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Oral Argument Tactics on the Supreme Court Bench: A Comparative Analysis of Verbal Tools Used by Justices Sotomayor, Kagan, and Gorsuch

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ABSTRACT

Oral argument scholars like Adam Feldman have categorized the Supreme Court justices'
behavior during oral argument using the approach-based method, labeling each as *one-sided*,
even-handed, or *restrained*. This approach is too narrowly constructed. Scholars sometimes
categorize justices in terms of the tools they use, which include *questions*, *hypotheticals,
declarations, interruptions, tone of voice*, and *silence* (Feldman 2018a). Neither of these methods
alone produce a nuanced analysis of each justice's actions during an individual case or across a
Term. As the Court's composition and dynamics are continuously changing, scholarship on oral
argument needs to adapt to become more effective in capturing the dynamics on the bench.
Accordingly, this thesis builds upon other scholarship by analyzing the content of vocalizations
executed by Justices Sotomayor, Kagan, and Gorsuch during the Court's 2017 Term oral
arguments in order to classify and better understand each justice's overall style during oral
argument. It seeks to fill the scholarly void on oral argument, particularly by crafting an analysis
at the individual-justice level and at a comparative level to understand the Court's motivations as
an institution. This research attempts to surpass the limitations of isolated statistical analysis
through its content-based approach and advocates methodological change.

CHAPTER ONE

INTRODUCTION

A. Scholarship on Oral Argument

In the mid-1990s, scholarship on oral argument before the U.S. Supreme Court began to take shape, consisting of practical performance advice for new advocates. First-time attorneys struggled with the conversational nature of oral argument before the Court. Additionally, the time restriction of thirty minutes per side while being interrupted by the justices poses a unique challenge (Black, Johnson, and Wedeking 2012, 12). By the late 1990s, some scholars turned their attention to the actions and vocalizations of the justices during oral argument (e.g., Epstein, Lee, and Knight). The term *vocalization* is used here to signify that justices often have a purpose behind speaking, i.e., a set goal behind the actual words and the delivery.

Scholars were fascinated to discover the influence each justice could have during the conversation-style exchanges (Black, Johnson, and Wedeking 2012, 11). Some justices clearly enter the courtroom with their minds made up, yet others listen to the exchanges of their colleagues before solidifying their positions. Malphurs notes how different schools of scholars disagree about how much a justice can influence the voting outcomes, while also agreeing that oral argument is a unique process where each justice plays an important role (Malphurs 2013, 56). The justices' approaches during oral argument can clash when vocal justices have opposing ideologies, as when conservative justices like Samuel Alito and Antonin Scalia square off against liberal justices like Stephen Breyer and Sonia Sotomayor (Feldman 2017a). Justice Ruth Bader Ginsburg has noted that the Roberts Court has become a "hot bench" because the justices ask

more questions than did justices on prior Courts; the justices' questioning rate has increased by 24%, while the attorneys' argument time decreased by 46% (Sullivan and Canty 2015, 1005).

Scholars like Feldman have categorized approaches to oral argument as *one-sided*, *even-handed*, and *restrained*. The restrained approach differs from the term "judicial restraint." A restrained approach is specific to oral argument and describes a justice who is almost a bystander to other active justices. While using the restrained approach justices can still speak, but their word count will be low and not feature a discernable stance. A few scholars also categorize justices by recognizing the tools they use, which include *questions*, *hypotheticals, declarations, interruptions, tone of voice*, and *silence* (Feldman 2018a). If each tool was analyzed, and patterns of behavior are recognized, scholars could categorize justices accurately. Scholars categorize justices without fully analyzing tool use by the justices and variations in their tendencies (e.g., Feldman; Malphurs 2013). Essentially, scholars have created specific molds they expect each justice to fit into instead of adapting categories to fit potential variations in behavior.

Current scholarship on the justices' approaches during oral argument largely ends with publications from 2015, so the contributions of second year Justice Neil Gorsuch or newly arrived Justice Brett Kavanaugh need scholarly attention. Scholarship on the Court's 2015, 2016, and 2017 Terms is limited to the frequency with which the justices spoke and broad speech categorization rather than analysis of the content and strategic tools the justices used when speaking during oral argument (Prakash 2018). Scholarship on oral argument approaches, where tool usage is statistically evaluated, ends with analysis from the 2007 Term, like the 2015 study by Phillips and Carter. This is problematic because it leaves Justices Sotomayor and Kagan unanalyzed as well. It is surprising that scholars have not more thoroughly analyzed the Court's oral argument approaches since 2008, given that four justices have joined the bench. Four new

justices could greatly reshape the interactions and dynamics on the bench during oral argument. One recently published study empirically examines over 9000 instances of laughter during oral argument with the purpose of determining its role on the Court from 1955 through the 2016 Term. Given that this study only focuses on laughter, it is not fair to say that it accurately reflects the Terms since 2007 and sufficiently updates the literature (Jacobi and Sag 2019, 1). Jacobi and Sag head in a better direction, yet their work should be expanded to include the additional tools.

As the Court itself is continuously changing, scholarship on oral argument needs to adapt to become more effective in capturing the dynamics on the bench. Some scholars have taken the initiative to note any limitations of their own work and that of their peers: "In particular, we know of no study conducted to date that has examined various dynamics of the Justices' on-bench interactions," and several "additional Justices [remain] whose behavior at oral arguments has gone largely unanalyzed – not to mention even more Justices over time" (Black, Johnson, and Wedeking 2009, 336). Since oral argument is characterized as a dialogue among the justices where the attorney is merely an intermediary, then arguably there is much to be gained by looking at the content within the justices' vocalizations in addition to the frequency of speaking. Current scholarship does not adequately go beyond the realm of acknowledging the existence of vocalizations, let alone analyze the content of what the justices are saying as a way of understanding their behavior or predicting their votes (e.g., Feldman 2018b).

Accordingly, this thesis builds upon other scholarship by analyzing the content of vocalizations executed by Sotomayor, Kagan, and Gorsuch during the 2017 Term's oral arguments in order to classify and better understand each justice's approach to oral argument. It seeks to fill the scholarly void on oral argument, particularly by crafting an analysis at the individual-justice level and at a comparative level to understand the Court's motivations as an

institution. This research attempts to surpass the limitations of isolated statistical analysis through its content-based approach.

B. Organization of Thesis and Basic Findings

This thesis analyzes the approaches of Sotomayor, Kagan, and Gorsuch to oral argument through close reading of the 2017 Term's oral argument transcripts, use of scholarship on justices' behavioral tendencies during oral argument, and listening to oral argument recordings. It builds upon previous scholars' understandings of oral argument by testing whether Gorsuch's first full Term is consistent with the typical behavioral patterns of justices and establishes whether Sotomayor and Kagan demonstrate a consistent approach throughout the Term. Yet the thesis goes beyond many other scholars' methodologies by using tool and content analysis before determining the approaches of Sotomayor, Kagan, or Gorsuch. Chapter Two explains the tool-based methodology for analysis and how justices' life experiences shape their style during oral argument. Chapters Three, Four, and Five examine each justice's use of the three categories of oral argument tools–interrogative, leading, and personality–as a means of explaining the styles of action executed during oral argument. Chapter Six addresses how justices can use their roles during oral argument to build voting coalitions by using the tools for persuasion. Both Sotomayor and Kagan actively attempt to persuade their colleagues through their actions during oral argument, while Gorsuch's persuasive ability is more of a side effect of his aggressive style.

The thesis finds that none of the justices fit into a single category of approach to oral argument. They are all dynamic participants whose styles defy the approach categorization model, which grasps only a portion of a justice's behavior during oral argument. Sotomayor is an active participant during nearly every argument, especially through her repetitive questions and

frequent interruptions. She uses a one-sided approach both to damage argument from an attorney she opposes and to assist a position she agrees with, which makes predicting her stance from this approach alone difficult. But, when analyzing her tool use, Sotomayor's stance often becomes obvious. She also uses an even-handed approach wherein she is highly active toward both attorneys. Primarily, Sotomayor uses a series of interruptions followed by declarations when using the even-handed approach to force both attorneys to explain their positions clearly.

Kagan's purpose of promoting clarity appears in her combined one-sided and even-handed style. Some may classify her as having a restrained approach, but this is simply because her word count tends to be smaller than that of the other justices. Her succinct speech obscures her activeness when statistical analysis alone is used. Her one-sided approach features clarifying questions and declarations along with interruptions of attorneys with whom she disagrees. Though promoting clarity is often a neutral task, looking into the content of Kagan's tool use reveals her bias. Her tone is frequently blunt and forward, which contributes to her concise phrasing. Kagan often steers the conversation in helpful directions by requesting that the attorneys provide additional information to explain their points further or by interrupting a dialogue that she considers less important.

Because Gorsuch uses questions and interruptions in a one-sided approach, tone in specific cases or when triggered by another person's actions, and silence in a sizable portion of arguments, his approach to oral argument is a hybrid. Gorsuch is predictably one-sided in his approach when he enters an argument with a predetermined vote, manifested by near or complete silence to one side and a highly interrogative approach to the side he ultimately votes against. In most cases, he uses tone and interruptions to react to situations; in other cases, he practices even-handedness, and he occasionally remains silent. His personality contributes to his hybrid

approach and tool usage and becomes apparent when he uses tone in response to a situation. His tone is blunt and sarcastic to attorneys but shifts to deference and collegiality toward colleagues.

The change in the Court's composition with the addition of Sotomayor, Kagan, Gorsuch, and Kavanaugh has provided ample opportunity for scholars to conduct content-based research, but nuanced scholarship is missing. Understanding the contributions of these four new justices can help us to understand better how individual members can affect the flow of oral arguments and written opinions, which is essential for true comprehension of the evolving institution. Oral argument in turn is an understudied factor that can promote understanding of the Court's written opinions. Detailed study of the individual justice's behaviors during oral argument can assist in understanding the distinctions ultimately involved in the personalities, motivations, positions, and eventual votes of each justice. This allows for a deeper understanding of the Court as an institution and humanizes its justices by showing how the variability in their thoughts and actions can produce different voting outcomes. In short, this thesis deepens scholarly understanding of the Roberts Court and its decisions by focusing on the contributions of Sotomayor, Kagan, and Gorsuch to the Court's decision making process.

CHAPTER TWO

ORAL ARGUMENT RESEARCH METHODOLOGY

Since using a content-oriented tool-based approach is unique to this analysis, this chapter explains the methodology of the thesis's substantive chapters. It also provides the justifications for creating a methodology that deviates from published research. Moreover, each tool of oral argument is explained along with the most common purposes behind using each tool. The oral argument tools can be categorized as interrogative, leading, or personality based. Despite the broader purposes of the tool categories, each of the tools retain individual variation that specifically justifies its use under particular circumstances. Next, statistical analysis and tool-based analysis are juxtaposed to demonstrate the reliability behind analyzing the content of vocalizations rather than the number of times justices act. Scholarship by prominent authors is critiqued based on this information. Finally, a justice's "style" to oral argument is introduced as a concept, which allows for more nuanced analysis of a justice's actions during oral argument. A style allows for personal background, tool use, and personality to be factors in identifying a justice's predominant approach to oral argument.

A. Oral Argument Approaches and Strategy

Content is often not a factor when crafting statistically oriented scholarship on Supreme Court oral argument. Some justices with unique tendencies, such as Justices Thomas, have been analyzed, while others are only vaguely described by scholars or are entirely ignored (Black, Johnson, and Wedeking 2009). Moreover, common tendencies exhibited by the justices are not grouped into named categories by most scholars, though this thesis has included four general

categorical names from SCOTUSblog scholar Feldman. Feldman identifies individual tendencies and variation within each category. Variation within the one-sided approach produces two categories that overlap in method but differ in purpose. Justices can be one-sided toward the side they disagree with to create legal holes in the case, point out any flaws, or cause the attorney to make concessions. Similarly, justices can vocalize more toward the side they agree with and eventually support. The one-sided approach seeks to explore the strengths of a side and potentially declare one's position to other justices (Feldman 2018a). The third approach is even-handed activism, accomplished through participating nearly equally throughout both arguments. Finally, some justices approach oral arguments by being reserved through little or no vocalization (Feldman 2018a).

Content analysis benefits scholars' overall analyses of oral argument because the tools used by justices are often indicative of the approach being used or their overall style. Identifying when justices use questions, hypotheticals, declarations, interruptions, tone, and silence during oral argument can help scholars identify the categories justices fit within, potentially allowing them to synthesize a justice's past actions and predict the justice's actions during future oral argument sessions. Identifying these tools and quantifying the number of times each was used helped identify Sotomayor's, Kagan's, and Gorsuch's dominant approaches to oral argument. Knowing this information allows for further extrapolation about the ultimate styles each justice pursues in order to persuade colleagues within the realm of strategic behavior.

B. Tools Used During Oral Argument

The first tool, posing *questions*, is often used by justices. Posing questions is a valuable tool for the justices since questions often make attorneys deviate from their prepared statements.

Questions occur when a justice asks the attorney (or fellow justices) to explore a legal issue or important aspect of the case more deeply. Often the purpose of questions is to direct conversation toward certain aspects of the case that the justice deems important, or a justice signals specific interests to other justices (Black, Johnson, and Wedeking 2012, 46–47). Justices often ask a mix of simple and complex questions. If each type is directed at a different attorney, the justice may be revealing a one-sided approach. But if a justice asks numerous questions of each side, it may simply be indicative of an overall interrogative approach to oral argument.

A subset of questions is the creation of a *hypothetical*, a tool used by justices to make attorneys and the other justices reflect on the ramifications of a case. In hypotheticals, a justice presents a scenario to test the legal limits of an attorney's argument and the legal issues in the case, or to connect the case at hand with other relevant cases or situations. Justices often use oral arguments "to get a better sense of the outer limits of an advocate's position," so hypotheticals assist in pushing the issues in a case beyond the confines of the specific set of facts (Frederick 2003, 6). Hypotheticals, like questions, point toward an interrogative approach and can be directed at one or both sides. Together, questions and hypotheticals comprise the majority of comments by justices in recent Supreme Court Terms.

In another vein, *interruptions* represent an effort by justices to disrupt the flow of conversation. Interruptions can occur in a broader sense than the other tools because interruptions can preface questions, hypotheticals, and declarations or they can be embodied with tone. Interruptions have become common during oral argument. Interruptions can occur when a justice speaks immediately after another justice's remark, without time in between for the attorney to respond; a justice speaks over another justice or the attorney; or one justice is about to speak but another justice becomes vocal instead (Black, Johnson, and Wedeking 2012, 20–

21). One purpose for using interruptions is to redirect the conversation toward another topic, likely one the justice deems more important. This is another example of strategic intervention, which is exemplified by many justices.

Likewise, *declarations* attempt to shape the dialogue during oral arguments by having the attorneys produce one of two responses. Justices either lead attorneys to give a detailed explanation of a concept they want more information about, or make a statement intended to produce a rash response from the attorney. The difference in outcome suggests a difference in the justice's purpose. A justice may employ the first type to assist an attorney whose position is favored or to subvert an opposing attorney's position, while the second type of declaration is targeted at those the justice disagrees with. The ambiguity in the first type of declaration affords creative applications whereas the second type elicits wholly negative applications.

Besides interrogative and leading tools, the justices also use *tone of voice* to provide insight about their attitudes toward the case to their colleagues and the attorney speaking. Tone can be reflective of a justice's personality. Tone typically falls into three categories: *rude*, *humorous*, and *collegial*. Rudeness often occurs when justices exploit their authoritative position in the courtroom in comparison with the attorney. During oral argument justices are learned conversationalists, whereas the attorney is a mediator in the conversation. (Sullivan and Canty 2015, 1075). Humor is used by justices to appeal to other justices, to maintain dominance during a line of questioning, to show mercy to a battered attorney, and to break tension (Black, Johnson, and Wedeking 2012, 111). Humor can range from lighthearted jests to, inquiries, mediating comments, and sarcasm. Collegiality reflects the level of normal verbal decorum in the courtroom. When justices feel passionately about a topic of jurisprudence or are experts in an area, collegiality may be less prominent. Typically, new justices experience a large amount of

collegiality from their fellow justices and exhibit the same attitude (Black, Johnson, and Wedeking 2012, 113). Tone of voice is a nuance used by justices often, as is common in daily life. Tone may be difficult to discern from reading oral argument transcripts but is more easily uncovered by listening to oral argument recordings.

Finally, *silence* is an infrequently used tool among the justices because many believe that oral argument should be an active dialogue. Few modern justices have exemplified a reserved approach to the extent of using silence. Yet silence is used at times during a one-sided approach when dialogue is extremely targeted. When used, silence can send a powerful message to the attorneys and other justices. Silence is most extremely demonstrated by Justice Thomas, who remained silent for a decade on the bench until he asked questions in *Voisine v. U.S.* on February 29, 2016 (Liptak 2016). Justice Thomas has spoken only once since that case, on March 20, 2019, in *Flowers v. Mississippi* (Liptak 2019).

C. Using Tools Instead of Statistical Analysis

Word count is an unpredictive measure of activity and style when analyzing justices' behavior during oral argument (e.g., Feldman 2018b). As a methodology, it can lead to misunderstanding of a justice's actions during a specific argument or of the justice's overall style. Because scholars who use word count as a measurement do not break down the number into an individual count per specific argument, a justice's actions during each party's argument, potential amicus argument, and rebuttal are not considered as separate entities. This is problematic as it only presents a snapshot of the justice's actual activity. For instance, when Gorsuch uses his one-sided approach, he may have spoken all of the words to just one attorney. Using word count as a method of analysis would not indicate this tendency. The way scholars

analyze word count does not allow for the level of nuance necessary for understanding a justice's style of oral argument, let alone the types of and purposes behind the tools implemented.

Analyzing word count also hinders comparison of justices' styles or levels of tool-based activity during a particular argument. Focusing on the percentage of words spoken is misleading, as seen through the combined totals for the Court's 2017 Term. Justice Breyer has the largest total word count with 21.70%, followed by Sotomayor at 16.96%, Kagan at 15.03%, Roberts at 11.95%, Alito at 10.89%, Gorsuch at 9.75%, Ginsburg at 7.96%, and Kennedy at 5.16%. Thomas was silent during the 2017 Term (Feldman 2018b). When comparing Sotomayor with Kagan, the total number of words spoken suggests similarity. However, this measurement overlooks that Sotomayor is far more active than Kagan, given that she uses more tools, specifically conversation-shaping tools like questions and interruptions. The measurement becomes distorted due to Kagan's verbosity during her questions and declarations. Given the perceived differences between these justices, the method used by many scholars becomes suspect.

