

# *“I’m Speaking”: Gender and Interrupting Behavior During Oral Argument at the U.S. Supreme Court*

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**Abstract:** Women are historically and presently underrepresented in the U.S. Supreme Court. More specifically, from 2000 to 2013, only 14.2% of lawyers who argued before the Supreme Court were women despite making up about 51% of the U.S. population and 37.4% of American lawyers. Between those same years, women made up between 22% and 33% of Supreme Court justices. Not only are women underrepresented within the Court, but they also experience discrimination. Researchers Patton and Smith (2020) evaluated the relationship between lawyer gender and the interruptions they experience when arguing before the court and found that justices demonstrated more interrupting behavior in quantity and length of interrupting behavior for female lawyers compared to male ones at a statistically significant level. A follow up study by Patton and Smith (2021) showed that the disproportionate interruption of female lawyers was more likely to come from male and/or conservative justices. Jacobi and Schweers (2017) noted similar statistically significant gendered speech patterns among the justices themselves, with female justices being disproportionately interrupted at a higher rate and male justices disproportionately interrupting at a greater rate. In addition, lawyers are more likely to find success, as defined by receiving the votes of a justice, if they adhere to gender norms within their oral argument (Gleason, 2020). These conclusions suggest that the substantive representation of women in the Supreme Court is limited not just by their numerical disadvantage but also by the systematic limitation of women’s speech during oral argument through verbal interruptions and the enforcement of gender norms.

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The law and the courts have historically been considered male domains, as evidenced by the fact that the first woman was not legally permitted to attend law school in the United States until 1919. It was almost another sixty years until Sandra Day O’Connor became the first woman confirmed to the Supreme Court in 1981. Despite this glass ceiling being shattered, gender imbalances continue in America’s highest court. Most lawyers who argue before the Supreme Court are men. From 1979 to 2013, approximately 11% of layers before the Supreme Court were women (Patton & Smith, 2017). Specifically, from 2000 to 2013, the percentage of women before the Court was 14.2%, so the number of women before the Court is slowly increasing (Patton & Smith, 2017). Because the Supreme Court is a deliberative body where oral argument has the potential to influence the votes of justices, and thereby the laws by which Americans live, it is important to understand how attorney gender plays a role in the effectiveness or experience of oral argument (Ringsmuth et al., 2013). Women also have different policy priorities than men when

it comes to “gendered issues.” These issues include “health policy, social welfare, education, family and children issues, and civil rights” (Yildirim, 2021). The idea of women representing themselves on the issues most important to them is referred to as substantive representation (Mansbridge, 1999). Thus, if women have different priorities than men but are less able to advocate for themselves, either from the bench or as lawyers, this will negatively impact the ability of women to substantively represent themselves in Court and likely result in Court decisions that negatively impact women. The purpose of this literature review is to ascertain the relationship between gender and interrupting behavior during oral argument before the United States Supreme Court between 1979 and 2015.

## **Speaker Gender**

The number of women both on the bench and arguing before the bench is steadily increasing. As the proportion of women at the Supreme Court increases, researchers have become more interested in the effect of gender on interactions in the Court.

It is well documented that men are on average more talkative and more assertive in their speech patterns than women (Leaper & Ayres, 2007). In addition, when women are in group settings, they tend to be regarded as less capable, especially in fields where they are often underrepresented such as the legal field (Mendleberg & Karpowitz, 2016). This perception can result in them regarding themselves as less capable as well (Mendleberg & Karpowitz, 2016). Thus, there are major indicators that women might be disadvantaged in the setting of the Supreme Court oral argument, a form of group discussion, due to both numerical minority status as well as gendered speech tendencies and gendered patterns of group behavior.

### **Justices’ Interrupting Behavior**

When the Supreme Court takes on a case, both parties submit written briefs and then come to the oral argument, the most public part of the Court’s decision process. Each side is allotted about thirty minutes to present their case. During that time, justices interrupt lawyers to gather information, challenge arguments, or persuade other justices (Phillipps & Carter, 2010; Ringsmuth et al., 2012). As such, oral arguments have the potential to influence justices’ decisions and their written opinions (Johnson et al., 2006). Interruptions are an inevitable part of oral argument for these reasons. Interrupting behavior can be measured by who does the interrupting, who is interrupted, how long interruptions last, and the frequency of interruptions.

