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Oral Argument Tactics from the Supreme Court Bench: an Analysis of Neil Gorsuch's First Term

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I. INTRODUCTION

In the mid-1990s, scholarship on oral argument before the U.S. Supreme Court began to take shape and consisted mostly of practical advice on how attorneys could perform more effectively before the justices. 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. The term “vocalizations” is used here to signify that justices often have a purpose behind speaking, 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. Scholars disagree about how much certain justices actually influence the voting decisions of other justices during of oral argument, but they agree that oral argument before the Court is a unique process where each justice plays an important role (Malphurs 2013, 56). Approaches during oral argument can clash when vocal justices have opposing ideologies, as seen through longtime conservative allies Justices Samuel Alito and Antonin Scalia against liberals like Justices 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 prior Courts; the justices’ questioning rate has increased by 24%, while the attorneys’ argument time decreased by 46% (Sullivan and Canty 2015, 1005).

Scholars categorize 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 make vocalizations, but there will be few in comparison and a low word count. Scholars also categorize justices in terms of the tools they use, which include questions, tone, interruptions, and silence (Feldman 2018a). When each tool is analyzed, and patterns of behavior are recognized, scholars can categorize justices accordingly. Many scholars categorize justices without fully analyzing tool usage by the justices and variations in their tendencies. 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 the 2015 term, so few scholars have examined the contributions of newly arrived Justice Neil Gorsuch. Scholarship on the 2016 and 2017 terms is limited to the frequency with which the justices spoke and broad categorization of their speech rather than the content and strategic tools the justices used when speaking during oral argument (Prakash 2018). Given the media coverage of Gorsuch’s confirmation and predictions that he would behave similarly to Scalia, I found it surprising that scholars had not yet categorized Gorsuch’s tendencies during oral argument. Accordingly, my research builds upon other scholarship by analyzing the content of Gorsuch’s comments during oral argument in order to classify and better understand his approach.

I expected to emulate the methodology of other scholars and categorize Gorsuch with ease. This proved not to be the case. Gorsuch differs from the other justices because he asks many more questions per vocalization, reflects multiple categorical tendencies, and exhibits all of the oral argument tools. Basically, Gorsuch varies from case to case without an apparent

causal element determining his approach. The irregularity of his approach renders statistical analysis useless. Consequently, my research question is, “what is Gorsuch’s approach to oral argument and why does he behave this way?” Gorsuch is the newest member of the Roberts Court; understanding his approach to oral argument affects scholars’ ability to predict his influence in future arguments and how he may change the Court’s dynamic.

This paper analyzes Gorsuch’s approach to oral argument through careful reading of the oral argument transcripts from the 2017 term and use of scholarship on justices’ behavioral tendencies during oral argument. The paper 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. Yet, the paper goes beyond many other scholars’ methodologies by using tool and content analysis before determining Gorsuch’s approach and identifying a cause for his specific behaviors.

The paper finds that Gorsuch does not fit into one category of modern justices’ approaches to oral argument. Instead, 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, I conclude that his approach to oral argument is a hybrid of already recognized categories. Gorsuch is predictably one-sided in his approach when he enters an argument with a predetermined vote, manifested by near 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. Gorsuch’s personality becomes readily apparent when he uses tone in response to a situation, as

observed in approximately 42 of the 2017 term's oral argument transcripts.¹ His tone is repeatedly blunt and sarcastic to attorneys but shifts to deference and collegiality toward other justices.

The change in the Court's composition created by Scalia's death in 2016 and Gorsuch's confirmation in 2017 provides an opportunity for scholars. Understanding Gorsuch's contribution to the Court's dynamic can help us to understand better how a new justice can affect the flow of oral arguments and written opinions. Accordingly, I end the paper with some general thoughts about Gorsuch's unique style and I speculate about how his contributions have changed oral argument before the Supreme Court and which of his tendencies may continue into future terms. This analysis could also assist scholars with understanding the approach to oral argument of recently retired Justice Anthony Kennedy's successor.

II. ORAL ARGUMENT RESEARCH METHODOLOGY

A. Categories of Oral Argument

Because content is not often considered within the existing statistically oriented scholarship on oral argument before the Supreme Court, the approaches justices utilize during oral argument are understudied. Some justices with unique tendencies, such as Justices Thomas and Sotomayor, have been analyzed, while others are only vaguely described by scholars or ignored entirely (Black, Johnson, and Wedeking 2009). Moreover, common tendencies are not grouped into named categories by most scholars, though this paper has included categorical names from SCOTUSblog scholar Adam Feldman. Feldman identifies four general categories with 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

¹ The actual number may vary because detecting tone within transcripts and recordings is a somewhat subjective task.

