Texas. Transcript of Oral Argument, *United States v. Louisiana*, *supra* note 165. This “opening” was not the first time that Hart spoke in *United States v. Louisiana*. The case went on for several days and Hart had presented argument on behalf of all the Gulf State respondents the day before, but this was the beginning of his argument for the day in question and the beginning of his argument for Texas as an individual party.

¹⁶⁷ *Id.* at 12–13.

¹⁶⁸ 364 U.S. 587 (1961). The case was argued on Nov. 15–16, 1960. *Id.* at 587.

a St. Louis labor lawyer,¹⁶⁹ delivered a 1,876-word opening monologue before the Court adjourned for the day.¹⁷⁰

2. Long Non-Opening Monologues

In addition to lengthy openings, the older cases include many examples of long, uninterrupted, non-opening monologues. For example, in *Travis v. United States*,¹⁷¹ which involved a venue challenge in a criminal prosecution for filing an allegedly false “non-Communist affidavit”¹⁷² with the Labor Board, the defendant’s lawyer, Telford Taylor,¹⁷³ spoke 302 words in his opening,¹⁷⁴ was thereafter engaged in a brief colloquy by Justice Frankfurter,¹⁷⁵ and then proceeded to give a non-opening monologue of 2,082 words, for just under seventeen minutes.¹⁷⁶ Similarly, in *Pan American Petroleum Corp. v. Superior Court*,¹⁷⁷ a case involving natural gas contracts, Byron Gray delivered a 1,584-word non-opening monologue,¹⁷⁸ and in *Maintenance Employees v. United States*,¹⁷⁹ there were five non-opening monologues that each exceeded 1,000 words.¹⁸⁰

¹⁶⁹ *Id.* at 587–88.

¹⁷⁰ Transcript of Oral Argument Part 1 at 1–3, *Callanan v. United States*, 364 U.S. 587 (1961) (No. 47), available at http://www.oyez.org/cases/1960-1969/1960/1960_47#argument (last visited Aug. 17, 2015); archived at <http://perma.cc/H4SR-VFVL>; see <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

¹⁷¹ 364 U.S. 631, 631. The case was argued on December 13, 1960.

¹⁷² *Id.* at 632.

¹⁷³ Taylor was a prominent lawyer and academic who served at Bletchley Park and on the Nuremberg prosecution team, achieving the rank of Brigadier General. Following Justice Jackson’s resignation, Taylor succeeded him as Chief Prosecutor at Nuremberg. He was also well known for his representation of people accused of disloyalty during the McCarthy period. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992); Peter Calvocoressi, *A Personal Tribute*, 37 COLUM. J. TRANSNAT’L L. 665, 665 (1999).

¹⁷⁴ Transcript of Oral Argument Part 1 at 1, *Travis v. United States*, 364 U.S. 631 (1961) (No. 10), available at http://www.oyez.org/cases/1960-1969/1960/1960_10#argument (last visited Aug. 17, 2015), archived at <http://perma.cc/5D6K-BLW8>.

¹⁷⁵ *Id.* at 1–2.

¹⁷⁶ *Id.* at 2–5. The monologue is too long to reproduce here. Assuming an average speaking rate of 125 words per minute, a 2,082-word monologue would have lasted almost sixteen minutes and forty seconds.

¹⁷⁷ 366 U.S. 656, 656 (1961). The case was argued on April 18, 1961.

¹⁷⁸ Transcript of Oral Argument Part 1 at 5–7, *Pan Am. Petroleum Co. v. Superior Court*, 366 U.S. 656 (1961) (No. 80), available at http://www.oyez.org/cases/1960-1969/1960/1960_80#argument (last visited Aug. 17, 2015), archived at <http://perma.cc/7C3N-9Y9A> [hereinafter *Pan Am. Petroleum Transcript*]. Gray also delivered a 789-word opening monologue in that case. *Id.* at 1.

¹⁷⁹ 366 U.S. 169, 169 (1961). The case was argued on March 28, 1961.

¹⁸⁰ William G. Mahoney opened with a 1,061-word opening, and later delivered two additional monologues of 1,594 words and 957 words, respectively. See Oral Argument Part

The most extreme case was *United States v. Du Pont & Co.*,¹⁸¹ a landmark case involving antitrust remedies. Hugh B. Cox, who represented DuPont, delivered a non-opening monologue of 2,839 words.¹⁸² Following a brief colloquy with Justice Stewart, Cox delivered a 1,553-word monologue.¹⁸³ Robert L. Stern, a former First Assistant Solicitor General,¹⁸⁴ followed Cox. Stern delivered his entire argument—4,343 words—without interruption.¹⁸⁵

3. *The Relative Participation Rates of Court and Counsel in Older Cases*

As previously noted, the average R in the older cases was 0.275, meaning that the Justices, on average, spoke only 27.5 words for every hundred words spoken by counsel.¹⁸⁶ That was much lower than the analogous R for the newer cases.¹⁸⁷ In some older cases, however, the R was much lower still. For example, in *United States v. Robinson*,¹⁸⁸ Beatrice Rosenberg and I. William Stempel each registered Rs

1 at 1–2, 10–14, *Maint. Emps. v. United States*, 366 U.S. 169 (1961) (No. 681), available at http://www.oyez.org/cases/1960-1969/1960/1960_681#argument (last visited Aug. 17, 2015), archived at <http://perma.cc/D85A-T9NK>. Solicitor General Cox followed; he delivered an 830-word opening monologue and two separate monologues of 1,066 words each. *Id.* at 15–16, 19–21; Part 2 at 1–3. Ralph L. McAfee followed, with one monologue encompassing 1,485 words. *Id.* at 6–8. Finally, Mahoney spoke for 1,083 words without interruption in his rebuttal. *Id.* at 9–11.

¹⁸¹ 366 U.S. 316, 316 (1961). The case was argued on February 20–21, 1961.

¹⁸² Transcript of Oral Argument at Part 2 at 1–6, *United States v. Du Pont & Co.*, 366 U.S. 316 (1961) (No. 55), available at http://www.oyez.org/cases/1960-1969/1960/1960_55#argument (last visited Aug. 17, 2015), archived at <http://perma.cc/35Q8-ENSP> [hereinafter *Du Pont Transcript*]. He first addressed a distinction urged by the government, used his refutation of that distinction to defend the district court's judgment, and then argued that Congress had not signaled any intention to limit the courts' traditionally broad remedial powers in antitrust cases. *Id.* By implication, Cox was addressing himself to appellant's argument that divestiture was a mandatory remedy at law. *Id.* He also addressed the question whether courts could fashion equitable remedies when an administrative agency had been established to resolve certain issues. *Id.* He then explained why divestiture, the government's preferred remedy, might injure innocent stockholders. *Id.*

¹⁸³ *Id.* at 6–8. That monologue addressed the market effect of stock sales and then returned to the subject of equitable remedies. *Id.*

¹⁸⁴ Robert Stern, together with Eugene Gressman, wrote the original treatise on Supreme Court practice. See STERN & GRESSMAN, *supra* note 138.

¹⁸⁵ *Du Pont Transcript*, *supra* note 182 at 8–15. Using the same 125 words-per-minute assumption, Stern spoke without interruption for just under thirty-five minutes.

¹⁸⁶ See *supra* note 123.

¹⁸⁷ *Id.*

¹⁸⁸ 361 U.S. 220, 220 (1960). The case was argued on December 8, 1959; see Transcript of Oral Argument, *United States v. Robinson*, 361 U.S. 220 (1960) (No. 16), available at http://www.oyez.org/cases/1950-1959/1959/1959_16#argument (last visited Aug. 17, 2015), archived at <http://perma.cc/ZZH4-KQFZ>.

less than 0.07, meaning that the Justices spoke fewer than seven words for every hundred that the lawyers spoke. Similarly, in *United States v. Raines*,¹⁸⁹ the highest R for any attorney was 0.0325, meaning that the Justices spoke only slightly more than three words for every hundred that the lawyer spoke. In *Pan American Petroleum Corp. v. Superior Court*,¹⁹⁰ Byron Gray not only had a lengthy non-opening monologue (as noted earlier), but an R of 0.0840. In Sam Daniels's lengthy rebuttal in *McNeal v. Culver*,¹⁹¹ his R was only 0.00334, meaning that the Justices spoke just over three words for every thousand words that Daniels spoke.¹⁹²

In some of the older cases, the Court had relatively few questions for one side, but peppered the other. In *Levine v. United States*,¹⁹³ for example, Myron L. Shapiro argued to a nearly silent Court, resulting in an R of 0.0228, while his opponent had an R of 0.362. In *Sun Oil Co. v. Fed. Power Comm'n*,¹⁹⁴ Leo J. Hoffman had an R of 0.0367, while his opponent had an R of 0.244. Likewise, in *United States v. Brosnan*,¹⁹⁵ Daniel M. Friedman¹⁹⁶ found himself listening to the Justices almost as much as they listened to him: His R was 0.938, meaning that the Justices spoke over

¹⁸⁹ 362 U.S. 17 (1960). The case was argued on January 12, 1960; see Transcript of Oral Argument, *United States v. Raines*, 362 U.S. 17 (1960) (No. 64).

¹⁹⁰ 366 U.S. 656 (1961). The case was argued on April 18–19, 1961; see Pan. Am. Petroleum Transcript, *supra* note 178.

¹⁹¹ 365 U.S. 109 (1961). The case was argued on December 6, 1960. *Id.* at 109. See Oral Argument, *McNeal v. Culver*, 365 U.S. 109 (1961) (No. 52), available at http://www.oyez.org/cases/1960-1969/1960/1960_52#argument, archived at <http://perma.cc/X7CQ-6YAH>.

¹⁹² Daniels's rebuttal was 1,498 words. The length of rebuttal arguments varies considerably, as do their R values. It is possible that the multi-day format contributed to lower R's. For example, in *Reina v. United States*, 364 U.S. 507 (1960), which was argued on November 8, 1960, the Tuesday carry-over oral argument featured an R of only 0.0457. It may be that the Justices had asked all the questions they thought necessary at the Monday session or were simply looking forward to the end of the argument.