### **Effect of Lawyer Gender on Justices’ Interrupting Behavior**

Patton and Smith (2020) studied the difference between male and female lawyers’ speaking time and the interruptions they experience during U.S. Supreme Court oral arguments from 1979 to 2013. In order to build the data set, they used an automated content analysis. The systematic analysis of 34 years of Court transcripts, which is as far back as validated online transcripts go, allowed them to evaluate overall patterns and reduced the chance that their data would be skewed by the dynamics of a particular set of justices. As a part of this wide data range, the researchers also controlled for changes in court makeup in their overall data, thereby turning a possible threat to internal validity into a strength.

There is also no risk of sampling error because by using all available data, the researchers are essentially conducting a census.

Patton and Smith began by downloading all 3,583 of the oral arguments before the Court from 1979 to 2013 from Lexis-Nexus. The researchers then used Python computer programs to “split each oral argument by presentation and then split each presentation into individual speeches by attorney and justices,” yielding a total of 10,345 observations. They analyzed the length in words of speeches by lawyers and justices as well as the quantity of interruptions by justices. They posited that each of these measures demonstrate “the Court’s willingness to allow lawyers to present their cases” and “how deferentially the justices treat the lawyers,” both of which are themes with strong external validity. They also leveraged data from the Supreme Court Data Base which helped them to control for variables such as the issue being litigated, ideological alignment between the Court and the lawyer, and which side won the case. The identification and explanation of all these control variables in addition to the demonstration of the effect size of each control variable on the dependent variables strengthened the internal validity of the study as well.

Once all data was collected, they employed difference of means tests for male and female lawyers on each dependent variable. They found that women were interrupted, on average, 3.6 more times than their male counterparts. They demonstrated that men are allowed an average of 225 words before the first interruption while women were permitted an average of 192 words, demonstrating a 33.3 average word difference. Put another way, female lawyers get about 5% less time to begin their arguments. Male lawyers were also permitted approximately 95 words between interruptions whereas female lawyers averaged 83 words, with an average of 12.1-word difference. When controlling for the client the lawyer is representing, these disparities persisted with male lawyers being permitted an average of 63.8 more words in their opening statements and an average of 17.1 more words between interruptions. All results had at least a .01 statistical significance. The study could have been strengthened, however, by individually listing the statistical significance of each finding.

### **Effect of Justice Gender on Justices' Interrupting Behavior**

Researchers Jacobi and Schweers (2017) looked beyond attorney gender and investigated the effect of gender on justice-to-justice interruption in the Supreme Court in 1990, 2002, and 2015. These years each represent a unique type of gender distribution on the Court. In 1990, there was one female justice. In 2002, there were two female justices, and one of them was the ideologically median justice. Jacobi and Schweers have also posited that the effects of gender and ideology on oral argument patterns are intertwined. Thus, this 2002 data set allowed them to disentangle those effects and improve internal validity. 2015 represents the Roberts Court in which there were three female justices as well as the first female justice of color. The concentration on these three terms, rather than the analysis of a long continuous range of terms, permitted a more in-depth analysis of those years as well.

Across these three years, Jacobi and Schweers analyzed 156 oral arguments, during which there were 422 interruptions. Using a computer program to search transcripts for the "--" that indicates an interruption, they examined the speaking and interrupting behavior of the 13 justices that have served on the bench in those years. In addition to the computer program, they double checked computer-marked instances of interruption to ensure that they were true interruptions and not simultaneous speech. These added quality assurance measures strengthened the reliability of measurement in the study.

Before adjusting for the underrepresentation of women on the bench, the data shows that they are interrupted about 54% of the time although they only make up between 11% and 33% of justices across these three years. In addition, men made up 85% of interrupters, despite being 78% of the court on average. After adjusting for the proportion of women represented on the Court, the patterns still bear out. In 1990, Justice O'Connor, the lone female justice, experienced 26% of interruptions despite being 11% of the Court and in 2015, female justices experienced 65.8% of interruptions despite making up 33% of the Court. With *p* values of .0029 and .0000 respectively, these are incredibly statistically significant findings. By comparing the years 1990 and 2015, it is clear that as the number of women

on the Court increases, the percentage difference between percent representation of women on the Court and the interruptions experienced by women increases. In 1990, it was a percent difference of 15%, and in 2015 it was 22.8%. This demonstrates that rather than acclimating to the presence of women on the Court, male justices are working harder to assert their verbal dominance over their female colleagues.

