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ARTICLES

Taking Laughter Seriously at the Supreme Court

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*Matthew Sag***

Laughter in Supreme Court oral arguments has been misunderstood, treated as either a lighthearted distraction from the Court's serious work, or interpreted as an equalizing force in an otherwise hierarchical environment. Examining the more than nine thousand instances of laughter witnessed at the Court since 1955, this Article shows that the Justices of the Supreme Court use courtroom humor as a tool of advocacy and a signal of their power and status. As the Justices have taken on a greater advocacy role in the modern era, they have also provoked more laughter.

The performative nature of courtroom humor is apparent from the uneven distribution of judicial jokes, jests, and jibes. The Justices overwhelmingly direct their most humorous comments at the advocates with whom they disagree, the advocates who are losing, and novice advocates. Building on prior work, we show that laughter in the courtroom is yet another aspect of judicial behavior that can be used to predict cases before Justices have even voted. Many laughs occur in response to humorous comments, but

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that should not distract from the serious and strategic work being done by that humor. To fully understand oral argument, Court observers would be wise to take laughter seriously.

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Elena Kagan:	Why is there no speech in . . . creating a wonderful hairdo?
Kristen Waggoner:	Well, it may be artistic, it may be creative, but what the Court asks when there's --
Elena Kagan:	The makeup artist?
Kristen Waggoner:	No . . .
Elena Kagan:	It's called an artist. It's the makeup *artist*. [LAUGHTER].[1]
Noel Francisco:	. . . people pay very high prices for these highly sculpted cakes, not because they taste good, but because of their artistic qualities. I think the more important point --
Neil Gorsuch:	In fact, I have yet to have a . . . wedding cake that I would say tastes great. [LAUGHTER].[2]
David Cole:	. . . that is not necessary to decide this case, but . . . in a future case that involved physical participation in . . . a religious ceremony that an individual deeply opposed, that a court . . . might create new doctrine and draw a new line and say, no . . . . We're going to make an exception . . . .
Stephen Breyer:	How do we do that? Because, you know, we can't have 42,000 cases, each kind of vegetable -- [LAUGHTER].[3]

1. Transcript of Oral Argument at 12, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Transcript of Oral Argument, *Masterpiece Cakeshop*]. Note that Supreme Court transcripts do not indicate emphasis; however, the emphasis is clear in the recording of the oral argument. *See* Oral Argument at 7:55, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Oral Argument, *Masterpiece Cakeshop*], https://apps.oyez.org/player/#/roberts8/oral_argument_audio/24402 [https://perma.cc/VSD3-ACJL].

2. Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 1, at 41.

3. *Id.* at 80.

INTRODUCTION

When the Supreme Court addressed whether a law sanctioning a baker for his refusal to make a wedding cake for a gay couple was contrary to the First Amendment in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[4] the courtroom erupted into laughter seven times during the extended ninety-minute oral argument. One episode was inspired by Justice Kennedy inadvertently stumbling between the words "case" and "cake."[5] But in all six other episodes, there was a serious point to the Justices' quips and comments that provoked the courtroom gallery into laughter. As seen above, Justice Kagan was illustrating the potential absurdity of Petitioner's argument that making a wedding cake was a personal statement demanding free speech protection. Kagan asked the serious question of how such claims could be limited by posing the seemingly absurd question of why hairstylists should not command the same respect.[6] Justice Breyer made a similar point about the potentially limitless distinctions the Court would be asked to make if it ruled in favor of the baker by resorting to the hyperbole of the Court deciding "42,000 cases, each kind of vegetable." Justice Gorsuch, in contrast, was emphasizing that wedding cakes are not made or consumed for their taste but for their symbolism and artistry, a jest that worked in Petitioner's favor. It is unsurprising, then, that Justice Gorsuch ultimately joined the majority opinion, which, while dodging the question of whether there is an exception to antidiscrimination

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4. *See* Brief in Opposition for Respondents at i, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), https://www.scotusblog.com/wp-content/uploads/2016/12/16-111-BIO-mullins-and-craig.pdf [https://perma.cc/W5S7-DXN5]; Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), https://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf [https://perma.cc/J9NS-YBGY].

5. Transcript of Oral Argument, *Masterpiece Cakeshop*, *supra* note 1, at 79 ("Suppose that either in this case or some cases you have a very complex case -- cake, and -- case and cake -- [LAUGHTER].").

6. For a similar point made through humor, see *Supreme Court Rules Gay Rights Do Not Extend to Dessert*, ONION (June 4, 2018, 12:51 PM), https://politics.theonion.com/supreme-court-rules-gay-rights-do-not-extend-to-dessert-1826541732 [https://perma.cc/5VHY-XV5B]:

> We are choosing to define "dessert" in the broadest possible terms. This means that gay rights will not be applicable in cases of ice cream, sorbet, decorative cookies, or any other post-meal treats, be they sweet or savory. Tiny glasses of port and cheese plates will also fall under the umbrella of "dessert" unless they are consumed before the entrée and defined specifically as "apéritifs."

Indeed, the following Term, the Supreme Court had to decide whether to rule on the same issue as applied to a florist—*Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671, 2671 (2018) ("[R]emanded . . . for further consideration in light of *Masterpiece Cakeshop*.").

principles for genuinely held religious beliefs,[7] upheld Petitioner's claim in this case. In contrast, Justice Kagan's concurring opinion, which Justice Breyer joined, explicitly narrowed the determination to one of discrimination by a state actor against Masterpiece and read the majority opinion as embracing the conclusion that a state law "can protect gay persons."[8] The way the Justices used humor in the *Masterpiece Cakeshop* oral argument is telling. Liberal Justices used humor to engage in a dialogue with Petitioner and express their skepticism, while conservative Justices did the same with Respondent.

This pattern raises some questions. First, is *Masterpiece Cakeshop* representative, or is there something special about the facts of that case (or cake?) that led to so much absurdist humor and mockery? It may well be idiosyncratic, given that the average case during the Roberts Court era has had only 2.74 instances of laughter,[9] whereas, for instance, an argument addressing the inherently snicker-producing question of nudity on television yielded twelve laughs in a sixty-minute hearing.[10] Yet oral arguments on topics as dry as standing in tax cases[11] or jurisdictional issues in employment discrimination law have inspired instances of laughter, albeit often at just how boring the case is.[12] Second, is laughter a function of salience? *Masterpiece Cakeshop* was one of the most salient cases of the 2017 Term, pitting antidiscrimination principles directly against

7. *Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts . . . .").

8. *Id.* at 1733 (Kagan, J., concurring) (reading the majority opinion "as fully consistent with" the view that the case was decided on the basis of prohibiting discrimination and emphasizing the narrowness of "its analysis to the reasoning of the state agencies" (emphasis omitted)).

9. Note that argument in *Masterpiece Cakeshop* was ninety minutes instead of the usual sixty minutes, but that it still registered above the average number of laughs per minute. *See* Oral Argument, *Masterpiece Cakeshop*, *supra* note 1.

10. Transcript of Oral Argument, FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012) (No. 10-1293).

11. For instance, in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 129, 141 (2011) (addressing whether ordinary taxpayers have standing to challenge a tax credit as opposed to a governmental expenditure), Justice Kennedy joked, "But I must say, I have some difficulty that any money that the government doesn't take from me is still the government's money. [LAUGHTER]." Oral Argument at 32:11, *Winn*, 563 U.S. 125 (No. 09-987), https://apps.oyez.org/player/#/roberts6/oral_argument_audio/22462 [https://perma.cc/U82X-BFBC].

12. See, e.g., *Perry v. Merit Systems Protection Board*, in which Justice Sotomayor joked during oral argument, "[I]f we go down your route, and I'm writing that opinion -- which I hope not, but if I were -- [LAUGHTER]," and Justice Kagan joked, "This would be a kind of revolution . . . to the extent that you can have a revolution in this kind of case. [LAUGHTER]." Transcript of Oral Argument at 44–45, 50–51, Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975 (2017) (No. 16-399).

religious freedom claims in the newly recognized[13] and still divisive[14] right of same-sex couples to marry. Justices may be more engaged, and thus inspire more episodes of laughter, in salient cases; on the other hand, salient cases may generally be more somber, involving high-stakes issues of fundamental rights and governmental powers.[15] Third, does the apparently tactical use of humor as a rhetorical tool in *Masterpiece Cakeshop* indicate a broader trend? And if so, are judicial comments that inspire laughter a good predictor of the voting intentions of individual Justices or the Court as whole? More specifically, we may ask whether it is typical that the Justices make comments inspiring laughter primarily during the time allotted to the advocates against whom they ultimately rule, or if laughter is indicative of who will win or lose the case. If such patterns are persistent, that suggests there is important information about the outcomes of cases contained within the seemingly innocuous parenthetical notations of laughter during Supreme Court oral arguments.

In this Article, we set out to investigate these and other questions relating to the use of humor and the nature of laughter in Supreme Court oral arguments. Although humorous exchanges at the Court are often discussed in the news media as they arise,[16] and a couple of scholars have tallied up counts to determine which Justice inspires the most laughter in a given Term,[17] we are not aware of any serious empirical investigation into the nature of laughter at the Supreme Court until now.

In this Article, we take laughter seriously. Without doubt, the comments that induce laughter in the Supreme Court gallery are often humorous. But they are more than just humor for the sake of humor or random lapses into absurdity. When the Justices make jokes and quips, they do so with serious intent, and the humor that results often

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13. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (recognizing that the fundamental right to marry extends to same-sex couples).

14. In fact, a clear majority of Americans (62%) support gay marriage whereas only 32% oppose it; however, only 35% and 44% of white and black evangelical Protestants, respectively, and 47% of Republicans, support the right. PEW RESEARCH CTR., SUPPORT FOR SAME-SEX MARRIAGE GROWS, EVEN AMONG GROUPS THAT HAD BEEN SKEPTICAL 1–2, 6 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/06/23153542/06-26-17-Same-sex-marriage-release.pdf [https://perma.cc/RU74-T6BE].

15. *See infra* Section II.B.

16. *See, e.g.*, Marcia Coyle, *A Hypothetical President, Grammar Lessons & 'Beautiful' Hovercrafts: SCOTUS Laugh Lines*, NAT'L L.J. (Dec. 26, 2018, 12:30 PM), https://www.law.com/nationallawjournal/2018/12/26/a-hypothetical-president-grammar-lessons-beautiful-hovercrafts-scotus-laugh-lines/ [https://perma.cc/DR92-CJQM].

17. *See infra* Section I.A.

stems from the barbed or pointed nature of their remarks. Indeed, it is often the serious point wrapped within the joke that makes it humorous. That does not mean that the laughter is incidental: humor is one of the weapons in the Justices' arsenals of rhetorical persuasion. In related work, we have shown that the Justices act more like advocates in the modern era of Supreme Court oral argument than Justices did in the past.[18] Since the mid-1990s especially, the Justices have talked much more during oral argument, leaving less time for the advocates to make their points, and intervening predominantly in the form of statements rather than asking questions.[19] At the same time, the "disagreement gap"—the difference between the number of words a Justice speaks to the Petitioner versus the Respondent in a given case—has become a much more reliable predictor of voting behavior on the Court.[20] In this Article, we show that the Justices' use of humor is part of the same historical trend: it is performative, contributing to the advocacy role that the Justices adopted during the later Rehnquist Court and have continued to use during the Roberts Court. Humor is a weapon of advocacy, and it is a particularly powerful one because the advocates are unarmed against it—not only by their formally inferior status to the Justices, but also because the rules of the Court admonish them to avoid using humor themselves.[21]

In order to take laughter seriously, we built a database of every Supreme Court oral argument transcript from the 1955 Term to the 2017 Term and identified every episode of laughter therein. That is over nine thousand instances of laughter, in 6,864 cases, over sixty-three years. This empirical approach allows us to examine changes in humor at the Court over time. We show that in an era of an increasingly polarized Court,[22] the Justices are significantly more

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18. Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161 (2019).

19. *Id.* at 1203 (discussing the Justices' increased speaking time); *id.* at 1206 (discussing the Justices' preference for statements over questions).

20. *See id.* at 1228; *see also* Tonja Jacobi & Matthew Sag, *Predicting Supreme Court Votes Based on Oral Argument Metrics*, SCOTUS OA (Sept. 17, 2018), https://scotusoa.com/predictions-preview/ [https://perma.cc/NY6R-RJWT].

21. *Guide for Counsel in Cases to Be Argued Before the Supreme Court of the United States*, SUP. CT. U.S. 10 (2015), https://www.supremecourt.gov/casehand/guideforcounsel.pdf [https://perma.cc/K6TW-4QGU] ("Attempts at humor usually fall flat.").

22. *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (describing the effect of political polarization in recent decades as making the Court into an institution in which party and ideology are closely linked, to an unprecedented extent); Jacobi & Sag, *supra* note 18, at 1234 (showing empirically that the Justices have significantly altered their behavior in numerous ways since Congress and the nation became more politically polarized after the 1994 Republican Revolution).

likely to make laugh-inducing comments than previously, just as they have a greater tendency to engage in other forms of aggressive advocacy, such as the strategic use of interruptions.[23] Our empirical methodology allows us to transcend the reliance on anecdote, folklore, and supposition that characterizes some earlier academic discussions of laughter. In so doing, we debunk the claim that the Justices use humor as an "equalizer" with the advocates, to foster a de facto egalitarian environment despite the structured hierarchical nature of the Court.[24] On the contrary, we show that the Justices most often use courtroom humor when they will eventually vote against the side an advocate is representing, when an advocate is losing an argument, and when an advocate is inexperienced.[25] The data shows that humor is used far more as a tool of advocacy and a weapon against the weak than as an equalizer or an antidote to the structured hierarchy of the Court.

There is a lot of genuine humor in Supreme Court oral arguments. Our aim is not to suggest otherwise, but rather to understand laughter in the courtroom and the comments that precipitate it as an aspect of judicial behavior worthy of more than lighthearted review. Our analysis reveals patterns of judicial behavior that belie the humorous context in which these incidents of laughter are contained. There is meaningful information contained in the court reporters' notation of when laughter occurs; information that goes far beyond assessing the relative comedic powers of the Justices. Laughter patterns tell us, for example, whether a case is likely to be decided for or against the Petitioner. With lives hinging on death penalty determinations and markets ready to fluctuate with the determination of patent and tax cases, Court observers would do well to take laughter seriously, as an indicator of likely case outcomes and as indicative of the nature of the relationships between the Justices and the advocates.

Part I establishes the foundations of our analysis: it describes the prior literature and its limits; it then presents our qualitative

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23. Jacobi & Sag, *supra* note 18, at 1239 (showing that Justices interrupt advocates they disagree with disproportionately more often than they interrupt advocates they eventually agree with); Tonja Jacobi & Matthew Sag, *Using Interruptions to Predict Supreme Court Cases*, SCOTUS OA (Oct. 22, 2018), https://scotusoa.com/predictable-gorsuch/ [https://perma.cc/XM6W-RNS8] (showing that the "interruption gap" is a very strong predictor for some Justices, particularly Justice Gorsuch, for whom 86% of votes can be predicted based on his interruption gap).

24. *See, e.g.*, Ryan A. Malphurs, *"People Did Sometimes Stick Things in My Underwear": The Function of Laughter at the U.S. Supreme Court*, 10 COMM. L. REV. 48, 71 (2012). For more detail, see *infra* Section I.A.

25. *See infra* Sections III.A, III.B, and III.C, respectively.

analysis of the last seven Terms of the Roberts Court, 2010 to 2017; it then outlines the data we use for our quantitative analysis; and finally, it develops our hypotheses. Part II tests the first set of hypotheses, examining how laughter at the Court has changed over time and investigating variability among the Justices in causing laughter. Part III tests the second set of hypotheses, examining in more detail the notion that humor is used as a weapon, rather than as an equalizer at the Court. It shows that the Justices use laughter differently against advocates making arguments that they ultimately vote for or against, against advocates who are winning versus losing the argument before the Court as a whole, and against advocates who are experienced versus inexperienced. Overall, it shows that laughter is a weapon used against the disfavored and the weak. Finally, it considers what it means to be the "funniest Justice" once the use of humor is seen as a form of advocacy. We then briefly conclude, contemplating both how Court observers should consider laughter in light of our results and also what laughter tells us predictively about cases that have not yet been decided.

I. FOUNDATIONS

This Part first considers the relevant prior literatures. It describes the handful of works that have considered laughter at the Court in particular, draws more broadly on theories of laughter stemming from philosophy, psychology, and other spheres, and then illustrates some of the trends we have identified regarding how laughter is used in the courtroom. Second, it outlines the fundamentals of our data, lays out our hypotheses and contending theories, and addresses the reliability of the laughter notation by the court reporters.

A. The Function of Laughter at the Court: The Limits of the Prior Literature

In 2005, Jay Wexler had the novel idea of counting how often each Justice made comments that were humorous enough to induce laughter in the courtroom, as noted in the official court reporter's transcript.[26] Wexler used a simple count of the number of such

26. *See* Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 2D 59 (2005). The Court reporters make the notation "(Laughter)" or some variant, such as "(A little laughter*)." See infra* Section I.C. To maintain consistency, we have standardized all transcript notations of laughter as

laughter incidents inspired by each Justice in the 2004 Term, and averaged those instances by case to assess the Justices' "relative comic ability."[27] Wexler conducted the same analysis again two years later.[28] The findings sparked media attention[29] and some imitators,[30] and even some mildly humorous reactions from the Justices themselves.[31] Wexler treated the project as a lighthearted inquiry, asking which Justice "provides the best comic entertainment," and explicitly rejected any aspiration to methodological rigor—he described his own study as "profoundly flawed in almost every respect."[32] But Wexler was onto something more than just amusing Court watchers in need of lighthearted distraction: looking at laughter at the Court has the potential to reveal meaningful insights into judicial behavior and advocate effectiveness.

Following on from Wexler, Ryan Malphurs sought to interrogate the function of laughter at the Court.[33] Malphurs drew on the standard three-way categorization that philosophers and scholars have developed to study laughter and which we discuss in more detail

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[LAUGHTER]. Otherwise, we have reproduced the transcripts here exactly as they were transcribed.

27. Wexler, *supra* note 26, at 59.

28. *See* Jay D. Wexler, *Laugh Track II – Still Laughin'!*, 117 YALE L.J. POCKET PART 130 (2007).

29. *See, e.g.*, Adam Liptak, *So, Guy Walks Up to the Bar, and Scalia Says . . .* , N.Y. TIMES (Dec. 31, 2005), https://www.nytimes.com/2005/12/31/politics/so-guy-walks-up-to-the-bar-and-scalia-says.html [https://perma.cc/F9YW-5P4L]. The work is still getting attention more than a decade later. *See, e.g.*, Kathryn Rubino, *Who Is the Funniest Justice of Them All — This Term?*, ABOVE LAW (Nov. 4, 2016, 7:03 PM), https://abovethelaw.com/2016/11/who-is-the-funniest-justice-of-them-all-this-term/ [https://perma.cc/8Q6Y-86HE].

30. *See, e.g.*, Lee Ross, *Laughter at the Supreme Court*, WKLY. STANDARD (July 7, 2008, 12:00 AM) https://www.weeklystandard.com/lee-ross/laughter-at-the-supreme-court [https://perma.cc/ JT53-8XM8]. Wexler keeps a yearly tally of laughter instances associated with each Justice. Jay Wexler (@SCOTUShumor), TWITTER, https://twitter.com/SCOTUSHUMOR (last visited Sept. 4, 2019) [https://perma.cc/APC8-Z9DM]. For a time, DC Dicta kept a cumulative weekly tally per Term, including examples of what it deemed to be the funniest line at the Court each week. *The Funniest Justice*, DC DICTA (Apr. 25, 2013), http://lawyersusaonline.com/dcdicta/category/the-funniest-justice/ [https://perma.cc/G7WB-GRVR].

31. Justice Breyer is reported to have said of coming second in Wexler's study, something along the lines of "being the second funniest [J]ustice is like being the shortest tall person." Jay Wexler, *SCOTUS Humor*, WORDPRESS, http://jaywex.com/wordpress/scotus-humor/ (last visited Sept. 4, 2019) [https://perma.cc/9H6M-VDLG]. Justice Alito suggested that Wexler did the analysis because he had "nothing better to do." Jay Wexler, *Counting [Laughter] at the Supreme Court*, MEDIUM (Nov. 22, 2016), https://medium.com/@BUexperts/counting-laughter-at-the-supreme-court-b44a57d1afca [https://perma.cc/3DJ8-9D2A].

32. Wexler, *supra* note 28.

33. *See* Malphurs, *supra* note 24, at 53–55.

below.[34] Any investigation of laughter at the Court must credit Wexler for his insight that the incidence of laughter in the Supreme Court transcripts was worth studying. Likewise, we credit Malphurs for his insight that laughter is about much more than determining which Justice is the "funniest" and for beginning to think about a typology of the function of humor at the Court. However, as we explain below, Malphurs's idiosyncratic methodology and baffling interpretation of his own data led him to exactly the wrong conclusions about the nature and function of laughter at the Court.