¹⁹³ 362 U.S. 610 (1960). The case was argued on March 22, 1960. *Id.* at 610. See Oral Argument, *Levine v. United States*, 362 U.S. 610 (1960) (No. 164), available at http://www.oyez.org/cases/1950-1959/1959/1959_164#argument, archived at <http://perma.cc/7XEG-BLUK>.

¹⁹⁴ 364 U.S. 170 (1960). The case was argued on April 26, 1960. *Id.* at 170. See Oral Argument, *Sun Oil Co. v. Fed. Power Comm'n*, 364 U.S. 170 (1960) (No. 321), available at http://www.oyez.org/cases/1950-1959/1959/1959_321#argument, archived at <http://perma.cc/CGR8-YEW5>.

¹⁹⁵ 363 U.S. 237 (1960). The case was argued on March 21–22, 1960. *Id.* at 237. See Oral Argument, *United States v. Brosnan*, 363 U.S. 237 (1960) (No. 137), available at http://www.oyez.org/cases/1950-1959/1959/1959_137#argument, archived at <http://perma.cc/87QG-FU23>.

¹⁹⁶ Friedman had a distinguished career as a government lawyer, Chief Judge of the Court of Claims, and United States Circuit Judge for the Federal Circuit. See *Biographical Directory of Federal Judges: Friedman, Daniel Mortimer*, FED. JUDICIAL CTR., available at <http://www.fjc.gov/servlet/nGetInfo?jid=2704&cid=999&ctype=na&instate=na> (last visited June 14, 2015), archived at <http://perma.cc/2AM9-W25J>.

ninety-three words for every hundred words he spoke.¹⁹⁷ Friedman's opponent, Samuel B. Stewart, registered Rs of 0.340 and 0.446 in his opening and rebuttal arguments.¹⁹⁸

4. *Colloquies*

Colloquies in the older cases typically featured one or more Justices who appear to have been trying to nail down points of importance. Whether the Justices pursued factual issues, tried to understand the nuances of counsel's argument, or pressed counsel to distinguish a precedent, they tended to ask respectful and generally nonleading questions. Even when they expressed doubt or skepticism, the Justices typically did so respectfully, and they appear to have listened attentively to counsel's response to their questions or observations.¹⁹⁹

For example, in *Knetsch v. United States*,²⁰⁰ a tax case involving a sham transaction devised solely for tax avoidance,²⁰¹ Justice Harlan found certain aspects of the government's argument puzzling:

Justice Harlan: Do you disagree with his argument on that? I don't want to go through the rigamarole of the -- because frankly I have -- in the lawsuit, right? But do you claim that he inevitably does get a tax benefit from this?

Mr. Wiprud: He would if his -- the deductions were allowed, Your Honor but we say --

Justice Harlan: No, no.

Mr. Wiprud: -- that they should not be allowed.

Justice Harlan: I mean if these deductions were allowed?

¹⁹⁷ See generally Oral Argument, *supra* note 194.

¹⁹⁸ *Levine, Sun Oil*, and *Brosnan* were all decided by a 5–4 vote. Interestingly, and contrary to what is now conventional wisdom, see Roberts, *supra* note 15, at 75, the winning party in each case was represented by the lawyer who faced the greater number of questions.

¹⁹⁹ In *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960), which was argued on May 17, 1960, for example, Chief Justice Earl Warren indicated that he was unclear—and somewhat skeptical—about counsel's argument. See Oral Argument at 11, *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960) (No. 451), available at http://www.oyez.org/cases/1950-1959/1959/1959_451#argument, archived at <http://perma.cc/L78J-8VHR>. The transcript also reflects the naturally courteous manner in which Chief Justice Earl Warren was known to treat others. See William J. Brennan, Jr., *Chief Justice Warren*, 88 HARV. L. REV. 1, 1 (1974).

²⁰⁰ 364 U.S. 361 (1960). The case was argued on October 17–18, 1960. *Id.* at 361. Oral Argument, *Knetsch v. United States*, 364 U.S. 361 (1960) (No. 23), available at http://www.oyez.org/cases/1960-1969/1960/1960_23#argument, archived at <http://perma.cc/4U6Q-UUCA>.

²⁰¹ See Daniel N. Shaviro, *The Story of Knetsch: Judicial Doctrines Combating Tax Avoidance*, in *TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES* 313 (Paul L. Caron ed., 2002).

Mr. Wiprud: He would -- he would -- the money in the pocket, yes, Your Honor.

Justice Harlan: He says he doesn't.

Mr. Wiprud: He says --

Justice Harlan: He gave some illustrations (Voice Overlap) --

Mr. Wiprud: He says--

Justice Harlan: -- puzzle me (Voice Overlap) --

Mr. Wiprud: Yes, he makes (Voice Overlap) --

Justice Harlan: I wish you deal with it.

Mr. Wiprud: He makes a curious argument that when he entered this transaction, he was doomed to an out-of-pocket loss whether or not the interest deductions were allowed and therefore he had no tax motive.

Justice Harlan: Well, can you answer it though?²⁰²

Shortly thereafter, Justice Frankfurter attempted to confirm certain elements of what he took to be the government's argument:

Justice Frankfurter: If you are right about that. You said there are two answer[s]. One, this is not intended?

Mr. Wiprud: Right and that's the specific.

Justice Frankfurter: And two that he buys the tax benefit?

Mr. Wiprud: And we think --

Justice Frankfurter: If you're right about one, you don't need two?

Mr. Wiprud: Right. Right, Your Honor. I see I have only a few minutes left and I have --

Justice Frankfurter: If you're right about --

Mr. Wiprud: Excuse me.

Justice Frankfurter: -- two is really the usual make of Gregory and Helvering, isn't it?²⁰³

Similarly, in *United States v. Louisiana*,²⁰⁴ Justice Black seemingly engaged in information gathering in the questions he put to Solicitor General Rankin:

Justice Black: Do they deny that ground?

I didn't know there was any difference between here on that point.

Mr. Rankin: Oh, I think the briefs are pretty strong about that and --

Justice Black: I thought they were saying that it didn't give them anything because it's hard that they had those boundaries to the extent they talked

²⁰² Oral Argument, *supra* note 200, at 6–7.

²⁰³ *Id.* at 7–8.

²⁰⁴ 363 U.S. 1 (1960). The case was argued on October 12–15, 1959. *Id.* at 1. See Oral Argument, *United States v. Louisiana*, 363 U.S. 1 (1960) (No. 10 ORIG), available at <https://www.oyez.org/cases/1959/10%20ORIG>, archived at <http://perma.cc/E5T4-8HK6>.

about denying the three leagues and therefore nothing was given by the Act.

Mr. Rankin: Well, if --

Justice Black: What they were -- the right they had in it and the power over it and the ownership of it were simply recognized. I thought that was their argument.

Mr. Rankin: Mr. Justice Black, if that is their position now, the -- the United States is pleased to have it, because it simplifies the problem, because then it resolves itself to a question of whether they legally did or legally did not, at that particular time, --

Justice Black: Well, I get it.

Mr. Rankin: -- have such boundaries.

Justice Black: If that's the difference, I think maybe I understand it. Maybe they concede, I am not sure, from the opinions it had that legally the State did not own it at that time, but that what they wanted to do, Congress -- what they insisted the Congress should do was to grant to the State that which they had always owned or claimed to own the authority.

Mr. Rankin: Well, that's the distinction I am trying to make, Mr. Justice Black, between -- the Congress, time after time, they said, "We are not asking that this bill shall give us what we claim" ²⁰⁵

As these examples suggest, counsel and the Court frequently interrupted each other, so that there were many partial speaking turns in the older cases. In many cases, these interruptions are strongly suggestive of conversation. The transcripts show that counsel and a Justice were interrupting each other in ways that suggest a common understanding and enterprise—where one is anticipating what the other is about to say. Oftentimes, it seemed as if one of the Justices were starting a sentence, counsel was adding the next few words, the Justice the next few, and so forth. ²⁰⁶

B. Oral Argument in the 2010–12 Period

1. Early, Frequent, and Direct Interventions

The Justices' behavior at oral argument in the newer cases was markedly different. First, the Justices tended to interrupt counsel on both sides earlier in the argument and more directly. There were few cases in which counsel was able to say

²⁰⁵ *Id.* at 1–2.

²⁰⁶ An extreme example of partial speaking turns within our sample is the March 21, 1961 argument in *Piemonte v. United States*, 367 U.S. 556 (1961). During the oral argument presented by government counsel, Theodore Gilinsky, the Justices had fifty-nine partial speaking turns, ninety full speaking turns, and 149 total speaking turns. One more partial speaking turn would have made sixty out of 150, or two-fifths of the Justices' speaking turns that would have been less than a full sentence. No newer case had a comparable percentage of partial speaking turns.

more than a sentence or two before being interrupted. Typical of these cases is *Compucredit Corp. v. Greenwood*,²⁰⁷ which involved the validity of mandatory arbitration provisions in credit card agreements. Scott Nelson of Public Citizen, who represented the respondent credit card holders, spoke only thirty-seven words before Justice Sotomayor interrupted him. She did not ask about the facts, existing precedent, or the petitioner's argument, but about a hypothetical:

[Mr. Nelson:] The Credit Repair Organizations Act provides consumers with what it explicitly denominates a right to sue, and then it says that any right of the consumer under the statute is non-waivable.

As this Court has said --

Justice Sotomayor: Does that mean that there is a violation of the statute the minute one of these organizations asks someone to sign an arbitration clause?