The comparative results are even more misleading when scholars combine word count with total number of words spoken for their analyses. Overall, Gorsuch's participation during oral argument is sporadic when compared with other justices (Black, Johnson, and Wedeking 2009). During the 2017 Term, his number of words per argument ranged from 0 in several cases to a high of 1053 in *Sessions v. Dimaya* (2018) (Feldman 2018b). The sheer variability in his number of words per argument undercuts the utility of statistical analysis as an analytical method. When a justice has a lower word count during a particular case, scholars like Feldman and Malphurs automatically classify the approach as reserved, but Gorsuch's lower word count arguments do not always reflect actions associated with the restrained approach. In *Hamer v. Neighborhood Housing Serv. of Chicago* (2018) Gorsuch spoke 165 words, yet every

vocalization includes a question. Likewise, in *National Association of Manufacturers. v. Department of Defense* (2018) regardless of his 131-word count, Gorsuch pushes counsel for the respondent when he fails to address a direct question posed by Alito. See below for a breakdown of Gorsuch's total word count in each orally argued case. (For visual continuity, Feldman omitted cases where Gorsuch remained silent.)

Figure 1

Words Per Argument (Gorsuch)
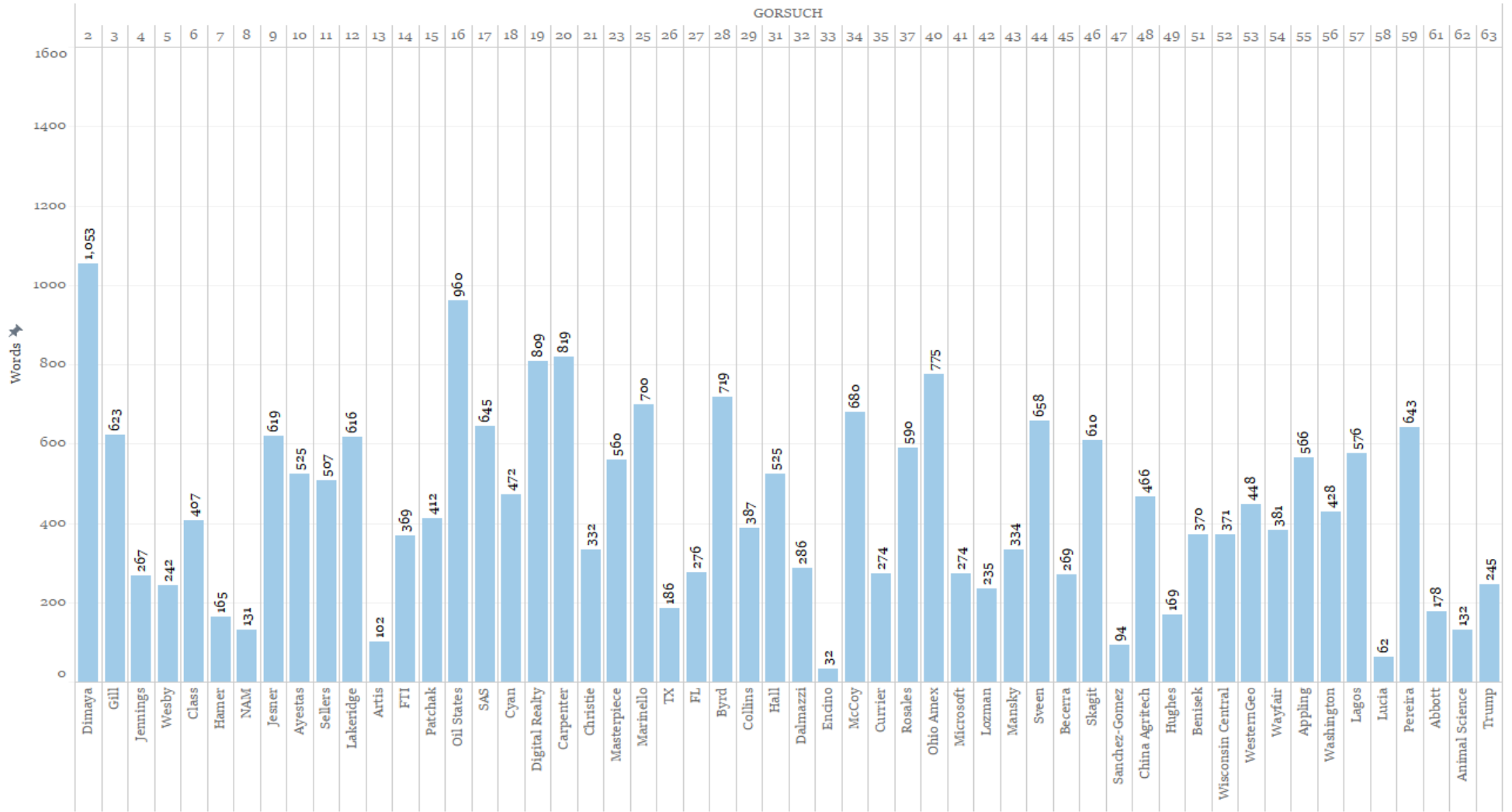
Source: Feldman 2018b

When Gorsuch's word counts are combined to create his total number of words spoken, he ranks very low among the justices. Yet he dominated oral argument during several cases and quite frequently during argument given by the attorney he eventually voted against. These statistic-based measurements do not accurately depict Gorsuch's real contributions during oral argument.

Just below the figure in his article, Feldman noted "this Term's arguments helped give us a much better sense of how Justice Gorsuch fits into the oral argument schematic as a justice that may participate little if at all in certain arguments and dominate the discussion in others," indicating Gorsuch's sporadic participation pattern (Feldman 2018b). Feldman deduced that neither case topic nor specific lawyer arguing succeeded as a predictive measure for Gorsuch's participation. Yet Feldman's next statistical analysis using the total participation does not convey this case-by-case variation. Regardless of the number of words Gorsuch uses per argument, his targeted use of tools is apparent when scholars use proper methodologies.

D. Critique of Scholarship and Recommendations

Although SCOTUSblog's annual "Stat Pack" provides useful data from the Court's Term, the 2018 edition does not fully illuminate the justices' contributions during oral argument. One measure used by SCOTUSblog displays the "frequency as first questioner," meaning the number of times a justice asks the first question during an oral argument (to the petitioner) (SCOTUSblog 2018, 32). However, Gorsuch's heavily one-sided style of questioning nullifies the utility of this measure when Gorsuch focuses on the respondent. If the statistic considered 'frequency as first questioner' for both the petitioner and the respondent, Gorsuch would rise in the rankings. When siding with the respondent, he often exhibited his tendency of leading questions by asking the first question to steer the conversation. In *Lamar, Archer & Cofrin, LLP*

v. Appling (2018), a case asking the Court to interpret a section of the Bankruptcy Code, Gorsuch

spoke 90 seconds into Mr. Hughes's argument. Gorsuch referred to a hypothetical posed to

counsel for the petitioner. He redirected the hypothetical to fit the discussion of financial

language more clearly (Transcript of Oral Argument 2018i, 33).

```
16              JUSTICE GORSUCH:  Well, let's -- let's
17      take Mr. Garre's example of the Harvard
18      Business School graduate.  I graduated from
19      Harvard Business School.  And someone might
20      reasonably rely on that and take it to be
21      material and significant.  But does it relate
22      to financial condition, overall financial
23      condition?  Doesn't that term have to mean
24      something?
```

Gorsuch's redirection and clarifying questions allowed Mr. Hughes to make a fuller and more

relevant contribution to the dialogue after some initial purposeful prodding (Transcript of Oral

Argument 2018i, 33–34).

```
25              MR. HUGHES:  So a few things about
1       that, Your Honor.  First, to directly answer
2       your question, we think that the clearest test
3       is to ask:  Does the statement describe what
4       would be a line item on one's balance sheet or
5       income statement?
```

Here it seems that Gorsuch attempted to make the respondent's position clear immediately and

gain support for the side he supported. Without looking at office correspondence, conference

notes, and draft opinions, it is impossible to know whether Gorsuch actually persuaded his

colleagues. However, the Court did rule unanimously for Appling. This is just one example of

the six instances where Gorsuch asked the first question of the respondent, showing the limited

utility of SCOTUSblog's measurement. Sotomayor also poses the first question in 28 of the

cases, 17 of which had her first questions being posed only to either attorney for an amici

argument or the respondent. SCOTUSblog's method missed Sotomayor's significant

contribution, and an important pattern that is indicative of her aggressive style.

Furthermore, SCOTUSblog's "Stat Pack" has a measurement of the "average number of

questions per argument" that misses the true number of questions the justices pose.

SCOTUSblog defines "questions" as "simply the number of times a given justice's name appears

in the argument transcript in capital letters," which can produce inaccurate results (SCOTUSblog

2018, 32). Gorsuch's number of questions is especially misrepresented because he frequently

poses multiple questions in rapid succession within the same vocalization. In *Minnesota Voters*

Alliance v. Mansky (2018), a case questioning whether a Minnesota statute prohibiting political

apparel at voting booths violated the free speech clause of the First amendment, Gorsuch spoke

to the petitioner quickly by asking four questions within a single vocalization. The questions

were posed in quick succession in an effort to force Mr. Breemer to respond to all of them at

once (Transcript of Oral Argument 2018L, 8–9).

```
18              JUSTICE GORSUCH:
                        ...
22              Is it an act to put on a button or is
23      it an omission to not speak about what's on the
24      button?  A T-shirt, you say, is passive.  What
25      if it were instead a sign on my head, you know,
1       flashing lights?  Is that active or is that
2       passive?  How are we supposed to police the
3       line you're -- you're suggesting?
```

Even with flawed statistics,[1] Gorsuch is ranked as the fourth highest questioner, coming in at

15.4 questions per argument (SCOTUSblog 2018, 32). Meanwhile, his total number of words

places him fifth among the justices (Feldman 2018b). The discrepancy is explained by his

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[1] While reading the transcripts, it is not difficult to count each question independently given that it creates more
accurate results. SCOTUSblog should adapt their process to produce more accurate results since Justice Gorsuch is
not alone in the tactic of posing more than one question per vocalization, even if counting each question individually
would take longer.

interrogative approach and his rapid-fire questioning at times. Gorsuch repeatedly uses the phrase "help me out with that" throughout the cases in the 2017 Term, but he especially uses the phrase in his lower word count cases like *United States v. Microsoft Corporation* (2018) (Transcript of Oral Argument 2018q, 18). This phrase likely does not get classified as a question or declaration when computer programs analyze transcripts, but it should because when Gorsuch makes the statement he asks the attorney to provide clarification.

E. Influence of Personal Experience on Oral Argument "Style"

Based on the information uncovered in this study of the Court's transcripts from the 2017 Term, that Justices Sotomayor, Kagan, and Gorsuch utilize multiple approaches to oral argument, a separate designation of a justice's "style" is warranted. By "*style*," this thesis refers to a justice's unique use of a combination of oral argument approaches as well as the ways the justice implements the tools of oral argument. A justice's style is the methodology used to achieve the overarching goal of influencing colleagues' voting behavior, ideally to vote in line with the justice's viewpoint on the case at hand. Each justice's style is influenced by the individual's personality and professional background, as both factors influence the justice's overall outlook on how oral argument should function. Moreover, style can evolve over time as justices settle into their roles on the Supreme Court and as the Court's dynamics evolve via retirements and new confirmations. The purpose of this thesis is not to fit justices into a predefined framework, which many scholars have done by rigidly categorizing justices into a single approach (e.g. Feldman; Sullivan and Canty 2015). Rather, this work strives to address the variability in each justice's individual style through acknowledging the humanity of justices.

Certainly, a justice's personality and life experiences play a role in tool use during oral argument and thus influences the justice's overall style.

Sotomayor's experience as a prosecutor for five years coupled with her two decades of judicial experience makes her a pugnacious, reactive adversary while on the bench. She "skipped the shy period of settling into the job and began to fire questions during oral arguments immediately," quickly rising to the top of the rankings as one of the most active justices during oral argument (Oyez, "Sonia Sotomayor"). Her style is one of fierce activism, using a plethora of questions, hypotheticals, and interruptions. She makes use of one-sided and even-handed approaches, with vocalizations targeted at both attorneys. As the daughter of working-class parents, growing up in an impoverished area of the Bronx, Sotomayor's adolescence instilled the value of hard work, perseverance, and preparation (SCOTUSblog, "Biographies of the Justices"). These values allowed her to succeed academically and ascend to the country's highest court.

Sotomayor's unrelenting, prosecutorial attitude translates into a combination of detailed planning, concentrated listening, and adaptable behavior while on the bench. Sotomayor creates a list of issues she wants each attorney to address, listens to the concerns of her colleagues, and prods attorneys to address the concerns she shares with her colleagues. Accordingly, her plan is malleable to the actions of her colleagues. Her reactive nature taps into her experience as a Circuit Court judge, given that she is used to deliberating with colleagues to make the best rulings possible. She seems to monopolize oral argument at times, but the strategy is successful because it causes her colleagues to ponder the issues Sotomayor deems are most influential. When getting attorneys to address new topics or clarify their position, Sotomayor clearly relies on her experience as a prosecutor by crafting questions in a way that will produces a favorable answer. Sotomayor seems unrelenting as she strategically interrupts her colleagues and the

attorneys equally when they deviate from her agenda. Sotomayor's extensive trial and judicial experience clearly influences the way she approaches oral argument as a Supreme Court justice who uses tools in a strategic, reactive manner.

Kagan's experience in academia at the University of Chicago Law School and Harvard Law coupled with her ample trial experience obtained during her brief tenure as the first female solicitor general cause her style to be that of an avid clarifier. Her paramount mission during oral argument is to use the tools through a lens of obtaining clarity on all matters for herself and her colleagues, possibly as a homage to her academic roots. As the second youngest sitting justice, Kagan is frequently referred to as the justice most in touch with society and the sentiment of the youth in the nation. Particularly in cases involving technology and social issues, her personal input clarifies the issues at hand for many of the justices (SCOTUSblog, "Biographies of the Justices"). In the 2017 Term, Kagan readily interrupts attorneys to ask for a definition of a term they are using, to quote relevant statutes and posit a question, or to quote germane Supreme Court decisions and ask about the applicability of the decision. These repetitive actions share the purpose of gaining clarity about the attorney's position along with how the position, if victorious, would affect existing doctrine. Kagan's mission for information provides her with as much clarity as possible and also gives her colleagues a more reasoned basis for voting.

Kagan's contributions during oral argument may seem inconsequential in comparison with a robustly active justice like Sotomayor, but this mischaracterization overlooks the importance of her vocalizations when she speaks. Kagan's strategic language tends to be direct, so her word count is not indicative of her contribution during oral argument. Similarly, her vocalizations often seek clarification from the attorney in quick succession so her rapid-fire questions may get lost in the shuffle of quick exchanges. Nevertheless, Kagan's clarifying

questions often spark debate among the justices with many posing hypotheticals based on the cases Kagan quotes or the definitions for terms provided by attorneys.

Gorsuch has been revered as an originalist conservative judge for over a decade, with his interpretations solidly reflecting his outlook on the law and his style during oral argument depending greatly on whether he has a predefined position. As a Colorado native who moved to Washington, D.C., as a child, his uniquely conservative outlook was noticed by his peers as early as high school, indicating a lifelong ideological viewpoint (SCOTUSblog, "Biographies of the Justices"). Gorsuch's Circuit Court experience has exposed him to many judicial subjects, so he seems to plan out his responses to each attorney's argument based on the information available in the brief and his own experience with the issue at hand. Despite his loyalty to conservatism, Gorsuch should not be mischaracterized as a pure ideologue, given that he has not supported conservatives in all oral arguments. Rather than referring to Gorsuch as politically conservative, it is a fairer characterization to dub him as jurisprudentially conservative. This means that Gorsuch is more often than not in favor of finding an original meaning to an issue at hand in a case, rather than simply siding with modern conservative values.

Gorsuch was confirmed in April 2017, allowing him to participate in the last month of oral arguments during the 2016 Term. Feldman analyzed Gorsuch's participation in the last 13 oral arguments of the 2016 Term, allowing for preliminary style conclusions. Feldman's work compares the justices' participation rates, word count, and total times spoken during the 2016 Term both before and after Gorsuch's arrival. From his first argument in *Perry v. Merit System Protection Bd.* (2017)*,* Gorsuch asserted himself as an active questioner, trailing only Justices Alito and Ginsburg, who are considered frequent questioners. Gorsuch's proportion of questions to statements (~37%) was higher than that of that of Chief Justice Roberts and Justices Kennedy,

Breyer, Kagan, and Sotomayor. His proportion is indicative of an interrogative style to oral argument (Feldman 2017a).

Unlike Sotomayor, Gorsuch is a rigid planner, which causes his dominant use of the one-sided approach to become predictive of his eventual vote. Gorsuch rarely deviates from his predetermined agenda and also steers the dialogue between justices and the attorney to emphasize the flaws in the position he disagrees with. He readily fluctuates between a high level of questioning toward the side he opposes and remaining silent in agreement with the side he favors. Gorsuch's style during oral argument features elements from all of the approaches to oral argument; his style seems highly dependent on the initial plan he forms before oral argument commences. The 2017 Term includes cases that demonstrate variations on his style including a one-sided, even-handed, and restrained approach. Justices Sotomayor, Kagan, and Gorsuch's individual styles during oral argument seem to be directly influenced by both their life experiences and their professional repertoire, which makes analyzing their backgrounds an essential part of understanding their actions on the bench.

Having a tool-based approach fosters further understanding behind a justice's actions and the tools chosen. This approach should be supported in future research because it produces a more nuanced understanding of a justice's motivations, actions, and interactions during oral argument. This analysis attempts to break from the confines established by other scholars where justices are supposed to only fit into one mold (e.g. Feldman; Sullivan and Canty 2015). Instead, the thesis works to create individual styles for each justice that synthesize their varied approaches based on their behavior during the orally argued cases from the 2017 Term.

CHAPTER THREE

INTERROGATIVE TOOLS: QUESTIONS AND HYPOTHETICALS

This chapter analyzes Sotomayor, Kagan, and Gorsuch's individual use of questions and hypotheticals, questions and hypotheticals are paired together due to their inherently interrogative nature. The goal is to deduce why, when, and how each justice uses the interrogative tools of oral argument. The information obtained by comparing each justice's use of questions and hypotheticals, along with comparing the three approaches, provides preliminary indications of how variable the tools' usage can be.

<u>QUESTIONS</u>

Since asking questions is the most commonly used tool, discovering the extent to which Sotomayor, Kagan, and Gorsuch used questions, the types of questions they posed, and whether their actions followed a pattern commences the process of identifying each justice's style during oral argument.

A. Sotomayor's Questions

Sotomayor's use of questions defies the simplistic approach-based categorization because, as her most used tool, her questions are numerous in nearly every case. This makes it difficult to categorize her vocalizations during oral argument into one of the predefined scholarly approaches. Furthermore, the variation in question types makes her tool usage complex. Sotomayor has the most speaking turns on average per oral argument at 20.40, where easily two-thirds of her vocalizations contain questions. For reference, Breyer ranks second with 18.80 turns, Roberts third with 16.41 turns, Gorsuch fourth with 14.98 turns, and Kagan fifth with

12.44 turns on average (Feldman 2018b). Sotomayor also has an interesting tendency to speak

first during an attorney's oral argument by posing a question, but there seems to be a lack of

predictive ability or causality involved in this. This trend is found in 28 of the 62 orally argued

cases from the 2017 Term. There is neither a consistent voting pattern nor any other clear

indication of when Sotomayor will speak first during either counsel's oral argument, but the

tendency remains intriguing.