Malphurs addressed three popular theories of humor and laughter. First, the "superiority theory," favored by Thomas Hobbes and René Descartes, captures scornful or mocking laughter that takes malicious delight in ridiculing the ignorance of others.[35] Second, the "incongruity theory," particularly favored by psychologists and philosophers such as Immanuel Kant and Søren Kierkegaard, holds that by defying our mental patterns and expectations, humor surprises an audience, often with something absurd.[36] The resulting laughter arises from the "mismatch between conceptual understanding and perception."[37] Third, the "laughter as relief" theory views laughter as akin to a pressure-relief valve.[38] It suggests that "laughter results from the expression and release of feelings caused by stress" and nervous energy.[39]

There are, however, a number of other theories of laughter worth considering beyond superiority, incongruity, and relief.[40] These include other general theories, such as the "inferiority theory," exemplified by the Three Stooges and marked by self-recognition of

34. Malphurs, *supra* note 24, at 53. The standard analysis of categorizing the theories of laughter into these three categories was first developed in D.H. MONRO, ARGUMENT OF LAUGHTER (1963). For a critique of the three groupings as an oversimplification, see Aaron Smuts, *Humor*, INTERNET ENCYCLOPEDIA PHIL., https://www.iep.utm.edu/humor/ (last visited Sept. 4, 2019) [https://perma.cc/7UW5-H8E5].

35. John Morreall, *Philosophy of Humor*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/archives/win2016/entries/humor/ (last updated Sept. 28, 2016) [https://perma.cc/H3MN-V26F].

36. *See* John Dewey, *The Theory of Emotion: (I.) Emotional Attitudes*, 1 PSYCHOL. REV. 553, 558 (1894).

37. Malphurs, *supra* note 24, at 54 (quoting JOHN MORREALL, TAKING LAUGHTER SERIOUSLY 18 (1983)).

38. Morreall, *supra* note 35.

39. Malphurs, *supra* note 24, at 54–55.

40. *See, e.g.*, MARTA DYNEL, HUMOROUS GARDEN-PATHS: A PRAGMATIC COGNITIVE STUDY 42 (2009) (organizing fourteen theories of laughter into three families: cognitive, social, and psycho-analytical).

silly antics, self-deprecating behavior, or modesty.[41] In addition, there are theories based on biology, which considers laughter either an essential element built into the nervous system or as an adaptive behavior that becomes pleasurable when blended with sympathy and affection;[42] ambivalence, by which "laughter results when individual[s] simultaneously experience[ ] incompatible emotions" that struggle for mastery within the individual;[43] and configuration, whereby "elements originally [seen] as unrelated suddenly fall into place," leading to potentially amusing insights.[44] One particular theory of note for our study is the "punctuation theory," in which laughter is seen not as interrupting speech but rather as punctuating statements.[45] On this last theory, laughter does not occur randomly throughout the speech stream, but rather emphasizes the ends of phrases, "akin to punctuation in written [speech]," with humor often used strategically for rhetorical advantage.[46] The Supreme Court's most notorious humorist, Justice Scalia, was, by the account of many of his clerks, quite strategic in his use of humor.[47] This claim, and the associated theory of strategic use of humor, fits with our thesis that humor is often used as a weapon, deliberately used to critique disfavored arguments or advocates.

Wexler's pioneering work on laughter had no theory of the function of humor at the Court. He simply equated provoking laughter with being funny: this is a reasonable assumption at a comedy club, but we think there is more going on at the Supreme Court. Malphurs only considered the superiority, incongruity, and relief theories; and of

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41. *See* Robert Solomon, *Are the Three Stooges Funny? Soitainly! (or When Is It OK to Laugh?)*, *in* ETHICS AND VALUES IN THE INFORMATION AGE 179, 184–85, (Joel Rudinow & Anthony Graybosch eds., 2002) (arguing that "[w]e enjoy [the Stooges'] petty plots of ambition, ire, and revenge . . . not because we feel superior to them" but because we are "similarly petty, vengeful, and [when] viewed from the outside, uproariously slapstick").

42. Patricia Keith-Spiegel, *Early Conceptions of Humor: Varieties and Issues, in* THE PSYCHOLOGY OF HUMOR: THEORETICAL PERSPECTIVES AND EMPIRICAL ISSUES 3, 5–6 (Jeffrey H. Goldstein & Paul E. McGhee eds., 1972).

43. *Id.* at 10.

44. *Id.* at 11.

45. Robert R. Provine, *Laughter*, 84 AM. SCIENTIST 38, 41–42 (1996) [hereinafter Provine, *Laughter*] ("The strong and orderly relationship between laughter and speech is akin to punctuation in written communication."); Robert R. Provine, *Laughter Punctuates Speech: Linguistic, Social and Gender Contexts of Laughter*, 95 ETHOLOGY 291, 296 (1993) [hereinafter Provine, *Laughter Punctuates Speech*].

46. Matthew Gervais & David Sloane Wilson, *The Evolution and Functions of Laughter and Humor: A Synthetic Approach*, 80 Q. REV. BIOLOGY 395, 400 (2005) (summarizing the punctuation theory and other functional theories of laughter); Provine, *Laughter*, *supra* note 45, at 42; Provine, *Laughter Punctuates Speech*, *supra* note 45, at 291, 293.

47. *Infra* Section III.D.

these, he discounted the latter two explanations, arguing they were unlikely to apply in the context of Supreme Court oral arguments because moments of incongruity are rare and the audience does not share the advocates' stresses.[48] He premised his inquiry on the assumption that the Court's adversarial nature meant that the superiority theory was most likely to apply.[49] Despite expecting superiority to explain laughter at the Court, Malphurs concluded the opposite: that "laughter's function in oral arguments revealed the Justices' willingness to reduce their power and control by diminishing significant institutional, social and intellectual barriers, and allowing others to laugh at and make light of them."[50] For ease of discussion, we will refer to Malphurs's conclusion as the "equalization" theory.

We disagree with both Wexler and Malphurs. We disagree with Wexler because most of the Justices' comments that provoke laughter are simply not humorous in any conventional sense. For ease of exposition, we often refer to these comments as "courtroom humor," but the adjective is a significant modifier. As Adam Liptak of the New York Times has pointed out, "what passes for humor at the Supreme Court would probably not kill at the local comedy club."[51] Even the "jokes" that are recognizable as such are often pretty weak—Justice Scalia's version of the time-worn "take my wife" joke is an apt example.[52] The same observation explains both our disagreement with Malphurs and why laughs are so cheap at the Court, at least for the Justices. Justices do not need to be all that funny to provoke laughter because the stress of litigation, the established hierarchy, and the formal constraints of oral argument all mean that the courtroom is primed to accept almost any deviation from expectation as a point of humor.

In short, stress, hierarchy, and formality lend themselves to absurdist humor, hyperbole, and laughter at breaches of protocol. For instance, Justice Ginsburg simply saying the words "[b]ong hits for

48. Malphurs, *supra* note 24, at 54–55.

49. *Id.* at 54.

50. *Id.* at 70.

51. Liptak, *supra* note 29.

52. Transcript of Oral Argument at 41, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13-1402) (Justice Scalia said, "A conviction eliminates your -- your marriage? Is that -- you don't have to get a divorce, you just have to get convicted? That's a good deal. [LAUGHTER]."). The original "take my wife—please," joke is credited to comedian Henry Youngman. *See* Mervyn Rothstein, *Henny Youngman, King of the One-Liners, Is Dead at 91 After 6 Decades of Laughter*, N.Y. TIMES (Feb. 25, 1998), https://www.nytimes.com/1998/02/25/arts/henny-youngman-king-of-the-one-liners-is-dead-at-91-after-6-decades-of-laughter.html [https://perma.cc/8X24-9UET].

Jesus" is enough to get a laugh.[53] Justice Ginsburg implicitly talking about septuagenarian sex also seems guaranteed to bring the house down,[54] the humor no doubt exacerbated by her age and propriety. Similarly, the great pressure that the advocates are under to perform in this prestigious domain lends itself to laughter as a way to relieve tension, particularly when advocates or Justices goof or say something that belies the seriousness of the forum. For instance, when the lights went out in the courtroom during oral argument in *Nichols v. United States*, the Chief Justice joked, "I knew we should have paid that bill. [LAUGHTER]."[55] And the hierarchy at work makes jokes about the superiority of the Justices and the inferiority of the advocates easy fodder, typically at the advocates' expense. The Chief Justice's comment in *American Trucking Associations v. City of Los Angeles* is typical of such exchanges.

Mr. Lerman:	I don't think this Court needs to get into single roads and I don't think there's any reason --
Chief Justice Roberts:	Well, I think you have to get into it since I asked you a question about it. [LAUGHTER].[56]

Malphurs began with a laughter-as-superiority thesis but concluded that the Justices in fact use humor to equalize their standing with the advocates.[57] This transition deserves some discussion. Like Wexler, Malphurs examined only one Term, the 2006 Term,[58] and based his conclusion on his personal belief that only three

53. Transcript of Oral Argument at 33, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) (No. 14-144).

54. Transcript of Oral Argument at 55, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) (all Justice Ginsburg said was "[s]uppose a couple, a 70-year-old couple comes in and they want to get married. [LAUGHTER].").

55. Transcript of Oral Argument at 50, 136 S. Ct. 1113 (2015) (No. 15-5238).

56. Transcript of Oral Argument at 12, Am. Trucking Ass'ns v. City of Los Angeles, 569 U.S. 641 (2013) (No. 11-798) [hereinafter Transcript of Oral Argument, *Am. Trucking Ass'ns*].

57. Malphurs goes on to say that "laughter may be facilitating the judicial process by reducing barriers between [J]ustices and lawyers, creating a more effective and egalitarian environment for communication, and playing an essential role in their oral arguments." Malphurs, *supra* note 24, at 71.

58. Malphurs et al. repeated the analysis for the 2011–2012 Term. Ryan A. Malphurs, Jamie Bochantin, L. Drescher & Melissa Framer, Too Much Frivolity, Not Enough Femininity: A Study of Gender and Humor at the U.S. Supreme Court (Oct. 3, 2013) (unpublished manuscript), https://ssrn.com/abstract=2335613, [https://perma.cc/2QE6-Q3LM]. Malphurs repeated the analysis for the 2015 Term. Ryan A. Malphurs, The Day the Laughter Died: With the Passing of Jus-

of the 131 instances of laughter he observed could be categorized as "aggressive"; the rest he considered a "more good-natured form of joking with advocates."[59] These distinctions were based on Malphurs's own assessment of the tone in which the comments were made,[60] an analysis that is highly subjective and difficult to replicate. Furthermore, the bulk of Malphurs's analysis focused on the direction of the supposedly nonaggressive laughter episodes: at whom he thought the humor was directed. This categorization also involved distinctions made largely on Malphurs's assessment of intent. For instance, he distinguished between a Justice "critiquing other [J]ustices" versus a Justice "teasing [an]other Justice,"[61] without explaining how one could validly or reliably distinguish between the two.

At any rate, Malphurs's assessment of direction does not help his conclusion: even accepting Malphurs's categories and his subjective allocation of individual instances of laughter to those categories, only 22 of the 130 laughter instances (or 17%) involved a Justice making a joke at his or her own expense.[62] In contrast, 65 of the 131 instances (or 50%) were directed at other persons—be it an advocate, another Justice, or a third party.[63] In addition, the remainder of the laughter episodes involved humor directed at the argument being advanced; these arguably also amount to jokes at the advocate's expense.[64] Consequently, using Malphurs's own subjective assessment, 83%, or 108 of the 130 laughter instances he analyzed, involved the Justices making fun of *other* people, primarily the advocates. Put this way, it is hard to support the conclusion that the Justices use laughter as an equalizing force.

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tice Scalia, Who Becomes the New "Court Jester," and with a Possible Female President, How Might a Majority of Female Justices Change the Court? (Apr. 30, 2016) (unpublished manuscript), https://ssrn.com/abstract=2773026 [https://perma.cc/W5PC-5YM7].

59. *See* Malphurs, *supra* note 24, at 59, 64, 68.

60. Malphurs assesses aggression in terms of whether a "[J]ustice uses a disdainful tone, disrespectfully ridiculing the advocate" or being "clearly dismissive of an advocate." *Id.* at 63 n.12.

61. *Id.* at 66.

62. *Id.* at 64.

63. *Id.* at 64. When Malphurs et al. repeated this analysis for the 2011–2012 Term, they found that a little over 10% of laughter episodes involved the Justices making jokes at one another's expense, 48% were directed at the advocates' arguments, and 21% at themselves. Malphurs et al., *supra* note 58, at 10. However, once again, that amounts to 38% of laughter incidents being directed at third parties, a figure that rises to 71% if laughter directed at advocates' arguments is included. *See id.*

64. *See* Malphurs, *supra* note 24, at 64; *see also* Malphurs et al., *supra* note 58, at 10 (noting that 48% of laughter in the 2011–2012 Term was directed at advocates' arguments).

B. The Function of Laughter at the Court: An Impressionistic Taxonomy

Although our approach is largely empirical, in this section we convey a richer sense of the nature of the laughter underlying our data based on a systematic review of laughter episodes in the transcripts. We read the transcript of every instance of laughter in the courtroom attributable to the Justices between 2010 and 2017 (1,061 episodes).

Our first observation can best be summarized as profound incredulity at Malphurs's interpretation of the oral argument transcripts and recordings.[65] Contrary to Malphurs's claim, we found many instances of laughter arising from an implication of the Justices' superiority over the advocates.[66] For example, when Assistant Solicitor General Zachary Tripp claimed that the government was "crushing" its goals to award government contracts to veterans under the Veterans Benefits, Health Care, and Information Technology Act of 2006, Chief Justice Roberts responded, "When -- I'm sorry. When you say you're crushing the goals, that means you're meeting them? [LAUGHTER]."[67] Tripp had already clarified that by "crushing these goals," he meant "beating them."[68] The Chief Justice was simply making a dig at the advocate.

This is not to suggest that the Justices have only one shtick. In fact, we found plenty of evidence for each of the three major theories about the cause of laughter. We observed numerous examples of laughter reflecting incongruity, arising from both absurdities and the surprising lack of fit between experience and expectation. Of the latter, an example is Justice Breyer's willingness to defy expectations by breaking the fourth wall, and his implicit reference to the discretion that Justices have in relying on various precedents:

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65. We are not the first to dispute Malphurs's subjective assessment of the meaning of laughter during oral argument. Others have noted that the Justices frequently target the legal profession and the advocates. *See* Ross, *supra* note 30. And one article analyzing instances of humor in a particular case, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), considered that, on Malphurs's theory, the laughs "should point toward some sort of inclusionary moment. Yet, they do not." Nathan French, *Laughter and the Supreme Court*, REVERBERATIONS (Jan. 29, 2014), http://forums.ssrc.org/ndsp/2014/01/29/laughter-and-the-supreme-court/ [https://perma.cc/P8TV-KWS3].

66. For a similar impression, see Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 UTAH L. REV. 1005, 1075.

67. Transcript of Oral Argument at 43, Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969 (2016) (No. 14-916).

68. *Id.* at 42.

Justice Breyer: Now, keeping that in mind, let's go back to two old cases which are scarcely mentioned. But old Supreme Court cases never die -- [LAUGHTER].

-- unless, luckily, they're overruled. And a few have been. They're submerged like icebergs. [LAUGHTER].[69]

Justice Breyer, the most whimsical Justice in our subjective reading, also provides an example of incongruity through absurdism in this interaction with Justice Scalia:

Justice Breyer: I just want an answer to my question. And, for the purposes of this question, I am assuming enormously in your favor. I am assuming that this set of conditions is the worst thing since sliced bread. [LAUGHTER] . . . .

Justice Scalia: Sliced bread's supposed to be good.

Justice Breyer: No, no. It's been proved bad. [LAUGHTER].[70]

Likewise, laughter as a release valve is also common, best represented by the many instances in which one Justice is confused for another. This typically occurs when an advocate confuses one female Justice for another, such as when Justice Kagan was confused for Justice Sotomayor[71] or when Justice Ginsburg was confused for Justice O'Connor, twelve years after Justice O'Connor had left the Bench, to which Justice Ginsburg quipped, "That hasn't happened in quite some time. [LAUGHTER]."[72] But surely the most hilarious incident was when Justice Kagan was confused for Justice Scalia:

69. Transcript of Oral Argument at 61, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674).

70. Transcript of Oral Argument at 19, Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447).

71. Transcript of Oral Argument at 8, Dean v. United States, 137 S. Ct. 1170 (2017) (No. 15-9260).

72. Transcript of Oral Argument at 60, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474).

Mr. Peterson: Justice Scalia, when Ramos-Bonilla adopted the --

Justice Kagan: He's definitely Justice Scalia. [LAUGHTER].

Mr. Peterson: I'm very sorry --

Justice Kagan: And we're not often confused. [LAUGHTER].

Justice Scalia: It's a good question, though. [LAUGHTER].[73]

As mentioned, laughter resulting from relief is also found when the Justices or advocates goof, such as here:

Chief Justice Roberts: We'll hear argument next in Kennedy v. Plan Administrator for DuPont Savings and Investment Plan. Mr. Furlow. I'm sorry. We won't. [LAUGHTER]. It's still early in the term. Case 07-542, Arizona v. Gant. Mr. Maziarz.

Justice Kennedy: Do you have any views on the other case? [LAUGHTER].

Mr. Maziarz: None whatsoever, Your Honor.[74]

The notion of laughter as relief also explains why many comments that induce laughter are actually quite difficult to sell as humorous. Many not-very-funny courtroom laughs are much better understood as relief of tension than comedy, such as when Justice Sotomayor got a laugh by simply telling Michael Carvin to "[t]ake a breath" in *King v. Burwell*. Sotomayor had already signaled she was about to ask a new question, so Carvin was talking very quickly in an attempt to finish an answer to Justice Breyer.[75]

We found regular instances of all categories of laughter described above, including those beyond the standard three that Malphurs considers. Configuration humor, whereby elements that

73. Transcript of Oral Argument at 34, Mata v. Lynch, 135 S. Ct. 2150 (2015) (No. 14-185).
74. Transcript of Oral Argument at 3, Arizona v. Gant, 556 U.S. 332 (2009) (No. 07-542).
75. Transcript of Oral Argument at 14, King v. Burwell, 135 S. Ct. 475 (2014) (No. 14-114).

seem unrelated come together to produce an amusing insight, can be seen in the Court's puns, which were particularly favored by Justice Kennedy. An example: "In other words, what the statute does -- it's phrased in terms of place, but it really has consequences as to time. Einstein would have loved it: You can't define space without time. [LAUGHTER]."[76] And punctuation theory is commonly evidenced in the many sarcastic jokes made by Justice Scalia, described below.

One of the most interesting of the other categories is inferiority. It is our impression from reading over a thousand instances of laughter over the last eight Terms of the Court that, at least in the Roberts Court, there are many instances of inferiority humor but the vast majority of them come from Justice Breyer. By far the majority of his jokes involve either silliness or self-deprecation, both forms of inferiority humor. Here are just a few examples of Justice Breyer making a joke at his own expense:

Mr. Dreeben:	So if you have an iPhone, Justice Breyer, and I don't know what kind of phone that you have --
Justice Breyer:	I don't either because I can never get into it because of the password. [LAUGHTER][77]

Justice Breyer:	I mean, the -- I am told, perhaps I shouldn't take this into account, but compared to the Middle Ages with which I am more familiar -- [LAUGHTER].[78]

Justice Breyer:	I don't have it in anything I've looked at yet. But I have it somewhere in the back of my

76. Transcript of Oral Argument at 18–19, Setser v. United States, 566 U.S. 231 (2012) (No. 10-7387).

77. Transcript of Oral Argument at 7, United States v. Wurie, 571 U.S. 1161 (2014) (No. 13-212). *Wurie* was argued immediately after *Riley v. California*, and the cases were consolidated in the Supreme Court's ultimate opinion. Riley v. California, 134 S. Ct. 2473 (2014).

78. Transcript of Oral Argument at 10, District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (No. 15-1485) [hereinafter Transcript of Oral Argument, *Wesby*].

> mind, which is sometimes wrong. [LAUGHTER].[79]

There were hundreds of examples of this kind of humor by Justice Breyer that we could have used. Unfortunately, there is no systematic way to code for self-deprecating humor, so we cannot empirically establish that Breyer is exceptional in his willingness to make fun of himself. But having read 324 examples of Breyer's courtroom humor over eight Terms, we are confident in making this characterization.[80] Other than Justice Breyer, only Justice Kagan seems to be a regular exponent of self-deprecating humor. In a recent search and seizure case, for example, Justice Kagan said, "[W]hen looked at from the reasonable partygoer's view, there are these parties that, once long ago, I used to be invited to -- [LAUGHTER]."[81] Or take this exchange from one of the arguments over the fate of the Affordable Care Act in the 2012 Term:

Justice Breyer:	I see the point. You can go back to -- go back to Justice Kagan. Don't forget her question.
Justice Kagan:	I've forgotten my question. [LAUGHTER].
Mr. Carvin:	I was facing the same dilemma, Justice Kagan. I --
Justice Ginsburg:	Well, let me -- let me ask a question that I asked Mr. Clement. It just seems --
Justice Kagan:	See what it means to be the junior Justice? [LAUGHTER].[82]

79. Transcript of Oral Argument at 57, Ayestas v. Davis, 138 S. Ct. 1080 (2018) (No. 16-6795).

80. If we are right that laughter is mostly a weapon, the fact that we can establish these results despite the person who inspires the second most number of laughs, Justice Breyer—*see infra* Section II.C—being very self-deprecating means that the effect is even bigger than our numbers will show, because it overcomes this contrary trend.