Mr. Nelson: There's --

Justice Sotomayor: A \$1,000 penalty for the mere asking?²⁰⁸

Similarly, in *Taniguchi v. Kan Pacific Saipan, Ltd.*,²⁰⁹ petitioner's counsel spoke forty-five words before being interrupted:

Mr. Fried: Our brief lists six categories of authorities demonstrating that the work of an interpreter under 28 U.S.C. section 1920(6) is limited to spoken communication. Primary among these is the Court Interpreters Act itself, whose central provisions afford simultaneous or consecutive spoken interpreter services. When the --

Justice Sotomayor: Could I make sure that I understand the extent of your argument? Are you saying that it's interpretation, oral interpretation, just in the courtroom?²¹⁰

And in *Fox v. Vice*,²¹¹ petitioner's counsel spoke for eighty-five words before being interrupted:

Mr. Rosenkranz: Mr. Fox has rock-solid legal claims against a police chief based upon facts that were strong enough to send that police chief to prison. Yet he's been ordered to pay all of the attorney's fees for an entire 2-year course of a litigation because his lawyers decided to plead and then

²⁰⁷ 132 S. Ct. 665 (2012). The case was argued on October 11, 2011. *Id.* at 665.

²⁰⁸ Transcript of Oral Argument at 17–18, *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (No. 10-948). Interestingly, the hypothetical was not a follow-up on something that had been addressed to petitioner's counsel.

²⁰⁹ 132 S. Ct. 1997 (2012). The case was argued on February 21, 2012. *Id.* at 1997.

²¹⁰ Transcript of Oral Argument at 3, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997 (2012) (No. 10-1472).

²¹¹ 131 S. Ct. 2205 (2011). The case was argued on March 22, 2011. *Id.* at 2205.

drop a single Federal theory. That award is wrong and it's not what Congress intended. Congress wanted to protect defendants from the lying or the vexatious plaintiff who shouldn't be in court at all.

Justice Kennedy: Did we take the case on the assumption -- your -- your predecessor and you may disagree -- but did we take the case on the assumption that this was a frivolous cause of action?²¹²

Many other examples confirm that the lengthy opening and non-opening monologues that regularly characterized the earlier cases are now few and far between.

2. General Judicial Talkativeness

As we have previously noted, the quantitative data is dramatic. In the newer cases, the average R is 0.627. In other words, the Justices spoke over sixty-two words for every one hundred words spoken by counsel. In the earlier cases, by contrast, the Justices spoke only an average of 27.5 words for every one hundred words spoken by counsel. While those numbers tell a great deal, a closer look at some of the more extreme cases is also instructive.

The most dramatic outlier among the newer cases was *Williams v. Illinois*,²¹³ which involved a confrontation clause challenge to expert DNA testimony proffered at trial by someone who had not performed the underlying tests. The R value for the argument presented by defense counsel Brian W. Carroll of the Illinois State Appellate Defender's Office was 2.156.²¹⁴ In other words, the Justices spoke more than 215 words for every one hundred words that Carroll spoke. Carroll's opening statement was 144 words long; none of his other speaking turns exceeded 120 words.²¹⁵ The state's R, by contrast, was 0.886, and the federal government's (as *amicus curiae*) was 0.607. Carroll's client lost in a 5–4 vote.²¹⁶

The highest composite R for all lawyers in a case—1.511—was seen in *J. McIntyre Machinery v. Nicastro*,²¹⁷ a case in which an English manufacturer of

²¹² Transcript of Oral Argument at 3, *Fox v. Vice*, 131 S. Ct. 2205 (2011) (No. 10-114).

²¹³ 132 S. Ct. 2221, 2221 (2012). The case was argued on December 6, 2011.

²¹⁴ Transcript of Oral Argument at 3–23, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505).

²¹⁵ *Id.*

²¹⁶ *Id.* Justice Breyer was in the majority, while Justice Scalia, not surprisingly, adhered to his views concerning the confrontation clause and was in the minority. *See, e.g.,* Joëlle Anne Moreno, *Finding Nino: Justice Scalia's Confrontation Clause Legacy from Its (Glorious) Beginning to (Bitter) End*, 44 AKRON L. REV. 1211, 1212–13 (2011). The high R for the criminal defendant's lawyer is not surprising, given the contentiousness and importance of the issue, but the R for the lawyer for the state (0.607), which is less than the average R for the recent cases (0.627), is somewhat surprising. *See* <http://epubs.utah.edu/index.php/ulr/article/download/1564/1229>.

²¹⁷ 131 S. Ct. 2780 (2011). The case was argued on January 11, 2011.

industrial machinery challenged the state courts' jurisdiction to hear claims brought by an American worker injured in an industrial accident.²¹⁸ The case resulted in a 6–3 decision for the manufacturer. The Justices were active—and seemingly partisan—from the outset. Justice Scalia, for example, interrupted the manufacturer's lawyer only forty-seven words into his argument. He did so to offer advice about effective advocacy, namely, that counsel should refer to his client's U.S. distributor as “the company that distributed its product,” rather than “its distributor”:

Mr. Fergenson: Mr. Chief Justice, and may it please the Court:
Because J. McIntyre did not direct any activity at residents of New Jersey either itself or by directing its distributor MMA to do so and had no awareness or knowledge that the distributor took the action that it did toward New Jersey, New Jersey lacked adjudicative jurisdiction.
Justice Scalia: When you say “its distributor,” was this distributor at all controlled by the defendant?
Mr. Fergenson: No, Your Honor. It was not. And both under Ohio law, *Wells v. Komatsu America*, and under the Restatement (Second) Agency, section 1-1, the right to control is essential to ascribe actions to create an agency, and it's on a per-purpose basis.
Justice Scalia: It might be better to refer to it as the company that distributed its product, rather than calling it “its distributor.”²¹⁹

The Justices continued thereafter to interrupt both sides with great frequency; the longest non-opening speaking turn was 117 words.²²⁰

Occasionally, the Justices allowed counsel in the newer cases to deliver relatively long monologues. For example, in *Sorrell v. IMS Health*,²²¹ the pharmaceutical industry's First Amendment challenge to a Vermont law protecting the confidentiality of individual physicians' prescribing practices, the Justices allowed respondent's counsel, Thomas C. Goldstein, a frequent Supreme Court advocate, to deliver a non-opening monologue of 697 words—the longest in any of the newer cases.²²² Goldstein later spoke for 604 consecutive words without interruption.²²³ *Sorrell* is an extreme outlier, however, because the newer cases averaged only one 500-word non-opening monologue for every five cases.

²¹⁸ *Id.* at 2783–84.

²¹⁹ Transcript of Oral Argument at 3–4, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343).

²²⁰ *Id.* at 61.

²²¹ 131 S. Ct. 2653, 2653 (2011). The case was argued on April 26, 2011.

²²² Transcript of Oral Argument at 35–38, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779). For a significant portion of this monologue, Goldstein read state regulations from his brief's appendix. *Id.*

²²³ *Id.* at 46–48.

In *United States v. Tinklenberg*,²²⁴ which involved the computation of excludable time under the Speedy Trial Act,²²⁵ defense counsel Jeffrey L. Fisher, another experienced Supreme Court advocate, opened his argument as respondent with a monologue of 135 words, addressing a question that the Court had raised during the petitioner's argument:

Before turning to the substance, I would like to, if I may, start with the procedural question that Justice Sotomayor raised and that -- and that my opponent just completed with, because I want to be sure there's no confusion on the posture of this case.

In particular, this Court's precedents squarely reject the notion that there's any history in this Court's precedents for refusing to reach an argument in this posture. In particular, in *Langness v. Green*, 282 U.S. 531, this Court held in 1931 that a Respondent's, quote, "right" to defend a judgment below on a ground that is properly preserved all along and that the lower court reached and rejected is, quote, "beyond successful challenge."

Now, I'm not sure -- I'm not aware of any exception from that rule in the 80 years since.²²⁶

Justice Alito intervened:

Suppose the petition here had simply raised one question, and that is the question of how you count time under -- under a version of Rule 45 of the Federal Rules Of Criminal Procedure that is not -- no longer in effect and as to which there is no conflict in the circuits. How would you grade the chances of the Court taking cert on that?²²⁷

Fisher responded: "Well, I'll take your hypothetical, Justice Alito, but I do want to be able to correct the notion that it's of no longer continuing importance."²²⁸ Fisher then proceeded to address the procedural issue in a monologue that lasted for another 454 words.²²⁹ Another question from Justice Alito prompted a 359-word response.²³⁰

Sorrell and *Tinklenberg* were outliers, as the newer cases were characterized by large Rs, small CWs, and short Os. Most frequently, the Justices began their questioning after only the briefest of introductions by counsel. In some cases, the

²²⁴ 131 S. Ct. 2007, 2007 (2011). The case was argued on February 22, 2011.

²²⁵ *Id.* at 2010–11.

²²⁶ Transcript of Oral Argument at 25–26, *United States v. Tinklenberg*, 131 S. Ct. 2007 (2011) (No. 09-1498).

²²⁷ *Id.* at 26.

²²⁸ *Id.*

²²⁹ *Id.* at 26–28.

²³⁰ *Id.* at 28–30.

questioning began as soon as counsel reached the podium. In *American Trucking Associations, Inc. v. City of Los Angeles*,²³¹ for example, Justice Sotomayor began questioning John F. Bash, an Assistant to the Solicitor General, in his argument as amicus curiae, before he could say anything beyond the ceremonial opening words:

Mr. Bash: Thank you, Mr. Chief Justice, and may it please the Court --
Justice Sotomayor: Do you think the city could pass a regulation like as
Justice Breyer suggested, that says, stay off residential streets?²³²

But that too was unusual. More often, as in *United States v. Bormes*,²³³ counsel would be permitted a sentence or two before the questioning began.²³⁴

While the Justices spoke many more words in the later cases, and occasionally more words than counsel, they did not usually do so. The overall R for the newer cases—0.627—shows that the Justices spoke sixty-three words for every hundred words spoken by counsel. Nonetheless, the differences between the earlier and later cases are striking.

3. *Strategic Interventions*

Perhaps the most striking aspect of the newer cases was the degree to which the Justices seemed to make strategic use of their ability to control the courtroom by interrupting as they saw fit. The Justices were often quite obvious in their use of counsel to make a point they wanted to have made, and they sometimes spoke harshly to counsel to undercut a position with which they disagreed. They also actively assisted some counsel, suggesting better arguments or helping counsel fill in gaps.

