

The Silent Minority:
An Examination of Female Justices of the Supreme Court during Oral Argument

An honors thesis for the Department of Political Science
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Chapter 1: Introduction

The Supreme Court addresses almost every high profile, controversial, and influential issue that comes before the other two branches of the federal government. But unlike the legislative and executive branches, the public has a limited control of the outcome of the Court's decisions. Instead, the result boils down to the arguments of nine judges, all capable of influencing judicial outcomes at every level of the judicial system. And of course none of the nine is elected directly by the people, and all serve a lifetime appointment. While the judicial process, unlike the political process, is often viewed as an objective, decision-making procedure, the life experiences of those who serve on any bench influence to some degree the methodology behind the final decisions of judges. If, on the one hand, the people drafting the laws of the land view the world through a particular lens — say a white, heterosexual, male, and privileged one — and if, on the other hand, the people interpreting those laws also view the world through that same lens, then naturally the interests of a substantial segment of the population — not white, heterosexual, male, nor privileged — will at best be absent, and at worst disadvantaged by those laws. Thus, diversity in every possible sense, on the parts of both lawmakers and interpreters, becomes necessary and essential. One side of this twofold lawmaking structure remains responsible to the public: those who make the laws. But the judicial side remains equally as important, especially considering the judiciary's lack of accountability to the public. I have focused this study on one aspect of this diversity: the gender of the Supreme Court Justices. Historically, the Supreme Court has been comprised entirely of men, but today one-third of the Supreme Court is female. I regard the composition of today's Supreme Court as a perfect subject for the study of the value of gender diversity.

My study focuses on several important and related questions: Given that men and women do not write decisions with any noticeable differences, and given that Justices O'Connor and Ginsburg are fond of claiming that wise old women and wise old men will reach the same decision, what is the specific value of having women on the Court, as opposed to gender-empathetic men? Given that presidents often have a pool of equivalently qualified Supreme Court nominees from which to pick, why should a president choose to nominate a woman to the Court? Should we aim for gender balancing on the Court, or does gender composition make no difference to the objectives of our judicial system and the highest Court in that system?

My thesis will focus on the most public duty performed by Justices: oral argument. Oral argument presents an opportunity to study both the behavior and treatment of the Justices, as well as the content of their exchanges on the bench. The increased number of women serving on the Supreme Court could potentially be altering how Justices interact with one another and with the petitioning lawyers during oral argument, as well as with their willingness to engage with gender issues during argument. Additionally, with the most recent introduction of two women to the Court, female Justices can begin to move away from token status toward a critical mass in which they are able to contribute as individuals and not simply as a representative of a group. Questions I will focus on during this study include the following: are the female Justices treated differently by their male colleagues, or by the petitioners? Do female Justices themselves treat their male and female colleagues differently? Do they treat male and female petitioners differently? What types of statements are female Justices making during cases that pertain to gender? Are women making "perspective statements" during oral argument that relate specifically to their life experience? Do these statements create a larger justification for nominating women to the Court beyond merely democratic rationales?

By measuring the participation of female Justices in Supreme Court oral argument, both quantitatively and qualitatively, I hope to discover answers to some basic preliminary questions revolving around gender and our justice system. By assessing the presence of patterns in their interactions, as well as the presence of gender awareness in their statements, I hope to foster a more honest dialogue about the influence of personal experience in a highly subjective judicial system. With extraordinarily high-profile and high-stakes issues coming before the Court — such as abortion rights, contraception rights, sexual harassment protection, and equal opportunity in the workplace and educational systems — how women participate in deliberations when deciding these cases may be crucial, both in developing their own opinions and in influencing and raising awareness for their male colleagues. Most importantly, I hope that my study can contribute in a meaningful way to the discourse currently surrounding issues of gender balance and gender equality by effectively presenting an ample basis for making gender diversity an ambition in judicial nominations.

Oral arguments represent rich data for analysis because they are the only occasion, apart from decision announcements, when the public has a window into the inner working and dynamics on the Court. It is during oral arguments that Justices want a petitioner to develop an argument strong enough to withstand criticism from the other petitioner and from their fellow colleagues. Before oral argument, Justices prepare by reviewing briefs presented by both sides, and by reviewing additional briefs submitted by third parties in support of either side. Thus, Justices often arrive at oral argument with a solid understanding of the issues at stake, and most likely an impression of their own attitude towards the issue. Petitioners each have half an hour before the Court to sway the Justices to their cause, clearing up confusion on the part of Justices they believe to be supporting their side, and attempting to dismantle the arguments of their

opponents in the hopes of winning over less likeminded Justices. In order to prompt the petitioners, Justices often participate in heated questioning with the petitioners and with each other. I posit that measuring the participation of female Justices during these arguments, both quantitatively and qualitatively, reveals their willingness to engage with their colleagues in a public and meaningful way.

I anticipate that, as the number of women has increased, their participation has also increased. Additionally, as both the female Justices have served for longer periods of time, developing a rapport with their male colleagues, and as their presence on the Court has increased, the male Justices have treated them more respectfully. I expect that the female Justices have become more willing to engage with issues directly relating to women as they have moved away from being a token minority to a sizable portion of the Supreme Court body. I also predict that all of the female Justices have used their perspective as women to comment on gender cases that reach the Court, inserting their general and personal experiences as women to inform the dialogue of the Court.

Studying gender in terms of social interaction given that only four women have ever sat on the Supreme Court, and given that the Supreme Court's configuration depends primarily on the individual personalities and styles of individual Justices, makes measuring these individuals on the basis of social classifications a risky endeavor. Some of what I find in my thesis may be due to the personal rhetorical style of the Justices, and differences noticeable between the genders may have more to do with personality than socialization, especially given that the Justices are all seasoned and experienced jurists. Yet I believe that the trends and patterns I do find can be considered constructive and telling despite these limitations. My study also does not require or demand that female Justices be feminists, either in their decisions or in their

interactions on the Court. Of course, there will be members of the Court who do not act in the stereotypical best interests of their race, religion, gender, region, etc. But this does not mean that understanding the perspective of a member of a different social category is not crucial to the broader awareness of one's inherent biases. It will always be easier to ignore the implications of certain laws and certain rulings for social groups to which one does not belong, if those one is deliberating with share many of one's own social attributes. Nevertheless, once one includes the perspectives of people who have walked in different shoes, no matter how they have reacted to their classifications, one's perspective will inevitably change. Thus, although generalizations when it comes to Supreme Court Justices are precarious undertakings, and should be viewed with the understanding that the sample is indeed quite small, gender differences must be explored if we are to understand better the purpose of having diverse courts at any level of the judicial system.

The second chapter of my thesis provides context for my examination of gender diversity on the Supreme Court by providing a complete literature review of past examinations of oral argument, female Supreme Court Justices, female jurists in the United States, and, most importantly, feminist legal theory and other legal theory upon which I have built my study. With this context, my thesis questions, methodology, and findings can be better understood in relation to the current status of gender, oral argument, and legal theory research. All of these categories of past research present diverse findings and challenges, each examined with varying intensity. Gender diversity remains a topic that currently enjoys an exhaustive volume of literature upon which to base and ground my study. By narrowing my focus on the Supreme Court and the gender of its make-up, I hope to add to, rather than repeat, these findings. Oral argument persists as an aspect of the judiciary's responsibilities that has received surprisingly little attention, but

may prove to make my thesis a unique endeavor. Supreme Court oral arguments have been transcribed with the names of the Justices starting only in 2004, leaving thousands of hours of recorded, but virtually useless, unidentified oral argument. Given that I am studying gender specifically, I was able to pick out the voices of Justice O'Connor and Justice Ginsburg, whose cases I examined before 2004, and thus conduct a rare experiment with oral argument. In regards to feminist legal theory and the field of legal theory in general, both have proven to be constantly evolving disciplines that nevertheless have contributed a great deal to the understanding of the purpose and place of this study in legal understanding.

My third chapter details my methodology. This chapter clarifies and expands upon the many obstacles involved in studying gender, the Supreme Court, and oral argument specifically. It also grounds the rest of the study in order to give the reader a complete understanding of the data presented later in the study. There were many necessary choices I had to make that limited my data collection: the availability of oral argument, as mentioned above, as well as time and resource limitations. These strictures all act to provide a better sense of why oral argument research remains indeed so rare, and as a result why my findings are so unique and valuable.

My fourth chapter consists of the data collected in regards to speech patterns present throughout oral argument. This section includes analysis and findings from my study relevant to the linguistic styles of each of the four female Justices. In order to implement this project, expansive new data collection was required in order to listen to and examine hundreds of cases and evaluate the contribution of the female Justices. I examined the number of times the female Justices spoke, the number of times they spoke first in the oral argument, the number of times they referenced one another as compared to their male colleagues, the type of questioning they employed (questions versus statements), the number of times they interrupted their colleagues as

well as the petitioners, the number of times they themselves were interrupted, and the number of times they were referred to as “ma’am” as opposed to “Your Honor” or “Justice.” Studies involving gender and the Court have been very limited, mostly to cases involving women’s rights or to individual biographical studies of female Justices. This section explores a more concrete, methodological, and quantitative look at the behavior and treatment of each female Justice during her first two terms on the Court. This chapter also includes analyses of the data presented and a discussion of its importance in the context of my thesis, and more broadly in my discussion of gender.

My fifth chapter encompasses the actual contributions of the four female Justices on a qualitative level. This chapter addresses the central question of my thesis: whether life experience plays a role in the contributions of female Justices during oral argument, and how important these contributions actually are. Using much of the data collected in Chapter Four, this chapter examines the words chosen by the Justices, especially those connoting life experience, and what I call “perspective statements.” This chapter analyzes these statements within both the context of the case itself and in the context of the Justice’s personal life experience. Finally, it assesses the importance of this data in creating a justification for female representation on the Court beyond democratic principles of equal representation.

My sixth chapter comprises my personal experiences attending two oral arguments during the spring of 2014, my final analyses of my data, and my assessment for the future of gender diversity and future appointments to the Supreme Court. I hope in this section to explain fully the relevance of my thesis in the current political climate, as well as for the future of Supreme Court nominees. I also hope to demonstrate the relevance of my study to the

understanding of every kind of diversity in any judicial context, not simply as it relates to gender or the Supreme Court.

Understanding the impact of gender on the Court leads to a more complete view of the Court and, one hopes, to the importance of gender balance. Research that has explored gender on the Supreme Court has been mostly anecdotal. This study seeks to ground such studies in original and innovative data assessing the overall impact and contribution women have made on the Court during their limited time and in their limited numbers. Huge strides have been made on the Court in the last several decades. For example, when Justice Ginsburg was a lawyer arguing before the Court for the ACLU, male Justices, who later became her colleagues, commented on her figure and outfits.¹ The Court rapidly changed from an all-boys club to one with three strong female Justices willing to make controversial arguments, even ones involving their gender. This study seeks to put female contributions during oral argument into a broader context. It also seeks to point to specific patterns of behavior or particular statements made by female Justices that represent a personal and gendered perspective. My study has the potential to change the way in which gender, and diversity more broadly, are viewed in the legal context. The decision-making process that judges must participate in stands as inherently prejudiced by their necessary interpretations of the law. We as a society must decide whether it is better to have a diversity of perspectives as judges go about evaluating our laws.

¹ Greenhouse, Linda, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Times Books, 2005), 106.

Chapter 2: Literature Review

I. History of Feminist Legal Theory

In order to better understand the context of the literature I examined, I first explored the initial movements that developed and prompted the research available today. Feminist Legal Theory introduced an entirely new debate about how the law should be interpreted and whom the law should serve. The Critical Legal Studies (CLS) movement of the 1970s, helmed by Duncan Kennedy, opened new doors in legal education concerning manipulation of the law to serve one's own aims. Nevertheless, feminist thinkers soon saw the short-comings of a movement dominated by white men who, while concerned about the problems faced by racial minorities and women, wanted control of their movement and refused to hand over power. Justice Ginsburg neatly summed up the goal of many in the Feminist Legal Theorist field:

But in order that women shall be emancipated . . . men must also be emancipated. [T]he aim must be that men and women should be given the same rights, obligations and work assignments in society. The greatest gain of increased equality between the sexes would be, of course, that nobody should be forced into a predetermined role on account of sex, but each person should be given better possibilities to develop his or her personal talents.²

Justice Ginsburg's declaration clearly explains how predeterminations based on sex undermine any kind of equality. With these predeterminations codified in the law, propping up fundamental ideas about gender roles and responsibilities in society, it is no wonder that both men and women suffer from these limiting definitions of employment, social position, aspiration, and fulfillment.

The Critical Legal Studies movement challenged both legal practices and the legal education system in the United States and successfully exposed many biases inherent within the law. The movement "burst onto the legal education scene in the mid-1970s," led by far-left law professors looking to challenge their conservative colleagues and the hierarchical system of legal education, as well as to hire fellow liberal thinkers onto law school faculties.³ Duncan Kennedy

² Ginsburg, Ruth Bader, "Gender and the Constitution," *University Cincinnati Law Review* 44, no. 29 (1975): 1.

³ Tamanaha, Brian Z., "The Failure of Critics and Leftist Law Professors to Defend Progressive Causes," *Washington*

largely directed the movement, disrupting hiring and tenure processes at Harvard Law School,⁴ and proscribing tough doses of reform for every aspect of the legal education system, from salaries to teaching methods. One of Kennedy's main assertions was that judges, not legislators, needed to shift the law towards fairer and more balanced outcomes for those left unrepresented by lawmakers. If the law was written and enforced primarily by rich, white men, their interests would naturally dominate the law and leave other groups disadvantaged. Thus, in his article "Freedom and Constraint in Adjudication" he walks his reader through his reasoning as a judge assigned to a union picketing case. Using his gut instinct that the union workers should be favored over corporate interests, he seeks to manipulate the facts of the case, the law, and the precedent in order to achieve not only a favorable outcome for the union workers in that instance, but to shift the law in general to look more favorably upon workers' rights.

Feminist Legal Theory took over where Critical Legal Studies (CLS) left off, examining the law as it disadvantaged women in particular. For example, while the criminal system worked well for assault and murder cases, acts of aggression typically affecting men, it failed in cases pertaining to rape, child custody, and domestic abuse, cases typically affecting women. Like Kennedy, many Feminist Legal Theorists used legal education as a path towards shaping the next generation of lawyers, using the first hand experiences of women to give proper context to the vague, male-oriented notions that CLS had towards women. Both of these groups of thinkers demonstrated how the law has been unfairly and exclusively shaped by wealthy white men who were unable or unwilling to expand its protections and equal application to other classes of people.

While the legal system is fundamentally imbalanced in that certain interests are sacrificed

University in St. Louis Legal Studies Research Paper No. 13-04-02 (2013), 315.

⁴ Tamanaha, "The Failure of Critics and Leftist Law Professors to Defend Progressive Causes," 315.

on the alter of other peoples' advantages, the law is not fundamentally unjust. Justice, after all, is a normative concept, relying on value and moral determinations as well as individual application of the law. Legal formalism, where the law is applied mechanically with no consideration for individual circumstances, does not function in the actual world. Thus, where individual discretion on the part of the judge and jury exists, and where unforeseeable circumstances occur, no absolute, positive justice can take place. While purely perfect justice does not exist, the American legal system strives, in a world of unforeseeable situations and necessary individual discretion, to implement a system of law that limits arbitrary outcomes and injures as few people as possible in the process. CLS thinkers and their Feminist successors accurately identified and attempted to correct a system of law highly disadvantageous to many political minorities who could not find relief in a political system stacked against them.

Before any examination of the system of law and its fundamental justness can take place, both the Critical Legal Studies movement and the Feminist Legal Theorists must be better understood. Duncan Kennedy championed the CLS movement and became "[t]he principal spokesperson for critical views of legal education..."⁵ He explained his complex and sometimes confused process of adjudication by reconciling "the law" with "how-I-want-to-come-out" or HIWTCO.⁶ For Kennedy, reconciling the law as it was, developed by wealthy white men to serve their interests, with what he wanted it to become, serving everyone's interests as equally as possible, proved to be the main struggle of this process of reconciliation. Unlike most deliberative legal processes, Kennedy's emphasizes an end goal, an "ideal scenario in which [he is] able to represent the legal field so that the law corresponds exactly to how-I-want-to-come-

⁵ Menkel-Meadow, Carrie, "Feminist Legal Theory, Critical Legal Studies, and Legal Education or 'The Fem-Crits Go to Law School,'" *Journal of Legal Education* 38, no. 61 (1988): 66.

⁶ Kennedy, Duncan, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education* 36, no. 518 (1986): 518.

out.”⁷ Thus, his ideal scenario is not limited to the outcome of a single case, but in the movement of the law towards his more general ideal of the law. Kennedy self-identifies as a political activist, a stance which influences his vision of the ideal outcome and which enables him to pursue this outcome through adjudication. As Kennedy explains,

I see the set of rules in force as chosen by the people who had the power to make the choices in accord with their views on morality and justice and their own self-interest. And I see the rules as remaining in force because victimized groups have not had the political vision and energy and raw power to change them.⁸

While the system of law remained in the control of those powerful few who manipulate legislation to fit their own interests, Kennedy felt empowered to manipulate the law to fit *his* interests. By revealing how easily the law could be manipulated, by him or anyone else, Kennedy and his fellow theorists hoped to show that the creators of the law had done the same thing: the legal system had been “largely built by elites who have thought they had some stake in rationalizing their dominant power positions, so at any given time they have tended to define rights in such a way as to reinforce existing hierarchies of wealth and privilege.”⁹ Their rationalizations did not prove less malleable than Kennedy’s, and by proving this fact, Kennedy and the CLS determined to change the people, and the perspective, creating law. The CLS movement, led by Kennedy, strove to prove that the law worked in a dysfunctional, highly manipulated manner by manipulating the law themselves.

Feminist Legal Theory took over from CLS theorists after it became apparent that discrimination against women in the law was seen as a sideshow to the main goal of the CLS movement. Feminist Legal Theory seeks to concentrate on areas of the law that either “mask unjust or unequal treatment of women,” or areas where men and women are “explicitly

⁷ Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology,” 544.

⁸ Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology,” 521.

⁹ Tamanaha, “The Failure of Critics and Leftist Law Professors to Defend Progressive Causes,” 315.

treated...differently.”¹⁰ Like the CLS theorists who sought to undermine the very foundations of the law built on a framework of powerful self-interests, feminist jurisprudence also sought to “undermine [the law’s] epistemological foundations, by exposing the ways in which law constructs what is essentially a male point of view as constituting ‘reality’ – objective, true and gender-neutral.”¹¹ Thus, not only did feminist legal scholars view the foundations of law as unjust, they worked with theories of gender that supplanted those investing the male point of view with neutrality. The task for women lay not just in conforming to equal standards, but also in conforming to male ones. For example, when handling cases involving pregnancy, the Supreme Court maintained a “gender-neutral stance,” where “nonpregnant persons” were defined as both men and women, meaning that “any denial of benefits to those who were pregnant could not logically be based on sex.”¹² This seemingly neutral stance affected women and men differently, as only women can become pregnant, leaving the discriminating effects against pregnant people an exclusively female burden. The fight for equality becomes more difficult if the standard of equality is being defined exclusively by one gender. For CLS theorists who considered gender a side issue, almost a distraction from their main drive, feminist legal scholars raised important points about perspective. If judges would not understand the perspective of women, how could they possibly change the law positively to reflect gender-neutral principles? As Carrie Menkel-Meadow says of the CLS’s attitude towards feminist issues, “[T]he critical legal studies critique begins - and, some would argue, remains - in a male-constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced.”¹³ By marginalizing gender, CSL theorists fell into the same trap as

¹⁰ Lacey, Nicola, “Feminist Legal Theory,” *Oxford Journal of Legal Studies* 9, no. 3 (1989): 384.

¹¹ Lacey, “Feminist Legal Theory,” 385.

¹² Menkel-Meadow, “Feminist Legal Theory, Critical Legal Studies, and Legal Education,” 71.

¹³ Menkel-Meadow, “Feminist Legal Theory, Critical Legal Studies, and Legal Education,” 61.

the very lawmakers and legal educators they criticized. As a consequence, female legal theorists applied the CSL theory more critically to law, using personal experience alongside scholarship to improve critical legal studies.

The foundation of the law at present resulted from establishing gender as a “suspect criterion” upon which to base legislation. This signifies that every time distinctions are made in the law based on gender alone, the basis of the law is immediately suspect.¹⁴ Unlike race, there must be exceptions, which include “personal privacy” and “physical characteristics unique to one sex”¹⁵ to accommodate inherent biological differences. This balance between strict scrutiny and natural biological differences between the sexes seems a relatively clear foundation. The Feminist Legal theorists hoped to expand the language of the law to include the female perspective and to create a gender-equal society in every sector of society. While these goals were potentially ignoble and personally motivated, they were no less valid than other methods of interpretation, from originalism to textualism. It only remains to be seen whether female and male Justices alike have been influenced by their attempts to create a more honest dialogue about the implications of a judicial system based upon interpretation.

In her article “Women and the Law,” Judith Baer explores the history of women’s rights in American jurisprudence and contributes significantly to a clearer understanding of the importance of overcoming gender discrimination in the law. While arguing about whether or not women or men contribute differently to the interpretation of the law may prove important, it must be understood within the context of sex discrimination from the founding of the United States. Baer explores this legacy of discrimination, from overt discrimination, “denying them [women] the vote, barring them from certain occupations, and so forth,” to more insidious

¹⁴ Ginsburg, “Gender and the Constitution,” 16.

¹⁵ Ginsburg, “Gender and the Constitution,” 23.

discrimination, “for example, veterans’ preference in civil service.”¹⁶ This more subtle discrimination can also come in the form of presuming “that men’s experiences are the societal norm.”¹⁷ In cases ranging from domestic violence to child custody battles, laws have been crafted by men, for men. Baer elaborates on the case of domestic violence in the law:

Criminal law, for instance, limits self-defense to situations where the accused perceives imminent danger. This definition fits the experience of a man in a fight better than that of a domestic violence victim.¹⁸

Given that men naturally experience certain aspects of life differently, and given that they are more likely to be involved in different kinds of legal disputes than women, this massive failure in the legal system concerning issues that pertain mostly to women is hardly surprising. Thus, Baer’s contribution in her brief overview puts many of these examples of the failure of law in their proper context. Her summary will prove useful by demonstrating the necessity of involving women in both the legislative and legal processes in the United States.

The contributions of Duncan Kennedy, Nicola Lacey, Carrie Menkel-Meadow, Judith Baer, and Ruth Bader Ginsburg all shed light not only on the various ways in which the law continues to disadvantage women, but also points to the importance of having women present in a system of law so susceptible to interpretation. Whether that mode of interpretation be as “pure” as originalism is believed to be by its adherents, or the mode of interpretation favored by Kennedy in directly manipulating cases to further service case law in that issue area, interpretation is an inherently subjective business. When dominated by one perspective, the subjectivity tends inherently to bias the law in favor of that perspective. Thus, given the ability all judges have to manipulate the law, consciously or subconsciously, it becomes all the more imperative to have judges with a variety of life experience. Feminist Legal Theorists point to the

¹⁶ Baer, Judith A., “Women and the Law,” In *Exploring Judicial Politics*, edited by Mark C. Miller (Oxford: Oxford University Press, 2009), 245.

¹⁷ Baer, “Women and the Law,” 245.

¹⁸ Baer, “Women and the Law,” 245.

most obvious ways in which the life experiences of men have biased them against the different lived experiences of women. Thus, these thinkers set the stage for future feminist scholars to build on their foundations to further develop the importance of lived experience in a highly interpretive style of law.

II. Standpoint Theory

Potentially the most influential study contributing to the essential question of my study comes from Sally Kenney and her work *Gender and Justice*. In this book, she outlines many fundamental arguments for the purpose and value of having women serve as judges in the United States. Her main thesis contradicts many feminist arguments centering on judicial decision-making. As she says,

I part company with many feminists in two ways. First, I argue that we should not make an argument for women on the bench based on difference. Second, I believe we should advocate both for more feminists on the bench and for more women – irrespective of whether they are feminist.¹⁹

The difference argument relies on feminist standpoint theory, which states that the perspective one acquires from having lived as a woman, in addition to the acknowledgement of the discrimination one faces, are the essential aspects of feminism. Therefore, being a woman is a crucial element of being a feminist, but so too is overcoming a “false consciousness” or an acceptance of the current exclusionary hierarchy.²⁰ Here, Kenney criticizes Justice Sotomayor for backing down from her comments in 2001 when she stated, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”²¹ While Kenney disagrees with the basic premise that women have an inherently different contribution to make from men, she does acknowledge that “we might have had an interesting national debate on how experience affects judging and

¹⁹ Kenney, Sally J, *Gender and Justice: Why Women in the Judiciary Really Matter* (London: Routledge, 2012), 9.

²⁰ Kenney, *Gender and Justice*, 14.

²¹ Savage, Charlie, “A Judge’s View of Judging Is on the Record,” *The New York Times*, May 14, 2009.

why a greater representation of social locations on the Court might be conducive to justice,”²² had Justice Sotomayor admitted to her belief in her comments.

Kenney acknowledges that conclusive studies have proved that men and women do not decide cases differently, as many had hoped would be the case after Justice O’Connor was nominated to the Court.²³ As Justice O’Connor and Justice Ginsburg often quote from Minnesota Supreme Court Justice Jeanne Coyne, a wise old man and a wise old woman reach the same decision.²⁴ Thus the question becomes, where is the necessity of having women on the Court? Kenney argues that the most important and compelling reason lies in democratic representation in our judicial system.²⁵ Like geographical representation, gender too is necessary in order that “justice is seen to be done.”²⁶ Still, relying on descriptive representation as the only motivation behind increased diversity may exclude more important reasons for inclusion. As Linda Maule points out, “This perspective of inclusiveness...views the placement of women on the bench to be by and large symbolic.”²⁷ Symbolism does hold value, yet arguments do exist, and must be tested, before symbolism is accepted as the end goal of diversity on the bench. Kenney has many persuasive arguments throughout her survey, yet I disagree fundamentally with them and hope to find a compelling case for perspective in judicial decision-making, a purpose that does not marginalize or exclude the female perspective.

Patricia Yancey Martin, John R. Reynolds, and Shelley Keith developed an important qualitative examination of the standpoint theory when they examined surveys of members of the Florida Bar and Florida judges regarding gender issues. While their study reveals important

²² Kenney, *Gender and Justice*, 15.

²³ Kenney, *Gender and Justice*, 3.

²⁴ Kenney, *Gender and Justice*, 5.

²⁵ Kenney, *Gender and Justice*, 161.

²⁶ Kenney, *Gender and Justice* 175.

²⁷ Maule, Linda, “A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court,” *Buffalo Women’s Law Journal* 9 (2000): 296.

results regarding gender perception and indicates strong support for the standpoint theory, their results are based on a 1988 mail-in survey, and thus may not prove to be as conclusive, especially in a present-day analysis, as they may initially appear.²⁸ They begin their analysis with a comprehensive examination of past scholarship on feminist standpoint theory, from female participation in a system that is not designed to account for their experiences, to the fact that “While...all women are not the same, we view society’s gender stratification system as devaluing all women (and the feminine) with the result that all women share to some degree a less privileged status or position relative to men.”²⁹ Rather than leaving gender “at the door” of the courtroom, gender instead plays a large role in how women experience the law, and should be used “to gain knowledge of how the legal institution actually works in contrast to how ‘official theory’ or ideology says it works.”³⁰ Their findings support these initial assertions concerning male and female relationships with the law:

Women observe more gender harassment and sexual harassment in legal settings than men do, especially more than men judges. Women attorneys and judges agree more with a feminist perspective on multiple gender issues that affect both litigants’ and legal professionals’ lives... In accord with feminist standpoint theory, as predicted, the connection between experiences with gender bias and a feminist consciousness is pervasive and relatively strong for women and absent or weak for men.³¹

This study demonstrates that the standpoint theory exists in practice, especially in the consciousness of female attorneys and judges. The absence of gender awareness on the part of their male counterparts only further demonstrates the awareness women have for the issue due to its personal effects. While the data, based on a 1988 mail-in survey, is hardly ideal, and may be strongly influenced by attitudes and behaviors that are no longer common in professional

²⁸ Martin, Patricia Yancey, John R. Reynolds, and Shelley Keith, “Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis,” *Signs* 27, no. 3 (2002): 675.

²⁹ Martin, Reynolds, and Keith, “Gender Bias and Feminist Consciousness Among Judges and Attorneys,” 667.

³⁰ Martin, Reynolds, and Keith, “Gender Bias and Feminist Consciousness Among Judges and Attorneys,” 669.

³¹ Martin, Reynolds, and Keith, “Gender Bias and Feminist Consciousness Among Judges and Attorneys,” 689.

settings, it still proves that, at this period in time, gender consciousness existed for women, and was largely ignored by men.

Gayle Binion's examination of Supreme Court rhetoric concerning abortion demonstrates the ways in which the justice system fails certain portions of the population when it relies too heavily on the interpretation and viewpoints of select members. Binion's examination has less to do with rhetoric, however, and more to do with pure discrimination than the title may suggest. Her hypothesis rests on the idea that life experience, more than "abstract principles," matters when assessing judicial decisions, and through decisions, rhetoric.³² When examining Supreme Court decisions concerning abortion, a highly politicized yet important issue, whose primary focus concerns women and their reproductive choices, Binion noticed a common theme of disempowerment. As she says,

The principles on which the Supreme Court has rested its rulings have, however, distinctly undermined the opportunity for women to actualize choice. Restrictions on information, on how doctors practice medicine, on financial support, and on the rights of minors, have allowed for a web of governmental regulation that is designed to deter the abortion choice and to render abortion unavailable to large segments of American women.³³

This quotation sums up the power game of legislation and interpretation that occurs between legislative and judicial bodies at all levels of government. If women remain absent from this dialogue, then their ability to have a say in the outcome of even their most fundamental biological choices can be taken away. Given the multitude of issues that concern exclusively or primarily women, from maternity leave to child custody to rape laws, women need to be active members of these bodies in order for decisions and rhetoric to reflect the interests of the people whom the laws impact. Binion offers an interesting anecdote on this point: "Gloria Steinem tells the story of a Catholic Boston cab driver who reportedly told lawyer Florynce Kennedy, 'Honey

³² Binion, Gayle, "Feminist Theory Confronts U.S. Supreme Court Rhetoric: The Case of Abortion Rights," *International Journal of Law, Policy and the Family* 11 (1997): 63.

³³ Binion, "Feminist Theory Confronts U.S. Supreme Court Rhetoric," 67.

if men could become pregnant, abortion would be a sacrament.”³⁴ The obvious thinking involved in that statement holds that the outcomes of decisions are different when they personally affect one group as opposed to another. Without the presence of the very people who have the greatest stake in an issue, a power struggle, as opposed to a rational negotiation of rights, ensues. While Binion’s examination provides useful context for judicial rhetoric involving a small case study, its narrower scope did not provide a large enough model for this study.

One of the most important studies I read during my examination of relevant literature belonged to Nichola Gutgold, *The Rhetoric of Supreme Court Women*. This study surveyed the four female Justices to serve so far on the Court, from their backgrounds and experiences with gender discrimination, to their past and current tenures on the Court. Most importantly, Gutgold closely examined their rhetorical styles and questioning methods. She started her examination with the first woman nominated to the Court, Sandra Day O’Connor. O’Connor came to the Court with far more to prove than any of her future female colleagues. Having only served for a short time on a state court, she was pulled from virtual obscurity onto the highest court in the land after President Reagan decided he wanted to nominate a conservative woman. Intent on proving her merit, Justice O’Connor rarely discussed the impact her gender played on her decision-making. As she herself said,

“Yes, I will bring the understanding of a woman to the court, but I doubt that that alone will affect my decisions. I think the important fact about my appointment is not that I will decide cases as a woman, but that I am a woman who will get to decide cases.”³⁵

Unlike future Justices Ginsburg, Sotomayor and Kagan, Justice O’Connor was appointed as a conservative and spent much of her tenure on the Court acting as the swing vote, often having the deciding balance of a case rest on her. Justice Ginsburg, on the other hand, came to the Court

³⁴ Binion, “Feminist Theory Confronts U.S. Supreme Court Rhetoric,” 67.

³⁵ Gutgold, Nichola D., *The Rhetoric of Supreme Court Women: From Obstacles to Options*, (Lanham, MD: Lexington Books), 2012, 21.

having fought for nearly a decade as the head of the Women's Rights Project at the American Civil Liberties Union, arguing six gender cases before the Court.³⁶ Instead of tackling them head-on as a feminist, Justice Ginsburg argued several of the cases from the point of view that the law was harming both genders, an appeal that worked much better for the nine white men who ruled on those cases.³⁷ Gutgold makes a point of highlighting these various motivations and tactics for the different behaviors of the first two female Justices on the bench. Both Justice O'Connor and Justice Ginsburg were appointed during a time of massive transition for women in the workplace, especially in the judiciary.

On the other hand, Justice Sotomayor and Justice Kagan, the newer generation of female Justices, encountered fewer obvious obstacles in their path to the Court. Justice Sotomayor's main obstacle came during her confirmation hearing. A past comment of hers, in which she declared that a wise Latina woman would hopefully "reach better conclusions" more often than a white man, enflamed conservatives in the Senate.³⁸ This very inflammation demonstrates the truth of a crucial aspect of my hypotheses: namely, that life experience does factor in to the decision-making process. The Senators who criticized her clearly forgot that everyone brings a unique life experience, the only difference here being that Justice Sotomayor's ethnicity and gender happened to deviate from the norm. Gutgold's analysis of Justice Kagan's was limited due to her new appointment; however, Gutgold rightly explored the media's coverage of her confirmation hearing and the press's exploitation of her marital status and haircut.³⁹ Overall, Gutgold's analysis helps piece together a narrative for the four female Justices and provides insight into their unique argumentation styles. Nevertheless, Gutgold fails to conduct an in-

³⁶ Gutgold, *The Rhetoric of Supreme Court Women*, 49.

³⁷ Gutgold, *The Rhetoric of Supreme Court Women*, 51.

³⁸ Gutgold, *The Rhetoric of Supreme Court Women*, 81.

³⁹ Gutgold, *The Rhetoric of Supreme Court Women*, 111.

depth, analytical study of their rhetorical styles and relies on brief and anecdotal evidence. Still, my theses will expand the groundwork laid by Gutgold.

The various challenges presented by the Feminist Standpoint Theory and those who criticize it make it a perfect theory upon which to base my research. Many feminist scholars do not find merit in exploring inherent differences between men and women; instead, they look towards the creation of equal treatment and equal standards. Nevertheless, I find significant benefit in delving more deeply into the issue of life experience as a restricted trait, an empathy that cannot be experienced by those who have not lived that life. Controversial as Justice Sotomayor's comments were, I believe they became all the more controversial since they require an acknowledgment of the high degree of interpretation inherent in our judicial system. When left to the discretion of white men, some Senators and political pundits seem to feel more comfortable with the insertion of their life experiences as somehow neutral or the standard. With the introduction of more "foreign" perspectives, such as those of women, racial minorities, and even sexual minorities, the insertion of life experiences becomes more controversial. My study intends to confront this issue and explore different arguments to discover the merits and drawbacks of highlighting the differences between the genders.

III. Influential Studies

Several empirical studies have examined, in various settings and to various degrees, the influence of women transitioning from token minority status to a critical mass. A notable study conducted by Linda Maule of the Minnesota State Supreme Court relates in many interesting ways to my current study of the Supreme Court. As Maule states, "In 1991, the Minnesota State Supreme Court became the first high court in the United States where women achieved majority status - four of the seven justices were female."⁴⁰ For that time period, and even for the present

⁴⁰ Maule, "A Different Voice," 295.

day, such a high concentration of women on one court provided a unique case study for female jurisprudence on an individual level and as a critical mass. Maule set out to answer two important questions, questions I too hope to address over the course of this study: “(1) do women justices tend to emphasize women’s issues and (2) are female justices more likely to demonstrate dissonant behavior as more women come onto the bench.”⁴¹ By studying over 1,000 cases over the course of a ten-year period (from 1985 to 1994), Maule sought to determine the behavior of the four women, nominated and elected from different backgrounds and political parties. Maule discovered that issue area determined the cohesion of the female justices: “The female justices, despite differences in their political affiliations, seem to exhibit a uniquely feminine voice in matters concerning family law. They lack the same unified voice when dealing with criminal law cases.”⁴² Maule did not limit her study to the scope of issue area, however. She also measured their willingness to dissent in opinions and write concurrences independent of other Justices on the Court. As the number of women on the Court increased, so too did their willingness to engage in this expressive behavior. While Maule’s study was limited by her small sample size (as is also the case in this study), her willingness to examine the entirety of the Justice’s behavior on Court, from the issues they examined and the outcomes of the cases they decided, to their willingness to write certain types of opinions, outlines a creative approach to a difficult problem.

In a similar vein, a study on critical mass in corporate boardrooms also tackles a fundamental aspect of my thesis: does having more than one woman change the dynamic of a professional conversation? How so? In a survey conducted with “50 women directors, 12 CEOs, and seven corporate secretaries from Fortune 1000 companies,” Vicki Kramer, Allison Konrad, and Sumru Erkut determined that while the presence of one woman was crucial in boardroom

⁴¹ Maule, “A Different Voice,” 303.

⁴² Maule, “A Different Voice,” 307.

discussions, the conversation substantially changed when there was a critical mass (at least three women).⁴³ When describing the various benefits of including women in these boardroom conversations, the authors claimed “Women...bring new issues and perspectives to the table, broadening the content of boardroom discussions to include the perspectives of multiple stakeholders.”⁴⁴ Crucial to having this broadened content and new perspectives added to the conversation, however, is the necessity of including women in a substantial manner. When only one or two women serve on a board, their perspectives may be ignored as those of outsiders, they may be excluded from important social settings, and too much importance may be placed on their gender:

Women who have served alone and those who have observed the situation report experiences of lone women not being listened to, being excluded from socializing and even from some decision-making discussions, being made to feel their views represent a “woman’s point of view,” and being subject to inappropriate behaviors that indicate male directors notice their gender more than their individual contributions.⁴⁵

As women become a more substantial force on a board, as when three or more women serve, their perspectives are no longer considered “female perspectives” but individual opinions. As the women disagree with one another, they assert their individualism in additional ways. Thus, while women do insert their personal experiences into discussions, experiences that often differ from their male counterparts, they are treated as equal participants - not as tokens - in the conversation. Kramer, Konrad, and Erkut’s survey demonstrates that women feel a substantial shift in discussion dynamics with a critical mass. I hope to apply this study to oral argumentation on the Supreme Court as the make-up of the Court has transformed over the last three decades.

The most crucial study I discovered in the course of my research was conducted by Christina Boyd, Lee Epstein, and Andrew Martin on the effects of gender on judging. They

⁴³ Kramer, Vicki, Allison Konrad, and Sumru Erkut, “Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance, Executive Summary,” *Wellesley Centers for Women* (2006): 2.

⁴⁴ Kramer, Konrad, and Erkut, “Critical Mass on Corporate Boards,” 2-3.

⁴⁵ Kramer, Konrad, and Erkut, “Critical Mass on Corporate Boards,” 3.

sought to answer the long-standing query of gender and its impact on the outcome of judicial decisions: “whether and in what ways male and female judges decide cases distinctly—‘individual effects’—and whether and in what ways serving with a female judge causes males to behave differently—‘panel effects.’”⁴⁶ They examined the issue in the federal appellate courts using 13 different issue areas, from abortion and affirmative action, to sex discrimination in the workplace and disability law.⁴⁷ While the study found no appreciable differences between male and female judging on 12 of the 13 issue areas, the 13th issue introduced a crucial result:

Based on an account that isolates the analysis to judge-vote observations with a nearest-neighbor match, we observe consistent and statistically significant individual and panel effects in sex discrimination disputes: not only do males and females bring distinct approaches to these cases, but the presence of a female on a panel actually causes male judges to vote in a way they otherwise would not—in favor of plaintiffs.⁴⁸

These results indicate findings for both individual effects and panel effects. In other words, female judges radically transformed the dialogue and outcome surrounding sex discrimination cases. When women served on the federal appellate panel, they were 10% more likely to side with the plaintiff than male judges; when men serve with women on a panel, they too are more likely to side with the litigant.⁴⁹ This study, while demonstrating this effect for a modest portion of the issue areas it studies — areas that include other gender hot-topics like abortion, sexual harassment, and affirmative action — produces statistical evidence to support my central claim: that the very *presence* of women on the Supreme Court can positively influence the gender discussion, and potentially even the *outcomes*, of gender cases. As more women are appointed to federal and state courts, more studies like this one can prove more definitively the positive impact women can have on their peers and the dialogue of the courtroom.

⁴⁶ Boyd, Christina L., Lee Epstein, and Andrew D. Martin, “Untangling the Causal Effects of Sex on Judging,” *American Journal of Political Science*, 54, no. 2, (April 2010): 389.

⁴⁷ Boyd, Epstein, and Martin, “Untangling the Causal Effects of Sex on Judging,” 397.

⁴⁸ Boyd, Epstein, and Martin, “Untangling the Causal Effects of Sex on Judging,” 406.

⁴⁹ Boyd, Epstein, and Martin, “Untangling the Causal Effects of Sex on Judging,” 389.

IV. The Justification for Oral Argument

As stated earlier, I chose to focus exclusively on oral argument as the medium through which to examine the specific contributions of female Justices. Many other options existed for this study, including the Presidential decision-making process in making judicial nominations, congressional hearings regarding the Justice's confirmation process, written decisions from the Justices themselves, memoirs of Justices, and various reports from clerks, friends, and colleagues.

The Presidential decision-making process remains an intriguing one and deserves more examination, as it is the only way in which potential nominees have a chance of becoming future Justices. This process relies almost exclusively, however, on reports from the Presidents themselves and those closest to them. These accounts become idealized through the process of recreating political narratives, and honesty cannot necessarily be depended upon. As President Reagan said of his nomination of Justice O'Connor, "I felt it was long past the time when a woman should be sitting on the highest court in the land and I intended to look for the most qualified woman I could find for my *first* nomination to the Supreme Court."⁵⁰ This explanation is not an entirely honest one, given that more qualified women existed on federal benches. Justice O'Connor, at the time of her nomination, was completing her second term on the Arizona State Court of Appeals. This is also a rather narrow-minded interpretation of events, as it implies that qualified women were lacking and needed to be "found." In addition, the Presidential decision-making process does not assess the value of women specifically because it relies exclusively on the current reasoning processes of Presidents, who may themselves be flawed.

I also considered using the congressional hearings available for every confirmation process of potential Supreme Court Justices. These records could provide insight into the most

⁵⁰ Gutgold, *The Rhetoric of Supreme Court Women*, 15.

crucial factors Senators consider when deciding whether or not to confirm Supreme Court nominees. While these hearings have potential for gender studies and more general examinations of important considerations for Justices, they again fail to approach the heart of my central question. The true value of gender diversity on the Court would not be readily apparent if I were to examine only the opinions of partisan Senators, each with his or her personal idea of the value of diversity. My study would not be an impartial fact-finding mission, but instead a compilation of other people's opinions.

Perhaps the strongest contenders for inclusion in my study were the written decisions of the Justices themselves. It was only the gradual discovery, repeated in much of the original literature I examined, which stated that the opinions of male and female Justices showed limited differences, which ultimately prevented me from using them. Susan Mezey summed up these surprising findings:

“In the end, she [Davis, who conducted a study on the way in which women judges decide cases] acknowledged that, contrary to the expectation that placing more women in judicial office would affect the legal system, her data did not ‘provide empirical support for the theory that the presence of women judges will transform the very nature of law.’”⁵¹

In addition to Davis' study, which found no concrete differences in female and male judicial decision-making processes, other studies have also found similar information. Sally Kenney sums up these efforts:

“As soon as enough women ascended to the bench to make quantitative analysis possible, scholars asked whether women decided cases differently from men... They found few striking or consistent differences, with the exception of a greater propensity of women appellate judges to find more often for the plaintiff in sex discrimination cases and to persuade men colleagues on panels to vote with them.”⁵²

⁵¹ Mezey, Susan Gluck, “Gender and the Federal Judiciary,” In *Gender and American Politics: Women, Men, and the Political Process*, edited by Sue Tolleson-Rinehart and Jyl J. Josephson (Armonk, NY: M. E. Sharpe Inc, 2005), 209.

⁵² Kenney, *Gender and Justice*, 3.

In defiance of many expectations from judicial scholars, Beverly Blair Cook explains that “Justice O’Connor’s voting record and opinions were disappointing...”⁵³ because of their uniformity. Other studies have likewise confirmed these results. These conclusions, conducted by scholars with legal training and a concrete understanding of legal decision writing, satisfy me that contributions made by women in the judiciary should not be evaluated for their different outcomes. Therefore, the contributions of women *due to their gender* must be found elsewhere, if they exist at all. Given this weighty evidence, I turned my attention from written decisions to the more informal process conducted by the Court: oral argument.