81. Transcript of Oral Argument, *Wesby*, *supra* note 78, at 28.

82. Transcript of Oral Argument at 91, U.S. Dep't of Health & Human Servs. v. Florida, 567 U.S. 519 (2012) (No. 11-398) [hereinafter Transcript of Oral Argument, *U.S. Dep't of Health & Human Servs.*]. *United States Department of Health and Human Services* is one of the consolidated Affordable Care Act cases; the judgment is cited as *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2013).

We do see occasional inferiority humor in the form of silliness from other Justices, such as when Justice Kennedy quipped in a case about throwing out fish as a form of destruction of evidence, "Perhaps Congress should have called this the Sarbanes-Oxley Grouper Act. [LAUGHTER]."[83] But it was comparatively rare for the other Justices to be self-deprecating in the selection of cases we read.

We do not interpret self-deprecating humor as a sign of intrinsic humility on the part of any of the Justices, nor would we attribute it to a desire to introduce some measure of equality between the advocates and the Justices. On the contrary, when the Justices make fun of their lack of familiarity with technology, the fact that they do not get invited to parties, or their confusion about the facts of the case, it is their faux-humility that makes laughter acceptable. We also observe that there is often a sharper point beneath the surface of ostensibly self-deprecating comments—when Justice Kagan remarked, "See what it means to be the junior Justice?" she was simultaneously making a joke at her own expense and at the expense of her senior colleagues, calling attention to their tendency to interrupt her.[84]

If Justice Breyer's predominant form of humor is self-deprecation and absurdism, Justice Scalia's is clearly snark and sarcasm, both of which fit clearly into the superiority thesis.[85] Here are a few examples of Justice Scalia's style of humor:

> Justice Scalia: Wow. Wow, that's -- I mean, that's my comment. [LAUGHTER].[86]

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83. Transcript of Oral Argument at 54, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451).

84. *See* Transcript of Oral Argument, *U.S. Dep't of Health & Human Servs.*, *supra* note 82, at 91.

85. A rare exception is found in *Sandifer v. United States Steel Corp.*:

> Mr. Schnapper: In ordinary parlance, not everything an individual wears would be referred to as clothes. There are examples of that in this courtroom: Glasses, necklaces, earrings, wristwatches. There may be a toupee, for all we know. Those things are not commonly referred to as clothes.
>
> Justice Scalia: I resent that. [LAUGHTER].

Transcript of Oral Argument at 3, Sandifer v. U.S. Steel Corp., 134 S. Ct. 870 (2014) (No. 12-417).

86. Transcript of Oral Argument at 37, Shapiro v. McManus, 136 S. Ct. 450 (2015) (No. 14-990) [hereinafter Transcript of Oral Argument, *Shapiro*].

Justice Scalia:	Oh, yeah, I'm sure that's what they all had in mind. I have no doubt of that. [LAUGHTER].[87]

Mr. Phillips:	We're going to leave the status quo ante, which means before the contracting officers declared that there was a default under these circumstances.
Justice Scalia:	It's the "go away" principle of our jurisprudence, right? [LAUGHTER].[88]

In the last example, Scalia returned to a comment that had yielded some laughter twice earlier in the same argument, making this his third use of essentially the same "go away" joke.[89] Justice Gorsuch, who was expected to be like Justice Scalia in other regards,[90] also seems predisposed to sarcasm.[91] In *Sessions v. Dimaya*, the Justice got a laugh simply for sarcastically saying "[g]reat" in response to the advocate's promise to answer his question after prefacing it.[92] Other Justices use sarcasm too, such as when Chief Justice Roberts cuttingly summarized an advocate's argument, saying, "It's only a violation of the Fourth Amendment for two minutes, right? [LAUGHTER]."[93]

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87. Transcript of Oral Argument at 48, Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913 (2015) (No. 13-894) [hereinafter Transcript of Oral Argument, *MacLean*].

88. Transcript of Oral Argument at 60, Gen. Dynamics Corp. v. United States, 563 U.S. 478 (2011) (No. 09-1298) [hereinafter Transcript of Oral Argument, *Gen. Dynamics Corp.*].

89. In the same case, Justice Scalia said, "We don't know what the answer is, so go away; we leave you where you are," and, "So to say 'go away' means everybody keeps the money he has." *Id.* at 48, 60.

90. *See, e.g.*, Jonathan H. Adler, *Gorsuch's Judicial Philosophy Is Like Scalia's — with One Big Difference*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/opinions/gorsuchs-judicial-philosophy-is-like-scalias—with-one-big-difference/2017/02/01/44370cf8-e881-11e6-bf6f-301b6b443624_story.html [https://perma.cc/A8WM-4CAX] ("Gorsuch has . . . expressed support for a judicial philosophy much like Scalia's. Gorsuch shares the late [J]ustice's commitment to statutory text and the original public meaning of the Constitution," though they differ on administrative law).

91. Others have noted the Court's increasing use of sarcasm in oral argument. *See* Sullivan & Canty, *supra* note 66, at 1065–67.

92. Transcript of Oral Argument at 39, 138 S. Ct. 1204 (2018) (No. 15-1498).

93. Transcript of Oral Argument at 36–37, Rodriguez v. United States, 575 U.S. 1 (2015) (No. 13-9972) [hereinafter Transcript of Oral Argument, *Rodriguez*]. Another example from the same case came from Justice Scalia: "Mr. O'Connor: In your example, Mr. Chief Justice, if he's pondering, then he's not being diligent . . . . Justice Scalia: Gee, we ponder all the time, and we think we're being diligent. [LAUGHTER]." *Id.* at 16.

While Justice Scalia, and perhaps now Justice Gorsuch, may be particularly prone to use sarcasm and snark, this type of humor is more representative of the Court's general approach than Justice Breyer's self-deprecating jokes. A large portion of the laughter attributable to the Justices followed comments made at the advocates' expense. In general terms, these are typically examples of superiority, but more interestingly for our purposes, they tend to be jokes about advocate weakness, advocate inexperience, and the failure of individual advocates to persuade the Justice or the Court as a whole. Humorous quips and jokes emphasizing the advocate's weak position are numerous and common to all the Justices on the Roberts Court, except for the perpetually silent Justice Thomas. For instance, In *United States v. Tinklenberg*, Justice Ginsburg told Assistant Solicitor General Matthew Roberts, "I don't think you should have been so happy with the way the argument was going -- [LAUGHTER]."[94] During the reargument in *Jennings v. Rodriguez*, Malcolm Stewart, for the government, suggested that an alien who was being detained for up to five years due to administrative delays "always has the option of terminating the detention by accepting a final order of removal and returning home." Justice Kagan responded, "I take it that that's your most extreme answer because it doesn't sound all that good. [LAUGHTER]."[95] In *King v. Burwell*, the Supreme Court's second major decision on the constitutionality of the Affordable Care Act, Chief Justice Roberts, referring to *National Federation of Independent Business v. Sebelius* previously upholding the individual mandate,[96] said, "Mr. Carvin, we've heard talk about this other case. Did you win that other case? [LAUGHTER]."[97] And Justice Sotomayor has asked multiple advocates some variation of the uncomfortable question, "[H]ow would you like to lose? [LAUGHTER]."[98]

The Justices also often joke about the weakness of specific arguments as the advocate is trying to advance them. For instance, in *Bond v. United States*, when Solicitor General Verilli said, "[I]t seems

94. Transcript of Oral Argument at 22, 563 U.S. 647 (2011) (No. 09-1498).

95. Transcript of Oral Argument at 26, 138 S. Ct. 830 (2018) (No. 15-1204) (reargument).

96. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575 (2012) (upholding the Patient Protection and Affordable Care Act under the taxing power).

97. Transcript of Oral Argument at 25, King v. Burwell, 135 S. Ct. 475 (2014) (No. 14-114). Mr. Carvin represented the losing side of the individual mandate question in *Sebelius*. 567 U.S. at 524, 540, 575.

98. Transcript of Oral Argument at 67, Carpenter v. United States, 138 S. Ct. 2206 (2018) (No. 16-402); *see also, e.g.*, Transcript of Oral Argument at 48–49, Kansas v. Cheever, 571 U.S. 87 (2013) (No. 12-609) ("Mr. Katyal, assuming the incredulity of my colleagues continues with your argument, which way would you rather lose? [LAUGHTER].").

unimaginable that a convention of that kind would be ratified by two-thirds of the Senate, which it would have to be," Justice Kennedy responded, "It also seems unimaginable that you would bring this prosecution. But let's leave that. [LAUGHTER]."[99] In *Advocate Health Care Network v. Stapleton*, the Chief Justice took the wind out of the Lisa Blatt's suggestion that *Skidmore* deference would be appropriate, with his rejoinder that *Skidmore* "seems to be the principle [that] you should defer to agencies when you agree with their interpretation. [LAUGHTER]."[100] And when an advocate in a Fair Housing Act case said, "If you were to believe the statute's ambiguous," Justice Breyer interrupted, "My goodness, if it isn't ambiguous, it would be surprising because ten circuit courts of appeals have all interpreted it the way opposite you and I take it you don't mean it's unambiguous on their side. [LAUGHTER]."[101]

Examples also abound of the Justices reinforcing hierarchy by putting an advocate personally in his or her place, as distinct from commenting on the advocate's argument. This includes explicitly reminding an advocate of his or her subordination to the Justices, such as when Respondent's advocate said, "We don't disagree" and Justice Scalia responded, "You're supposed to say, 'yes, sir, good'. [LAUGHTER]."[102] The Justices also use humor to call out the advocates on flimsy or evasive arguments and responses. For example, in the free speech case *Reed v. Town of Gilbert*, Justice Scalia queried whether there was "a difference between the function of the sign and the content of the sign?"[103] When Philip Sarvin responded, "In a literal sense, yes," Justice Scalia answered, "Oh, I see. What sense are we talking here? [LAUGHTER] Poetic?"[104] In this instance, Justice Scalia's sarcasm was so apparent that the courtroom laughed before he had even given the punchline, "poetic."

Another common way that the Justices put the advocates in their place is to remind them who has control over the process. For instance, when Carolyn Fuentes posed a rhetorical question in *United States v. Kebodeaux*, Chief Justice Roberts responded: "I get to ask the

99. Transcript of Oral Argument at 28, 134 S. Ct. 2077 (2014) (No. 12-158).

100. Transcript of Oral Argument at 15, 137 S. Ct. 1652 (2017) (No. 16-74).

101. Transcript of Oral Argument at 18, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 939 (2015) (No. 13-1371).

102. Transcript of Oral Argument at 36, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012) (No. 11-246) [hereinafter Transcript of Oral Argument, *Patchak*].

103. Transcript of Oral Argument at 52, 135 S. Ct. 2218 (2015) (No. 13-502).

104. *Id.* at 53.

questions. You don't. [LAUGHTER]."[105] And when an advocate in a different case suggested, "I don't think this Court needs to get into . . ." a particular issue, the Chief responded, "Well, I think you have to get into it since I asked you a question about it. [LAUGHTER]."[106] Similarly, when an advocate acknowledged, "I think that would be a -- a more difficult case for us," Justice Gorsuch would not let him avoid the hard question, saying, "No, no, no, no, no, not so easy. [LAUGHTER]."[107] And when one advocate said, somewhat redundantly, "I disagree with my friend," Justice Sotomayor jumped in to tease him, saying, "I know you do. The question is how and why. [LAUGHTER]."[108] Similarly, she told another advocate, "I get that you don't want to answer the question. [LAUGHTER]."[109]

In contrast to the Justices, Supreme Court advocates are afforded little room for comedy. As mentioned, the Supreme Court Guide for Counsel warns, "Attempts at humor usually fall flat."[110] One experienced advocate, Thomas Goldstein, reported that this advice is well heeded, describing humor at the Court as a "land mine," and saying that an advocate is expected to act as a "straight man" to the Justices.[111] Another highly experienced advocate, former Solicitor General Paul Clement, agreed, observing that "the unheralded role of the oral advocate is to play straight man for the [J]ustice."[112] Such accounts raise doubt about the notion of laughter as an equalizing force on the Court. However, every so often a joke at the advocate's expense is deftly turned around by the advocate, such as on these two occasions:

Justice Breyer:	I've read the briefs fairly carefully, and I'm still uncertain that I understand it

105. Transcript of Oral Argument at 44–45, 133 S. Ct. 2496 (2013) (No. 12-418).

106. Transcript of Oral Argument, *Am. Trucking Ass'ns*, *supra* note 56, at 12. Somewhat more wittily, when an advocate responded to a question by saying that the Court had never addressed the issue specifically, Justice Kennedy jested, "[T]hat's why we've invited you to lunch, so that you will tell us what the law is. [LAUGHTER]." Transcript of Oral Argument at 12–13, Wood v. Moss, 134 S. Ct. 2056 (2014) (No. 13-115).

107. Transcript of Oral Argument at 23, Sveen v. Melin, 138 S. Ct. 1815 (2018) (No. 16-1432).

108. Transcript of Oral Argument at 23, Howell v. Howell, 137 S. Ct. 1400 (2017) (No. 15-1031).

109. Transcript of Oral Argument at 41, Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (No. 15-1498).

110. *Guide for Counsel in Cases to Be Argued Before the Supreme Court of the United States*, *supra* note 21, at 10.

111. Liptak, *supra* note 29.

112. Ross, *supra* note 30.

	well enough. That isn't your problem, but it might turn out to be. [LAUGHTER].
Mr. Frederick:	Well, let me address -- I think I -- let me try to make it their problem. [LAUGHTER].[113]

Mr. Specter	I would respectfully disagree with that, and I'll tell you why --
Chief Justice Roberts:	I thought you would. [LAUGHTER].
Mr. Specter	At least it's respectful. [LAUGHTER].[114]

More often, though, jokes by the advocates, particularly at the expense of the Justices, are met with stony silence, even when they are arguably funny. For instance:

Mr. Brooks:	I have many answers to that, Your Honor, but the easiest answer is this. The easiest answer is no --
Justice Kennedy:	Don't tell us we're not working hard enough. [LAUGHTER].
Mr. Brooks:	I do recall, Justice Kennedy, that once upon a time, the Court took 150 cases a year. Maybe foreclosures could be among them.[115]

Here we have provided numerous examples from the last eight Court Terms of the Justices making jokes at the expense of the advocates, where the humor often stems from pointing out the advocate's weakness, be it the overall case, the particular argument at

113. Transcript of Oral Argument at 38, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461) [hereinafter Transcript of Oral Argument, *Aereo, Inc.*].

114. Transcript of Oral Argument at 50, Schwarzenegger v. Plata, 563 U.S. 493 (2011) (No. 09-1233).

115. Transcript of Oral Argument at 33–34, Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553 (2017) (No. 14-1055).

hand, or the advocate's institutional weakness vis-à-vis the Justices. It is not possible to systematically analyze the nature and direction of humor at the Court in this Article—there is no digital humor dog for the comically impaired to assist in recognizing the causes of laughter, at least not yet. Nevertheless, in our empirical analysis, we are able to ascertain certain trends that we expect will be associated with the patterns in humor we have identified here. The aspects of laughter that are objective and verifiable, which we discuss in the remainder of this Article, confirm our impressions outlined so far: humor at the Supreme Court is not an equalizing force.

From our analysis of eight Terms, we believe that laughter at Supreme Court oral arguments does not tend to indicate lighthearted, good-natured jesting. Instead, we believe the Justices use it as a rhetorical weapon against their inferiors, as a form of advocacy against counsel arguing a side they will likely oppose, or to indicate that an advocate is inexperienced or doing badly. Obviously, we reject Malphurs's equalization theory. But we also take issue with Wexler's assumption that seeing which Justice uses courtroom humor the most tells us who is the funniest Justice. It is potentially quite misleading to equate courtroom humor with actual humor, wit, jocularity, or whimsy. If we are right that comments leading to laughter are often a tool of rhetoric used strategically by the Justices, then properly understood, laughter at the Court is not about humor at all, but about power and advocacy—part of what we have shown elsewhere to be a broader trend of greater advocacy by the Justices.[116]

C. Data and Methods

All prior studies of laughter at the Court have examined only one year's worth of incidents. Looking at any one given Term of the Court can yield unrepresentative results. For instance, the New York Times repeated Wexler's initial study the following year and found that it was not Justice Scalia, as Wexler had found, but rather Justice Breyer who was the "funniest" Justice that Term.[117] To more rigorously analyze the subject of laughter at the Court, we constructed a database of the entire transcript of every case that came before the Court between the 1955 and 2017 Terms. In our database, we examine over nine thousand instances of laughter over sixty-three years of oral argument. This broader set of data allows us to understand trends

116. Jacobi & Sag, *supra* note 18.

117. Liptak, *supra* note 29.

over time and to avoid making sweeping conclusions based on what turn out to be year-to-year fluctuations. Our study also takes advantage of more sophisticated methodologies: we do more than simply count cases and rely on subjective assessments of judicial tone or target. We are able to examine, for instance, whether laughter is a sign that the advocate is doing well or badly. We are also able to examine how the Justices are using laughter: if it is part of a strategy to strengthen a position the Justice supports, or if some other behavioral pattern can be discerned by studying the arguments.

Oral arguments offer an excellent means of studying judicial behavior because Justices are relatively unguarded at oral arguments, compared with the very careful crafting that goes into judicial opinions and judicial speeches. The episodes of laughter that are captured by the court reporters illustrate that relative comfort. Whereas it is now quite common to observe laughter episodes during oral arguments, with an average of approximately 2.76 instances per five thousand judicial words during the Roberts Court,[118] it is fairly rare to see humor in written opinions. The few exceptions, such as when Chief Justice Roberts wrote a dissent from a denial of cert in the style of a crime noir novel,[119] are deliberate and polished, and arguably suggest that the Justices may do well to heed the advice they give to advocates and avoid humor. In contrast, at oral argument, one can publicly hear examples of silliness, such as Justice Breyer saying, "Your client's lawyer, namely you -- [LAUGHTER],"[120] or whimsy, however pointed, such as when advocate Lisa Blatt said "Well, who knows?" and the Chief responded, "I was hoping you did. [LAUGHTER],"[121] or even light-hearted childishness, such as the in the following exchange:

Ms. Maguire	[M]y very first sentence was, "This case is about who gets to decide the facts that trigger a mandatory minimum sentence."

118. *Infra* Section II.A.

119. Pennsylvania v. Dunlap, 555 U.S. 964, 964 (2008) (Roberts, C.J., dissenting) ("North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood.").

120. Transcript of Oral Argument at 14, Vasquez v. United States, 132 S. Ct. 1532 (2012) (No. 11-199).

121. Transcript of Oral Argument at 30, Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 831 (2013) (No. 11-889).

Justice Scalia:	No, that wasn't it. [LAUGHTER].
Chief Justice Roberts:	It started, "Mr. Chief Justice." [LAUGHTER].[122]

To examine the way in which humor is used during oral arguments, we constructed a dataset drawn from the text of every Supreme Court oral argument from 1955 to 2017. This database contains 1.7 million speech events by Justices and advocates.[123] This covers 9,378 episodes of laughter, 6,087 of which were triggered by the Justices and 3,300 attributable to the advocates.[124] On average, there were 1.32 laughs per argument—an average of 0.89 laughs attributable to the Justices, and 0.48 attributable to the advocates—but as we will show below, there is considerable variation over time.[125] On average, each argument consists of 250 speech events and about five thousand Justice words,[126] but these numbers and the relative contributions of the Justices and the advocates also fluctuate significantly over time.[127]

We supplemented that data with other sources of information about the advocates and the Justices—such as judicial ideology and advocate experience—as well as case outcome votes, individual judicial votes in the cases, and the political and legal salience of the cases. We conducted multivariate regression analysis to formally test our hypotheses, and we also performed structural break analysis on our key variables to confirm when critical changes occurred. But it is not necessary to comprehend complex statistical analysis to appreciate our results: we demonstrate all of our noteworthy effects with

122. Transcript of Oral Argument at 17, Alleyne v. United States, 133 S. Ct. 2151 (2013) (No. 11-9335). Just prior to this exchange, Justice Scalia had asked the advocate to repeat the first thing she said. *Id.* at 16.

123. By speech event, we mean all of the words spoken by a speaker until a new speaker speaks: these episodes can be very short, or they may be extremely long. The transcript text we derive from Oyez does not come preformatted into speech events; rather, it consists of "chunks" of text and associated metadata. We wrote a separate program to thread those chunks into coherent speech events.

124. There are some speech events that are not attributed to any speaker due to deficiencies in the transcript. For those calculations where speaker attribution is necessary, there are 8,935 total episodes of laughter, 6,037 attributable to the Justices and 2,898 to the advocates.