When posing questions, Sotomayor's experience as a prosecutor becomes obvious given

the frequency with which she asks a new question. Specifically, Sotomayor frequently asks back-

to-back questions before the first one feasibly could be answered. In *Byrd v. United States*

(2018), the Court addressed a continuous case regarding a circuit split over whether an unlisted

driver of a rental car has a reasonable expectation of privacy. In this case, Byrd was the unlisted

driver who allegedly consented to a search of the car where illegal items were found.

Sotomayor poses several questions in an exchange with Mr. Feign, counsel for respondent

United States (Transcript of Oral Argument 2018b, 34–35).

```
13              JUSTICE SOTOMAYOR:  Let's assume he
14      wasn't a criminal.  Let's assume it was the
15      renter's son, not the wife because there is an
16      exception for spouse in the contract.
17              Is that son in the same position as
18      Mr. Reed?
19              MR. FEIGIN:  I think as a matter of
20      law he would be.  Obviously, I think, as
21      Justice Kagan pointed out, the actions here
22      were even more unreasonable.  But the reason
23      why we would -
24              JUSTICE SOTOMAYOR:  I -- I don't
25      disagree with you, but I'm asking a question
1       which is:  Police can search a car when they
2       have probable cause, correct?
3               MR. FEIGIN:  Yes.
4               JUSTICE SOTOMAYOR:  And they're free
5       to do that of any car driven even by a licensed
6       driver, correct?
```

```
7              MR. FEIGIN:  Yes.
8              JUSTICE SOTOMAYOR:  Or a licensed
9      co-driver on a rental agreement.  So really the
10     issue here before us is when are the police
11     permitted to search without a warrant, without
12     probable cause?
```

The rapid succession of her questions cuts off Mr. Feign and then restricts him to one-word responses before another question is initiated. This tactic proves effective for limiting the interaction and explanation possible from counsel for the side she opposes. Sotomayor's pugnacious nature is evident, and her professional experience overwhelmingly influences this tactic, especially in cases where her approach is more one sided. Though, this tactic is also demonstrated in cases demonstrating a more even-handed approach toward the side she opposes. Therefore, her use of back-to-back questions transcends the approach-based categorization model as it is not featured in solely one category.

Despite her typically aggressive style while questioning counsel, Sotomayor is very collegial toward the other justices and even assists them during oral argument when their interests align. In *Texas v. New Mexico* (2018), the Court was asked to determine whether the United States government can intervene in an action involving a dispute over a compact between states. The question arose from disagreement over a compact concerning water resource transfers between Texas and New Mexico's access points on the Rio Grande. Kagan had posed two questions to Mr. Keller, the Solicitor General of Texas, which effectively went unanswered through Keller's purposeful misinterpretation of Kagan's question. When Kagan attempted to correct Keller's interpretation by rephrasing her question, Keller's noncommittal answer of "well potentially" effectively did not answer her question yet again (Transcript of Oral Argument 2018o, 28–29). Sotomayor reacted to the situation with her inquisitive nature and blunt demeanor by acknowledging Keller's blatant attempt not to answer the question posed.

Furthermore, Sotomayor poses Kagan's question again both because it has merit and aligns with

Sotomayor's own view on the case (Transcript of Oral Argument 2018o, 30).

```
 3              JUSTICE SOTOMAYOR:  I'm not sure
 4      you're answering Justice Kagan.  She's asked –
 5      go to the end of the litigation.  Where would
 6      the -- you and the U.S. differ?
 7              MR. KELLER:  Well, one issue -
 8              JUSTICE SOTOMAYOR:  In what -- what
 9      issues?  Are there issues in which there can be
10      a difference?
```

Sotomayor does not let Keller get away with his apparent disregard for decorum by all but

ignoring Kagan's questions. The circumstances around this exchange demonstrate Sotomayor's

collegiality and provides another example of her aggressive questioning style.

Sotomayor's scrutiny when questioning is not limited to a single approach or even used

solely toward counsel that she votes against. In *United States Bank National Association v.*

Village at Lakeridge, LLC (2018), Sotomayor grills counsel for respondent Village, Mr. Geyser,

within seconds of his argument starting. This is somewhat surprising because she goes on to vote

in favor of his position. Sotomayor begins by addressing an argument made by counsel for the

petitioner where he articulates a test for "closeness" of an individual to a corporation, used to

determine whether the person is classified as an insider. Insider status has several prohibitions

that would affect the outcome of the case for Mr. Rabkin, the individual in question, and the

company at issue, MBP Equity Partners (an affiliate of Village at Lakeridge, LLC). Sotomayor

then makes Geyser establish why the definitions at issue are not questions of law, as her instincts

are inclined to think (Transcript of Oral Argument 2017m, 32–33).

```
13              JUSTICE SOTOMAYOR:  I don't think he
14      is.  He articulated his test very simply.  He
15      wants the circuit court to say what the legal
16      standard is.  What does closeness mean?
                        ...
 2              It seems that that seems like pure
```

```
  3      questions of law to me.  And what he's saying
  4      is that's what the circuit court didn't do
  5      here.  It didn't define in any meaningful way
  6      what closeness means or what arm's length
  7      means.  Even as a Black's Law Dictionary
  8      definition or as a subsidiary definition, it
  9      didn't give any guidance.
 10              So why aren't -- why isn't that
 11      questions of law?
```

The dialogue here from Sotomayor is interesting because she immediately throws a difficult

issue at the attorney whose position she agrees with, raising questions about her strategy. One

can speculate that Sotomayor asked this question to steer the conversation. Another

interpretation is that Sotomayor wanted Mr. Geyser to address this contentious issue as a means

of persuading her colleagues to view the position favorably. In this example, the case yields a

unanimous opinion in favor of Village at Lakeridge, LLC. This raises the question of whether

the other justices were mostly decided on the case prior to oral argument or whether Sotomayor's

aggressive tactic and Geyser's successful response proved persuasive. Because Sotomayor's use

of questions is multifaceted, it is difficult to detail every purpose and type of question she

employs throughout the 2017 Term. It is important to keep this variation in mind and note the

aggressive nature that typically comes through in her questions, especially against an attorney.

B. Kagan's Questions

According to Feldman, Kagan is the lengthiest questioner (Feldman 2018b). However,

Kagan's succinct nature while using other tools balances out her impact during oral argument.

As Figure 2 below clearly indicates, Kagan's average words per question of 93.44 greatly

surpasses that of her colleagues, with Roberts in second at 79.93. Kagan's wordiness is often

ignored by scholars who focus on the number of utterances rather than the content (see scholars

in references). Because of this, Kagan is stereotypically categorized as a restrained justice

throughout oral argument. However, a closer look at the content of her utterances proves this claim false. Each of her utterances are true vocalizations containing both strategic purpose and dialogue moving tactics, showing another example of the tool-based approach's benefits.

Figure 1

Justices' Words Per Question
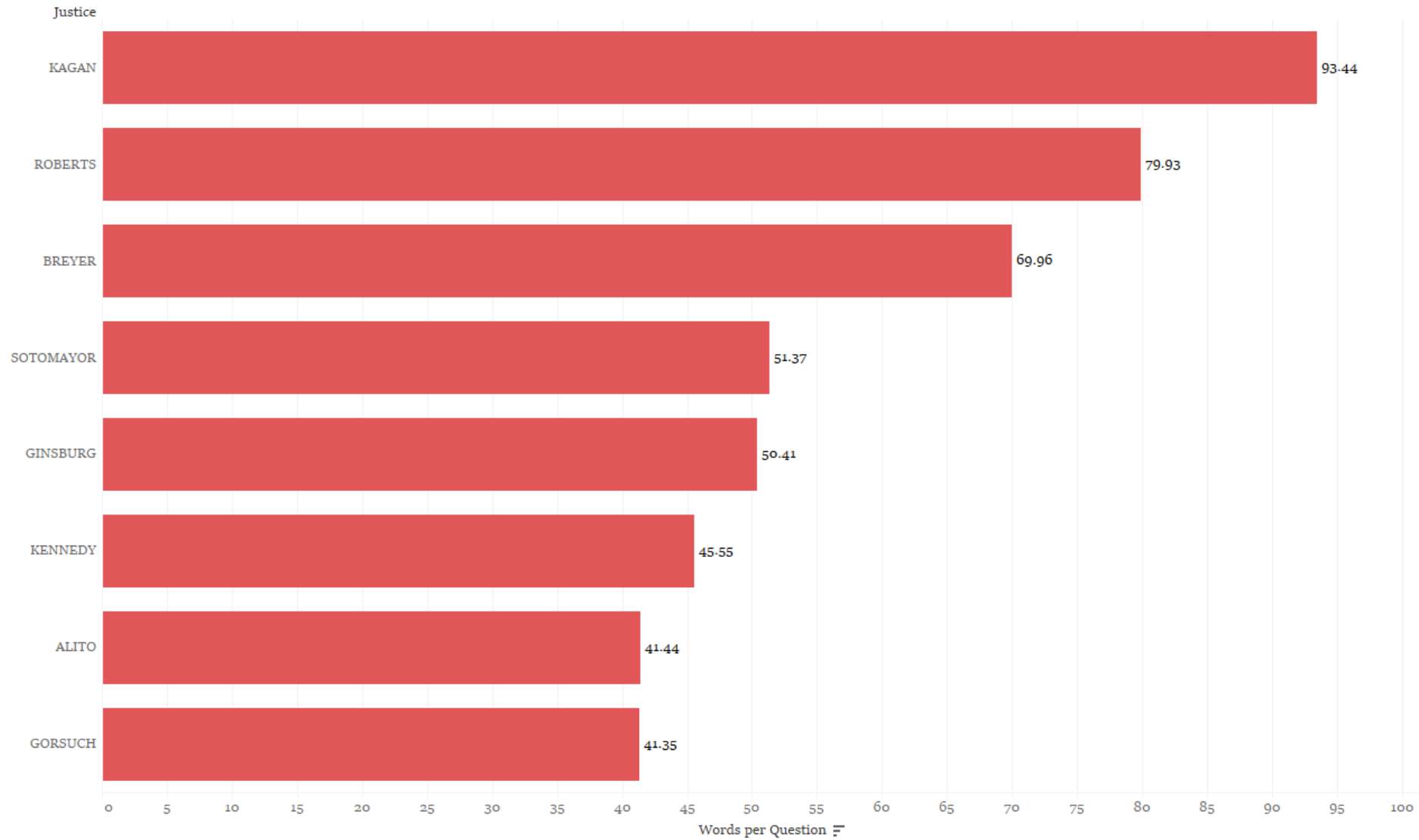
Source: Feldman 2018b

Though Kagan's style breaks down into the categories of one-sided, even-handed, and restrained, labeling the arguments does not successfully predict the types or quantity of questions she poses. Instead, Kagan's tendency to clarify topics comes to the forefront of her style when she uses questions. In fact, Kagan often directly quotes outside sources during oral argument, and nitpicks over the use of a single word from statutes or that the attorneys use. These sources include officially recognized documents, such as statutes and lower court opinions. In *Sessions v. Dimaya* (2018) the Immigration and Nationality Act's clause calling for the deportation of any non-citizen convicted of an aggravated felony, coined a "crime of violence" and defined as "any offense that involved the use or substantial risk of physical force against another person or property" (584 US __ (2018). The Court needed to determine whether the term "crime of violence" is unconstitutionally vague under the Fifth Amendment's Due Process Clause. Mr. Kneedler, Deputy Solicitor General and counsel representing Attorney General Sessions, gets caught up in an exchange with Justice Kagan about applying a past ruling's standard to the statute currently under review in the case at hand. The Johnson standard calls for determining how the application of a statute under both an "ordinary" and "type of risk" situation is not arbitrary (Transcript of Oral Argument 2017L, 5). To continue this line of questioning, Kagan begins to quote the Court's opinion from *Johnson v. United States* (2015) to ask whether the clause at issue in that case and the one here are substantially different in their effect (Transcript of Oral Argument 2017L, 6–7).

```
15          JUSTICE KAGAN:
18     ... And then there's,
19     you know, a clear holding sentence just a
20     little bit later on in the opinion where it
21     basically tells you exactly what two aspect
22     it's talking about.  It says, "by combining
23     indeterminacy about how to measure the risk
24     posed by a crime with indeterminacy about how
25     much risk it takes for the crime to qualify as
```

```
 1     a violent felony.  The residual clause produces
 2     more unpredictability and arbitrariness than
 3     the Due Process Clause authorized tolerates."
 4           So, you know, it says, Number 1,
 5     ordinary case analysis.  Number 2, combined
 6     with a fairly fuzzy standard as to the
 7     threshold level of risk.  And those were the
 8     two factors.
 9     And I guess the question is, are those
10     two factors any different here?
```

Kagan's use of another case's opinion captivates her colleagues, as several begin to ask

questions along the same lines. Her questions and decision to use another standard completely

redirected the flow of the conversation among the justices.

In *Manuel Ayestas v. Davis* (2018), a case asking the Court to settle disagreement among

Circuit Courts over a statute defining ineffective counsel, Kagan demonstrates her consciousness

for obtaining clarity by questioning the definition of "may" in the statute at issue. Shortly before

the quoted exchange, Sotomayor poses a difficult question. In response, as counsel for petitioner

Ayestas, Mr. Kovarsky attempted to answer while maintaining his client's position by providing

a noncommittal response about instances unrelated to his case that would answer Sotomayor's

concern. Immediately after Mr. Kovarsky's response, Kagan probes him about the purpose

behind the inclusion of "may" into the statute at issue to which Mr. Kovarsky responds favorably

(Transcript of Oral Argument 2017g, 14).

```
 1           JUSTICE KAGAN:  The things, the
 2     examples that you just gave to Sotomayor, is
 3     that why you think the word "may" is in the
 4     statute?  What is the effect of that word?
 5     What is it covering and what discretion does it
 6     allow?
 7           MR. KOVARSKY:  Those are examples -
 8     "may" is basically an escape hatch that allows
 9      a court to decline to award services under
10      extenuating circumstances like the
11      circumstances I just described.
```

Here, Kagan's question provides Kovarsky with an opportunity to recover from Sotomayor's question barrage and resume his advocacy for Ayestas. Kagan's question allows her to gain clarity of Kovarsky's stance and respite after the insufficient examples given to Sotomayor.

In a similar vein, Kagan nitpicks over the word "under" in *National Association of Manufacturers v. Department of Defense* (2018), a case about the Clean Water Act's provisions for judicial review when action by the Environmental Protection Agency (EPA) results in the issuance or denial of any permit or places restrictions on waste emissions or any other activities related to the waters. Specifically at issue is whether the Clean Water Act grants judicial review over the EPA's recent rule determining the scope of the United States' water space, i.e., the tangible waterways subject under the statute. Kagan questions respondent Ohio counsel General Murphy's use of the word from the statute at issue. Kagan suggests that interpretation of "under" has proven troublesome in past Supreme Court and when writing policies given that "under" can be inclusive or exclusive (Transcript of Oral Argument 2017m, 25–26).

```
12            JUSTICE KAGAN: Do you -- do you think
13      general -- I mean, does your interpretation
14      depend very much on a specific understanding of
15      the word "under"? In other words, you are
16      reading this to say something like under the
17      specific authority of Section 1311, 1312. But
18      "under" is a kind of nebulous word. It doesn't
19      say under the specific authority here. It just 20
20      says "under."
21         You might read "under" a little bit
22      differently. You might read "under" to say
23      something like limitations regulating actions
24      taken under Sections 1311, 1312, et cetera.
25      So why should we read "under" your
1       way, rather than in some other way?
2             MR. MURPHY: Yes, because I think you
3       -- "under" is absolutely -- the Court has said
4       it's a chameleon...
```

Even in this instance where Kagan is only quoting one word from the statute at issue, her vocalization is long-winded and compels Murphy and the justices to consider the multitude of

implications Murphy's interpretation of "under" would have. Different definitions of the word could change the Act's meaning, potentially altering the Court's eventual opinion in the case.

Though some of Kagan's questions include quoting sources, Kagan also demonstrates her clarifying nature through more straightforward questions. In *Masterpiece Cakeshop Limited v. Colorado Civil Rights Commission* (2018), questioning whether the Colorado statute prohibiting discrimination against gay people in purchasing products and services had to be applied neutrally with regard to religion, Kagan launched a series of straightforward questions to continue discussion about the definition of artist according to the plaintiff. Counsel for plaintiff Masterpiece, Ms. Waggoner, handled the rapid-fire questions semi-successfully while defending her client's firm and narrow definition of artist (Transcript of Oral Argument 2017i, 12).

```
 4              JUSTICE KAGAN:  So the jeweler?
 5              MS. WAGGONER:  It would depend on the
 6       context as all free-speech cases depend on.
 7       What is the jeweler asked to do?
 8              JUSTICE KAGAN:  The hairstylist?
 9              MS. WAGGONER:  Absolutely not.
10       There's no expression or protected speech in
11       1that kind of context, but what it would -
12              JUSTICE KAGAN:  Why is there no speech
13       in -- in creating a wonderful hairdo?
14              MS. WAGGONER:  Well, it may be
15       artistic, it may be creative, but what the
16       Court asks when there's -
17              JUSTICE KAGAN:  The makeup artist?
18              MS. WAGGONER:  No.  What the Court
19       would ask -
20              JUSTICE KAGAN:  It's called an artist.
21       It's the makeup artist.
22            (Laughter.)
```

Kagan attempts to make Ms. Waggoner concede on one of her examples, but counsel for the plaintiff does not deviate from the narrowly crafted definition that benefits her client's interest. Kagan's use of questions varies depending on the particular purpose she sets, yet most of her questions fit within the parameters of her style as a clarifier.