A good example is the lesson in advocacy that Justice Scalia gave counsel for the U.K. machinery manufacturer in *J. McIntyre Machinery v. Nicastro*.²³⁵ As previously noted, Justice Scalia interrupted counsel to suggest that he refer to the U.S. distributor of his client's machinery as "the company that distributed its product" rather than "its distributor."²³⁶ On the other hand, in *Dorsey v. United*

²³¹ 133 S. Ct. 2096, 2096 (2013). The case was argued on April 16, 2013.

²³² Transcript of Oral Argument at 19, *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (No. 11-798).

²³³ 133 S. Ct. 12, 12 (2012). The case was argued on October 2, 2012.

²³⁴ Transcript of Oral Argument at 3, *United States v. Bormes*, 133 S. Ct. 12 (2012) (No. 11-192). Later, during the respondent's argument presented by Chicago lawyer John G. Jacobs, counsel and the Justices sometimes appeared to be exchanging remarks of about equal length. For example, Jacobs made a twenty-one word response to a twenty-one word statement by Chief Justice Roberts. *Id.* at 37–38. Next, Justice Ginsburg spoke for 109 words and Jacobs responded in a 103-word answer. *Id.* at 38–39.

²³⁵ 131 S. Ct. 2780, 2780 (2011). The case was argued on January 11, 2011. *See supra* notes 216–219 and accompanying text.

²³⁶ *See supra* notes 216–219 and accompanying text.

States,²³⁷ which involved a defendant's eligibility for a reduced mandatory minimum sentence for crack cocaine,²³⁸ Justices Kennedy and Sotomayor both expressed incredulity at the government's position:

Justice Sotomayor: Well, generally the word "express" incorporates "clear."

Mr. Dreeben: --There is no dispute here, I don't think, that there is a -- a lack of an express statement in the Act. But --

Justice Sotomayor: So that -- why doesn't that defeat your case?

Mr. Dreeben: -- Well, as Justice Scalia explained in his concurring opinion in *Lockhart v. United States*, one Congress cannot impose standards of how another Congress is to enact legislation. The subsequent Congress is free to choose how it will express its will in the language or structure that it sees fit. And I'd like to give an example--

Justice Kennedy: Well, so then we -- we ignore The Dictionary Act?

Mr. Dreeben: No, of course not, Justice Kennedy. But these--

Justice Kennedy: And can we ignore 109?

Mr. Dreeben: No. It provides a background presumption that overcomes the common-law rule of abatement, under which, if Congress had amended a statute, all prosecutions under the prior statute would be deemed to be a nullity and they would --

Justice Kennedy: Well, why doesn't it -- why doesn't that bring us right back to what 109 says?²³⁹

Shortly thereafter, Justice Scalia intervened with an unusually supportive comment:

[Mr. Dreeben:] They intended that it be prepared so that sentencing courts would use those new mandatory --

Justice Scalia: Exactly, and I think we would come out that way. I think you are entirely right.²⁴⁰

Like Justice Scalia in *Dorsey*, other Justices sometimes intervened to help out the party for whom they would eventually vote. In *Stern v. Marshall*,²⁴¹ which

²³⁷ 132 S. Ct. 2321, 2321 (2012). The case was argued on April 17, 2012. *Id.* at 2321.

²³⁸ *Id.* at 2325–26. The Court held, by a 5–4 vote (with Justices Kennedy and Sotomayor in the majority and Justice Scalia in the dissent), that the reduced mandatory minimum provision should apply to persons who were sentenced after the effective date of the statute for offenses committed before that date. *Id.*

²³⁹ Transcript of Oral Argument at 16–17, *Dorsey v. United States*, 132 S. Ct. 2321 (2012) (No. 11-5683).

²⁴⁰ *Id.* at 18.

²⁴¹ 131 S. Ct. 2594, 2594 (2011). The case was argued on January 18, 2011 (Petitioner Howard K. Stern was Executor of the Estate of Vicki Lynn Marshall (Anna Nicole Smith)).

involved a bankruptcy judge's power to enter a final judgment on a debtor's counterclaim,²⁴² Justice Sotomayor helped petitioner's counsel develop his point:

[Mr. Richland:] Congress drafted the bankruptcy statutes --

Justice Sotomayor: Can you tell me why?

Mr. Richland: Excuse me, Your Honor? I'm sorry.

Justice Sotomayor: What's the authority at all for a bankruptcy court to adjudicate proof of claims, without violating Article III? I don't think we have ever had a case that's actually said that.

Mr. Richland: This Court has never approached that issue directly. Of course --

Justice Sotomayor: So what's --

Mr. Richland: Excuse me, Your Honor.

Justice Sotomayor: So, what's the constitutional basis?

Mr. Richland: Well, of course, it need not reach that in this case, because the court below and the Respondents assume for the purposes of this case that, in fact, there was authority for the bankruptcy court.

Justice Sotomayor: I'm not sure how that helps. If there's no jurisdiction for the bankruptcy court to adjudicate proof of claims, then how can it adjudicate counterclaims? Don't both [claims and counterclaims] fall if there's an Article III violation?

Mr. Richland: Well, I don't think so, Your Honor, because Article III, of course, is not jurisdictional in the sense that we think of basic fundamental jurisdiction, subject matter jurisdiction. It can be waived, of course. But beyond that, I think that *Marathon*, as I said, assumes that there is Article III authority to adjudicate the proof of claim

Justice Sotomayor: Answer the question. Don't assume.²⁴³

In the Affordable Care Act (ACA) cases,²⁴⁴ which were argued on March 26–28, 2012, the Justices pulled no punches as they aggressively supported and undercut the advocates by turn. On the second day of the argument, when the constitutionality of the individual mandate was being argued,²⁴⁵ the Justices interrupted Solicitor

²⁴² *Id.* at 2600–01. In a 5–4 decision, the Court agreed with respondent and held that the bankruptcy court lacked that power. *Id.* at 2601. Justice Sotomayor was in the dissent. *Id.* at 2621.

²⁴³ Transcript of Oral Argument at 3–5, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179).

²⁴⁴ The cases challenging the Affordable Care Act (ACA) were consolidated as *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). As noted, the cases were argued over a three-day period; we considered only the arguments of Tuesday, March 27, 2012. *Id.* at 2566.

²⁴⁵ The individual mandate of the Affordable Care Act (ACA) requires that individuals who are not exempt or otherwise covered (either by an employer or through a government plan) must purchase a minimum amount of health insurance coverage or pay a penalty to the

General Donald Verrilli 180 times—or once every twenty-two seconds—in his fifty-six minutes at the lectern.²⁴⁶ According to Supreme Court correspondent Marcia Coyle, General Verrilli “was able to speak roughly ten or fewer seconds more than 40 percent of the time before being interrupted.”²⁴⁷ By contrast, former Solicitor General Paul Clement, lead counsel for the parties challenging the ACA, was interrupted only thirty-three times in thirty minutes.²⁴⁸ However, General Verrilli received what turned out to be a helping hand from Justice Sotomayor, who asked him to address the taxing power argument:

Justice Sotomayor: General, could you turn to the tax clause?

Mr. Verrilli: Yes. Thank you, so --

Justice Sotomayor: I have looked for a case that involves the issue of whether something denominated by Congress as a penalty was nevertheless treated as a tax, except in those situations where the code itself or the statute itself said treat the penalty as a tax. Do you know of any case where we’ve done that?²⁴⁹

In the end, of course, it was the taxing power that carried the day.

Another type of judicial advocacy was evident in *Peugh v. United States*,²⁵⁰ an Ex Post Facto Clause challenge to the application of later-enacted sentencing guidelines that were less favorable to the defendant than those in effect when the offense was committed. At one point, three Justices engaged in a colloquy while the advocate simply looked on. Justice Ginsburg implicitly criticized counsel’s argument by critiquing the trial court’s holding. Justice Kennedy then spoke, urging counsel to answer Justice Ginsburg’s point. Justice Scalia then intervened in an attempt to smooth out a rough spot in counsel’s argument. Finally, Justice Kennedy interrupted Justice Scalia. The colloquy follows:

Justice Ginsburg: But it’s not -- it’s not a question of whether the judge thought that the one guideline was better than the other. He specifically said he wasn’t interested in that question. The question was which guideline does he follow? Which -- what does he start with? And you recognize that you do start with the guidelines.

government. *Id.* at 2577, 2580. The constitutionality of that provision was challenged under the Commerce Clause and the taxing power in *Sebelius*. *Id.* at 2581. In a 5–4 vote, the Court upheld the ACA under the taxing power, while a different majority, also by a 5–4 vote, held that the ACA was beyond the power of Congress under the Commerce Clause. *Id.* at 2600–01.

²⁴⁶ COYLE, *supra* note 37, at 343.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Transcript of Oral Argument at 46, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398).

²⁵⁰ 133 S. Ct. 2072, 2072 (2013). The case was argued on February 26, 2013.

Justice Kennedy: Yes, I agree with Justice Ginsburg's follow-up question. It seems to me you avoided the question. You said, oh, well, the judge looked at all this and selected the sentence he did. But he did so because he referred to the later guidelines, and I think you have to recognize that .

..

Justice Scalia: I think you are saying it doesn't matter because they are advisory --

Justice Kennedy: Well, I'd like to finish. Unless I am wrong under the record.²⁵¹

Justice Scalia intervened to reframe counsel's argument, perhaps in an attempt to influence Justice Kennedy (who may have seemed to be leaning toward Justice Ginsburg's position), but Justice Kennedy would not yield.

In other cases, the Justices were even more obvious in using counsel to advance their own arguments. For example, in *Thompson v. North American Stainless*,²⁵² a Title VII third-party retaliation case, Justice Alito posed a question about the plaintiff's standing to government counsel, who appeared as amicus curiae,²⁵³ but Justice Ginsburg answered the question before counsel could do so.²⁵⁴ Counsel then continued briefly with her argument before Justice Alito resumed his questioning.²⁵⁵

The newer arguments are also noteworthy for their use of sarcasm. For example, in *Maryland v. King*,²⁵⁶ which involved the constitutionality of DNA testing in the "booking" process, Justice Scalia immediately interrupted the state's argument with a sarcastic remark:

Ms. Winfree: Mr. Chief Justice, and may it please the Court:

Since 2009, when Maryland began to collect DNA samples from arrestees charged with violent crimes and burglary, there have been 225 matches, 75 prosecutions, and 42 convictions, including that of Respondent King.