125. *Infra* Section II.C. The medians on all of these figures are zero.

126. The average number of words spoken at oral argument was 10,059. In the modern era, the Justices account for approximately half of the words spoken in any given case. In contrast, in the 1960's, the advocates spoke approximately 80% of the words at oral argument.

127. *See* Jacobi & Sag, *supra* note 18, at 1203 ("[T]he advocates have been consistently speaking less over time and the [J]ustices are speaking more."); *infra* Section II.A.

graphical analysis. This provides an accessible way for the reader to visually confirm if significant changes were occurring, and if so, when, and what caused them.

Our study rests on the validity and reliability of the "laughter" notation in the transcripts of oral argument. The court reporters record when laughter occurs in the courtroom as a result of the content of the oral argument. Laughter is typically noted on the transcript as "[Laughter]," and sometimes as "(Laughter)." Very occasionally, these notations are couched in a broader description, such as "General laughter" (about 360 times), and there are a handful of more specific references to "A little laughter," "Attempt to laughter," and "Audience laughter." We were careful to exclude references to manslaughter and the slaughter of animals, neither of which is intrinsically funny.[128]

One unpublished manuscript has questioned the reliability of the laughter notation. Malphurs et al. listened to the laughter episodes of one year, the 2013 Term, and reported finding 61% more instances of audible laughter than that which was noted by the court reporters.[129] Malphurs et al. concluded that these discrepancies were gendered in nature, with Justices Ginsburg and Sotomayor having 200% and 133% more instances of laughter than recorded, respectively, although Justice Kagan was below the average discrepancy, with only 53% more instances.[130] Some caveats should be applied to this conclusion of bias. First, these numbers are very small: Justice Ginsburg rose from 2 on the official count to 6 on the revised count,[131] from which it is hard to draw a reliable conclusion. Also, the authors simultaneously seem to suggest that the effect results not from bias but from the female Justices being less humorous, a conclusion Malphurs also seemed to embrace in his most recent work on the topic,[132] in which he also suggested that female humor is likely to be different in nature since "females generally offer a more nuanced, congenial, and face-saving critique."[133]

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128. We used simple regular expressions (also known as "regex") text data-mining tools supported by the software application Stata 15 to conduct this analysis. See also *supra* note 26 regarding our standardization of the [LAUGHTER] notation.

129. Malphurs et al., *supra* note 58, at 6 (reporting results from listening for laughter during oral arguments from the 2011–2012 Term).

130. *Id.*

131. *Id.*

132. Malphurs, *supra* note 58, at 7 (predicting that a "female dominated court," which could result from a Hillary Clinton presidency, "would also likely produce fewer instances of humor").

133. *Id.* at 8. Note however that elsewhere, Malphurs suggested the opposite: that female advocates may be involved in fewer instances of laughter because women are more likely to be

Most importantly for the question of whether the transcripts are reliable and consistent, Malphurs et al. report every instance they observed of any laughter, "from chuckles to full-throated roars," whether from the audience, Justices, or advocates.[134] However, just as the court reporters do not report audible asides among the Justices,[135] their job is not to report every titter that can be heard in the courtroom, including chuckles from the Bench. The Marshal's office reports: "Our reporters note when general laughter occurs in the Courtroom if it is audible and clearly a reaction response to something that was said officially during oral argument. They do not note any laughter, chuckles, etc. from the bench should such occur."[136]

As such, Malphurs et al. are measuring something different to what the "Laughter" notation on the transcripts is intended to capture: audience laughter in response to the oral argument. Malphurs et al. are coming closer to capturing general humorousness or levity by the Justices among themselves, a quite different inquiry. In both the unpublished manuscript and his other work, Malphurs emphasizes the importance of differentiating between humor and laughter because some serious comments can provoke laughter and some attempts at humor may fail to generate laughter.[137] We agree with this analysis and so consider the expanded notation that

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aggressive. Malphurs et al., *supra* note 58, at 12 ("It's possible that female advocates may approach oral argument with a more serious tone, since it is not uncommon for females to adopt a more aggressive communication style to be well regarded within male dominated fields. These more earnest female advocates could be less inviting to the [J]ustices' humor.").

134. Malphurs et al., *supra* note 58, app. A at 22–23.

135. An exception was where the court reporters did note Justice Kennedy saying as an aside "Sonia is off" when Justice Sotomayor continued to question the advocate after his time had expired. Transcript of Oral Argument at 70, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274). This was remarked upon by Court watchers. *See, e.g.*, Dahlia Lithwick, *The Women Take Over*, SLATE (Mar. 2, 2016), https://slate.com/news-and-politics/2016/03/in-oral-arguments-for-the-texas-abortion-case-the-three-female-justices-upend-the-supreme-courts-balance-of-power.html [https://perma.cc/P68D-5GHZ].

136. E-mail from Pamela Talkin, Marshal of the U.S. Supreme Court, to authors (Jul. 25, 2018, 14:17 EDT) (on file with authors).

137. *See* Malphurs, *supra* note 24, at 52 ("During Supreme Court oral arguments, labeling a [J]ustice's or advocate's statement 'humorous,' as a result of the audience's laughter ignores the potential for a serious comment to be misunderstood."); Malphurs et al., *supra* note 58, at 3 ("[W]hile humor is a cognitive communication process, laughter is simply a manifestation of that process . . . .") (citing VERA M. ROBINSON, HUMOR AND THE HEALTH PROFESSIONS (1991)). For instance, in the copyright case *American Broadcasting Cos. v. Aereo, Inc.*, the following comment of Justice Breyer's that we found funny did not get a laugh from the audience:

> Mr. Frederick: I think that your argument, Justice Breyer --
>
> Justice Breyer: It's not my argument. It's a parody perhaps, or an incorrect version of your argument.

Transcript of Oral Argument, *Aereo Inc.*, *supra* note 113, at 45.

Malphurs et al. use to be less effective for the purpose of assessing laughter at the Court than the court reporters' unamended notations.

One important aspect to understand about laughter at the Supreme Court is that it rarely emanates from either the Justices or the advocates themselves. Laughter, or at least the laughter that makes it into the transcript, is the reaction of the courtroom gallery as a whole. Sometimes the gallery erupts quickly, but more often it does so after a brief pause. Thus, by the time the laughter reaches the threshold of disruption that causes the court reporter to make a note of it, the next speaker may have already begun speaking. This creates a problem of attribution. We addressed this issue by attributing laughter within the first or second word of a speaker's dialogue to the previous speaker. Admittedly, this may still be over- and under-inclusive in some cases, but our review of the record convinces us that it is the appropriate general rule. Our initial search yielded 5,223 laughter notations attributable to the Justices and 3,864 to the advocates; after this timing adjustment, those figures changed to 6,087 and 3,300, respectively.[138]

In this Article, we have chosen to present the majority of our empirical analysis graphically. Graphical analysis often conveys more information than regressions and it is certainly more comprehensible to the average reader. We have prioritized this method of presentation to allow readers to make their own assessment of competing claims. Where appropriate, we use regression analysis to confirm, qualify, or even dispute the impression conveyed by the graphs. The details of the regression analysis are primarily discussed in footnotes and in the Statistical Appendix.

D. Hypotheses

Consistent with our prior work, we are particularly interested to see if patterns in laughter changed in 1995, when the Justices became significantly more active at oral argument and engaged in greater forms of advocacy. In *The New Oral Argument: Justices As Advocates*, we tested a theory about the changing nature of Supreme Court oral argument and the degree to which the Court is influenced by broader social and political contexts. We hypothesized that as

138. There is a slight discrepancy in these totals because the initial numbers undercount laughter where an advocate's speech event begins and ends with laughter. In our model, the advocate is credited with the second, but not the first.

American politics and society became distinctly more polarized in the mid-1990s, so too did the Court:[139]

> U.S. politics witnessed a sharp and sustained increase in political polarization with the landslide Republican victory in the mid-term Congressional elections of 1994. The 'Republican Revolution' that began in the subsequent 104th Congress brought a large influx of freshmen Congressional representatives to Washington in 1995 who were unwilling to be bound by traditional norms of seniority and bipartisan cooperation.[140]

In *The New Oral Argument,* we showed that "judicial activity at oral argument has increased significantly" in recent decades;[141] "that the nature of that activity is directed toward greater judicial advocacy;"[142] and that this "new paradigm . . . can be dated as beginning in" the mid-1990s.[143] Without definitively establishing causation, we explained why political polarization was the most likely explanation for the changing nature of oral argument.

We documented these changes in the nature of oral argument by establishing a multi-faceted increase in judicial activity across various behaviors at oral arguments around 1995, including the number of words used, the duration of judicial speech, and the number of judicial interruptions, among other measures.[144] Furthermore, we showed that the increased activity represents activism in favor of the side that each Justice ultimately decides in favor of and against the side he or she rules against.[145] For instance, we showed that Justices take up more of the time of the advocate they ultimately rule against and disproportionately direct comments to that advocate, whereas they direct questions to the advocate in whose favor they eventually rule.[146] Elsewhere, we have used these patterns to predict case outcomes, based on judicial behavior at oral argument.[147] At the start

139. Jacobi & Sag, *supra* note 18, at 1162–63.

140. *Id*. at 1163.

141. *Id*. at 1163, 1202–12.

142. *Id*. at 1163, 1226–31.

143. *Id*. at 1163, 1237.

144. *Id*. at 1234, 1239.

145. *Id.* at 1243 tbl.5.

146. Tonja Jacobi & Matthew Sag, *Favoring Friend Versus Foe in Supreme Court Oral Arguments*, SCOTUS OA (Sept. 24, 2018), https://scotusoa.com/friend-or-foe/ [https://perma.cc/2EVF-6LGL].

147. Jacobi & Sag, *supra* note 20; for an example, see, e.g., Tonja Jacobi & Matthew Sag, *The Importance of Empirical Analysis (with Forecasts of Bucklew & Madison)*, SCOTUS OA (Nov. 19, 2018), https://scotusoa.com/bucklew-madison/ [https://perma.cc/NBV9-DKL7] (predicting the outcomes of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (addressing whether it would be unconstitutionally cruel and unusual to execute a prisoner for whom lethal injection would be exceptionally painful, given his particular medical history) and *Madison v. Alabama*, 139 S. Ct. 718 (2019) (addressing whether it would be unconstitutionally cruel and unusual to execute a prisoner for a crime he can no longer remember, due to a medical condition)).

of this project, our prediction was that courtroom humor would also fit this pattern; that is, we believed the Justices would use courtroom humor to the disadvantage of advocates whose arguments they oppose and to the advantage of those they favor.

Our view that courtroom humor is part of advocacy by the Justices led us to expect specific patterns in laughter episodes: first, we expected to see a change over time, with a significant increase in the modern era for the number of laughter incidents, as the Court became more performative. Second, in particular, we expected to see a change before and after 1995, when political polarization shaped other forms of judicial behavior at oral argument, as discussed. Third, we expected to see patterns of advocacy emerge from laughter-inducing behavior—we theorized there would be systematic differences in which side of an argument prompts each Justice's laugh-inducing comments. Fourth, we expected those patterns not to be focused on equalizing, but rather focused on advantaging some and, importantly, disadvantaging others. Furthermore, even when the courtroom humor of the Justices was not closely tied to judicial advocacy, we expected it to be used to reinforce the existing courtroom hierarchy. Thus, our fifth hypothesis was that we expected to see an *anti*-equalizing trend in the data, one that emphasized the Justices' top spot in the hierarchy and the advocates' inferiority. We did not expect these differences to be universal—we anticipated variation—but overall, we expected these hypotheses to be borne out.

Throughout, we also paid close attention to whether a similar change was discernible in 1986, since that was the year when Justice Scalia joined the Court. Justice Scalia was declared the "funniest [J]ustice" by Wexler, although that ranking is actually subject to some year-to-year fluctuation,[148] and many believe that Justice Scalia had a significant effect on every aspect of oral argument.[149] However, it is difficult to disaggregate Justice Scalia's effect on the Court from other significant changes that occurred in the mid-1980s. For example, 1986 was also approximately when the Supreme Court bar began to be manifestly more concentrated and professionalized. The professionalization and concentration of the Supreme Court bar began

148. See *supra* notes 26, 28, 31 and accompanying text.

149. *See, e.g.*, Erin Fuchs, *Lawyer Who's Argued 73 Cases in Supreme Court Says Oral Arguments 'Changed Completely' After Scalia*, BUS. INSIDER (Feb. 13, 2016, 8:24 PM) (quoting Carter Phillips), www.businessinsider.com/scalia-death-oral-argument-supreme-court-2016-2 [https:// perma.cc/FGA3-3LSX].

with Sidley Austin hiring former Solicitor General Rex Lee in 1985.[150] Lee "create[d] a Supreme Court and appellate practice [at] Sidley's DC office," and firms such as Mayer Brown & Platt, Jenner & Block, and Kirkland & Ellis quickly followed suit by recruiting talent from the Justice Department and recent Supreme Court clerks.[151] A year after Rex Lee moved to Sidley, and the same year Justice Scalia was appointed, William H. Rehnquist was promoted to Chief Justice.[152] We also note that in 1987, just after Justice Scalia joined the Court, President Reagan's nomination of Judge Robert Bork was rejected after a confirmation hearing so controversial that "bork" became a verb used to refer to ending a nominee's prospects.[153]

Most statistical analyses cannot prove causation, only correlation, but some correlations are more persuasive than others. If a plausible theory yields a testable prediction—an ex ante hypothesis—we should have greater confidence in the theory when the prediction is supported by the data. In contrast, ex post rationalizations of patterns that emerge from the data should be treated with skepticism. For an alternative thesis to be given credibility, such as the Bork explanation, there would obviously have to be a logical relationship between the controversy of the failed nomination and increasing laughter. That would be necessary but not sufficient—in addition, the thesis would have to be something that seemed credible ex ante, not simply a post hoc rationalization. Forging a strong relationship between theory and empirics in this way is essential in order to avoid post hoc rationalizations once empirical trends have been discerned. We have no theory as to why Rehnquist's promotion or Bork's failed nomination should have changed the rate of laughter at the Court. On the other hand, the changing nature of the Supreme Court bar does present us with a credible alternative to explain changes in the use of courtroom humor in the mid-1980s. It is plausible that as the atmosphere in the Court became more clubby and exclusive, interactions between the Justices and the advocates became less formal, more relaxed, and more humorous. For reasons explained later in the Article, we ultimately rejected this thesis.

150. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1489 (2006).

151. *See id.* at 1489–99; *see also* Jacobi & Sag, *supra* note 18, at 1165, 1191–92 (summarizing the argument and showing it did not have a significant effect on most forms of judicial activity).

152. *See* Lazarus, *supra* note 150, at 1503.

153. *See, e.g.*, *Bork*, LEXICO, https://www.lexico.com/en/definition/bork (last visited Sept. 4, 2019) [https://perma.cc/MG4L-GXXC].

So our first group of hypotheses concerned what has occurred at the Court and why: we expected to see a significant increase in laughter over time, as the Court has become more performative, and we theorized that change is likely to have occurred most dramatically either in 1986, 1995, or both. As well as hypothesizing about changes in the laughter patterns, we also wanted to inquire as to what laughter means at the Court. This focus gave rise to our second set of hypotheses: although laughter is often equated with humor, we believed that judicial jokes and jibes are likely to be strategically directed, and not simply random. In particular, we predicted that we would see more jokes made at the expense of advocates with whom the Justice eventually votes against in the case at hand. Specifically, we expected to see a "laughter gap" consistent with the "disagreement gap" and "interruption gap" that we have shown elsewhere, whereby Justices speak more and interrupt more during the time of the advocate with whom they eventually disagree.[154] Furthermore, we expected to see judicial jokes at the expense of more inexperienced advocates and losing advocates—that is, that laughter caused by the Justices is a sign of the weakness of the advocate against whom a joke is made.

II. THE MODERN ERA OF LAUGHTER AT THE COURT

In this Part, we first examine whether patterns of laughter at the Court have changed over time to test our first hypothesis that comments inducing laughter, like other judicial activity, have dramatically increased in the modern era. We then test when such a change occurred and whether it should be attributed to the entrance of Justice Scalia onto the Court (in 1986), the effect of political polarization on the Court (significantly increasing in 1995), or the more exclusive Supreme Court bar (starting in 1986).

A. Laughter as Performance: Trends Over Time

Our first hypothesis was that instances of laughter have been increasing over time. Our earlier research showed that the Justices are far more engaged in the modern era of Supreme Court oral argument than in the past.[155] We attributed that engagement to the Justices taking on an advocacy role and treating oral argument as a

154. *See* Jacobi & Sag, *supra* note 18; Jacobi & Sag, *supra* note 20.

155. Jacobi & Sag, *supra* note 18, at 1203.

form of performance, by which they influence public opinion.[156] Comparing oral arguments in the modern era to those in the past leaves no doubt that interactions between the Justices and the advocates have become more intense.[157] We hypothesized that the general incidence of laughter would increase over time with that intensity. Listening to oral arguments from the late 1950s and early 1960s is quite tedious—there is little of the intense back and forth that has come to dominate modern oral arguments. A back of the envelope calculation supported this impression: of the over nine thousand instances of laughter occurring between the 1955 and 2017 Terms, the Warren Court accounted for just 9% of laughter incidences (885) despite covering 22% of our data measured by Term (fourteen Terms). Laughter became significantly more common during the Burger Court, which provided 19% of laughter episodes (1,743). However, it still fell behind average, accounting for 27% (seventeen Terms) of our time period. The bulk of the laughter occurred during the Rehnquist and Roberts Courts: the Rehnquist Court saw 46% (4,278) of laughter episodes, despite covering only 30% (nineteen years) of our sixty-three-year study, and the Roberts Court witnessed 26% of laughter episodes (2,472) despite only covering 20% (thirteen Terms) of the measured time period up to 2017. Thus, the modern Court, the Rehnquist and Roberts eras, accounts for two-thirds of laughter incidents, despite covering less than half of the time period studied.

Furthermore, during both the Warren and Burger Courts, there was more laughter in response to comments by the advocates than those of the Justices. During the Warren Court, advocates inspired 497 laughs, compared to 388 laughs for the Justices. In the Burger Court, the numbers were almost even, 896 and 847, respectively. In contrast, during the Rehnquist Court, the ratio was reversed and far more divergent, with the Justices accounting for 2,901 laughs and advocates only 1,377. Similarly, during the Roberts Court, the Justices inspired 1,942 incidents to the advocates' 530. That means that looking at judicial behavior alone, the percentages above are even more tilted in the modern era: the Warren and Burger Court Justices accounted for only 6% and 14% of judicial courtroom humor, respectively, whereas the Rehnquist and Roberts Court

156. *Id.* at 1165–66 ("The [J]ustices are not simply becoming more active at oral argument, they are advocating.").

157. *Id.* at 1168 ("[O]ral argument in the past was a sedate and dignified affair where advocates 'got up and told their story' relatively free from interruption, [while] in the present it is a disjointed and fractious affair.")

Justices accounted for 48% and 32%, respectively, of comments by Justices inspiring laughter. Figure 1 below displays more detailed and comprehensive information.

FIGURE 1: LAUGHTER OVER TIME, JUSTICES AND ADVOCATES, PER FIVE THOUSAND WORDS

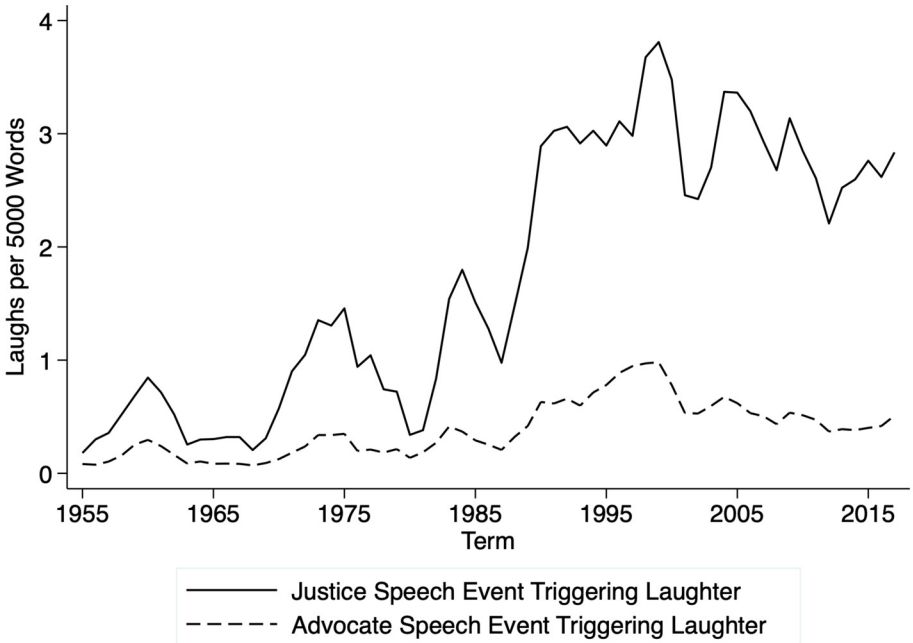


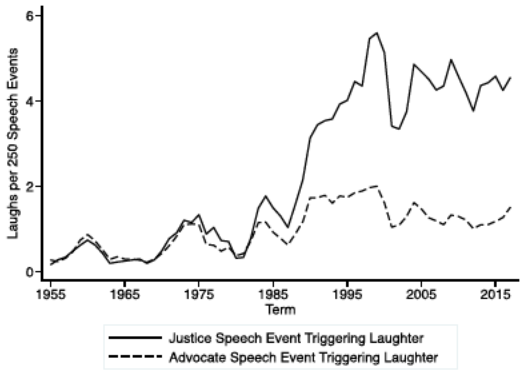
Figure 1 provides further support for our initial hypothesis, showing a very dramatic increase in laughter episodes in more recent Terms. It shows a three-term moving average of the rate of laughter incidents inspired by the Justices and advocates as two groups. We applied a three-year moving average to smooth out year-to-year fluctuations and highlight longer-term trends. In order to assess whether the Justices' behavior provoking laughter in particular has changed, it was therefore appropriate to control for how much time they spend speaking, relative to previous eras and relative to the advocates. As such, rather than looking at raw numbers and percentages, as above, Figure 1 is scaled to laughs per five thousand words, to reflect the approximate average laughs per case—there are roughly five thousand words spoken in the average oral argument. A

very similar result is achieved when scaled to 250 speech events.[158] Normalizing the data in this way is very important in light of our previous research demonstrating the dramatic increase in judicial activity in oral argument since the mid-1990s. The extent to which oral argument has changed is demonstrated by the fact that in the post-1995 era, the Justices as a group speak for thirteen minutes more on average in each case than they did previously.[159] Setting aside the fact that every so often an argument does not exhaust the full sixty-minute window usually allocated, if the Justices are speaking thirteen minutes more every hour, then the advocates must be speaking thirteen minutes less. With the Justices speaking more, it seems quite likely that they would garner more laughs than previously, and the advocates fewer, simply by virtue of increased airtime.