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, in the second approach, 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 one of even-handed activism, accomplished through participating nearly equally throughout both of the opposing arguments. Finally, some justices approach oral arguments by being consistently 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 their approach. Identifying when justices use questions, interruptions, tone, and silence during oral argument can help scholars identify the categories justices fit within, allowing them to synthesize past actions and predict the justices' actions during future oral argument sessions. Identifying these tools and quantifying the number of times each was used helped identify Gorsuch's approach to oral argument.

B. Tools Used During Oral Argument

The first tool, posing questions, is often used by justices when they choose to speak during oral argument. Posing questions is a valuable tool for the justices since questions force attorneys to think on their feet because 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 through the content and type of questions asked

(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 and hypotheticals, or can be embodied with tone. Interruptions have become common during oral argument, and they have unique meanings based on usage. 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 utilizing interruptions is to redirect the conversation toward another topic, likely one the justice deems more important. This purpose is

coined as “strategic intervention” because of the justice wielding authority to make lawyers and fellow justices quickly address a separate issue (Sullivan and Canty 2015, 1061).

Besides interrogative 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 also be reflective of a justice’s personality. Tone typically falls into three categorizations: rude, humorous, and collegial. Rudeness often occurs when justices reflect their authoritative position in the courtroom in comparison to the attorney. During oral argument justices are the learned conversationalists, whereas the attorney is a mediator in the conversation. Justices are not rude to each other often; a certain level of collegiality is expected among the jurists (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 not spoken since that case.

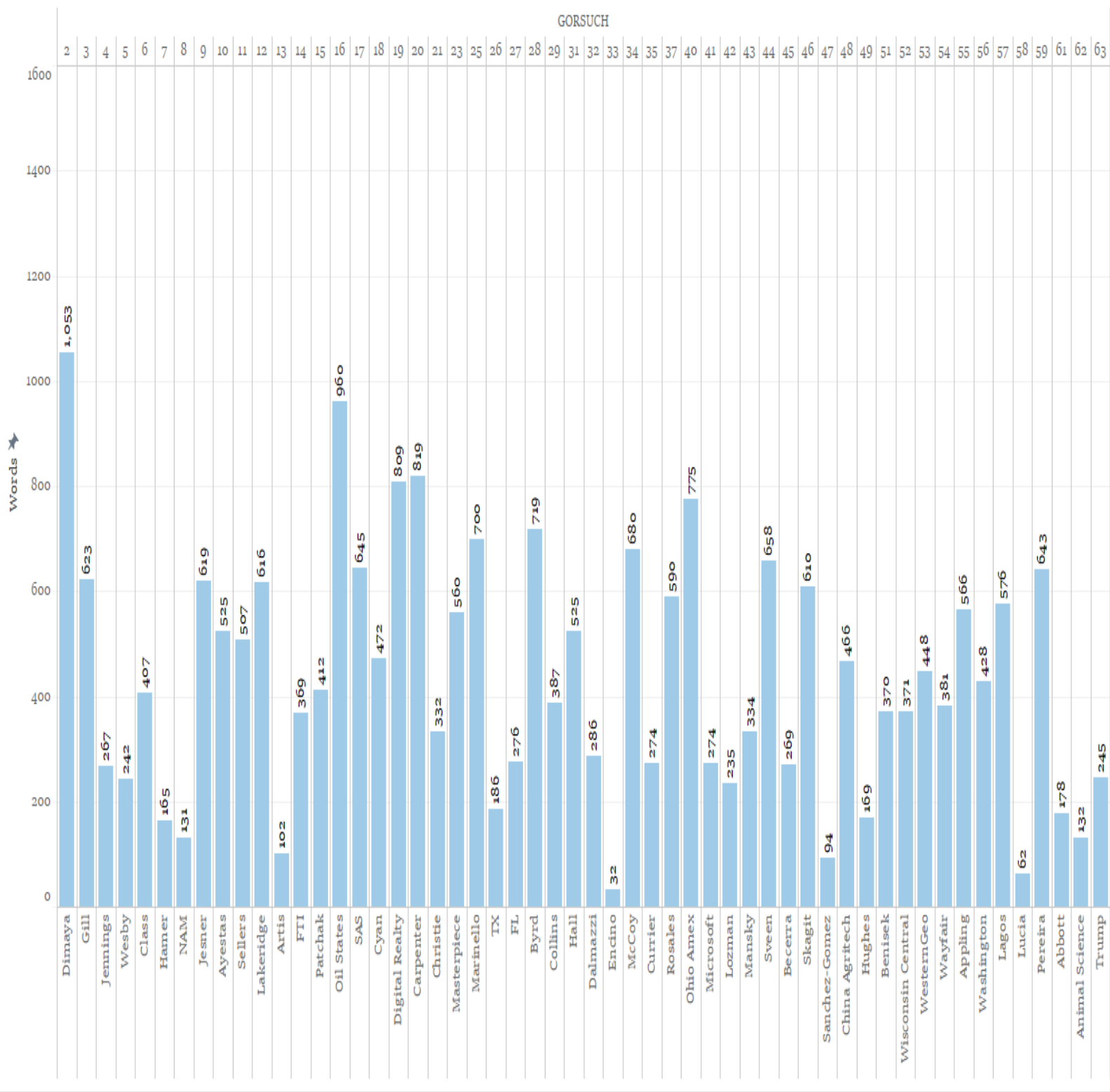
Analyzing all 63 orally argued cases² from the 2017 term, researching voting records, and comparing statistical data from Gorsuch's first month to his first full term, permits preliminary conclusions about his approach to oral argument. Gorsuch does not fit into one of the broad categorizations of oral argument; instead he currently displays a hybrid approach. His approach varies from case to case, though some underlying tendencies can be seen when all the cases and his voting record are taken into account. The 2017 term oral argument transcripts primarily reveal an interrogative one-sided approach, most commonly toward counsel of the side he eventually votes against.