C. Gorsuch's Questions

Because Gorsuch's style easily breaks into the three approach categories, the subsequent tool analysis sections will follow an approach-based organization. While using his one-sided approach, Gorsuch tended to direct insistent clarifying questions and challenging extrapolation questions to the side he opposes, somewhat easier leading questions to the side he favors, and hypotheticals to both sides. Yet these generalizations are not absolute. *McCoy v. Louisiana* (2018) raised the question: "does a criminal defendant's Sixth Amendment right to assistance of counsel apply if defense counsel concedes the defendant's guilt over the defendant's express objection?" During oral argument, the justices heatedly debated the intentions behind McCoy's public defender's actions and explored numerous hypotheticals about similar variations on the case. Gorsuch's comments demonstrate his tendency to disagree with the petitioner via loaded questions and leading questions to the respondent. Gorsuch interrupts petitioner's counsel, Mr. Waxman, as he attempts to answer a question from Breyer (Transcript of Oral Argument 2018k, 14). Then, Gorsuch aggressively questions Mr. Waxman without allowing adequate time to respond (Transcript of Oral Argument 2018k, 14–15). The use of hypotheticals and extrapolations in this exchange characterizes Gorsuch's one-sided approach.

```
24              MR. WAXMAN:  So --
25              JUSTICE GORSUCH:  -- why -- why
1     doesn't it go down to that level?  That's one
2     axis.
3              MR. WAXMAN:  The --
4              JUSTICE GORSUCH:  The other axis would
5     be you say it's -- the lawyer can't admit the
6     element.  But what if the lawyer casts doubt on
7     the element?
                        ...
15              So we have ambiguity on both these
16    axes.  Where would we draw the lines?
```

Gorsuch takes a noticeably different approach with Ms. Murrill, counsel for the State of

Louisiana as respondent, by asking her leading questions. Gorsuch tries to lead her into

discussion of another topic within the case not brought up by Mr. Waxman. The exchange begins

with a clarifying question by Breyer, and then Gorsuch interrupts Ms. Murrill's response to pose

leading questions, with explanation of his purpose (Transcript of Oral Argument 2018k, 48–49).

```
13          JUSTICE BREYER:  What is your view, if
14    you can say it in a sentence or two?
15            MS. MURRILL:  That in a very narrow
16    class of death penalty cases, counsel may be
17    required to override the decision of his
18    client, if that's -- if -- if the client's
19    strategy is -- is futile and --
20            JUSTICE GORSUCH:
                          ...
3             So we'd still have prejudice prong, I
4     understand your arguments there, but why not on
5     deficient performance?  I would have thought
6     under the ethical rules, which I know are not
7     controlling here, that you -- you would have
8     had an argument for an ethical violation in
9     conceding your client's guilt.
```

Gorsuch again used helpful leading questions after Ms. Murrill struggled to answer a tag-teamed

question set and hypothetical from Ginsburg and Kagan that Gorsuch believed to be beyond the

case (Transcript of Oral Argument 2018k, 55).

```
9             JUSTICE GORSUCH:  Well, let's take
10    Justice Kagan's hypothetical then on its own
11    terms.  What would be the outcome in that case?
```

Ms. Murrill then responds, indicating her understanding of how the hypothetical would be

resolved. Gorsuch asks her two more leading questions because he was still dissatisfied with her

lack of clarity. With these questions, Gorsuch uses a specific term ("assistance of counsel") that

he wants Ms. Murrill to use in her response (Transcript of Oral Argument 2018k, 55–56).

```
19            JUSTICE GORSUCH:  Let's posit all of
20    that, that we have a competent, rational,
```

```
21      thoughtful individual who makes a calculated
22      decision autonomously, that that's the route he
23      or she wishes to go.
24          Is it -- can we even call it
25      assistance of counsel?  Is that what it is when
1       a lawyer overrides that person's wishes?
2           MS. MURRILL:  I -- I do believe it
3       still falls within assistance of counsel.  And
4       I -- I think that that is answered by the
5       deficiency prong and the norms of practice –
```

Here Gorsuch successfully gets Ms. Murrill to use assistance of counsel to describe the situation

at hand, a position which many justices rejected from Mr. Waxman's position for Mr. McCoy.

Gorsuch's attempt to assist Ms. Murrill was futile, as the six-member majority voted for McCoy,

and Gorsuch joined the three-member dissent.

In *SAS Institute Inc.* v. *Iancu* (2018), Gorsuch was fully one-sided, asking Mr. Bond (the

respondent's counsel) 12 questions and interrupting him repeatedly. *SAS Institute Inc. v. Iancu*

required the Court to determine whether the Patent Trial and Appeal Board must "address every

claim challenged in the petition" by SAS Institute, or whether addressing only a subset of claims

was permissible. Gorsuch remained silent while the petitioner's attorney made his argument. He

attempted to cause Matal's counsel, Mr. Bond, to concede key points regarding the issue at hand,

that he subsequently used in his majority opinion (Transcript of Oral Argument 2017k, 45–46).

```
25              JUSTICE GORSUCH:  So that's why
 1      there's a difference in language there, you
 2      agree?
 3              MR. BOND:  Right, exactly.  And we
 4      think that that underscores that what's left
 5      can include the fact –
```

Before Mr. Bond could expand upon this response and make his overall answer more specifically

in favor of his side, Gorsuch interjects to capitalize on his vague answer. The following lines

cause those favoring Incau's position to make an important concession regarding the

applicability of the language difference to the specific language within the specific statute at issue in the case (Transcript of Oral Argument 2017k, 46).

```
 6              JUSTICE GORSUCH:  Okay.  But -- but
 7     how then do we deal with the fact that in 314,
 8     we have all the -- all the PTO has to do is
 9     decide whether there is one non-frivolous
10     claim.  It's a thumbs-up or a thumbs-down
11     decision -
12              MR. BOND:  Because -
13              JUSTICE GORSUCH:   -- that's
14     anticipated there, not a -- not a
15     claim-by-claim examination.
```

In these examples, Gorsuch uses questions to focus Mr. Bond on the statute at issue rather than on another one that he cites to advance his client's claim. By doing so, Gorsuch shows the Court that Mr. Bond's argument struggles to prevail under the statute at issue's language.

Gorsuch's pattern of questioning in his even-handed cases is consistent; he posed equally tough or simple questions to both sides in the cases. The even-handed approach exhibited in 12 cases is not representative of Gorsuch's overall tactics during oral argument. In *Manuel Ayestas v. Davis* (2018), a case asking the Court to settle disagreement among Circuit Courts over a statute defining ineffective counsel, Gorsuch demonstrated even-handed questioning. Mr. Kovarsky, counsel for the petitioner, fell victim to Gorsuch's blunt questioning when he provided a vague answer, causing confusion because he seemed to equate two fundamentally different concepts. Gorsuch responded critically (Transcript of Oral Argument 2017g, 27).

```
 2              JUSTICE GORSUCH:  I've never heard of
 3     this animal before.  It's collateral, but it
 4     still merges to the final order?
```

Mr. Keller, counsel for the respondent, also provided a conflicting answer to the justices that Gorsuch attempted to flesh out through a critical question. Though this question displays more

kind framing in the beginning of his vocalization, Gorsuch's bluntness and purpose remain

consistent (Transcript of Oral Argument 2017g, 50).

```
14              JUSTICE GORSUCH:  But -- but -- that's
15      contacting the family members.  And I'll spot
16      you that.  But I'm talking about the mental
17      health issue.
18              How can -- how can there have been no
19      deficient performance holding if it withdrew
20      the basis of that holding in its -- in its
21      revised opinion?
```

In the examples, Gorsuch attempts to show the other justices mistakes the attorneys have made in

their previous answers. Furthermore, he attempts to make the attorneys clarify their arguments

pertaining to the confusing topics. From the transcript itself, Gorsuch does not have an apparent

bias in the case because he is equally critical of both attorneys in his questions.

HYPOTHETICALS

Hypotheticals are often considered a subset of questions, but this thesis has created a

separate section for the tool to highlight this author's understanding of hypotheticals as an

independent entity to explain the various purposes behind a justice's choice to create an entire

hypothetical situation rather than posing a simpler one-off question.

A. Sotomayor's Hypotheticals

Sotomayor creates hypotheticals quite frequently, most often with the purpose of pushing

or testing the extent of an attorney's position. In *Janus v. American Federation of State, County,*

and Municipal Employees (2018) Sotomayor poses five hypotheticals to Mr. Messenger, counsel

for Janus. Sotomayor fervently attempts to dissuade her colleagues from voting for Janus's

position. She launches into a discussion with Mr. Messenger about prior court rulings stating that

wage negotiations between employee and state as employer is not protected by the First

Amendment. Given these standards that "employment related issues" are outside the First

Amendment, Sotomayor poses an important question asking why there is a transformative nature

to a group of people coming together instead of acting as individuals (Transcript of Oral

Argument 2018h, 14–15). She demands to know why there is a difference when a union rather

than numerous individual workers goes to the state for negotiation. Sotomayor's hypothetical

then builds on this series of questions to illuminate her chief concern for her peers (Transcript of

Oral Argument 2018h, 16).

```
7           JUSTICE SOTOMAYOR:  So, if an employee
8      is disciplined by the state for some
9      malfeasance, that's an employment-related issue
10     not entitled to First Amendment protection?
11          MR. MESSENGER:  Oftentimes,
12          JUSTICE SOTOMAYOR:  Oftentimes.  If
13     employees come to the union -- come to the
14     state and want greater training, employment
15     issue, correct?
16          MR. MESSENGER:  Generally, yes.
```

Sotomayor raises a hypothetical to demonstrate her perceived disconnect between past precedent

and Mr. Messenger's case regarding the applicability of the First Amendment to worker's rights

when a union raises an issue. Using a hypothetical to draw out a flaw pushes Mr. Messenger's

position beyond the initial scope of the case as a test and allows for follow-up questions with

regard to the applicability of past precedent to both the hypothetical and the issue at hand. Her

attempt does not garner majority support, as the Court ultimately votes 5–4 for Janus.

In *Chavez-Meza v. United States* (2018), Sotomayor poses two hypotheticals with the aim

of getting Mr. Coberly, counsel for Chavez-Meza, to clarify the content and the extent of his

argument. The case revolves around an issue arising from a 2014 change in the sentencing

guidelines for drug offenses, where the minimum sentence for methamphetamine distribution

was decreased by 27 months. Chavez-Meza successfully appealed his minimum sentence based on the new guidelines but was not resentenced to the guideline's new minimum. Subsequently, he appealed his resentencing on the grounds that the district court did not explain why he was not granted a proportional sentence reduction to the new minimum sentence. Sotomayor poses her hypothetical to include a situation where a judge provides a reason for the disproportional reduction in Chavez-Meza's sentence, albeit a highly subjective reason. The hypothetical challenges Mr. Coberly to reaffirm his position for an appeal in an instance where the judge provides a potentially unsatisfactory reason but a reason behind the lack of equivocal sentencing nonetheless (Transcript of Oral Argument 2018c, 13).

```
 3          JUSTICE SOTOMAYOR:  Since the
 4      guidelines are advisory, what would make it
 5      improper for the judge to say, I don't care
 6      what the guidelines say, I think trafficking of
 7      this type is serious, and I think that 114
 8      months is the right amount for -- for the
 9      seriousness of the crime and the deterrence.
10       How could you appeal that?
```

Mr. Coberly concedes that in this hypothetical, launching a valid appeal is difficult since the district judge provided a concrete reason behind the disproportionate resentencing. The simple concession shows the limitation of his argument and precludes interpretation that the case is about a more topical issue than simply demanding an explanation from judges in such cases where there is no explanation for a judge's deviation from an established norm. Sotomayor's hypothetical had persuasive potential, but conversation quickly redirected, and the United States ultimately won with a 5–3 majority. Through these examples, Sotomayor showed herself to be an adaptable justice who alters her use of tools like hypotheticals to fit her needs of helping out a position or potentially damaging a position she disagrees with.

B. Kagan's Hypotheticals

Kagan's hypotheticals reinforce her clarifying nature, while her tone and phrasing often indicate her position on the case. In *Abbot v. Perez* (2018), a case considering several issues about redistricting in Texas, Kagan poses hypotheticals to both attorneys due to the complicated and competing interests. Kagan poses a particularly aggressive hypothetical to Mr. Keller, counsel for Governor of Texas George Abbot. Here, she asks Mr. Keller to ignore a central tenet of his argument when answering her hypothetical as a means of obtaining a concession that would be detrimental to his actual position (Transcript of Oral Argument 2018a, 25).

```
 3          JUSTICE KAGAN:  General, what would
 4     you think -- let's put aside the court order
 5     for a second.  Just pretend it doesn't exist,
 6     which I realize is -- you know, that's an
 7     important feature of the case for you, but
 8     let's just pretend.
 9          MR. KELLER:  It is.
10              (Laughter.)
11          JUSTICE KAGAN:  Suppose there's one
12     map and -- and -- and then there's a second
13     map, and the one map is later found to have all
14     kinds of evidence of discriminatory intent
15     surrounding it.  There are e-mails.  There's
16     everything.
17          The second map, nothing.  But the
18     second map is exactly the same.  What should a
19     court do with respect to the second map?
```

Kagan alters the situation to the point where it does not reflect the case at hand, yet Mr. Keller still attempted to answer her questions while simultaneously redirecting the conversation back to the actual issues at issue, which he believed he could successfully contend with.

In the same case, Kagan crafts a remarkably different hypothetical for Deputy Solicitor General Kneedler, counsel for the United States in support of Abbot's position. This hypothetical is very straightforward, and though she disagrees with the government's position to support Abbot, she does not embed this hypothetical with tone. The purpose here is for Mr. Kneedler to

explain and clarify why a change in duration would alter the government's overall position

(Transcript of Oral Argument 2018a, 27–28).

```
22              JUSTICE KAGAN:  Mr. -- Mr. Kneedler,
23      that might be true.  It might have been a
24      terrible decision to give only three days, but
25      suppose that the court had given three weeks.
1       Why would that have made a difference for this
2       question of whether something is an injunction
3       or has the practical effect of an injunction?
```

Kagan's more straightforward diction in this instance allows Kneedler to answer her hypothetical

and subsequently move on in his argument. Compared with the hypothetical posed against Mr.

Keller, this hypothetical is much less likely to attract the interest of other justices and get the

attorney bogged down in subsequent follow-up exchanges.

Another side to Kagan's style emerges in a hypothetical posed to Solicitor General

Francisco as acting counsel for President Trump in *Trump* v. *Hawaii* (2018), a case focused on

the constitutionality of President Trump's series of executive orders on immigration and

Hawaii's subsequent lawsuit. Kagan poses a highly politicized, targeted hypothetical about a

discriminatory president who creates an executive order based on his own prejudice (Transcript

of Oral Argument 2018p, 15–16).

```
22              JUSTICE KAGAN:  I agree.  So this is a
23      hypothetical that you've heard a variant of
24      before that the government has, at any rate,
25      but I want to just give you.
1       So let's say in some future time a -
2       a President gets elected who is a vehement
3       anti-Semite –
4               GENERAL FRANCISCO:  Uh-huh.
5               JUSTICE KAGAN:  -- and says all kinds
6       of denigrating comments about Jews and provokes
7       a lot of resentment and hatred over the course
8       of a campaign and in his presidency and, in the
9       course of that, asks his staff or his cabinet
10      members to issue a proc -- to issue
11      recommendations so that he can issue a
```

```
12      proclamation of this kind, and they dot all the
13      i's and they cross all the t's.
14           And what emerges -- and, again, in the
15      context of this virulent anti-Semitism -- what
16      emerges is a proclamation that says no one
17      shall enter from Israel.
18           GENERAL FRANCISCO:  Right.
19           JUSTICE KAGAN:  Do you say Mandel puts
20      an end to judicial review of that set of facts?
```

This hypothetical departs from Kagan's normal style of demanding clarity on existing issues and is polarizing, perhaps it was her goal to shock her colleagues with an out-of-character exploration into a political topic given the news media's frequent accusations against President Trump for race, gender, and ethnicity based bias (Leonhardt and Philbrick, 2018). More likely, this hypothetical dives into Kagan's personal disapproval of what she perceived to be an all-powerful, biased executive. This interpretation warrants the extreme implications created by the statement despite objections from certain individuals who believe the topic is inappropriate for the Court to address. Some consider the topic inappropriate given its political undertones and the Court's purpose of remaining apolitical, which is highly unrealistic.

C. Gorsuch's Hypotheticals

Gorsuch does not use hypotheticals frequently, but they typically contain discernable tone and attempt to undermine the attorney's position. Gorsuch often accomplishes his goal of undermining a position by using humor or seemingly irrelevant comparisons in his hypotheticals. In *Ohio* v. *American Express Company* (2018), Gorsuch poses a hypothetical by interrupting counsel for Ohio, Mr. Murphy, with an interesting comparison between established governmental restraints and car shopping (Transcript of Oral Argument 2018m, 7).

```
11           MR. MURPHY
                        ...
16           They have -- essentially, Amex has
17      channeled -
```

```
18              JUSTICE GORSUCH:  Isn't that true with
19      every vertical restraint?  Anytime I say I'm
20      only going to service Cadillacs at a Cadillac
21      dealership, I -- I can't buy a Volvo at a
22      Cadillac dealership.
```

His hypothetical breaks the flow of conversation and clearly startles Mr. Murphy who then

stutters as if he has lost his train of thought or falters to craft an adequate response to Gorsuch's

peculiar parallel. Gorsuch clearly accomplished what may have been his desired goal of halting

the dialogue and producing an eventual majority vote in favor of American Express.

Gorsuch uncharacteristically asked three hypotheticals in *Wisconsin Central Limited* v.

United States (2018), though his initial involvement in oral argument may explain his authorship

of the majority opinion supporting Wisconsin. The Court was asked to determine whether stocks

used as a form of payment by a railroad company to its employees are taxable under the Railroad

Retirement Tax Act. Gorsuch crafts an undermining hypothetical for Ms. Kovner, counsel for the

United States, regarding regulations on non-monetary forms of compensation employers give to

employees (Transcript of Oral Argument 2018s, 43).

```
3               JUSTICE GORSUCH:  So more regulations.
4       Okay.  Fine.  And what do we do about the more
5       general problem, though, that lots of companies
6       issue lots of things to their employees that
7       are forms of compensation that can be reduced
8       readily to money?
9               You mentioned lifetime passes for
10       riding the rails, for example.  Sports tickets
11       might be another.  Home technology might be
12       another.  Why aren't all those kinds of
13       benefits -- child care -- why don't all those
14       qualify as money remuneration in the
15       government's view, or do they?
```

Here, Gorsuch crafts a broader definition for remuneration than the government accepts by

listing a series of other non-monetary payment methods. Gorsuch is not only exasperating Ms.

Kovner by broadening her position but also catches her off guard by referring to a 1938 statute

that the government no longer endorses. Although Gorsuch uses hypotheticals sparingly, when he crafts them, they are used as a highly successful method of undermining his opposition.

Together, questions and hypotheticals form the category of interrogative tools. When combined, justices have a whole arsenal that they can employ to assist the attorneys they agree with, attack the attorneys they disagree with, redirect conversations, and intervene when other justices are being unfair to an attorney's position. Often, scholars have insisted that there is a correlation between the number of questions and the number of hypotheticals a justice poses (e.g., Frederick 2003). This relationship is supposed to extend from simply a correlation during a specific argument to align with the justice's overall style. This study of the 2017 Term does not support the relationship found by other scholars. In fact, this study disagrees with this supposed relationship given that Sotomayor, Kagan, and Gorsuch all ask far more questions than they pose hypotheticals. If the relationship between the number of questions and hypotheticals were accurate, then number of questions Gorsuch poses would suggest that he crafts a large number of hypotheticals, which is definitely false. This thesis asserts that a justice's use of questions and hypotheticals are separate entities; the frequency with which they are used is not intertwined.

CHAPTER FOUR

LEADING TOOLS: DECLARATIONS AND INTERRUPTIONS

The categorization of leading tools stems from the ability of the particular tools to evoke a targeted response. This chapter analyzes the use of declarations by Sotomayor and Kagan, as well as the use of interruptions by them and Gorsuch. The application of these tools is fairly universal among the justices in this study because there is a limited number of purposes behind a justice's choice to use these tools. Of the leading tools though, interruptions are a more useful tool for indicating a justice's overall style to oral argument. Both declarations and interruptions lead the attorney since they aim to provoke a particular type of response, either helpful for an attorney's position if the justice posing the tool agrees with the points made or damaging to their argument if the justice disagrees.