I was likewise able to exclude memoirs of current and past Justices and second-hand material from clerks, friends, and colleagues due to their anecdotal nature and quantitative limitations. Justices often publish memoirs while serving on the Court, instead of after their retirement, because they are nominated so late in their lifetimes, and they often retire late in life or die while serving on the Court. Their memoirs provide insight into their backgrounds, their life experiences, and their decision-making processes on the Court. Nevertheless, the Justices often write their chronicles to prove to critics that their decisions on the Court are the product of a valid methodology, as well as to provide insight to a curious public about their pasts. They often offer limited anecdotes of Court life, due to its private nature, and have irregular publishing dates that can come at the beginning of their tenure (for example Justice Sotomayor), or at any point in the middle of their tenure (for example Justice Breyer and Justice Thomas, who have both published multiple memoirs). Clerks likewise maintain strict codes of confidentiality and loyalty for the Justices with whom they served, and rarely divulge private information. Other second-hand accounts struggle for authenticity due to their unverifiable and second-hand nature.

⁵³ Kenney, *Gender and Justice*, 3.

In conclusion, these accounts remain limited and anecdotal in nature, and do not generate enough compelling data to answer the questions I pursued.

V. The Value of Oral Argument

The justification for oral argument required a fuller understanding of the process as it has developed overtime, as well as its current place in Supreme Court life. The most expansive examination of oral argument remains Lawrence Wrightsman's *Oral Arguments Before the Supreme Court*, in which he gives an overview of the operations of oral argument, and an effective introduction to the process, historical significance, and continued relevance of oral arguments in Supreme Court decision-making. Wrightsman begins his study with an examination of the purpose of oral argument and its role in current Supreme Court jurisprudence. Towards that end, he conducts a historical review of oral argument, the petitioners appearing before the Court, the eventual introduction of women to the Supreme Court Bar, and a small but potentially decisive moment when Justice O'Connor proposed suspending oral argument after the Court had overbooked its docket in 1981.⁵⁴ Justice O'Connor's innocent suggestion betrayed the evolution in Court practice that has reduced the essential role of oral argument to a custom that may be safely ignored. As Justice Lewis Powell responded,

I could agree with Sandra's proposed change [but] my only concern is that we might abuse this privilege. I believe in the utility of oral argument, and also in the symbolism it portrays for the public. Accordingly, if the rule is changed, I would hope that we could use this option sparingly.⁵⁵

Justice Powell's reasoning carried the day and oral argument has continued in Supreme Court tradition despite these challenges to its importance. Beyond simply demonstrating the continued effectiveness of oral argument, Wrightsman also delves into the personalities and arguing styles of all the then-current members of the Court (at the time of the study in 2008, Justice Souter and

⁵⁴ Wrightsman, Lawrence, *Oral Arguments Before the Supreme Court: An Empirical Approach* (Oxford: Oxford University Press, 2008) 10.

⁵⁵ Wrightsman, *Oral Arguments Before the Supreme Court*, 10.

Justice Stevens were still serving and Justice Sotomayor and Justice Kagan had not yet been appointed). Using a widely accepted psychological personality categorization, Wrightsman demonstrates aspects of five of the Justices' behavior on the bench that make them compatible with these traits: Justice Scalia for extraversion, Justice Breyer for agreeableness, Justice Souter for conscientiousness, Justice Kennedy for openness to experience, and Justice Thomas for negative affectivity, or anxiety, or neuroticism.⁵⁶

Wrightsman also introduces a methodology for classifying questions asked from the bench: so-called "affirming questions," "inquisitive questions," and "challenges."⁵⁷ These categories cover questions that further an attorney's argument, that deal with the facts of a case, and those that challenge the attorney's case and might harm his or her argument.⁵⁸ While all of these various methodologies and techniques do explore areas of oral argument that rarely have been examined, the investigation Wrightsman offers often becomes superficial and descriptive rather than analytical and essential. When categorizing the personalities of the Justices, he relies exclusively on anecdotes. Due to the fact that the names of the Justices do not appear on oral argument transcripts before 2004, his study of questions from the Justices is limited by the very lack of availability of resources for his study. While his study is limited in key ways that I hope to improve upon in this study, Wrightsman's methodology does provide useful and novel descriptions of the oral argument process as practiced by the Court. These methods and categories have in turn proven useful to me in outlining the purposes and findings of this study.

VI. Conclusion

I feel confident pursuing my exploration of the value of diversity on the Supreme Court. There has been significant work done in a number of fields from feminist legal theory to the

⁵⁶ Wrightsman, *Oral Arguments Before the Supreme Court*, 85-101.

⁵⁷ Wrightsman, *Oral Arguments Before the Supreme Court*, 70-1.

⁵⁸ Wrightsman, *Oral Arguments Before the Supreme Court*, 70-1.

purpose and relevance of oral argument, all of which will tie into my hypotheses. However, all of these studies have been limited by their methodology, something that my study will capitalize on. My thesis has the potential to combine disparate elements of judicial decision-making, feminism, Supreme Court structure, and female Justices into a broad study that will provide analytical proof for the Feminist Standpoint Theory. Thus, despite the broad range of literature available for my topic, a significant niche exists for my research.

Chapter 3: Methodology

I. Background and Guiding Research Questions

In order to pursue the various questions outlined in the Introduction and expanded in Chapter 2, I decided upon a specific methodology that, while expansive, will effectually act as the first stepping-stone in better understanding the importance and necessity of having gender balance on the country's highest Court. It is crucial to note that feminist and legal scholars do not universally pursue this search for a “gender difference” between men and women. Many simply believe that it is important “that women not be seen to be excluded as participants in the judicial system, and how confidence in our institutions requires that they reflect the citizenry.”⁵⁹ My interest lies in finding whether this is actually the extent of gender importance, or if there is a value in life experience on judicial decision-making. If laws affect the two genders differently, do the different life experiences of the people interpreting the laws influence their evaluation of these laws, regardless of the end product of the decision?

The main question I hope to pursue in this study concerns the makeup of the Court and its ideal composition: given that men and women do not write decisions with any noticeable differences, what is the specific value of having women on the Court, as opposed to gender-empathetic men? Why should a President choose to nominate a woman to the Court? Should we aim for gender balancing on the Court, or does gender composition make no difference in the functioning of our judicial system? I hypothesize that life experience does matter and contributes significantly enough to make female appointments and gender balancing on the Court a priority for any President given the existence of cases pertaining exclusively to women, and the impact all cases have on the lives of women.

⁵⁹ Kenney, *Gender and Justice*, 6.

I plan to examine two ways in which gender may influence the workings of the Supreme Court: (1) how the behavior and treatment of female Justices changes over their time on the Court and as more women join the Court; and (2) how the life experiences of women are integrated into their discussions of gender related issues on the Court. These two separate studies are connected to the same overarching goal of assessing the difference hypothesis. Do women treat each other and female petitioners in a manner different from their male colleagues and male petitioners? Are they in turn treated differently by their male colleagues and by the male and female petitioners? When cases pertain to gender, do they incorporate their personal life experiences and life experiences as a woman into the discussion of gender issues? It would be inappropriate for judges unilaterally and explicitly to decide cases exclusively on the basis of their identity, and to discuss their identity as pertains to the case in overt ways. There are more subtle ways, however, in which the Justices may incorporate their experiences to broaden the perspectives of their colleagues and to draw the Court's attention to a particular result of a law they may have been unaware of. Thus, these two methods of assessing my difference hypothesis go to heart of gender on the Supreme Court and its significance in oral argument.

II. Data Collection: Identification of Cases

In order to examine these questions, I conducted an expansive examination of hundreds of Supreme Court oral argument transcripts and recordings, then systematically categorized and coded them. I decided to examine the four female Justices who have served on the Court: Justice Sandra Day O'Connor, nominated by President Ronald Reagan in 1981, who served until 2006; Justice Ruth Bader Ginsburg, nominated by President Bill Clinton in 1993 and who continues to serve; Justice Sonia Sotomayor, nominated by President Barack Obama in 2009; and Justice Elena Kagan, also nominated by President Obama in 2010.

After determining which Justices I would study, I began narrowing the thousands of oral arguments I had at my disposal. Given that Justice Sotomayor and Justice Kagan had recently been appointed, and that Justice Kagan had recused herself from over one third of the cases during her first term, I was presented with the dilemma of creating a uniform examination with factors, such as recent nominations and recusals, over which I had no control.⁶⁰ I therefore decided to study the first two terms of each female Justice, which would create a constant for each of them. While the Justices have all served for different amounts of time, studying each of them during their first two terms would compare them during their period of greatest insecurity and adjustment; in many ways it would also offer a “control” for time. I also study two of the female Justices later on in their terms (for example, Justice O’Connor was still serving when Justice Ginsburg was nominated in 1993, allowing me to examine Justice O’Connor during this time period as well). Justice O’Connor’s first term occurred in 1981, a time when the Court took twice as many cases as it currently handles. For the sake of uniformity, I therefore took only cases from her first term, 1981, which gave me a roughly equal caseload as her future female colleagues. The time periods I examined follow: 1981, 1993-1994, and 2009-2012 (2009-2010 for Justice Sotomayor, 2011-2012 for Justice Kagan, because she had recused herself from so many cases in her first term).

This narrowing process still left me with hundreds of cases per Justice. I therefore further winnowed the cases by examining “Constitutional challenges” exclusively. I defined a Constitutional challenge as a case dealing directly with Constitutional issues or ‘original jurisdiction’ between states or states versus the federal government. I excluded cases dealing with statutes where new legislative action could be taken: questions of federal law, tax code and other non-Constitutional matters. For example, I included *Barclays Bank PLC v. Franchise Tax Board*

⁶⁰ Wermiel, Stephen, “Justice Kagan’s Recusals,” *Supreme Court of the United States Blog*, October 9th, 2012.

of California (1993) because it concerned the Interstate Commerce Clause found in Article 1 of the Constitution, but excluded *Beecham v. United States* (1993) because it concerned federal law 18 U.S.C. 922 and examined a question narrowly focused exclusively on that law: “can state procedures for the restoration of the civil rights of felons restore the right of a federal felon to possess a firearm?” This case clearly addressed the scope of a certain federal regulation, but does not comment directly on any portion of the federal Constitution. By excluding non-Constitutional challenges, I eliminated roughly two thirds of the cases, retaining the caseload that often deals with individual, group, state and government rights as opposed to the scope of state and federal laws. After this narrowing process, I was left with roughly 60 to 70 cases per female Justice.

III. Data Collection: Analyzing Transcripts

For my initial data collection, I relied exclusively on the Oyez Project and the National Archives for recordings and transcripts of the oral arguments. The Oyez Project is a website built by researchers at the Chicago-Kent College of Law, where researchers compiled and digitized all of the available transcripts and recordings of oral argument. From that website, I created a list of cases that qualified as Constitutional challenges for each period of years I would examine. I also compiled the transcripts for each case I had selected. I then listened to each selected case from 1981, 1993 and 1994, highlighting the transcript for each case as I listened.

Early in my examination of oral argument, I discovered that before 2004 the transcripts of oral argument sessions did not identify the names of the Justices speaking. Instead of marking each statement with the name of the Justice making the statement, the transcripts are marked instead with “Unknown Justice.” In order to access Justice O’Connor and Justice Ginsburg’s earlier oral arguments from 1981, 1993, and 1994, I needed to listen to hundreds of hours of oral argument, identifying them purely on their distinctive female voices, and in the case of Justice

Ginsburg, her telltale New York accent. Unfortunately, this process of identification could not be used effectively and reliably to identify the voices of the seven or eight other male Justices. If I had studied the behavior and contributions of male Justices during these years as well, identifying them in this process would have been highly inaccurate and at times impossible to replicate. Thus, my highlighted transcripts served as both a highly unique data set and a necessary narrowing of my potential data due to availability of accurate oral argument transcripts, not to mention constraints of time and resources.

For each transcript and each female Justice, I assigned different colors for when they spoke first in oral argument; when they interrupted someone (either the petitioner or a fellow Justice); when they were interrupted (either by the petitioner or a fellow Justice); when they spoke; when they were mentioned (by the petitioner or a fellow Justice); and when a comment made by anyone in the oral argument pertained to gender or a Justice was referred to as “ma’am” or “sir” as opposed to “Justice” or “Your Honor.” Each of these highlights lasted for an entire sentence. For example, even if Justice O’Connor only interrupted the petitioner with one word, I highlighted the entire sentence with her particular “interrupting color” to indicate that she had interrupted someone. The same held true for when the female Justices were interrupted by someone. This process made counting the number of times they were interrupted, and the number of sentences they spoke, a much easier process. As more and more women joined the Court, I assigned each their own colors for these categories (speaking first, interrupting, being interrupted, speaking, and being mentioned).

For the later cases from 2009-2012, I simply went through the transcripts and highlighted based on the notation now available in the transcripts that identified each Justice by name. I no longer had to rely exclusively on the recordings of each case. The notation in the transcripts

indicated not only when each Justice spoke, but also if they were interrupted or had interrupted someone else. These were indicated with dashes by the Court stenographer. While I found inaccuracies in the transcripts as I listened to the oral argument recordings in 1981, 1993, and 1994, I lacked the time to listen to another four years, totaling over 240 hours worth of oral argument recordings. The discrepancies between the recordings and transcripts were rare and thus did not affect my data in any significant way.

Following this highlighting process, I went through each transcript and transferred the information stated above onto a spreadsheet, with categories for each piece of information. Each year was given its own spreadsheet (for example 1994, which included data on both Justice O'Connor and Justice Ginsburg). The spreadsheets were organized by case, starting with the case date, case title, docket number, and keyword, which stated the constitutional issue pertaining to the case. These columns were followed by a more detailed explanation of the case topic, the vote tally, and columns for the votes of each Justice, including whether or not they had written an opinion (for example Y(O) would indicate that the Justice had voted in the majority, "Y, " for yes, and written the majority opinion "(O)" opinion, whereas "N" for no, would indicate that the Justice had dissented but had not written a dissenting opinion). Following these columns, I indicated whether or not the case was classified as a "gender case," and the justification for such a classification. "Gender cases" according to my study were for the purpose of my perspective statements section and had to meet at least one of the following criteria:

- If the case specifically involves women's rights issues, such as abortion, contraception, discrimination, employment, education etc.
- If the case involves gender discrepancy (a difference in the way the genders are treated by a law or statute)
- If the case involves issues only pertinent to women (i.e. breastfeeding)
- If the appellants gender factored into the case in some way
- If the case involves sexual crimes where the victim(s) is a woman (for example, a rape case that challenges some aspect of the defendant's sentencing)

If the case met at least one of the above criteria, I marked it as a “gender case” and examined it for the presence of a statement pertaining to the life experience of one of the female Justices.

Following these background sections, I then detailed in columns for each female Justice present for the oral argument the number of sentences in total they had spoken, the number of questions they had asked, and the number of statements they had made. I then went on to tally the number of times they interrupted a Justice, the number of times they interrupted the petitioner, and the number of times they were interrupted by a Justice or a petitioner. I then listed if they had spoken first, the number of words they spoke in that case, and the proportion of words they spoke compared to the overall words spoken in the case. In order to collect this data, I highlighted each statement made by the female Justices, used “word count” in Microsoft Word to determine the number, and tallied them together for the “words spoken” section of each spreadsheet. For the “words as a proportion” section, I divided the “words spoken” section by the total word count for the entire transcript. This does not give a completely accurate picture of their relative contribution because the word count included the indications of each speaker, for example “Chief Justice Roberts,” which are obviously not part of the spoken transcript. However, these inclusions were unavoidable; further, as they were present for all transcripts, they did not impair the accuracy of the data and thus eliminated problems with comparisons.

I next included a section on “mentions”: the number of times the Justice was addressed by the petitioner or a fellow Justice, the number of times they were mentioned by a Justice, and the number of times they were mentioned by a petitioner. I felt that the distinction between being addressed as opposed to being mentioned was an important one because it spoke to the value of the argument the Justice made. If they were setting forth a good point, or a good counterexample, that the Court employed throughout the argument, this would demonstrate the respect and value

of their argument as received by their colleagues. On the other hand, the number of times they were addressed only really indicates the frequency of their speech. I then included sections on the number of times the Justices were referred to as “ma’am” and “sir,” as well as the proportion of “ma’ams” to women on the Court, and “sirs” to men. For example, when Justice O’Connor served on the Court, the number of times she was addressed as “ma’am” would be divided by one, because she was the only woman serving. For her male colleagues, however, the number of “sirs” would have to be divided by eight, as eight men served on the Court. This number gives a more contextual representation of these references by allowing the makeup of the Court to dictate its value. I then included sections on the number of times the Justice referred to another Justice in their statements, and specifically to another female Justice. As more and more women joined the Court, I included more and more columns in this section (for example, Justice Sotomayor’s 2010 spreadsheet included columns for referencing male Justices, Justice Ginsburg, and Justice Kagan). These columns were included to test whether female Justices referenced each other more often than their male counterparts in oral argument. I also included a section to tally the number of times the Court and courtroom laughed in response to a comment by that female Justice.

While not all of these categories related specifically to a particular hypothesis I was testing, I wanted to be as thorough as possible in the data collection process in order to avoid repeating my coding process.

In addition to looking for specific speech patterns, I also examined and analyzed “perspective statements.” These statements point to life experience. If made frequently or somewhat frequently when the case pertains to gender, they could speak to the importance of

having that viewpoint stated at the table where that issue is being decided. I define a “perspective statement” in four ways:

1. A statement using personal pronouns (I believe, from my experience, we etc.), or
2. A statement claiming ownership of the issue at hand, or
3. A statement using personal experience, historical examples, life experience of the Justice or of someone they are close to, or
4. A statement contrasting different perspectives, implying that they agree with one perspective over another.

The concept of a perspective statement combines the identity of the speaker with their speech to draw a connection that the audience can then make between those two aspects of the speech, making it more powerful than if a person without that identity had said it. A very clear example of perspective statements comes from an unexpected source. Justice Thomas spoke eloquently during the oral argument of the 2003 case *Virginia v. Black*, involving the legality of burning a cross by the Klan. As Thomas said, no doubt to the amazement of the Court, a burning cross is “unlike any symbol in our society; there’s no other purpose to the cross, no communication, no particular message...It was intended to cause fear and terrorize a population.”⁶¹ As Wrightsman notes, “For him the cross burned by the KKK was a symbol of a reign of terror, signifying ‘one hundred years of lynching.’”⁶² This statement from Thomas demonstrates the insertion of perspective into the oral argument process, drawing his white colleague’s attention to the symbolic meaning and importance of the burning cross for black Americans, an experience none of them could be as intimately familiar with. I searched for similar statements made in connection with gender by the female Justices on the Court in order better to determine how frequently, and how boldly, they inserted their gendered perspective.

In order to set aside cases in which to find these perspective statements, I used my classifications of “gender cases” in order to narrow my search. One of the fundamental reasons

⁶¹ Wrightsman, *Oral Arguments Before the Supreme Court*, 99.

⁶² Wrightsman, *Oral Arguments Before the Supreme Court*, 99.

that gender balance on the Court indeed becomes so crucial pertains to the significance of the cases the judiciary hears involving specifically women's rights, from reproduction to workplace discrimination to domestic violence. In order to test my hypothesis, I developed a standard for all cases I examined, dividing them into "gender" and "non-gender" categories. As stated earlier, my criteria is as follows:

- If the case specifically involves women's rights issues, such as abortion, contraception, discrimination, employment, education etc.
- If the case involves gender discrepancy (a difference in the way the genders are treated by a law or statute)
- If the case involves issues only pertinent to women (i.e. breastfeeding)
- If the appellants gender factored into the case in some way
- If the case involves sexual crimes where the victim(s) is a woman (for example, a rape case that challenges some aspect of the defendant's sentencing)

In order to narrow my search for perspective statements pertaining to gender, I looked through the transcripts of each "gender case" for each year I had compiled the transcripts, reading the female Justice's remarks while keeping in mind my criteria. Every time I happened upon a promising statement, I compiled it, along with the case name and year. Once I had gathered all of my potential statements, I went back through each candidate statement and attempted to justify its selection. After this process, I was able to eliminate several of the statements because they lacked the subjective quality a perspective statement required.

My methodology works within the bounds and constraints of human data collection in order to find patterns of behavior and treatment of the female Justices, along with their personal contributions to oral argument. In the next chapter, I analyze the findings of my data collection as it pertains to the behavior and treatment of the female Justices on the Court.

Chapter 4: Behavior and Treatment of Female Justices

I. Introduction

The first half of my examination of the female contribution to the Supreme Court will focus on both the female Justices' behaviors on the Court, as well as their treatment by their female and male peers and petitioners alike. This aspect of my study focuses on participation in oral argument to explain the gender dynamics of the Court. While their actual statements during argument speak to their willingness to engage with gender issues, their treatment on the Court reveals the broader Court dynamic in which they are operating. As Jeffrey Toobin noted, "Justice O'Connor was very aware of sexist treatment that she received, both before and after her appointment to the Supreme Court and she, like Justice Ginsburg, had excellent radar for being patronized by her colleagues — most especially Justice Scalia."⁶³ It is this "radar" discussed by Toobin that I hope to quantify in this portion of my study. The assessment will concentrate on such variables as the number of words they speak during oral argument; the number of times they speak first during argument; the number of times they are referenced by petitioners and Justices, and the number of times they reference one another; the number of statements they make as opposed to the number of questions, as well as the broader number of sentences they speak; the frequency with which they interrupted one another, male Justices, and petitioners; the frequency with which they are interrupted; and the usage of "sir" and "ma'am" as a substitute for more professional addresses. These variables all address my broader question about the contribution of female Justices by exploring their presence on the Court as measured empirically through available speech patterns. It would be impossible without personally witnessing every oral argument to gauge this dynamic on the Court, especially when it comes to gender. Thus, these variables attempt to compensate for this lack of access to the Court, and can serve to

⁶³ Toobin, Jeffrey, "Ruth Bader Ginsburg: The Supreme Court's 'Heavyweight,'" *National Public Radio*, March 6, 2013.

simulate and recreate the interactions the Justices have with fellow Justices and the petitioners, both male and female. In this chapter, I will detail the relevant graphs and regressions for each variable and analyze any patterns found in the data. I will then place my findings in the their context of the overall dynamics of the Court, in terms of both the female Justice's behavior and their treatment from their female and male colleagues and the petitioners arguing before them.

II. Behavior of Female Justices

a. Hypotheses

One of the most important supplementary issues explored in my study is the issue of quantity. If women do contribute to oral argument differently and significantly, does a justification exist for more than one woman? Does having more than one woman significantly change the amount and style of interaction for all female Justices on the Court? Additionally, does their behavior change over time as they develop confidence on the Court and with their colleagues? I hypothesize that having more than one woman will impact their behavior and treatment for the better; therefore, having more women on the Court is as crucial as having female Justices in the first place. I also hypothesize that, over time, each individual female Justice will develop more confidence, and thus be inclined to speak more often, speak first more often, interrupt more often, and display similar traits that indicate confidence. I also hypothesize that this confidence and seniority will impact their treatment, as well as the level of respect allowed to them, by fellow Justices. In order to test this hypothesis, I have developed three time periods in which to examine the number of perspective statements made when one, two, and three women were on the Court: Justice O'Connor in 1981, Justices O'Connor and Ginsburg in 1993-1994, and Justices Ginsburg, Sotomayor, and Kagan in 2010-2012. These three periods of comparison will provide a clear and quantitative measure for whether their contributions increase

as more women are appointed to the Court, and whether their solidarity empowers them to speak more frequently concerning gendered experiences.

There are obvious shortcomings in this type of assessment. The role of women in the workplace and in the judiciary has changed significantly since Justice O'Connor's nomination, when she felt that she had to justify her right to serve on the Court, to Justice Sotomayor and Justice Kagan, who were graduating from law school and college respectively when they learned of Justice O'Connor's nomination.⁶⁴ Therefore, their life experiences and their comfort with speaking from their personal perspectives, especially regarding gender, have changed. Additionally, with such a small sample size of Justices, issues of personality will strongly affect the way in which they choose to bring personal experience into the equation of judicial decision-making, especially during oral argument. I still believe, however, that this test will produce significant patterns and will thus contribute to a better understanding of gender and behavior on the Court.

b. Words Spoken – See Tables 1-5 in Appendix

The first variable I examined in order to study the broader behavior of female Justices on the Court pertains to the amount they speak, as measured by their word count. Specifically, do female Justices speak more often as more female Justices join the Court? In order to answer this question, I compiled the pertinent data for each female Justice and their "word count" per year. After assembling this information, I tallied the number for each Justice in each year. For example, I tallied all of the word counts for Justice O'Connor in 1981, 1993 and 1994. I then counted the total number of cases available for each year. For example, in 1981, there were 70 cases in question. In 2010, I examined a total of 25 cases, but Justice Kagan participated in only 19 of these, recuing herself from the rest. After collecting this information, I then divided the

⁶⁴ Woodruff, Judy, "Four Women of the Supreme Court Agree: More Is Better," *PBS News Hour*, April 12, 2012.

word count total for each Justice in each year by the number of cases they participated in for that year. Thus, for Justice Ginsburg in 2010, her word count was divided by 25, whereas Justice Kagan's 2010 word count was divided by 19. After gathering these total word counts and averages per case, I then compared the numbers in order to determine if the Justices did in fact speak more often as time went on and more women joined the Court.

I created a total of five bar charts in order to compare word counts among the Justices and for each Justice individually over time. In Table 1, I compared the three Justices currently serving — Justice Ginsburg, Justice Sotomayor, and Justice Kagan — over the course of the three years they have been serving together on the Court: 2010, 2011, and 2012. Three trends emerged from this chart. Firstly, Justice Sotomayor spoke the most of the three Justices, even though she was still a very new Justice to the Court. In 2010, she barely edged Justice Ginsburg out, before taking a dominant lead over the other two Justices in 2011 and 2012, establishing a margin of roughly 150 to 200 words. The second trend shows Justice Ginsburg's gradual decline in words spoken over the three years. As the other two Justices established themselves on the Court as brand new Justices, Justice Ginsburg gradually decreased the volume of her speech. The third trend shows Justice Kagan's steady rise in words spoken. She began in 2010 with the fewest words spoken, understandably due to the fact that it was her first term on the bench. Over the course of the next two terms, however, she caught up to Justice Ginsburg and then surpassed her, displaying a growing confidence over time.

Table 2 reveals Justice O'Connor's growing confidence over the beginning and middle of her time on the bench. In 1981 she started out with an average of roughly 181 words per case, the lowest average for all of the female Justices in their first years. By the 1993 term, 12 years into her time on the Court, her average grew to roughly 227 words spoken and reached roughly 268

by 1994. While these numbers demonstrate positive growth and confidence for Justice O'Connor, these numbers also remain by far the lowest of all of the female Justices, whether in their first terms or well into their careers. This means that in 1993, during Justice Ginsburg's first term on the bench, Ginsburg was speaking roughly 347 more words per case than O'Connor — more words than O'Connor spoke on average throughout her term. The Justice with the nearest number is Justice Kagan with 410 words per case in 2010, her first year on the bench. Thus, Table 2 proves that Justice O'Connor grew more confident in her contributions during oral argument over time, and had clearly established her presence on the Court by 1994. It also demonstrates that Justice O'Connor was very much a product of her time and her peculiar nomination to the bench by never contributing in sheer volume anywhere near as much as her future female colleagues.

Table 3 shows Justice Ginsburg's impressive role on the Court, and her more recent decline in words spoken. Her average for her first term in 1993, 574 words spoken, was never matched by another female Justice until Justice Sotomayor's third term in 2011. Her contribution shrank slightly in 1994, but by 2009, fifteen years later, she was still going strong with an average of 562 words spoken. Interestingly, her contribution has been steadily declining starting in 2009 with the introduction of Justice Sotomayor to the Court. Her age and physical condition may be contributing to her less talkative performance more recently, or this could merely represent a small period of declining contribution. Despite shrinking numbers in comparison to her early years on the Court, Justice Ginsburg still talks frequently and is no means overshadowed by her other two female colleagues. Jeffrey Toobin commented on Ginsburg's contributions to the Court, especially as related to her three current liberal colleagues, two of which are women. As he states,

The four liberals are not fragments... They are together, and that's really Ginsburg's work. ... That is a matter ... of persuasion. She has said, 'We would be more powerful. We would have more of an impact on — potentially — other courts or the future of the courts if we — the four of us — speak together.' I think it's testament to Ginsburg's respect that she engenders among her colleagues that even though the other three don't have to defer to her, they do.⁶⁵

This testament to Ginsburg's reputation among the Court's liberals speaks to her influence, even as her sheer output declines. Thus, while the chart shows a diminishing word count in recent years, Ginsburg's influence has grown as the center of the liberal wing, perhaps indicating that sheer volume is no longer needed for her voice to be heard.

Justice Sotomayor, as seen in Table 4, is by far the most talkative of all four female Justices, eclipsing Justice Ginsburg's most outspoken year in both 2011 and 2012. As Justice Ginsburg noted in 2013 of her colleagues, Justice Sotomayor in particular, "These women are not shrinking violets. Justice Sotomayor won the contest with Scalia for who would ask the most questions at oral arguments this year. It's always Scalia, but this year it was Sotomayor."⁶⁶ Justice Sotomayor's rate of speech will most likely stabilize over the next few years, given her place as the most inquisitive Justice on the Court. Nevertheless, it demonstrates the new model of female Justices in the fashion of Justice Ginsburg, ones who do not shy away from accusations of being "'a terror on the bench,' 'nasty,' 'overly aggressive,' or 'a bit of a bully.'"⁶⁷ Senator Lindsay Graham (R-SC) drew unflattering comparisons during Justice Sotomayor's confirmation proceedings between her style on the bench and Justice Scalia's: "I just don't like bully judges. There are some judges that have an edge, that do not wear the robe well. I don't like that. [Supreme Court Justice Antonin] Scalia is no shrinking violet. He's tough, but there's a difference between being tough and a bully."⁶⁸ The distinction between "tough" and "bully" for Senator Graham remains an incredibly subtle one. In the face of such criticism, Justice

⁶⁵ Toobin, "Ruth Bader Ginsburg: The Supreme Court's 'Heavyweight.'"

⁶⁶ Liptak, Adam, "A Most Inquisitive Court? No Argument There," *The New York Times*, October 7, 2013.

⁶⁷ Totenberg, Nina, "Is Sonia Sotomayor Mean?" *NPR*, June 15, 2009.

⁶⁸ Totenberg, "Is Sonia Sotomayor Mean?"

Sotomayor's trend in Table 4 proves that she is purely becoming a more vocal member of the Court.

Justice Kagan, as seen in Table 5, also appears made in the same mold as Justices Ginsburg and Sotomayor. Over the course of her first three years, her average words spoken per case has increased rapidly. While her average over her three years on the court stands at 100 words less than Justice Sotomayor's average, and 40 less than Justice Ginsburg's average, she still proves to be a vocal member of the Court, a fact that has not gone unnoticed. As Justice Robert's remarked of the presence of Justices Sotomayor and Kagan, "Recent appointees tended to be more active in questioning than the justices they replaced. It's nothing bad about either of them. It's just a fact."⁶⁹ Indeed, it is not a bad thing. Instead, like Justice Sotomayor's trend, it appears that the two new female Justices take after Justice Ginsburg more than Justice O'Connor as far as oral argument volume is concerned.

c. Speaking First – Tables 6-15 in Appendix

The second variable I examined is whether being assertive early in the oral argument makes the Justices more likely to be a dominant force throughout the argument. Specifically, if a female Justice speaks first in oral argument, does she speak more frequently throughout the argument? For each case, I calculated the number of times each female Justice spoke and compared those numbers with the average number of words spoken when the female Justices had spoken first, and when they had not.⁷⁰ I hypothesized that when the female Justices spoke first,

⁶⁹ Liptak, "A Most Inquisitive Court? No Argument There."

⁷⁰ In order to answer this question, I first compared the number of times each Justice spoke first with the total number of cases in which they participated in a given year. I also compiled the number of words spoken for each case, and each Justice, in each year that I examined. Once I had compiled this data, I then copied each list of numbers twice. For example, for Justice O'Connor in 1981, I had a list of the number of words spoken for each of the 70 cases I examined. In one column, I highlighted the number, representing that particular case, in which the Justice had spoken first in the oral argument. I then deleted the numbers that were not bolded, or where they had not spoken first. In the second column, I deleted the numbers that were bolded. I was then left with two lists, one with the total words spoken from cases where the Justices had spoken first, the other with the total words spoken from cases where the Justices had not spoken first. I then averaged these two lists in order to find the average total words

this suggested a greater willingness to engage with the case and a greater willingness to speak during oral argument. Thus, the average words spoken in a case where the Justice had spoken first would be greater than in cases where they had not. I also expected that the number of times speaking first would remain a constant, or increase over time, as the female Justices gained more confidence on the Court. I anticipated that the female Justices would also constitute an equal percentage of times speaking first with their overall percentage on the Court (for example, if there were three female Justices, they would, in total, speak first one third of the time).

My hypotheses turned out to be only partially correct, which came as a surprise. For my comparison of times speaking first across the four Justices, there seemed to be no clear patterns. As seen in Table 6, the number of times that Justice O'Connor spoke first jumped between 1981 and 1993, a predicted outcome. Yet this number did not increase or remain constant in 1994, dropping from eight times to five. While not a huge decrease, it still does not indicate steady growth for O'Connor. Justice Ginsburg's numbers are even less clear. Ginsburg started her first year on the Court in 1993 with a timid three times speaking first in oral argument, a number that declined to zero in 1994. By 2009, she increased her willingness to speak first, jumping to eight times speaking first. Over the next three years, however, there was a steady decline in the number of times she spoke first, perhaps decreasing in a similar manner to her overall speech patterns seen earlier in Table 3. Justice Sotomayor followed my hypothesized pattern of increased willingness to speak first as she gained momentum on the Court. As the number of words she spoke per case increased, as seen in Table 4, so too did the number of times she spoke first in oral argument, excepting a small decline between 2009 and 2010. Justice Kagan operated

spoken from these two types of cases. I compiled these numbers for each Justice in each year studied. In addition, I tallied the number of times each Justice spoke first in each year in order to compare their overall totals with one another. I also compared the number of times each Justice spoke first with the total number of cases in a particular year in order to determine the percentage of times they spoke first in comparison to the total number of cases.

with the least clear pattern in terms of speaking first. In 2010, her first term on the Court, she did not speak first at all. In her second year she spoke first a modest five times, and by 2012 she spoke first only once. Her words-spoken pattern from Table 5 indicates a steady increase in average words spoken and shows her to be a major contributor to oral argument discussion. Perhaps these numbers indicate a difference in her style, or perhaps an unwillingness to jump into the fray immediately, but instead an instinct to see what her colleagues give away first.

As a helpful tool of comparison, I contrasted each Justice's yearly number of times speaking first with the number of cases in which they participated, in order to give a clear indication of the percentage of times they spoke first. While this is not a perfect measure of willingness to jump into the fray, as colleagues can often cut each other off or jump in unexpectedly early, it does demonstrate larger patterns of speech activism on the Court. Justice O'Connor's percentages, for example, in Table 8 show a Justice who rarely spoke first during oral argument, but who also consented to it on occasion. Justice Ginsburg's track record in Table 9 reveals a Justice who was more willing overall to speak first, but with a declining willingness later on. Her percentage of speaking first grew over her tenure, when comparing her record in the 1990s and the 2010s, and constituted a healthy portion of the cases in which she participated (in 2009, she spoke first in 35% of cases and 28% in 2010). Justice Sotomayor, by contrast in Table 10, increased her percentage of speaking-first cases to a very commendable percentage of total cases. By 2011, her third year on the Court, she spoke first in 30% of the cases, and by 2012 spoke first in 37% of the cases. Justice Kagan in Table 11 proves to be another case entirely. The percentage of the time she speaks first is only a small fraction of the total cases in which she participated.

I also examined the total percentage of cases in which female Justices spoke first in order to gain a better perspective into the courtroom dynamic, as seen in Table 7. Starting in 1993, female Justices began to speak first in roughly 25% of cases, a bit more than the two ninths of the Court they constituted. That percentage shrank in 1994, but rebounded by 2009, when two women on the Court spoke first in roughly 35% of the cases (compared to the 22.2% of the Court they represented). Excepting a small dip in 2010, that percentage only grew as one more woman joined the Court. In 2011, one third of the Court spoke first over 40% of the time, and in 2012 in roughly 35% of the cases. These numbers paint a generally positive picture of female participation on the Court, measured by a willingness to direct the initial conversation of the oral argument. It takes confidence and surety to interrupt the petitioner, especially while sitting on such a strong and intense Court. These interruptions often come within sentences, sometimes not even an entire statement, of the petitioner's argument. Thus, if the female Justices are speaking first in oral argument in such a frequent manner, they clearly feel strongly about the case matter or have a prepared question they feel is important enough to lead off with, setting the tone for the rest of the argument before the petitioner has a chance to address the issue independently.

Table 12 compares the number of words spoken when Justice O'Connor spoke first versus the number of words spoken when she did not speak first. The results match my hypothesis: when she spoke first in 1981, she spoke roughly 100 more words than in cases when she didn't speak first; but by 1994, she uttered over 200 more words when speaking first. Justice Ginsburg's comparison in Table 13, by contrast, remains far less conclusive. During her first term on the Court in 1993, Ginsburg spoke over 200 more words per case in which she spoke first. In 1994, however, she did not speak first at all, making a comparison impossible. 2009 shows a similar trend to 1993, if not by such a diminished margin. In 2010, however, the words

spoken in cases in which she did not speak first eclipse those cases in which she did speak first. 2011 and 2012 establish the normalized pattern once again, but by very small margins. Justice Sotomayor in Table 14 more closely follows Justice Ginsburg's pattern than O'Connor's, though by small margins, and by an inverse correlation in 2010, demonstrating that the connection between words spoken and speaking first in oral argument is hardly a positive, or conclusive, one. Justice Kagan in Table 15 establishes a clearer pattern. In 2010, her first term on the Court, she did not speak first in any cases, but in 2011, and by an even greater margin in 2012, she spoke more in cases in which she spoke first. These comparisons amongst the Justices demonstrate that, for some Justices like O'Connor and Kagan, in cases in which they spoke first, they came prepared to engage more in the general argument. For the Justices that spoke first more frequently, however, a similar pattern did not establish itself. This duality could demonstrate that Justices Ginsburg and Sotomayor more readily speak first, not just in cases they feel a special affinity with.

d. Referenced – See Tables 16-19 in Appendix

The third variable I considered assesses the value and merit of the points presented by the female Justices, and the validation they received from their colleagues and the petitioners. Consequently, how does the number of times the female Justices speak correlate to the frequency with which they are referenced by their colleagues and the petitioners? If a Justice speaks verbosely but is never mentioned by their colleagues or the petitioners, this could mean that the points they are making are not influencing the direction of argumentation. If, however, a Justice is being mentioned frequently, regardless of how frequently they speak, this could reveal an influential voice on the Court. In order to address this question, I gathered the data on the number of times the Justices were mentioned by other Justices and petitioners, and, further, assembled it for every Justice in every year. I excluded the number of times each Justice was

addressed directly by the Justices or petitioners because these mentions fail to correspond with the strength of the argumentation, but simply reveal how often the Justice is speaking. If a petitioner mentioned returning to Justice O'Connor's point while addressing Justice Scalia's argument, this would indicate an important remark on Justice O'Connor's behalf. Nevertheless, if a petitioner simply said, "You make a good point Justice O'Connor, however it is incorrect for these reasons," it would indicate that the petitioner was simply answering a question posed by Justice O'Connor. After gathering the total "mentions" and the average per case, I then ran a correlation on the numbers to determine whether a direct relationship existed between the number of times speaking and the number of times mentioned. I hypothesized that a strong positive relationship existed between the two variables, denoting that, as the female Justices spoke more frequently, both their colleagues and the petitioners would mention them more frequently.

My findings overruled my hypothesis and demonstrated that there was little to no correlation between the two variables for any of the female Justices. Table 16 reveals Justice O'Connor's correlation between words spoken and mentions by both petitioners and fellow Justices. The correlation for mentions by Justices was a correlation of only 0.26, and for petitioners, only 0.18. While these relationships are positive, indicating that, as the number of words spoken increases, so too does mentions by fellow Justices and petitioners, nevertheless, they are far too small to be considered a strong correlation. Similar correlations prevail for the other three female Justices in Tables 17 through 19. Justice Ginsburg has the weakest correlation, with the relationship of words spoken to Justice mentions at 0.16, and with petitioners at a negative 0.003. These correlations demonstrate that these variables are unrelated in any meaningful or direct way. Still, these tables do not prove conclusively that there is not a

relationship between how often a Justice speaks and how often their arguments are reintroduced in an oral argument discussion. My manner of examining the variables is very explicit and direct, but does not allow for the myriad and subtle ways in which real life conversations are conducted. While my methods were limited due to time and resource constraints, a more nuanced examination of these variables may reveal interesting results.

e. Referencing One Another – See Tables 19-22 in Appendix

The fourth variable involves how often the female Justices reference one another, as opposed to their fellow male Justices. If the female Justices referenced each other more often than their peers, this could indicate camaraderie and cohesion of their arguments not present among their male colleagues. A classic example of female Justices referencing one another during oral argument occurred during the 2010 case *Bullcoming v. New Mexico*. Justice Ginsburg interrupted the petitioner and pressed him on his previous answer to Justice Sotomayor:

Justice Ruth Bader Ginsburg: I -- in your answer to Justice Sotomayor, did you mean to agree with the New Mexico Supreme Court when they said printout plus an analyst who didn't do this particular run but knows how the process works?⁷¹

This example counts as a reference because Justice Ginsburg directly refers to Justice Sotomayor and her argument, bringing Sotomayor's previous question back into the discussion once again. While increased levels of referencing could correlate to political position, as three of the four female Justices have been on the liberal end of the Court's ideological spectrum, it is still valuable to measure their interactions with one another. Thus, my question in this section remains: how often do the female Justices reference one another, and is it more frequent than with the male Justices?⁷²

⁷¹ The Oyez Project: Chicago-Kent College of Law, "Bullcoming v. New Mexico," accessed April 16, 2014.

⁷² In order to measure how often they referenced one another, I combined columns from each spreadsheet that tallied the number of times they referenced their colleagues. In each of these columns, I had also included the number of times these references included a female colleague. Thus, I added columns for each Justice from each year for total "references" and then references for each other female Justice. For example, for Justice Kagan in 2012 I had a column for "total references," "Justice Sotomayor references," and "Justice Ginsburg references." As with the

Table 20 measures the proportion of female versus male Justice references by Justice O'Connor by year. This table shows only a relatively limited perspective into Justice O'Connor's tendencies in terms of whom she referenced over the course of the three terms that I measured. In 1981, Justice O'Connor was the only female Justice, making it impossible for her to reference other female Justices. In 1993, however, she only referenced Justice Ginsburg when referencing other Justices. This means that she did not directly refer to a point made by a male colleague. Throughout the term, the only Justice she directly referenced in oral argument was her fellow female Justice, Ginsburg. Despite their ideological differences, O'Connor found it valuable to refer directly to one of Ginsburg's arguments, during Ginsburg's first term on the Court no less. This is certainly an interesting trend. Given that the transcripts did not site the names of the male Justices speaking, it impossible to tell which male Justices was being referenced. It is certainly likely, however, that there was more than one Justice being referenced. For Justice O'Connor in 1993, nevertheless, only one option was available in terms of referencing female Justices. In 1994 the trend reverses itself, albeit to a smaller degree, with Justice O'Connor referencing only male colleagues. This graph is unhelpful in that 1981 only gives a perspective into how often O'Connor references colleagues, and then the years 1993 and 1994 reverse each other. Thus, Justice O'Connor's data is inconclusive. It does reveal, however, that Justice O'Connor did not mention her fellow colleagues a great deal, making each individual reference more compelling.