On the other hand, Sandra Day O'Connor committed 5% of interruptions in 1990 while making up 11% of the Court, and in 2015 three women committed 17% of interruptions while making up 33% of the Court. The 1990 difference among interrupters is not significant, likely due to low sample size, but the 2015 data has a *p* value of less than .01 which is very significant. The inconsistency of data presentation within the study is a major weakness. Raw data was sometimes presented but percentages or ratios appeared at other times with minimal discussion of the reasoning for the disparity in presentation. On occasion, the tables were often difficult to understand and not well explained within the discussion of the data. Therefore, the data is consistently presented as a percentage within this literature review for increased legibility.

Both studies examined the interplay of speech and gender in the U.S. Supreme Court through different lenses. While Patton and Smith (2020) focused on the interruption of lawyers by justices, Jacobi and Schweers (2017) were more concerned with interruptions between justices. The evidence of outsized interruption of female speakers in both justice-to-lawyer interruptions and justice-to-justice interruptions demonstrate that gendered dynamics on the Court are more prevalent across power dynamics.

Although the limited presence of women before the Court and on the bench posed a challenge to both researchers in terms of the amount of data available to them, both researchers still managed to find strong data sets and statistically significant evidence of gender bias against women in the Supreme Court. Both studies also build upon and do well to include many studies on the interplay of gender, speech, politics, and power throughout. This helps the reader to understand their foundation for the assertion that implicit gender bias, or a need to assert dominance plays into the greater interruptions of women and the outsized interrupting behavior of men.

### **Factors Influencing Justices’ Propensity to Interrupt of Lawyers**

Patton and Smith (2021) built upon the question of gender interruption of lawyers and conducted a study aimed at understanding gender bias in the U.S. Supreme Court by analyzing oral arguments from 2004 to 2014 and observing the effects of attorney gender, justice ideology, and justice gender on the proportion of words a person speaks during oral arguments. The study was strengthened by both by removing Justice Thomas from the study due to his outlier status as well as the plethora of control variables included in the data analysis such as ideological alignment, case salience, and lawyer affiliation. Another major strength of the study was the treatment effects analysis which deftly demonstrates effect size by essentially using each justice as their own control in the experiment. After adjusting for controls, the researchers found that 75% of the justices (9 out of 12) spoke more on average when a woman presented than when a man presented and that the differences all had a statistical significance of at least .01%. They also found that effect size among those prolific speakers was at least .50% higher for conservative justices than liberal justices. Across gender lines, effect size is also strongly demonstrated. Patton and Joseph note a nearly 0.6 percent greater effect size for male justices than female justices when a female lawyer speaks.

### **Gender Norms and Lawyers’ Success in the U.S. Supreme Court**

Gleason (2020) broadened the lens of gender and the U.S. Supreme Court by examining the impact of attorney adherence to gender norms on success before the U.S. Supreme Court from 2004 to 2016. He conducted a textual analysis of one-on-one oral arguments before the Court and demonstrated that while there is a positive relationship between the affective content of oral argument and securing a justice’s vote for female attorneys, there is a negative relationship for male attorneys with correlation coefficients of approximately 0.5 and 95% confidence intervals for both sexes. The effect size of female attorney’s use of affective content on securing judicial votes is about 21.5% with a statistical significance of  $p < .01$ . The discussion of multiple control variables strengthens the internal validity of the study. This finding is significant because affective speech is

customarily discouraged by legal institutions such as the Court. However, affective speech is a female gender norm. Thus, it would appear that women are being discouraged from speaking in a way that better allows them to find success before the Court.

### **Conclusion**

This literature review provides evidence of a strong correlational relationship between a speaker’s gender and their interrupting behavior before the Supreme Court during oral argument. Through a detailed examination of 34 years of Supreme Court transcripts, Patton and Smith (2020) found that female lawyers are afforded less speaking time than their male colleagues.

After controlling for a variety of factors, the study demonstrated a statistically significant correlational relationship between the presence of a female lawyer presenting and lesser speaking time allowed to lawyers. They also found correlation between female lawyers and more frequent and longer justice interruptions.

A follow up study by the same researchers confirmed these findings and indicated that conservative justices and male justices demonstrate a greater effect size in their propensity to interrupt female lawyers. A study by Jacobi and Schweers (2017) provided strong evidence of a similar pattern in justice-to-justice interruptions. They used three representative Supreme Court terms to demonstrate that female justices are interrupted at a far greater per capita rate than their male colleagues and that male justices are far more likely to interrupt their colleagues than female justices are. Gleason (2020) also provided evidence that gender norms are enforced by the Court, with lawyer adherence to gender norms having a statistically significant correlation to winning one’s case. Taken together, these studies demonstrate the strong presence of implicit gender bias among Supreme Court justices as evidenced by their speech patterns and judicial decision-making practices.

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