Overall, Gorsuch's participation during oral argument is sporadic when compared with other justices (Black, Johnson, and Wedeking 2009). During this 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 normal statistical analysis as a predictive or analytical method. 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.)

² Justice Gorsuch did not participate in two oral arguments, so percentages of cases utilized in the paper will be out of 61 cases rather than the 63 total orally argued cases from the 2017 term.

Figure 1

Words Per Argument (Gorsuch)



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 lawyer succeeded as a predictive measure for Gorsuch’s participation. Regardless of the number of words Gorsuch uses per argument, his targeted use of oral argument tools is apparent. Future work hopes to create a predictive pattern regarding word count and use of particular tools, but at this time Gorsuch’s word count is not indicative of which approach he utilized or which tools were used prominently in each case.

III. Gorsuch’s Hybrid Approach to Oral Argument

Examples from the Court’s 2017 oral argument transcripts show the variability within Gorsuch’s hybrid one-sided, even-handed, and restrained approaches, yet also continuity with his use of tools for specific reasons. Since asking questions is the most commonly used tool, discovering the extent to which Gorsuch used questions, the types of questions he posed, and whether he followed a pattern began my process of identifying his approach during oral argument. Then, Gorsuch’s interruptions are analyzed. Next, tone usage is discussed to show how his personality plays a role in his approach. Specifically, his use of bluntness, sarcasm, collegiality, and humor are analyzed within the context of his three approaches. Finally, Gorsuch’s noteworthy use of silence is included to further discussion of his variability.

A. One-Sided Approach

Overall, 41 cases featured a one-sided approach to oral argument, so the pattern encompasses two-thirds of the Court’s cases during the 2017 term. Gorsuch’s one-sided

approach was demonstrated through high word counts and significant differences in number of questions per side in 19 cases, and less distinctly in lower word count cases and a lower question differential in 22 cases. Gorsuch features a one-sided approach when his stance is determined before oral argument commenced. Given the last few decades' trend of justices consistently voting along ideological lines, Gorsuch's conservative judicial ideology makes his stances on some cases predictable (Malphurs 2013, 77). Since he often knew which side of the issue before the Court he will vote with, Gorsuch was able to target his difficult questions toward the side he disagreed with. This was likely in an attempt to persuade other justices to view the issues similarly.

1. Questions

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 preliminary conclusions about his style. 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 approach to oral argument (Feldman, 2017a). Interestingly, Gorsuch ranked as the third least vocal justice³ (Feldman, 2017a). Gorsuch's status as an active questioner became apparent in his

³ Feldman excluded Justice Thomas when ranking the justices due to his lack of vocalization during oral argument.

first arguments in the 2016 term, but his level of questioning is not directly tied to the amount of time he speaks per argument.