Justice Ginsburg's table is more telling. In 1993 and 1994, Ginsburg also had one option when referring to female colleagues: Justice O'Connor. As seen in Table 21, in these two years, she referenced her female colleague, one whom she was not always ideologically compatible with, far more often than any other colleague. This data indicates a compatibility between the

previous section, I gathered the totals for each column and compared the numbers to study for patterns in the total numbers of their references.

two female Justices, at least in 1993 and 1994 on Justice Ginsburg's part. It is also interesting to note that at no other time does Ginsburg reference either gender as much as she references O'Connor in 1993 and 1994. Jeffrey Toobin reflected on an interview he conducted with Ginsburg in which she discussed her relationship with Justice O'Connor, and the period between O'Connor's retirement and the nomination of Sotomayor in which she was the sole woman on the Court:

I remember interviewing Justice Ginsburg once during that period before Justice Sotomayor was appointed, where she was the only woman on the court, and she hated that. She really didn't like being the only woman on the court, and she liked the fact and O'Connor liked the fact that they were different in many ways. You know, here you have O'Connor, this tall, outgoing, rangy Westerner, and Ginsburg, this bookish Brooklynite. And they both like the idea that it shows that women aren't just one way in the world, that women are complicated and different from one another, yet it's important that women also be represented.⁷³

Despite the fact that she and O'Connor were very different ideologically, they clearly shared a unique relationship while on the bench, and these levels of referencing during 1993 and 1994 clearly demonstrate this relationship. The rest of Ginsburg's data, the years between 2009 and 2012, show surprising differences. Every year except for 2010, a tie year, shows Ginsburg referencing male colleagues more often than female ones. This is a surprising discovery given that the other two female colleagues during these years are very ideologically compatible. Perhaps these findings demonstrate that Ginsburg is more likely to reference those who are ideologically opposite or more likely to be won over to her argument, a swing vote like O'Connor. As her ideologically compatible colleagues all become women, she references them less and less.

Justice Sotomayor's data is even less conclusive than Justice Ginsburg's. As seen in Table 22, in 2009 her references to female and male Justices are tied. In 2010 and 2011, Sotomayor referenced male Justices more frequently than female colleagues, while in 2012 she

⁷³ Toobin, "Ruth Bader Ginsburg: The Supreme Court's 'Heavyweight.'"

referenced female Justices more frequently. These flip flop results remain inconclusive and indicate that Justice Sotomayor does not reference male and female Justices with any sort of pattern or collegial affiliation. Justice Kagan's results, on the other hand, are far more concrete. In Table 23, for each of her three years on the bench she references her male colleagues more often than her female ones. Given that two of the three Justices with whom she agrees with ideologically are women, these results indicate, as with Justice Ginsburg, that her directed remarks in oral argument are targeted at colleagues with whom she is not ideologically compatible. She is thus most likely attempting to engage with Justices who could potentially be persuaded, or discredit colleagues with whom she disagrees. All of this data demonstrates the patterns with which the female Justices overtly direct a petitioner to a previous comment or question from their colleagues. While it is impossible to deduce their motivations for specifically calling out a colleague on the bench, it most likely has to do with the relevance of the Justice's statement and their interest in hearing more from the petitioner on that subject. Referencing is also a rare phenomenon during oral argument, given the fast-paced nature of the discussion and the interest each Justice has in answering their own particular queries. Thus, these references reveal which Justices are making the most interesting or telling remarks on the bench, and which Justices are willing to push the petitioner to answer fully a question or comment from their colleague.

f. Argumentation Style – See Tables 24-28 in Appendix

While measuring the verbosity of language used during oral argument factors in the number of words each Justice speaks, another crucial aspect of their argumentation style includes how frequently they speak, not simply the volume of their words. Thus, I also tallied the number of sentences spoken by each female Justice, dividing the category into statements and questions. By using these categories, I hoped to gain a better understanding of each Justice's willingness to

engage continually with the petitioner, not simply making one long statement, but repeatedly demanding the attention of the petitioner and the Court at large. The differentiation between statements and questions may point to a difference in oral argumentation style. A Justice who uses lots of questioning language may view the oral argument as a time to gain clarity from the petitioner, or demand answers of the petitioner through the use of leading questions. Justice Kagan provides a typical example of a leading question in the 2011 case *Coleman v. Maryland Court of Appeals* that concerns sick leave for men as part of the Family and Medical Leave Act. Kagan asks the petitioner, “But women don’t get sick less often than men, do they?” The petitioner responds “No, absolutely.”⁷⁴ Her question clearly evokes the answer, especially with the addition of “do they?” at the end of her question. It also demonstrates that she herself knows the answer and was simply bringing the Court’s attention to the matter. A Justice who primarily uses statements may view oral argument as a time to convince their fellow Justices and either reveal flaws into the petitioner’s argument, or make a better case than the petitioner. For each Justice and each year, I tallied the total number of sentences, statements, and questions, and compared the numbers to expose trends.

First, I compared the average number of sentences spoken per case for each Justice across the years used in my study. In Table 24, these averages for each Justice are measured against one another, showing Justice Sotomayor the clear leader in average sentences spoken with roughly 37 per case. Closely behind her comes Justice Ginsburg with an average of 28, measured over a much longer career. Justice Kagan similarly has an average of 24, which, given her junior Justice status and newness to the Court, appears to be an impressive average. The only outlier among the female Justices is Justice O’Connor, whose average number of sentences spoken is a mere 14.

⁷⁴ The Oyez Project: Chicago-Kent College of Law. “*Coleman v. Maryland Court of Appeals*,” accessed April 7, 2014.

Like Justice Ginsburg, this measurement includes terms in both the beginning and middle of her career on the Court. Unlike Justices Sotomayor and Kagan who are only being measured in their first few years as Justices, O'Connor and Ginsburg were measured across a longer period of time. This fact should mean that Ginsburg and O'Connor are more assured, and their average most closely represents their true behavior on the Court.

Justice O'Connor's "sentences spoken," as seen in Table 25, demonstrates a fairly expected outcome. In her first year, she employs questions more frequently than statements, revealing that she sought clarity more often than stating a fact or opinion, or presenting an alternate pattern of facts. Yet 12 years later in 1993 and 1994, she transitioned to employing statements more frequently. While the number of statements and questions are relatively equal, the fact that in both years she made more statements indicates an overall trend towards statements. At the same time, she still employed both, indicating that her discussion was not dominated by one form of communication. As her words spoken graph in Table 2 indicates, Justice O'Connor speaks more verbosely as time goes on.

In Table 26, on the other hand, Justice Ginsburg's averages show a clear trend across time. Ginsburg employs far more statements than questions during oral argument across the board. Her averages remain closer during her first two terms on the Court, but by 2009, a stark difference in the style of communication Ginsburg prefers appears. Justice Ginsburg told New York Times reporter Adam Liptak that "[o]ral argument questions are often directed more to a colleague than to the lawyer."⁷⁵ In this case, she clearly uses statements to attack or support a colleagues' position, a trend that demonstrates a more direct style. Rather than disguising a point made for a colleague as a question for the petitioner, Justice Ginsburg uses plainer language to make her point.

⁷⁵ Liptak, "A Most Inquisitive Court? No Argument There."

Justices Sotomayor and Kagan, as seen in Tables 27 and 28, follow strikingly similar patterns with Justice Ginsburg. In their first years on the Court, and for Justice Sotomayor the first two years, the number of questions and statements remain relatively equal. Yet even by their second and third years a strong trend appears with both Justices making far more statements than questions.

Among all four Justices the number of questions remains relatively constant across time, yet the number of statements made becomes the variable in flux. The question then arises, why is it that the number of statements changes, often increasing, while the number of questions remains constant? Is the number of statements a sign of growing confidence? What experience leads the female Justices to feel comfortable making more statements? Given that this trend exists independently across four female Justices, I believe that there must be an element of argument style that develops over time that uses more and more statements in oral argument. This could relate to Ginsburg's point that argumentation involves convincing or disturbing their colleagues on the bench, rather than clarifying points with the petitioner. Perhaps this confidence to attempt to convince colleagues develops over time as relationships and familiarity with their colleagues unfolds. Perhaps during their first terms, the Justices felt that oral argument should be used to clarify points with the petitioner, as seen with O'Connor's unusually high level of questions in 1981 back when the Court was less charged with controversy. Over time, however, and quite rapidly in fact, the Justices developed a sense of their colleagues, their argumentation styles, the points that trouble them about certain arguments, and their voting record on certain issues. They then developed their argumentation styles to address these concerns in the hopes of winning colleagues over to their side. This is not to say that this process cannot occur with the use of questions, but perhaps statements are a more direct and effective manner of stating points

for the benefit of colleagues. Overall, the breakdown between statements and questions during oral argument reveals an interesting and potentially significant detail of argumentation style across ideological and time lines.

g. Interruptions – See Tables 29-43 in Appendix

Finally, I examined the amount that the female Justices interrupt both the petitioner and their colleagues. I hypothesized that the Justice's willingness to make the maximum use of the allotted time in oral argument by forcing the petitioner to go directly to the heart of their inquiry marks a certain confidence in character. This confidence could provide yet another measure of the willingness of the female Justices to engage in an aggressive, yet comparatively accepted, practice during oral argument. That confidence also runs the risk of interrupting a fellow colleague, and/or increasing the stakes for choosing to engage with petitioners in an aggressive manner. In order to measure this inclination, I counted the number of times each Justice interrupted the petitioner and fellow Justices for each case, tallying them for each year and each Justice. I had also collected data to introduce female versus male Justice interruptions and female versus male petitioner interruptions. For each case I tallied whether or not a female petitioner was involved in the case. Thus, for each case I also tallied the number of times that the female petitioner was interrupted in order to determine whether or not the female Justices interrupted a female petitioner more often than a male one. I also measured the number of times the female Justices interrupted a fellow female colleague. Using these side-by-side comparisons for gender, I compiled the data for interruptions for each distinct category, adding in the number of cases heard in each year for a frame of reference.

I first sought to compare interruptions across the female Justices, and found that interruptions of petitioners far outweighed those interruptions of Justices. The second point of notice was the difference in interruption level across the four Justices. Justice Sotomayor's

dominance in interruptions was hardly surprising, given her aggressive argumentation style. The breakdown of the other three female Justices, with Ginsburg coming in second for average interruptions in a case, followed by Justice Kagan and then Justice O'Connor, shows a typical rundown of the Justice's styles. I found extremely close crossover with the average sentences-spoken graphs, and Table 30 shows how closely these two variables mirror each other, suggesting that the frequency with which a Justice speaks predicts how frequently they will interrupt the proceedings. Tables 31 through 34, showing the yearly progressing of interruptions for each individual Justice, also strongly mimic those displaying their average sentences-spoken.

Focusing on the interruptions of fellow Justices, in particular fellow female Justices, Table 35 displays the breakdown of interruptions for each Justice, for each year, for each particular female Justice, and for male Justices in general. Most notable is the fact that, excepting Justice Ginsburg in 2011 and Justice Kagan in 2012, all female Justices interrupt their male colleagues far more often than their female colleagues. Justice O'Connor never interrupted Ginsburg in 1993 and 1994, with Ginsburg interrupting O'Connor only twice in 1994. Justice Sotomayor, a serial interrupter, also became very restrained when interrupting her female colleagues. Also notable is the fact that every Justice in every year interrupted their colleagues at least twice, and very often more frequently. It seems that it is an impossible feature to avoid, especially in such a dynamic Court with constant input from the Justices. Justice Sotomayor remains the female Justice most frequently interrupted by her female colleagues, most likely due, again, to her talkative style on the Court. She is followed by Ginsburg and Kagan, a pattern that once more draws parallels with the amount that each Justice speaks on the Court. Table 36 shows Justice O'Connor's upward trend of interruptions, but only in regards to her male colleagues since she never interrupts Justice Ginsburg. This is hardly surprising given that, in 1981, no

female colleagues existed for her to interrupt, and in 1993 and 1994, Ginsburg was the only other woman on the Court. Table 37 reveals a more varied pattern for Ginsburg in terms of interrupting her colleagues. As stated earlier, 2011 was the only year in which she interrupted her female colleagues more frequently, perhaps indicating that the women on the Court had finally become a substantial enough percentage of Justices on the Court for this to occur without suggesting some specific rudeness towards female Justices. Table 38 indicates that, while Justice Sotomayor certainly does not shy away from interrupting her colleagues, she seems more careful not to interrupt her female peers. Given her high rate of interruption, this pattern perhaps reveals a level of respect she accords to her female colleagues, especially Ginsburg. Table 39 shows a markedly unclear pattern for Justice Kagan. Her rate of interruption for her male colleagues declines over her first three years on the Court, while her rate for female Justices inexplicably grows significantly. Kagan mostly interrupted Sotomayor, which may have to do with Sotomayor's higher frequency of speech; however, Kagan also interrupted Ginsburg twice in 2012, an unusual occurrence given that Ginsburg's rate of speech has been declining recently, and she is usually awarded a high level of respect on the current Court. This may also indicate that the women of the Court often question the petitioner in a tag-team manner, making it more likely that they will accidentally interrupt one another.

In order to measure the female Justice's treatment of male versus female petitioners during oral argument, I differentiated between cases in which both petitioners were male and cases in which at least one of the petitioners was a female. In a Supreme Court oral argument, both sides typically get half an hour to argue their case. In some rare cases, more than one person will argue before the Court, although only one petitioner speaks before the Court at a time. Due to this particular constraint, and the rarity of having a female petitioner, it was impossible to

obtain a large enough sample of cases in which there were two female petitioners. Therefore, in order to measure male versus female petitioner cases, I divided cases for each year into “male petitioner” cases where all petitioners were male, and “female petitioner” cases where at least one of the petitioners was a woman. I then took the average of interruptions of each female Justice in both types of cases and compared them to look for differences in treatment. I hypothesized that the female Justices would interrupt more frequently in cases with at least one female petitioner, due to the social perception that women are easier to interrupt and override. This would be true for female petitioners, I felt, but not fellow female Justices, because the female Justices would not necessarily have a collegial relationship or closeness with the petitioners. My hypothesis turned out to be inaccurate, and Tables 40 through 43 reveal that very little difference exists in the interruption rates for male and female petitioners. This may be due to the above-mentioned limitations of the study. The difference also may not have been registered because even the “female petitioner” cases more often than not had only one female petitioner. If I had been able to measure interruptions by each half of the case, any differences that existed may have been noticeable. As it is, the difference was not great enough to emerge in this format.

III. Treatment of Female Justices

a. Main Question

The second major analysis of behavior that my study examines centers on the treatment of the female Justices by their male colleagues and the petitioners presenting the cases. While the Justices’ contributions constitute the most important aspect of analysis in this study, their treatment, the change in their treatment over time, and their treatment of each other also affects their contributions in important ways. While every person serving on the Court arrives at the Court with extensive experience and a laundry list of qualifications, it remains important to ask

whether women and men are treated equally while on the Court, and whether that treatment has changed over time as societal shifts have emerged, and as women have become a greater force on the Court. Thus, the fundamental question becomes: are the female Justices treated differently by their male colleagues or by the petitioners? In order to answer this question, I undertook a comparative study as much as my limited sample size allowed, studying the number of times women were interrupted while on the Court, and by whom, and how often they were referred to as "ma'am," and how often their male colleagues were referred to as "sir." These two factors offer a glimpse into the verbal dynamics of the Court and the various cues available for Justices on the Court. Are their ideas being valued? Are they being taken seriously? As more and more women have been nominated, these issues have become less of a concern, but my study attempts both to place the current Supreme Court in perspective from Justice O'Connor's Court in 1981, and seeks to determine how the dynamic has changed since then.

While gender attitudes have changed significantly since Justice O'Connor's nomination, I predicted that Justice O'Connor and Justice Ginsburg received the most divergent treatment by their colleagues and the petitioners. Further, I theorized that, as attitudes and work environments changed, so too would the language surrounding professional interactions. After all, members of the Court such as Justice Blackmun went from commenting on Justice Ginsburg's appearance when she argued before the Court to welcoming her as a colleague a decade later. Although it became impossible measure the number of times the female Justices were interrupted against the number of times male Justices were interrupted, I was still able to compare "sirs" versus "ma'ams" to great effect.

b. Interrupted – See Tables 44-58 in Appendix
An important indicator of the treatment of female Justices is the frequency with which they are interrupted by both petitioners and fellow Justices. While the number of times they

interrupt the proceedings indicates their willingness to engage in a lively debate, it is also important to understand the reverse side of the equation. While being interrupted in the intense debate of oral argument does not necessarily denote disrespect, it is important to appreciate how often each Justice is being interrupted, whether their position on the Court changes this dynamic, and whether their colleagues specifically treat them differently.⁷⁶ I hypothesize that petitioners would interrupt female Justices more frequently, and that their male colleagues and the male petitioners would also interrupt them more frequently.

Table 44 presents a comparison of all four female Justices and their rates of interruption from Justices and petitioners. It shows, once again, an arc similar to that recording how much the four Justices speak on the Court. Such a similarity suggests a correlation between the two variables. As with the interrupting variable, the Justices are interrupted far more often by petitioners than by fellow Justices, most likely due to the fact that they are often engaged with direct verbal jousts with the petitioners. Further, the petitioners can have difficulty determining when the Justice is done with their question or statement. A strongly element of haste also inserts itself in the argument, due to the fact that the petitioner is well aware that they have only half an hour to make a convincing argument. If, for example, a slow-speaking Justice veers off on a tangent the petitioner finds unhelpful or potentially detrimental to the case, her or she may sometimes attempt to hurry the Justice along. On the whole, however, the comparison produces few surprises and verifies my initial hypothesis that petitioners interrupted the female Justices far more often than male Justices.

⁷⁶ In order to measure the frequency of interruptions, I compiled the collected data for each Justice in each year for petitioners, fellow Justices, and female Justices. I then also included the number of cases per year for context. As with the number of times that the Justices interrupted their fellow Justices and the petitioners, with male and female breakdowns, I measured these same indicators for the number of times that female Justices were interrupted by Justices, petitioners, male versus female Justices, and male versus female petitioners.

As with the display of Justice's interrupting fellow Justices, I produced a similar graph for the Justices' interrupted by their male and female colleagues in Table 45. The breakdown is striking: first, it shows how large the gap between the interruptions of female Justices by their male versus their female colleagues actually is. It also reveals which of the female Justices are doing the interrupting. Justice Kagan leads with a total of nine interruptions for her female peers, with Justice Ginsburg close behind with eight interruptions. Justice O'Connor, although with less opportunity since she had only two years with other female colleague, never once interrupted a fellow woman. Justice Sotomayor's restrained interruptions were also surprising, given her vigorous and verbose oral argument style. This speaks perhaps to her high regard for her female colleagues, in particular Justice Ginsburg, whom she has never interrupted. While I have been portraying interruptions in this section as intentional actions against specific Justices that signal disrespect, these interruptions can sometimes arise from misunderstandings in a heated discussion in which everyone simply wants an opportunity to voice their concerns. A classic example of such misunderstanding comes from *Metrish v. Lancaster* (2012), in which Justice Kagan unintentionally interrupts Justice Ginsburg:

Justice Ruth Bader Ginsburg: Why -- why was it--
Justice Elena Kagan: This is -- I'm sorry.
Justice Ruth Bader Ginsburg: --why was it the right case?
The parties didn't even raise it, did they?⁷⁷

As this interaction demonstrates, the Justices can often simply misunderstand and misread the timing of their colleagues' remarks. Nevertheless, the larger point remains that large patterns of interruption, especially from male Justices accustomed to dominating a conversation on the bench can speak to the unconscious treatment of female Justices, and their perception of that treatment.

⁷⁷ The Oyez Project: Chicago-Kent College of Law, "Metrish v. Lancaster," accessed April 1, 2014.

Tables 46 through 49 reveal the individual rundowns for Justices versus petitioners interrupting the four women. Justice O'Connor's table shows an interesting variation from 1981 to the 1990s. In 1981 her fellow Justices primarily interrupted her. By 1993, the phenomenon is reversed to the point that she was not interrupted by a single Justice for the entire term. This may reveal different standards for the 1980s as opposed to the 1990s Courts. However, it does suggest that O'Connor, in her first year on the Court and as the only woman, was treated with far less consideration than she was by the time Ginsburg joined the Court. Petitioners may also have operated under more respectful guidelines of behavior, guidelines that radically changed by the 1990s. The rate of interruptions, from a miniscule number in 1981, rose dramatically for O'Connor in 1993, and rose even more the following year. These numbers may indicate a Court in transition, in more ways than one. With two women now on the Court, male colleagues may have begun to take notice of the growing mass of women. Justice Ginsburg's numbers seem to support the notion of a changing Court. The petitioners interrupted her far more often in every year than the other Justices. Nevertheless, the rate of those interruptions steadily declined overtime. The rate of Justice interruptions, however, suddenly jumped up in the 2010s. While the decline in the rate of petitioner interruptions may signal that Justice Ginsburg, as one of the oldest members of the Court, and the frailest, has gained their consideration. However, her colleague's increased attacks may indicate that with three women on the Court, the Justices have stopped treating Ginsburg as a token and, instead, as one of a critical mass. It may also simply indicate a hotter Court in terms of the overall tempo of conversation in comparison with the early 1990s.

Justice Sotomayor is interrupted more often than her fellow female colleagues most likely, once more, because she speaks so frequently and so aggressively, prompting petitioners

and Justices alike to be similarly aggressive in order to cut in. As with Ginsburg, there have been variations over her four terms: the rate of Justice interruptions have steadily increased, indicating, as with Ginsburg, that colleagues feel more comfortable interrupting one of a mass and not a token woman. Petitioner interruptions have fluctuated, but have remained relatively healthy, given her high rates of participation. Justice Kagan, however, is an interesting case. Of the four women, she remains the only one interrupted by Justices more frequently than by petitioners. While it is unclear why she of the four women has the fewest interruptions, given that she speaks more than Justice O'Connor did while on the Court, similar explanations may indicate why Justices are now interrupting the three women on the Court. Clearly, the women on the Court are no longer token minorities, and this fact seems to have affected their treatment on the Court.

The tables depicting the rates of interruption for the female Justices from their male versus female peers on the Court are extremely telling and fit in well with my hypothesis. Justice O'Connor's rates remain something of an anomaly. In 1981, she saw rates of interruption from her peers unparalleled by any of the other Justices. Nevertheless, by 1993, with the advent of Ginsburg's tenure, she had zero interruptions from her male colleagues, and only two interruptions from Ginsburg herself in 1994. Such a drastic change in treatment by her male colleagues speaks to a dramatic shift in attitudes over those twelve years, or perhaps to the introduction of Ginsburg to the Court. Either way, her male colleagues overrode her voice in an extremely dominating and consistent manner in 1981, but that attitude had shifted radically by 1993. With twelve years of experience and one more female colleague, something clearly shifted, consciously or unconsciously, in her treatment by her male colleagues. Ginsburg's rate of interruption was, like O'Connor, low in the 1990s, but by the 2010s had picked up markedly.

The vast majority of the interruptions came from her male peers. Table 51 displays an interesting shift in interruption, with mostly male interruptions in 2009, which drop steadily over the next few years. Female colleague's interruptions, however, steadily climb to an almost equal level by 2012. This shift could signal a change in treatment of the female Justices, now one third of the Court. Sotomayor and Kagan may be growing in confidence during oral argument, partly producing the rise in interruptions of Ginsburg. On the other hand, Ginsburg's rate of speaking on the Court has also decreased between 2009 and 2012, perhaps indicating that her male colleagues had fewer opportunities to interrupt her. Justice Sotomayor's table reveals another interesting trend. The rate of her interruption by both male and female colleagues has steadily increased. Nevertheless, the rate of the female interruptions still remains markedly lower. While there are currently six male Justices, one of whom never speaks during oral argument, and two active female participants in oral argument besides Sotomayor, the five to two ratio seen in Table 53 demonstrates that female Justices interrupted her less than expected, or less than their numbers on the Court would warrant. Justice Kagan's rate of interruption from her male colleagues remained remarkably steady across her three terms on the Court. In 2011, she was interrupted by her female colleagues half as often as her male colleagues, but other than that she has not been interrupted at all by her female colleagues.

As with the section on the Justice's interrupting petitioners, I again compared the rate that the Justice's were interrupted by male versus by female petitioners. Female petitioners were also once again labeled based on having at least one female petitioner involved in the case. The results, unlike the inconclusive results for interrupting on the part of the Justice's, demonstrated a marked difference in rates of interruption. For Justice O'Connor, the rates were relatively equal in 1993, but in 1994, the conspicuous upsurge means that cases with all male petitioners

interrupted her at a much higher rate. Justice Ginsburg's graph also shows a noticeable difference between the two rates, with a marked uptick in 1994, and a smaller but still noteworthy gap in every other year revealing the rise in male petitioner interruptions. The gaps for Justice Sotomayor are more considerable, especially in 2009 and 2011. For Justice Kagan, apart from only female petitioner interruptions in 2010, her patterns closely resembled those of her female peers. While conclusive explanations for these gaps are difficult to produce given that female petitioner cases are cases in which often only one of the petitioners is a woman, these numbers become all the more striking. Perhaps the influence of the female petitioners in terms of rate of interruption of the female Justices was so great as to make the difference noticeable, even factoring in the interruptions of the male petitioners in the case. Perhaps having a female petitioner so changed the oral argument dynamic for both sides as to render it an entirely different environment. Either way, these gaps remain striking and speak to a noticeable shift in the energy and activity on the Court when women present their cases before the Court.

c. Ma'ams and Sirs – See Tables 57-59 in Appendix

The second factor potentially revealing the treatment of female Justices also lends itself to comparison. While Justices on the bench should typically be referred to as “Your Honor” or “Justice,” petitioners occasionally slip and call them either “ma’am” or “sir.” My question was whether or not the petitioners referred to the female Justices as ma’am more often than the male Justices were referred to as sir. This could demonstrate a bias on the part of the petitioners revealing greater levels of rudeness directed at the female members of the Court. In order to measure these numbers, I counted the number of times the Justices were referred to as “ma’am” and “sir” for every year I collected, disregarding which Justice the title was directed at. I then measured the proportion of sirs and ma’ams according to the number of men and women on the Court at that time. For example, when Justice O’Connor served alone on the Court, the sirs were

divided by eight, and the ma'ams by one. Likewise, by the time Justice Kagan joined the Court, the ma'ams were divided by three and the sirs by six. I also looked for whether the usage of ma'am declined as more women joined the Court. I hypothesize that it would change the behavior of the petitioners simply due to the normalcy of having women on the Court.

The actual results contradicted my hypothesis and instead revealed an interesting trend that may indicate why my reasoning about ma'am and sir used in the Court could have been incorrect. As both Table 59 and 60 indicate, 1981 was the year with the greatest usage, by far, of both ma'am and sir, with the proportion of sirs far eclipsing that of ma'ams. After 1981, however, the usage of both terms decreased rapidly. In the 1990s, the usage stayed a small fraction of what it was in 1981. In these two years, the proportion of sirs remained greater than ma'ams. By 2009, the terms have virtually disappeared with sir being used only 12 times between 2009 and 2011, and used zero times by 2012. Ma'am likewise was not present from 2009 to 2011, and was used only twice in 2012. This trend seems to speak to the fact that, rather than a term of disrespect, the replacement of "Justice" or "Your Honor" with sir or ma'am belonged to an earlier era. It seems that, as time passes, the usage of these two terms has disappeared, rather than as a result of the introduction of more women to the Court. I was also surprised to find that sir was used so much more often than ma'am, even when viewed as a proportion of the number of Justices of each gender on the Court. Table 61 also reveals to which female Justices the ma'ams were directed. It comes as no surprise that Justice O'Connor and Justice Ginsburg received all of the ma'am references, as they were the only female Justices on the Court when the terms were customary, or at least current. They did not evenly split the ma'ams in 1993 or 1994, flip-flopping for who is referred to more frequently as ma'am. Interestingly, in 2012 both references to ma'ams were direct at Justice Ginsburg. This seems

further proof that the references to sirs and ma'ams belongs to an earlier period, given that Justice Ginsburg at 81 is by far the oldest woman on the Court.

IV. Conclusion

These assorted variables reveal significant and valuable indicators of how the women on the Supreme Court both behave and are treated. While not all of the variables were strongly correlated or corroborated my hypotheses, the vast majority revealed the importance of gender in how the female Justices choose to conduct their oral arguments, how they treat one another, how they treat the petitioners, and how they in turn are treated. Some of the most interesting and noteworthy results that the bar charts and correlations reveal are patterns I had never noticed while collecting the data, as well as relationships I had surmised and which were verified by the data. For example, while it seemed that female Justices had no qualms about interrupting one another, the chart depicting the frequency with which they were interrupted by male as well as female colleagues revealed an important camaraderie amongst the women in the broader picture. Importantly, they were more likely to interrupt their male colleagues than they were to interrupt one another. Another dramatic finding revealed that having even one female petitioner participating in an oral argument consistently reduced the frequency with which the female Justices were interrupted during oral argument. Other findings, such as the realization that the use of “ma’am” and “sir” during oral argument is most likely a product of changing times rather than gender discrimination also proved constructive. Overall, the findings produced in this chapter serve as only the first step in constructing a better understanding of courtroom dynamics. With such limited access, often only in the form of recordings and transcripts, reconstructing the Court proceedings and analyzing them in an accurate and empirical manner presents a challenge. Nevertheless, this initial study proves that substantial patterns do exist, and these patterns may signify broader behavioral trends on the part of both male and female Justices.

In summary, I conclude that gender does have an impact on the behavior and treatment of the female Justices on the Court. Clear and distinct patterns of behavior show a camaraderie among the female Justices that does not extend to their male colleagues. Moreover, a clear relationship exists between the number of women on the Court and the number of times the Justices speak. As their numbers grow on the Court, so too does the overall contribution of each female Justice. Although my study is limited in that comparisons with male Justices are largely excluded from my consideration, gender clearly factors into oral argument in observable patterns, especially for the women on the Court.