Justice Scalia: Well, that's really good.

I'll bet you if you conducted a lot of unreasonable searches and seizures, you'd get more convictions, too.

(Laughter)

Justice Scalia: That proves absolutely nothing.²⁵⁷

²⁵¹ Transcript of Oral Argument at 41–42, *Peugh v. United States*, 133 S. Ct. 2072 (2013) (No. 12-62).

²⁵² 131 S. Ct. 863 (2011). The case was argued on December 7, 2010.

²⁵³ Transcript of Oral Argument at 28, *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011) (No. 09-291).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ 133 S. Ct. 1958, 1958 (2013). The case was argued on February 26, 2013.

²⁵⁷ Transcript of Oral Argument at 3, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207). One important aspect of the art of advocacy, of course, is to begin one's argument

Similarly, in *Miller v. Alabama*,²⁵⁸ the juvenile mandatory life-without-parole case, several of the Justices responded sarcastically to petitioner's arguments:

Justice Sotomayor: So, how do we get rid of the mandatory if that's what we're going to do?

Mr. Stevenson: It's a challenge, and I -- and I concede that. But I -- and so, the first part of my answer would be that I think the easier rule to write would be that there is a categorical ban on all life without parole sentences for all children up until the age of 18, acknowledging --

Justice Scalia: How -- how do I come to that decision? What do I -- just consult my own preferences on this matter?²⁵⁹

Justice Alito later intervened with a sarcastic remark:

Justice Kennedy: So, it's very difficult to assess your answer to Justice Alito that, oh, the legislatures don't know about this.

Mr. Stevenson: Well, in -- that answer -- that number, Your Honor, is partly rooted in the fact that these sentences are mandatory. There is no one capable, once the court makes a decision to try the child as an adult, to do anything to consider the status of children.

Justice Kagan: Mr. Stevenson --

Justice Alito: If you think these legislators don't understand what their laws provide, why don't you contact them? And when they -- when you tell them, do you realize that in your State a -- a 16-year-old or a 17-year-old may be sentenced to life imprisonment without parole for murder, they'll say: Oh, my gosh, I never realized that; let's change the law.²⁶⁰

Finally, Justice Scalia challenged counsel with an observation about "that rehabilitation thing":

Mr. Stevenson: Well, I think one of the problems, Your Honor, with -- with trying to make these judgments is that -- that even psychologists say that we can't make good long-term judgments about the rehabilitation and

in a way that does not unnecessarily invite an immediate, counterproductive or even hostile response from the bench. See Barry Sullivan, *The Art of Advocacy*, 42 LOY. U. CHIC. L.J. xxiii, xxx–xxxii (2010) (discussing Solicitor General Olson's opening in *Rasul v. Bush*, 542 U.S. 446 (2004)). Ms. Winfree might well have anticipated a response along the lines of Justice Scalia's interruption in the preceding excerpt.

²⁵⁸ 132 S. Ct. 2455 (2012). *Miller v. Alabama* and *Jackson v. Hobbs* were consolidated and argued together on March 20, 2012. *Id.* at 2455.

²⁵⁹ Transcript of Oral Argument at 12, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646).

²⁶⁰ *Id.* at 14–15.

transitory character of these young people. That's the reason why in *Graham* this Court didn't permit that kind of discretion. We know that -- Justice Scalia: Well, I thought that modern penology has abandoned that rehabilitation thing, and they -- they no longer call prisons reformatories or whatever, and punishment is the -- is the criterion now. Deserved punishment for crime.

Mr. Stevenson: Well --

Justice Scalia: Now, if that's the criterion, is everything that you say irrelevant?²⁶¹

Not only were the Justices interrupting more frequently and talking more overall in the newer cases, but they may well have been interrupting more strategically and were more prone to speak sarcastically in their interventions.²⁶²

4. *Colloquies, Cross Talk, and Consecutive Justice Speaking Turns*

In the newer cases, colloquies between the Justices and counsel generally were much shorter, and extended colloquies were less frequent, than in the older cases. The substance of colloquies also appeared to be different. In the older cases, the Justices tended to use colloquies to establish a fact or to clarify a particular legal argument. In the newer cases, colloquies were more likely to involve hypotheticals, perhaps evidencing a greater concern with limiting principles or simply reflecting the dominance of former law professors on the Court. For example, in *Camreta v. Greene*,²⁶³ which involved the constitutionality of an in-school student interrogation concerning suspected parental sexual abuse, Justice Breyer probed the limits of a suggested Fourth Amendment rule through a series of hypotheticals:

Justice Breyer: Was there a seizure? No -- no professor -- no policeman?

Ms. Kubitschek: If -- if --

²⁶¹ *Id.* at 21–22.

²⁶² Again, our study is limited to Tuesday cases. If our study included arguments on other days, many additional examples would be available. The oral argument transcripts in *Doe v. Reed*, 558 U.S. 1142 (2010), and *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), provide many examples of sarcasm during oral argument, while the transcripts in *McDonald v. Chicago*, 561 U.S. 742 (2010) (166 interruptions), *Magwood v. Patterson*, 561 U.S. 320 (2010) (87 interruptions), and *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (156 interruptions), provide instructive examples of interruptions. (As noted, *Sebelius* involved three days of argument. While we looked only at the Tuesday session, the transcripts for all three days contain numerous examples of sarcasm.) *See also* Robert Barnes, *Supreme Court Justices Are Talking More*, WASH. POST (Mar. 2, 2011, 7:51 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030104697.html?sid=ST2011030106550>, archived at <http://perma.cc/D3DM-528J> (discussing the recent trend of increased interruption by Justices during oral arguments).

²⁶³ 131 S. Ct. 2020 (2011). The case was argued on March 1, 2011.

Justice Breyer: School nurse?

Ms. Kubitschek: The school nurse?

Justice Breyer: Seizure?

Ms. Kubitschek: Probably not a seizure.

Justice Breyer: And so, it's not a seizure if exactly the same thing happens but there is no outside person there, but it is a seizure if there's an outside person?

Ms. Kubitschek: If the outside person comes into the school --

Justice Breyer: That's the rule as to whether there's a seizure?

Ms. Kubitschek: That's one of the factors to look at.

Justice Breyer: No, no, no, whether there's a seizure?

Ms. Kubitschek: Yes.²⁶⁴

Similarly, in *Wal-Mart Stores, Inc. v. Dukes*,²⁶⁵ which involved the propriety under Rule 23(a) of a nationwide class in a Title VII sex discrimination case, Justice Scalia engaged in a brief colloquy with class counsel. Justice Scalia explained that he was talking about hypothetical cases:

Justice Scalia: Well, otherwise, how could you say that all -- all of the companies are -- are -- are presumptively engaging in sex discrimination?

Mr. Sellers: Well, Justice Scalia, I -- I -- I want to deal with the -- in this instance, we have -- it's not just any old analysis that we're -- that we're using. We have statistical regression analysis that isolates and takes into account the factors such as performance and -- and seniority.

Justice Scalia: See, I wasn't talking about this case.²⁶⁶

The Justices in the newer cases more frequently talked over each other—or talked immediately after each other—with little or no participation by counsel. For example, in *Wos v. E.M.A. ex rel. Johnson*,²⁶⁷ which involved the federal Medicaid statute's possible preemption of an irrebuttable state law presumption, Justice Ginsburg followed Justice Scalia, who followed Justice Breyer.²⁶⁸ Then, after North Carolina Solicitor General John F. Maddrey spoke briefly, Justice Sotomayor and Justice Ginsburg both spoke. The colloquy follows:

Justice Breyer: We know what you would like, but we don't know the answer.

²⁶⁴ Transcript of Oral Argument at 41, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (No. 09-1454).

²⁶⁵ 131 S. Ct. 2541 (2011). The case was argued on March 29, 2011.

²⁶⁶ Transcript of Oral Argument at 42–43, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277).

²⁶⁷ 133 S. Ct. 1391 (2013). The case was argued on January 8, 2013. *Id.* at 1391.

²⁶⁸ Transcript of Oral Argument at 16, *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013) (No. 12-98).

Justice Scalia: Don't you think the statute may -- may give you the answer? . . . It applies to judgments as well as to settlements.²⁶⁹

Justice Ginsburg: You answered the question with respect to jury verdicts. I suppose it would be no different if it's the judge that found the 10 percent rather than the jury.

Mr. Maddrey: I would agree.

Justice Ginsburg: The statute --

Justice Sotomayor: I didn't hear Justice Ginsburg's question.

Justice Ginsburg: The question that Justice Breyer was asking about the 10 percent has already been answered because we were told that if a jury allocated 10 percent to medicals, it would not make any difference, the statute entitles the State to 30 percent.

Justice Sotomayor: Basically you are saying the judge would be required to give you your one-third regardless of what the jury said.

Mr. Maddrey: Exactly.²⁷⁰

Later, during the argument presented by E.M.A. counsel Christopher G. Browning Jr., Justice Breyer and Chief Justice Roberts each spoke twice before allowing counsel to respond.²⁷¹ Later still, the Justices spoke consecutively three separate times, without any interjection by counsel.²⁷² Such incidents of Justice cross talk and back-to-back speaking turns show a Court firmly in control of the courtroom.

It is commonly thought that the Justices and counsel in the older cases engaged in more one-on-one conversations, while the Justices in the newer cases overwhelm counsel from all angles, but our study did not substantiate that view. For example, in *Miller v. Alabama*,²⁷³ the juvenile mandatory life-without-parole case, Justice Scalia made twelve consecutive interventions without being interrupted by another Justice:

Justice Scalia: What about 50 years? Is that -- is that too much?