<u>DECLARATIONS</u>

A *declaration* is a matter-of-fact statement meant to provoke an intended response, where the attorney is led by the justice. Most often the justices intend to receive a response that clarifies an issue, or provoke an immediate typically rash response. The difference in purpose can be determined from the inclination of the justice's position on the case at hand and the attorney's response. Declarations act like questions to a certain extent, such as demanding more information or an explanation, yet they never feature question marks or an interrogative tone. Declarations were executed repeatedly only by Sotomayor and Kagan. The lack of declarations from Gorsuch seems to be linked to his blunt and quizzical nature; when he does speak, he seems to prefer using questions to provoke response or request additional information.

A. Sotomayor's Declarations

In *Sessions v. Dimaya* (2018), Sotomayor makes a declaration with the purpose of

provoking a response from Mr. Kneedler, counsel for Attorney General Sessions representing the

United States. Sotomayor's interruption and declaration come shortly after Gorsuch asks a series

of hypotheticals and questions with the purpose of assisting Kneedler. Sotomayor interjects by

asserting that moral turpitude, a crime that violates the accepted standard of the community, can

only be applied when a statute covers ordinary situations. Sotomayor's point is that the

immigration statute at issue in this case is vague and the facts cannot fall into the category of

"ordinary," so moral turpitude is inapplicable. She attempts to undermine Mr. Kneedler's case

(Transcript of Oral Argument 2017L, 16).

```
 3              JUSTICE SOTOMAYOR:  But Kneedler -
 4        Mr. Kneedler, the crime of moral turpitude is
 5        always applied to the facts of the case.  So
 6        Johnson pointed out that, when you have a
 7        statute that uses approximations like
 8        substantial or significant or severe, that what
 9        gives it life is its application to actual
10        facts.
11              The difference between these two
12        approaches is that this one is asking judges to
13        hypothesize the facts and has nothing to do
14        with the reality of the crime.
```

This declaration's purpose is to make Mr. Kneedler concede on the issue of moral turpitude,

which would greatly cripple his argument in defense of the statute. Sotomayor intends the

declaration to destroy her opponent's position while also showing her peers one reason why they

should vote in favor of Dimaya.

Similarly, in *United States Bank National Association v. Village at Lakeridge, LLC*

(2018) Sotomayor directs another provoking declaration toward Mr. Cross, counsel for U.S.

Bank National Association Trustee. Just before this declaration, Mr. Cross attempts to redirect

the flow of conversation away from the lower court's ruling and toward the issue he perceives to

be most favorable for his position: the standard of review that should have been used by the

lower court. Here, Sotomayor ignores Cross' redirection by explicitly referring to the lower

court's ruling, which emphasized facts (Transcript of Oral Argument 2017m, 15).

```
18              JUSTICE SOTOMAYOR:  It -- it's more
19      blunt than that, because the lower court said
20      that there was diligence appropriate to the
21      amount of the investment.  So that does sound
22      like a factual finding, which is:  it was due
23      under the circumstances.
```

Mr. Cross responds with facts from the case in an attempt to address Sotomayor's concerns but

fails. His response prompts another reaction by Sotomayor, including a declaration and a

subsequent question in an attempt to get further clarification from Cross (Transcript of Oral

Argument 2017m, 16).

```
12              JUSTICE SOTOMAYOR:  You -- you have an
13      awful lot of strong arguments in this case on
14      the facts, but it still doesn't answer why this
15      is not a finding of fact as opposed to a
16      conclusion of law, because when he says this
17      was diligence enough for a $5,000 investment,
18      to me, that sounds like a quintessential fact
19      finding.  How am I supposed to know that as a
20      judge?
```

Sotomayor concedes that the facts make Cross's position look strong to some extent, yet she

fundamentally disagrees with his continued—and key—assertion that the issues in the case are

conclusions of law rather than findings of fact. She urges him to explain the difference, largely

because she disagrees and wants to pose further questions based on his circumspect explanation.

On the other hand, Sotomayor directs a helpful leading declaration in *Florida v. Georgia*

(2018) at Mr. Garre, counsel for Florida, who Sotomayor votes in favor of to create a 5–4

majority. This case concerns a system of dams in the ACF (Apalachicola-Chattahoochee-Flint)

River Basin built by the Army Corps of Engineers, pursuant to Congressional authorization. The

manual for authorization had not been updated since 1958, and numerous states have alleged that

the apportionment of waters has become inequitable over time. Specifically, at issue is whether

Florida proved in the lower courts that capping Georgia's consumption would redress the injuries

endured by Florida even if the cap did not bind the Corps to the same standard (585

U.S.__2018). Sotomayor's tone in this exchange is notably different from her more hostile

exchanges with attorneys whose position she rejects. Here, Sotomayor simply prods Mr. Garre to

provide her with the direct evidence of his position that creating a "consumption cap" on the

water used by Georgia is fair, given that the state's overconsumption has had a directly negative

effect on Florida's wildlife (Transcript of Oral Argument 2018f, 10).

```
12              JUSTICE SOTOMAYOR:  All right.
13      Mr. Garre, but -
14              MR. GARRE:  Do we have to show that a
15      mere certainty standard -
16              JUSTICE SOTOMAYOR:  It is very
17      critical for me that you go through the
18      evidence of that.
19              MR. GARRE:  Yes.
```

Sotomayor then brings up the Special Master's official report, which indicates that a

consumption cap would not have the effect that Florida claims. Rather, the report suggests that

any scheme to make water distribution equitable would not have a substantial effect on Florida's

wildlife or soil problems (Transcript of Oral Argument 2018f, 10–11). Though Sotomayor's

declaration seems more accusatory and negative, her purpose is actually to get Mr. Garre to

address and successfully refute the report, as it is a significant impediment to his position

(Transcript of Oral Argument 2018f, 11).

```
12              JUSTICE SOTOMAYOR:  And as I read his
13      report, he -- he does say there was no evidence
14      of the cap providing you with more water.  And,
15      in fact, I did find plenty of evidence of that.
```

```
16      So I'm not quite sure.  And he discussed some
17   evidence and rejected it as meaningful.
18           So point me to evidence he didn't
19   discuss and explain why it's meaningful.
```

The direct prompt here is for Mr. Garre to provide evidence that the Special Master's report either omitted or did not consider. Sotomayor clearly hopes that Mr. Garre has the necessary information and can wield it in a way that renders the report invalid, or at least unsubstantiated, so that Florida's position prevails. Though the majority of Sotomayor's declarations attempt to provoke damaging responses from the attorneys, some are aimed at leading the conversation in a more beneficial direction for the attorney's position.

B. Kagan's Declarations

Unlike Sotomayor in *Florida v. Georgia* (2018), Kagan votes with the minority in favor of Georgia's position that Florida did not meet its burden in the lower courts. Kagan also directs a declaration at Mr. Garre, but her purpose is notably different from Sotomayor's. Kagan attempts to capitalize on the major flaw in Florida's argument, how the scientific facts to support their proposed consumption cap are missing. She is blunt and slightly provoking with her phrasing that it "obviously must be true" that these facts must have been entered into the record, even though she cannot seem to find them (Transcript of Oral Argument 2018f, 26–27).

```
16              JUSTICE KAGAN:  So here -- here's my.
17   difficulty, Mr. Garre, with this argument.  And
18   it's especially with respect to this exception
19   2d, I think it is.
20           MR. GARRE:  Yeah.
21           JUSTICE KAGAN:  Is that you have
22   common sense on your side.
                     ...
 2           But there seems to be a real dearth of
 3   record evidence specifically quantifying how
 4   much more water you would have gotten, exactly
 5   what benefits would have followed from that.
 6   It just doesn't seem as though Florida put that
```

```
7      into the record, even though you kind of want
8      to say, well, that must obviously be true.
```

Ultimately, Kagan's attempts to undermine Florida's position are unsuccessful, yet her efforts

did chip away at Florida's otherwise logical argument about the reallocation of water resources

among the states sharing the Corp's system of dams.

In *Artis v. District of Columbia* (2018), a case examining a statute-of-limitation issue

when a claim transitions from federal to state court, Kagan directs a pointed declaration to

Deputy Solicitor General Alikhan. Kagan sides with the Court's majority for Artis, so her verbal

attack against the government's position seems logical (Transcript of Oral Argument 2017a, 41).

```
 1           JUSTICE KAGAN:  But there's a very
 2      easy way to write a statute like the one that
 3      you think this one is.  I mean, Congress has
 4      done it.  All the states have done it.  I'll
 5      just read you one of Congress's:  "In the event
 6      that any action is timely brought and is
 7      thereafter dismissed, the action may be
 8      recommenced within one year."
 9           I mean, that's a very simple way of
10      writing a grace period statute.  Thirty states
11      have done the exact same thing.  Nobody writes
12      a grace period statute like this.
```

Kagan notes her position with some irony, implying that the government has confused the type

of statute in this case with one where their claim could have merit. Instead, Kagan believes the

government's claim does not work within the statute's grace period. Her dismissive tone makes

this declaration pointedly aggressive and highly indicative of her stance on the case.

Kagan occasionally uses declarations with the purpose of being helpful, which are highly

effective. One such example is directed toward Mr. Tripp, counsel for the United States in

Dahda v. United States (2018). This case arose over controversy about wiretaps placed on the

devices belonging to brothers Los and Roosevelt Dahda. Attorneys for the brothers claimed that

the judge ordered the wiretaps outside of his jurisdiction. Mr. Tripp begins to discuss the easiest

way for the Court to resolve the case based on the Circuit Court's ruling that the judge's order

had all the necessary components and the scope of the authority was appropriate. Before Mr.

Tripp could elaborate, Kagan quickly poses her declaration requesting Mr. Tripp to lay out the

details of what is supposed to be included in the wiretap order and what elements cause it to be

within the initial judge's authority (Transcript of Oral Argument 2018d, 58–59).

```
18        JUSTICE KAGAN: I mean, if we're
19  talking about easy ways to resolve this case, I
20  have to say the more I think about this, the
21  more it seems really complicated to me, what's
22  supposed to be in these orders and what's not
23  supposed to be in these orders.
24        The only thing I'm sure of in this
25  case is that there's no core concern
1     requirement
```

Kagan's goal of dispelling confusion among the justices is evident through her own admission

that she is becoming confused. She poses the declaration in a seemingly neutral manner, yet

clearly requests a damaging clarification from Mr. Tripp. Kagan uses the phrasing as a means of

disagreeing while appearing to promote clarity by "understanding" the attorney's view.

INTERRUPTIONS

Interruptions carried out as a tool during oral argument have even more impact on their

audience than interruptions carried out during normal parlance. When justices interrupt, it is very

purposeful. Interruptions occur at the justices' discretion; many justices interrupt both the

attorneys and their fellow justices depending on the situation. Analyzing interruptions reveals as

much about each justice's personality, as it does the justice's individual style during oral

argument.

A. Sotomayor's Interruptions

Sotomayor uses interruptions quite frequently without any discernable difference between her treatment of the attorneys and her colleagues. She is quite relentless and immediately interrupts conversations counter to her position. In *Husted* v. *A. Philip Randolph Institute* (2018) Sotomayor interrupts Mr. Murphy, counsel for Husted, a total of 14 times during his argument. The case questioned whether Ohio's list-maintenance process is allowable given that it takes two years of a registered voter's inactivity to trigger its initiation. The following passage demonstrates her persistence in obtaining concessions from counsel when she disagrees with a position, where she pushes and questions Mr. Murphy's position advocating for Ohio's use of its list-maintenance process (Transcript of Oral Argument 2018m, 6–7).

```
15            MR. MURPHY:  No.  We -- we -- we run
16    the notices every year -
17            JUSTICE SOTOMAYOR:  Every year.
18            MR. MURPHY:   -- but we still wait the
19    -- we still wait until -
20            JUSTICE SOTOMAYOR:  Now, you have
21    taken the position in your brief that you
22    really don't need anything; you need -- you
23    could send out a notice any time, any place,
24    and if someone fails to respond to it, you can
25    purge them.  Isn't that your position?
1             MR. MURPHY:  No.  No.  Our position is
2     the notice gets sent out.  If they respond,
3     then obviously you can't honor -
4     JUSTICE SOTOMAYOR:  But my point is
5     you don't even need the failure to vote two
6     years to use the notice –
```

Sotomayor successfully redirects Mr. Murphy's argument to the direct issue at hand regarding the process' trigger of inactivity causing the notice to be sent out. Sotomayor clearly believes that the notices are unsatisfactory and that the trigger of inactivity is arbitrary, leading to her position that the process as a whole is invalid. Though Sotomayor's position lost the eventual

vote, her series of interruptions slowed Mr. Murphy's argument and allowed her to throw in more difficult issues for him to grapple with.

In *Ohio* v. *American Express* (2018), Sotomayor similarly interrupts Mr. Chesler, counsel for American Express, about the system of vertical restraints discriminating against other credit card providers and cost gouging at the merchant level (Transcript of Oral Argument 2018m, 35).

```
11          JUSTICE SOTOMAYOR:  I care about
12    whether today I want to pay the 1 percent more
13    or not.
14          MR. CHESLER:  And, Your Honor -
15          JUSTICE SOTOMAYOR:  And this vertical
16    restraint is stopping horizontal competition.
17          MR. CHESLER:  Your Honor, I disagree
18    with that.  In fact, the district court here
19    said no one had proved what the price of the
20    product is.  So we can't, in fact, conclude -
21          JUSTICE SOTOMAYOR:  I don't really
22    care.  All I know is that the merchant is
23    offering me this at $90 or $100, and I have a
24    choice between paying $100 or $99.
```

Sotomayor rarely interrupts counsel just once; her pattern tends to emulate these examples where she repeatedly interrupts counsel until the conversation becomes more favorable to her position.

Sotomayor can be unrelentingly competitive with her colleagues when their positions differ, regardless of her personal relationships. This is shown clearly in *Masterpiece Cakeshop Ltd.* v. *Colorado Civil Rights Commission* (2018) where Sotomayor and Kagan work against each other during argument from Ms. Waggoner. This exchange shows both justices' competitive natures and interest in getting their points across to persuade votes. They each have individual agendas in this case, which correspond with their eventual split vote. Here the two justices repeatedly interrupt each other and neither really gets an actual point across before Ms. Waggoner chimes back in with a thorough response and shifts the conversation away from Sotomayor and Kagan's verbal duel for control (Transcript of Oral Argument 2018i, 21).

```
6              MS. WAGGONER:  Respectfully, Your
7         Honor, I don't think this Court has ever
8         compelled speech in the context of -
9              JUSTICE SOTOMAYOR:  I'll read Newman
10        myself.
11             JUSTICE KAGAN:  But, I'm sorry, could
12        I just - -
13             JUSTICE SOTOMAYOR:  Answer my
14        question.
15             JUSTICE KAGAN:  -- understand your -
16             JUSTICE SOTOMAYOR:  It's your theory
17        -- is your theory that you -- that you -
18        public accommodation laws cannot trump free
19        speech or free-exercise claims in protecting
20        against race discrimination?
```

Sotomayor wrote a passionate dissent while Kagan concurred with the majority for Masterpiece

Cake Shop. This exchange highlights the divide between the justices and is indicative of their

eventual split despite their similar ideologies. Sotomayor's pattern of interruptions fits in with

her aggressive, reactive style. She mainly interrupts to steer conversations, yet she also uses the

tool for the sheer purpose of showing her disagreement with a particular point an attorney makes.

B. Kagan's Interruptions

     Despite Kagan's regular use of interruption as a tool, she is interrupted by her colleagues

and even the attorneys quite frequently. Kagan interrupts for two primary reasons, to redirect

conversation and to stop an unsatisfactory response from an attorney or to halt an attempted

redirection by another justice. In *Lucia* v. *SEC* (2018) Kagan executes many interruptions during

argument from Mr. Wall, deputy solicitor general serving as counsel for the SEC. Kagan clearly

disagrees with Mr. Wall's position in favor of the government, given her attempted redirections

from his major points. In one instance, she halts him by stating that his various points end up

being worthless because they lead to only one conclusion. Kagan seems to imply that Mr. Wall is

wasting his argument time by insisting on multiple matters rather than condensing his argument

into a single persuasive argument (Transcript of Oral Argument 2018j, 30).

```
3              MR. WALL
4      ...
5      The question is, will you be appointed
6      by the department head or by the chief ALJ?
7              JUSTICE KAGAN:  But all of these
8      things –
9              MR. WALL.  I don't think that's a
10     meaningful -
11             JUSTICE KAGAN:  Mr. Wall, all of these
12     things go to the same thing.
```

Kagan's interruption and subsequent statement is powerful, as she successfully forces Mr. Wall

to address her concern in depth before he can continue making his initial multi-point argument.

This tactic eats up a good amount of his oral argument time, potentially benefitting her position.

In *Epic Systems* v. *Lewis* (2018) Kagan blatantly interrupts Sotomayor, who was in the

middle of formulating her thoughts in response to Mr. Clement. Kagan redirects the conversation

by posing a question to Mr. Clement while basically ignoring Sotomayor's vocalization

(Transcript of Oral Argument 2017d, 7).

```
15             MR. CLEMENT: Right. It doesn't say
16     in the workplace. I
17        directed in -- in every context.
18             JUSTICE SOTOMAYOR: I'm sorry, but why
19        --
20             JUSTICE KAGAN: Well, why is it
21     directed there if it doesn't say that?
```

Interruptions like this occur frequently, even though collegiality is seemingly missing within the

transition here from Sotomayor to Kagan. The justices are often very competitive with one

another, especially when attempting to get a new point across. Shortly afterward, Kagan

interrupts Mr. Clement again. Here, Kagan redirects Mr. Clement's argument to the Norris-

LaGuardia Act, which protects non-union worker's rights. This is a notably different statute from

the National Labor Relations Act, the statute used to question Epic's denial of overtime wages

for its employees. Kagan believe that unlike the National Labor Relations Act, the Norris-

LaGuardia act undercuts Mr. Clement's argument (Transcript of Oral Argument 2017d, 18).

```
 2     It's really because I think the way to
 3     think about the Section 7 right is it gets you
 4     to the courthouse, it gets you to the Board, it
 5     gets you to the arbitrator.
 6          JUSTICE SOTOMAYOR: Is this contract
 7     --
 8          MR. CLEMENT: But once you're there –
 9          JUSTICE KAGAN: Mr. Clement, what
10     about -
            MR. CLEMENT: -- you're subject to the
12     rules.
13          JUSTICE KAGAN: What about Section 102
14     and 103 of the Norris-LaGuardia Act? Because
15     let's take Justice Kennedy's example.
```

It is likely that Kagan brings up sections 102 and 103 of the Norris-LaGuardia Act in an attempt

to persuade her colleagues' viewpoints since she believes these sections contradict Epic's

position. Kagan later dissented from the majority, which voted in favor of Epic's position. Her

repeated interruptions of Mr. Clement are suggestive of her eventual dissenting vote.