Table 1: Words Spoken Comparison

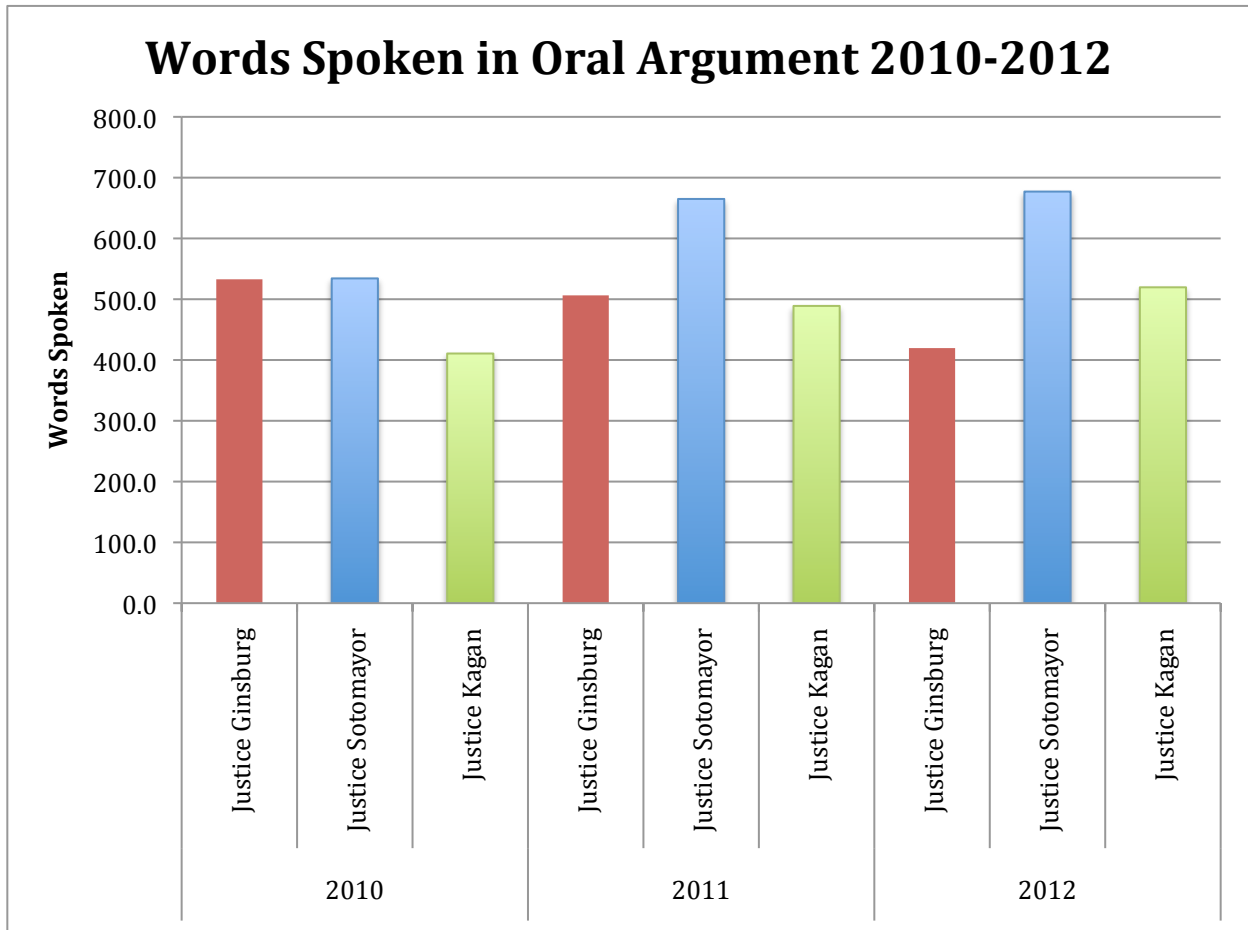


Table 2: Justice O'Connor Words Spoken

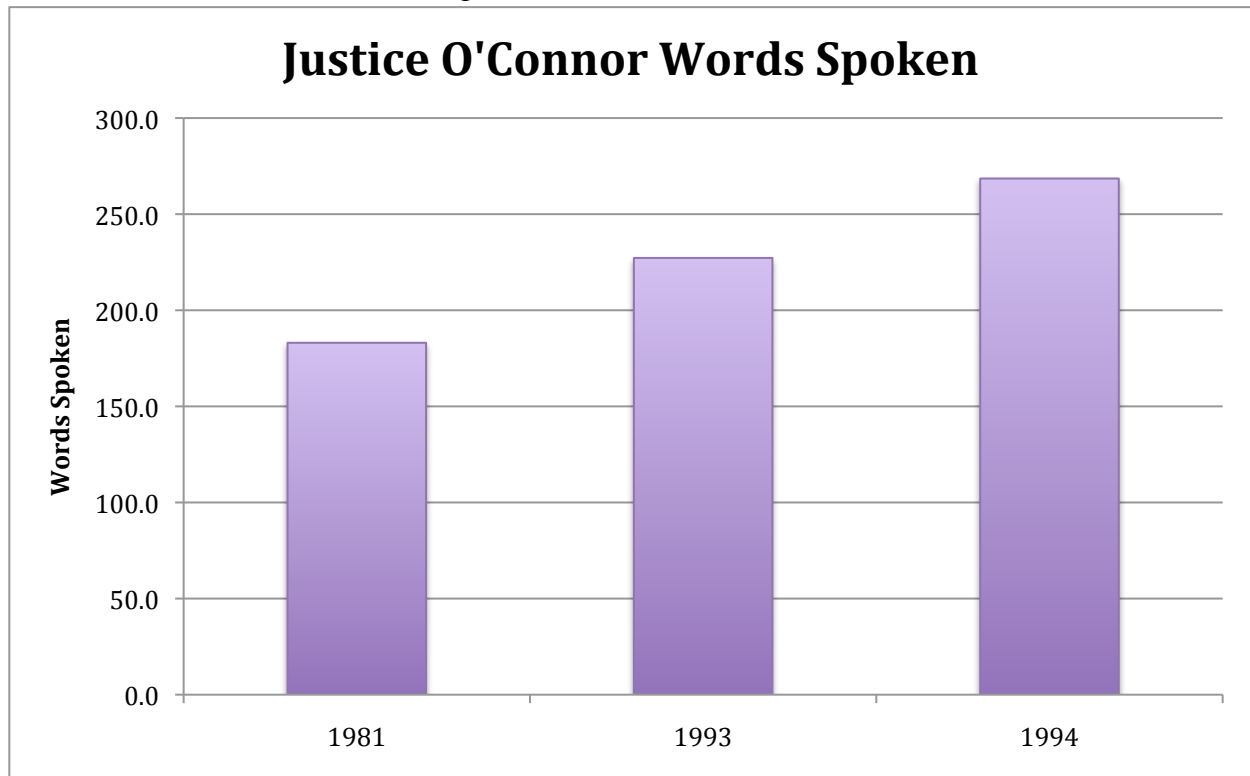


Table 3: Justice Ginsburg Words Spoken

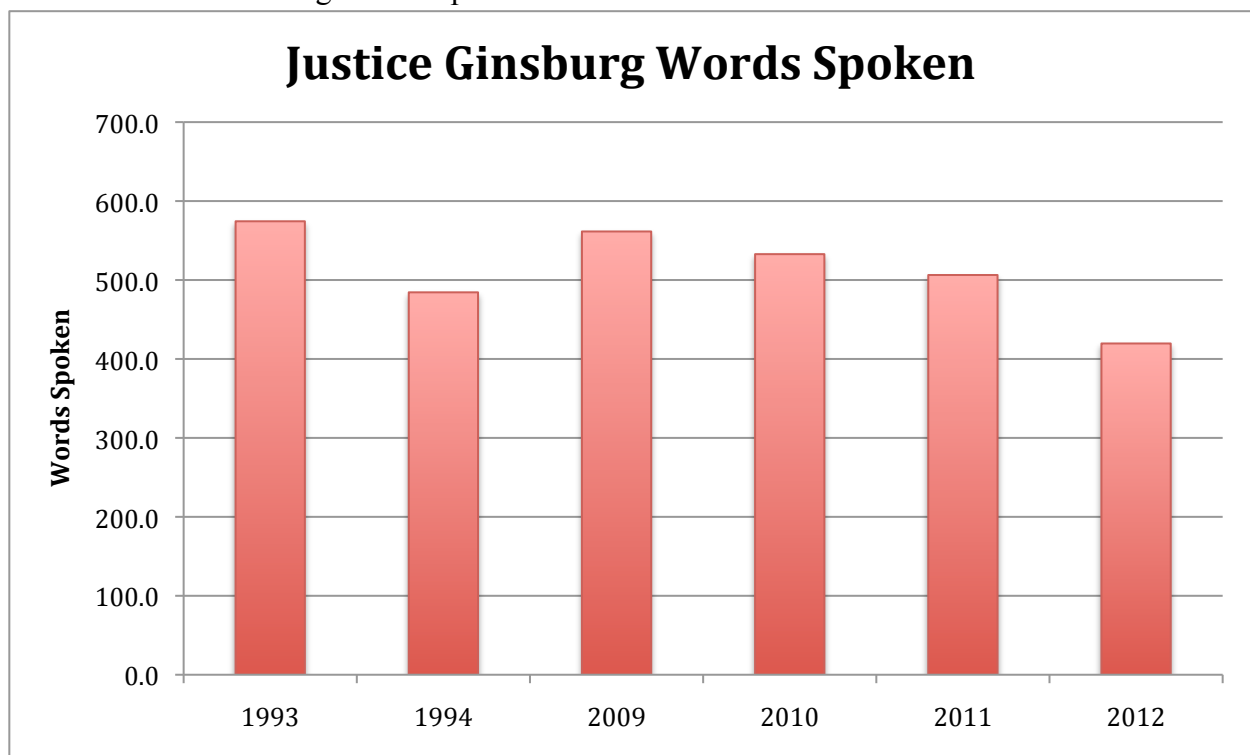


Table 4: Justice Sotomayor Words Spoken

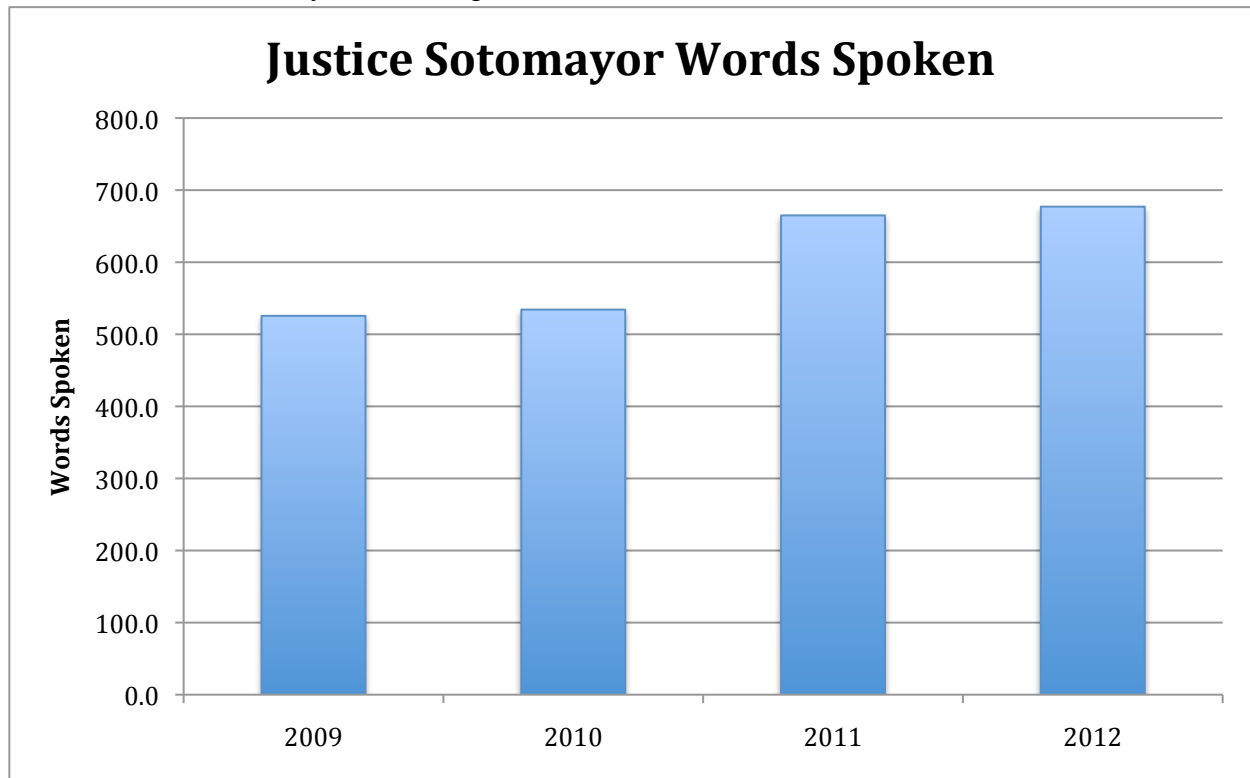


Table 5: Justice Kagan Words Spoken

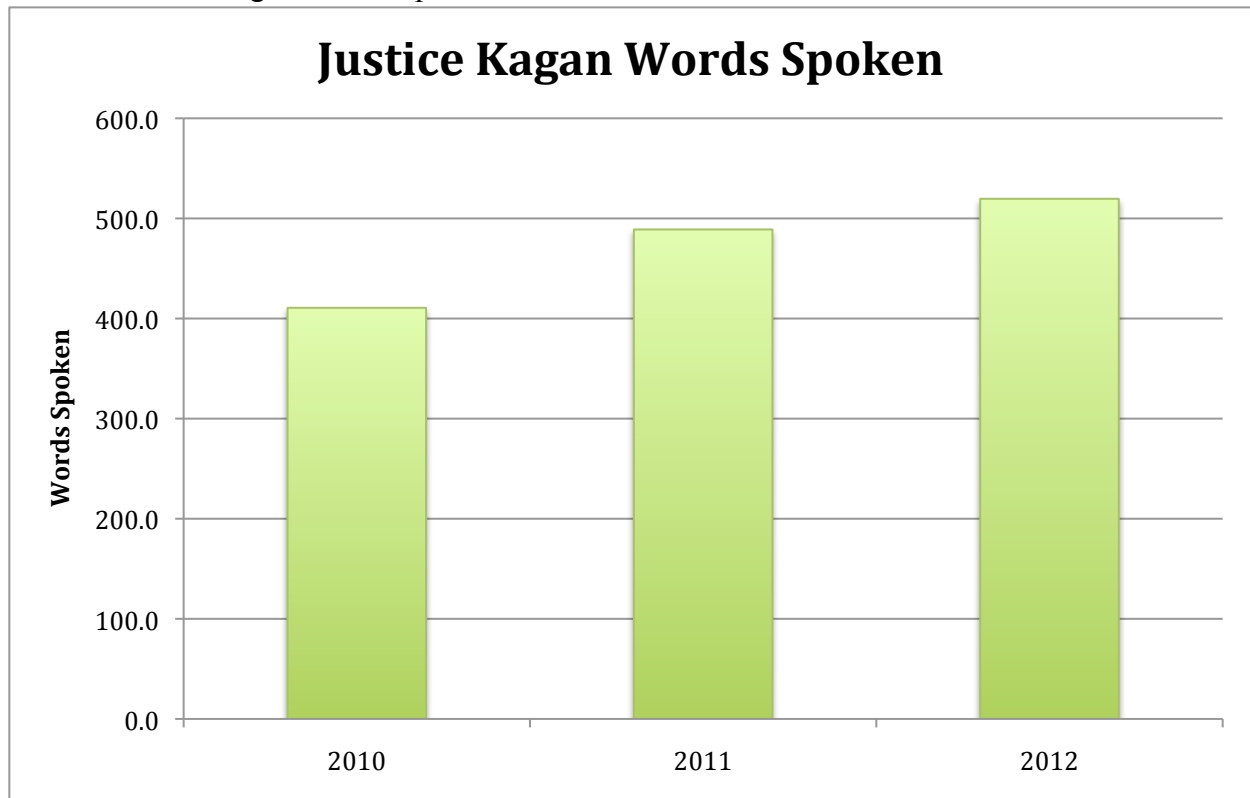


Table 6: Comparison of the Number of Times Each Justice Speaks First

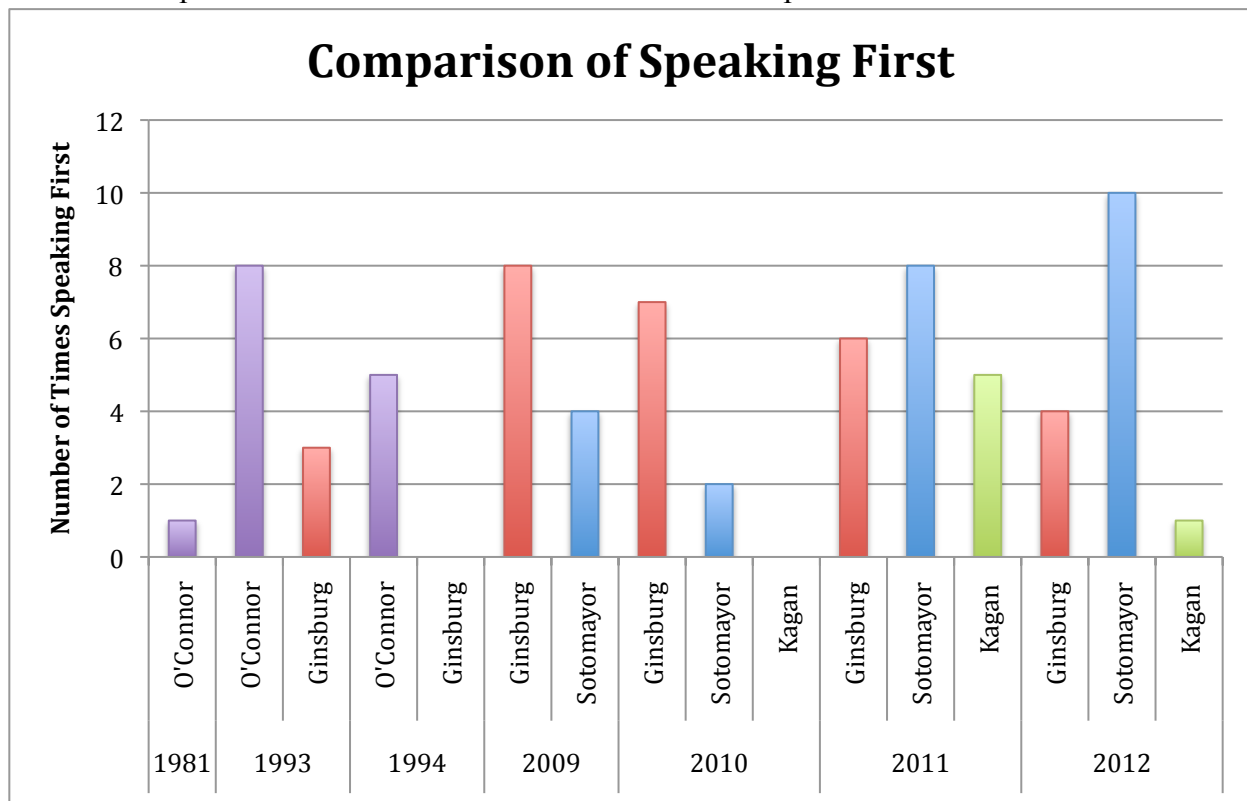


Table 7: Percentage Comparison of the Justices Speaking First

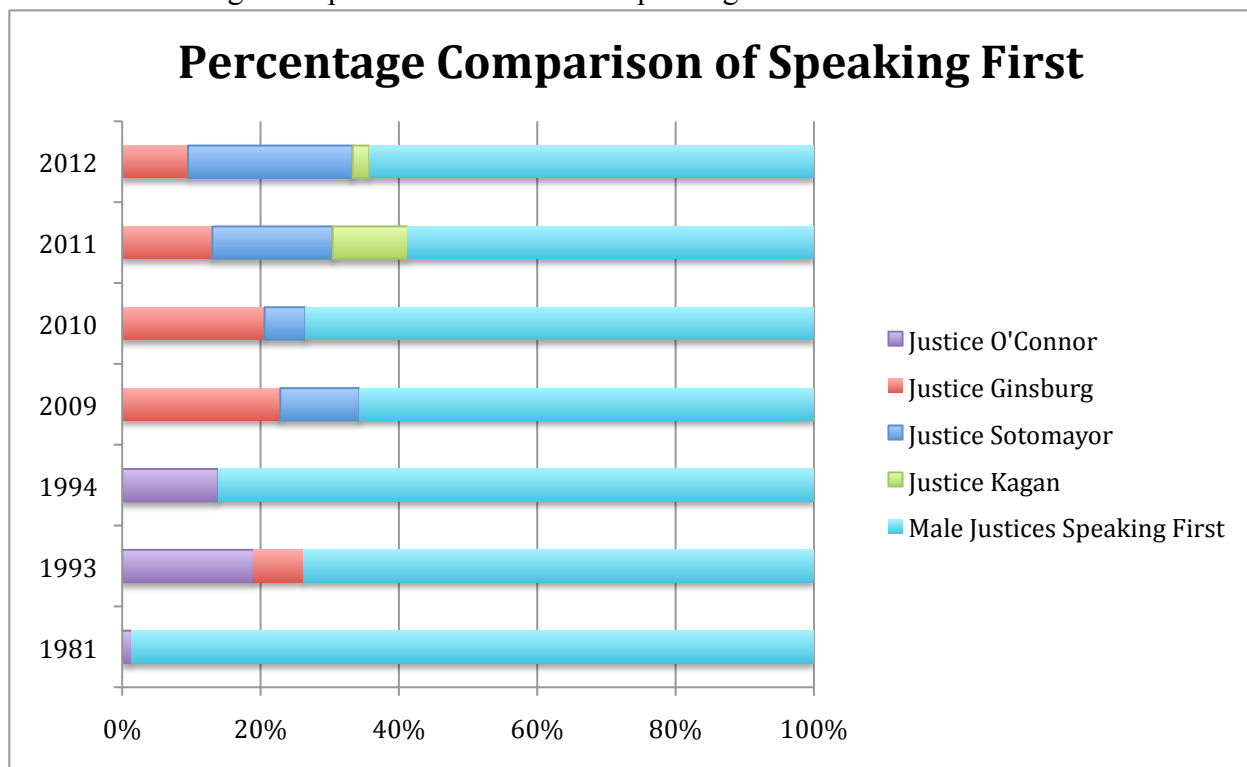


Table 8: Justice O'Connor Percentage of Cases Speaking First

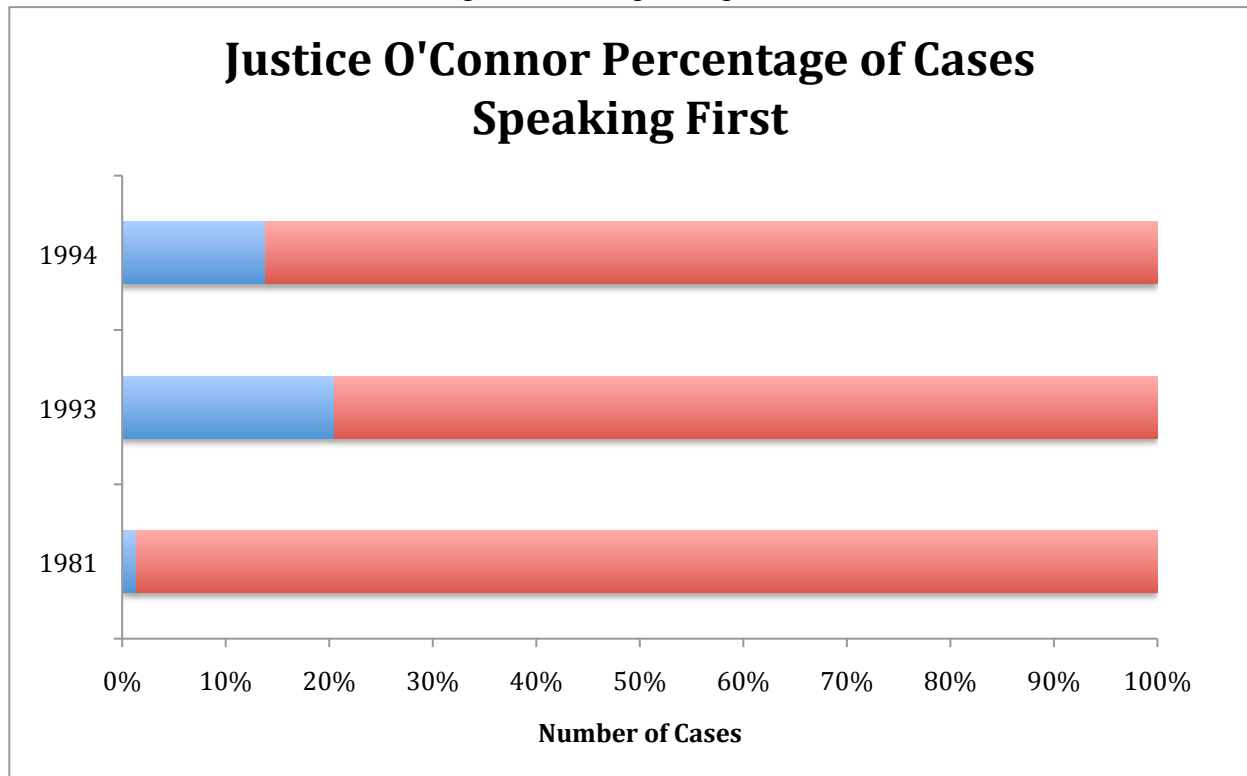


Table 9: Justice Ginsburg Percentage of Cases Speaking First

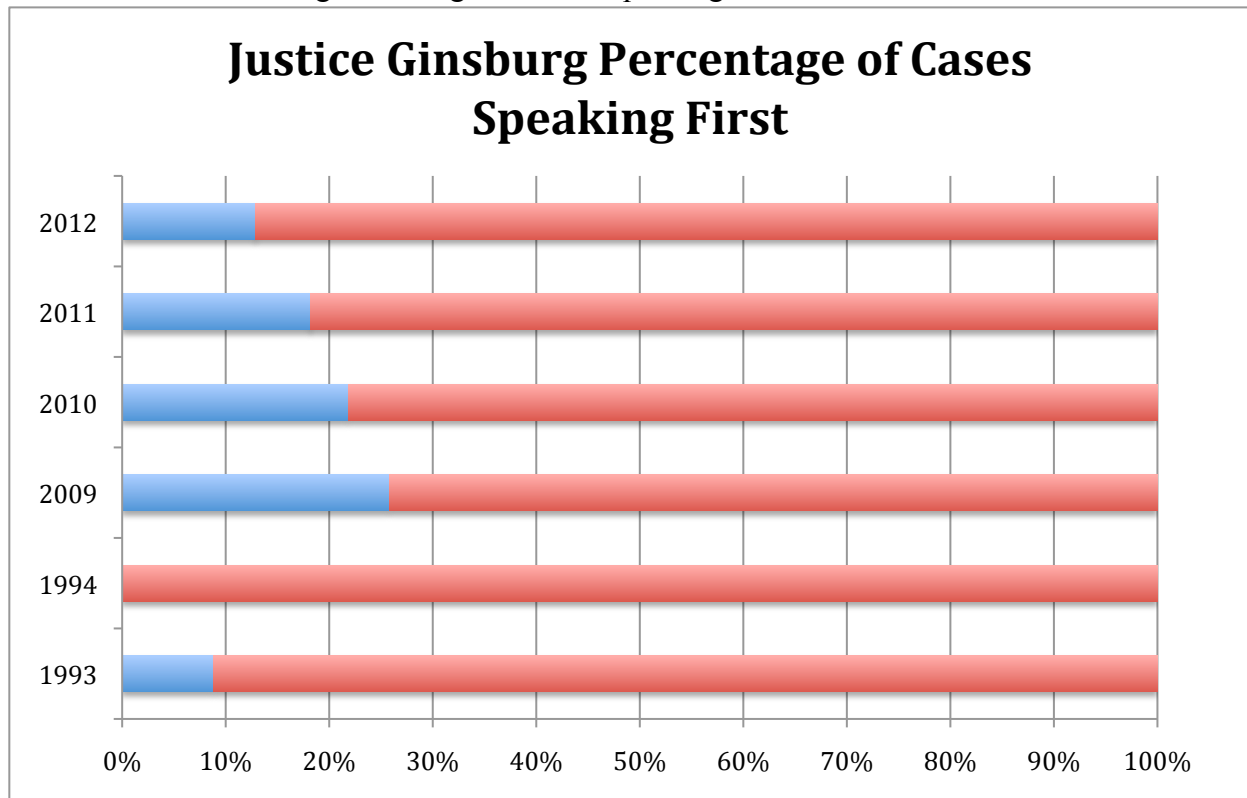


Table 10: Justice Sotomayor Percentage of Cases Speaking First

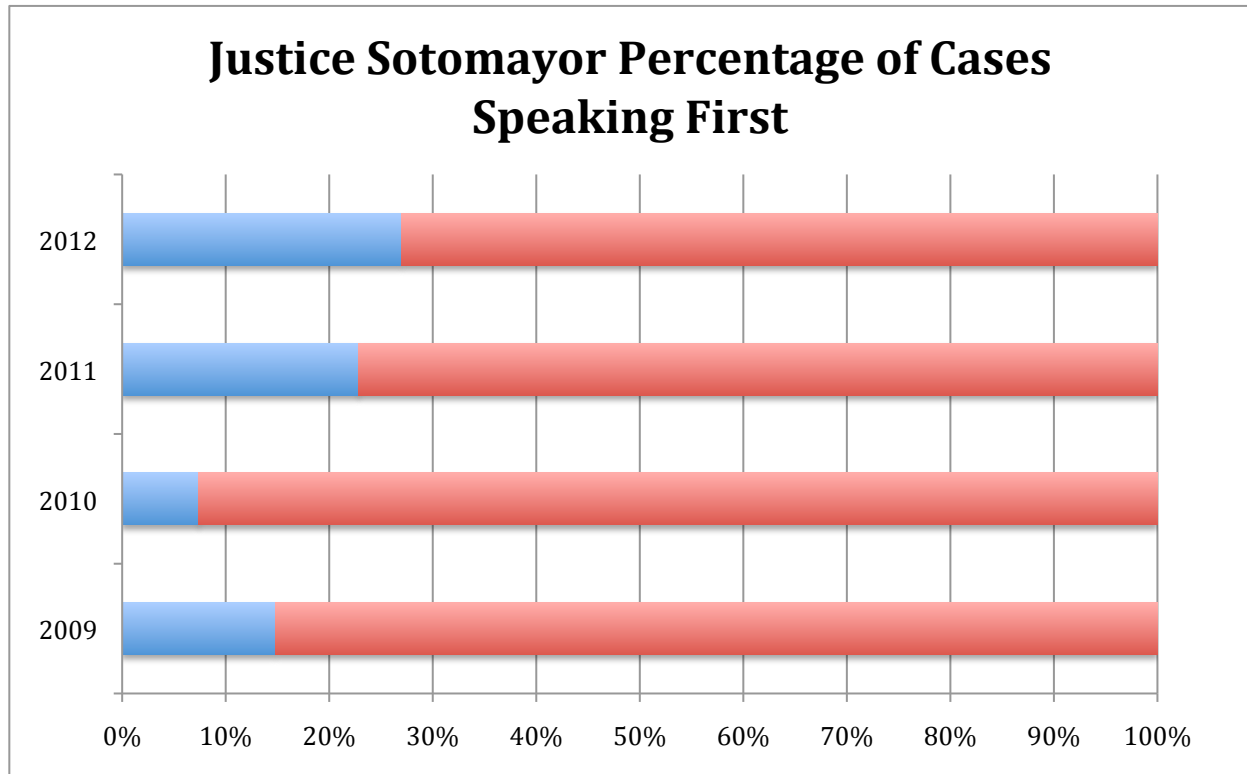


Table 11: Justice Kagan Percentage of Cases Speaking First

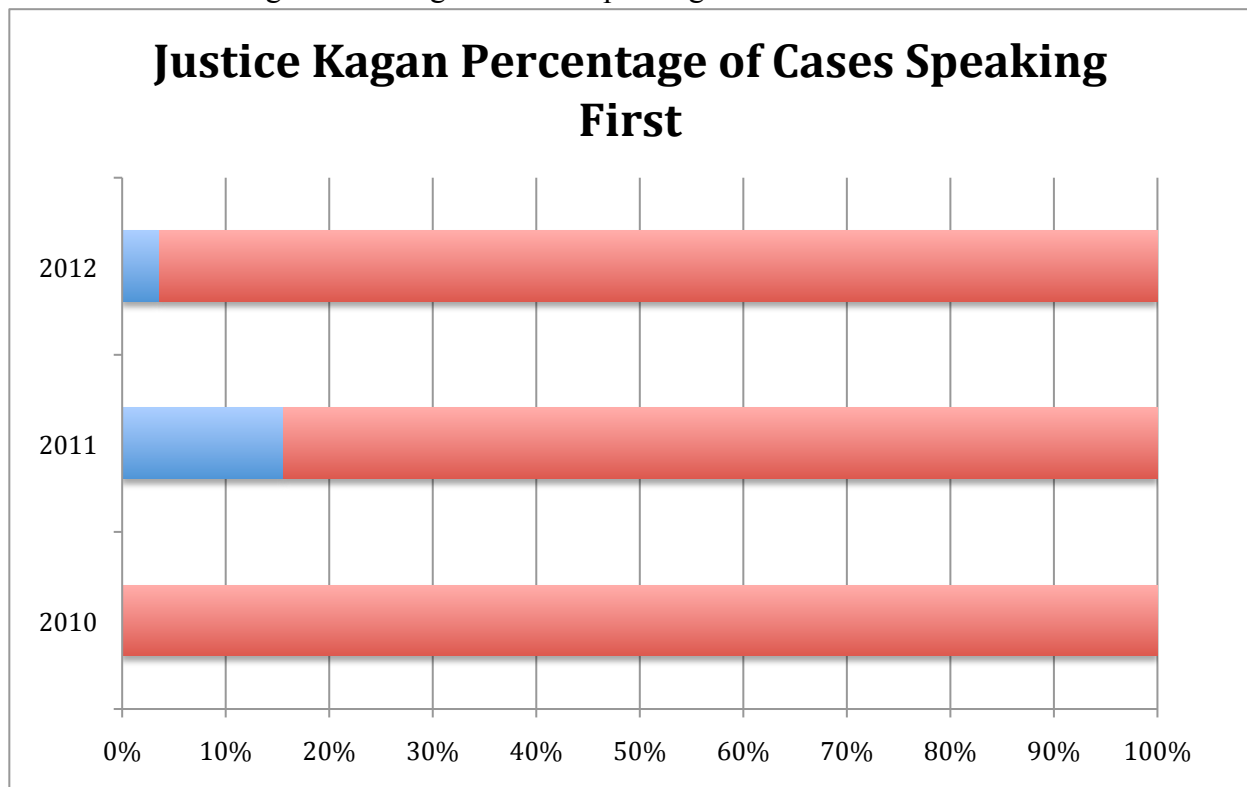


Table 12: Justice O'Connor Speaking First

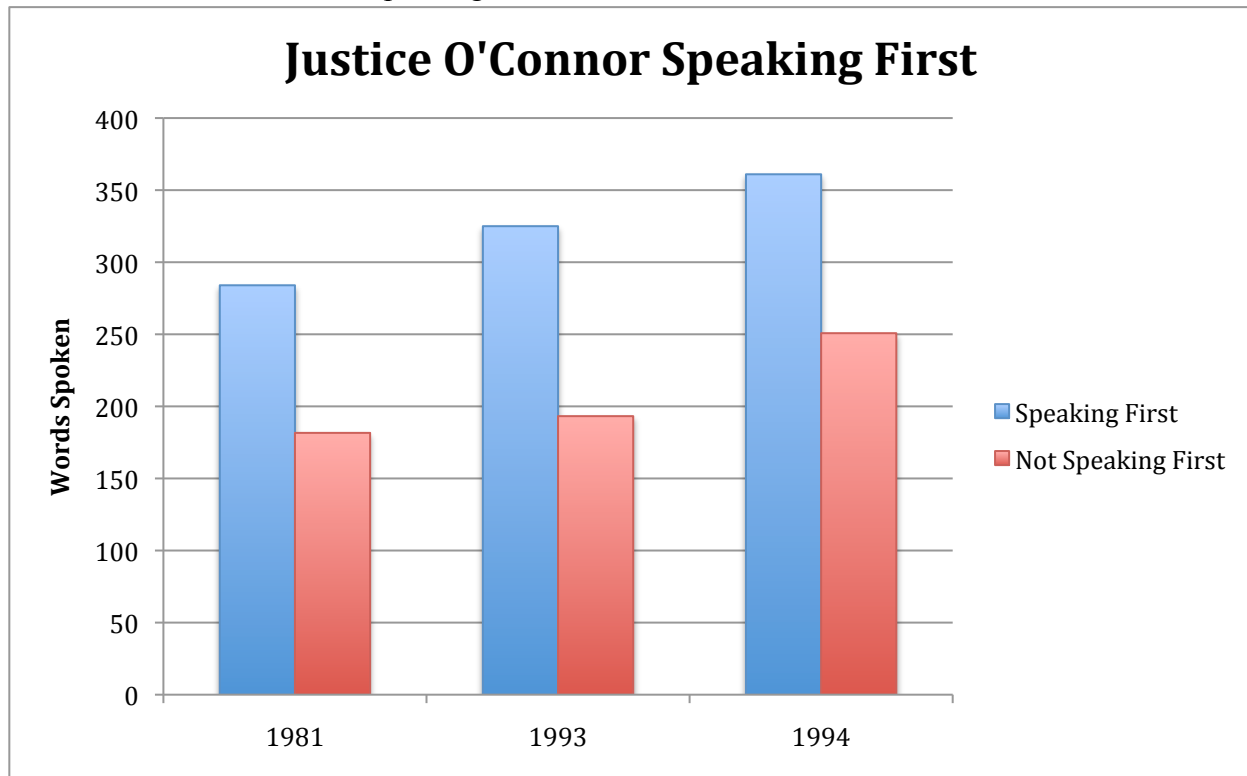


Table 13: Justice Ginsburg Speaking First

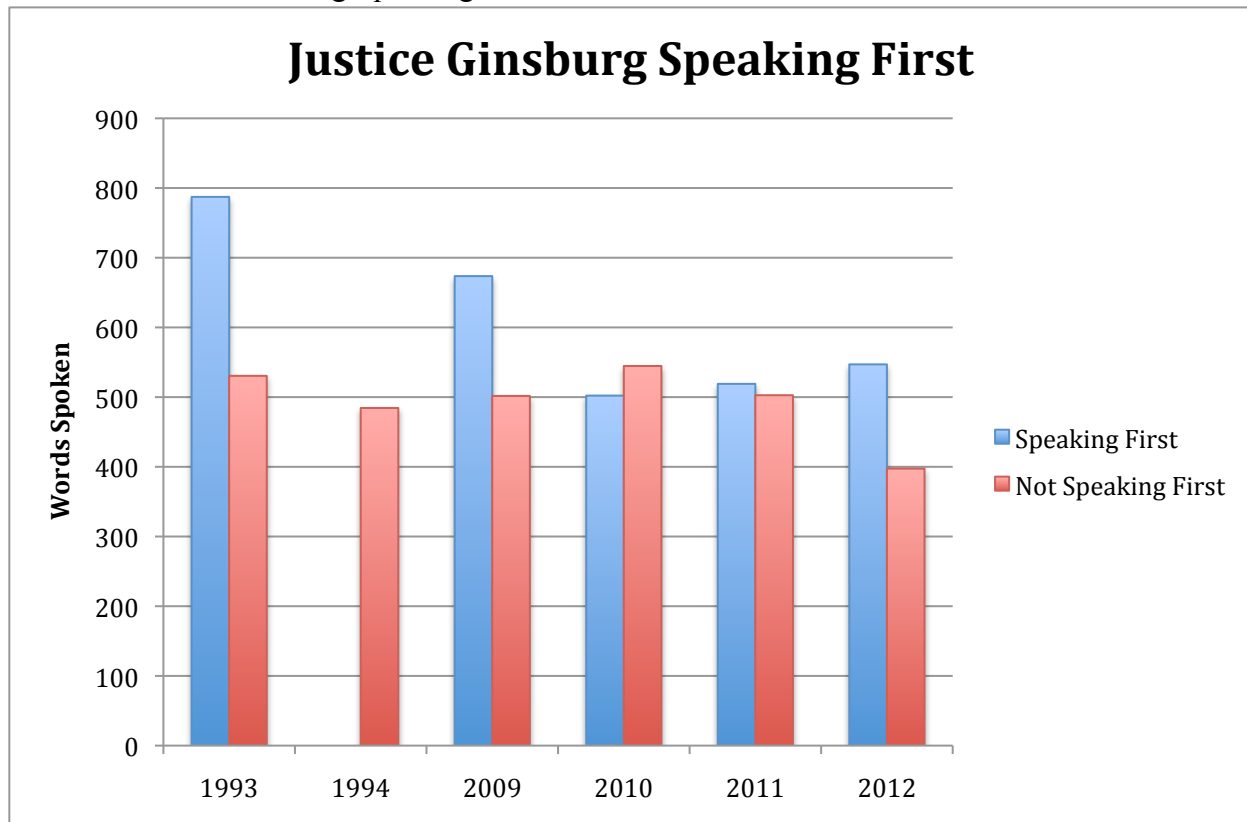


Table 14: Justice Sotomayor Speaking First

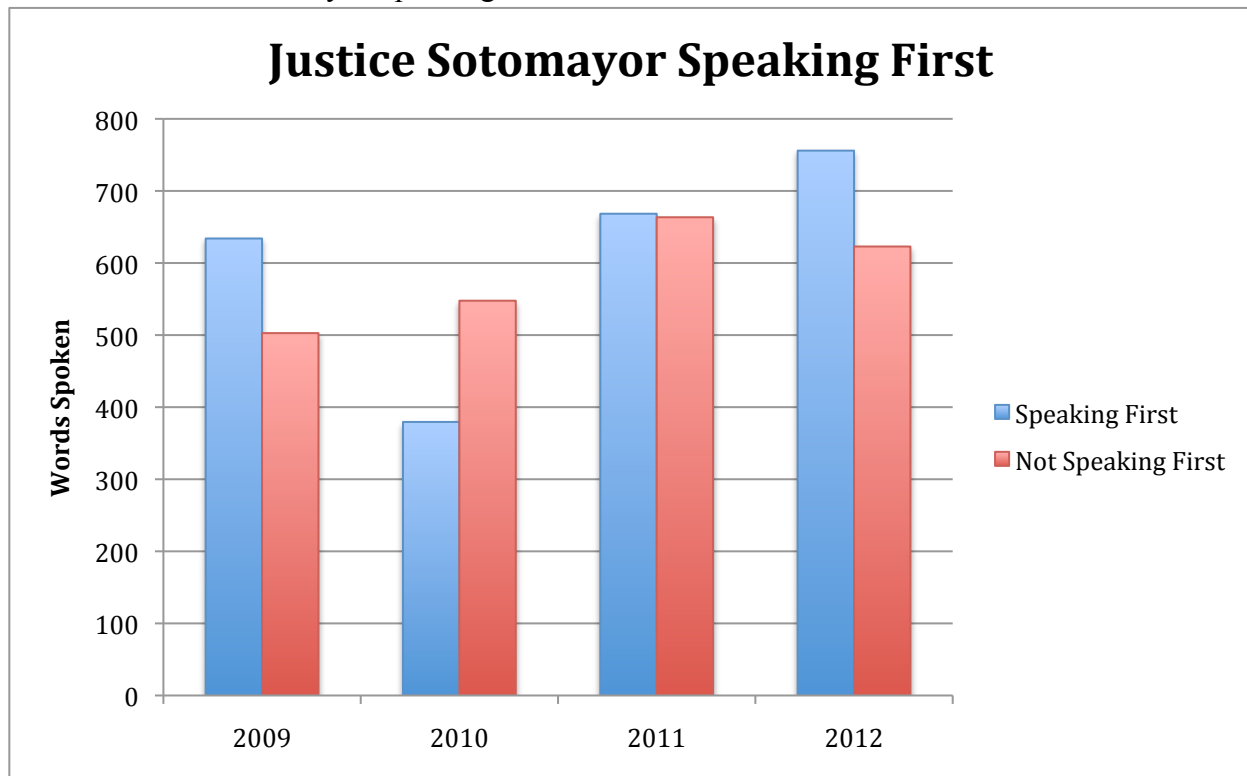


Table 15: Justice Kagan Speaking First

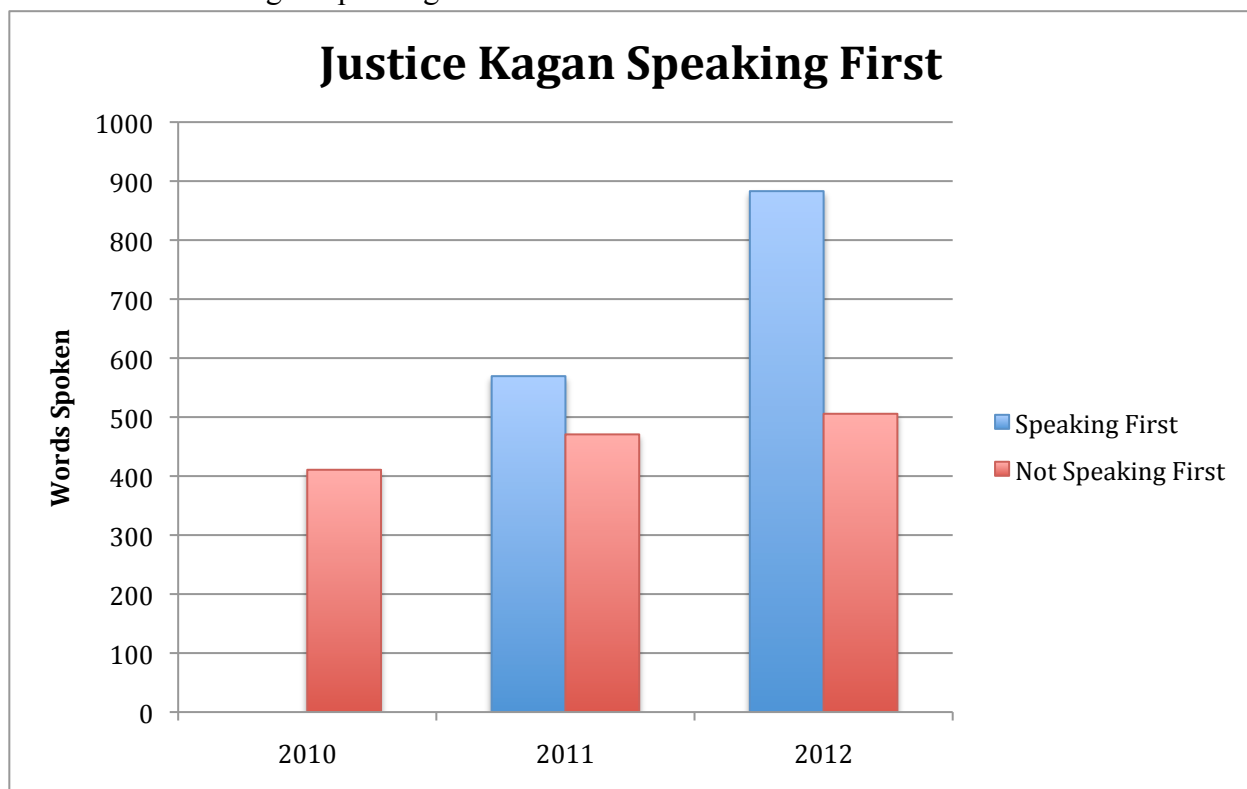


Table 16: Justice O'Connor Referenced by Fellow Justices and Petitioners

	<i># Words Spoken</i>	<i># Times Mentioned by fellow Justice</i>	<i># Times Mentioned by Lawyer</i>
# Words Spoken	1		
# Times Mentioned by fellow Justice	0.264220539	1	
# Times Mentioned by Lawyer	0.180099194	0.019346011	1

Table 17: Justice Ginsburg Referenced by Fellow Justices and Petitioners

	<i># Words Spoken</i>	<i># Times Mentioned by fellow Justice</i>	<i># Times Mentioned by Lawyer</i>
# Words Spoken	1		
# Times Mentioned by fellow Justice	0.156883469	1	
# Times Mentioned by Lawyer	-0.002623985	0.090046419	1

Table 18: Justice Sotomayor Referenced by Fellow Justices and Petitioners

	<i># Words Spoken</i>	<i># Times Mentioned by fellow Justice</i>	<i># Times Mentioned by Lawyer</i>
# Words Spoken	1		
# Times Mentioned by fellow Justice	0.208732521	1	
# Times Mentioned by Lawyer	0.028699792	0.039748243	1

Table 19: Justice Kagan Referenced by Fellow Justices and Petitioners

	<i># Words Spoken</i>	<i># Times Mentioned by fellow Justice</i>	<i># Times Mentioned by Lawyer</i>
# Words Spoken	1		
# Times Mentioned by fellow Justice	0.306878487	1	
# Times Mentioned by Lawyer	0.208471665	0.021424438	1