Mr. Stevenson: What the Court held in -- in Graham --

²⁶⁹ The statute provides that, "Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department [up to 33%]." N.C. GEN. STAT. ANN. § 108A-57 (2011).

²⁷⁰ Transcript of Oral Argument at 16–17, *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013) (No. 12-98).

²⁷¹ *Id.* at 31–32.

²⁷² *Id.* at 35. Similarly, in *Camreta v. Greene*, Justice Scalia and Justice Sotomayor began talking over each other at one point. Transcript of Oral Argument at 6, *Camreta v. Greene*, 131 S. Ct. 2020 (2011) (No. 09-1454). Later, Chief Justice Roberts and Justice Sotomayor did the same. *Id.* at 14.

²⁷³ 132 S. Ct. 2455 (2012). The case was argued on March 20, 2012. *Id.* at 2455.

Justice Scalia: Well, you know, once -- once you depart from the principle that we've enunciated that death is different, why is life without parole categorically different from 60 years or 70 years or -- you know, you'd be back here next term with a 60-year sentence?

Mr. Stevenson: Justice Scalia, I think you're absolutely right, that there is a point at which a term-of-year sentence could constitute the same kind of judgment --

Justice Scalia: Okay.

Mr. Stevenson: -- as life imprisonment without parole.

Justice Scalia: Good.

Mr. Stevenson: But there is a distinction obviously between life imprisonment without parole and any other term sentence

Justice Scalia: I'll change my -- I'll change my question to 50 years without possibility of parole.

Mr. Stevenson: I - in --

Justice Scalia: Then you have no -- no distinction, right?

Mr. Stevenson: Well, I think there, it would be a tough case.

I think imposed on a juvenile, a 50-year sentence --

Justice Scalia: Without --

Mr. Stevenson: -- would not create the meaningful possibility of release that this Court ordered in the Graham context. . . .

Justice Scalia: How about 15 years old? 15, 60 years; or 14, 70 years?

Mr. Stevenson: I think all of the --

Justice Scalia: What -- what's the distinction between 14 and 15?

Mr. Stevenson: Well, I think from a sentencing perspective, all of those sentences would be problematic. But the distinction between a 14-year-old and a 15-year-old for constitutional purposes is that, of course, the younger you are, the more compelling are these deficits, these distinctions, that --

Justice Scalia: I understand, but how are we -- how are we to know where to draw those lines? We can't do it on the basis of any historical tradition, certainly.²⁷⁴

Other cases tell a similar story. In *Mutual Pharmaceutical Co, Inc. v. Bartlett*,²⁷⁵ which involved the possible preemption of state law design-defect claims, Justice Sotomayor engaged counsel for eleven speaking turns without the intervention of another Justice,²⁷⁶ and Justice Breyer spoke to counsel eight consecutive times without being interrupted by another Justice in *Match-E-Be-Nash-She-Wish Band of*

²⁷⁴ Transcript of Oral Argument at 4–7, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9647).

²⁷⁵ 133 S. Ct. 2466 (2013). The case was argued on March 19, 2013.

²⁷⁶ Transcript of Oral Argument at 7–10, *Mut. Pharm. Co. Inc. v. Bartlett*, 133 S. Ct. 2466 (2013) (No. 12-142).

Pottawatomí Indians v. Patchak,²⁷⁷ which involved a claimed waiver of sovereign immunity.²⁷⁸

Although the Justices in the newer cases sometimes seemed to engage in rapid-fire questioning from nearly all directions at once, our study shows that lengthy one-on-one colloquies also occurred frequently. Thus, while the length and tone of colloquies may have changed, and there is an undeniable increase in the frequency with which the Justices interrupt each other and ask multiple questions of counsel at the same time, those changes have not had the effect of displacing one-on-one colloquies altogether. In the later cases, the Justices still often engaged with counsel one-on-one, but they also spoke more overall and seemed less reluctant to pile questions on top of one another.

VII. CONCLUSION

Our study admittedly involves a relatively small number of cases. We cannot claim to know with certainty that the two three-year periods we have chosen are truly representative of the longer periods from which they were selected, and we cannot claim to know with certainty that the Justices' performance in Tuesday cases is truly representative of the Court's performance during the rest of the week. But we have no reason to doubt the representativeness of our data sets in either respect, and some of the differences between the two periods are particularly stark and compelling. In any event, we offer our data for what they are: two snapshots taken at two particular points in time.²⁷⁹ With these parameters in mind, we nonetheless believe that our study shows the existence of significant differences between the two periods and that some important conclusions may be drawn from our study.

The cases in our study suggest that what happens at oral argument, and the shape that oral argument takes, are substantially different from what they appear to have been a few decades ago. While the idea that the Justices (or some of them) value oral argument as an opportunity for influencing their colleagues is not a new idea, the Justices' extra-curial pronouncements on the nature and purpose of oral argument now seem to emphasize that aspect of oral argument much more than in the past. It is not clear whether that new emphasis correlates with changes in the Justices' in-court behavior, but the Justices in the newer cases certainly were more talkative and seemed to act more aggressively toward counsel and each other. That is not surprising. With twice the number of law clerks, vastly improved legal-research and word-processing resources, and markedly fewer cases to decide, the current Justices can be far better prepared for each argument than their predecessors were. Being better prepared, they are more likely to have strong views about the

²⁷⁷ 132 S. Ct. 2199 (2012). The case was argued on April 24, 2012.

²⁷⁸ Transcript of Oral Argument at 14–17, *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199 (2012) (No. 11-246).

²⁷⁹ In addition, we have made no effort to determine the existence (or not) of any possible trend between the two data points.

proper outcome of a case at an earlier stage in the process, and to be more personally invested in the case by the time of the oral argument.²⁸⁰ On the other hand, the time set aside for oral argument in each case is only half what it was before. So the Justices may know more about the case and have a stronger incentive to say what they know, but they have less time in which to do it. Thus, the Justices seem to compete with each other—and with counsel—for the time available.²⁸¹

An explanation frequently given for the emergence of the “new oral argument” is that the Justices increasingly see oral argument mainly as an opportunity to persuade each other—an opportunity that their otherwise formalistic interactions do not provide. Once certiorari has been granted, the Justices typically do not discuss a case among themselves until the post-argument conference, which has been truncated in more recent times.²⁸² At oral argument, therefore, those who have made

²⁸⁰ EPSTEIN, LANDES & POSNER, *supra* note 3, at 313. It may be, of course, that seeming to be more personally invested in the outcome of a case at an earlier stage (that is, when the case is being argued orally) is a function of their being better prepared for oral argument. It may also be the case that law professors (who now constitute a plurality of the Court’s membership) are more likely to have more definite views about what the law ought to be, with respect to a wider range of legal issues, than other Justices, and it is almost certainly the case that longer-serving Justices will be particularly protective of their prior contributions to the Court’s jurisprudence. It is likely, for example, that a Justice will be particularly active at oral argument if he or she perceives a danger to the continued viability of a precedent or line of precedents for which he or she is the progenitor, and that increased level of activity may be mainly directed toward the party that is perceived to represent that danger. The perceived threat to a favored precedent or line of authority may well account for certain large Rs, such as that produced by the criminal defendant’s argument in *Williams v. Illinois*. See *supra* note 213. More generally, if factors such as a greater degree of preparedness mean that most or all of the Justices come to oral argument with their minds firmly made up, the value of oral argument may well be questioned. Although oral argument can have value because it allows the public to understand the case and the process of adjudication, it can hardly be valuable for that reason if it is only a charade.

²⁸¹ It may also be that there is some natural limit to the Justices’ active participation at oral argument. According to that hypothesis, the Justices’ participation might remain relatively constant (or at least not double) if the time for argument were doubled, notwithstanding a caseload of stable size and a consistently high amount of argument preparation. It might be that the Justices are now speaking close to the maximum amount that they would be likely to speak in any event, and that much of the additional time achieved through a return to the previous standard of one hour to the side might well be available to counsel. Some proof for that hypothesis may be found in the lack of proportionality between the Justice words to lawyer words ratios for the two periods. In addition to other possible explanations, it may be that the more favorable lawyer words to Justice words ratio in the earlier period was due to the fact that the Justices had as much time as they felt necessary to question counsel or otherwise express their views.

²⁸² Professor Epstein and her coauthors have argued that the conference is limited in duration, artificial in structure, stilted in content, and, in general, overrated as an effective means of exchanging ideas, sharpening arguments, or forging consensus. Judges have their own moral and political values; there is a strong norm of equality among judges, and judges

up their minds can signal their intentions to their colleagues and do battle for the votes of those who may still be undecided.²⁸³ The Justices' interventions are likely to be statements or questions intended to persuade, rather than questions intended to elicit additional information that they do not know. In an important sense, according to this theory, oral argument may have become a substitute for the discussion that could occur at the post-argument conference, but apparently does not.

This explanation may well have some traction. As Professor Epstein and her coauthors have noted, most judges do not relish challenging their colleagues' positions in the conference room. It is easier, and often more effective, to use the questioning of counsel as a vehicle for pointing out the alleged absurdity of an argument that one's colleague might otherwise find persuasive.²⁸⁴ Indeed, if the point were attacked effectively at oral argument, the colleague might be sufficiently chastened as to refrain from even voicing that view in the conference room. Given the apparent shortening of the conference, bringing the conference discussion into the courtroom is not illogical; but there is some doubt as to whether oral argument even serves the colleague-persuasion function. Professor Epstein and her coauthors have suggested that most judges are rarely influenced by their colleagues' views or arguments and seldom change their minds based on what transpires at oral argument or in the conference room.²⁸⁵ They may do so more often in highly technical cases, but those are not the cases that are most salient at the Supreme Court level.²⁸⁶

are not chosen with a view toward effective group interactions or consensus building. At the conference, the judges speak their piece (but also apparently pull their punches) and then vote. It is considered a serious breach of etiquette to interrupt a judge when it is his turn to speak, which also discourages meaningful interaction. EPSTEIN, LANDES & POSNER, *supra* note 3, at 306–07. Professor Epstein and her coauthors have also compared service on a multi-member court to an arranged marriage without possibility of divorce. *Id.* at 32.