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, for Gorsuch deviates in select cases. *McCoy v. Louisiana* (2018) raised the question: “does a criminal defendant’s Sixth Amendment right to assistance of counsel 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 overall 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 2018b, 14). Then, Gorsuch aggressively questions Mr. Waxman multiple times without allowing him adequate time to respond (Transcript of Oral Argument 2018b, 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, then Gorsuch interrupts Ms. Murrill's response and poses leading questions with a prolonged justification and explanation of his purpose (Transcript of Oral Argument 2018b, 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 2018b, 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. Murrell to use in her response (Transcript of Oral Argument 2018b, 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 encourages Ms. Murrill to use assistance of counsel to describe the situation at hand, which many justices rejected during Mr. Waxman's argument 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. Gorsuch's pattern of questioning in *McCoy* was indicative of his vote.

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, which, interestingly, he later used in his majority opinion (Transcript of Oral Argument 2017f, 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 listening 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 2017f, 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 in the case rather than on another one that he tries to utilize to help his client's claim. By doing so, Gorsuch shows the Court that Mr. Bond has difficulty justifying his side's position based on the language of the actual statute at issue rather than related legislation.

Although SCOTUSblog's annual "Stat Pack" provides useful data from the Court's term, this year's edition does not fully illuminate Gorsuch's 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' 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 2018a, 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 2018a, 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.

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 2018c, 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,⁴ 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 interrogative approach and his rapid-fire questioning at times.

2. Interruptions

As noted, Gorsuch conducts interruptions primarily through strategic intervention. His goal with interruptions is often to redirect conversation or cause an attorney to make an answer

⁴ 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.

clearer. In *Cyan, Inc. v. Beaver County Employees Retirement Fund* (2018), a case 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 on the attorney’s part, 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 2017a, 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 another redirection. Though it may look similar, the intended outcome is different because here Gorsuch prompts Mr. Goldstein to provide an interpretation that Gorsuch and other justices could then criticize in future 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. In *Gill v. Whitford* (2018) Gorsuch interrupted another justice, which was a rarity for him during the 2017 term (Transcript of Oral Argument 2017c, 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 only exhibits collegiality to his fellow justices. (See section on restrained tone for an example.)

3. Tone

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. In some of his first oral arguments, including *Gill v. Whitford* (2018) and *Class v. United States* (2018), Gorsuch's word counts were not high but his use of tone when he spoke 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 2017c, 50). Gorsuch did not agree with this interpretation, so as Mr. Smith continued detailing his response to a hypothetical formula posed by Chief Justice Roberts, Gorsuch responded with blunt sarcasm (Transcript of Oral Argument 2017c, 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, a mixture of lighthearted jests and more serious sarcasm. His humor is more negative toward attorneys who seem to take the proceedings less seriously or who 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.” 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 2017e, 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?

4. Silence

Gorsuch uses silence within his one-sided approach when the side he favors does not need assistance clarifying its points or does not face distinct opposition from other justices. 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 case, Gorsuch used the other oral argument tools actively against the side he voted against.

B. Even-Handed Activism: A Rarity

In a minority of cases, Gorsuch exhibited even-handed activism, posing a nearly equal number of questions to counsel for both the petitioner and the respondent. Five of the 12 cases exhibiting even-handed activism yielded unanimous opinions, while Gorsuch joined the majority opinions in 3, voted to dismiss in 2, and dissented in 2. Unfortunately, this breakdown shows that a distinct pattern among the cases is unidentifiable. No central theme, issue at hand, or consistent voting pattern is discernable.

1. Questions

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. This behavior may dissipate over subsequent terms on the bench. 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 his even-handed questioning. Gorsuch was highly interrogative toward

both attorneys. Mr. Kovarsky, counsel for the petitioner, faced Gorsuch's questions first. Mr. Kovarsky fell victim to Gorsuch's blunt questioning when he provided a vague answer to a question, causing confusion because he seemed to equate two fundamentally different concepts. Gorsuch responded critically (Transcript of Oral Argument 2017d, 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 2017d, 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 make the other justices realize the mistakes the attorneys have made in their previous answers. Furthermore, he attempts to make each attorney 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.