Table 20: Justice O'Connor Referencing Fellow Justices

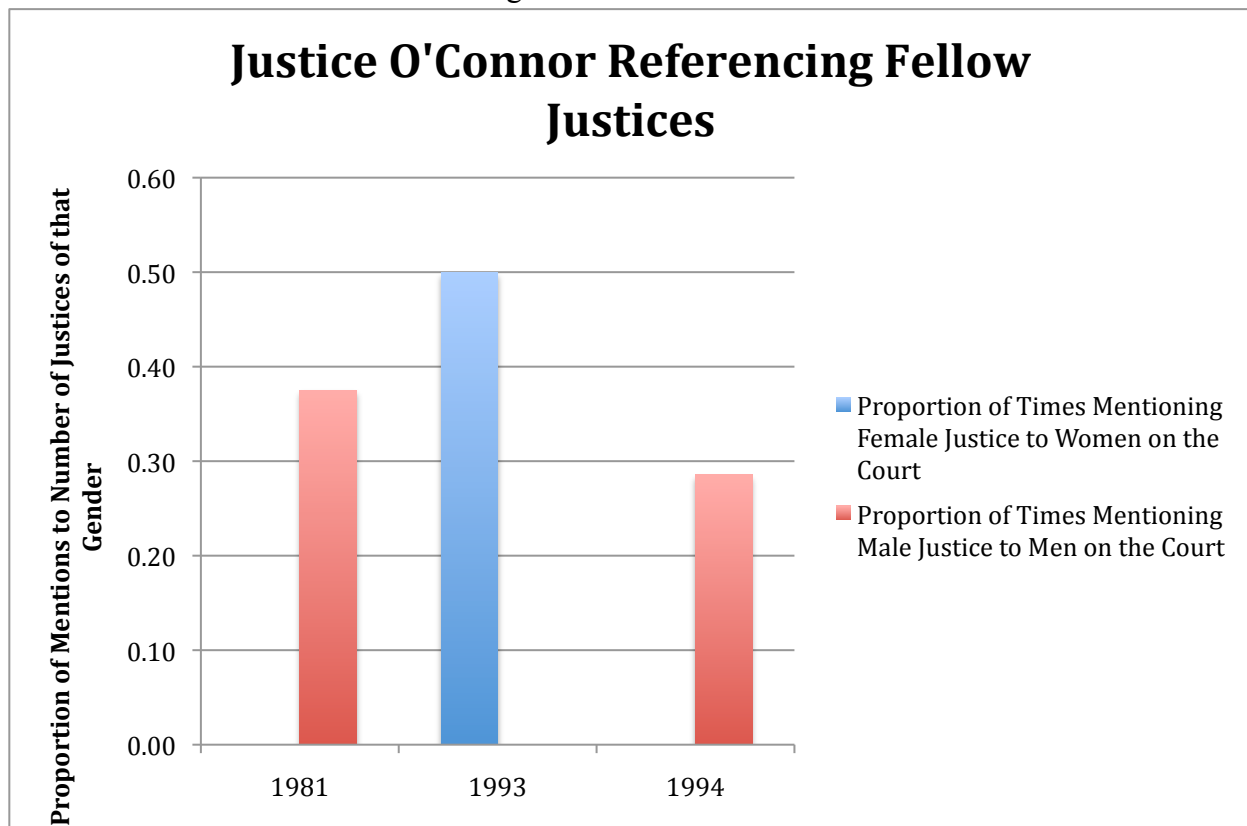


Table 21: Justice Ginsburg Referencing Fellow Justices

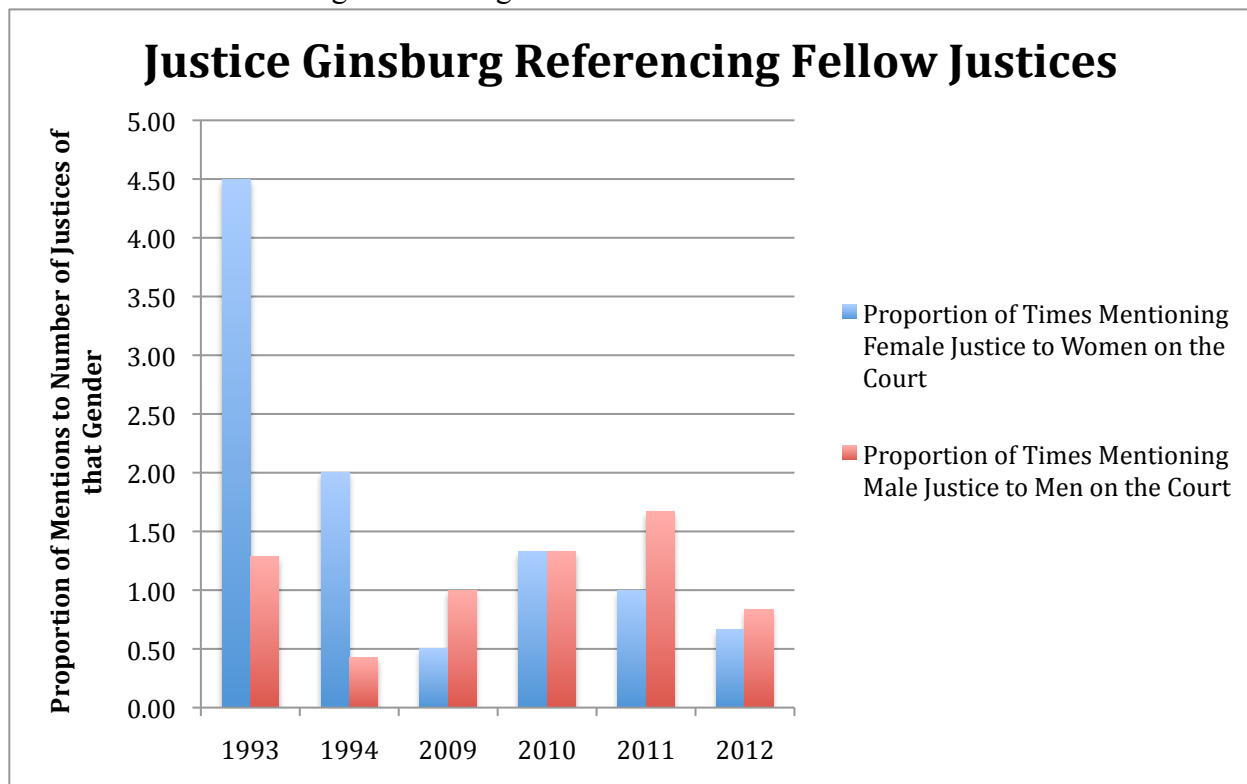


Table 22: Justice Sotomayor Referencing Fellow Justices

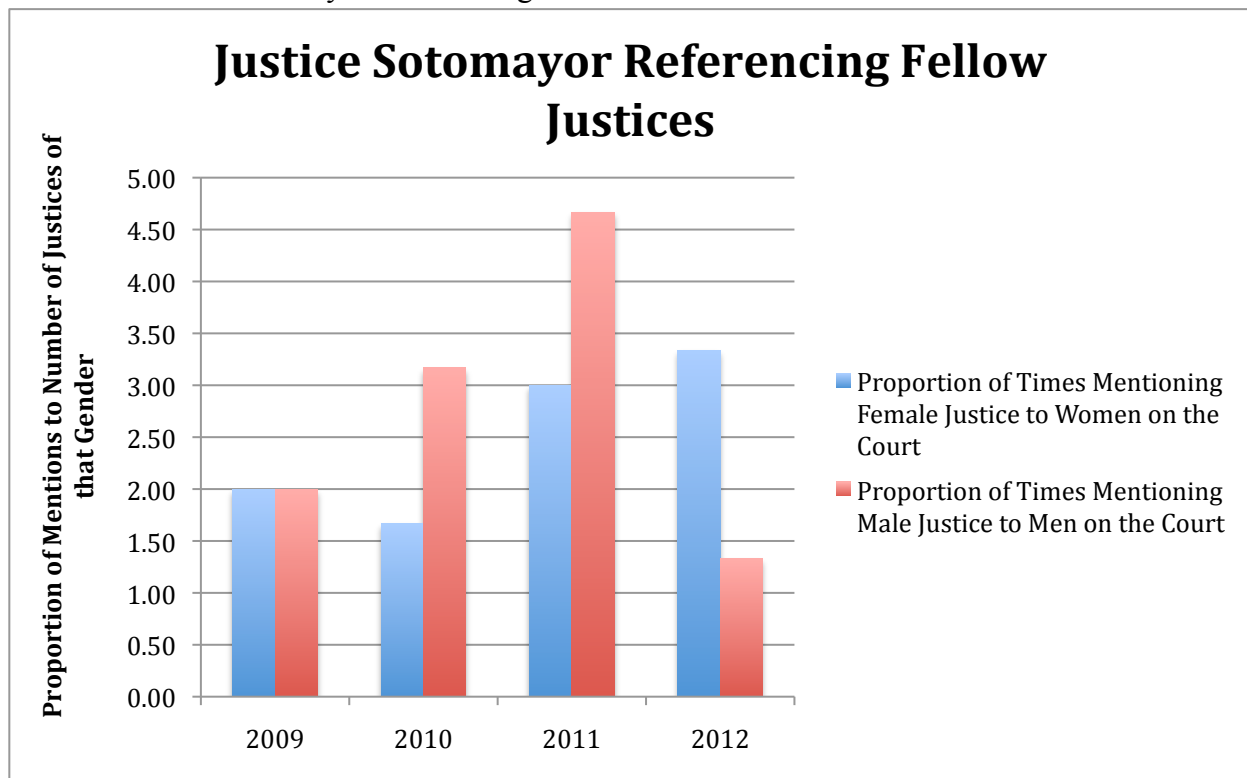


Table 23: Justice Kagan Referencing Fellow Justices

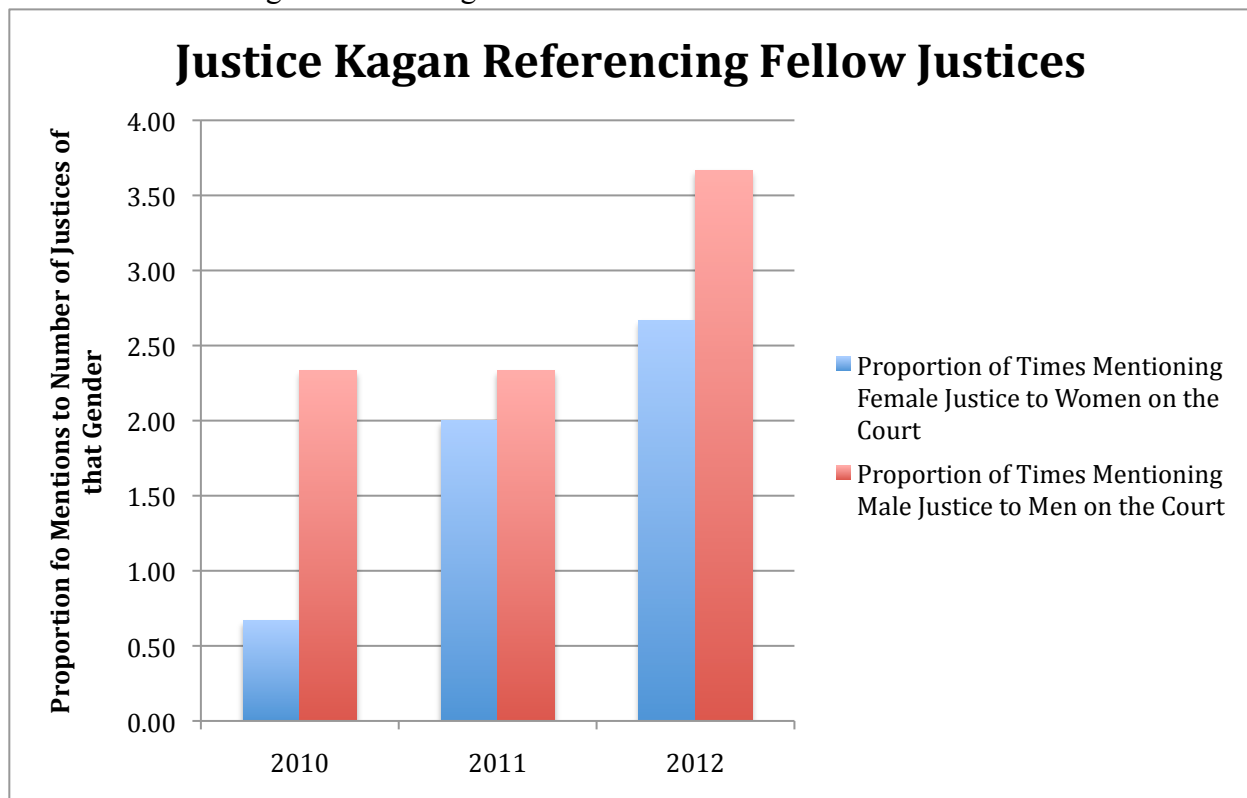


Table 24: Comparison Between Justices of Average Sentences Spoken

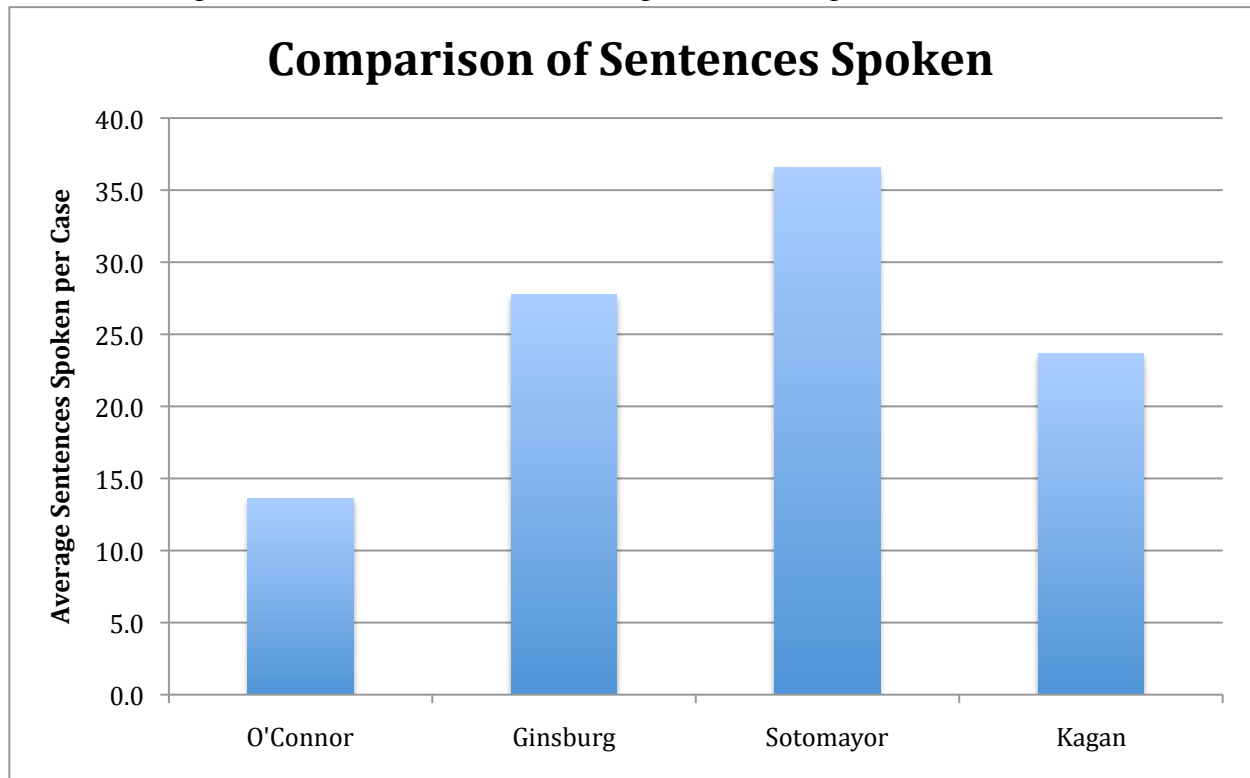


Table 25: Justice O'Connor Verbose Language

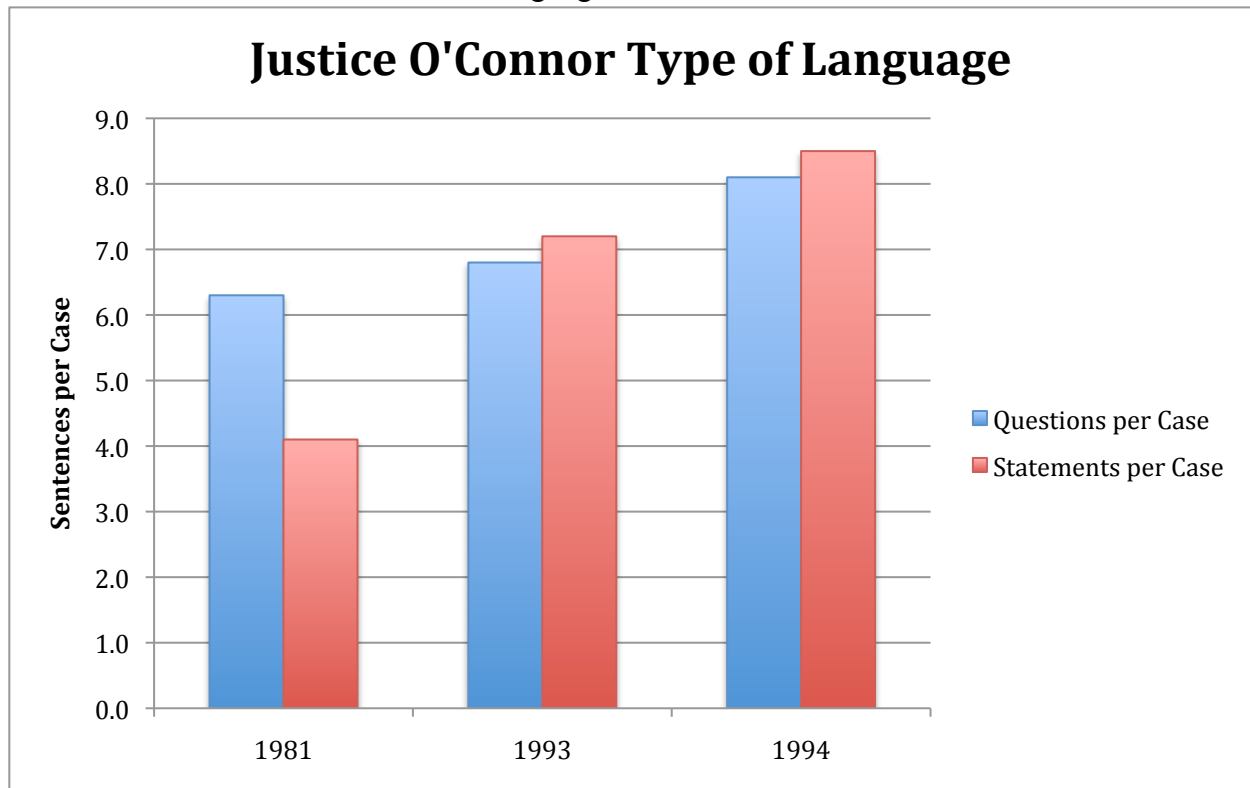


Table 26: Justice Ginsburg Verbose Language

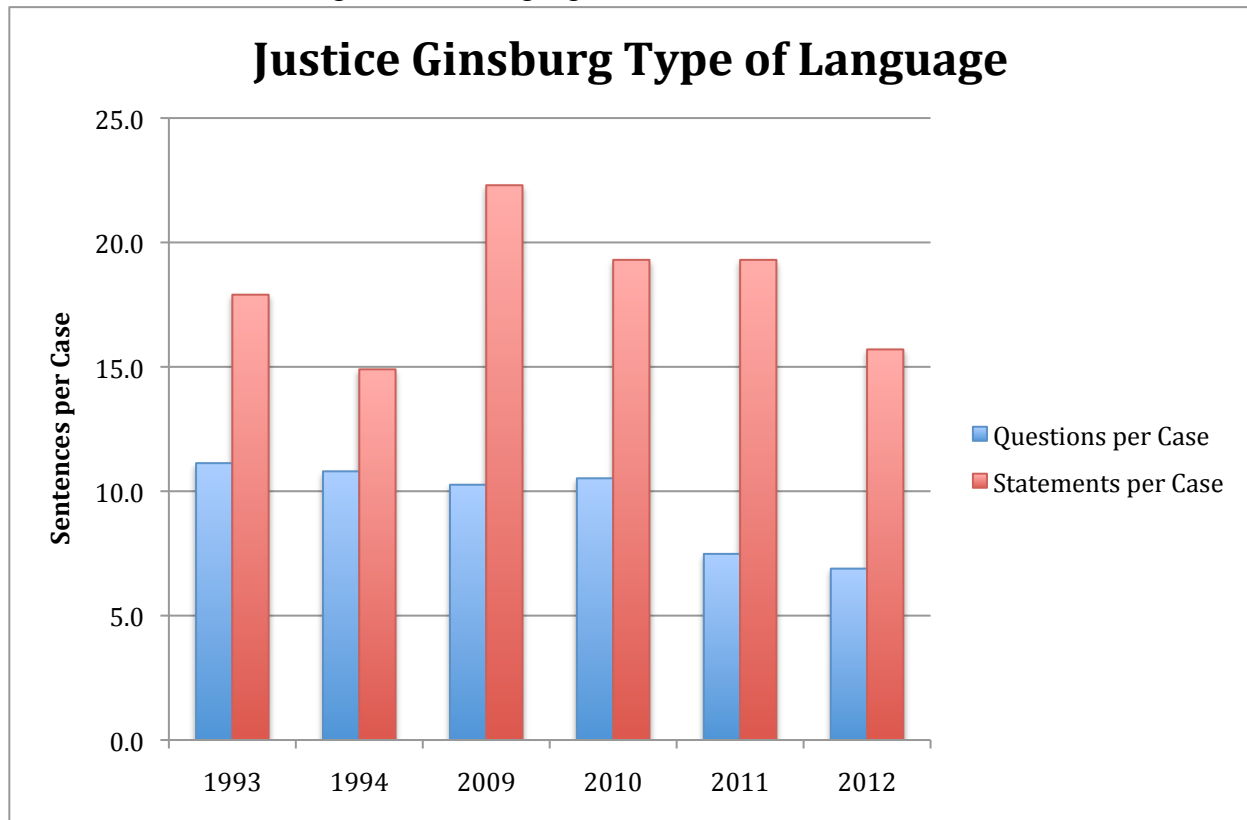


Table 27: Justice Sotomayor Verbose Language

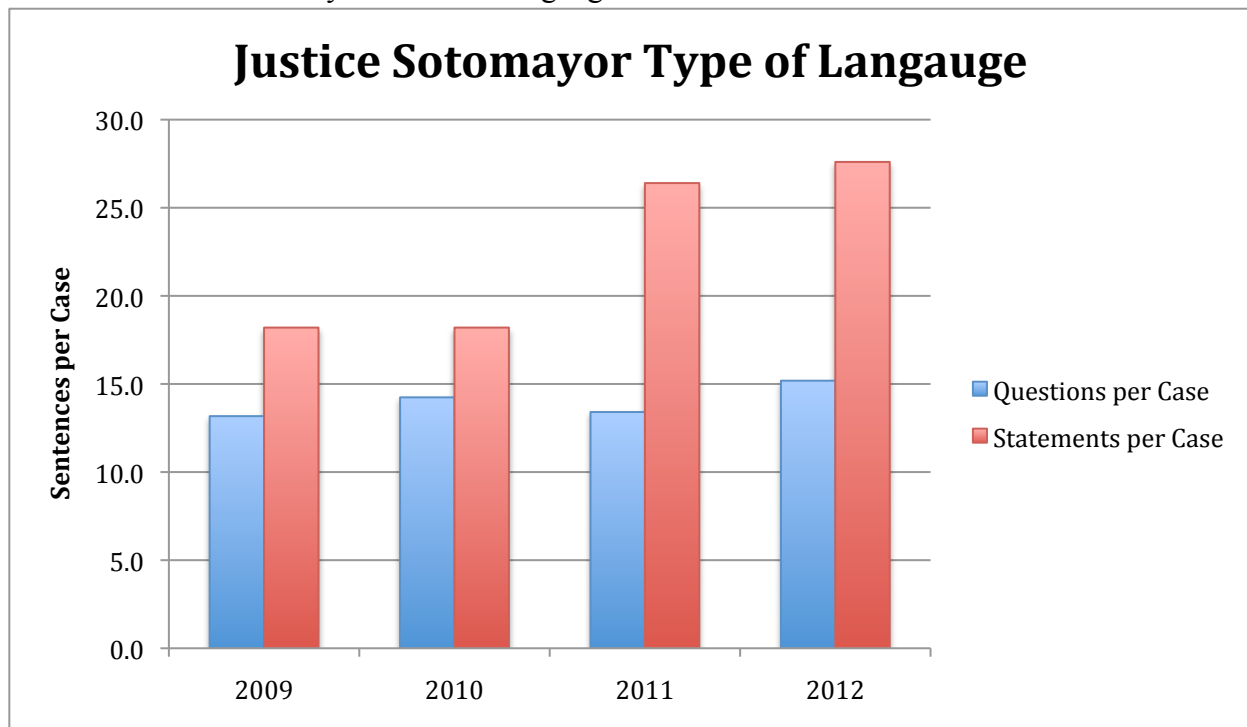


Table 28: Justice Kagan Verbose Language

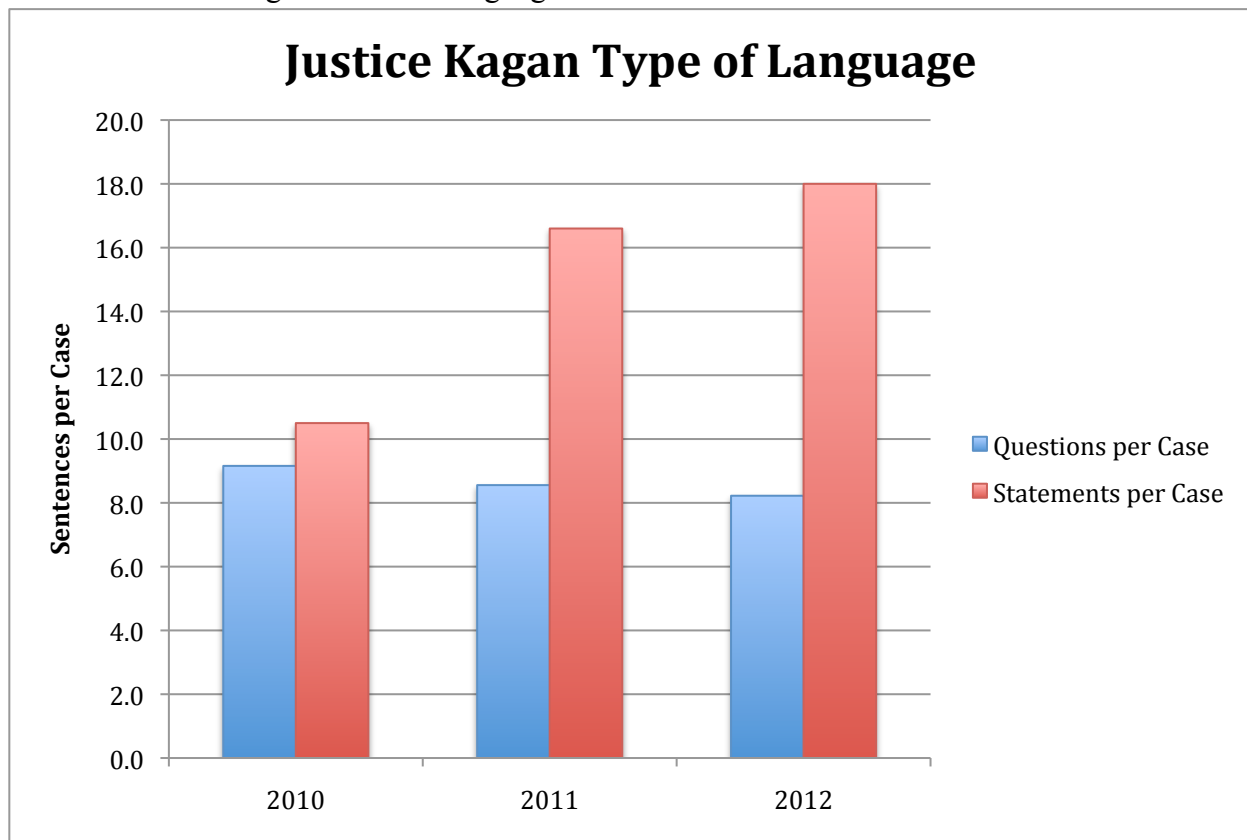


Table 29: Comparison of Average Interruptions per Case

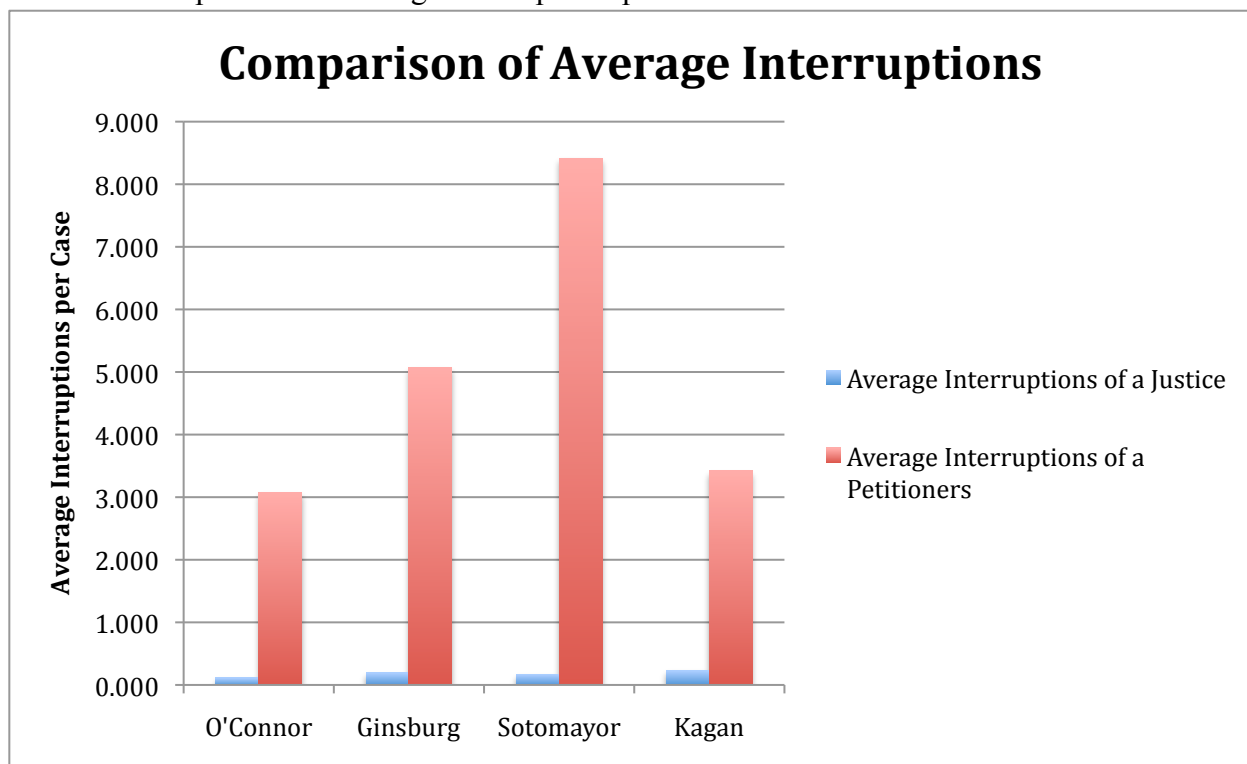


Table 30: Comparison of Interruptions versus Statements

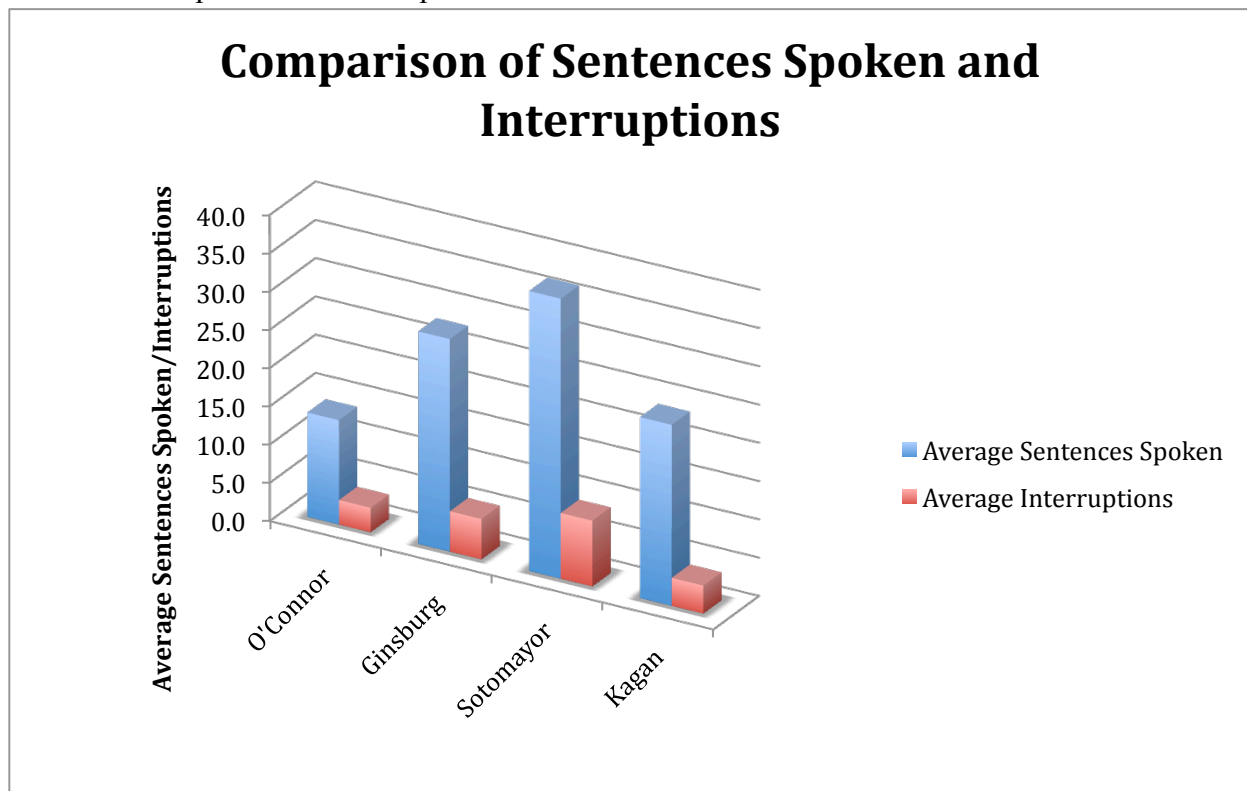


Table 31: Justice O'Connor Interrupting Justices and Petitioners

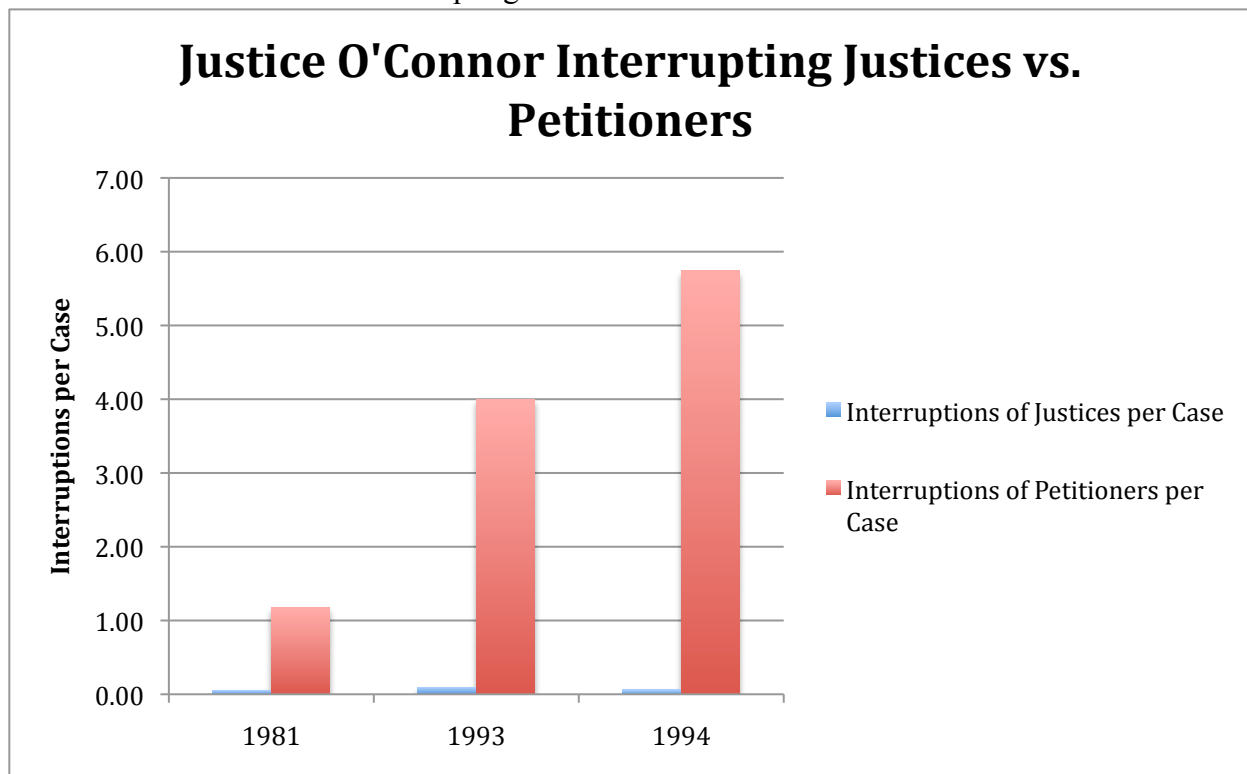


Table 32: Justice Ginsburg Interrupting Justices and Petitioners

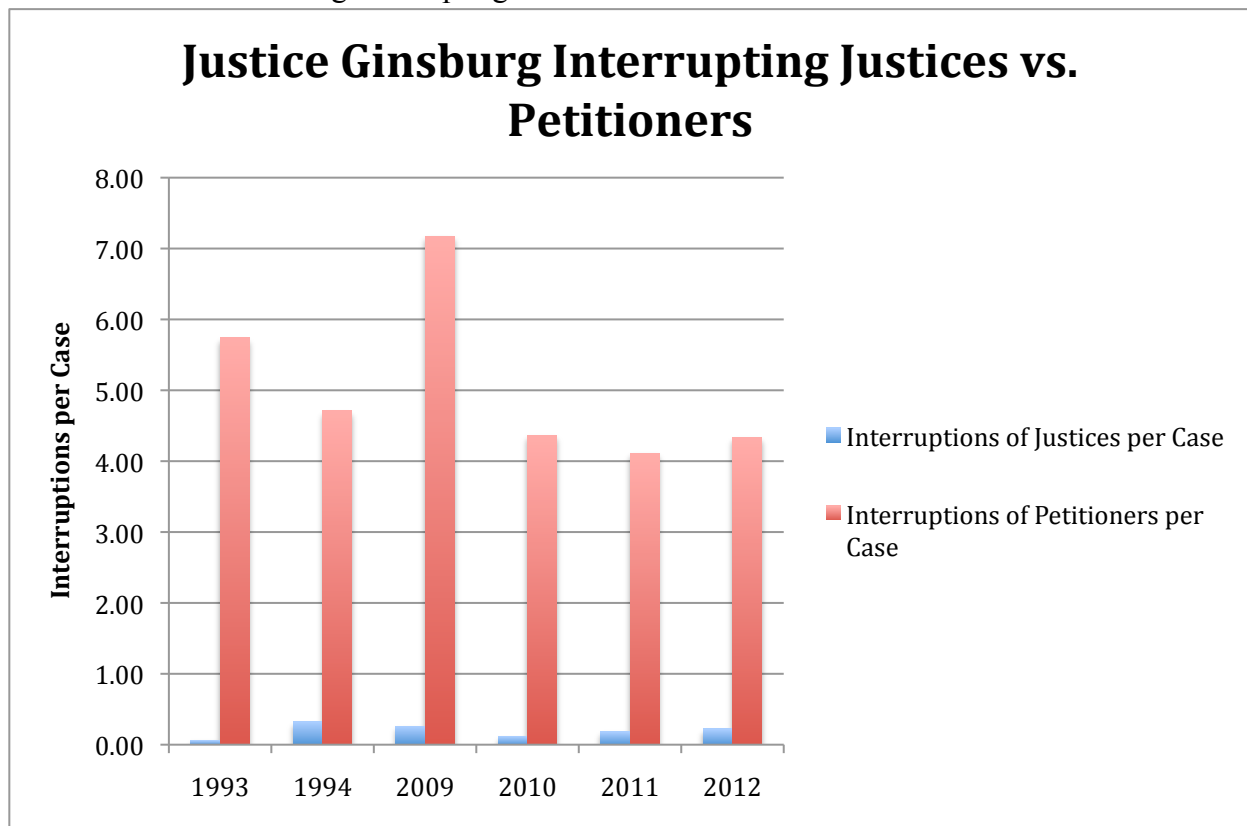


Table 33: Justice Sotomayor Interrupting Justices and Petitioners

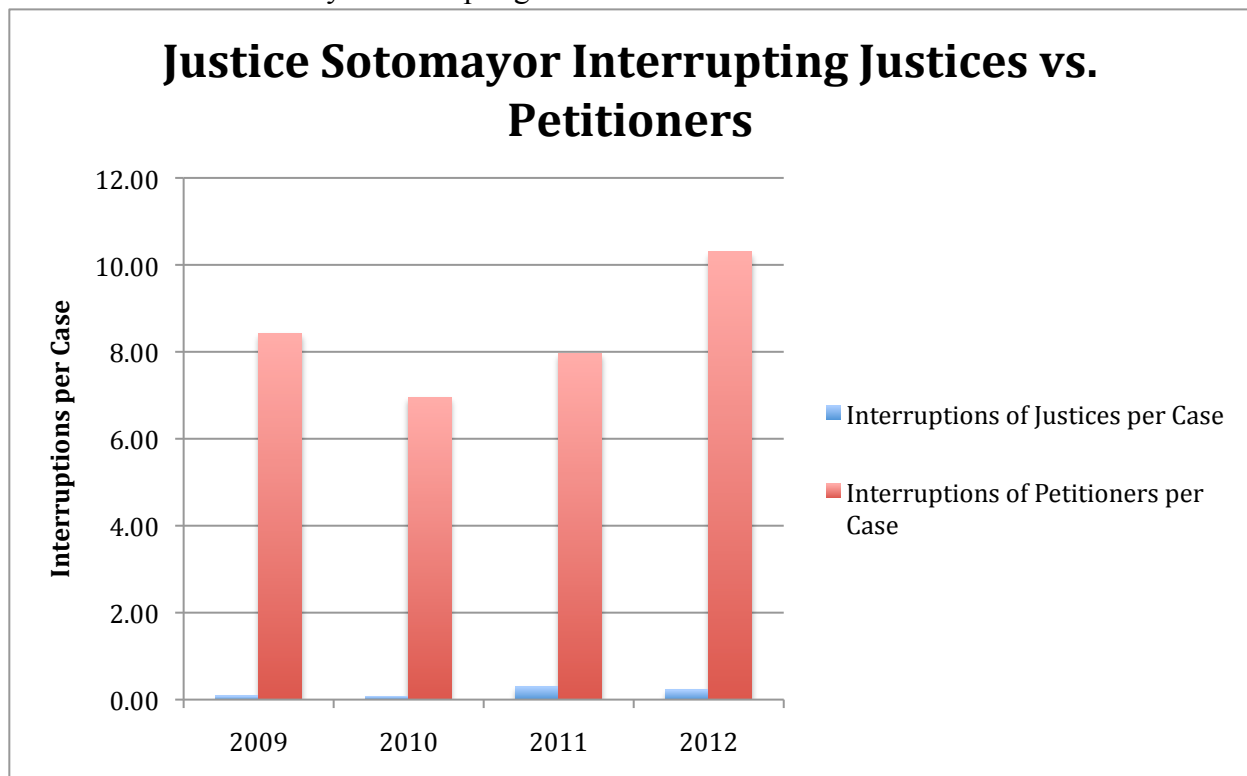


Table 34: Justice Kagan Interrupting Justices and Petitioners

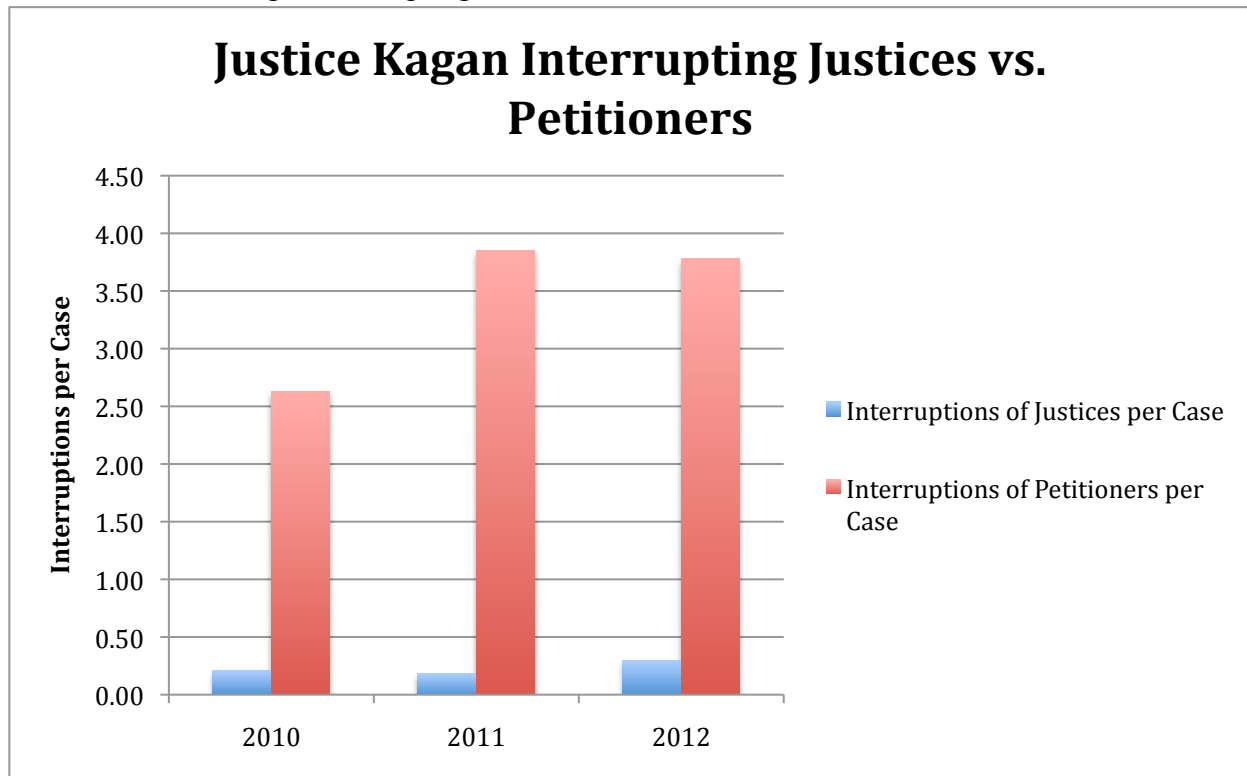


Table 35: Comparison of the Number of Times Female Justices Interrupted Fellow Justices