²⁸³ The Justices (or many of them) probably have viewed oral argument in this way for a very long time, but the Justices' attempts at signaling and persuasion seem to have become less subtle, less artful, and more obvious in recent times.

²⁸⁴ EPSTEIN, LANDES & POSNER, *supra* note 3, at 308–09.

²⁸⁵ *Id.* at 307–09.

²⁸⁶ Judge Posner has argued that deliberation and discussion are simply overvalued. In most cases, according to Judge Posner, a competent judge will quickly make up her mind about the correct decision in a case and be relatively impervious to persuasion thereafter, except, perhaps, in highly technical, nonsalient cases, in which the correct outcome may be less obvious. According to Judge Posner, spending more time in discussion may seem desirable to intellectuals because they are accustomed to settling disputes through reasoned discussion, but that is not the case in judicial deliberation because judges often have fundamentally different views and “reasoned argument . . . is ineffectual when the arguers do not share common premises.” POSNER, *supra* note 47, at 302. “In such situations,” Judge Posner believes, “the principal effect of arguing is . . . to drive the antagonists farther apart—or at least to cause them to dig in their heels.” *Id.* Judge Posner's argument also follows from his view that a judge's “difficulty making up his mind . . . is a psychological trait rather than an index of conscientiousness.” *Id.* at 299. It is not clear, of course, why legal questions should be especially impermeable to meaningful argument and persuasion, so long as the

As a group, the Justices dominated the courtroom in the newer cases, and, among the Justices, there was intense competition for the short time available. Whether the Justices act as they do because they see oral argument mainly as an opportunity to persuade their colleagues is difficult to know. It may also be that they believe, based on professional training and experience (reinforced, perhaps, by certain personality traits shared by those who become Justices) that the spirit of combat reflected in the newer arguments is truly the most effective way of ascertaining truth, or—more modestly—the best answers to the questions that are theirs to decide. It may be that they enjoy the frisson of the “passage with counsel”²⁸⁷ and with each other. It may also be that, being so well prepared (and possibly having made up their minds before the argument begins), they have strong views and a strong incentive to express them. But, having made up their minds (and suspecting that others have as well), they may also see oral argument as a pointless exercise made bearable only by taking charge. Or perhaps they just want to “have a good time,” which often means showing off their own cleverness or erudition. Alternatively, they may see oral argument as simply a prescribed part of their job, and they may not have deeply theorized its purpose, notwithstanding the many extracurricular statements that some of them have made about it. Different Justices may perceive oral argument differently, and the same Justices may perceive oral argument differently, depending on the case and what is at stake.²⁸⁸

To be sure, the Justices in the older cases also sought to influence their colleagues by asking questions, making statements, and emphasizing points they found particularly weak or compelling. What seems markedly different, however, is that the Justices in the older cases seem to have acted in a way that was more congenial to the other purposes of oral argument: providing counsel with a meaningful opportunity to craft a narrative that makes their best case directly to the Justices; assuring the parties that their concerns have been heard and fairly considered; communicating to the public, in an effective way, what is at stake in a particular case; and ensuring public confidence in the justice system. To the extent we can tell, the earlier Justices also seemed more likely to ask questions about things that were actually bothering them, and they generally gave counsel a reasonable opportunity to answer their questions. It was not all sweetness and light, of course. We know that at least one Justice of that period often irritated his colleagues (and counsel) by seeming to monopolize the argument time and treating counsel as if they

interlocutors act in good faith and display an “openness to mutual transformation.” DAVID TRACY, *PLURALITY AND AMBIGUITY* 93 (1987). Of course, interlocutors “differ not only in [their] judgments and in [their] ways of reaching those judgments, but also in their susceptibility to persuasion, to considering and adopting other points of view and other strategies.” Thomas Morawetz, *The Epistemology of Judging: Wittgenstein and Deliberative Practices*, 3 *CAN. J. OF L. & JURISPRUDENCE* 35, 43 (July 1990).

²⁸⁷ See WEST, *supra* note 28, at 29.

²⁸⁸ See *supra* note 285 and accompanying text.

were students in his class.²⁸⁹ Perhaps consistent with the mores of that earlier period, the Justices generally treated counsel with respect. They seldom, if ever, seemed rude or sarcastic. And they simply talked a great deal less.

The more recent arguments display a different dynamic. The Justices talk a great deal. They often interrupt an advocate's argument after a few words—before she has had an opportunity to state what she thinks the case is about. The Justices rarely allow counsel to develop even the outlines of a coherent narrative, and they frequently use an advocate's limited time (half the amount allotted to counsel in the older cases, as noted previously) to joke or argue with each other. The argument that results is not often the argument that the lawyer wanted the Justices to hear, but that has always been the case; it is inherent in the nature of oral argument. What the Justices now hear, however, is the argument that the most vocal and persistent of the Justices want to make. And some of the Justices seem very vocal and very persistent. Whether the argument that results is the argument the Justices need to hear is another question. Similarly, the narrative—if one or more emerges—is likely to be the Justices' narrative. The Justices also can come across as sarcastic or rude to counsel, sometimes berating counsel or making jokes at his or her expense, and belittling the interests and concerns of the litigants.²⁹⁰ They sometimes interrupt with the obvious intention of helping one side or the other. They sometimes seem to filibuster with the apparent intention of preventing a lawyer from making what might have been a good point. They sometimes interrupt with little obvious purpose—behavior more appropriate, perhaps, for a law school moot court competition. In moot court, after all, the purpose is to determine which side has the better gladiator, but that is not the purpose of litigation in the real world, where “human opportunities and liberties and life itself may be taken,”²⁹¹ as Judge Noonan has emphasized. Finally, the transcripts sometimes seem to suggest that the Justices may see oral argument as an opportunity to test their forensic skills against those of counsel. In that game, the Justices not only call the balls and strikes, but also pitch, bat, and field. Like all judges, the

²⁸⁹ See, e.g., SCHWARTZ, *supra* note 55, at 37–48 (discussing the attitudes that Justice Frankfurter's colleagues had toward him); STEVENS, *supra* note 59, at 71 (describing Justice Frankfurter's oral argument style). These dynamics were not particularly noticeable, however, in the specific cases contained in our sample.

²⁹⁰ See *supra* notes 84, 262–266 and accompanying text.

²⁹¹ NOONAN, *supra* note 40, at 14. See also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in TEXT AND TEACHING: THE SEARCH FOR HUMAN EXCELLENCE 2–3 (Michael J. Collins & Francis J. Ambrosio eds., 1991) (“My relation to this great text is inescapably public. . . . [C]onsequences flow from a Justice's interpretation in a direct and immediate way. A judicial decision respecting the incompatibility of Jim Crow with a constitutional guarantee of equality is not simply a contemplative exercise in defining the shape of a just society,” but an order “supported by the full coercive power of the State—that the present society change in a fundamental aspect. . . . One does not forget how much may depend on the decision. More than litigants may be affected. The course of vital social, economic and political currents may be directed.”).

Justices have immense power in the courtroom, and the current Justices are not reluctant to exercise it.

It may be that other aspects of the Justices' behavior can be explained by changing social mores. In our time, people tend to be more direct and outspoken and may seem less concerned with being polite or treating others with respect. These trends may have had some effect on the Court and the way it functions. Some of the Justices treat each other²⁹²—and sometimes the parties²⁹³—pretty roughly in their opinions; they can also be rough with the lawyers who appear before them at oral argument. The lessons the Justices teach in that respect have not been lost on the lawyers, who sometimes file briefs that mete out similar treatment to their opponents. But lawyers are still bound to treat the Justices with respect according to the old ways, so the intrusion into the courtroom of coarser social values generally moves in only one direction.

The “new oral argument” is undoubtedly stimulating for the participants—and particularly so for the Justices, who dominate the courtroom and must be treated with respect, regardless of how they treat those who appear before them. But the “new oral argument” is not about the lawyers, who can sometimes seem to be bystanders or straight men. Nor is it about the parties, whose real-world interests

²⁹² See Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 399 (2000) (collecting examples).

²⁹³ Justices rarely dissent from a denial of certiorari. Even more rarely do Justices answer such dissents with concurring opinions on the denial of certiorari. See GRESSMAN, ET AL., SUPREME COURT PRACTICE, *supra* note 57 at 330–34. But one such a concurrence provides an apt illustration:

Justice Blackmun begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. See *McCollum v. North Carolina*, cert. pending No. 93-7200. How enviable a quiet death by lethal injection compared with that!

Collins v. Callins, 510 U.S. 1141, 1142–43 (1994) (Scalia, J., concurring in the denial of certiorari). *McCollum*, whom Justice Scalia took as his case in point, was later exonerated. See Ed Mazza, *Scalia Once Pushed Death Penalty for Now-Exonerated Inmate Henry Lee McCollum*, HUFFINGTON POST, (Sep. 2, 2014, 11:09 PM), http://www.huffingtonpost.com/2014/09/02/scalia-death-penalty_n_5756362.html, archived at <http://perma.cc/4HMW-QRTW>.

hang in the balance. Nor is it about the public,²⁹⁴ despite the fact that oral argument is the most public part of the process we have devised for resolving some of the most important questions of public law.²⁹⁵ In short, the Justices may not have a shared vision concerning the purpose of oral argument, but it does seem, as the expression goes, to be “all about them.” In that respect, the Justices may be seen to give less than optimal attention to the litigants or their concerns, except insofar as they are the abstracted authors and materials, respectively, of those “sordid controversies” that are “the stuff out of which” the Justices will shape “great and shining truths.”²⁹⁶

Our study raises some fundamental questions about the conduct of oral argument, its value, and its present and potential roles in the decisional process. How, for example, does one square the basic idea of legal representation and the lawyer’s role in an adversarial system with a reality in which the Justices not only speak more than the lawyers, but also seem to do battle for one side or the other? In addition, as things now stand, one might well wonder whether the Justices believe that oral argument serves any real purpose in the decisional process. If they do, one might further wonder what that purpose is, and whether, in any event, the “new oral argument” represents the optimal use of the only time that counsel and the Justices are able to interact face to face and in public. If it does not, why is that? And what should be done about it? If the only purpose that oral argument serves is to provide an opportunity for the Justices to talk to each other, does that suggest more deep-seated problems with the decisional process? The same question is raised, of course, if the Justices have come to believe that oral argument serves no purpose at all. But that view would be shortsighted. Clearly, oral argument serves important purposes that may not be acknowledged or well served by the way in which oral argument is now conducted. What goes on at oral argument is critically important in assuring the parties that their case has been fully and fairly heard. It is also important to the public, both in terms of understanding the circumstances of the particular case and in terms of understanding the role of the Court. It is also critically important to the respect that government owes its citizens in a democratic regime. Finally, the way

²⁹⁴ In a sense, of course, the way the Justices act at oral argument may be influenced by its public nature, as Judge Posner has suggested: “So consider a Supreme Court in which . . . two very talkative Justices replace two silent ones. The remaining silent Justices may begin to feel uncomfortable, to feel like wallflowers, worrying that the media will raise questions about their competence—will suggest that maybe they aren’t quick enough or sufficiently well prepared to be able to participate actively in the give and take of oral argument.” POSNER, *supra* note 6, at 57.