Figure 1 shows the number of laughter episodes per Term in response to comments by the advocates, represented by the dashed line, and by the Justices, represented by the solid line. Looking first at the dashed line, it is clear that the rate of advocate courtroom humor has stayed remarkably consistent over time, with comparatively little increase. In sharp contrast, the trend for the Justices is unmistakable: they have dramatically increased their use of courtroom humor.

One way to think about the difference between the time trend for Justices and advocates is to imagine all of the variation in Figure 1 averaged out to a straight line. The gradient of such a line of best fit for advocate laughter between the 1955 and 2017 Terms would be 0.007. The gradient for Justice laughter over the same period would be seven times greater, at 0.043.[160] To elaborate: if these upward trends

158. When examined per 250 speech episodes, laughter instances by the Justices and advocates over time show a very similar pattern:



159. Jacobi & Sag, *supra* note 18, at 1203, 1234.

160. Both estimations are significant at the p<0.00 level.

were completely linear, we would see an extra laugh attributable to the Justices per case after every twenty-three years, but it would take 142 years to reach the same increase for advocates.[161] Thus, clearly, something is changing at oral argument that affects the Justices and the advocates differently.

In terms of when the change in the rate of laughter at oral argument occurred, the most noticeable upward shift arose in 1989. Since that time, rates of laughter inspired by the Justices have consistently remained at the higher level of approximately three laughs per five thousand words spoken by the Justices. The change appears to be a fairly sudden and stable jump upwards at 1989, although the overall trend is a gradual upward sloping line. While there was a further jump upwards after 1995, this graph does not provide strong support for the polarization thesis vis-à-vis laughter. It does support the Scalia thesis to some extent—the increase is certainly not apparent in 1986, but it is not difficult to imagine that it could take a few years for a Justice to hit his or her stride.[162]

Even though the professionalization of the Supreme Court bar occurred at roughly the same time Justice Scalia joined the Court, Figure 1 nonetheless enables us to differentiate between the two hypothesized simultaneous causes. The fact that the advocate laughter changed so much less than Justice laughter in the late 1980s undermines the Supreme Court bar explanation: if the increase in laughter was a product of the more exclusive club that the Court became, we would not expect to see a seven-to-one ratio between the increase in Justice and advocate laughter. As such, whereas elsewhere we have shown that Justice Scalia's impact on oral argument is mostly overstated in regard to other Court behavior,[163] Figure 1 provides some preliminary support for the Scalia thesis as it pertains to laughter—albeit with a delayed effect.

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161. Similar results hold in regression estimations using alternate measures, such as laughter per 250 speech events and the raw number of laughs per term. The authors are happy to provide details of unreported regressions upon request, but in this case, they add very little to clear graphical analysis.

162. For instance, we showed elsewhere that Chief Justice Roberts significantly increased his role as the referee of oral arguments after taking the first few years to settle in. Tonja Jacobi, *Gendered Interruptions at the Court: Looking Forward and Backward*, SCOTUS OA (Aug. 2, 2018), http://scotusoa.com/gendered-interruptions-at-the-court/ [https://perma.cc/7ANA-6DSN].

163. Jacobi & Sag, *supra* note 18, at 1191 (showing that 1986 was not associated with significant increases in judicial words spoken, duration of judicial speech, judicial interruptions, or judicial questions and that the only area where 1986 showed a significant increase was the number of comments made to advocates, concluding that "it seems likely that his recent death in 2016 may have led to an outsized estimation of his role as an agent of change on the Supreme Court").

Rather than concentrating exclusively on either the long-run trends or on particular Justices, it is helpful to examine the trend over time in terms of historical eras of the Supreme Court. Table 1 divides the data into four eras: 1955–1969, 1970–1985, 1986–1995, and 1996–2017. The 1955–1969 era was the sole period of liberal dominance on the Court;[164] it was also a time in which oral arguments were ordinarily two hours instead of one hour.[165] The 1970–1985 era captures the remainder of the Burger Court. The 1986–1995 era coincides with Justice Scalia entering the Court and Rehnquist becoming Chief Justice. Finally, the 1996–2017 era begins with the dramatic increase in political polarization of the mid-1990s and takes us up to the present day.

TABLE 1: JUDICIAL- AND ADVOCATE-INSPIRED LAUGHTER, MEAN PER ARGUMENT FOR FOUR COURT ERAS

	Justices			Advocates		
Era	Laughter	Speech Events	Words	Laughter	Speech Events	Words
1955–1969	0.23	151	2,613	0.30	174	1,0767
1970–1985	0.35	87	1,625	0.37	121	7,096
1986–1995	1.15	97	2,301	0.67	115	6,115
1996–2017	2.16	120	3,658	0.70	125	5,885

164. In 1969, the conservative Chief Justice Burger replaced the liberal Chief Justice Warren, a switch that not only made the head of the Court conservative, but also brought the average Martin-Quinn ideology score for the Court as a whole to above zero for the first time since 1960, one measure of the Court becoming conservative. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 135 (2002). Updated data is available at *Martin-Quinn Scores: Measures*, U. MICH. C. LITERATURE, SCI. & ARTS, https://mqscores.lsa.umich.edu/measures.php (last visited June 12, 2019) [https://perma.cc/AJT7-DVK2]. Arguably, the Court became conservative not in 1969 but in 1970, when Justice Blackmun joined the Court and became the fifth conservative of the nine Justices. Either way, putting the cutpoint at 1970 captures that shift on the Court.

165. *See* CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 124 (2011). The rule was changed in 1970. *Id.* at 126; *see* SUP. CT. R. 28(3) ("Unless the Court directs otherwise, each side is allowed one-half hour for argument.").

Table 1 shows the number of laughter episodes inspired by the Justices and the advocates separately in each era. It also shows the average number of speech events and words attributable to each group. The figures for laughter, speech events, and words are each normalized on a per-argument basis and divided between the Justices as a group (on the left) and the advocates as a group (on the right).

As Table 1 clearly shows, the number of Justice laughs in a given argument has been consistently increasing throughout the four eras, although not at a consistent pace. To make sure that this apparent increase is not simply an artifact of Justices speaking more over time, we can examine the number of Justice laughs as a proportion of the number of Justice words and normalize to a base of five thousand.[166] Prior to 1986, there were on average 0.76 laughs per five thousand words spoken by the Justices, whereas the comparable figure in the period from 1986 onwards (until 2017 in our data) is 2.8 laughs per five thousand words. Looking at the pre-1986 period more closely, there were an average of 0.42 Justice laughs per five thousand words during the Warren Court and early Burger Court (1955–1969) and 1.08 per five thousand words during the remainder of the Burger Court (1970–1985). In the early Rehnquist Court (1986–1995), that figure rose to 2.53 Justice laughs per five thousand words. The ratio increased slightly, to 2.92 Justice laughs per five thousand words, in the post-1995 era of the late Rehnquist and early Roberts Courts (1996–2017). Thus, while there has been a consistent upward trend across all eras, the biggest change is between the earlier and later Courts.

The question remains: Did that change occur in 1986, when Justice Scalia joined the Court; in 1989, as the graph suggests; in the mid-1990s, as our analysis of other trends in oral argument would suggest;[167] or some other time period? To determine exactly when the biggest change took place, we performed a structural break analysis on both Justice and advocate comments inspiring laughter, in absolute terms and normalized in relation to the number of speech episodes and, alternately, the number of words spoken. There are essentially two ways to do this analysis: to specify a time at which the change is theorized to have occurred, and see if there is a significant difference before and after that time; or to not specify such a time and let the

166. Five thousand words per argument is a compromise between a slightly high estimate for the Justices as a group and a slightly low one for the advocates.

167. Jacobi & Sag, *supra* note 18, at 1234, 1243.

computer program find the point in time that has the most significant change associated with it. We did both.

When we tested for expected breaks at 1986 and 1995, both were significant; an analysis allowing for structural breaks at both points was also significant and more powerful than each alone. Using the unguided structural break method in the Wald test, which assumes a single break at an unknown point in the data, we rejected the null hypothesis that there was no break at any time. That is unsurprising, given the dramatic increase shown in Figure 1. The program's unguided best guess at the break points for the Justices were: in absolute numbers of laughs, 1989; in laughs per speech episode, 1989; and in laughs per five thousand words, 1969. For the laughter associated with the advocates, those same numbers were: 1994, 1988, and 1988, respectively. All breaks were highly statistically significant. Overall, then, the two types of break test both mostly pointed in the direction of the late 1980s, 1986, or 1989. Just like eyeballing Figure 1, these more sophisticated tests suggest that the most significant increase in laughter at oral argument was sometime between 1986 and 1989. This supports the Scalia thesis, albeit potentially with a two- to three-year delay.

To augment the structural break analysis, then, we included dummy variables for post-1986 and post-1995 in a set of multivariate logistic regressions that also included a general time variable, and found that both 1986 and 1995 were significant.[168] In similar regressions focusing on laughter by the advocates, both the post-1986 and post-1995 dummy variables are statistically significant. However, although both significant, they actually point in different directions. The odds ratio for post-1986 is substantially greater than one, meaning that after 1986, advocate laughter became *more* likely, holding all other variables constant. In contrast, the odds ratio for post-1995 is substantially less than one, meaning that in an era of intense political polarization, from 1995 to the present, advocate laughter at oral argument became less likely, holding all other variables constant.[169]

The results for both Justices and advocates provide much stronger support for the post-1995 effect than the previous analysis suggested. For advocates, in the post-1995 period, not only was there a

168. For the Justices, the post-1986 dummy variable was significant at the .01 level and the post-1995 dummy variable was significant at the 0.05 level. *See infra* Statistical Appendix, Model 1, Models 3–4. These regression models are discussed in more detail in the remainder of this Article.

169. *See infra* Statistical Appendix, Model 5.

statistically significant effect in the direction predicted, but it reversed an earlier change in the opposite direction. This is consistent with our earlier work showing that political polarization had a critical effect on the Court. The results also make the interpretation of the post-1986 effect more ambiguous. Clearly, 1986 was significant, either because of the entrance of Justice Scalia onto the Court or because of the change in the Supreme Court bar, or both. But the fact that advocate-inspired laughter and Justice-inspired laughter move in the same direction in the 1980s but in divergent directions in the 1990s suggests that the overall phenomenon we are identifying is more a product of political polarization than the two 1986 effects.[170] This adds to our general skepticism that changes in the nature of oral argument can be attributed to any individual, rather than a broader institutional change.

B. Laughter as Performance: Salient Cases

In keeping with our laughter-as-advocacy theory, we also examined the relationship between laughter and case salience. There are two commonly used measures of the importance of Supreme Court cases in the law and courts literature. The first measure is a proxy for public interest; it counts a case as salient if it was mentioned on the front page of the *New York Times*.[171] The second measure is a proxy for legal importance; this measure, published in the *Congressional Quarterly,* "is based on experts' retroactive assessment of whether a case was a landmark decision."[172] It is convenient to think of the two measures in terms of political salience (measured contemporaneously with the decision) and legal salience (measured retrospectively).

Looking at the raw data, there is a significant difference between the average quantities of laughter in salient versus nonsalient cases. There is more laughter in salient cases under both the political and legal measures. Over the entire period of our study,

170. Advocate-inspired laughter is a different phenomenon than Justice-inspired laughter, one requiring more detailed analysis than space allows here to determine if the shift in advocate behavior in the 1980s came about from oral arguments becoming more clubby, with that trend subsequently reversed by political polarization. Here we are focusing primarily on Justice-inspired laughter; in a future project, we will explore advocate behavior in more detail.

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

172. Adam Bonica et al., *Influence and Ideology in the American Judiciary: Evidence from Supreme Court Law Clerks* 18 n.21 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 790, 2017), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2449&context=law_and_economics [https://perma.cc/VKF9-EP36].

there were an average of 1.12 Justice laughs per case in politically salient cases and only 0.73 otherwise.[173] Likewise, there were an average of 1.68 Justice laughs per case in legally salient cases and only 0.74 otherwise.[174] Regression analysis also confirms the importance of both political and legal salience. Both measures of salience are statistically significant in multivariate logistic regression, with additional independent variables discussed in subsequent sections of this Article.[175] This result holds regardless of whether the dependent variable is Justice laughter[176] or Justice laughter normalized by the number of words spoken.[177]

C. Variation Among the Justices: Who is the "Funniest"?

We saw in the first Section of this Part that the rate of laughter at Supreme Court oral argument has dramatically increased, and that the increase is largely attributable to changes in judicial behavior. This supports our first hypothesis, that laughter is increasing in the modern era as the Justices see their role as more performative than ever. These results are also tentatively consistent with our second hypothesis, and our broader findings in other work, that political polarization has increased judicial advocacy in the form of this performance. We say "tentatively consistent" because although the data supports the theory that there was a significant change in the incidence of laughter at oral argument in the mid-1990s corresponding with our current era of intense political polarization, the data even more strongly supports the view that the most significant change occurred in the mid-to-late 1980s and that a structural break centered on 1995 was only of secondary importance. This finding is interesting when contrasted with our previous research that very strongly indicated that the increase in judicial activity, which characterizes what we term "the new oral argument," was a function of increasing political polarization in the mid-1990s. In our earlier work, we largely

173. We confirmed that this difference is significant at the 0.01 level using a t-test.

174. Again, we confirmed that this difference is significant at the 0.01 level using a t-test. The same pattern holds true in terms of advocate laughter episodes. There were an average of 0.73 and 1.02 advocate laughs per case in politically and legally salient cases, respectively, and only 0.42 and 0.44 otherwise.

175. These variables relate to agreement with the advocate (Agreement), whether the advocate speaking won the case (Winner), and advocate experience categories (Novice and Hero). They also include the time trend variable (Term), and the dummy variables for post-1986 and post-1995 (Post1986, Post1995) discussed above.

176. *See infra* Statistical Appendix, Model 1.

177. *See infra* Statistical Appendix, Model 4 (normalized by five thousand words spoken).

debunked the theory that Justice Scalia had a transformative effect on oral argument.[178] We must concede, based on the evidence presented so far at least, that there is considerably more support for the notion that Justice Scalia changed the comedic tone of the Court.

In the next Part, we explore the polarization thesis in much greater detail and find considerably stronger support for it. But now we pause to consider Justice Scalia's role in more detail. Taking a closer look at the rate of laughter associated with each individual Justice and analyzing the time trend for each Justice confirms that Justice Scalia played a significant role in the increased incidence of laughter, but it also suggests that his influence was by no means dominant.

To begin this analysis, Figure 2 ranks the Justices in order of the frequency by which they inspire laughter in the Courtroom.

178. The only significant impact Justice Scalia had was the large increase in the number of comments directed at advocates, in lieu of questions, an effect that does go to the heart of Justices behaving as advocates, and so Justice Scalia can take some credit for that dubious honor. *See* Jacobi & Sag, *supra* note 18, at 1243.

FIGURE 2: MEAN LAUGHTER PER ORAL ARGUMENT, BY JUSTICE, 1955–2017

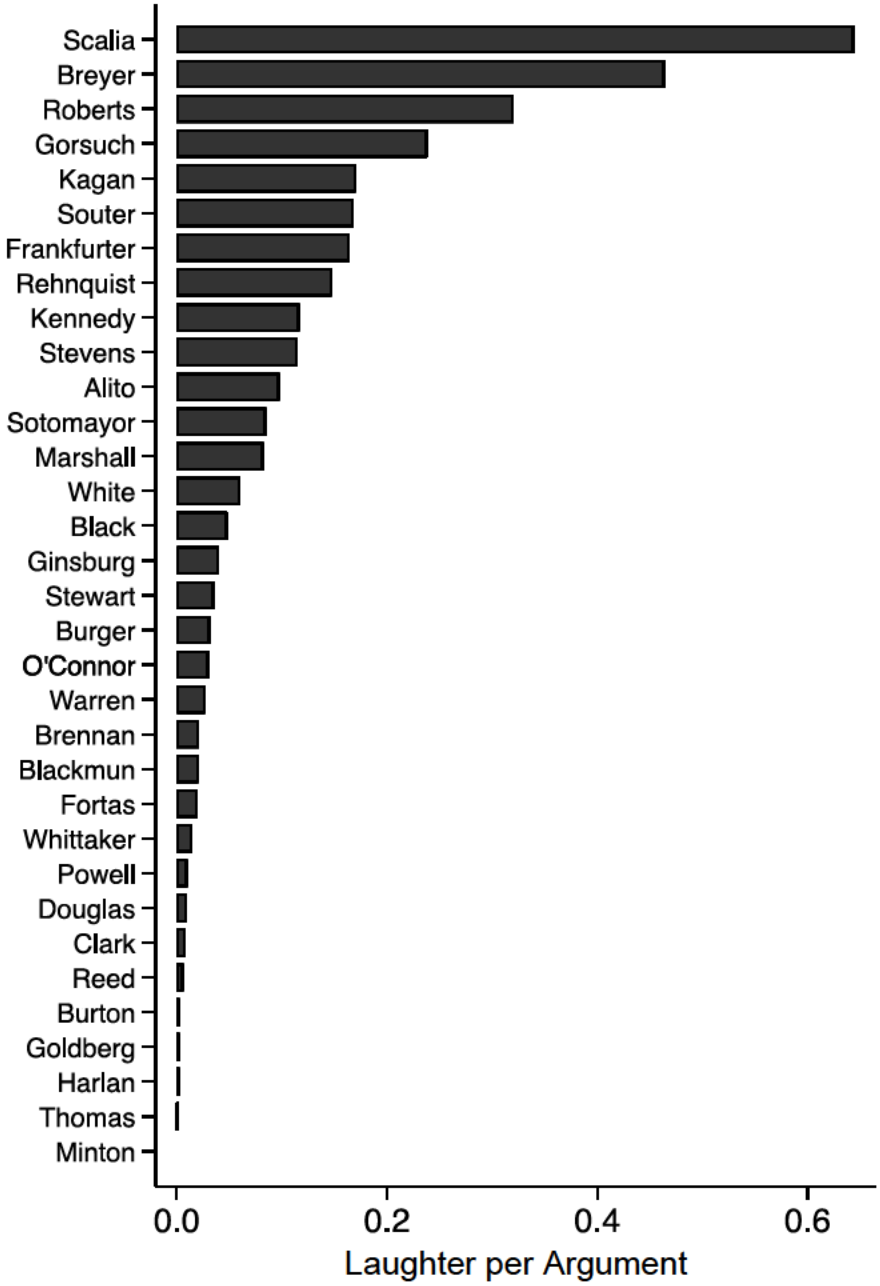


Figure 2 shows it was the New York Times, rather than Wexler, who happened upon an outlier Term when it found that Justice Breyer was the most laugh-inducing Justice. Overall, Justice Scalia is clearly number one, independently responsible for approximately two-thirds of one laugh per oral argument on average. However, the Figure also shows that Justice Scalia was not as much of an exception as some may claim.[179] Justice Breyer is not far behind, responsible for more than one laugh in every two oral arguments. As such, it is not surprising that the New York Times found Justice Breyer to be the "funniest Justice" in the 2005 Term. And the current Chief Justice is also honing his skills in this regard, responsible for almost one laugh in every other argument, and as we will see below, gaining in the rankings over time.