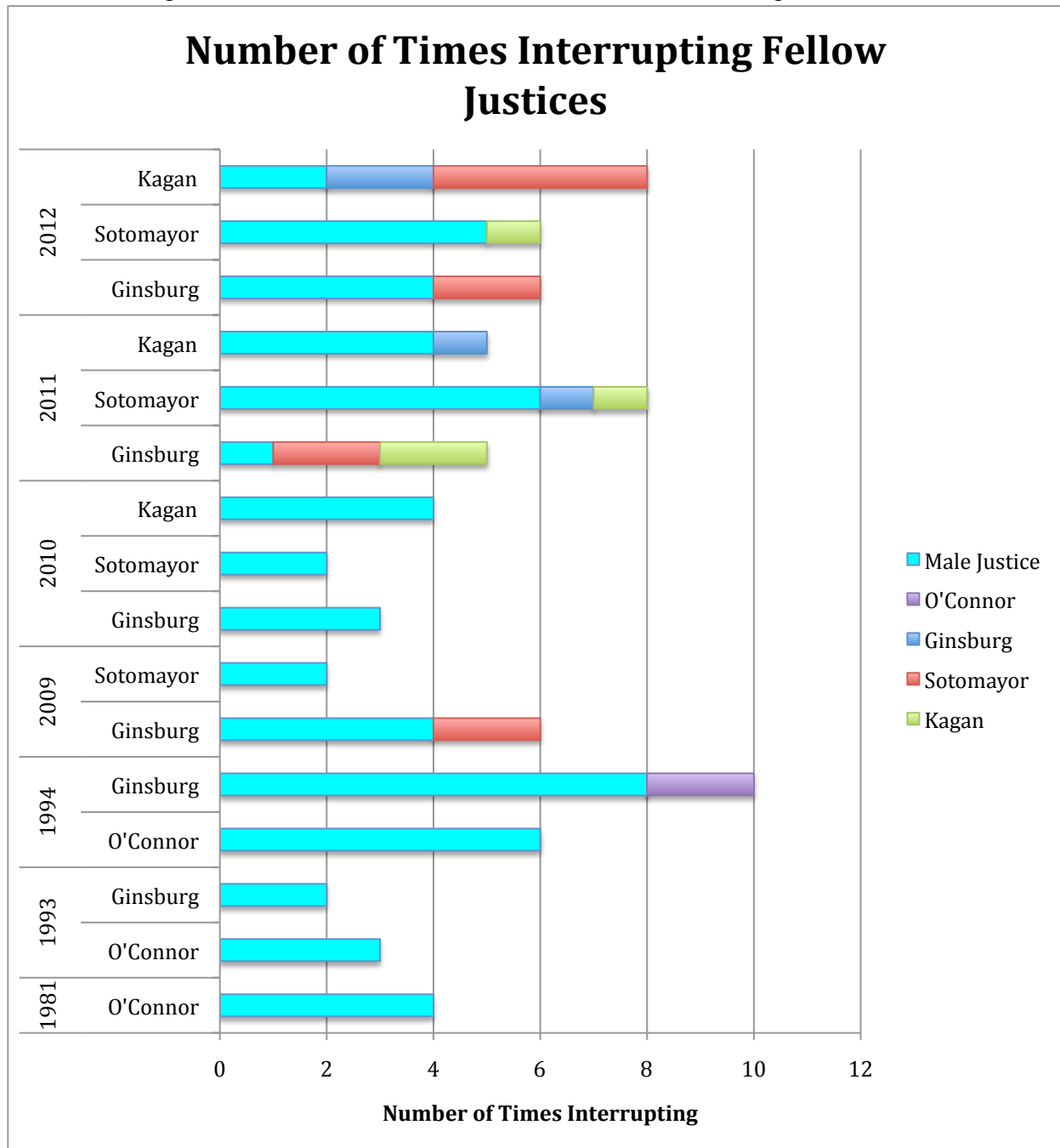


Table 36: Justice O'Connor Interrupting Male vs. Female Justices

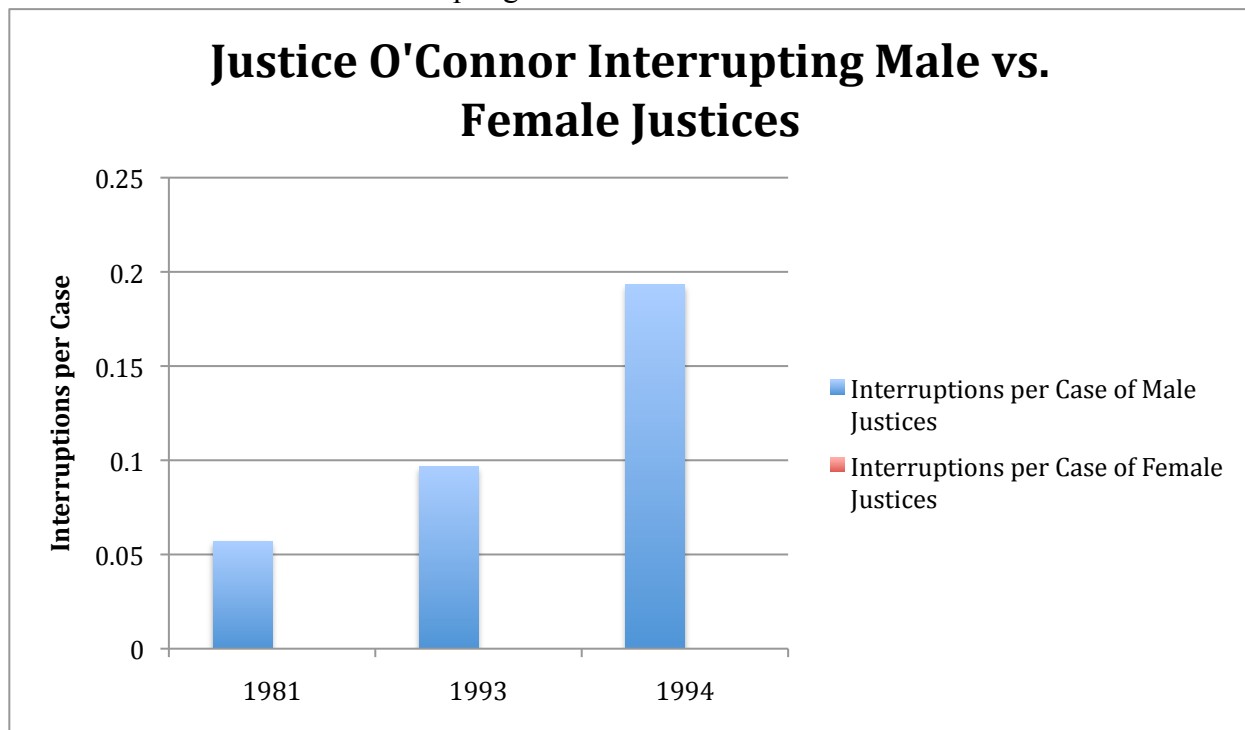


Table 37: Justice Ginsburg Interrupting Male vs. Female Justices

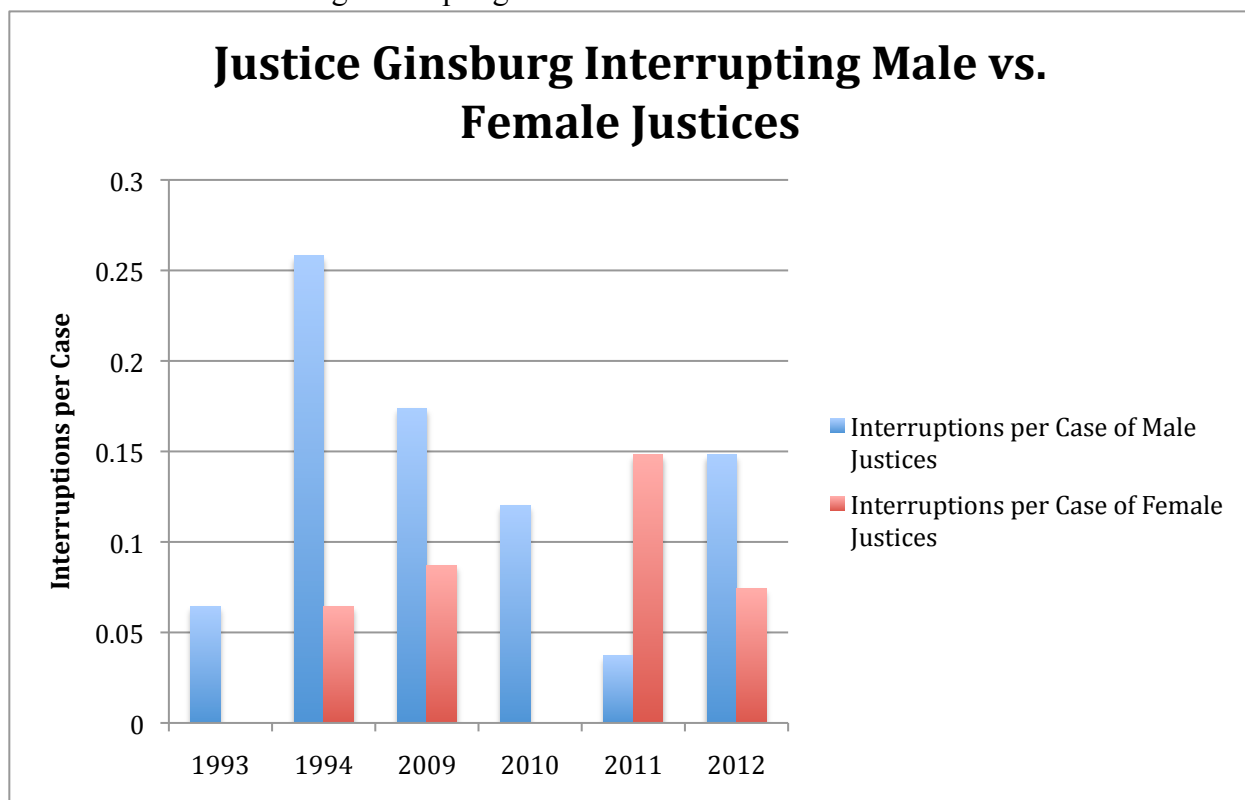


Table 38: Justice Sotomayor Interrupting Male vs. Female Justices

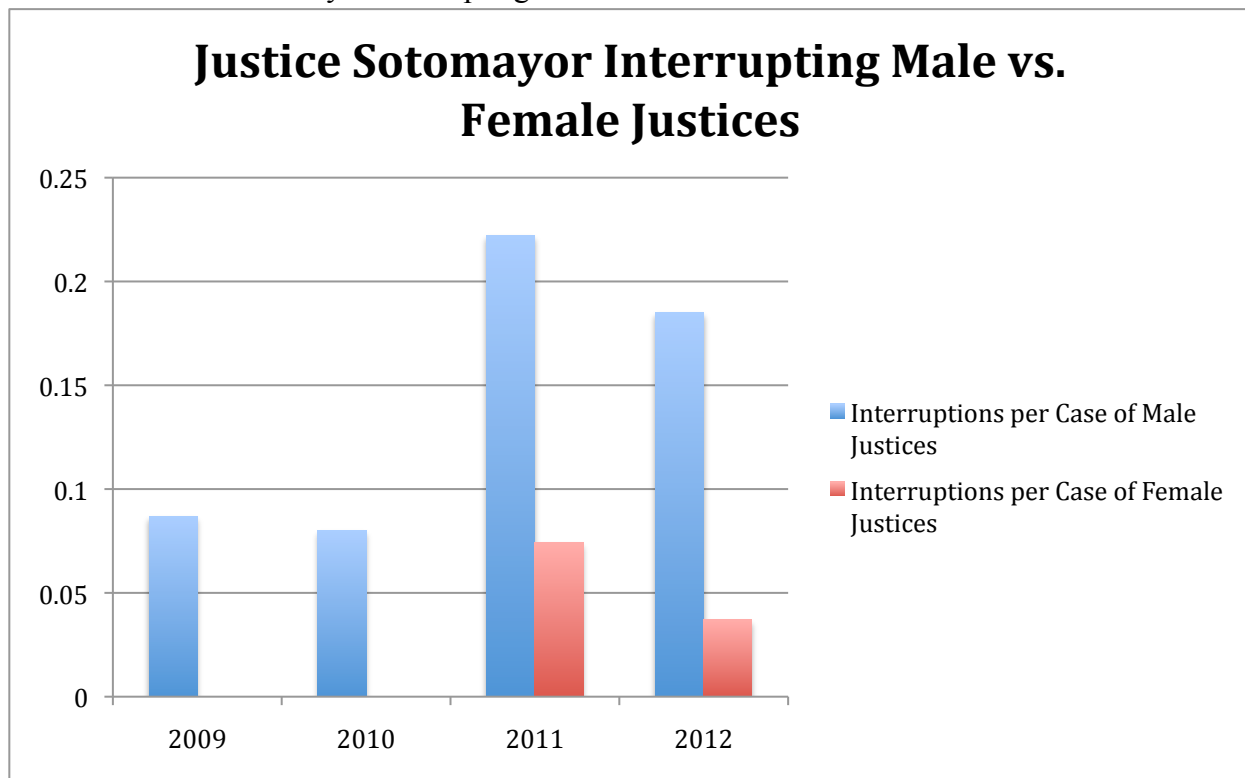


Table 39: Justice Kagan Interrupting Male vs. Female Justices

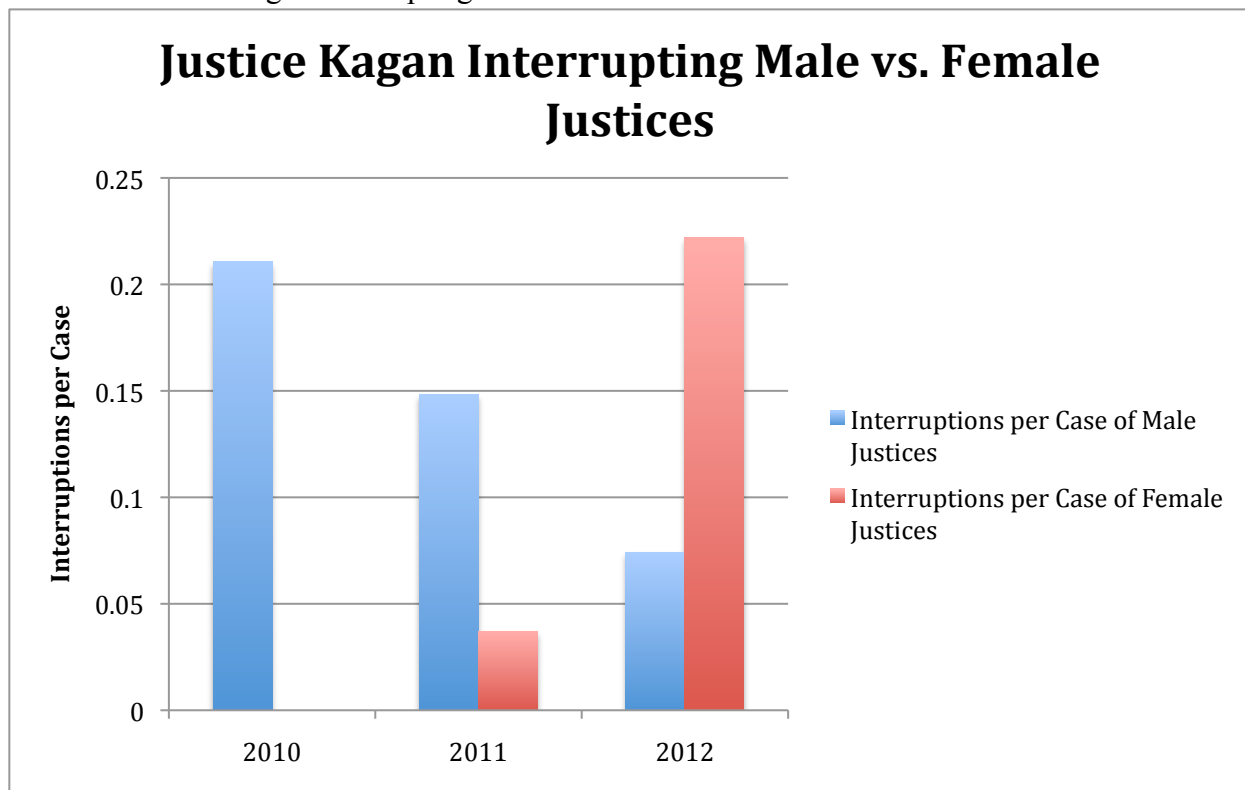


Table 40: Justice O'Connor Interrupting Male vs. Female Petitioners

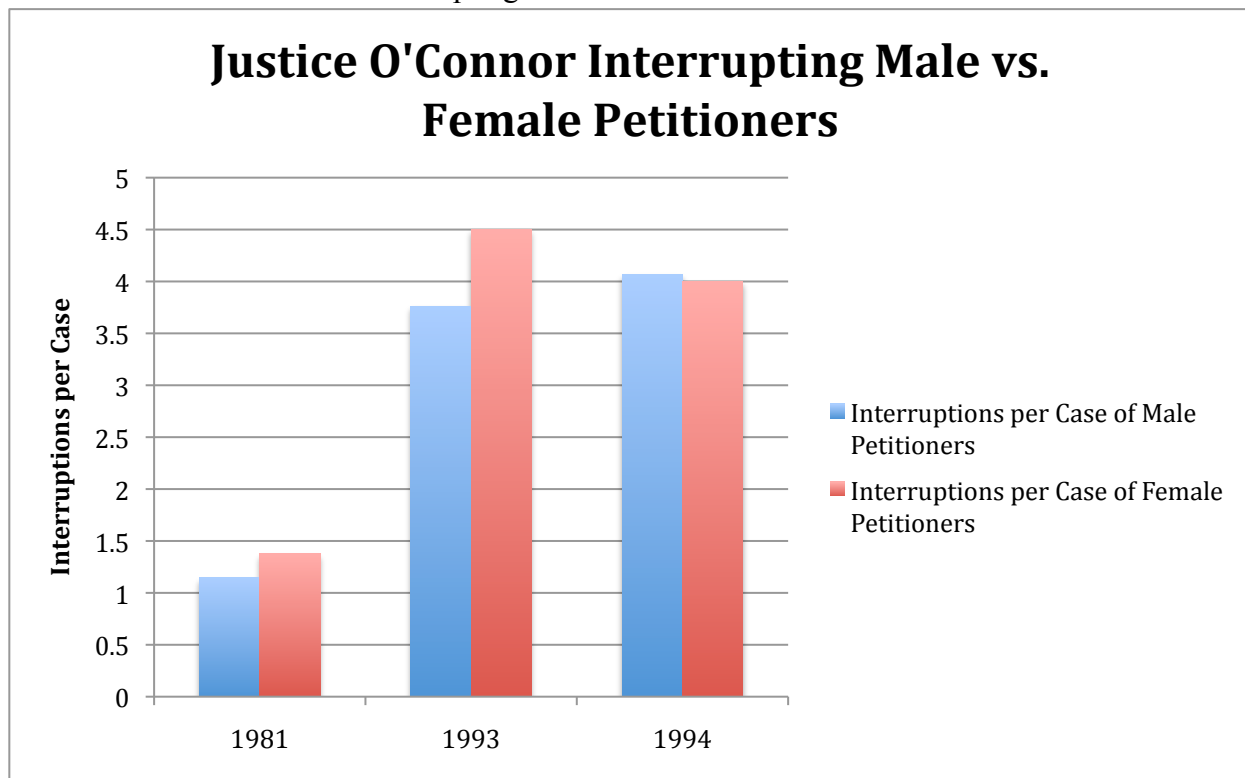


Table 41: Justice Ginsburg Interrupting Male vs. Female Petitioners

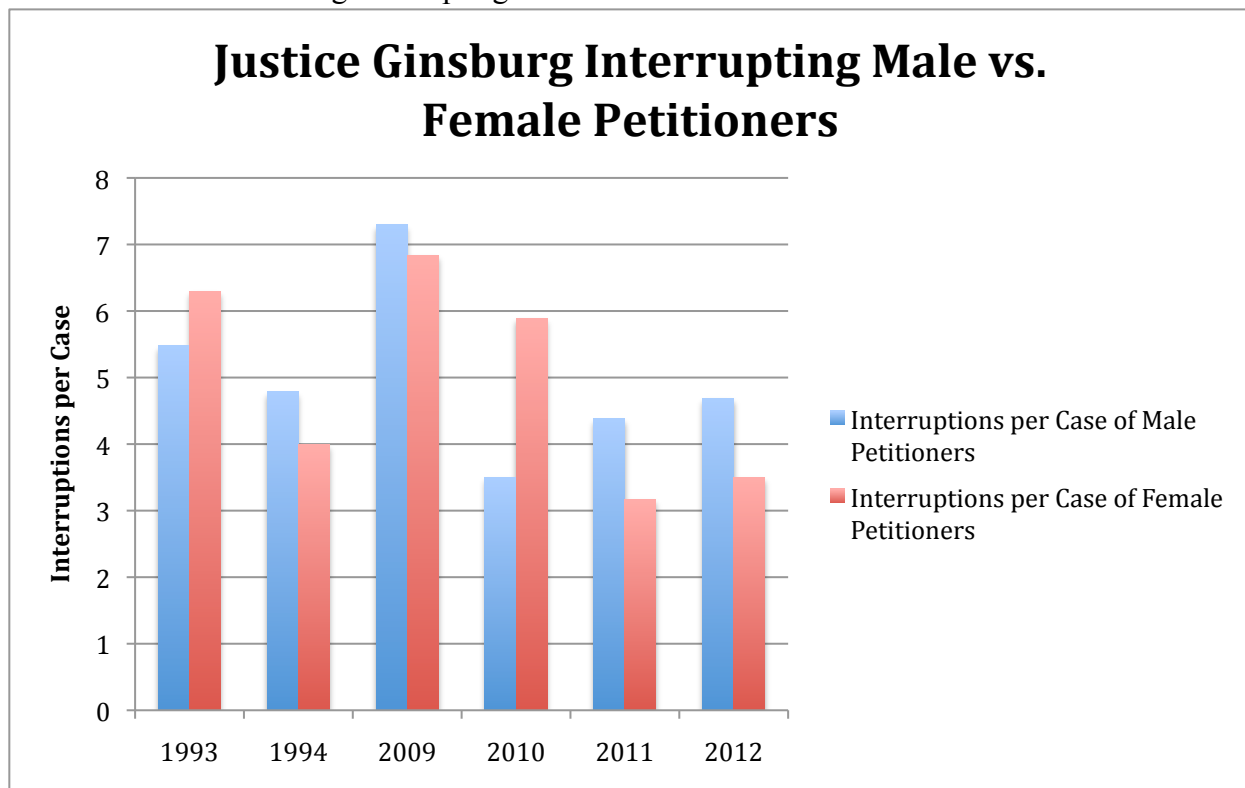


Table 42: Justice Sotomayor Interrupting Male vs. Female Petitioners

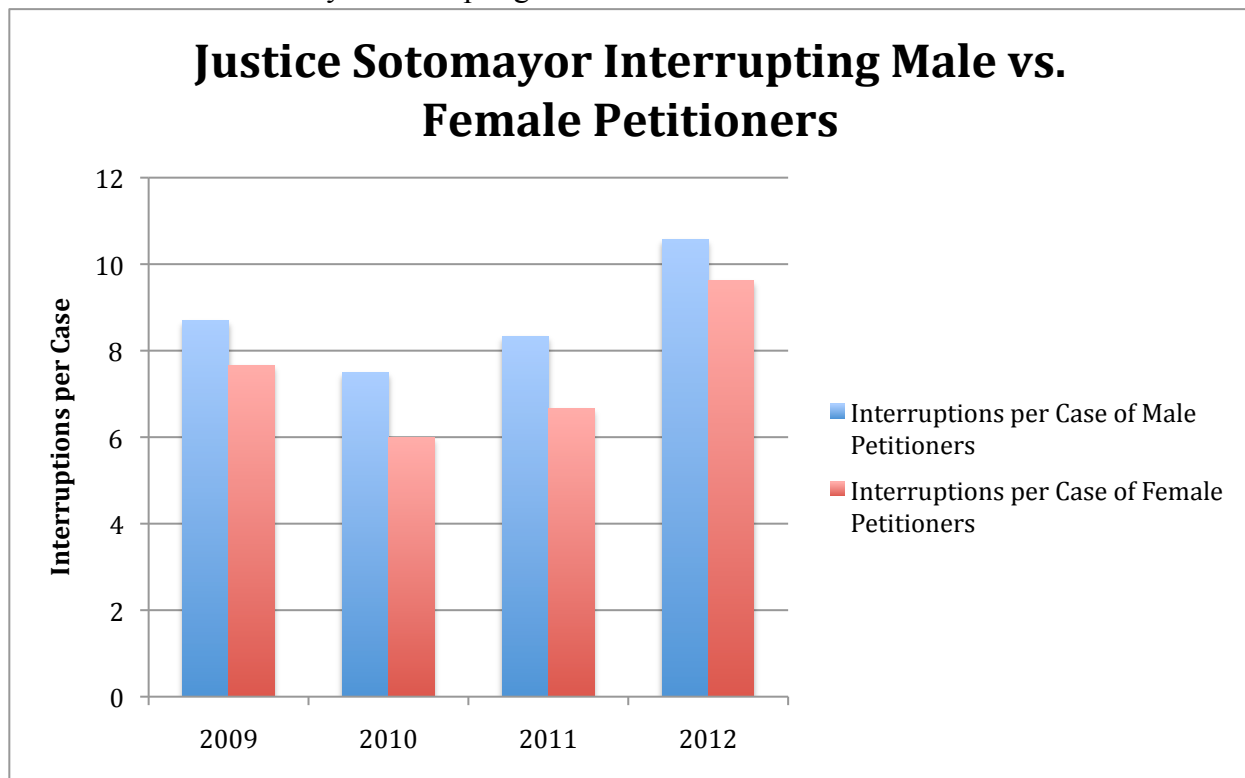


Table 43: Justice Kagan Interrupting Male vs. Female Petitioners

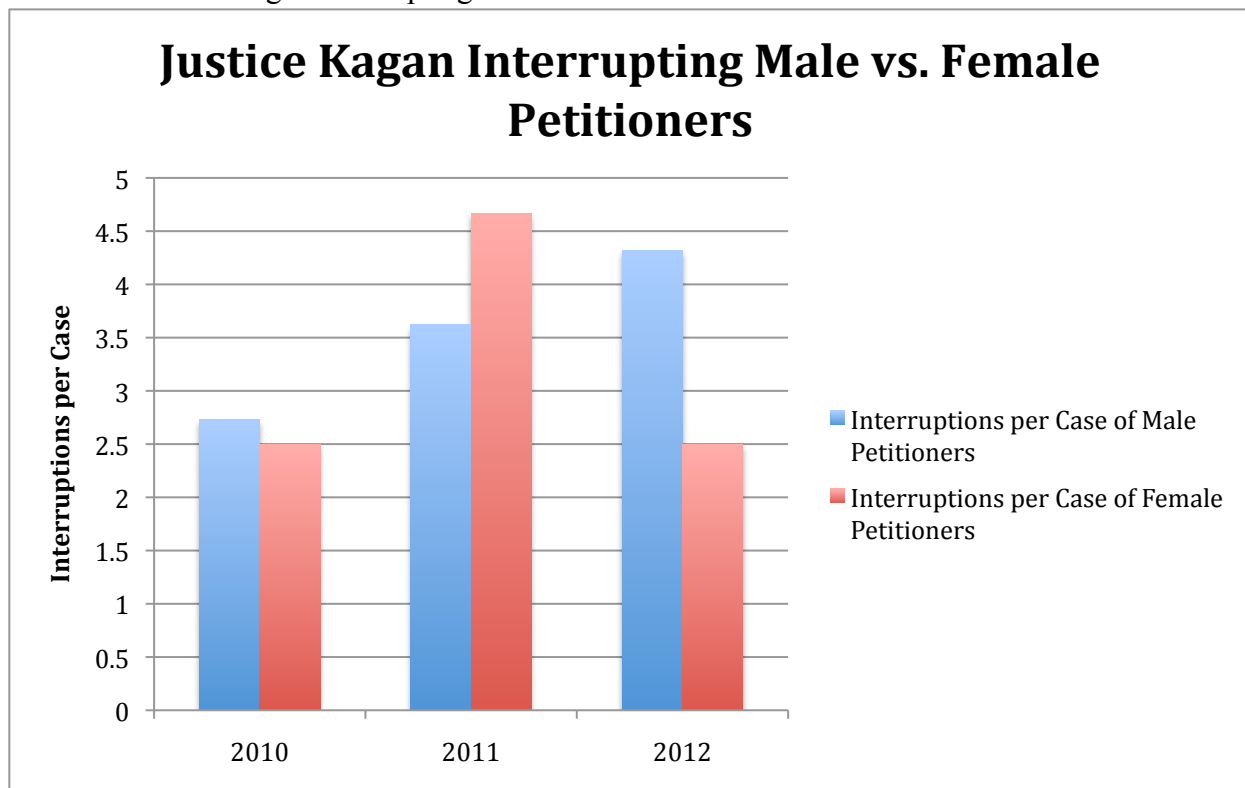


Table 44: Comparison of Interruptions by Justices and Petitioners for all Justices

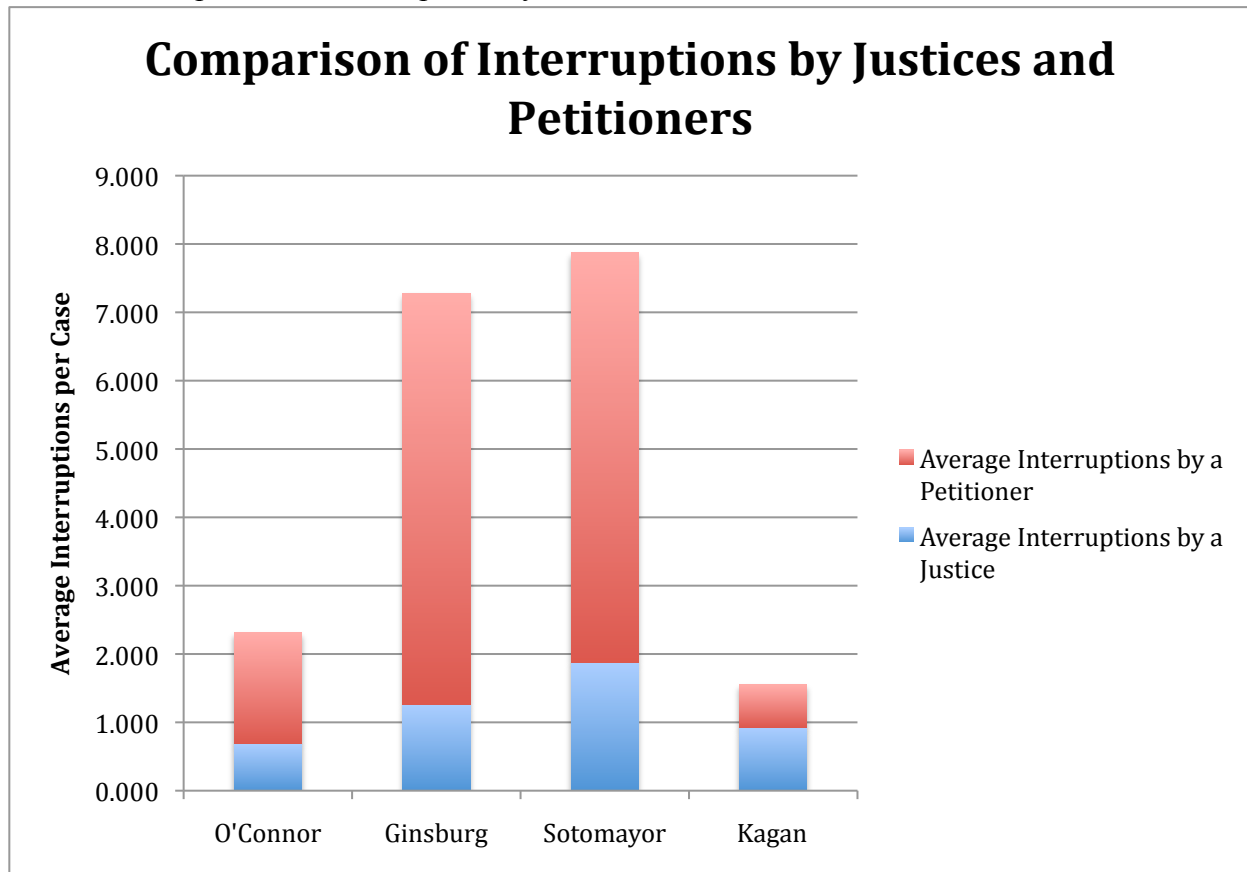


Table 45: Comparison of the Number of Times Interrupted by Fellow Justices

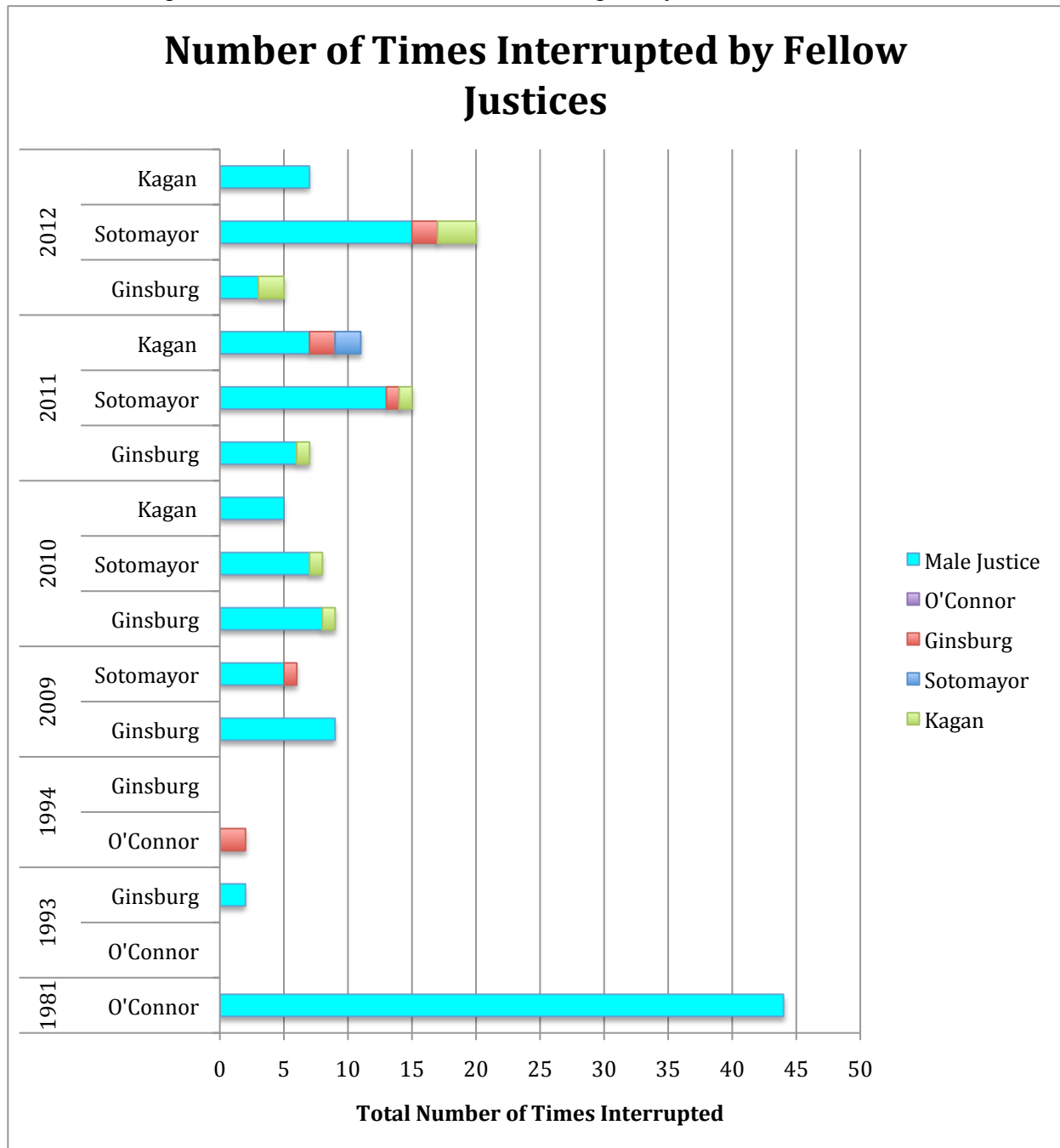


Table 46: Justice O'Connor Interrupted by Justices vs. Petitioners

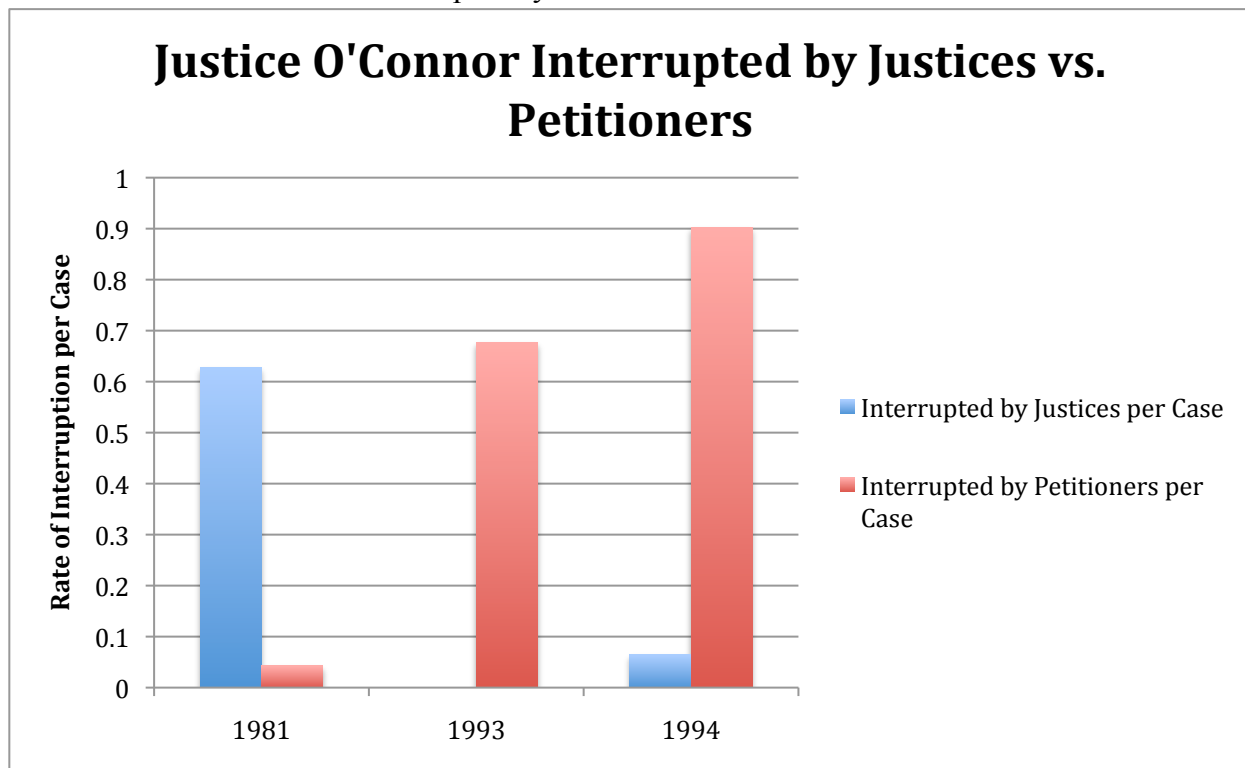


Table 47: Justice Ginsburg Interrupted by Justices vs. Petitioners

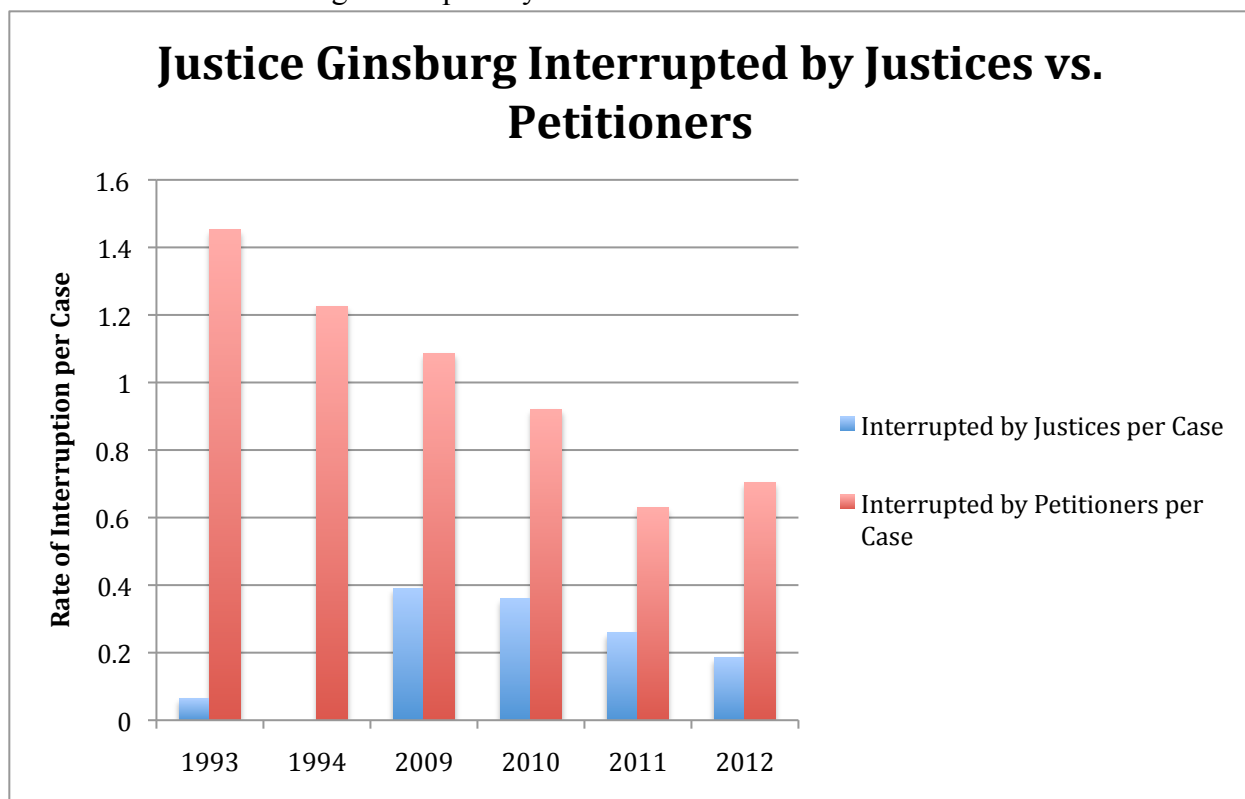


Table 48: Justice Sotomayor Interrupted by Justices vs. Petitioners

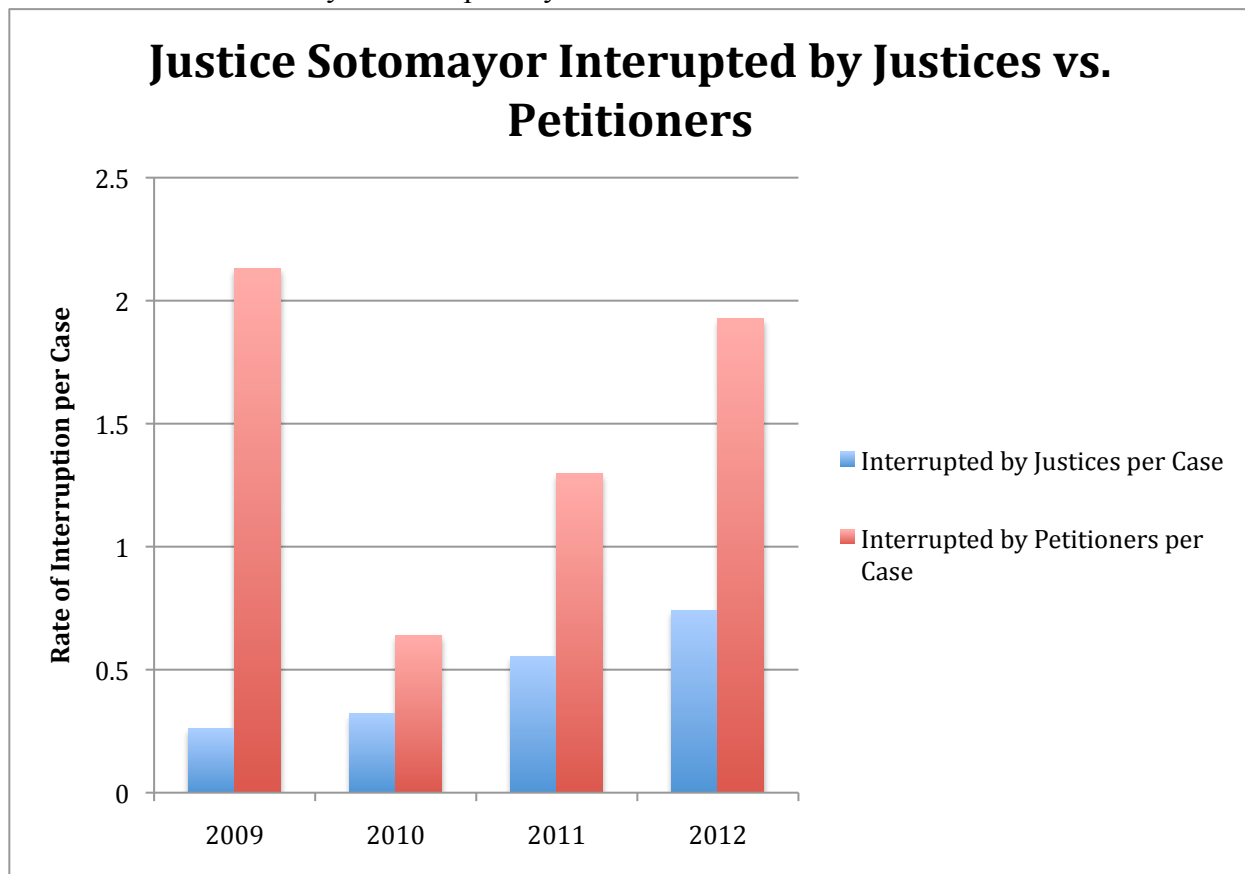


Table 49: Justice Kagan Interrupted by Justices vs. Petitioners

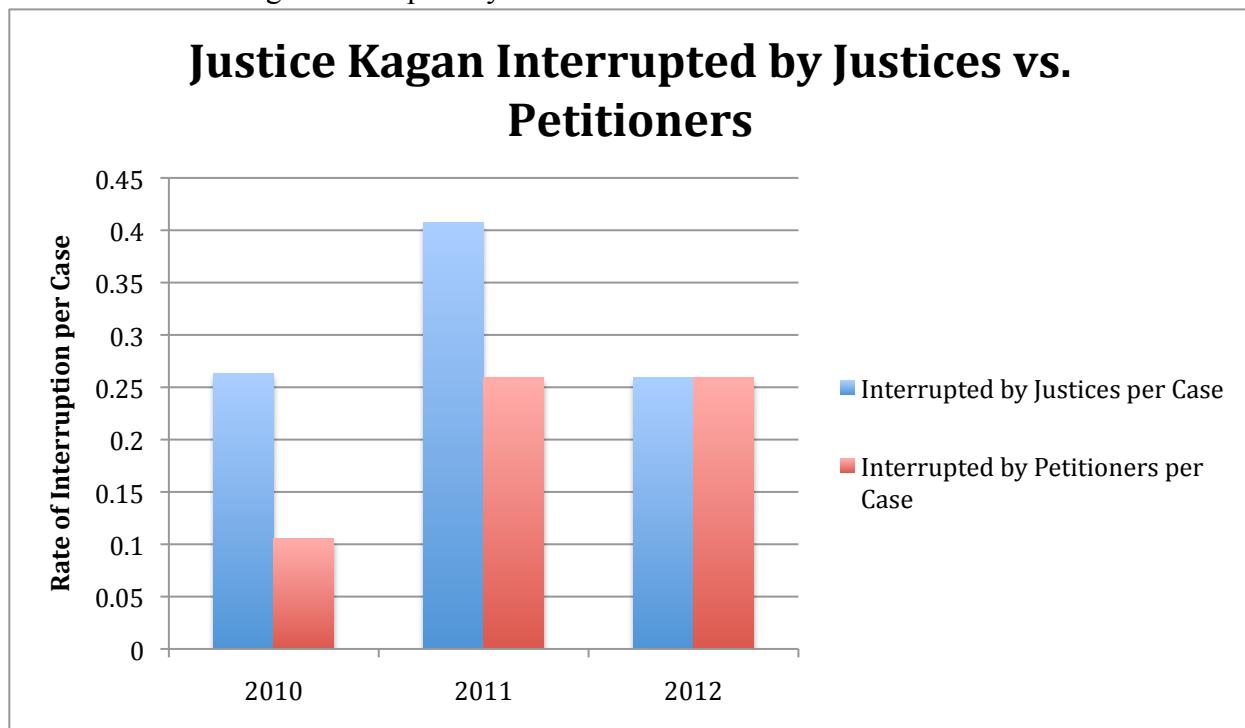


Table 50: Justice O'Connor Interrupted by Male vs. Female Justices

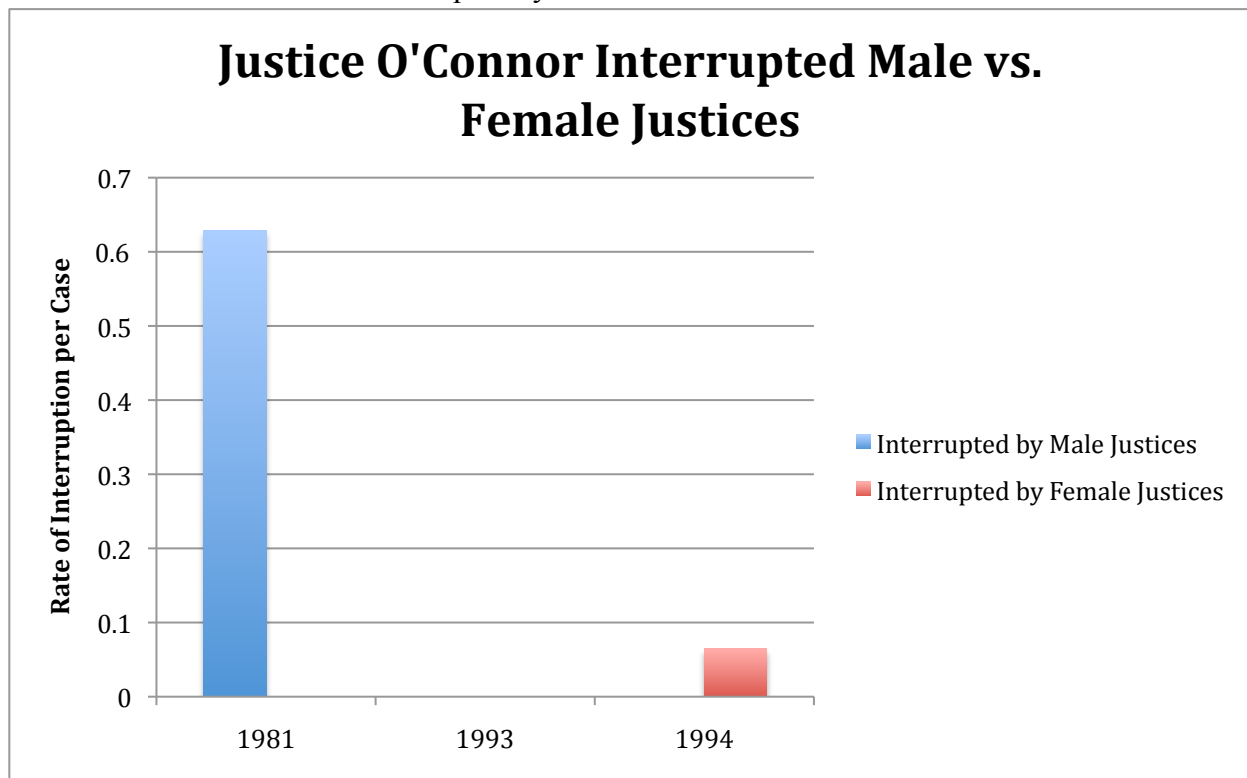


Table 51: Justice Ginsburg Interrupted by Male vs. Female Justices

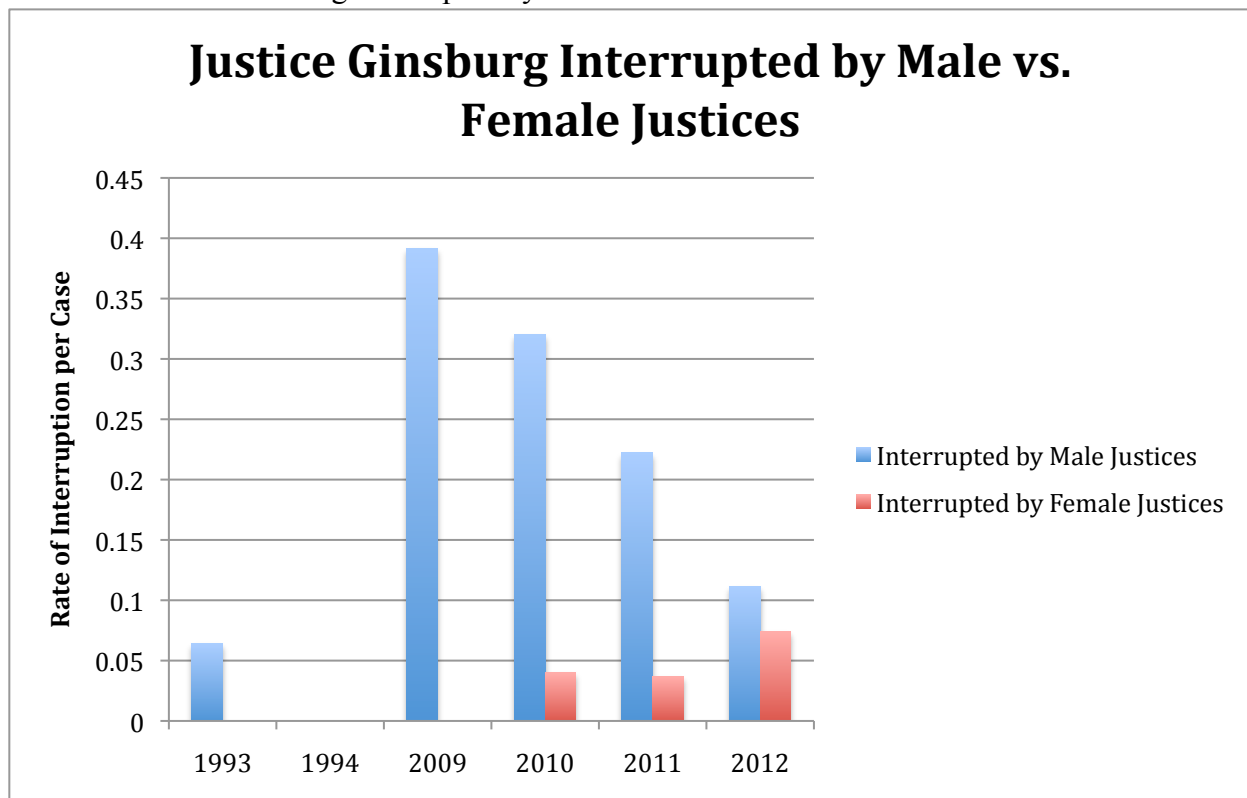


Table 52: Justice Sotomayor Interrupted by Male vs. Female Justices

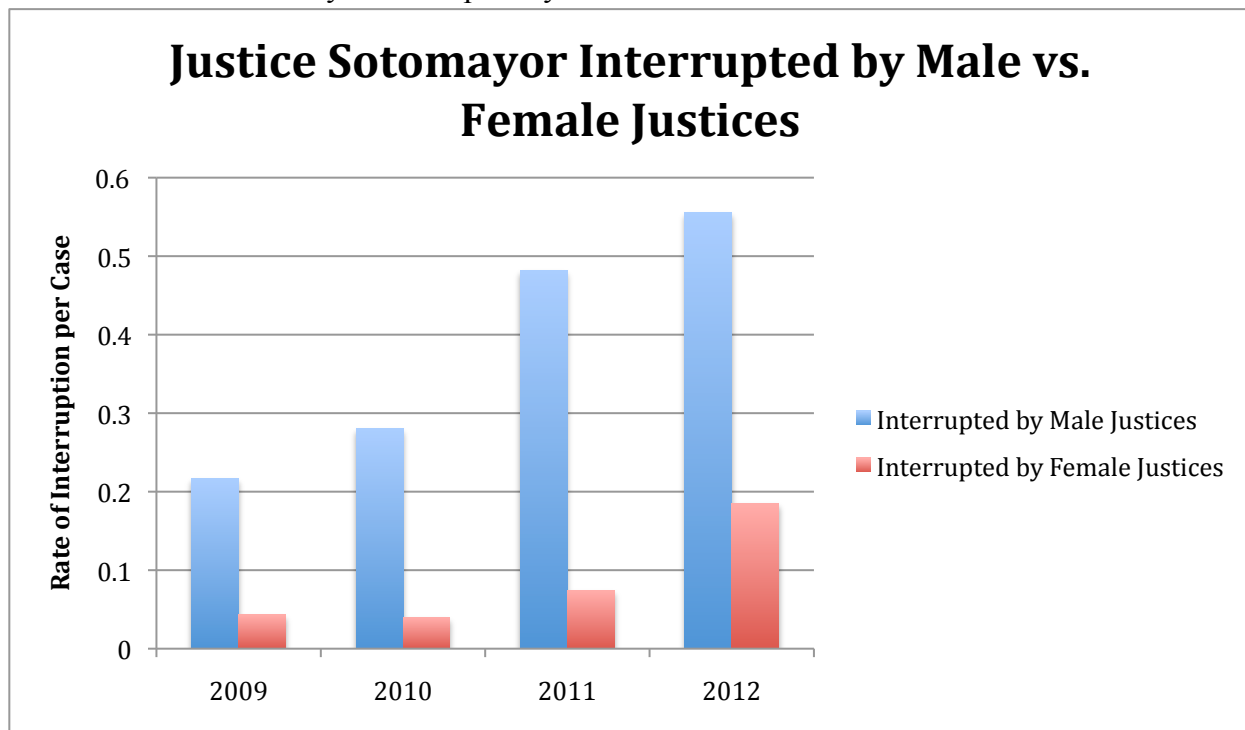


Table 53: Justice Sotomayor Interrupted by Male vs. Female Justices, plus Expected Rate of Interruption of Female Justices