C. Gorsuch's Interruptions

As noted, Gorsuch uses interruptions primarily for strategic intervention. His goal with

interruptions is often to redirect conversation or cause an attorney to make an answer clearer. In

Cyan, Inc. v. Beaver County Employees Retirement Fund (2018), about a statute authorizing state

court jurisdiction over a subset of federal issues, Gorsuch and the respondent's counsel

repeatedly talked over each other. This is a flagrant violation of protocol since attorneys know to

stop speaking if a justice begins to speak. Gorsuch successfully redirected the flow of

conversation multiple times, as observed in this fragmented exchange. When pieced together,

Gorsuch asks: "Doesn't yours [Mr. Goldstein's position] indeed come up with nothing with respect to that first 'except' clause and also with respect to the 'provided' – 'involving covered securities' language? Help me out with that" (Transcript of Oral Argument 2017b, 49).

```
10          JUSTICE GORSUCH:  But -
11          MR. GOLDSTEIN:  -- we would have a
12     problem.
13          JUSTICE GORSUCH:  -- doesn't yours -
14          MR. GOLDSTEIN:  No.
15          JUSTICE GORSUCH:  -- indeed come up
16     with nothing -
17          MR. GOLDSTEIN:  No.  It doesn't.
18          JUSTICE GORSUCH:  -- with respect to
19     that first "except" clause and also with
20     respect to the "provided" -- "involving covered
21     securities" -
22          MR. GOLDSTEIN:  Sure.  So two things
23     about that -
24          JUSTICE GORSUCH:  -- language?  Help
25     me out with that.
```

Shortly after Gorsuch's repeated redirections, he used an interruption to ask Mr. Goldstein for clarification on his answer to a previous redirection. Though it may look similar, the intended outcome is different because here Gorsuch prompts Mr. Goldstein to provide an interpretation that could be criticized in subsequent vocalizations (Transcript of Oral Argument 2017a, 53).

```
17          JUSTICE GORSUCH:  Okay.  You haven't
18     helped me out much there.  Maybe you can help
19     me with the -- the language in -- in (c),
20     "involving a covered security."
21          MR. GOLDSTEIN:  Sure.
22          JUSTICE GORSUCH:  How is that not
23     superfluous on your reading?
```

Gill v. Whitford (2018), which asked the Court to determine whether Wisconsin's voting district map constituted a partisan gerrymander by diluting Democratic voters, sparked heated debate. Gorsuch interrupted another justice, which was a rarity for him during the 2017 Term (Transcript of Oral Argument 2017f, 22).

```
4          JUSTICE GORSUCH:  Ms. Murphy -
5          MS. MURPHY:  So just finding the
6    intent isn't a problem.
7          JUSTICE KAGAN:  But there is a
8    difference -
9          JUSTICE GORSUCH:  I'd like to go back
10   to Justice Breyer's question.  It would be
11   helpful to get an answer for me on that
```

This more aggressive behavior toward a fellow justice is an outlier. Typically, Gorsuch exhibits collegiality toward his fellow justices. (See section on Gorsuch's tone for an example.)

Analyzing the number of instances where a particular justice uses the leading tools for the purposes outlined above can reveal the justice's overall oral argument style. In this study, Sotomayor's persistent interruptions combined with her declarations that intend to produce negative responses from the attorneys point toward an aggressive style. Likewise, Kagan's significant use of interruptions reflects a highly active style. Yet her use of primarily helpful declarations requires a more nuanced conclusion about her style. Gorsuch's lack of declarations demonstrates his highly inquisitive style, where his vocalizations prioritize posing questions instead of statements to produce responses. His use of interruptions uncompromisingly is evidence of his relentless style, where he assists the attorneys he agrees with and openly disagrees with those he votes against.

CHAPTER FIVE

PERSONALITY TOOLS: TONE OF VOICE AND SILENCE

Tone of voice and silence are grouped together in this chapter because these tools are revealing of a justice's personality. A justice is often unfiltered and reactionary when using tone of voice as a tool, which can yield insight into the justice's stance on the case, jurisprudential view, and demeanor. Personality plays a major role in the ways that tone becomes embedded in a justice's vocalization. Unlike tone, silence is an entirely planned tool. Justices may choose to be silent for many reasons including as a response to an attorney's position, because they do not want to shape the argument's dialogue, and as a means of leaving their view concealed.

USING TONE OF VOICE

Tone use is discussed to show how each justice's personality plays a role in a case and in the justice's overall oral argument style. Specifically, Sotomayor's use of bluntness, humor, and embedded aggressive tendencies play key roles in forming her style. Furthermore, Kagan's more courteous bluntness and overall goal of honesty help her achieve her purpose of promoting clarity. Gorsuch's use of bluntness, sarcasm, collegiality, and humor are analyzed within his style. Tone of voice is admittedly the most subjective tool examined in this thesis though the author has tried to mitigate reader bias by also listening to argument recordings that seem to indicate tone of voice. By comparing the written transcripts with the audio files, we can be more certain that tone is actually being implemented in the highlighted exchanges. This is not an absolute list of tone but rather analyzes each justice's more typical tone use in the 2017 Term.

A. Sotomayor's Tone of Voice

Sotomayor's tone of voice is often found in conjunction with her technique of repetitive questions or use of interruptions. Sotomayor presents a blunt demeanor regularly, it comes from her personality and from her professional experience. Her short-term purposes vary to such an extent that a lengthy section would be required to capture accurately every use of bluntness. Instead, this section attempts to draw examples describing her most common uses of bluntness. In *Wilson v. Sellers* (2018) Sotomayor is repeatedly blunt with Georgia's Solicitor General, Ms. Warren, acting as counsel for Warden Eric Sellers. Sotomayor's blunt demeanor is triggered by disagreement about the limitations of Ms. Warren's argument, given that she wants the Court to overlook the Georgia Supreme Court's ruling and implement a new standard that would instead benefit her client's position (Transcript of Oral Argument 2017r, 55).

```
 4              JUSTICE SOTOMAYOR:  I -- I just have
 5      so much trouble.  It starts with what Justice
 6      Kagan said.
 7              You admit that if the -- if it's a
 8      reasoned decision in the supreme court, we have
 9      to look at the reasoned decision, correct?
10              MS. WARREN:  Yes -- yes, Your Honor, I
11       think that is -
12              JUSTICE SOTOMAYOR:  All right.  And
13      there is nothing in the language of 2254(d)
14      that says that.  It just says you have to look
15      at the reasoning and determine whether they are
16      -- it's contrary to federal law.
17              So I'm not sure how that gets you to
18      where you're going
```

Here, Sotomayor almost insults Ms. Warren's thought process through her frank and disputatious dialogue. This type of interaction is common for Sotomayor. She frequently dismisses an attorney's position by crafting several distinct arguments against the point the attorney made. Sotomayor uses blunt language as a tool to convey disagreement with an attorney's use of a particular word, a concept, an argument, or an entire position on a case.

Similarly, she uses blunt language to force an attorney to provide an example, elaborate

on a point, or enumerate the central point. Sotomayor employs blunt language to assist attorneys

and as a method of damaging a position. This tactic pervades *National Association of*

Manufacturers v. Department of Defense (2018), where it is used against Mr. Bishop as counsel

for the petitioner. Sotomayor poses a question to Mr. Bishop, but quickly determines that his

response is inadequate. She interrupts and bluntly demands that he provide the Court with a

"concrete example" proving his position as feasible (Transcript of Oral Argument 2017j, 15–16).

```
20          JUSTICE SOTOMAYOR: Could you just
21  give me one moment, because you just mentioned
22     the limitations.
23  Give me your interpretation of
24  effluent limitation or other limitation. What
25  would other -- give me concrete examples of
 1  what would be an other limitation so that the
 2     two terms are not redundant?
 3          MR. BISHOP: Other limitations means
 4  the non-effluent limitations in the four listed
 5     provisions.  (E) -
 6          JUSTICE SOTOMAYOR: Give me an
 7  example, concrete example.
 8  MR. BISHOP: Well, let me give you
 9  four examples.
```

Sotomayor's blunt interruptions are meant to reveal Mr. Bishop's unsatisfactory response and

force him to succinctly provide the Court with the necessary information.

Her blunt phrasing is also used in instances where she requests additional information

from an attorney that could influence her colleagues' opinions. Often, the central purpose is to

procure information that she thinks is compelling but that the attorney has not yet addressed. In

SAS Institute v. Incau (2018), Sotomayor tells Mr. Castanias that he must articulate SAS

Institute's statute-based challenge clearly. She feigns confusion in an effort to obtain the relevant

information that would solidify his client's position (Transcript of Oral Argument 2017k, 4).

```
10          JUSTICE SOTOMAYOR:  It was only
```

```
11   instituted with respect to certain claims.   So
12   I have two questions.
13        MR. CASTANIAS:  Please.
14        JUSTICE SOTOMAYOR:  I'm not at all
15   clear what it is you're challenging here.  Are
16   you challenging the Board's right to initiate
17   partial adjudications or are you challenging
18  the fact that they are not addressing all of
19   the claims in their final decision?  What is it
20   that you're actually asking us to review?
21        MR. CASTANIAS:  Well, we are
22   challenging the latter.  Our question presented
23   is focused on the language –
```

She interrupts Mr. Castanias again with a series of questions that force him to convey his position clearly and in as much detail as possible. Then, she makes a blunt remark again about the true purpose of the case being to overturn the *Cuzzo* precedent. This remark assists Mr. Castanias's position yet again by guiding her fellow justices' interpretations of SAS Institute's position and the ramifications if the position prevails (Transcript of Oral Argument 2017k, 5).

```
23        JUSTICE SOTOMAYOR:  Ahh, you want to
24   get around Cuozzo.
25        MR. CASTANIAS:  No, I don't.
```

Though her consistent interruptions, questions, and blunt tone may have appeared hostile, Sotomayor's vote in favor of Mr. Castanias's position indicates her support here. Her purpose is clear in retrospect, though whether she influenced her colleagues remains unknown.

Much like her blunt expressions, Sotomayor's humor is typically genuine. However, on occasion Sotomayor uses humor directly at the expense of the attorney she disagrees with. In *Byrd v. United States* (2018), Sotomayor uses humor after a series of repeated questions against Mr. Feign, counsel for the United States as respondent. Her humor calls attention to the ridiculous circumstances under which Mr. Byrd was stopped. This reason was put forth in jest to demonstrate Sotomayor's belief that Byrd was stopped for no apparent reason and thus his right

to privacy was violated, regardless of the current notion that unregistered persons for a rental car

lack any reasonable expectation of privacy (Transcript of Oral Argument 2018b, 35–36).

```
24          JUSTICE SOTOMAYOR:  Well, the police
25     here said we stopped him because he was driving
1      a rental car.  He was doing something totally
2      illegal.  Every driving school teaches you to
3      put your hands at a 10 to 2 angle, and they
4      found that suspicious.
5          (Laughter.)
6          JUSTICE SOTOMAYOR:  And they waited
7      until he made a turn that was not authorized by
8      the traffic laws.
```

Sotomayor's humorous examples make the audience erupt into laughter, which frazzles Mr.

Feign and offsets his prepared argument. Sotomayor successfully uses the break to control the

conversation for several subsequent minutes. Her humor successfully derailed the conversation

to a topic that was more favorable for her position. Moreover, the content covered in

Sotomayor's tangent may have persuaded her colleagues, given the unanimous decision favoring

Byrd and extending the right of reasonable privacy within rental cars to all drivers.

Sometimes Sotomayor combines different tones to maximize the impact she has on an

attorney's argument. During argument in *United States* v. *Microsoft* (2018), Sotomayor uses a

blunt tone toward Mr. Rosenkranz, counsel for Microsoft, regarding the technical nature of the

case. In this case, a judge in the United States signed a warrant allowing for the search of

Microsoft's records even though some of the digital records were located online but stored on

physical servers in Ireland. Given the technical knowledge involved in understanding the mining

of information for customer email content, Sotomayor admits her ignorance and thus poses a

question requesting that counsel describe the servers (Transcript of Oral Argument 2018q, 44).

```
16          JUSTICE SOTOMAYOR:  I'm sorry, I don't
17     -- perhaps it's my technological ignorance.
18     How is it in a locked box?  If I'm trying to
19     mentally imagine this, what has to happen?
```

Sotomayor's blunt, honest tone allows Mr. Rosenkranz to provide the information in detail and

encourages other justices to admit their own lack of technical experience in the conversation.

Shortly afterward, Sotomayor also uses humor as she continues to probe Mr. Rosenkranz

regarding the technical aspects of the case. She posits a hypothetical that runs somewhat wild

where she wonders about how the case would be altered if the information were cloud based

rather than stored on physical servers internationally (Transcript of Oral Argument 2018q, 45).

```
20          JUSTICE SOTOMAYOR:  I -- I'm sorry,
21     I'm -- I'm now -- I guess my imagination is
22     running wild.
23               (Laughter.)
24       JUSTICE SOTOMAYOR:  How -- how does -
25     who tells the robot what to do and what does
1      the robot do?
```

Here Sotomayor's humor breaks tension during the conversation and gives the justices a reprise

from the technical language while giving them insight into her feelings on the case. Sotomayor's

personality is evident through her active engagement with the attorneys during oral argument,

especially when she is aggressive through posing blunt or humorous questions and declarations.

B. Kagan's Tone of Voice

Kagan uses blunt language frequently; it serves as a main feature of her clarifying style

because she frequently tells attorneys to stop their current track of argument and answer a

question on a new topic. Her honesty pairs directly with her blunt nature. In *Jesner v. Arab Bank*

(2018), Kagan is blunt when speaking about the position advocated by Arab Bank's counsel, Mr.

Clement. The dialogue below is prompted by Mr. Clement's response to a question posed by

Breyer, which Breyer is satisfied with. In disagreement, Kagan interrupts Breyer's praise of Mr.

Clement's response and states her disapproval (Transcript of Oral Argument, 2017e, 46–47).

```
22          JUSTICE BREYER:  Exactly right.  I
```

```
23      completely agree.  I agree.  Now, given that,
24      what are -
25              JUSTICE KAGAN:  I don't agree.
 1              (Laughter.)
 2              JUSTICE KAGAN:  But -
 3              JUSTICE BREYER:  I just want to be
 4      sure I get an answer to the second part.
```

A short while later, Kagan brings up her disagreement with Mr. Clement through a lengthy

declaration and question regarding his understanding of the scope of his case. In the omitted

portion of transcript, Kagan reiterates Mr. Clement's suggestion that the case should have

international ramifications and standards, a position she fundamentally disagrees with and

bluntly rejects (Transcript of Oral Argument 2017e, 51–52).

```
13              JUSTICE KAGAN:  Mr. Clement, I think
14      the reason I said I don't agree before is
15      because
22                      ...     I mean,
23      where -- where do you get the understanding
24      that that's a question where all countries have
25      to agree to the same thing?
 1              MR. CLEMENT:  Well -
 2              JUSTICE KAGAN:  As far as I understood
 3      your brief, you're only getting it from that
 4      Sosa Footnote 20, which really does not make
 5      that point at all.
```

Kagan's fiery dismissal of Mr. Clement's position is mirrored throughout the 2017 Term, which

shows that this behavior is a pattern in Kagan's style as a facet of her personality.

Kagan's blunt speech also translates into an opportunity to trick attorneys she disagrees

with to provide damaging information. Justice Ginsburg posed a clarifying question to Ms.

Alikhan about the meaning behind the phrase "shall be tolled," given Ms. Alikhan's prior

assertion that the phrase meant "continue to run" (Transcript of Oral Argument 2017e, 28).

Ginsburg pushes this interpretation by questioning whether other federal statutes have included

this phrasing, and whether the meaning is consistent with Ms. Alikhan's. In an effort to save her

definition, Ms. Alikhan responds by claiming other cases have used the phrase similarly. Kagan

interrupts and launches into the definition in depth (Transcript of Oral Argument 2017e, 28–29).

```
 1            JUSTICE KAGAN:  Well, it does have an
 2    ordinary meaning, but, honestly, until I read
 3    your brief, I just sort of thought that the
 4    ordinary meaning was "suspend," stop the clock,
 5    so -- and then later, on some trigger point,
 6    the clock starts running again.
 7            And I -- you know, I had to go to the
 8    dictionaries to look up what you were saying it
 9    meant; whereas, you know, if I'm just any old
10    lawyer, "tolled" means one thing when it's -
11    when it's referring to a statute of
12    limitations.  I mean, it means something else
13    when you're driving on the highway, but when
14    it's referring to a statute of limitations, it
15    means you stop the clock.
```

In her response, Kagan's blunt language seems to poke holes in Ms. Alikhan's definition by

citing various dictionaries and other instances where the definition would be altered. Essentially,

Kagan's bluntness is tearing apart Ms. Alikhan's definition and simultaneously baiting the

attorney to respond aggressively in defense of her perceived understanding.

Kagan also uses humor occasionally, mostly to break tension during argument. In *United

States* v. *Microsoft* (2018), Kagan uses humor toward Mr. Rosenkranz to make him explain

where his case fits in within the larger statute at issue. Her humor provides a brief break for Mr.

Rosenkranz and the justices alike, given that just before several technical questions were

answered (Transcript of Oral Argument 2018q, 54–55).

```
13            JUSTICE KAGAN:  Well, how do we know
14    really?
                      ...
 1    I'm not sure how I pick between those
 2    two from the face of the statute, whether it's
 3    2703 or whether it's the broader statute.  So
 4    give me your best shot.
 5            (Laughter.)
 6        MR. ROSENKRANZ:  Okay.  So I -- I'll
```

```
7       give you, if I may, I'll give you a couple
8       shots.
```

The friendly banter between justice and attorney is atypical since attorneys refrain from too much familiarity with the justices. The typical reverence is not here which makes the exchange interesting and indicative of a more favorable view from Sotomayor on Rosencrantz's position.

Kagan's humor is also apparent in *Encino Motorcars* v. *Navarro* (2018) with Mr. Clement, counsel for Encino. Kagan interrupts Breyer to provide explanation for her previous hypothetical as well as to tell Mr. Clement that she would be sparing him from a complicated hypothetical she had planned for him (Transcript of Oral Argument 2018e, 15).

```
1           JUSTICE KAGAN:  Could I ask your
2   indulgence -
3           JUSTICE BREYER:  Yeah.
4           JUSTICE KAGAN:  -- and just before you
5   talk to -- about purposes?
6   Just, you know, my -- what my
7   hypothetical was designed to do, and I came up
8   with a bunch of them and I'll spare you -
9               (Laughter.)
10          MR. CLEMENT:  Thank you.
```

Kagan's humor demonstrates her tendency to assist the attorneys whose positions she agrees with by allowing them ample time to detail their argument. This becomes important when other justices seem skeptical of an attorney's position and employ tools in ways that attempt to highlight faults in the argument or redirect the conversation away from important points of the argument. Instead of posing her challenging hypothetical, as promised, she asks Mr. Clement a follow-up question on a hypothetical posed by Breyer (Transcript of Oral Argument 2018e, 15).

```
17  --
18          JUSTICE KAGAN:  Now you're daring me.
19          (Laughter.)
20          MR. CLEMENT:  Well, no, no, but - but
21      --
```

Kagan's constant pursuit of clarity underscores her personality throughout the 2017 Term's oral arguments since this purpose allows her to be more animated during discussion.