Of particular interest, we note that Justice Gorsuch, who has only been on the Court for less than two Terms in our data (which does not yet include the 2018 Term) comes in fourth place. This raises doubts about attributing the cutpoint in the laughter increase at the 1989 Term to a delayed effect of Justice Scalia—Justice Gorsuch, at any rate, does not appear to have needed much time to bring his own unique brand of humor out into the open. The second noteworthy appearance is Justice Frankfurter, coming in at number five. He is the only Justice from the earlier part of our data set who mirrors the behavior of the modern Justices. Justice Frankfurter is an outlier for his era in other respects; he also spoke much more than any other Justice on the Court until the 1980s. Both these findings are consistent with Justice Frankfurter's reputation for domineering behavior: his badgering and bullying is even said to be responsible for the nervous breakdown of Justice Whittaker.[180] Once again, Justice Frankfurter's appearance in the top ranks of the Justices on the laughter scale, then, is an obvious challenge to the notion of laughter as an equalizing force on the Court. The third noteworthy Justice appearing at the top is Justice Kagan—her presence here belies the

179. For example, President Barack Obama described Justice Scalia as having an "incisive wit." Nolan D. McCaskill, *The 11 Most Memorable Scalia Quotes*, POLITICO (Feb. 14, 2016, 12:59 AM), https://www.politico.com/story/2016/02/best-antonin-scalia-quotes-219274 [https://perma.cc/KA6Q-FWME]. SCOTUSblog opined that "his many memorable quips from the bench, usually during oral argument, are also an important part of his legacy." Mark Walsh, *A "View" from the Courtroom: "I'm Scalia" and Other Quips*, SCOTUSBLOG (Feb. 18, 2016, 3:45 PM), https://www.scotusblog.com/2016/02/a-view-from-the-courtroom-im-scalia-and-other-quips/ [https://perma.cc/56GX-LRRH].

180. *The Political Thicket*, WNYC STUDIOS (June 9, 2016), https://www.wnycstudios.org/story/the-political-thicket [https://perma.cc/2MEC-7DYL] (describing how negotiations over *Baker v. Carr*, 369 U.S. 186 (1962) pushed Justice Whitaker to a nervous breakdown and eventually led Justice Frankfurter to the hospital).

claim of Malphurs et al. that women, at least on the Supreme Court, are just not funny.

The next Figure looks at how often each Justice inspires courtroom laughter in terms of the individual trendline for each Justice over time. This allows us to pay greater attention to each Justice, to see not only their overall ranking, but their progression. For instance, while not every Justice in the current era has been consistently "funny," if indeed that is what laughter at the Court represents, every Justice save three has had at least one somber Term where his or her rate of laughter was less than 0.1 per argument. The exceptions are Justices Breyer and Gorsuch, and Chief Justice Roberts.[181] But Figure 3 also starkly illustrates just how consistent the overall change for the Court was over time—the comparison between the two earlier and the two later Courts is very stark indeed.

181. The lowest per argument rates of laughter for those three Justices are 0.14, 0.20 and 0.24, respectively. Justice Scalia's comic nadir was a mere 0.07. Note that the figure for Justice Gorsuch may be an artifact of the limited data available.

FIGURE 3: JUSTICE BEHAVIOR OVER TIME AND BY ERA

FIGURE 3.A: JUSTICES WHO LEFT THE COURT PRIOR TO 2000

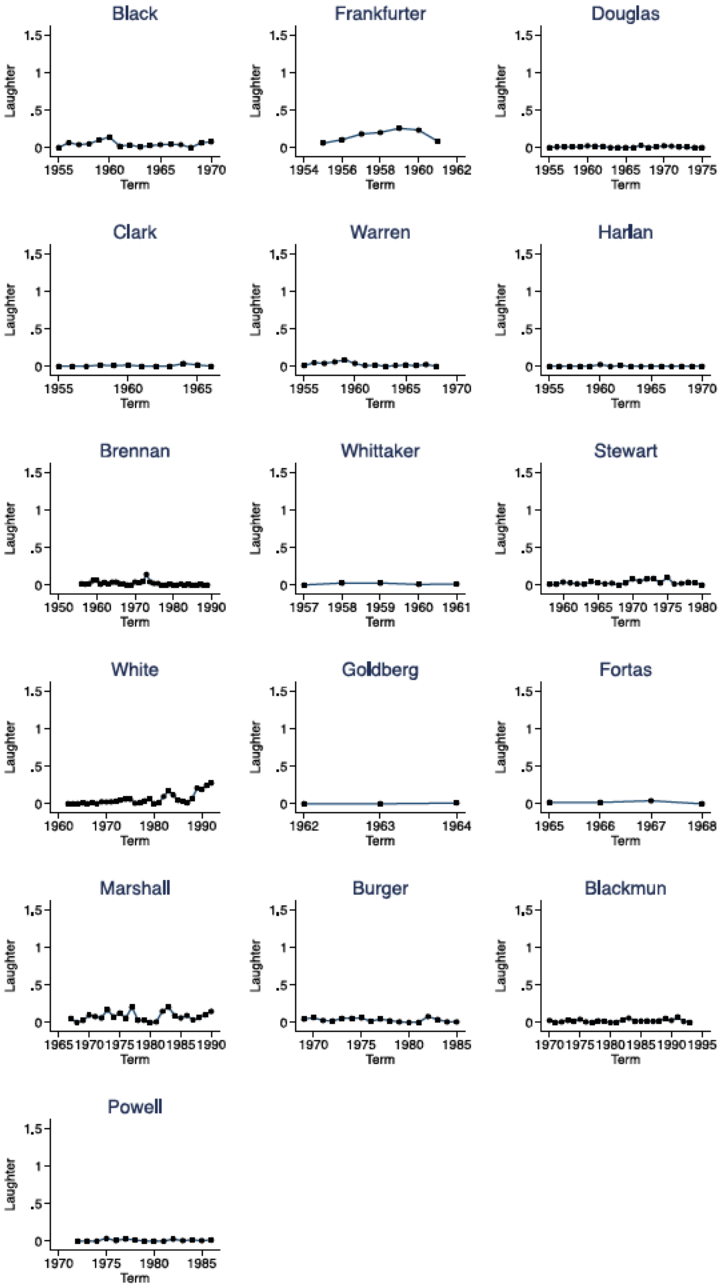
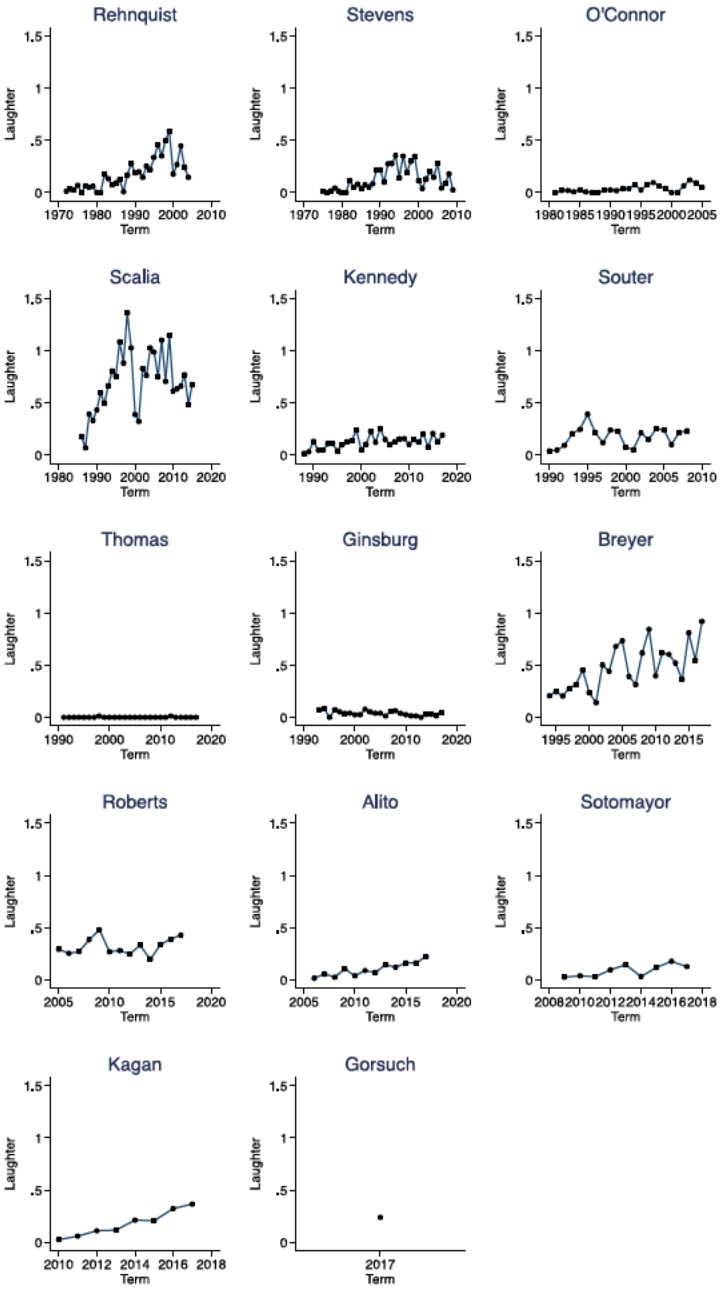


FIGURE 3.B: JUSTICES WHO LEFT THE COURT AFTER 2000



Looking at Figure 3.A, we see only minimal variation. As discussed, Justice Frankfurter was an outlier for this time. Justice Marshall was also unusually active among his colleagues on the Warren Court, but note that he particularly increased his rate of laughter-inspiring episodes in the late 1980s. Justice White showed a similar trend, with an increase in laughter episodes manifesting again in the late 1980s and continuing throughout the early 1990s. These two Justices[182] lend support to the claim that much of the change we are seeing is institutional, rather than an idiosyncratic change resulting from one unusual individual.

What is even more striking than the change in behavior of individual Justices is that, other than these three Justices mentioned, the other thirteen Justices in the earlier era shown in Figure 3.A consistently show very little courtroom humor. The "worms" that track their behavior over time are practically straight lines that lie near zero—if these results were EKGs, we would worry that the patients were dead.

In contrast, in Figure 3.B, covering the later Rehnquist and Roberts Courts, there is considerable variety in judicial behavior on the laughter scale. Of all the Justices who were on the Court in this century, it is the three with consistently low levels of laughter who are the outliers. Justice Thomas's almost-zero level of laughter-inducing episodes is no doubt unsurprising to most, since he barely speaks, averaging only three words per oral argument over the course of his career.[183] The other two low fliers appear to be Justice O'Connor and Justice Ginsburg. The latter in particular may be surprising to some. Justice Ginsburg is probably the most personally idealized Justice of all time, with extensive paraphernalia sold depicting her making all

182. Justice Frankfurter, of course, had left the bench long before Justice Scalia's entrance onto the Court.

183. The only laugh that Justice Thomas inspired in the final five years of our study was in *Boyer v. Louisiana*. The transcript indicates as follows: "Justice Thomas: Well there -- see, he did not provide good counsel. [LAUGHTER]." Transcript of Oral Argument at 42, Boyer v. Louisiana, 569 U.S. 238 (2013) (No. 11-9953). This comment came in the middle of a discussion about the competence of a particular lawyer to try a capital case. *Id.* at 41–42. The joke appears to be that Justice Thomas was doubting whether being a Yale Law School graduate indicated competence or incompetence in this regard. We agree with Rory Little's assessment that Justice Thomas probably did not intend to make an on-the-record comment here. *See* Rory Little, *Argument Recap: Justice Thomas Jokes While Hearing an 'Incredibly . . . Fact-Bound' Speedy Trial Case*, SCOTUSBLOG (Jan. 15, 2013, 11:26 AM), https://www.scotusblog.com/2013/01/argument-recap-justice-thomas-jokes-while-hearing-an-incredibly-fact-bound-speedy-trial-case/ [https://perma.cc/FY9L-QEGA].

sorts of humorous fun at her critics' expense,[184] and Kate McKinnon playing her on *Saturday Night Live* doling out zingers called "GinsBURNs."[185] But it is worth noting that although both she and Justice O'Connor look like outliers in the modern era, they are not low on the humor scale overall. Justice Ginsburg appears in the top half of Figure 2, and Justice O'Connor is very close to the top half. Justice O'Connor is the lowest ranking Justice on the laughter scale in the modern era—other than the silent Thomas—and even she raised her game somewhat in her later years, after 1995.

The rest of the Justices in the modern era are much more active in inducing laughter, but they are also much more varied in their behavior. We see that Justice Scalia was indeed number one, but he showed considerable change over time—he had a clear, consistently upward trajectory from his arrival on the Court in 1986 when, for the first five years, he was consistently under 0.5 laughs per argument; subsequently, he barely ever dropped below 0.5 in any Term after that (other than after *Bush v. Gore*,[186] which was associated with significant decreases on a number of dimensions).[187] He then regularly clocked in at more than one laugh per argument for each Term of his later career.

Also, again, we see in Figure 3.B that Justice Breyer was not as active in his early years on the Court but became increasingly so, with a strong upward trajectory over time. Chief Justice Roberts is active but less varied; Justice Souter was perhaps surprisingly active; Justice Kagan shows an upward trend and is now approaching 0.5 laughs per argument; Justice Alito is lower overall, but also shows a very constant upward trend; and Justice Stevens went from a typical traditional pre-2000 Justice to a modern Justice, with an almost dead worm transforming into an active butterfly around 1990. Chief Justice Rehnquist followed a similar pattern until he had a sharp drop-off, possibly associated with his illness prior to death. The high rate of variation among the modern Justices, and particularly the change

184. Stephanie Francis Ward, *Justice Ruth Bader Ginsburg Has Become an Unlikely Pop Culture Icon,* ABA J. (Oct. 1, 2018, 12:00 AM), http://www.abajournal.com/magazine/article/ruth_bader_ginsburg_pop_culture_icon [https://perma.cc/Z7MP-Z5UR]; *see Popular Items for Ruth Bader Ginsburg*, ETSY, https://www.etsy.com/market/ruth_bader_ginsburg (last visited Sept. 4, 2019) [https://perma.cc/J8JW-XDPE].

185. *See, e.g.*, Saturday Night Live, *Weekend Update: Justice Ruth Bader Ginsburg on Brett Kavanaugh*, YOUTUBE (Sept. 29, 2018), https://www.youtube.com/watch?v=aY8A2cpK6tg [https://perma.cc/9CY5-32SC].

186. 531 U.S. 98 (2000).

187. This will be the subject of a forthcoming blog post on ScotusOA, following the publication of this article. SCOTUS OA, http://scotusoa.com.

within individual Justices' behavior over time, strongly suggests that the change on the Court is not simply due to personnel changes but to an institutional change on the Court.

This raises the question of whether courtroom humor is contagious or even perhaps competitive. Even though we have seen that Justice Scalia is not solely responsible for the increase in laughter, maybe it was his influence on the rest of the Court that led to the change we have observed. That is a very difficult theory to prove or disprove, but Figure 4 below provides some insight on this question.

FIGURE 4: LAUGHTER EPISODES ATTRIBUTABLE TO JUSTICES SCALIA, BREYER, AND ALL OTHER JUSTICES, BY DECADE

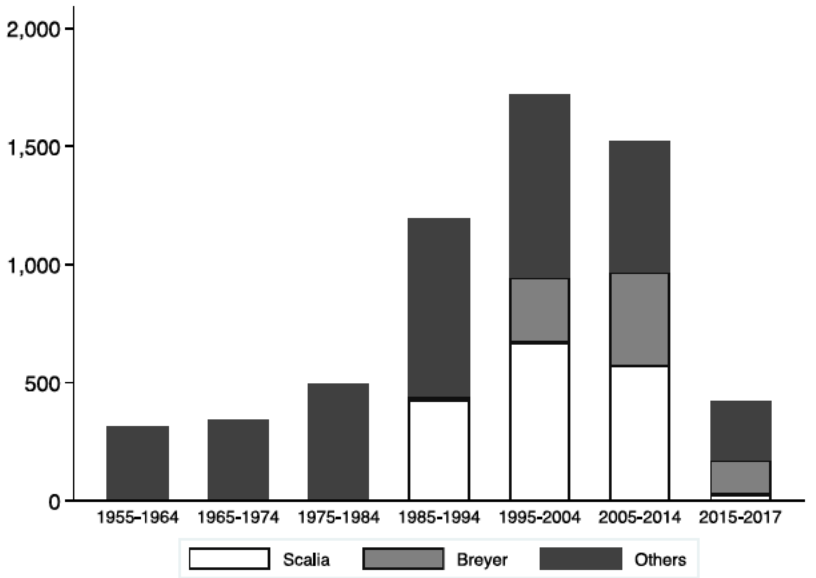


Figure 4 shows the number of laughs attributable to Justices Scalia, Breyer, and all other Justices.[188] It shows that based on the raw numbers, Justice Scalia was indeed responsible for a large proportion of the courtroom laughter provoked by the Justices during his tenure. However, we think that this figure might be misleading.

Figure 5 illustrates another way to think about the influence of Justice Scalia. The solid black line in Figure 5 depicts the three-year moving average of Justice laughter per five thousand words from 1955

188. Were it not for the limitations of publishing in black and white, we would also highlight the contributions of other key Justices, such as Chief Justice Rehnquist and Chief Justice Roberts. A more detailed color figure will be published on ScotusOA.com, following the publication of this article. *Id.*

to 2017, the same as in Figure 1. We calculated two alternate versions of this data, one simply by omitting Justice Scalia and the other by replacing Justice Scalia with a simulated Justice who was the average of all of the other Justices in a given term. The Court without Justice Scalia is depicted by the dashed line and the Court with a simulated average Justice taking the place of Justice Scalia is depicted by the dotted line.

FIGURE 5: JUSTICE LAUGHTER EPISODES, WITH JUSTICE SCALIA, WITHOUT JUSTICE SCALIA, AND WITH AN AVERAGE SUBSTITUTE

Without doubt, as the figure clearly demonstrates, Justice Scalia accounted for more laughter than the average Justice during his tenure on the Court. Nonetheless, his marginal contribution is not as significant as the dramatic upward shift in judicial laughter during the 1980s in total. What is more, the general shape of the time trend with Justice Scalia, without Justice Scalia, and with our simulated Justice looks the same. This reinforces what we have already seen: Justice Scalia is influential but by no means dominant.

III. HUMOR AS AN EQUALIZER VERSUS HUMOR AS A WEAPON

As we saw in Section I.B, jokes at the advocate's expense are so common that we had to come up with subcategories for them. There are many more examples we can draw on: for instance, when Assistant to the Solicitor General Anthony Yang provided an explanation that Justice Kagan did not like, she got a laugh for commenting that it was "[n]ot an A-plus explanation."[189] In *Elgin v. Department of the Treasury*, Justice Breyer even managed to have a joke at the expense of both sides:

> Justice Breyer: [R]eally what the argument boils down to is . . . if we accept your position, there's a kind of procedural complexity and anomaly. And your argument is that his position's worse. And yours is also fairly bad. [LAUGHTER].[190]

In this Part, we move beyond showing that much of the laughter at the Court comes at the expense of the advocates in general to showing that it comes at the expense of particular advocates. It is not random *which* advocates the Justices target for their barbs; rather, courtroom humor is part of their advocacy and strategy. As such, not only is laughter not a beneficent tool of equalization, it is in fact a weapon of advocacy to be used against the weak.