²⁹⁵ The Court is not simply charged with “say[ing] what the law is,” but with making sure that the people understand the processes by which the meaning of the Constitution and the liberties of the people are clarified and given effect. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See, e.g., Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314, 325 (1985) (noting the educational role of the federal judiciary); see also Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 1004–12 (1992) (discussing the Supreme Court’s educational role). For that reason, oral argument should be transparent to the governed in some essential sense.

²⁹⁶ CARDOZO, *supra* note 41, at 35.

in which oral argument is conducted in the Supreme Court is an important benchmark as to what constitutes sound practice and appropriate behavior for judges throughout the land.

In sum, our study suggests that the nature of oral argument may have changed greatly, if imperceptibly and without deliberate design, in the past half century, and that the time is now right to consider whether that change has been for the best. Assuming that we are correct in the conclusions we draw from the data we have studied, we think that the Court as a whole should evaluate the current practice of oral argument. More specifically, the Court needs to consider what it hopes to achieve from oral argument, both in light of current circumstances and with a proper understanding of the Court's role in our democratic society. What this means is that the Justices need to talk candidly among themselves about the evolution of oral argument, the purposes that oral argument can and should serve, their own behavior at oral argument, the possible effects of their behavior and the impression it makes, and what might be done to correct what many may perceive as an excessive indulgence on the part of the Justices.

In addition, given the steep decline in the Court's caseload, it may be that the original justification for shortening the length of oral argument no longer holds. Perhaps that decision should be reconsidered. A longer oral argument might allow counsel the time to develop their arguments in a more coherent way, while also providing the public with a better understanding of both the case and the process, as well as allowing the Justices, who clearly are well prepared for oral argument, sufficient time to interact with counsel and each other to better effect. Alternatively, the Court may wish to consider setting aside some portion of the time allocated for oral argument for counsel to be able to speak without interruption by the Justices, perhaps at the beginning or at the end of counsel's argument.²⁹⁷ In any event, to the

²⁹⁷ Chief Justice Roberts apparently attempted early in his tenure to persuade his colleagues that their questioning of counsel should cease once the white light (signifying that the attorney's time would expire in five minutes) appeared, but, according to the Chief Justice, even he had a difficult time conforming his conduct to that convention. *See* Remarks of Chief Justice John Roberts, *Supreme Court Term Review, Fourth Circuit Court of Appeals Judicial Conference*, June 29, 2013, available at <http://www.c-span.org/video/?c4457880/hot-bench>, archived at <http://perma.cc/7YK3-WFZM>. A more effective mechanism might be provided through the introduction of a convention whereby the Court would set aside a certain amount of time for counsel to speak without interruption at the beginning of her argument. The United States Court of Appeals for the Fifth Circuit has long followed that practice in connection with en banc hearings. *See* PRACTITIONERS' GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, October 2014, at 73, available at www.ca5.uscourts.gov/clerk/docs/pracguide.pdf, archived at <http://perma.cc/ZPC8-YH WX> ("Generally, each side is allowed thirty minutes for argument. The court will not ask questions during the first half of the allotted time for opening argument, unless counsel waives this privilege."). In addition, that innovation would permit counsel to frame her argument and establish a narrative, which is a purpose that could not be achieved simply by permitting counsel some amount of uninterrupted time at the end of her argument.

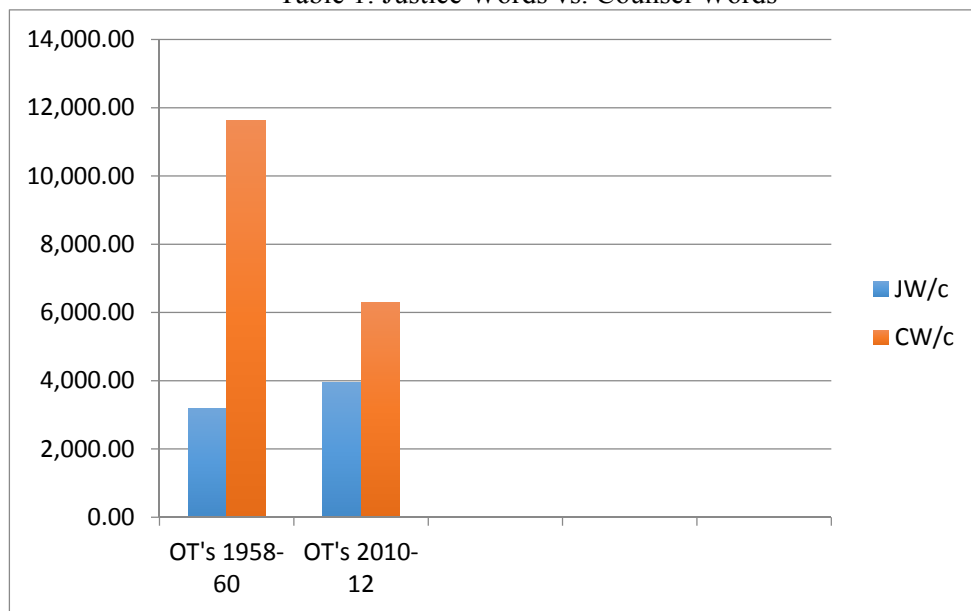
extent that oral argument may have come to substitute for the conference as an opportunity for the Justices to discuss the cases they have to decide, perhaps the Court should reconsider the ways in which the Justices communicate with each other.

Most important, the Court needs to consider whether the present practice of oral argument truly serves the interests of the parties and the public, as well as the Court's own interests, and it needs to act based on its answer to that question. Otherwise, we risk the possibility of continued reliance on one aspect of the decisional process that seems to have evolved without conscious direction and may not now optimally serve the purposes for which it was created. We do not suggest, of course, that we can or should return to comparatively sleepy days of the Warren Court, but the differences between the practice of oral argument then and now are sufficiently stark to raise questions as to whether the change has been for the good, and, if not, what, if anything, can be done. It may be, of course, that the Justices will think that this is something they cannot do, or that the costs of trying to do it may be too great. They are, after all, not each other's keepers or confidants, but merely partners in an "arranged marriage" without the possibility of divorce.²⁹⁸ In such circumstances, collegiality is a precious and fragile necessity. It must be preserved if the Court is to do its work, and it must not be squandered or compromised needlessly. But that response is not entirely persuasive. Whether the current practice of oral argument serves its traditional purpose is a question central to the administration of justice and one worthy of the Court's attention. However the Justices may have come to be where they are, they are collectively responsible for the performance of the Court on which they sit, and for preserving the public's confidence in it.

²⁹⁸ EPSTEIN, LANDES & POSNER, *supra* note 3, at 32.

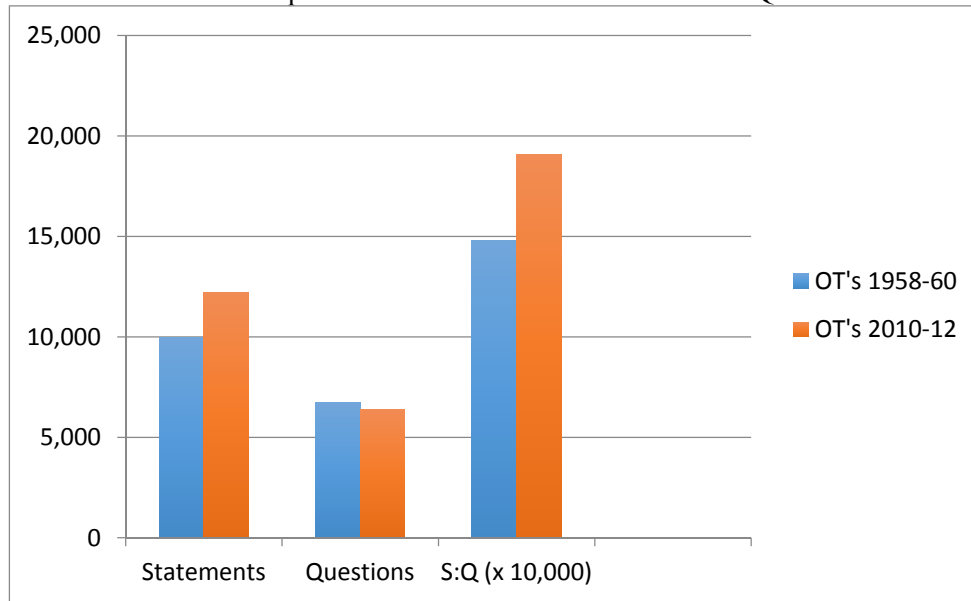
Appendix A

Table 1: Justice Words vs. Counsel Words



Appendix B

Table 2: Comparison of Justice Statements to Justice Questions



Appendix C

Table 3: Opening Statements and Longest Non-Opening Monologues Compared