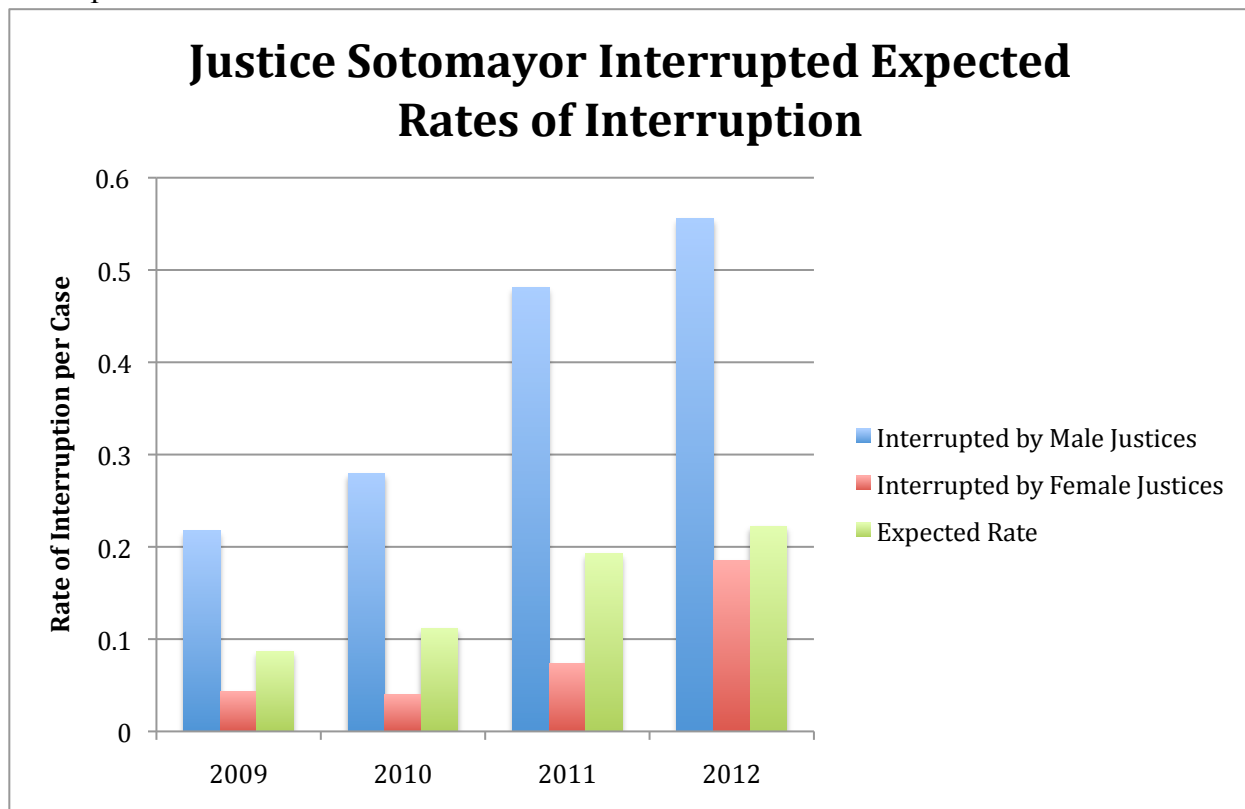


Table 54: Justice Kagan Interrupted by Male vs. Female Justices

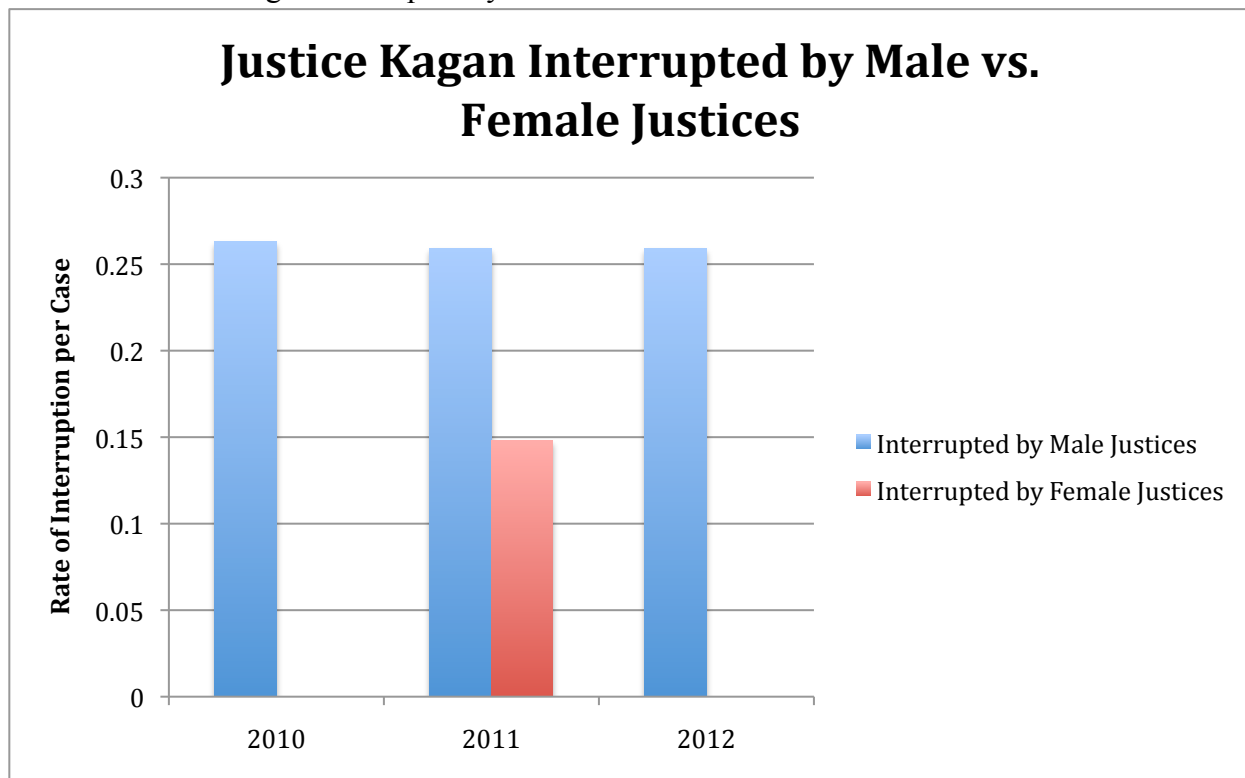


Table 55: Justice O'Connor Interrupted by Male vs. Female Petitioners

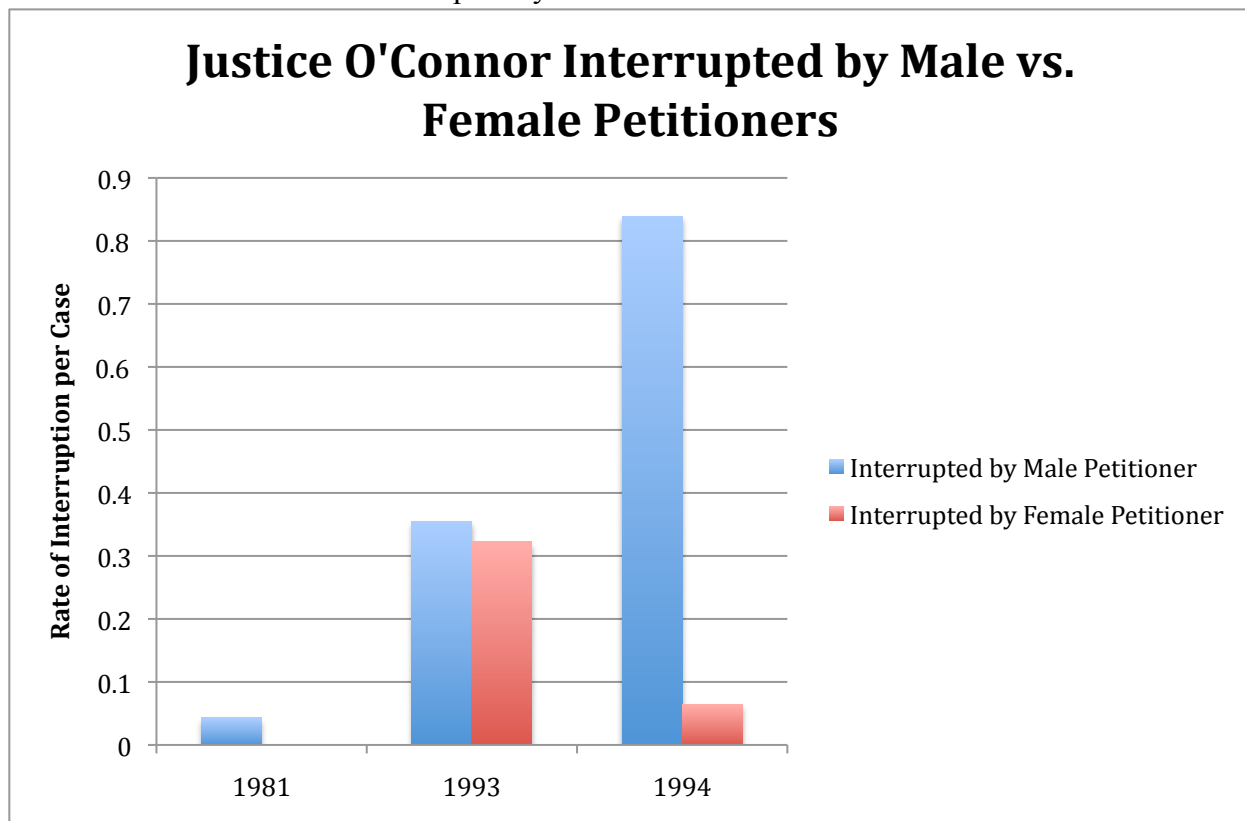


Table 56: Justice Ginsburg Interrupted by Male vs. Female Petitioners

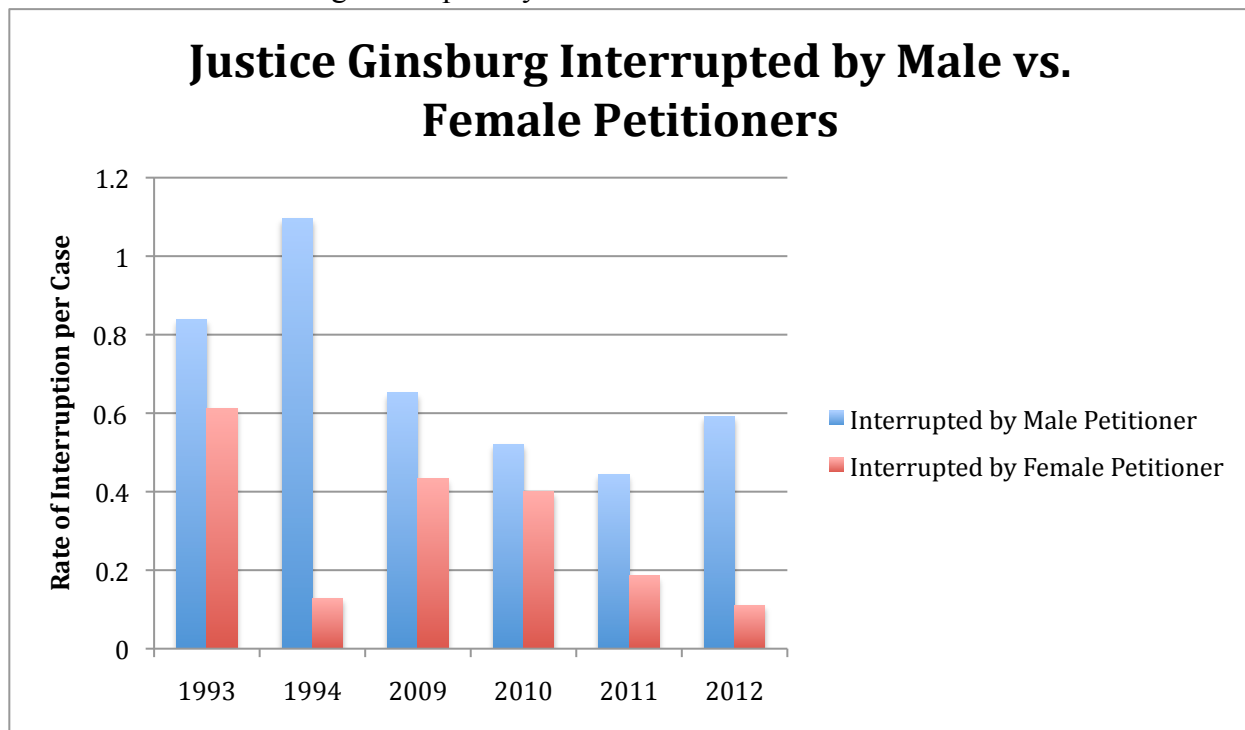


Table 57: Justice Sotomayor Interrupted by Male vs. Female Petitioners

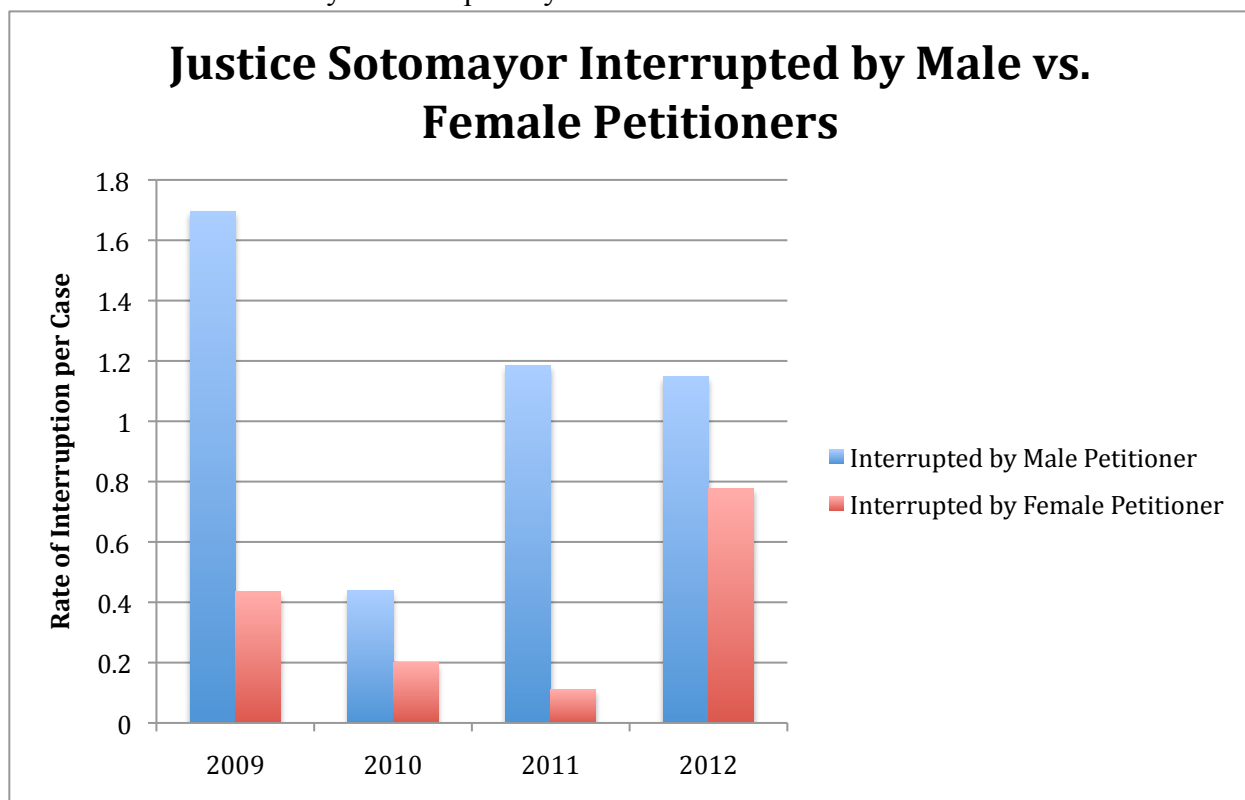


Table 58: Justice Kagan Interrupted by Male vs. Female Petitioners

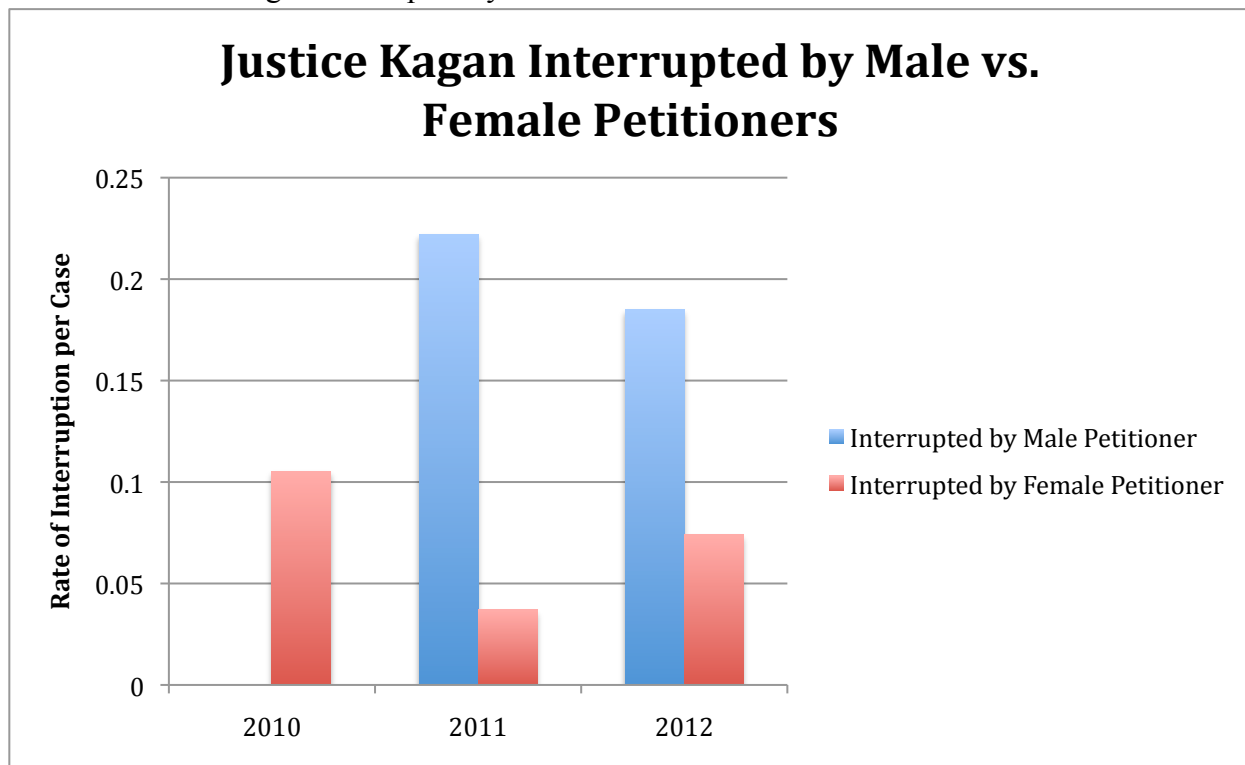


Table 59: Proportion of Sirs and Ma'ams in Oral Argument

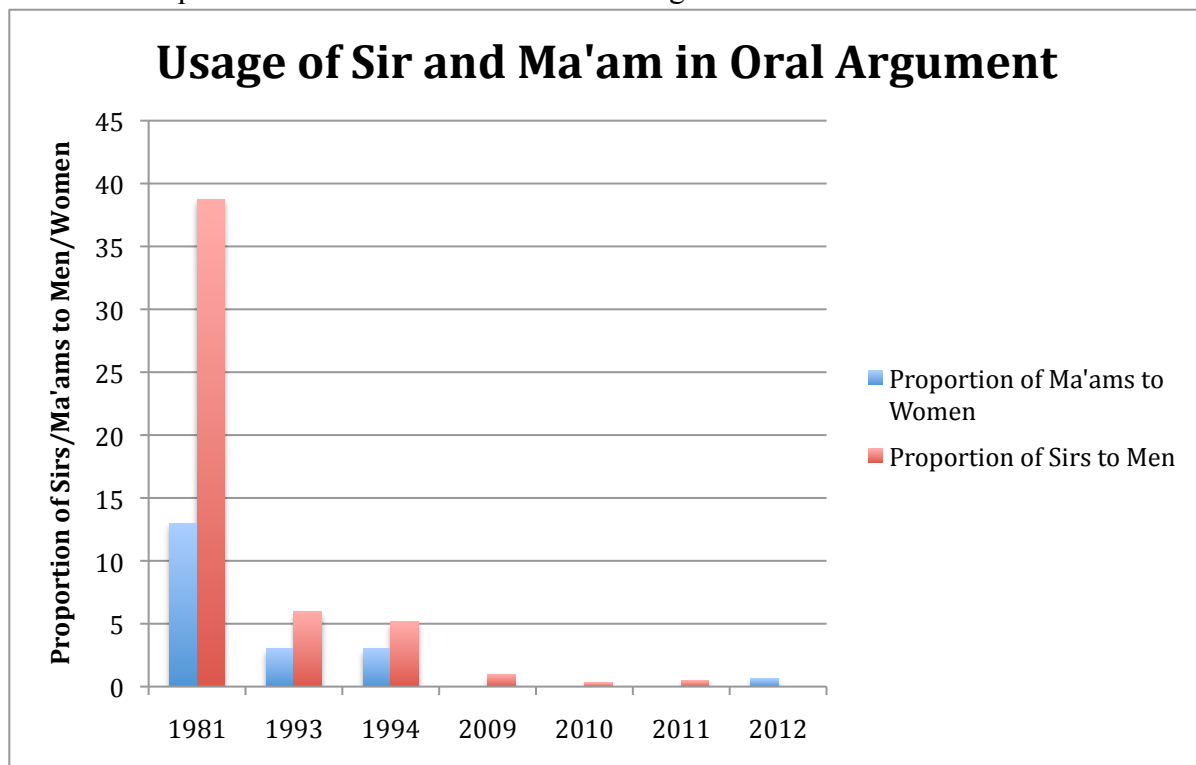


Table 60: Number of Times Sirs and Ma'ams Used

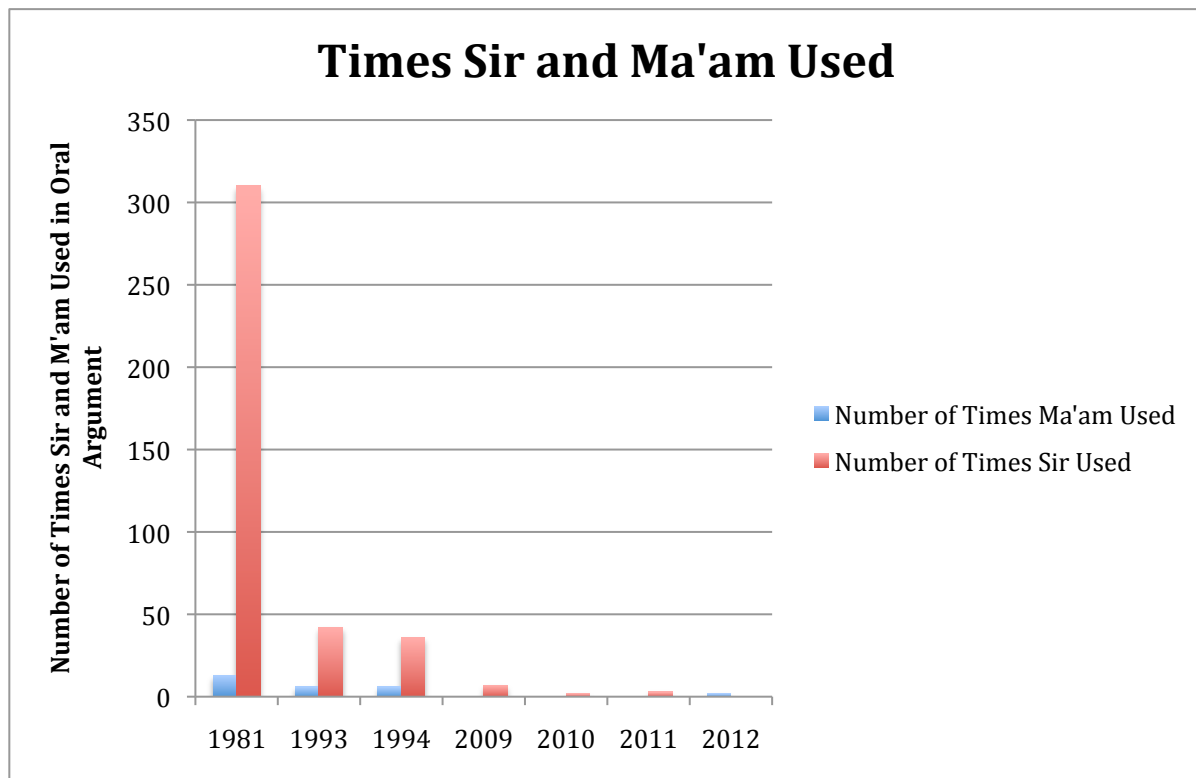
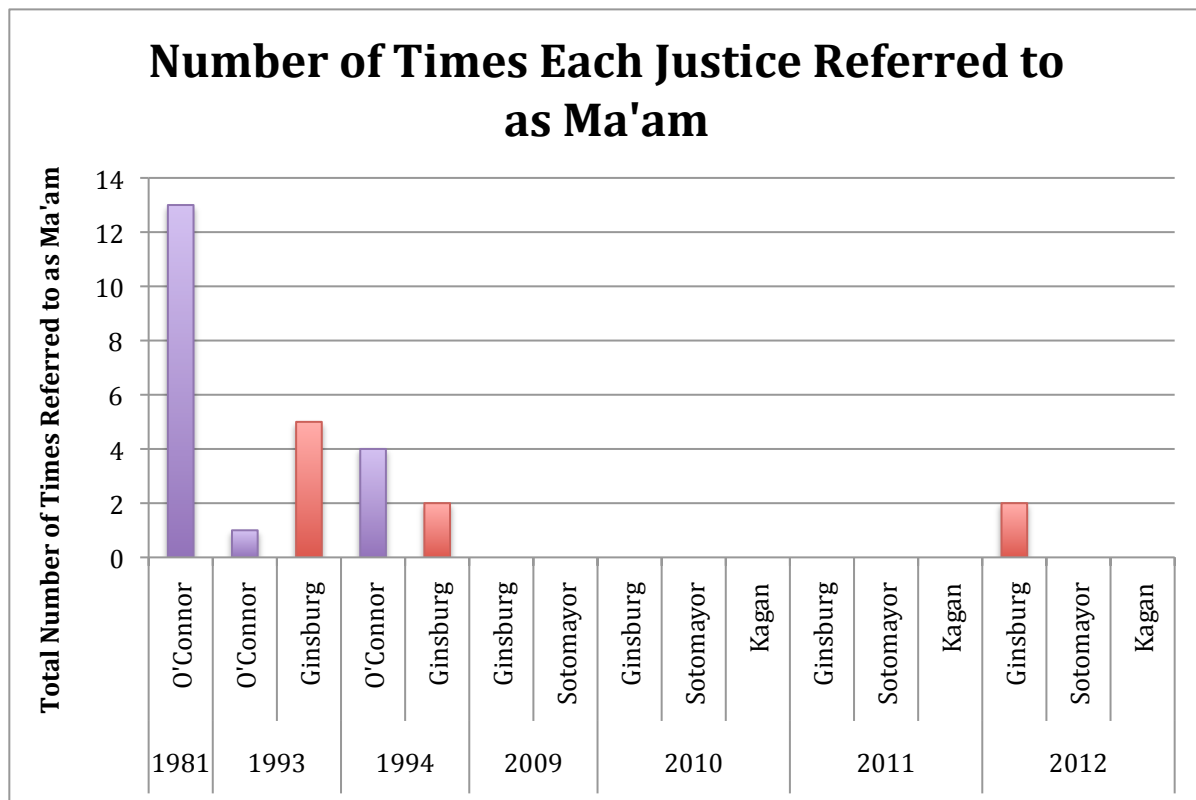


Table 61: Number of Times Each Female Justice Referred to as Ma'am



Chapter 5: Perspective Statements

I. Introduction

A crucial aspect of assessing the ways in which women contribute to the Court centers not only on their participation, behavior, and treatment on the Court, but also on the content of their statements. In order to study this content, I looked for statements I could analyze in a comprehensive manner in order to determine whether they could correctly be said to represent the insertion of perspective into the oral argument of the case. I examined the transcripts of cases pertaining to gender in the seven years my study focuses on: 1981, 1993-4, and 2009-12. As stated earlier, gender cases are cases where gender becomes a focal point in the case, and include the following criterion:

- If the case specifically involves women's rights issues, such as abortion, contraception, discrimination, employment, education, etc.
- If the case involves gender discrepancy (a difference in the way the genders are treated)
- If the case involves issues only pertinent to women (i.e. breastfeeding)
- If the appellants gender factor into the case in some way
- If the case involves sexual crimes where the victims are women

After combing through the transcripts, I selected statements from the female Justices I felt linked their identity as a woman with the issue at hand, creating a compelling and more personal judgment on the case than if a male colleague had made the same statement. As I defined "perspective statements" in Chapter 3, I looked for statements that met at least one of the following criteria:

1. A statement using personal pronouns (I believe, from my experience, we, etc.)
2. A statement claiming ownership of the issue at hand
3. A statement using personal experience, historical examples, life experience of the Justice or of someone they are close to
4. A statement contrasting different perspectives, implying that they agree with one perspective over another.

I then listened to the statement in the context of the rest of the oral argument from that case, taking note of tone from fellow Justices, petitioners, and the female Justice herself. After researching the background of the case and the opinion of the Court, I came back to the statement and attempted to categorize it into one of three categories: a statement about (1) their personal life and experience, (2) the general experience of women, or (3) the history of women as a marginalized class. After categorization, I then analyzed the statement, from the wording to the broader importance in the oral argument and case dialogue. All of these different modes of analysis served not only to situate the statements in their proper contexts, but also to point to their relevance and importance in the dialogue of women's rights on the highest Court in the United States.

The cases I examined in depth all involve either gender discrimination or issues, such as rape or contraceptive coverage, which affect women on a greater scale than men. Interestingly, however, many of the discrimination cases involve the discrimination of men on the basis of their gender, rather than women. From peremptory strikes on a jury on the basis of gender, to immigration laws with greater residency requirements for fathers than for mothers, they seem reminiscent of the six cases Justice Ginsburg presented to the Court during her time at the American Civil Liberties Union (ACLU). An in-depth account of Ginsburg's time as head of the Women's Rights Project at the ACLU touched on Ginsburg's tactic of using male plaintiffs to exhibit gender discrimination to the all-male Supreme Court. As the ACLU states, "Deb Ellis, a WRP staff attorney in the mid-80s, applauds Ginsburg's tactic of occasionally using male plaintiffs in equal protection cases, including *Frontiero*, to demonstrate that sex-based distinctions harm men and women -- indeed, entire families."⁷⁸ The use was more than occasional: two of her four biggest cases before the Court involved issues of male gender

⁷⁸ "Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff," *American Civil Liberties Union*, March 7, 2006.

discrimination.^{79, 80} Like Ginsburg's use of male plaintiffs to drum up support for gender discrimination cases before an all-male Court, two of the gender discrimination cases I examined for perspective statements involved discrimination against men. This trend indicates that gender discrimination continues to be an issue for both genders, especially when laws are crafted with an eye towards stereotypes or when stereotypes are allowed to factor into people's perceptions of attitudes and abilities.

These cases provide a more intimate look into the oral arguments I examined, beyond their overarching trends, and the dissection of perspective statements allowed to me to delve into their actual content. Although the statements only provide a relatively small glimpse into the total picture of dialogue the women of the Court engage in, they nevertheless suggest a willingness on the part of the female Justices to insert perspective into oral argument when the situation demands it. The majority of the perspective statements I identified during the course of my research came from Justice Ginsburg. This fact hardly comes as a surprise, considering her work on the ACLU as a women's rights activist; further, it demonstrates her continuing enthusiasm to use this expertise while on the highest court in the country. Despite this trend, the other three women on the Court also contributed their own noteworthy perspective statements. I approached each individual statement as its own unique contribution to the case. But I also used the same techniques in order to reflect on the broader role of these statements in defending the justification for gender on the Court. For each perspective, the female Justices used a variety of personal and general experiences as a woman in order to make their point. I first looked for this

⁷⁹ Her four most prominent cases as the petitioner for the ACLU were *Reed v. Reed* (1971), in which the Court expanded the Equal Protection Clause to apply to women for the first time, *Frontiero v. Richardson* (1973) where male dependents of female service members received fewer benefits, *Weinberger v. Wiesenfeld* (1975) where Social Security provided special benefits for widows but not widowers, and *Duren v. Missouri* (1978) which effectively challenged laws making jury service optional for women. *Frontiero* and *Weinberger* are clear examples of the use of male plaintiffs in gender discrimination cases.

⁸⁰ "Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff."

insertion of experience; I then developed the statement within the context of the debate the female Justice was partaking in. This contextualization often led me to the conclusion that the Justices were bringing up their experiences independent of a petitioner's general argument. This suggests that they found their own perspectives lacking in the argument. Their willingness to contribute their perspective, especially as it related to their identity, validates the role of gender on the Supreme Court in such a concrete and forcible manner as to make my analysis mere framework.

II. Personal Life

The first category of perspective statement I chose to scrutinize was the most personal of the categories. Statements that touch on private moments in a Justice's life, no matter how subtle, are perhaps the most important connection of identity with the issue they are addressing. While general experiences as a woman are also crucial to perspective statements on any court, by connecting specific experiences with cases before the Court, the Justices can utilize their experiences to create associations for their fellow Justices who lack similar experiences.

Justice Ginsburg provided an important example of this insertion of personal experience as a woman in an interview following the controversial case, *Safford Unified School Districts v. Redding* (2009). The case occurred during one of the three terms Ginsburg served as the only woman on the Court following O'Connor's retirement in 2006 and predating Sotomayor's appointment in 2009. In *Safford*, Savana Redding, a 13-year-old student, was "strip-searched by school officials on the basis of a tip by another student that Ms. Redding might have ibuprofen on her person in violation of school policy."⁸¹ The Court ruled these types of school searches unconstitutional, but Justice Ginsburg found the discussion of the strip search during oral argument by her colleagues troubling at times, especially when they "suggested during oral

⁸¹ The Oyez Project: Chicago-Kent College of Law, "Safford Unified School District v. Redding," accessed April 10, 2014.

argument that they were not troubled by the search.”⁸² As she explained, “They [her male colleagues] have never been a 13-year-old girl...It’s a very sensitive age for a girl...I didn’t think that my colleagues, some of them, quite understood.”⁸³ This understanding does not necessarily or naturally lead to a particular outcome in the case, demonstrated by the fact that every Justice, apart from Justice Thomas, agreed that this particular search breached any reasonable expectations of excessive intrusion. Thus, their experiences as men did not bar these male Justices from understanding the bounds of a reasonable search for a 13-year-old girl. Yet Justice Ginsburg’s comments touch on a deeper personal understanding and empathy that can only come from personal experience. Just as Justice Alito’s time in the army gives him perspective that the other eight Justices lack, Ginsburg’s personal experience, not just as a woman but specifically in this case as a shy 13-year-old girl, gives her more authentic experience with cases to which she can relate directly as a woman.⁸⁴ Justice Ginsburg’s assessment of her colleague’s lack of understanding establishes the necessity of having members of the Court with varied life experiences. Due to the large volume of cases that the Court hears that in some way touch on gender, this diversity of experience becomes all the more crucial.

Personal experience is founded on countless incidents and events, and Ginsburg’s comments in *Coleman v. Maryland Court of Appeals* (2011) demonstrate a more specific reflection on her own personal life than in *Safford*. *Coleman* dealt with the intention behind the Family and Medical Leave Act (FMLA), and whether or not it should allow for equalized medical leave time for men as well as women in order to discourage sexist hiring and firing practices. The discussion in the second half of the oral argument, argued by John Howard on

⁸² Lewis, Neil A., “Debate on Whether Female Judges Decide Differently Arises Anew,” *New York Times*, June 3, 2009.

⁸³ Lewis, “Debate on Whether Female Judges Decide Differently Arises Anew.”

⁸⁴ “The Justices of the United States Supreme Court,” *Supreme Court Review*, 2013/2014 Term.

behalf of the Maryland Court of Appeals, centered on the last part of a four-part provision of the FMLA, which allows for up to 12 weeks of leave a year for (A) the care of a newborn biological child; (B) for the care of a newly adopted child; (C) for the care of a sick spouse, child, or family member; and finally (D) because the employee themselves has a “serious health condition.”⁸⁵

The problem Justice Ginsburg, along with the Court’s three other liberals, found with the petitioner’s claims lay in the first three provisions of the Act that did not adequately work to dissuade employers from discriminating against women. An employer relying on stereotypes would assume that male and female employees would not take similar amounts of time off to care for children or sick family members. The final section, D, would work to even the playing field because it would narrow the gap between the perceived amount of time men and women take off from work.^{86, 87} While men might not take equal amounts of time off from work for the care of children and family members, they would take a more equal amount of time off for personal health conditions, or so Congress believed while drafting the legislation.

This case inspired a uniquely personal moment during oral argument for Justice Ginsburg. Ginsburg is never one to shy away from sensitive topics before the Court, especially as they relate to gender. One of her remarks during *Coleman* in particular comes across as surprisingly private and sensitive. As she states,

Justice Ruth Bader Ginsburg: There's some focus in the legislative history particularly on the -- the family that has a single parent -- much more often a woman, not a man -- and the devastating impact on that family of the woman getting sick, the sole breadwinner getting sick. So that was certainly a -- a problem for families with -- with only one breadwinner. And Congress was focusing on those women and wanting to have job security for them.

⁸⁵ *Coleman v. Maryland Court of Appeals*, 10 U.S. 1016 (2012).

⁸⁶ One of the main points of contention in the case revolves around the fact that men and women take the same amount of sick leave from their jobs. The Court’s four liberals argued that employers do not take these facts into account when hiring, but rather work from stereotypes that are difficult to eliminate. By providing the incentive of section D, Congress was working to even the playing field, while knowing that they were working on perceptions of employment, rather than cold hard fact. Although Congress did not consider cases of gender discrimination when drafting section D, as they did with sections A – C that handle child-care, the Court’s liberals argued that the four parts were intended to work together.