A. Friend Versus Foe

The distribution of laughter at the Court is not random. In the same way that the Justices have more to say to the side they eventually vote against,[191] we find that the Justices direct their jokes at the expense of the advocates they do not support. To help establish this "friend versus foe" difference, Figure 6 below illustrates the difference in Justice laughter depending on whether the Justice ultimately agrees or disagrees with the advocate. By the terms "agree" and "disagree," we simply mean that the Justice ultimately votes for

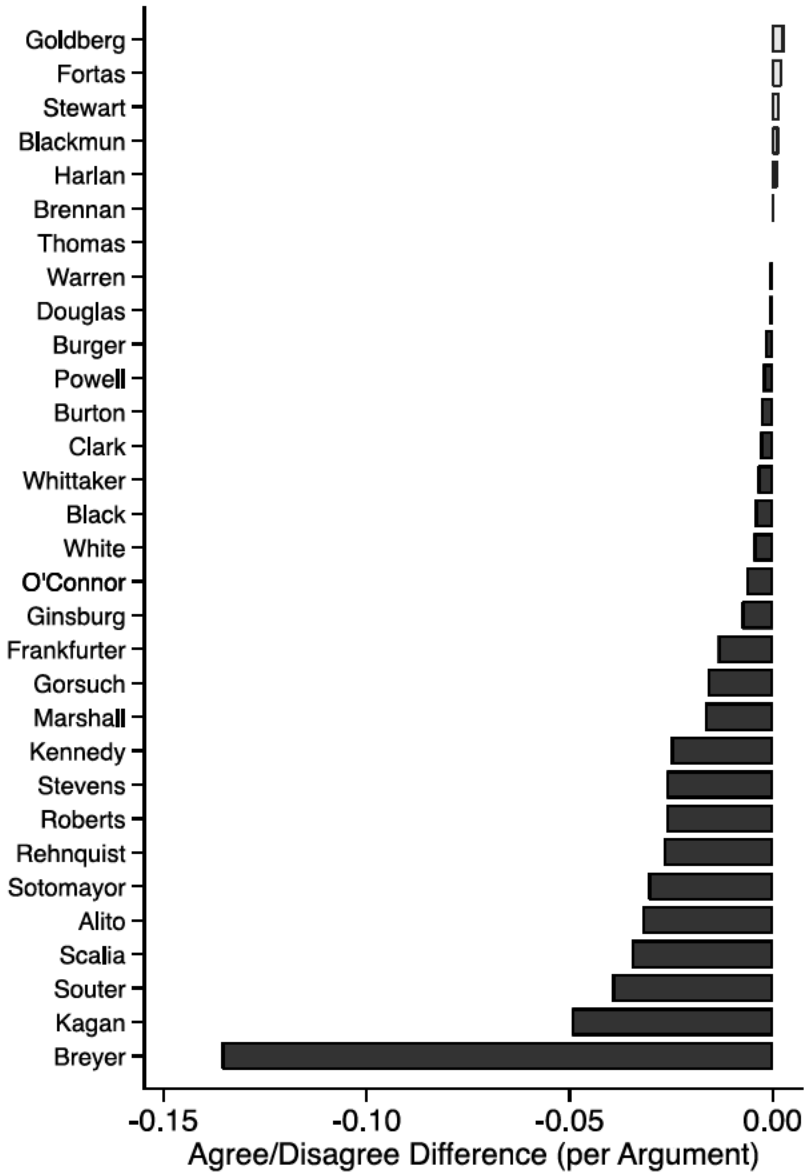
189. Transcript of Oral Argument at 51, Encino Motorcars v. Navarro, 136 S. Ct. 2117 (2016) (No. 15-415).

190. Transcript of Oral Argument at 45, Elgin v. Dep't of the Treasury, 567 U.S. 1 (2012) (No. 11-45).

191. Jacobi & Sag, *supra* note 18, at 1227; Jacobi & Sag, *supra* note 20.

or against the advocate's side of the argument. Values are depicted for each Justice and normalized on a per-argument basis.

FIGURE 6: EACH JUSTICE'S TENDENCY TO INSPIRE LAUGHTER, BY DIFFERENCE IN AGREE/DISAGREE WITH ADVOCATE



The five Justices at the top of the scale in Figure 6 all lie slightly to the right of zero, meaning that, to a very small extent, they each inspire laughter more often during the time allotted for the advocate they ultimately agree with. The effect for each of these Justices is very small and cannot be statistically differentiated from zero, that is, neutrality. Also, they are the exceptions. All of the other Justices, to varying extents, lie to the left of zero, meaning that they more frequently cause laughter during the time of the advocate they ultimately oppose.

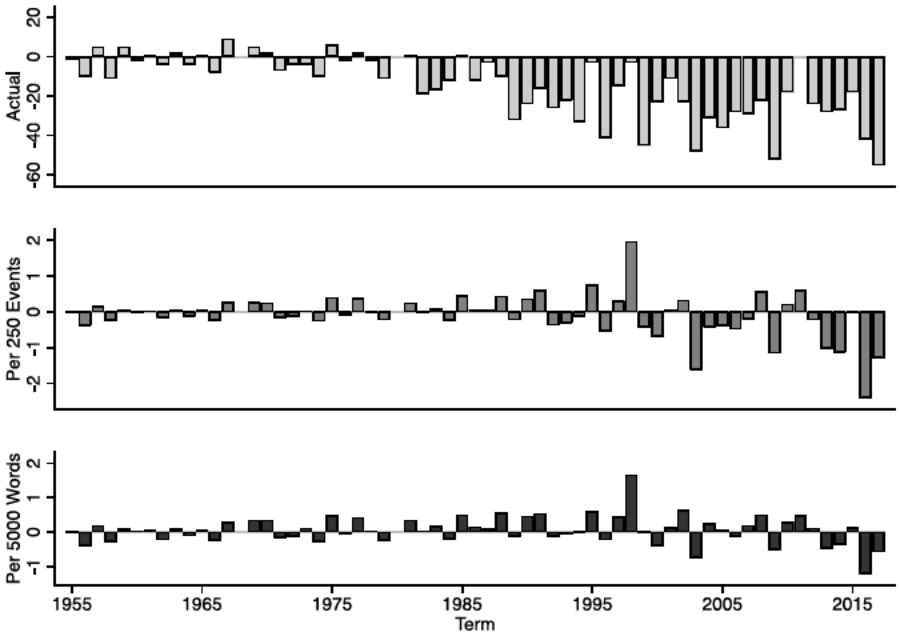
For the Justices to the left and right of zero on the top half of the figure, the numbers are very small—there is no meaningful difference between those who favor one side versus the other. If the top half of the table was our only result, we would conclude there was no bias for friend or foe. However, the bottom half of the table is far different: approximately half of the Justices use courtroom humor significantly more often during the time of their foes than during that of their friends. Strikingly, the five Justices who joke a little more in the time of their friends are all Justices from the earlier era. In fact, every single Justice in the top half of the table, where there is little difference, are all from the earlier era. With once again the sole exception of Justice Frankfurter, every Justice appearing in the bottom half of the table, meaning they joke significantly more during the time of their foes, is from the modern era. This agreement difference is an almost perfect form of differentiation between the two eras of the Court.

Note also that even within the modern era, the Justices who most often inspire laughter—what Wexler would call the "funniest Justices"—are in fact the most biased in their use of humor. Justices Breyer, Souter, Scalia, and Kagan were four of the seven "funniest" Justices in Figure 2 above, and they are the four most biased Justices in terms of the agreement differential. Not all of the so-called funniest Justices are at the very top of the bias rankings, but all lie near the top—for instance, Chief Justice Roberts and Justice Gorsuch are third and fourth, respectively, in overall laughs and are sixth and ninth, respectively, in the laughter bias ranking. The only real exception is Justice Frankfurter, who drops from fifth in overall laughs to twelfth in bias, but of course he is the only Justice ranking high on the laughter ratings who is from the previous era, suggesting once again that things have changed, and that laughter in the courtroom really is different in the modern era.

Next, Figure 7 explores the agree/disagree differential in aggregate for the Court over time. We assess this in three different

ways to show how the mode of analysis alters the apparent effect. The first graph shows the agree/disagree differential in raw numbers—it essentially aggregates the previous figure for the Court as a whole. The second graph shows the same results normalized per 250 speech events, and the third graph shows the results normalized per five thousand words. Negative numbers, that is, bars below the zero line, reflect when the Justices tend to use courtroom humor more against advocates they disagree with. That is, Figure 7 is still not looking at how the Court rules as a whole—which we do in the next section—but rather whether the Court as a whole shows the tendency that individual Justices in the bottom half of the figure above exemplify.

FIGURE 7: JUSTICE LAUGHTER OVER TIME, DIFFERENCE IN AGREE/DISAGREE WITH ADVOCATES, MEASURED IN THREE WAYS



If all else was even, and the two sides of each argument were treated equally, the bars on each of the three graphs above would be at the zero line. Instead, what we see is a stark difference in the first graph: the raw figures show a clear trend in the second half of our study period in favor of Justices resorting to humor more often during the time of their foes. But the results are more mixed in the two proportional measures. These measures normalize laughter by some measure of how active the Justice was during oral argument, either by

speech episodes or by words. What do these different results tell us? Figure 7 shows that Justices do in fact use laughter overwhelmingly against their foes as a descriptive matter. But the proportional results indicate that once other attributes of advocacy have been accounted for, it is hard to say whether laughter is an independent sign of judicial advocacy, or simply associated with the disagreement gap in terms of words spoken or speech events that we have identified previously.[192] That is, Justices clearly show favoritism in their use of humor in the modern era, but most of that effect is captured by looking at how active the Justices are in general.

We also explored the relationship between Justice laughter and agreement using multivariate logistic regression. Specifically, we tested the relationship in a series of regressions specifying Justice laughter as the dependent variable and agreement, number of words spoken, Term, political salience, and legal salience as the main independent or causal variables. In the main regression, there is no statistically significant effect for agreement. The dummy variable for agreement in our main regression is significant at the 0.10 level, well outside the conventional threshold for statistical significance in a study like this.[193] Repeating the same analysis, but limited to the post-1995 era, we find that agreement is significant at the 0.05 level and makes Justice laughter less likely (that is, the odds ratio is less than one). However, the explanatory power of this model is very weak to the point that it is unconvincing.[194]

The regression analysis and the graphical analysis are consistent. Both suggest that when the Justices engage in courtroom humor, they do so out of disagreement with the advocate who is speaking. However, the predictive value of laughter is only as an alternative to words spoken or speech events: laughter gives us no significant *additional* information in terms of agreement. This is entirely consistent with our hypothesis of courtroom humor as an act of dominance or a signal of opposition, but it leaves room for the alternative theory that the Justices make more jests at advocates they disagree with, but only because they spend more time speaking to them in the first place. Put another way, while we can predict who a given Justice would favor based on who is the butt of his or her jokes,

192. Jacobi & Sag, *supra* note 18; Jacobi & Sag, *supra* note 20.

193. *See infra* Statistical Appendix, Model 1.

194. *See infra* Statistical Appendix, Model 2. The explanatory power of a model is estimated by the Pseudo R-squared value, which ranges from zero to one. We always expected the explanatory power of a regression model investigating a rare event such as laughter to be low, but the Pseudo R-squared value for Model 2 is actually zero.

we could have ascertained that same information from examining who the Justice spoke more to, and laughter tells us little new in addition to that.

In sum, the data is consistent with the view that courtroom humor is itself a form of judicial advocacy, or is at least a byproduct of that advocacy; it is entirely inconsistent with the equalization thesis. In terms of *when* laughter became a form of advocacy used mostly against one's foes, we can see from the same Figure that in raw numbers, there was no meaningful difference prior to around 1980. From 1955 to 1985, there is a disagreement gap in laughter in absolute terms, but the number is vanishingly small at an average of -2.8 episodes of laughter per Term. In the period between 1986 and 1995, the disagreement gap increases to an average of -18.1 episodes per Term. And from 1996 to 2017, it increases again to an average of -28.1 episodes per Term. Once again, this is consistent with our previous findings on judicial advocacy and oral argument: that the increase has been quite marked since 1995. The fact that the disagreement gap increased significantly in the mid-1980s, and then again in the mid-1990s, strongly suggests that the use of courtroom humor by the Justices is part and parcel of judicial advocacy and not an idiosyncratic phenomenon linked to the personality of a particular Justice.

B. Laughter as a Sign of Advocate Weakness

Here we conduct similar analysis directed at the associated question of the relationship between the use of courtroom humor by the Justices and whether an advocate is winning or losing the argument. Put another way, is the advocate subject to the Justices' jokes more likely to be one who the Court as a whole disfavors in the ultimate decision? Investigating this question gives us case-specific insight into judicial laughter as a signal of the advocate's weakness. As we saw in Section I.B, the fact that the advocate's argument is not going so well is the punchline of many of the Justices' jokes. This can be as explicit as the many versions of "how would you like to lose?"[195] At other times, the laugh comes from the Justice pointing out the weakness of the argument, with the implication being a likely loss. One such example is Justice Kennedy saying to an advocate, "Your -- your whole argument gives me intellectual

195. *See* sources cited *supra* note 98 and accompanying text.

whiplash . . . [LAUGHTER],"[196] or when the state was attempting to defend denial of same-sex marriage rights and Justice Ginsburg said that they were advocating "two kinds of marriage, the full marriage, and then this sort of skim milk marriage. [LAUGHTER]."[197] Figure 8 confirms our hypothesis that these examples are representative—that laughter often comes at the expense of a losing advocate. Like Figure 7 above, it illustrates the difference in Justice laughter depending on an attribute of the advocate, but in this case, the attribute we focus on is whether the advocate ultimately wins or loses. Like Figure 7 above, these values are normalized on a per argument basis.

We see a similar pattern to the agree/disagree difference in that there is an overwhelmingly large effect of Justices making jokes during the time of losing advocates. Furthermore, the win/lose differential follows a similar pattern to agree/disagree, in that there are a small handful of Justices who lie on the positive side of zero, indicating that they use courtroom humor more during the time of winning advocates, but with the exception of Justice Stevens, these effects are very small; they are dwarfed in comparison to the quite large effects shown by the Justices in the bottom half of the scale, who significantly favor making jokes during the time of losing advocates. This obvious difference between Justice Stevens and the rest of the modern Court fits with his reputation for politeness: as we have shown elsewhere, Justice Stevens was exceptionally polite for a Justice on the modern Court, the Justice most often to use traditionally polite language, such as "May I ask?" or "Can I ask?"[198] This may be idiosyncratic or may represent a distinct Midwestern style.[199] In addition to the unusual Justice Stevens, there are three Justices for whom the win/lose difference sums to exactly zero: Chief Justice Burger, Justice Clark, and Justice Harlan were precisely evenhanded in this sense.

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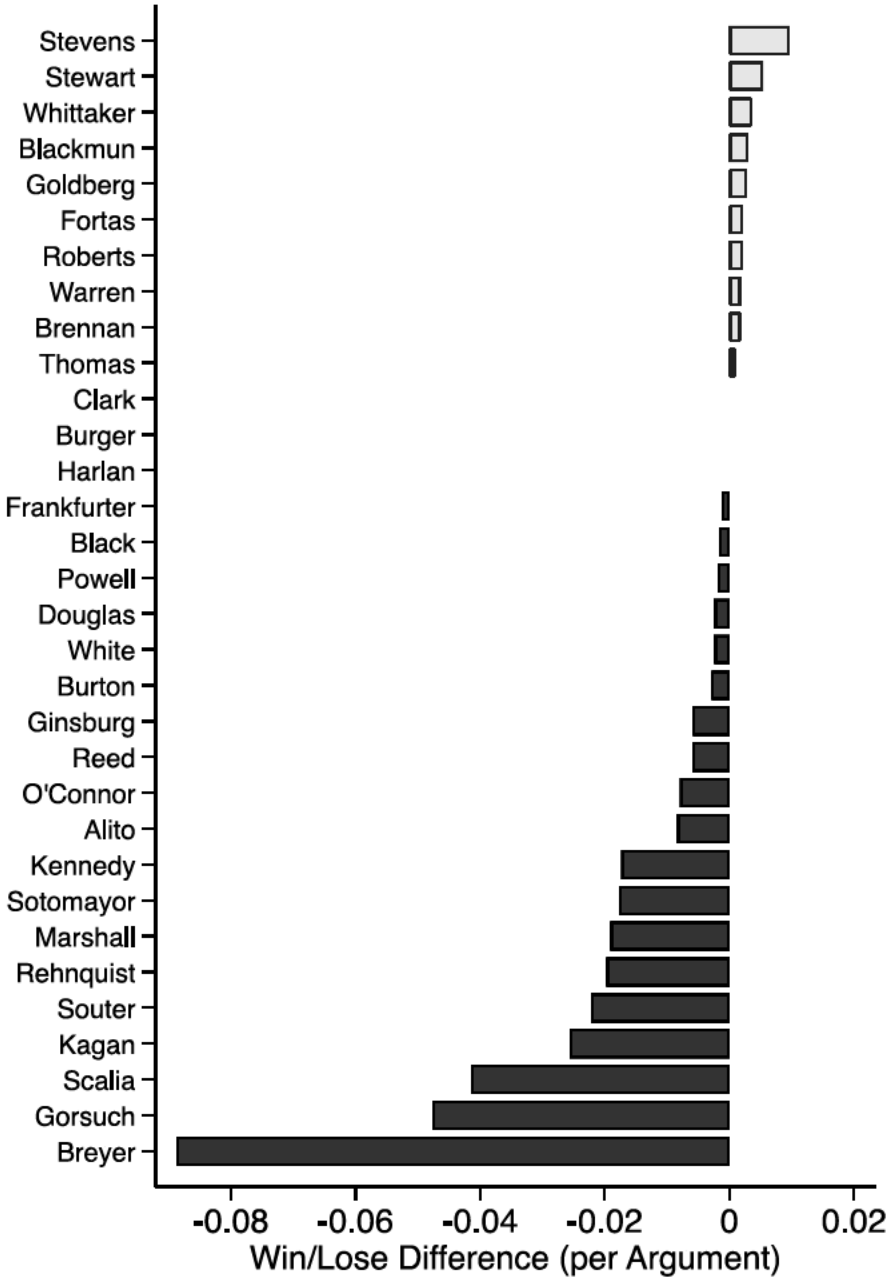
196. Transcript of Oral Argument at 55, BG Group PLC v. Argentina, 572 U.S. 25 (2013) (No. 12-138).

197. Transcript of Oral Argument at 71, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307).

198. Tonja Jacobi & Matthew Sag, *Politeness and Formality in Supreme Court Oral Arguments*, SCOTUS OA (Aug. 27, 2018), https://scotusoa.com/category/politeness/ [https://perma.cc/7R4D-2JHN] (showing "Justice Stevens has the highest level [since 1955] of using traditionally polite language, primarily by utilizing the polite preliminary phrases 'May I ask?' or 'Can I ask?' "). Justice Kagan is the Justice most likely to use less traditional forms of politeness, particularly the formalism of naming the advocate before asking a question. *Id.*

199. Matt Sundquist, *Justice John Paul Stevens From the Bench: Arguments, Questions, and Dissents*, SCOTUSBLOG (May 4, 2010, 6:00 PM), https://www.scotusblog.com/2010/05/justice-john-paul-stevens-from-the-bench-arguments-questions-and-dissents/ [https://perma.cc/99WK-A8R8] (noting that Justice Stevens is "polite, thoughtful, and humorous" during oral argument).

FIGURE 8: EACH JUSTICE'S TENDENCY TO INSPIRE LAUGHTER, BY DIFFERENCE IN ADVOCATE WIN/LOSE



Once again, the Justices lying in the top half of the scale, showing the small effect of joking more during winning advocates, are again overwhelmingly from the early Court era, with two exceptions. The first is that Justice Thomas measures almost imperceptibly on that side of the ledger, but as mentioned, his laughs are even rarer than his speech episodes, which are so few as to make his silence legendary,[200] and so this effect is insignificant. But of more significance, Chief Justice Roberts also appears in the top third of the scale. The size of his positive effect is very small, making him essentially neutral rather than biased against losing advocates. But neutrality makes Chief Justice Roberts remarkable: all of the other Justices of the modern era appear down the bottom of the scale, significantly favoring the use of jokes during the time of losing advocates. This may be because a large percentage of the Chief's jokes are about procedure and timekeeping due to his unique role as Chief Justice, so his seemingly unusual lack of bias in the modern era may be a result of his institutional role. All other Justices of the Roberts Court and later Rehnquist Court appear down the bottom half of the scale, showing bias against losing advocates. And again, the Justices with the biggest number of laughs are also those who are most biased against losing advocates: the top five are Justices Breyer, Scalia, Gorsuch, Kagan, and Souter, who all appear in the top seven in overall laughter.

Once again, then, this runs contrary to the equalization thesis—Justices overwhelmingly direct humor at advocates who are losing. Figure 9 shows that not only are "losers" more often the butt of Justices' jokes, but the effect has strong predictive power, even controlling for other aspects of advocacy.

200. Tonja Jacobi & Matthew Sag, *Supreme Court Justices Are Speaking up More Because They're Not Afraid to Be Partisan*, WASH. POST (Apr. 6, 2018), https://wapo.st/2GDoX2v [https://perma.cc/2NU9-5VLB] ("Thomas went 682 cases without uttering a single word between 2006 and 2016. When he eventually broke that silence, it made national news.").

FIGURE 9: JUSTICE LAUGHTER OVER TIME, DIFFERENCE IN ADVOCATE WIN/LOSE, MEASURED IN THREE WAYS

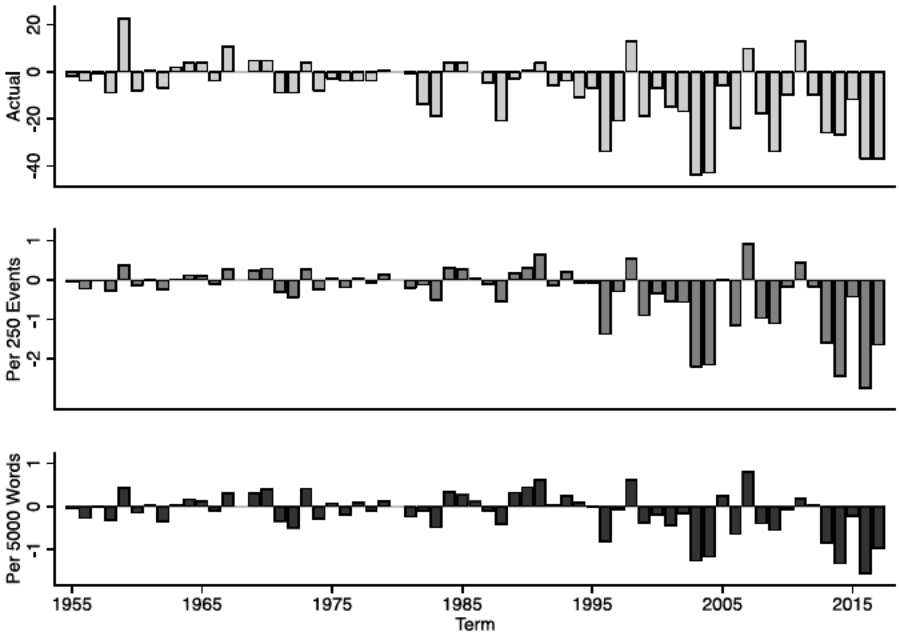


Figure 9 above takes the same approach as Figure 7 above, showing the win/lose differential using raw laughs, laughs normalized by 250 speech events, and laughs normalized per five thousand words. Using courtroom humor more during the time of the losing advocate is presented as negative, below the zero line. Once again, if the Justices' behavior was neutral, the win/loss ratio should be close to zero. If the behavior was random, it should add up to close to zero in spite of Term-to-Term fluctuation. Note that advocates here include the solicitor general and amici if their argument supporting one side is clear.