C. Gorsuch's Tone of Voice

Gorsuch's personality was apparent from the beginning of the 2017 Term, his use of sarcasm and bluntness is unrivaled by his peers. Most often, Gorsuch uses tone when provoked by the actions of attorneys. At times, Gorsuch's use of tone created a tense atmosphere in the courtroom with pointed redirections and sarcasm toward counsel. In *Gill v. Whitford* (2018), Gorsuch became sarcastic with counsel for respondent Whitford, Mr. Smith, when he stated that "the only thing we're asking you [the Court] to do here" was identify a formula to determine when an "extreme gerrymander" occurs (Transcript of Oral Argument 2017f, 50). Gorsuch did not agree, so as Mr. Smith responded to a hypothetical posed by Chief Justice Roberts, Gorsuch responded with blunt sarcasm (Transcript of Oral Argument 2017f, 50–51).

```
24            JUSTICE GORSUCH:  So, Mr. Smith, what
25    is the formula that achieves that?  Because the
1     court below didn't rely on efficiency gap
2     entirely.  It looked also at the partisan
3     symmetry test.  It reminds me a little bit of
4     my steak rub.  I like some turmeric, I like a
5     few other little ingredients, but I'm not going
6     to tell you how much of each.
7        And so what's this Court supposed to
8     do?  A pinch of this, a pinch of that?
```

Gorsuch's use of humor is noteworthy as a mixture of lighthearted jests and serious sarcasm. His humor is negative toward attorneys who seem to take the proceedings less seriously or attempt to dodge questions posed, as in *Marinello v. United States* (2018). *Marinello* asked the justices to determine whether the federal crime of "corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action" (584 U.S. __ 2018). Counsel for the respondent, Mr.

Parker, was pushed by Gorsuch over a hypothetical posed by Breyer. Gorsuch was blunt and

sarcastic with his rebuke of Mr. Parker's attempt at a full answer to his question instead of a

simple yes or no, which Gorsuch insisted upon (Transcript of Oral Argument 2017h, 32–33).

```
16          MR. PARKER:  Well –
17          JUSTICE GORSUCH:  For my -- for my
18   friend's son's snow shoveling business.
19          MR. PARKER:  Well, I -
20          JUSTICE GORSUCH:  Right?
21          MR. PARKER:  I think that that -
22          JUSTICE GORSUCH:  I mean, the answer
23   is yes, I think, isn't it?
24          (Laughter.)
25          MR. PARKER:  That -- that circumstance
1    may come within the scope of the statute.
2           JUSTICE GORSUCH:  I'm waiting for a
3    yes or a no.  You can just -- it may come
4    within the scope.  So that's a yes?
```

Gorsuch used his tone as a weapon during numerous oral arguments when attorneys were not

forthright in their positions. He applied the tool equally in even-handed cases. In *Digital Realty*

Trust, Inc. v. Somers (2018) Gorsuch's approach and his pugnacious attitude dominated the

conversation at times. Gorsuch directed his tone efforts at the respondent and the amici

supporting the respondent. Gorsuch became frustrated with the respondent's counsel for using

ambiguous language in response to several questions (Transcript of Oral Argument 2017c, 38).

```
1           JUSTICE GORSUCH:  I'd like to talk
2    about that notice and comment period for just a
3    moment.  It seems to me you've got this plain
4    language problem, so you've got to generate an
5    ambiguity.  That's the first step of your –
6    your move.
```

Gorsuch was blunt and sarcastic toward counsel for the respondent and the attorney representing

United States, Mr. Michel, arguing as amicus in support of the respondent. Gorsuch was blunt

with Mr. Michel regarding omission of a key phrase in the statute in response to his earlier

questions for clarification of the government's stance (Transcript of Oral Argument 2017c, 57).

```
 4              JUSTICE GORSUCH:  "Who provides
 5    information to the Commission."  Right?  That's
 6    kind of an important little phrase there.
 7              MR. MICHEL:  Right.  I -- I agree with
 8              JUSTICE GORSUCH:  Right.
 9              MR. MICHEL:  And -- and I'm not saying
10    that it couldn't have been written more
11    clearly.  I do think if you look at -
12              JUSTICE GORSUCH:  I think it was
13    written very clearly.
```

Gorsuch's tone was often collegial toward his fellow justices. His collegiality is featured

throughout most of his interactions with other justices during oral arguments, regardless of his

ideological or position-based differences with his colleagues. For example, in *Rosales-Mireles v.*

United States (2018) Gorsuch and Kagan began to butt heads ideologically over an exchange

with the respondent's counsel, yet their respect for each other transformed the situation into a

humorous apology from Gorsuch (Transcript of Oral Argument 2018n, 27–28).

```
21              JUSTICE GORSUCH: Isn't it -
22              JUSTICE KAGAN: Well, I think what
23      they're -
24              JUSTICE GORSUCH: I'm sorry. No,
25      please.
 1                 (Laughter.)
 2           JUSTICE KAGAN: --  I mean, he can
 3      probably do it better than I can.
 4           JUSTICE GORSUCH: You're doing a much
 5      better job than I.
 6                 (Laughter.)
```

SILENCE

Silence can be used as a tool of oral argument by a justice remaining silent throughout an

entire session, or by refraining from vocalizations during argument from one side. Scholars often

debate the motivation behind using silence, largely based on analyzing Justice Thomas's record-

breaking silence during oral argument (e.g., Liptak 2016). That is not the type of silence

discussed in this section. When silence is used by Gorsuch he has a distinctly different purpose from Thomas's simple belief that his colleagues speak too much and the attorneys should be given time to present their cases (Liptak 2016). Even among the justices studied in this thesis, Gorsuch separates himself from Sotomayor and Kagan through his distinct use of silence. Furthermore, justices' word counts during a particular oral argument have been incorrectly used as a categorizing tool by many scholars (e.g., Feldman 2018b).

A. Gorsuch's Multifaceted Silence

Gorsuch uses silence in his one-sided approach when the side he favors does not need assistance clarifying its points or does not face harsh opposition. Of his 19 distinctly one-sided arguments, Gorsuch used silence in 5 cases: *Jennings v. Rodriguez* (2018), *SAS Institute v. Iancu* (2018), *Digital Realty Trust, Inc. v. Somers* (2018), *Collins v. Virginia* (2018), and *South Dakota v. Wayfair, Inc*. (2018). In each, Gorsuch used the other oral argument tools actively toward the side he voted against. Silence is not directly used in the even-handed approach because the same level of activism is exhibited toward each side of the case. If a justice directed silence to each side, then the approach as a whole would be categorized as restrained rather than even-handed.

Gorsuch began the 2017 Term in silence, surprising many Supreme Court observers, given his brief yet active participation in argument during the 2016 Term. Justices typically remain consistent in their approach to oral argument, so Gorsuch's seemingly sporadic use of silence is noteworthy. During the 2017 Term, Gorsuch was completely silent in seven cases: *Epic Systems Corporation v. Lewis* (2018) and *Murphy v. Smith* (2018) where he authored the majority opinion; *Rubin v. Islamic Republic of Iran* (2018), *Dahda v. United States* (2018), and *Koons v. United States* (2018) where the justices voted unanimously; and *Janus v. State, County, and Municipal Employees* (2018) where he joined the majority opinion. Deducing a cause for

Gorsuch's silence is not possible at this time because the sample size is too small. Gorsuch is intentional in his actions during oral argument, so without an interview scholars can only speculate about why he decides to remain silent. For now, it is fair to conclude that Gorsuch's silence demonstrates how his style during the 2017 Term was a hybrid of the ridged categories. Gorsuch's silence may be an aspect of his rigid planning before the argument begins. Since he almost always has a plan established for each case, it makes sense that his use of silence to one or both attorneys reflects that plan.

Alternatively, Gorsuch's silence may indicate that he is uninterested in fostering understanding of an attorney's position or in building a working majority during the argument. These possibilities seem somewhat unlikely since an experienced jurist like Gorsuch would understand that an individual justice's position on a case is unlikely to be immediately shared by the rest of the bench. It is much more likely that blatant coalition building is simply contrary to Gorsuch's planned-out style to oral argument and his frequent use of silence.

B. Sotomayor's and Kagan's Lack of Silence

Neither Sotomayor nor Kagan remained completely silent during any of the Court's 2017 oral arguments. Although they certainly differed on how much they spoke to each attorney in some cases, as well as speaking more overall during arguments for some cases than for others. The lack of silence is directly caused by their styles during oral argument, where both justices execute active approaches. They try to make their views apparent, so other justices know they have a distinct stance and to foster their colleagues' understanding of their position. Sotomayor accomplishes this through her aggressive, back-to-back questioning. She is able to reveal information about the attorney's argument and her own views through the tactic. Likewise,

Kagan's clarifying questions and response-inducing declarations provide insight into her opinion of an attorney's position. Moreover, Sotomayor and Kagan are ideologically liberal and surely conscious of the growing conservative bloc on the bench. They may be trying to discern which topics will be most salient between the ideological blocs so they can be effective negotiators. As active justices during oral argument, both women focus on coalition building during oral argument. Sotomayor and Kagan likely think about coalition building even as they are preparing for oral argument through the types of questions they intend to ask and the topics they focus on during an attorney's argument. Forming coalitions will be discussed in depth in the next chapter.

This chapter attempts to shed light on the most subjective tools used by the justices during oral argument. Using both tone of voice and silence are purposeful and active ways to engage during an attorney's argument because they reflect a justice's choice. Silence is perceived by scholars including Epstein, Lee, and Knight as being passive, yet by analyzing Gorsuch's one-sided approach we can see that silence is more complicated than is often thought. Similarly, though tone of voice is often reactionary the way justices use their tone can be part of a larger plan to assist one attorney or harm a position. Understanding these tools is essential for identifying the personalities of justices and subsequently comprehending their respective oral argument styles. Furthermore, the personalities of justices affect the discourse during arguments given that the justices repeatedly interact with each other. The ability to understand the nuances in interactions make the discussions during oral arguments more meaningful and potentially predictive of the Court's vote.

CHAPTER SIX

PERSUASION AND VOTING COALITIONS

This chapter discusses how justices begin to form voting coalitions during oral argument and the importance of these interactions. Justice's actions during oral argument can influence colleagues' opinions and alter the voting outcomes of cases. Scholarship on this topic is explored in the first section, accompanied by explanation of oral argument's place in the coalition building process. Then the methods employed by Sotomayor, Kagan, and Gorsuch to persuade their colleagues are explored. Specific tools are highlighted for each justice based on the frequency with which the individual justices employ them for persuasion and their actual success. Then, each justice's efforts are analyzed alongside the Court's voting record from the 2017 Term. From this data, a justice's success when attempting to persuade colleagues is estimated. Finally, the chapter examines the broader implications of coalition building.

A. Scholarship on Persuasion and Coalition Building

Regardless of the approach used by a justice during a particular oral argument, the justices share a goal of creating a majority by persuading their colleagues to vote in line with a certain interpretation of the case. After all, justices have predetermined policy goals and other agendas that, coupled with their backgrounds, influences the way they perceive and eventually decide cases. Yet policy preference alone is insufficient for predicting judicial behavior, especially during oral argument where many opinions are preliminarily forming. Scholars have debated whether the institutional behavioral model adequately explains judicial behavior i.e., whether we should view "judicially constructed law in narrow terms of relatively discrete and

determinate rules or commands" based on a justice's specific agenda (McCann 1998, 66). The evidence acquired for this thesis aligns more with the strategic model. The strategic model sees justices as "strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act" (Epstein and Knight 1999, 10). Essentially, justices are strategically compromising during every step of the decision-making process to make a majority and have their individual preferences represented in that majority. Each approach to oral argument features a strategy of persuasive tool use for vote gathering.

As one of the first steps in resolving a case, oral argument is considered an informative step in the judicial decision-making process. At this stage the justices have read briefs from the parties, amici briefs, and other preparatory documents, yet many view oral argument as the first opportunity for opinion formation. Sotomayor believes that oral argument is an essential part of the Court's deliberative process and important for her own decision-making because she prepares a list of questions and topics, she is either curious about or needs clarification on. Sotomayor states, "I get so intensely engaged in argument that it's never fake. Every question I ask has a purpose; it has some importance to something that is troubling me or that I'm curious about," keeping her discourse refreshing and her style reactive (Lamb, Swain, and Farkas 2010, 147).

Furthermore, justices can see oral argument as a prime opportunity to observe their colleagues' thoughts and attempt coalition building. Kagan prepares for oral argument similarly to Sotomayor yet strives to remain open minded about the content of her vocalization by "listen[ing] hard to what happens in the argument to try to figure out which of those questions I should ask, which would be important, which would be meaningful," presumably for persuading her colleagues to align with her interpretation (Lamb, Swain, and Farkas 2010, 168). Kagan's

comments demonstrate that justices who plan out their approaches often systematically predict their colleagues' positions, showing that the coalition-building process begins before the post-argument conference discussion. Predicting other justices' positions enables a justice to plan out what approach to use and the tools that should be emphasized during a particular argument (Black, Johnson, and Wedeking 2012, 13). Gorsuch's predictive ability and planned-out methods are particularly noteworthy. Despite their clearly different approaches to oral argument, Sotomayor and Kagan detail how they are strategic with the content of their vocalizations.

From these comments, we know that some justices see oral argument as an opportunity to persuade each other through an open-ended dialogue that their other interactions do not provide. Therefore, justices who come into oral argument with an established position can "signal their intentions to their colleagues and do battle for the votes of those who may still be undecided" by using the oral argument tools in a way that persuades their colleagues (Sullivan and Canty 2015, 1073). Many active justices begin the process of building coalitions with like-minded colleagues, while also keeping those who are unlikely to join the coalition at bay through using the tools defensively (Black, Johnson, and Wedeking 2012, 20). Malphurs coins the terms "deliberative sensemaker" and "biased sensemaker" to describe two subsets of active justices whose interactions differ based on their level of self-awareness and whether they are concerned about how their actions will affect their colleagues (Malphurs 2013, 53). A deliberative sensemaker is aware that his or her communication may negatively influence how others understand a problem, while a biased sensemaker's chief concern is expressing their own positions (Malphurs 2013, 53–55). Kagan falls within the categorization of deliberative sensemaker, given her frequent attempts at persuasion through elaboration or asking for clarity. In contrast, Sotomayor and Gorsuch seem to be biased sensemakers through their frequent domination of dialogue during

and aggressive behavior toward the attorneys. Gorsuch seems unconcerned about how his tone and word choice affect his colleagues.

Justices attempt to use the tools persuasively by having the side they agree with enumerate more favorable information and probe the side they will vote against to disclose information that weakens their position or may evoke a less favorable response from the justices. Frequently, activist justices attempt to persuade their colleagues by taking control of the conversation during oral argument for a brief period. These justices redirect arguments and make the lawyer answer questions, explain concepts, or extrapolate based on hypotheticals with the goal of disclosing persuasive information while the justices remain in control of the flow of dialogue. This tactic is coined as "strategic intervention" because of how the justice wields the authority to make lawyers and fellow justices quickly address a separate issue (Sullivan and Canty 2015, 1061). Strategic intervention is an effective subset of the persuasive strategy. Moreover, the decided, activist justices are increasingly likely to demand persuasive information from the attorney through questions and declarations as a means of explaining the position the justice wants to prevail. Justices attempt to build coalitions through asking questions aimed at "seeing the cases slightly differently, even moving their opinion 10 degrees can help build coalition" (Black, Johnson, and Wedeking 2012, 7–8). Often, coalition building does not require more than a few justices to alter their position too significantly. At times, simply presenting the information in a new manner can shift a justice's position enough to gain a vote in the future.

The attorney's role as an intermediary for the dialogue is essential for the process of coalition building. The Court has a conversation with itself through the attorney as an intermediary because the Court attempts to deduce the most important issues, in part by consulting the attorney's expertise on the case (Black, Johnson, and Wedeking 2012, 7–8). Post-

argument informal deliberations between the justices are different because the attorney's ability to add additional information or present similar case decisions is often influential in slightly moving a justice's position. Plus, oral argument is a prime opportunity for decided justices to exert influence over their undecided colleagues with assistance from the attorneys.

Questions and hypotheticals are effective interrogative tools for persuasion when executed properly. They are most successful when used to make an attorney explain the complexity of issues in a case to other justices or address possible objections to a position. As leading tools, declarations and interruptions can lead other justices to understand why the justice implementing the tool has a certain view. In particular, interruptions used to steer a conversation followed by a question or declaration are very successful. The personality tools are likewise successful means for justices to convey their predetermined viewpoints to other justices during oral argument by using the attorneys involved in the case as intermediaries. A justice can signal a position preference to other justices by using different tones to the attorneys in the case or by being active during one argument and silent during another. Either way, a justice can convey partiality by differing activity and the tools implemented during different arguments. Depending on they are implemented, justices can use the each oral argument tool for persuasion.

B. Sotomayor's Aggressive Coalition Building

Sotomayor's pugnacious style is evident throughout her attempts at persuasion, especially since she uses questions, hypotheticals, and interruptions frequently when building coalitions. When attempting to persuade her colleagues to join her position, her questions often attempt to elicit additional information that presents a new dynamic of the case. Likewise, her hypotheticals test the limits of the positions the attorney advocates in an effort to show her colleagues that the

position would not have extreme outcomes. Alternatively, her hypotheticals can ask attorneys to differentiate their positions from the Court's decisions in similar cases. Sotomayor's interruptions when attempting persuasion often strategically redirect conversation away from any harmful topics or mitigate the impact of any claims made against the position she holds on the case. Her tool-based actions in aggregate during an argument are somewhat predictive of her ultimate vote. However, by looking at the specific ways she used the tools, the information becomes more informative. Her initial position, the members of the Court she targets for persuasion and her eventual vote become far more accurate when specific instances of tool use are examined. Sotomayor is typically brutal to every attorney through the sheer number of questions she poses and interruptions she executes.

Given her aggressive demeanor, one might think that her attitude would be directed along the more typical pattern of activity against an attorney's position. Thus, Sotomayor's tendency to be increasingly active to the attorney reflecting her own position on the case must have another explanation. Sotomayor's behavior is explained by her pursuit of coalition building. By understanding the dynamics involved in persuading her colleagues, we can better understand Sotomayor's motivations for being highly active during oral argument. Her activity during argument with a like-minded attorney indicates tools used in an effort to make the attorney share pertinent persuasive information. Many of these instances are conveyed in the respective Sotomayor sections throughout the tool-based chapters of this thesis.

Sotomayor's power of persuasion is complex, given that she is active during arguments with attorneys she opposes, and even more active toward the attorney she agrees with. When she opposes an attorney's position, Sotomayor's questions are aimed at highlighting discontinuity in an argument or explaining how a prior Court ruling disagrees with the position. Her

hypotheticals vary depending on the distance between her opinion and the position asserted by the attorney. They range from a simple altering of facts to a multi-faceted explanation of the position's statutory or precedent-based complications. When interrupting, her strategic interventions are intended to halt conversations beneficial to the position or dialogue from attorneys giving beneficial information. Her tool use when attempting to persuade her colleagues to agree with an attorney's position is frequently delivered in her blunt, serious tone.