2. Interruptions

In even-handed cases, Gorsuch used interruptions in response to the actions of attorneys rather than strategic intervention. Using interruptions indicated his even-handed approach. Since the tool is reactionary and sporadically used. When interruptions were used, Gorsuch did not

present an identifiable bias against the side. Rather, he displayed annoyance with the action or phrases causing his interruption.

3. Tone

Gorsuch used his tone as a weapon during numerous oral arguments when attorneys were not forthright in their positions. He did this 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 2017b, 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 both 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 his omission of a key phrase in the statute at issue in response to his earlier questions for clarification of the government's stance (Transcript of Oral Argument 2017b, 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.

4. Silence

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.

C. Restrained

Gorsuch's version of the restrained approach manifests itself as cases where he uttered few words or remained completely silent. For other justices, using fewer words would likely mitigate the use of oral argument tools within vocalizations. But this trend does not exist for Gorsuch because he is still an active participant in cases where his word count would indicate otherwise. Unlike the previous sections, analysis of questions, interruptions, and tone fitting within this approach are exchange specific. This means that examples were selected based on having a restrained purpose rather than necessarily coming from a case reflecting the restrained approach because it is difficult to draw full examples of the oral argument tools from restrained cases. Silence in this approach will be examined in the seven cases where Gorsuch remained silent.

1. Questions

Lower word count cases automatically get classified as reserved by scholars, 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. *Artis*

v. District of Columbia (2018), a case examining a statute of limitation issue when a claim transitions from federal to state court, also deviates from the presumption that a low word count guarantees a restrained approach. Gorsuch remained silent during oral argument for the petitioner and respondent then became the only participant during petitioner's rebuttal. All four of his vocalizations during his 102-word count exchange contained aggressive questions attempting to undermine the petitioner's complicated argument. Gorsuch's sentiments were shared, as the Court was split 5–4, with the majority voting for Artis and Gorsuch joined by Thomas, Alito, and Kennedy, dissenting.

A more successful method of determining a restrained approach consists of reading vocalizations independently and determining their purpose. 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 2018e, 18). This phrase likely does not get classified as a question when computer programs analyze transcripts, but I believe it should because when Gorsuch makes the statement he asks the attorney to provide clarification on a subject. Gorsuch's repeated phrase presents a restrained approach because the question is asked frequently of both attorneys, applied simply, and devoid of any tone.

2. Interruptions

In a restrained approach, interruptions are not commonly practiced. Upon reviewing the transcripts, I could not find an example of interruption with a restrained purpose or within restrained approach cases.

3. Tone

Gorsuch's tone was often collegial toward his fellow justices. Although collegiality from Gorsuch is featured throughout all of the approaches, collegiality itself is inherently restrained because the justice is not attempting to be active. 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 2018d, 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.)

Gorsuch's humble attitude and deferral to Kagan demonstrated a restrained approach to conflict with other justices, an indicator of mutual respect on the bench.

4. Silence

Gorsuch commenced the 2017 term in silence, surprising many Supreme Court reporters, 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 silent in 7 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 or a memoir scholars can only speculate about why he decides to remain silent. For now, it is fair to conclude that Gorsuch's silence indicates that his overall approach to oral argument during the 2017 term deviated from the specified categories.

IV. CONCLUSIONS

By analyzing questions, hypotheticals, tone, and interruptions, scholars can begin to identify a justice's overall approach to oral argument. Identifying these tools within oral argument transcripts revealed interesting stylistic tendencies during Gorsuch's first full term as a Supreme Court Justice. He is unique because he exhibits three of the four approaches to oral argument, yet I would still classify him as a one-sided justice. In 41 out of the 61 cases he participated in, Gorsuch was discernably one-sided and used the oral argument tools aggressively. I believe that his attitude, though volatile at times, largely reflects a confident outlook, set judicial views, conservative ideology, and an inquisitive approach to oral argument.

Gorsuch's approach has clearly altered the Court's overall pattern of oral argument. His word counts have caused other justices to lose speaking time. Furthermore, his sarcasm and humor at the expense of attorneys has caused a reinvigorated sense of humor in multiple cases. His preset judicial views have provided a conservative majority vote on multiple cases. Gorsuch has started out as a hybrid; I predict he will continue in this pattern with regard to his word counts and his use of tools. Gorsuch's predominant style may change over time, though I hypothesize that his dominant approach will continue to be one-sided. Once justices find their style, they rarely deviate. Gorsuch may prove to be an enigma by maintaining his hybridity, but only future terms can tell.

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