All three figures show a strong effect in favor of resorting to courtroom humor during the time of the losing advocate. The effect is particularly strong after 1995. We tested this relationship more formally in regression analysis specifying Justice laughter as the dependent variable and winner, number of words spoken, Term, political salience, and legal salience as the main dependent or causal variables. In this regression, the dummy variable indicating whether the advocate ultimately won the case, *Winner*, was significant at the

0.00 level with an odds ratio of 0.88. An odds ratio of less than one means that the event is less likely.[201] This analysis confirms the clear impression from Figure 9 that there is a meaningful bias in the direction of courtroom laughter against the losing advocate. The same regression also shows that there is a statistically significant effect for post-1985 and post-1995 incidences.

Since 1995, it has been very rare for the difference to be above zero—there were only three or four (depending on the measure) Terms during the Roberts Court in which there was not a tendency for the overall Court to make more jokes during the time of losing advocates. In contrast, the effect between 1985 and 1995 is much less clear. Overall, the fact that the Justices direct their courtroom humor much more towards advocates who are losing directly rebuts the equalization thesis. Moreover, the fact that this win/lose differential increased significantly in the post-1995 era is consistent with our earlier research linking increased judicial advocacy to political polarization, and this in turn reinforces our view that the Justices use courtroom humor deliberately as a tool of advocacy.

The data also shows there is new information to be gained from looking at the direction of laughter episodes. In contrast to the agree/disagree differential, which showed evidence that laughter is a tool of advocacy but provided no new information on top of that gleaned from other tools of advocacy, here we have significant additional predictive power from laughter. In terms of the win/lose differential, there is new information to be gained on who is likely to win or lose a case even when we have controlled for the number of words spoken or the speech episodes. Table 2 illustrates the effect, dividing the data into four eras that track the four stages of the Court's development.[202] Negative numbers are bolded for ease of reference.

201. *See infra* Statistical Appendix, Model 1.

202. In some cases, we were unable to match the speech event to the ultimate winner or loser of the case. This explains why the numbers in the Winning and Losing columns do not precisely match the Total column.

TABLE 2: JUSTICE LAUGHTER,
DIFFERENCE IN IF ADVOCATE WINS/LOSES, BY ERA

	Justice Laughter			Win/Lose Difference		
Era	Total	Winning	Losing	Actual	Per 250 Speech Events	Per 5,000 Words
1955–1969	26.60	12.27	11.27	1.00	0.01	0.01
1970–1985	49.75	22.25	25.81	**-3.56**	**-0.05**	**-0.03**
1986–1995	130.00	61.80	67.00	**-5.20**	0.05	0.15
1996–1917	159.59	69.68	88.09	**-18.41**	**-0.87**	**-0.42**

From 1970 to 1985, the results on all three measures are bolded to indicate they are negative—that is, they show the predictive bias—but the effect is very small. From 1985 to 1995, the effect is once again a small negative number in actual terms and is positive if we use the relative measures. But after 1995, the effects on all three measures are in the direction predicted, showing bias against losing advocates, and are substantially and statistically significant.[203] That means that in the era of political polarization, when the Justices are behaving more like advocates across various measures—from talking, to interrupting, to making comments rather than asking questions—the Justices are also using laughter against both advocates they personally disagree with and advocates who are losing the Court as a whole. In addition, in the latter aspect, laughter is not only a weapon of advocacy—it is a refined enough weapon that it can be used as a predictive tool, even controlling for other forms of advocacy, such as talking more often and at greater length.

This puts another nail in the coffin of the assertion that laughter is used as an equalizing tool at oral argument. The Justices are making fun of losing advocates, using their own weakness against them. If equalization means anything, it means the opposite of that. It is also interesting to think about the cause and effect here: the Justices are either making fun of the advocates' weakness or may actually be contributing to that weakness—that is, the use of

203. *See infra* Statistical Appendix, Models 1, 3, 4, and 5.

courtroom humor itself may highlight their weakness and make other Justices more likely to rule against them. It seems poetic that loss and laughter are forever entwined.

C. Advocate Experience and Inexperience

Now we turn to a different measure of weakness: advocate inexperience. Of course, an inexperienced advocate may not be weak in terms of quality, but their inexperience may at least contribute to the perception of weakness. We are interested here in whether advocates are treated differently when they are more or less experienced. First, we want to know whether the Justices use courtroom humor more during the time allotted for more inexperienced advocates. For this purpose and for the analysis that follows, we classify the advocates into four levels of experience: "novices," those arguing their first case before the Court, who make up the majority of advocates; "adepts," those repeat players who are by no means highly experienced but have argued between two and four cases, including the case at hand; "champions," whose experience ranges from five to ten cases; and "heroes," who have appeared at least eleven times.[204] These categories are not evenly distributed; there were 5,458 appearances by Novices in our data, 2,695 by Adepts, only 1,414 by Champions, and 6,626 by Heroes.

The results are clear. The Justices are significantly more likely to make the kind of comments that provoke the courtroom gallery into laughter while a Novice is speaking, and are significantly less likely to do so during the time of the advocates we classify as Heroes. Novice advocates experience judicial laughter at a rate of 0.55 episodes per appearance; that number drops to 0.41 and 0.45 for Adepts and Champions, respectively; and it drops precipitously to 0.19 for Heroes.[205] Regression analysis confirms the significance of the Novice category as a predictor of the use of courtroom humor by the Justices.[206]

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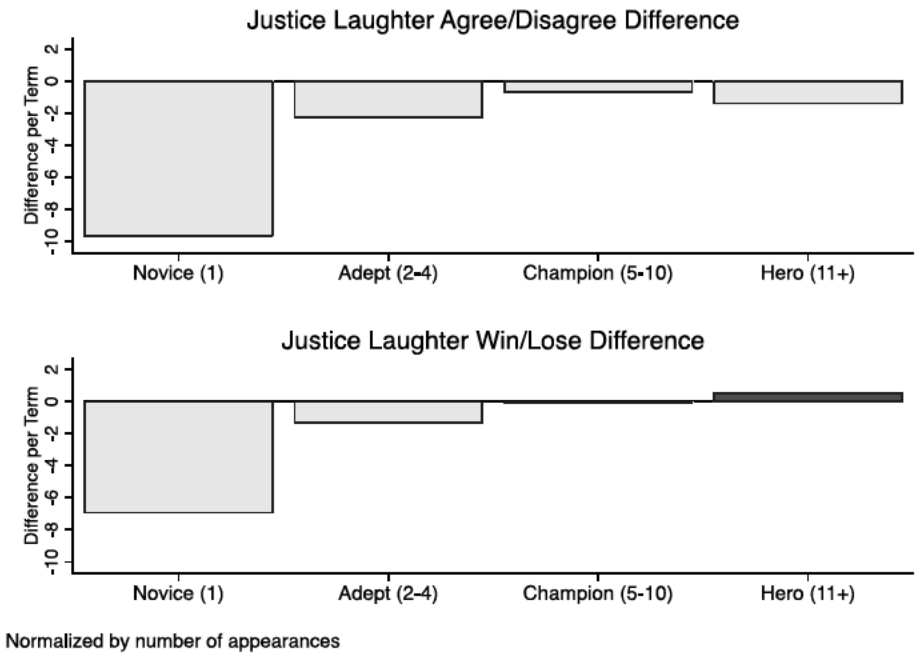
204. The average for this group was just over 33. The most experienced advocate in this cohort was Lawrence G. Wallace, who made his 138th appearance in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), *argued*, Nov. 12, 2002.

205. The differences between each category and the remaining categories are significant at the 0.01 level using a conventional t-test. The difference between the means for Adept and Champion is not statistically significant.

206. Unreported regressions confirm that experience group is highly statistically significant. In our main regression, reported at Model 1 in the Statistical Appendix, we include both Novice and Hero as explanatory variables for Justice laughter along with other explanatory variables already discussed. *See infra* Statistical Appendix, Model 1. In this estimation, Novice makes Jus-

These differences are just the tip of the iceberg. Further examination suggests that there is a significant interaction between experience level and the agree/disagree and win/lose differentials. Figure 10 shows the results in graphical form.

FIGURE 10: JUSTICE LAUGHTER, DIFFERENCE IN AGREE/DISAGREE AND WIN/LOSE, BY ADVOCATE EXPERIENCE



The top graph in Figure 10 shows the relationship between laughter caused by the Justices during an oral argument appearance and our agree/disagree differential, by our four categories of advocate experience. The lower graph shows the same, but looking at the win/lose differential. The numbers reflected in the figure are means of the Term averages of the relevant differentials. A cursory examination of Figure 10 suggests that it is Novice advocates who experience the biggest difference in terms of both the win/lose and the agree/disagree differentials. Graphically, the effect is almost perfectly as we hypothesized: the biggest difference in terms of both win/lose and

tice laughter more likely (i.e., the odds ratio is more than 1) and is significant at the 0.01 level, whereas there is no statistically significant effect for Hero.

agree/disagree is for Novice advocates. As noted above, advocates who have never argued a case before are the most likely to find the Justices making jokes at their expense, but more than that, those same advocates also see much higher associations between that laughter and their win/lose and agree/disagree differentials. The next largest effect is for Adepts; Champions are treated much like Adepts in terms of agree/disagree but face less bias in terms of win/lose, as expected; and Heroes not only face the smallest amount of bias on both measures, but for win/lose they actually rise above the zero line, meaning there is actually slightly more laughter when they are winning, though still less laughter when a Justice agrees with the advocate.

Interestingly, the clear picture on the graphs becomes a little muddy in regression analysis. When we added interaction terms to our main regression examining the potential causes of Justice laughter, we saw a significant result for the interaction between Novice and Winner, but not for Novice and Agreement. The odds ratio for the *Novice*Winner* interaction term is less than one, which implies that although being a Novice advocate makes Justice laughter more likely, being a winning Novice counteracts that effect.[207] Thus, although the graph suggests that Novices experience uneven treatment in terms of both the agree/disagree and win/lose differentials, the win/lose differential appears to be doing most of the work. None of this diminishes the more general finding that the burden of Justice laughter falls disproportionately upon the Novice advocates. The fact that this effect is compounded when those Novices are losing implies that laughter at the Court has a mean-spirited edge.

D. Assessing the "Funniest Justices" in Light of These Results

In this Part, we have shown that Justices are most likely to inspire laughter during the time allotted for advocates with whom they will ultimately disagree in the case at hand and when the advocate is losing. Both of these effects show that the Justices use courtroom humor as a weapon of advocacy. We have also shown that those effects are particularly stark for inexperienced advocates. We conclude that judicial laughter is certainly not a sign of an empathetic attempt to equalize a hierarchical system; rather, laughter is a blood sport at the Court.

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207. *See infra* Statistical Appendix, Model 3.

In the previous Part, we showed that laughter attributable to the Justices became much more common in Supreme Court oral arguments in the late 1980s. We confirmed that indeed, of all the Justices, Justice Scalia used courtroom humor the most, followed by Justice Breyer, Chief Justice Roberts, and Justice Gorsuch. But we also noted that it is the Justices who get the most laughs who tend to show the greatest bias in how their jokes are targeted. Taken together, then, what does it mean to win the title of the "funniest Justice"? In general, it means that these Justices are the most pointed advocates. As we discussed in Section I.B, Justice Breyer, and to a lesser extent Justice Kagan, are exceptional in being self-deprecating, but we have shown that the overall humor of the Court is pretty mean.

Justice Scalia is often lauded for being so funny, but if laughter is a weapon, that means that Justice Scalia is simply the most acerbic, and the most strategic at this particular type of advocacy. One response to this might be that perhaps Justice Scalia is just naturally funny, but testimony from his clerks belies this claim. A former Blackmun clerk attests that Justice Scalia tried hard to get laughs, describing him as "play[ing] to the crowd."[208] Another seemingly disagreed, saying "that is who he is" but then in the same interview acknowledged that Justice Scalia "understood sometimes humor makes the point clearly" and sought to use it in this way.[209] A number of others have acknowledged that Justice Scalia used humor out of anger,[210] and commentators have noted that most of his humor was sarcastic,[211] and was frequently bullying.[212] Justice Scalia, we argue, put the punch in punchline.

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208. *See* Liptak, *supra* note 29 (quoting Pamela S. Karlan).

209. Ross, *supra* note 30 (quoting John Duffy).

210. *Id.* (suggesting that while some of his humor was hard to predict, "there [were] certain issues sure to draw his ire").

211. Malphurs, *supra* note 58, at 2 (noting that in the 2015 Term, "Justice Scalia more often adopted a sarcastic approach, probably not a surprise to anyone").

212. Obviously this is a subjective view, but it is one that is widely held. *See, e.g.*, RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 66 (2018) (reporting the view of certain liberal Justices that "Scalia was a polarizing figure who used humor in a demeaning and condescending way, sometimes to punch down at lawyers at oral argument"); *see also* BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 433 (2014) (quoting veteran Court reporter Linda Greenhouse querying, "[W]hat does this smart, rhetorically gifted man think his bullying accomplishes?"); J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 292 (2017) (describing Justice Scalia's approach as "bullying and bombast, invective and attack"). *But see* Steven G. Calabresi, *Foreword: In Memory of Justice Antonin Scalia*, 50 LOY. L.A. L. REV. 165, 165, 168 (2017) (describing Justice Scalia as "a Platonic leader who was both a man of ideas and a man of action" and "what the ancient Greeks might have called a philosopher king" who displayed all the virtues of "Wisdom, Courage, Temperance, and Justice, as well as . . . Faith, Hope, and Love").

The point is not simply that Justice Scalia's humor was sometimes mean, but rather that this meanness is an essential part of his legacy. Justice Scalia was an important champion of the jurisprudential theories of textualism and originalism.[213] For him, these supposedly neutral and objective tools of legal analysis separated legal decisionmaking from the personality or political preferences of individual Justices. Yet Justice Scalia's behavior at oral argument was far from neutral, objective, or impersonal. As Richard Hasen reports in a recent study of Justice Scalia's legacy, *The Justice of Contradictions*, Justice Scalia's "demeaning and condescending" use of humor and his tendency to "punch down" from the Bench is part of what made Justice Scalia such a polarizing figure.[214] At oral argument, he constantly sought to inject his personality into the discussion, quite often in the form of sarcastic and snarky comments.[215] There is ample support for the view that Justice Scalia used humor as a deliberate strategy to dominate and disrupt advocates and his fellow Justices.[216] This assessment sits incongruously with Justice Scalia's claims of judicial neutrality. As Richard Hasen astutely observes, one of the great ironies of Justice Scalia's legacy is that he used his claim to impersonal objective legitimacy in highly personalized attacks on the legitimacy of his fellow Justices when they disagreed with him.[217]

The contrast between Justice Scalia and Justice Breyer is illuminating. Justices Scalia and Breyer were two of the most active Justices in oral argument during the time period of our study. Up until Justice Scalia's death, they were also the two Justices who made the greatest use of courtroom humor, and both were far more likely to

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213. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (describing the pros and cons of both originalism and nonoriginalism, and concluding that originalism is his preferred approach).

214. HASEN, *supra* note 212, at 66.

215. For example "Wow. Wow, that's -- I mean, that's my comment. [LAUGHTER]," Transcript of Oral Argument, *Shapiro*, *supra* note 86, at 37; "Gee, we ponder all the time, and we think we're being diligent. [LAUGHTER]," Transcript of Oral Argument, *Rodriguez*, *supra* note 93, at 16; "Oh, yeah, I'm sure that's what they all had in mind. I have no doubt of that. [LAUGHTER]," Transcript of Oral Argument, *MacLean*, *supra* note 87, at 48; "You're supposed to say 'yes, sir, good.' [LAUGHTER]," Transcript of Oral Argument, *Patchak*, *supra* note 102, at 36; and "It's the 'go away' principle of our jurisprudence, right? [LAUGHTER]," Transcript of Oral Argument, *Gen. Dynamics Corp.*, *supra* note 88, at 60.

216. *See* DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH 43 (2018) (observing that Scalia "often hogged" oral argument at the Supreme Court).

217. HASEN, *supra* note 212, at 174–75 ("The *raison d'etre* for his language-based tools of interpretation was to legitimize the Supreme Court's decisionmaking process. He saw himself remaking legal analysis to serve the greater good. But his attacks on fellow [J]ustices for not using his methodology served to delegitimize their decisions, and the Court's by extension.").

use that humor against advocates with whom they disagreed, and against advocates who were losing the argument. For all that, there are also significant differences between them. First, as discussed in Section I.B, Justice Breyer's humor is largely genial and self-deprecating, in contrast to Justice Scalia's sarcastic and biting approach. Second, and more importantly, Justice Breyer does not claim a judicial philosophy of impersonal objectivity. If Justice Breyer inserts himself into oral argument through humor, he is not being a hypocrite when he does so.

CONCLUSION

Laughter at Supreme Court oral arguments has been mostly misunderstood. Treating laughter in the courtroom as a lighthearted distraction that is random and meaningless fails to recognize that patterns can be identified, beyond who is "the funniest." Use of laughter is another form of strategic behavior by the Justices, like favoring comments over questions and interrupting. Courtroom humor is a form of advocacy, a mechanism by which one party can be preferred over another during an important part of the decisionmaking process of the Court. Likewise, claiming that laughter is an equalizing force at the Court is facially absurd—even reading or listening to one Term of arguments should make it clear that most jokes are at the expense of advocates, not an aid to them, and often take the form of "I am the judge, stay in your place." An imbalance of power between the Justices and the advocates may seem inevitable, but it is not inconsequential.[218] And when examined over decades at the Court, it becomes clear that this tendency is not simply a matter of tone: laughter is used strategically by the Justices to shape the process and, potentially, the outcome. Laughter incidents are exercises of control by Justices over their subordinates that are used strategically to favor preferred positions.

This helps us better understand another aspect of individual judicial behavior: the Justices use humor as a tool of rhetoric and advocacy and as an expression of power and dominance. Additionally, we can also observe the way the Court as a whole has changed over time. Episodes of laughter have increased over time, even accounting for the massive rise in Justices' dominance of argument time. Oral arguments have become more performative, and this change is

218. Barry Sullivan, *Just Listening: The Equal Hearing Principle and the Moral Life of Judges*, 48 LOY. U. CHI. L.J. 351, 357 (2016).

seemingly not driven by the selection process alone, since we observe changes in Justices' behavior after decades on the Court. Furthermore, laughter provides information to Court observers, making outcomes more predictable. Justices make jokes more during the time of the advocate they will individually rule against and against advocates whom they perceive (mostly correctly) are losing arguments. Consequently, considering the patterns that we have identified helps predict case outcomes before Justices have even voted.

STATISTICAL APPENDIX

	Model 1	**Model 2**	**Model 3**	**Model 4**	**Model 5**
Dependent Variable	*Justice Laughter*	*Justice Laughter*	*Justice Laughter*	*Justice Laughter per 5000 words*	*Advocate Laughter*
Agreement	1.06*	0.93**		1.06*	1.04
Winner	0.87***			0.87***	1.00
Novice	1.09***		1.14***	1.09***	0.94
Hero	0.99		0.98	0.99	1.18***
Novice*Agreement			1.02		
Novice*Winner			0.91**		
Term	1.02***	1.00	1.03***	1.02***	1.02***
Words	1.00	1.00	1.00	1.00	1.00***
Salience (NYT)	1.37***	1.21***	1.37***	1.37***	1.45***
Salience (CQ)	1.13**	1.05	1.13**	1.13**	1.23***
Post 1985	2.84***		2.83***	2.84***	1.49***
Post 1995	1.11**		1.10**	1.11**	0.85**
Constant	0.00***	0.22	0.00***	0.00***	0.00***
Observations	729,973	190,529	729,973	729,973	709,486
R-Squared	0.065	0.000	0.065	0.065	0.016

Logistic regression using robust standard errors reporting odds ratios. Odds ratios of more (less) than one indicate that the dependent variable is (more) less likely. Statistical significance is indicated as follows: * p<0.1, ** p<0.05, *** p<0.01.