Sotomayor's ability to build coalitions during oral argument is unique because she expertly implements the oral argument tools to her benefit. Her efforts are rewarded by building majority coalitions in many instances. During the 2017 Term Sotomayor voted with a majority in 50 of the 73 cases that carried votes and 43 of the 62 orally argued cases, which demonstrates her desire to build coalitions. Despite the impressive sound of these totals, Sotomayor's position in the majority drops to 22 out of the 45 divided decisions. This 49% is a low when compared with her position in the majority on divided cases from recent Terms: 76% in the 2016 Term, 68% in 2015, and 82% in the 2014 Term (SCOTUSblog Stat Pack 2018, 17). Furthermore, Sotomayor was in the majority in only 4 of the 19 5–4 decisions (SCOTUSblog Stat Pack 2018, 43–44). This statistic is surprising considering how Sotomayor attempts to persuade her colleagues through her tool use during oral argument, although it may point toward Sotomayor's overall ability to persuade colleagues' votes when their positions are fundamentally close on cases or when the topic is not polarizing. Conversely, the lack of majority coalition building in 5–4 cases demonstrates the general limitations of coalition building in highly contested cases; even an effective persuader was unable to build coalitions with the polarization found in the 2017 term.

C. Kagan's Persuasion through Information Gathering

Kagan's goal of promoting clarity manifests itself through tactics of information gathering, especially when she attempts to influence her colleagues' votes. While being persuasive, she focuses on promoting clarity among the justices by frequently using questions, declarations, and interruptions. The total number of tool-based actions throughout an argument is inconclusive of her position on a case, but she remains fairly consistent in her level of activity from case to case regardless of the approach she uses. Therefore, specific vocalizations must be critically analyzed to understand her position on a case. Like Sotomayor, Kagan works toward coalition building quite frequently. Yet she tends not to dominate the dialogue unless she feigns confusion or adamantly believes that addressing a specific topic from the perspective of one position would enhance everyone's understanding. Overall, Kagan's persuasive efforts are more discrete, given her more response-focused nature. She does not typically begin an area of discussion but will chime in once an aspect becomes unclear.

When Kagan intends to be persuasive, her questions seem evenly split between assisting an attorney's position and damaging a stance. When directed at an attorney she disagrees with, her questions attempt to highlight logical flaws in an argument or quote statutes and precedents that disagree with an attorney's asserted position. Likewise, the declarations attempt to evoke damaging responses by baiting attorneys to react heatedly to her comments. Kagan is especially skilled at seeming aloof or confused in an effort to make the attorney seem unclear or the position advocated is illogical. Likewise, when her interruptions are targeted against an attorney's position, she attempts to interrupt the attorney with a point of clarification through long-winded tangents without other justices' interactions.

These actions are unlike her tool use when persuading her colleagues toward an attorney's position. Her questions become focused on letting the attorney highlight the strongest points rather than focusing on her own discussion. Furthermore, her declarations lead the attorney toward the same goal of enumerating details on the case's argument in a way that makes the justices understand the position's strengths. Kagan's interruptions are especially frequent, which somewhat takes away from the attorney's ability to elaborate on the relevant arguments. Fortunately, her frequent use of long-winded questions mitigates the effect of her interruptions on the attorney's overall argument inasmuch as she gives the attorneys ample topics to cover.

Given the ideological similarity of Sotomayor and Kagan, their persuasive efforts often overlap. As discussed in previous chapters, they sometimes tag-team attorneys by emphasizing the same issues or strengths in a case through their questions and declarations. Still, their votes sometimes differed, with Sotomayor often dissenting while Kagan was in the majority or wrote a concurring opinion. This demonstrates Kagan's commitment to persuasion, given that she helped make some conservative-leaning opinions more liberal by joining a majority. Kagan voted within the majority in 52 of the 70 total votes and 44 of the 62 orally argued cases throughout the 2017 Term. In the 44 divided decisions, she voted with the majority 26 times (SCOTUSblog Stat Pack 2018, 17). Kagan's majority membership is the highest of the liberal justices when decisions are divided, which emphasizes her willingness to compromise when forming majorities. Surprisingly, Kagan was in the majority in only 3 of the 19 5–4 decisions (SCOTUSblog Stat Pack 2018, 43–44). Even Kagan's willingness to compromise for coalition building has a limit.

Kagan is focused on coalition building through promoting clarity because she wants each justice to make a fully informed choice when participating in the opinion-drafting process to cast a vote. Promoting clarity through tools designed to gather information is a fundamental aspect of

Kagan's overall style of oral argument. Moreover, her ability to persuade through promoting clarity seems rather successful, even in somewhat divided cases. Nevertheless, like other members of the liberal bloc she remains unsuccessful in persuading her colleagues in coalition building in highly divisive 5–4 decisions. Building coalitions throughout the 2017 Term was understandably difficult for the liberal bloc of justices, given the Court's even more conservative orientation. Regardless of a justice's individual persuasive ability, it is impossible for one justice alone to build a successful coalition. Justices must collaborate together for successful coalition building and other justices must be receptive to the messages their peers articulate.

D. Gorsuch's Intentional Interactions

Gorsuch's conservative ideology causes him to automatically be in the Court's majority frequently, given the Court's current conservative composition. Accordingly, Gorsuch does not seem to work actively toward persuading colleagues. Rather, his aggressive demeanor and his planned out interactions provide insight about when he actually intends to persuade and when persuasive behavior is unintentional. Because he plans out his interactions during oral argument based on whether his position will prevail, his votes are fairly predictable throughout the 2017 Term. When using his predominantly one-sided approach, his positions on the case at hand are clear to his colleagues, given that he attacks an attorney's position head on. While using his one-sided approach, the types of questions he poses and instances where he chooses to interrupt often procure information that damages an attorney's position. In these instances, Gorsuch may be unintentionally persuasive for his colleagues by deterring their acceptance of a weakened position. Although, when attempting to be persuasive while using the one-sided approach Gorsuch tends to indicate his purpose by directly building upon the hypotheticals and questions of his colleagues to gain a more nuanced explanation from an attorney. The responses Gorsuch

elicits typically either mitigate the beneficial impact of another justice's helpful question, or they

compel the attorney to make concessions in explicit language that was intentionally avoided.

Often simple, explicitly worded concessions have devastating effect on an attorney's argument.

When Gorsuch uses his even-handed approach, the other justices may perceive his

general aggressiveness as an indication of indifference, but this would be inaccurate. By

considering Gorsuch's tone with each attorney, his behavior becomes more predictive of his

position on the case. When he uses his blunt and sarcastic humor, Gorsuch is most often

attempting to raise an issue in an attorney's position that could derail the proceedings. This is

demonstrated most pointedly when Gorsuch poses a leading hypothetical that is delivered with

sarcasm followed by his notorious "can you help me out with that?". This secondary question is

damaging for attorneys because it signals that Gorsuch is anticipating a detailed explanation of a

concept that he has deemed as needing the Court's attention. Since he often follows this

exchange with several pointed clarifying questions, attorneys often stumble over their responses.

In contrast, Gorsuch's tone when trying to help an attorney comes with questions posed while

interrupting other justices' attempts to undermine the position. These questions are frequently

helpful leading questions or redirections, all expressed with a tone of collegiality. The purpose of

this tone is twofold, showing respect to the interrupted colleague and encouraging the attorney to

be forthright while answering. Thus, his tone in combination with his types of questions can

signal his position on a case even when using his even-handed approach to oral argument.

Admittedly, when Gorsuch is silent his position on a case is unpredictable. Despite this

limitation, analyzing his tool use throughout the 2017 Term allows for greater understanding of

how his aggressive manner translates into persuasion. Gorsuch voted with the majority in 60 of

his 69 total votes and 48 of the 60 orally argued cases. Gorsuch was in the majority in 33 of the

44 decisions, giving him the third largest number of occurrences among the justices (SCOTUSblog Stat Pack 2018, 17). Gorsuch was in the majority in 16 of the 5–4 decisions, making him second to Chief Justice Roberts (SCOTUSblog Stat Pack 2018, 43–44). Gorsuch's frequent majority membership is unsurprising, yet his relative centrism when voting is curious, given his ideological certainty. In fact, in *Sessions v. Dimaya* (2018) he voted in a 5–4 majority with the liberal bloc of justices. This decision was one of several where Gorsuch cast a centrist vote during the 2017 Term. Gorsuch deliberated cases with a consistent jurisprudential conservatism. Yet several of the majority decisions he joined seemed rather moderate for his ideology-based positions. From this we can deduce that Gorsuch clearly realizes the importance of coalition building and maintaining a consistent conservative voting bloc on the Court.

These voting statistics are inflated by Gorsuch's ideological similarity with the majority of the Court rather than any intentional or unintentional acts of persuasion. In fact, his willingness to display his ideology likely detracts from bipartisan coalition formation more than it assists in the process of coalition building. Given that Gorsuch does not need to persuade his colleagues often, his vocalization during oral argument reflect his genuine interests in the argument at hand rather than highlighting the most potentially persuasive concepts. This is a direct contrast with Sotomayor and Kagan, given their near constant coalition building efforts through their vocalizations during the arguments in a case.

CHAPTER SEVEN

CONCLUSIONS

Supreme Court oral argument is more complex than many scholars have recognized, especially when their work uses an approach-based categorization method or only examines total instances of tool use (e.g., Jacobi and Sag 2019). No single approach category accurately conveys a justice's contributions during arguments throughout a Court Term. Before research for this thesis began, the hope was to update scholarship by emulating the methodology of other oral argument scholars and categorizing Sotomayor, Kagan, and Gorsuch with ease. The prevailing oral argument methodologies turned out to be too narrow and rigid for accurate analysis (e.g., Feldman 2018b). Rather than perpetuate a problematic dialogue, this thesis has attempted to change the discourse on oral argument by proposing a new methodology that takes into account the individual variation of each justice and how each affects oral argument as a facet of the Court's decision making process. This methodology does not just fit justices into a predefined framework; justices approach oral argument with their own thoughts and motivations, which should be accounted for when discussing their work from the bench. By analyzing questions, hypotheticals, declarations, tone of voice, interruptions, and silence, scholars can identify a justice's overall approach to oral argument by looking at each justice as an individual decision maker. The tool-based approach allows for much more nuance, as it represents a justice's actions in each individual argument carried out by the various attorneys in every case and it can track behavioral patterns over the course of a Term.

Identifying these tools from oral argument transcripts revealed interesting stylistic tendencies about Sotomayor's and Kagan's styles and about Gorsuch during his first full Term as

a Supreme Court justice. Sotomayor often dominated the discussions carried out during each attorney's argument, which makes her membership on the Court a major development for oral argument. Kagan's behavior is more sporadic, with an equal mix of passivity and control in conversation through her clarifying questions, hypotheticals, and declarations. Her clarifying purpose has definitely altered the content of discussion during oral argument, given that she consistently uses the tools for this purpose. Gorsuch is peculiar because he regularly exhibits three of the four approaches to oral argument, yet he still largely fits classification as a one-sided, aggressive justice. When an attorney's position sparks his disagreement, Gorsuch tends to dominate the conversation through repeated attempts to shut down that attorney's arguments. This information demonstrates that three of the four newer justices have altered the on-bench dynamics during oral argument and the content of the Court's discussions. Furthermore, their contributions have significantly affected the Court's decision making process as a whole, given their generally strong positions and persuasive skills.

A. Understanding a Justice's Contributions Through the Tool-Based Method

By looking at the number and types of tools used in each case and throughout the Term in conjunction with the approach used in every case, each justice's style can be determined. Ultimately, the three justices examined in this thesis are active participants in the dialogue during arguments and in shaping the way oral argument discussions are used. Each chooses to implement the tools of oral argument in unique ways that work toward serving each justice's individual motivations for being active. When analyzing a justice's actions during a particular case, higher instances of tool use and multiple tool types demonstrated indicates a more active approach. However, this is not always an accurate conclusion for justices like Sotomayor and

Gorsuch since multiple tools can be inferred per vocalization and throw off measurement of a justice's actual level of activity. When justices' actions are compared, the individual tendencies can work in conjunction when the justices are allies for a particular position, or they can contribute to on-bench conflict that manifests during inter-justice dialogue. Tool use is inherently easier to identify and derive conclusions from than the approaches the justices use in each case since one need only count the number of times a justice uses a tool in each argument across the Term. It is equally important to analyze the tools used collectively by each justice to describe each individual approach. Furthermore, comparing tool use by multiple justices throughout an argument can reveal how the Court as a whole approached a particular case's arguments.

By understanding the case-by-case breakdown of each justice's approach use throughout the 2017 Term, the more specific conclusions about each justice's tool use become more meaningful. Based purely on the way a justice actually executes an approach, i.e., what tools are most prominent, some justices' approach use is obvious. In other instances, the approach is more convoluted. For example, based on the way he purposefully uses the tools, Gorsuch's approach use is nearly always obvious. Despite the approach-based categorization method being problematic, using the tools to establish a justice's approach in each argument and trends across the Term can be useful. None of the justices fit into a single broad category of oral argument; instead they all display a hybrid style that makes understanding the purposes behind their tool use essential for deducing the approaches used in each individual case. When combined, the conclusions about each case can reveal a justice's overall style. Together, tool use and approach can demonstrate the justices' mindsets and illuminate tendencies as the Court evolves.

B. Disappearance of a Liberal Voting Coalition

This section applies the tool-based approach as a lens through which to view the modern Court's difficulties with coalition building and the disappearance of the liberal voting bloc. Larger Court trends can be explained by looking at how the justices interact with each other during oral argument. How the justices choose to use tools can directly exemplify their individual positions, sentiments about compromise, and beliefs about the institution's purpose. Thus, the utility of the tool-based approach extends beyond merely understanding the justices' actions during oral argument. Scholars can begin to develop a deeper understanding of polarization and how it prohibits successful coalition building by looking at the divergence of opinion evident between the justices while using tools. Once these unproductive trends are understood, potential strategies for using the tools to build a more collaborative environment can be established. A simple shift in a few justices' mindsets or vocalizations could produce more common ground on which the justices could base majority or unanimous decisions.

The recent polarization of the Court makes coalition building far more difficult as it has become impossible for individual justices to craft voting coalitions on their own. Instead, ideologically similar justices must work together when attempting to draw support from justices who are not automatically allies based on their political outlook. In the aggregate, the 2017 Term was the least successful term for the liberal bloc to form voting coalitions in the Court's recent history. The paramount cause for the liberal bloc's failure was its inability to attract Justice Kennedy's swing vote in 5–4 or 5–3 decisions. Kennedy voted with three of the four liberal bloc members to form a majority only in *Florida v. Georgia* (2018). In recent Terms, Kennedy was a consistent ally of the liberal bloc. Over time he cast an increasing number of liberal votes, setting a record in the 2016 Term when half his votes in 5–4 or 5–3 cases could be characterized as

liberal (Liptak and Parlapino, 2018). Kennedy's distance from the liberal bloc in the 2017 Term surprised Court watchers. By losing a key ally, the liberal bloc of justices needed to work harder during the 2017 Term to build winning coalitions. The liberal bloc sought to broaden its opportunities for coalition building beyond seeking Kennedy's key swing vote. These persuasive efforts were seen in Sotomayor's repetitive questions to attack attorneys the bloc disagreed with and Kagan's helpful declarations that requested beneficial information from attorneys whose position was favored. Both justices used these tools in conjunction with one another to combine their influence. In fact, the liberal bloc won in this Term's 5–4 decisions only by winning Chief Justice Roberts's vote twice and Gorsuch's vote once.

The Court ruled unanimously in only 34% of cases during the 2017 Term, which demonstrates the ideological polarity that has developed (Liptak and Parlapino, 2018). The lack of unanimity has frequently caused justices to use the tools as a way to foster like-mindedness by breaking cases down to a basic less politically triggering level. If the Court continues on this trajectory, the justices will become increasingly reliant on compromise when attempting to make majorities, and their vocalizations will be composed of persuasive tool use. This would differ from the current balance of vocalizations, where persuasive efforts and coalition building comprise only a portion of a justice's effort. Moreover, a lack of cohesion through polarization could fundamentally change the paramount features of oral argument, including the types of tools used and the purposes behind a justice's vocalizations. The justices attempt to rework the ideological imbalance through using the oral argument tools persuasively. When tools are used for persuasion, justices are attempting to build voting coalitions that can alter the outcome of cases and the content of a written decision, making oral argument a fundamental starting point in the Court's decision making process.

Understanding the ways that justices attempt to influence the decision making of their colleagues during oral argument is essential for fully comprehending their interactions with each other and with the attorneys. Using a tool-based analysis increases understanding of the justices' efforts of persuasion and the transition from oral argument to official votes. Without a tool-based analysis, scholars miss a fundamental opportunity to analyze the intricacies of justices' vocalizations. Additionally, going beyond simplistic approach-based analysis and including tool comprehension improves accuracy when predicting a justice's position on a case and the motivation for activity during arguments. A justice's actions should be analyzed independently, then compared with the rest of the Court, and finally examined in the context of the Court's specific Term. Conducting research using all these steps allows for broader Court trends like polarization and coalition building to be recognized, analyzed, and addressed.

C. Continuing Oral Argument Research is Essential

Generations of scholars neglected to research oral argument in favor of analyzing the Court's written opinions, given the importance of written opinions in setting judicial precedent. Fortunately, scholarly understanding of oral argument's significance has grown as evidenced through the recent increase in literature by prominent court watchers like Feldman and Liptack. Oral argument is a crucial part of the Court's decision making process, since it is the first formal opportunity for the justices to discuss the cases before the Court. Scholars must continue to develop the methodology presented in this thesis to foster further understanding of oral argument's role for the Court as a whole and for the justices individually. This thesis attempts to move oral argument scholarship in a new direction by analyzing each justice as an independent actor during isolated exchanges, during entire arguments, and across a full Term. Conducting a

multifaceted analysis is essential for promoting deeper understanding of each justice's

motivations, tool production, approach use, and overall style. This in turn allows us to recognize

the importance of justices' interactions during oral argument as they present their positions and

attempt to persuade colleagues, all to influence how the Court votes in a given case.

The importance of the tool-based methodology can extend far beyond allowing scholars

to understand the intricates of oral argument, as seen through the tools' ability to demonstrate the

Court's polarization. When politics influences a Court decision, those expected to carry out the

decision may question the content of the decision or attempt to appeal a similar case in search of

a different ruling. Unanimity has been an important feature of the Court in the past; its relative

absence in the 2017 Term speaks volumes about the evolving nature of the Court's memberships

and internal dynamics. Thus, the polarization of the modern Court poses a problem for the

institution. This, along with other problems the modern Court faces, should be analyzed by

focusing on each aspect of the Court's decision making process. Tool-based analysis provides a

more comprehensive understanding of the justices' motivations and actions throughout the

decision making process. Scholarship on oral argument needs to change because the polarization

of modern politics has trickled into the institution. A new Court demands a new method for

understanding the motivations and actions of the individual actors who comprise it. This thesis

hopes to fill the void.

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