⁸⁷ “*Coleman v. Maryland Court of Appeals*,” *Oyez Project*.

That wasn't the only group of women, but certainly that -- that affected this act as it came out, didn't it?

Mr. Howard Jr.: Yes.

There is discussion in the record of the disproportionate impact that you say.⁸⁸

As the transcript reveals, her speech came in a somewhat halting and carefully crafted manner during her statement. Her pronouncement also makes no broader claim concerning the case, but focuses exclusively on the personal impact for single mothers that Congressional records also demonstrated. The purpose of this statement, as its response from the petitioner indicates, was to bring to the general consciousness of the Court the struggle single mothers face in the job market, especially when it comes to job security. Nevertheless, her statement demonstrates more than mere support of women struggling in the job market. Justice Ginsburg married her husband, Martin, during her last year of college and gave birth to their first child that same year. Only a couple of years later, while both she and her husband were attending Harvard Law, her husband contracted testicular cancer. Faced with caring for their very young daughter, helping her husband through “intensive treatment and rehabilitation,” as well as helping both of them through their law studies, Ginsburg rose to the challenge admirably.⁸⁹ Her husband recovered, and Ginsburg managed to go on to graduate from Columbia Law after serving on law reviews for both Harvard and Columbia. These achievements remain all the more impressive considering the personal sacrifice demanded of her during those trying years.⁹⁰

Justice Ginsburg was never a single mother during this or any other period of her life. Nevertheless, this experience, of raising a child alone while in addition caring for an ill spouse and succeeding magnificently in law school, all demonstrate that her personal understanding of the burdens of single parenthood. As she said during the argument, “There's some focus in the legislative history particularly on the...devastating impact on that family of the woman getting

⁸⁸ “Coleman v. Maryland Court of Appeals,” *Oyez Project*.

⁸⁹ Gutgold, *The Rhetoric of Supreme Court Women*, 48.

⁹⁰ Gutgold, *The Rhetoric of Supreme Court Women*, 48.

sick, the sole breadwinner getting sick.” She knows directly what it means for one member of the family to become sick. While her husband Martin was also at the time in law school and so not the sole breadwinner, Ginsburg can herself can exactly imagine what would have happened to her family had she herself become sick, or how much more dire the situation would have been had she or Martin been holding jobs instead of attending law school. These statements acknowledge a very real and important struggle in the lives of many single parents. But it is Ginsburg’s personal identification with the struggle that creates the powerful perspective in this statement.

III. General Experience as a Woman

In addition to personal experience, the women of the Court bring their experience to bear on oral argument through commenting on the general experience of women, outside of specific individual experiences that can be directly traced to their personal lives. Commenting on the general experience of women constitutes a perspective statement because it demonstrates an inherent understanding and empathy with this outlook, lacking in a person who has not actually lived that life. By empathizing and identifying with the female perspective of a case during oral argument, the female Justices automatically attach their identities to the identity of the women they are relating to. By lending their voices as female Justices to the female voice in a particular argument, an otherwise debatable point suddenly gains credence. As with Justice Thomas’ statement about the experience of a black man in the United States, it is not necessarily that only a black person could make that statement.⁹¹ Clearly anyone sympathetic to that perspective could comment on the experiences of black people, whether or not they share that identity. Still, by linking his identity as a black person serving on the Court to the black experience in the United States, Thomas made a connection inherently more powerful for his audience. That experience

⁹¹ Wrightsman, *Oral Arguments Before the Supreme Court*, 99.

suddenly has the sympathy of a Justice that can only come through a lived, shared experience. Likewise the female Justices bring the same experiences to bear when they link their identities as women to the experience of women in the cases they hear.

The first example of general experience into oral argument once again comes from Justice Ginsburg during *Coleman v. Maryland Court of Appeals* (2011). After pushing Mr. Howard, the petitioner for Maryland, on the specifics of section D and legislative history, Ginsburg returned to the overarching point of the case in the final moments of the oral argument. As she remarked to Mr. Howard:

Justice Ruth Bader Ginsburg: But (D) is a remedy for the problem [of socioeconomic disadvantage for women, particularly single mothers].
I think there's really not much disagreement about the problem, that there is gender discrimination in the job market.
Mr. Howard Jr.: --Yes.
Justice Ruth Bader Ginsburg: And then the question is how do we remedy that?⁹²

After dealing with issues of his argument-time running out, Mr. Howard responded:

Mr. Howard Jr.: --We think that the remedy in (D) may cover the types of concerns you referred to, but I -- I would emphasize this is a disproportionate incongruent remedy.
It subjects States to far more suits for unrelated health conditions than the Eleventh Amendment should permit.⁹³

Justice Ginsburg's comments above are poignant and sharp. Rather than relying on detached legal terminology or focusing exclusively on the narrow issue at hand, in these last moments of Mr. Howard's argument Ginsburg speaks much more broadly about the issues the Act sought to rectify. Although the Act was passed in 1993, this case, argued in 2011, still very much addresses the realities of gender discrimination in the job market. Ginsburg's comments unite the Courtroom by speaking to the larger issue at stake. While the Court chose to rule in a narrow manner on Congressional intent when passing section D, her comments speak to the stakes of the case. As she says in the argument, drawing agreement from her ideologically opposed petitioner,

⁹² "Coleman v. Maryland Court of Appeals," *Oyez Project*.

⁹³ "Coleman v. Maryland Court of Appeals," *Oyez Project*.

“there’s really not much disagreement about the problem, that there is gender discrimination in the job market.” This is obviously a phenomenon Ginsburg has dealt with very directly in her life. An ACLU tribute reflects on her experience upon graduation from Columbia Law (after transferring from Harvard Law and serving on both school’s law reviews – the first student ever to perform such a feat):

Ginsburg had worked for a top law firm in New York during the summer of her second year in law school. ‘I thought I had done a terrific job, and I expected them to offer me a job on graduation,’ she recalled. Despite her performance, there was no job offer. Nor was there an offer from any of the twelve firms with which she interviewed; only two gave her a follow-up interview.⁹⁴

These personal experiences with job discrimination eventually led to the formation of the ACLU Women’s Rights Project in 1972 under her guidance.⁹⁵ These experiences, admittedly from decades prior to the writing of the FMLA and the case before the Court, clearly inform Ginsburg’s awareness of this issue. When Mr. Howard attempted to make the argument over the course of his oral argument that Congress never intended gender discrimination to play a part in the passing of section D, Ginsburg clearly found such logic disingenuous. As she so clearly and bluntly puts it, even Mr. Howard and conservatives can agree with the problem, and Congress clearly passed legislation to address that very same problem. Thus, her second question, “how do we remedy [job discrimination]?” is clearly rhetorical. The FMLA remains the effective remedy introduced by Congress to plug holes left in earlier legislation such as the Pregnancy Discrimination Act. Justice Ginsburg’s comments here not only touch upon the experience of so many women, proven by the testimony Congress heard when passing the legislation, but also speak to her personal encounters with job discrimination. The link between her identity as a woman, combined with her shared experience with the women in question, create a powerful statement once again highlighting the importance of her perspective on the Court.

⁹⁴ “Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff.”

⁹⁵ “Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff.”

The second perspective statement acknowledging the general experience of women comes from Justice Sotomayor from the same 2011 case, *Coleman v. Maryland Court of Appeals*. The case dealt with sick leave for men and women as detailed under the Family and Medical Leave Act, specifically expanding medical leave for the employee themselves, as opposed to the sole care of family members and children. Her comments come at the very beginning of Mr. Howard's oral argument on behalf of Maryland, and on the heels of comments from both Justice Ginsburg and Justice Kagan. This argument reveals a clear tag-team effort on the part of the liberals, particularly the female Justices. In her comments Sotomayor draws a distinction between the realities of how often men and women actually take sick leave, and the biased perception of their sick times on the part of potential employers. She counters Mr. Howard's response to Justice Kagan as follows:

Mr. Howard Jr.: --Congress, Justice Kagan, did not I think take that stereotype or perception that Mr. Foreman referred to into account.

And I'd specifically point the Court to page 21 of our brief, where we cite some Bureau of Labor Statistics studies indicating that men and women at the time took roughly the same amount of sick leave.

In fact, Mr. Foreman has conceded as much.

And that same study projects that men and women will take roughly the same amount of time after the enactment of the FMLA--

Justice Sonia Sotomayor: But, there certainly was -- there was certainly much conversation and testimony that, whether they in fact took the same amount of leave time or not, that women who were pregnant or were perceived as capable of getting pregnant were hired less frequently because subjectively the employers thought that they were more likely to take the time.

So, frankly, for years there was questions about whether law firms were hiring young -- not hiring young women because they feared they would leave in the middle of a big case or something else. We all know those stories, so it is sort of common knowledge in many ways, but there was plenty of testimony related to that.

So assume that that was Congress's perception, because it was supported by the record or as much of the record as Hibbs recognized as adequate.

Where does that leave your argument?⁹⁶

Justice Sotomayor's assertions here turn out to be important not only for her argument, but because they draw attention to an important phenomenon that Mr. Howard attempts to discredit. As Sotomayor notes, the real problem was not "whether they in fact took the same amount of

⁹⁶ "Coleman v. Maryland Court of Appeals," *Oyez Project*.

leave time or not,” but the subjectivity of the employers and their preconceived notions about women, especially young women. Sotomayor also refers to common knowledge during her statement, claiming, “We all know those stories.” This point remains an essential one because it involves the petitioner and the rest of the Court in her point. While the Court often relies on testimony and records provided by Congress, Sotomayor appeals to a higher authority in her statement: common experience with hiring practices, especially in law firms. Whether or not Sotomayor personally ever dealt with job discrimination, she makes it difficult for either the petitioner or her fellow male colleagues to deny that they have at least “heard stories,” even if they have not had more personal experience with this type of discrimination. Thus, Sotomayor’s statement not only includes the Court in her personal experience with the issue, but also implicates the collective body of the Court itself as witness to discrimination, not necessarily just recipients. Sotomayor employs this wise linguistic device because it succeeds in making the case more personal, as most of these perspective statements do. Further, it makes the point personal for a wider range of people. Sotomayor’s perspective statement draws in the perspective and experience of a broader range of people, and creates not only a connection for the women of the Court, but for all members of the Court.

The final perspective statement in this category comes from a case not in the section of Supreme Court terms I specifically studied, but instead from an oral argument I witnessed. I felt compelled to include the statement while witnessing the oral argument for *Sebelius v. Hobby Lobby Stores* (2014). The impact of Kagan’s statement stood out during the time of the argument as extremely powerful due to the personal reflection it required in order to sympathize with the women potentially damaged as a result of the case. In contrast to the often-lofty legal arguments debated by the entire Court, Justice Kagan included, her statement spoke to the individual and

private repercussions of the law. Thus, I found it worthwhile to examine more fully the perspective statement I had personally witnessed, and examine why it had stood out so clearly in my mind during the argument. *Sebelius v. Hobby Lobby Stores* (2014) involves the ability of a for-profit corporation to opt-out of certain healthcare mandates, specifically four types of contraceptive methods in the Affordable Care Act. As the Oyez Project summarized, “While there are exemptions available for religious employers and non-profit religious institutions, there are no exemptions available for for-profit institutions such as Hobby Lobby Stores, Inc.”⁹⁷ This clash between the religious rights of a corporation and those of its employees was less central to the oral argument of the *Hobby Lobby* petitioner, Paul Clement. The Court’s liberals, especially the three women, focused instead on other exceptions that might be challenged next by corporations, such as vaccinations or blood transfusions, if the Court were to side with Hobby Lobby Stores.⁹⁸ Justice Kagan, however, directed one of her remarks to the burden placed on women who would be denied contraceptive coverage by their employer. Her remarks followed an analogy that Mr. Clement drew between subsidizing someone else’s access to Bibles and subsidizing healthcare. Kagan accurately pointed out that Congress has made a definitive ruling on this aspect of the Affordable Care Act. But she took her remarks an extra step beyond that of her colleagues: she focused on the harm to the women at the heart of the case. The exchange went as follows:

Paul D. Clement: And so if I could, though, I think, just to illustrate why it's sort of double counting to count the mandated issue here as being what gives the burden to the third party or the benefit on the third party.

Imagine two hypotheticals.

One is Congress passes a statute and says I have to destroy all of my books, including my Bibles. Another statute, Congress comes in and says I have to give all of my books, including all of my Bibles, to you.

Now, in the second case, I suppose you could say that a RFRA claim somehow gets rid of your statutory entitlement to my Bibles, but I don't think, since it's the very benefit that we're talking

⁹⁷ The Oyez Project: Chicago-Kent College of Law, “*Sebelius v. Hobby Lobby Stores*,” accessed April 12, 2014.

⁹⁸ “*Sebelius v. Hobby Lobby Stores*,” *Oyez Project*.

about that's at issue there, I don't think -- I think that really is double counting and I don't think those two hypothetical statutes should be analyzed any differently.
The other thing, though, about burdens, and I think it should go -- this is the fourth point -- that should go into the compelling interest test--
Justice Elena Kagan: I mean, Mr. Clement, isn't that just a way of saying that you think that this isn't a good statute, because it asks one person to subsidize another person.
But Congress has made a judgment and Congress has given a statutory entitlement and that entitlement is to women and includes contraceptive coverage.
And when the employer says, no, I don't want to give that, that woman is quite directly, quite tangibly harmed.
Paul D. Clement: --Well, Justice Kagan, I think you could say the same thing about my Bible hypothetical.⁹⁹

Much of her statement is dedicated to rebutting Mr. Clement's Bible hypothetical, but her inclusion of the tangible harm to women being denied certain contraceptive coverage is important. Nowhere in Mr. Clement's earlier statement does he address any tangible harm the Bible owner would face, and his hollow remark that similarities of harm could be found in his example appear far less sincere than Kagan's remark. While owning Bible remains certainly highly important for many people, contraceptive coverage harms the physical well-being of the women unable to afford it. While Kagan's statement is not revolutionary in its impact, it introduces a human element lacking in the oral argument that will ultimately affect the health decisions of many women across the country. Kagan's apparent empathy with their tangible harm in her statement comes across as deeply empathetic. Thus, by extending her statements to include the personal reflection on the specific harm faced exclusively by women, Kagan brings the Court's consciousness to the human element in the case. By calling attention to the harm inflicted on the women, Kagan links her identity as a woman to that harm, creating a powerful connection for her audience, specifically the swing Justice, Justice Kennedy.

IV. History as a Marginalized Class

The history of women as a marginalized class in the United States constitutes the third category I developed for perspective statements. This category cuts beyond personal experience and general experience as a woman and allows women to claim empathy based on historical

⁹⁹ "Sebelius v. Hobby Lobby Stores," *Oyez Project*.

factors that contribute to the current state of women's rights. While men, too, can comment effectively on the history of women as a class, it remains more influential and powerful coming from women because they clearly still experience the lingering (and at times still enduring) effects of their history of marginalization. Women's own comments on their status as a group thus carry personal connections absent from sympathetic statements made by male colleagues in that they can empathize with discrepancy in treatment on the basis of belonging to their gender, even if they themselves have not encountered specific discrimination. For example, while Justice O'Connor may not be able to empathize directly with a rape victim who brings her case to trial, as she herself has never brought a rape case to trial, her level of empathy as a member of the gender most vulnerable to rape becomes powerful and personal. This class of perspective statements does not necessarily relate to a personal event or series of events in the lives of the female Justices, but they do comment on the larger female experience in the United States. Coming from the mouths of women, these statements carry the weight of identity on par with the other two classifications of perspective statements.

The first case I examined in this category has both a relatively complicated legal history and a current status that leaves much unresolved. The case, *Tibbs v. Florida* (1981), came before the Court during Justice O'Connor's first term on the Court. The case involves the murder of a twenty-something year old white man and the rape of his 16-year-old travelling companion, Cynthia Nadeau, who were allegedly picked up by Delbert Tibbs. After Tibbs murdered her companion and then raped her, Nadeau was ordered to walk out in front of Tibbs' truck. Instead, she ran in the opposite direction, successfully escaping.¹⁰⁰ An all-white jury convicted Tibbs, an African American, and recommended the death penalty. The Florida Supreme Court reviewed

¹⁰⁰ Genlaw Jr., William P., "A Retreat in Double Jeopardy Policy: *Tibbs v. Florida*," *Boston College Law Review* 24 (1983), 772-3.

the evidence and discovered weaknesses in the State's case against Tibbs, particularly with the testimony of Nadeau, the rape victim.¹⁰¹ As William Genlaw details in his analysis of the case,

Under Florida law no corroborative evidence was required in a rape case if the victim was able to testify directly to the crime and identify the defendant as her assailant. The court said, however, that the limitation on this rule was that the testimony of the victim had to be 'carefully scrutinized so as to avoid an unmerited conviction.'¹⁰²

The state Supreme Court remanded the case for a new trial, whereupon Tibbs raised the issue of double jeopardy, a clause in the Constitution that prohibits the retrial of a person for the same crime. The issue ultimately came before the United States Supreme Court.¹⁰³

Justice O'Connor's statements in oral argument target the issue of sufficient evidence that the Florida State Supreme Court Justices felt was insufficient. Her comments also speak to a broader issue in rape cases: the believability of the rape victim. As she asks during the argument of Florida's petitioner:

Justice Sandra Day O'Connor: Well, Mr. Beller, isn't that logical to believe that it's true, where you have a situation where the evidence in the case consisted of the testimony of the eyewitness victim, hardly insufficient as a matter of law?
Isn't it a case where the court of appeals said, we didn't believe her?
Reading the cold record, we just don't believe her.
We're going to weigh it differently.
But that isn't insufficient evidence as a matter of law, is it?
Mr. Beller: I think as a matter of law it might be, unless there's some even very faint corroboration.
I think that most cases that have held eyewitness testimony to be the sole convicting factor have had some strands of corroboration.
And that's what the court went into, the fact that there wasn't the vaguest point of corroboration other than her story, and that there were reasons to judge her story suspect, not the least of which was the factor that she made an identification based on solely a photographic exhibition of Delbert Tibbs.¹⁰⁴

O'Connor's comments here are both powerful for the legal case she later defended in her majority opinion for the case, and also as an insertion of her opinion into the oral argument.

When she asks the petitioner whether her statement is "logical," she clearly believes it is.

¹⁰¹ Genlaw Jr., "A Retreat in Double Jeopardy Policy: Tibbs v. Florida," 773.

¹⁰² Genlaw Jr., "A Retreat in Double Jeopardy Policy: Tibbs v. Florida," 773.

¹⁰³ Genlaw Jr., "A Retreat in Double Jeopardy Policy: Tibbs v. Florida," 773-4.

¹⁰⁴ The Oyez Project: Chicago-Kent College of Law, "Tibbs v. Florida," accessed April 9, 2014.

Furthermore, her last statement is a perfect example of a leading question: “But that isn’t insufficient evidence as a matter of law, *is it?*” [emphasis added].¹⁰⁵ It is her subtle but powerful defense of the rape victim, however, that speaks volumes about her opinion on the case. Speaking from a legal perspective, she says, it is logical to believe that the testimony of the eyewitness victim is “hardly insufficient as a matter of law.” Ye, the all-male panel of Justices on the Florida State Supreme Court reviewing the case said, according to O’Connor, “Reading the cold record, we just don’t believe her.”¹⁰⁶ In this statement she directly accuses the Florida court of receiving adequate evidence, but arbitrarily deciding not to accept Nadeau’s testimony as true. Her statements focus the Court once again on the issue at hand: adequate evidence existed as a matter of law, evidence that the Florida court subjectively found to be potentially false.

While the case carries many competing and troubling elements — not the least of which the clear racial tones of a black man being convicted and sentenced to the death penalty by an all-white jury for crimes against two white people — O’Connor takes a different approach in her statement. She accuses the Justices on the Florida court of opinion-based jurisprudence. As she says in a re-enactment of the Florida court, “We [the Florida court] are going to weigh [the evidence] differently.” For a normally tactful Justice who usually spoke only a small amount during oral argument, particularly in her first term, these statements amount to a bold declaration of her opinion on the case, as well as a bold attack on the Florida Justices for their method of assessing the reliability of the eyewitness victim in a rape case. During a case in which the credibility of Cynthia Nadeau was constantly questioned, especially as the case hung on her eyewitness testimony as the only witness to the crime, O’Connor’s critique of the Florida Court becomes especially significant. As Genlaw stated above, as a matter of Florida state law, rape

¹⁰⁵ “Tibbs v. Florida,” *Oyez Project*.

¹⁰⁶ “Justices of the Florida Supreme Court.”

cases require the testimony of the rape victim and the positive identification of the rapist. This case had both of the requisite elements. For the Florida Justices to question such evidence appeared as subjective as O'Connor believed it to be. O'Connor's defense of the legal issues in question during her statement certainly go beyond a factual analysis due to the linkage of her identity as a woman to the issue of a female rape victim's credibility in a court of law.

The next case involves a more straightforward set of facts and a more obvious statement of support, this time from Justice Ginsburg. The 1993 case *J.E.B. v. Alabama Ex. Rel. T.B.* came before the Court during Ginsburg's first term. By that point, however, Justice Ginsburg was an experienced litigator and had argued six cases before the Court itself. She had also become an aggressive defender of women's rights, having led the Women's Rights Project at the ACLU during the 1970s.¹⁰⁷ The case involved the constitutionality of striking jurors during preemptory challenges on the basis of their gender. A paternity suit was brought on behalf of the mother of a minor child in the state of Alabama for paternity and child support. The jury panel consisted of 12 male and 24 female prospective jurors. After striking three jurors for cause, leaving 10 male and 23 female possible jurors, the state then used nine of its ten preemptory strikes (strikes without cause, the number of which varies by state) to strike men from the jury. The defendant's attorneys then used nine of their ten strikes to strike female jurors, leaving an all-female jury. As Justice Blackmun wrote in the opinion of the Court, "We granted certiorari...to resolve a question that has created a conflict of authority--whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race."¹⁰⁸ Race-based strikes had been ruled in violation of the Equal Protection Clause in 1986 with *Batson v.*

¹⁰⁷ "Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff."

¹⁰⁸ *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

Kentucky, and the question for the Justices in *J.E.B. v. Alabama* was whether or not they would extend the same protection to gender-based strikes.¹⁰⁹

Justice Ginsburg made her perspective statement during the middle of the state's argument, implementing a combination of leading questions and humor to make her point to the petitioner. As Ginsburg stated:

Justice Ruth Bader Ginsburg: Ms. Brasfield, isn't it true that there's no other group in the history of this country that was excluded from jury service as long as women?

Not even the racial classifications lasted into... in fact, it was 1967 in Alabama; the decision was '66, but the change was '67.

Ms. Brasfield: --Justice Ginsburg, it is true that only blacks and women have, been under the law, denied the right, and that actually black men were allowed to sit on juries prior to women in Alabama.

Justice Ruth Bader Ginsburg: --So wouldn't we be putting the peremptory challenge back where it was in the days when it was never exercised on the basis of either race or sex because there weren't any women or any minorities in the pool to begin with?

So all this talk about how you're shrinking the peremptories, you're just putting it back the way it was in the bad old days.

[Laughter]¹¹⁰

Ginsburg begins her remark with a leading question by asking the petitioner about the history of female jury service, something about which Ginsburg is clearly well versed. As previously mentioned, Ginsburg argued the case *Duren v. Missouri* (1978) before the Court, a case that struck down optional aspects of female jury service. Thus, her question was clearly intended as a message to her fellow colleagues, and far from a clarification for herself. Additionally, her phrasing “isn’t it true,” and her addition of the information regarding jury service for racial minorities clearly implies that she knows the answer. By making these statements she reaches out to her colleagues who may be in agreement with the state’s petitioner. She also backs the petitioner herself into a corner where she is forced to acknowledge striking similarities between jury service for African Americans and women, and moreover the fact that women were excluded longer. The petitioner had earlier argued that “Both men and women regularly sit on

¹⁰⁹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹¹⁰ The Oyez Project: Chicago-Kent College of Law, “*J.E.B. v. Alabama Ex Rel T.B.*,” accessed April 1, 2014.

juries throughout this country. And part of that is the very fact that men and women are not minorities; they are both fairly equal in numbers.”¹¹¹ Further, these earlier arguments become subsequently undermined when Ginsburg forces her to acknowledge that “only blacks and women have been under the law, denied the right, and that actually black men were allowed to sit on juries prior to women in Alabama.”¹¹²

Ginsburg goes on to undermine thoroughly the argument presented by the petitioner by making an interesting argument. By not striking jurors on the basis of race and sex, preemptory challenges would actually resemble more closely the legal system as it originally existed, when women and racial minorities did not serve on juries. These comments even earned a chuckle from the courtroom for pointing out the contrary logic at work in the argument. Ginsburg’s statement, while clever and hard-hitting, also serves as an insertion of perspective into the oral argument discussion. With her first comments to the petitioner, she clearly means to bring the Court’s attention to the long history women have faced in the United States in terms of discrimination during jury selection. By being excluded for so long from service, and after inclusion having so many opportunities to opt out, women were clearly informed by the state that their contribution was less valuable than that of men. Contrary to the petitioner’s argument that women being struck from a panel in an overwhelmingly gendered way would not “leave the courtroom thinking that they had been excluded from the jury system...”¹¹³, Ginsburg makes the historical argument that women’s service on juries remains far more fragile than population statistics would suggest. She also seems to suggest that this line of argument does a disservice to the historical relationship women have with jury service. Despite Ginsburg’s comments towards the end of her statement about returning preemptory challenges to “the bad old days,” she also

¹¹¹ “J.E.B. v. Alabama Ex Rel T.B.,” *Oyez Project*.

¹¹² “J.E.B. v. Alabama Ex Rel T.B.,” *Oyez Project*.

¹¹³ “J.E.B. v. Alabama Ex Rel T.B.,” *Oyez Project*.

makes clear in her comments that she agrees with this conclusion, if not with the logic she suggests.

Interestingly, while I noticed no perspective statements on O'Connor's behalf during oral argument in *J.E.B. v. Alabama*, her majority opinion contained an uncharacteristic concession about the insertion of perspective into the law. The case obviously pertains to juries, where the participants are untrained in legal thinking and thus must often rely on their own personal experiences to draw conclusions about certain cases. Justice O'Connor writes in her opinion concerning this difference of perspective that women bring to cases:

Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case.¹¹⁴

These "resulting life experiences" constitute an important part of O'Connor's larger claim of the importance of having women serve on juries to represent peers. What is a jury of one's peers but a collection of social experiences? O'Connor may feel differently about inserting gendered experiences into judicial decision making, or even during oral argument, but her acknowledgment of its impact on a person's "view of the case" is a significant recognition of its existence.

My final example of perspective statements based on women's history as a marginalized class comes from Justice Ginsburg in a 2010 case, *Flores-Villar v. United States* that turned on the stereotypical assumptions of lawmakers. The case dealt with a federal law that "establishes different standards for children born out of wedlock outside of the United States to obtain U.S. citizenship, depending on whether the child's mother or father was a U.S. citizen..."¹¹⁵ In this particular case, the father, a United States citizen, was sixteen at the time of his son's birth. The

¹¹⁴ *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

¹¹⁵ Supreme Court of the United States Blog, "Flores-Villar v. United States," accessed April 9, 2014.

federal law in question required 10 years of residency in the United States, and “five of those years after the age of fourteen.”¹¹⁶ Single mothers, by comparison, could transmit citizenship to their child after one year of residence, regardless of their age.¹¹⁷ The difference between the two residency requirements for single parents highlights a difference in the perceived, as well as the traditional, involvement of single fathers in the lives of illegitimate children.

Ginsburg pointed out the hypocrisy of the United State’s petitioner’s, Mr. Kneedler’s, claim that laws can be constructed in a vacuum, especially when the outcome seems so closely to resemble gendered stereotypes. Ginsburg pursued Mr. Kneelder’s remarks as follows,

Mr. Kneedler: And here, this is not just based on the gender of the parent, it's based on the -- on the complexities in the legal history with respect to illegitimacy, and -- and how children born out of wedlock are dealt with, which again turns not on -- on stereotypes of behavior or talents, but on longstanding legal regimes not just in this country but in -- in other countries, that until the father does something to have a meaningful relationship, the mother is the -- is the only legal parent, or in the terminology of this Court's decision in *Nguyen*, the parent who is likely to have the meaningful relationship...

Justice Ruth Bader Ginsburg: And you said something about -- this has nothing to do with stereotypes, this is the way the law was?

But wasn't the law shaped because of the vision of the world of being divided into married couples, where the father is what counted, and unwed mothers, where she was -- they say both father and mother, because the law didn't regard him as having any kind of obligation?¹¹⁸

Here, Ginsburg pounces on Mr. Kneedler’s faulty distinction between stereotypes and “longstanding legal regimes,” when he attempts to account for the discrepancy in treatment of single fathers versus single mothers. As Ginsburg points out, the law was shaped by societal perceptions of responsibility in childrearing. While it often harmed women in that they retained the burden of raising children by themselves while the father was not regarded “as having any kind of obligation,” in this case these stereotypes hurt fathers attempting to “have [a] meaningful relationship” with their children. Ginsburg’s argument points, however, to a larger gender-based assumption in the law. Laws have never been written in a vacuum, but instead have been crafted

¹¹⁶ King, Anne, “Flores-Villar v. United States: No Further Guidance from the Court on Equal Protection,” *National Women’s Law Center*, June 14, 2011.

¹¹⁷ King, “Flores-Villar v. United States.”

¹¹⁸ The Oyez Project: Chicago-Kent College of Law, “Flores-Villar v. United States,” accessed April 9, 2014.

with the society they seek to govern in mind. For laws that deal with gender this has been especially true. To say that “this is the way the law was,” as Ginsburg points out, simply creates circular logic. Indeed, the law was crafted for a very specific reason: stereotypes.

Acknowledgement of these stereotypes can lead to rectifying laws that have an identifiably negative impact on affected populations. Thus, the law can become more honest when addressing these discriminatory inequalities. Ginsburg makes a larger point about gender in her statement by pointing to the ways in which a law is crafted by the environment in which it is written,

V. Conclusion

These three categorizations of perspective statements mostly likely remain only an incomplete account of the potential for personal experiences to shape oral argument discussion. Although I only examined seven years' worth of cases, the large number of perspective statements I identified leads me to believe that they are a frequent occurrence. I can state with confidence that many similar perspective statements no doubt exist during the 26 other years during which women were present on the Court. I can also state with confidence that other types of perspective statements exist in addition to the ones that I discovered in the seven years' span I was able to examine. Here, I can clearly demonstrate that perspective statements on the part of the female Justices exist in a real and exciting way during discussions of gender issues on the Court. I cannot prove that they influence their colleagues in terms of their decision in the case, or in their writing of their opinions. Yet, simply proving that they exist consistently throughout oral argument discussions remains itself a significant success. Female Justices raise the awareness of the Court about the issues they discuss when they make these statements. Without these injected perspectives, from a variety of lived experiences as different as Justice O'Connor's and Justice Sotomayor's, the Court would lack the fundamental concern for the personal impact of the law

on the lives of the people it ultimately influences. While this impact should not always be the main priority for the Court, its consideration is essential in order to understand better the ways in which the law affects its diverse constituents. The Feminist Standpoint Theory first introduced in Chapter 2 requires a lived experience as a woman in addition to an acknowledgment of the fundamentally different experiences of a woman when compared to those of a man. These statements from all four of the women on the Court demonstrate an acknowledgment of this difference and connect their personal identities as women to this fundamental distinction.

In the next chapter, I will discuss my personal experiences witnessing two very different oral arguments during the 2013-2014 term, and my concluding observations on this study.

Chapter 6: Conclusion

I. Introduction

This study expanded across an array of oral argument features, from behavior of Justices and petitioners, to the content of the exchanges. While no study can be conclusive, especially when dealing with human interactions, gender relations, and a body as closed off as the Supreme Court, the findings presented in the previous five chapters point to compelling behavioral patterns and the presence of crucial gendered statements. Given the presence of these trends, the purpose of this chapter is to place these findings in their broader context. I will first place the data presented in my chapters in the context of oral arguments I was able to witness in the spring of 2014. The two cases I heard, *Hall v. Florida* (2014) and *Sebelius v. Hobby Lobby Stores* (2014), met all of the requirements of my study, excepting the date of the argument, and provide a crucial gauge against which to verify the shortcomings and strong suits of my style of data collection and of my findings. I also touch again on several of the highlights of the data presented earlier in my study. I then discuss the limitations of my study, from my choice to focus exclusively on female Justices to my inability personally to witness the oral arguments I dissected. Finally, I discuss the future of my study and the direction I would like to see similar research take.

II. The Benefits of Attending Oral Argument

This case gave me my first glimpse into the oral argument process beyond the tape recordings and previous descriptions I had read. The Court conveys a level of dignity reminiscent of British courts of law, albeit without the wigs worn by British judges. The Supreme Court chambers seem more appropriate to a Roman temple than the epicenter of American justice. Columns and elaborate red velvet curtains dominate the room. The seating consists of one level of benches, and in the very back, spread between the massive columns and

golden screens, extra chairs to accommodate the curious public. Court attendants keep the general volume of the chambers to mere whispering long minutes before the oral argument, leaving the observers to take in the marble engravings at the top of the columns, the long wooden bench, and the nine black swivel chairs, which the Justices maneuver with abandon during the course of the argument.

The appearance of all nine Justices through three curtains at one chime of the clerk's bell can be overwhelming. The room stood to attention to watch the Nine take their seats. All of the Justices seemed to have aged dramatically with every encroaching year. Easily hiding behind their official portraits taken years or decades earlier due to the closed nature of their duties, the newly grayed or thinning hair and heavy wrinkles displayed by each Justice marked the hardships that come with serving on the highest Court. Each Justice also asserted their unique personality with vigor throughout the one-hour sessions. Some like Justice Alito rested their cheek on their hand, even as they intently stared at each petitioner. Some, like Justices Thomas and Scalia, displayed less consistency in their attention, but reacted more strongly to the statements made in the courtroom. Justice Thomas, for example, though he continues to maintain his silence on the Court, rolled his eyes and turned his head to stare the ceiling in obvious annoyance when Justice Breyer mentioned racial discrimination in the makeup of juries.¹¹⁹ Justice Ginsburg's head remained steadfastly fixed on her paperwork, as she either read or wrote intently, occasionally raising her head to insert a comment. Justice Breyer seemed the most willing and obvious target of the Court's humor. When he directly asked the petitioner if he was incorrect in asserting a specific statistical claim, the petitioner uncomfortably replied that, yes, he was indeed incorrect. All nine Justices, especially Justice Breyer, seemed heartily to enjoy such a remark, and Breyer's self-deprecating charm earned him points among the public audience.

¹¹⁹ The Oyez Project: Chicago-Kent College of Law, "Hall v. Florida," accessed April 7, 2014.

The Court maintains an aura of extreme precision, intense engagement with the issues it handles, and dedicated work to produce its contentious opinions. My visit to the Court also demonstrated how, for over fifty years, the Court's transcriber could fail to note the Justices' names in its official transcripts. Shrouded in tradition and custom, practicality takes a backseat to the daily operations of the Court. Rather than, for example, lifting the curtains, removing the golden screens, and creating a more transparent visiting process for citizens, the Court continues to operate as it has for the last fifty years. My visits to the Court highlighted in the clearest terms the exclusivity of the Court's proceedings. Seats reserved for the public remain limited and often require waiting in line for hours, if not days, in order to obtain a seat. The Court has so far resisted all calls for a change in procedure to introduce video recorders and cameras into the argument sessions, and the one known insistence of a recording successfully smuggled out of the Court occurred only this past February.¹²⁰ Thus, for the vast majority of the population, information about the Supreme Court is limited to the judicial opinions they produce and the recordings and transcripts of oral arguments. These recordings miss much of the actual dynamics of the Court, as one might imagine. While statements and verbal cues, such as laughter, easily translate, all other cues that determine the dynamic of the discussion — the mood of the room, the attention of the Justices, and patterns of their behavior — are all lost without actually watching the arguments.

III. *Hall v. Florida*

Thanks to a generous grant from Tufts University, I was able to travel to Washington, D.C. twice to witness oral argument for two different cases. For the first case, *Hall v. Florida*, I was able to obtain a ticket to oral argument through a Harvard Law Professor who had clerked with Justice Kennedy. Tickets for oral argument are distributed through each Justice's office and

¹²⁰ Mears, Bill, "Supreme Court Secretly Recorded on Camera," *CNN Politics*, February 27, 2014.

operate on a selective basis. One may also gain access to oral arguments as a personal guest of a Justice, in which case one has virtual front-row access to the argument; as a member of the Supreme Court bar, in which case one sits towards the front of the chamber; or as a member of the public, seated behind the columns and gilded screens, depending on the number of bar members present. This requires waiting in line for approximately 50 to 100 seats, depending on the popularity of the case. There is also a line for 3-minute access to the Court, at which point you are filed out to make room for more tourists less inclined to listen to the entire case. Access to the Court requires passing through several metal-detectors, and all personal items except a small legal pad and writing utensil must be left outside the doors of the Court.

Hall v. Florida (2014) revisits the constitutionality of sentencing intellectually disabled criminals to the death penalty. A recent case, *Atkins v. Virginia* (2002), deemed the death penalty a cruel and unusual punishment for “mentally retarded”¹²¹ criminals. The issue at stake in *Hall* was the ability of individual states to determine for themselves what constituted an intellectual disability. As Lyle Dennison of the SCOTUS Blog clarifies, “A year after the *Atkins* decision, the Florida Supreme Court interpreted an existing state law defining mental retardation to mean that the individual’s IQ score had to be seventy or below.”¹²² This I.Q. score was the first part of a three-part test designed to examine mental capacity. Much of the oral argument on the case surrounded the 95% confidence interval, and whether a score of 71, a score within this interval, could reasonably be said to be outside of the range of appropriate I.Q. scores. Unsurprisingly, Justice Sotomayor opened up the oral argument as the first speaker, interrupting the petitioner for Hall with the point that the Court had decided in *Atkins* to defer to the states’ judgments when defining mental illness. Her comments were referenced by her male colleagues throughout the

¹²¹ The Supreme Court still uses the phrase “mentally retarded” to identify people with intellectual disabilities.

¹²² Dennison, Lyle, “Argument Preview: Measuring Mental Handicap,” *Supreme Court of the United States Blog*, February 28th, 2014.

argument. All of the Justices apart from Justice Thomas spoke during the argument. The Justices were also all engaged in the argument, occasionally swiveling in their chairs to whisper with their colleagues, as Thomas and Scalia and Sotomayor and Breyer did, or to discuss something with one of their aids.

Other Justices were more solitary in their argument. Justice Alito, seated between liberal Justices Ginsburg and Kagan, kept his cheeks propped on his hands, and leaned closer to the petitioner in concentration. During the middle of the argument, Justice Breyer briefly touched on the issue of racially imbalanced juries, at which point Thomas, and even Scalia, rolled their eyes or put their head in their hands in obvious exasperation.¹²³ However, it was the newest addition to the Court, Justice Kagan, who seemed the most consistently engaged in the discussion, whether directly speaking or listening attentively. Renowned Supreme Court scholar Jeffrey Toobin's observations about the youngest members of the Court were readily apparent throughout the argument session:

The Court's youngest members (and junior New Yorkers) sit on opposite ends of the bench, and both take aggressive tones with the lawyers. Sotomayor leans forward, her right forearm aimed skyward and nearly covered in bracelets; she burrows into the facts of cases in extraordinary detail. Kagan takes the opposite tack. Her early trademark question is about the big picture, and it's usually a refined version of "Counsel, let's cut the crap. Isn't this case really about ... ?"¹²⁴

Justice Sotomayor delved into the detailed facts of the case, while Justice Kagan, with the help of the Court's swing vote, Justice Kennedy, continually broadened the focus of the Court. These two were not, however, the only top speakers during the argument. That distinction included, with little surprise, Justices Scalia, Breyer, and Alito. Justice Breyer used self-deprecating humor to great effect during the argument, but he too shared Justice Kagan's penchant for examining the larger parts of the issue at hand. As he said to Florida's petitioner, increasing the number of

¹²³ Justice Breyer during the oral argument *Hall v. Florida*: "This is in whether jury trial are – are discriminating because they don't have black people on the jury. It's all over the law."

¹²⁴ Toobin, Jeffrey, "Clarence Thomas's Disgraceful Silence," *The New Yorker*, February 21, 2014.

people exempt from the death penalty due to mental illness would not be against Florida's interest if these people were in fact mentally ill.¹²⁵

The most striking aspect of witnessing the courtroom dynamic in person lies in the seating arrangements and their effect on the Justices. Justice seating during oral argument sessions is determined by seniority. At the center of the bench presides the Chief Justice, currently John Roberts. To his left sits the most senior member of the Court (the longest serving Justice), and then interchanging, the next most senior Justice sitting on his right, the third most senior sitting again to his left, fanning out to the end of the bench.¹²⁶ Thus, the three Justices sitting in the center of the Court, Justices Roberts, Kennedy, and Scalia present a formidable nucleus. In the section of three to their right sit Thomas, Breyer, and Sotomayor. This presents Breyer and Sotomayor the opportunity to consult with one another. Likewise, Scalia is seated in between Roberts and Thomas, both intellectually like-minded conservatives. To the left of the center of the Court sit Ginsburg, Alito, and Kagan. These three are all separated from like-minded Justices, and therefore are the least distracted members of the Court. Ginsburg remains engrossed in her notes, Alito sits at attention throughout the argument, and Kagan sits poised to interject in the argument. The most striking aspect of the arrangement, however, lies in its impact on the seniority of the Justices. Sotomayor and Kagan, as the newest members of the bench, sit on opposite ends of the bench, an arrangement that emphasizes their rank and precedence in a highly disadvantageous manner. Roberts, Kennedy, and Scalia by contrast seem to dominate the room, if not the discussion, by their placement. It becomes much more understandable that these outlier Justices could be so easily interrupted.

IV. *Sebelius v. Hobby Lobby Stores*

¹²⁵ "Hall v. Florida," *Oyez Project*.

¹²⁶ The Supreme Court of the United States, "Visitor's Guide to Oral Argument," accessed April 16, 2014.

For my second trip to the Court, I did not have a ticket and was hoping to watch the highly anticipated case of the term, *Sebelius v. Hobby Lobby* (2014). Knowing that access would be extremely coveted, I flew down the night before, hoping to wait in line starting early in the morning. Getting off of the plane the night before, I became worried that, due to the notoriety of the case, a line might already be forming. I had read reports that spectators had camped out three days before the Affordable Care Act oral arguments, and I wanted to ensure that, having already flown down to Washington, I would not miss the argument. When I arrived at the Court, a line was indeed already stretching down the sidewalk outside of the Court, and camps of visitors had already been established. The last man in line informed me that the line already stretched 60 people long. Thus, my only hope of getting into the session the next day lay in spending the night in line.

Throughout the course of the night I learned that the vast majority of those already in line were not personally interested in the case, but were in fact professional line sitters. These people are paid to spend the night, or potentially nights, outside of the Court and hand over their spots in the morning by arrangement with their employers. The professional nature of their arrangement explained the camaraderie of those in line, and their extreme preparedness. At 6am, the police woke up those of us who had stayed the night. Around the same time, protestors arrived, along with an unseasonable snowfall. For three straight hours, those of us who had braved the cold for the night watched as the protestors grew in size and volume on both sides, and as the media arrived, filming the long line that grew steadily behind us. By 9am, the police let in the first fifty people in line, and the professional line sitters drifted off, having performed their duty. I landed at fifty-fifth in line, and thus stood for another anxious 45 minutes until it was determined that a few more places remained. We few, we happy few were ushered through the many layers of

security, dragging with us our snow-soaked belongings. The contrast between my night on the streets of D.C. and the regal proceedings of the Court was stark and eye opening. The coifed and professional Supreme Court bar members bustling about inside the warm and secure Courtroom building seemed a world away from my freezing, homeless night, and my morning spent listening to the angered chants of protestors.

After swearing in several new members of the Supreme Court bar, the Court got down to business. Up first was the petitioner for Hobby Lobby Stores, Mr. Paul Clement. He had barely made it through a couple of sentences before Justice Sotomayor interrupted, aggressively questioning him on future religious challenges the Court could expect, should they rule in Hobby Lobby's favor, from blood transfusions to vaccinations. The women of the Court kept up a barrage of questions for the rest of Mr. Clement's time at the podium, working off of one another's arguments. The fact that the case at its heart dealt with contraception coverage only heightened the significance of their aggressive questioning. However, when the U.S. Attorney General, Donald Verrilli, representing Sebelius, spoke, it was the Court's conservatives who took over questioning. Only Justice Breyer attempted to help Mr. Verrilli with questions to draw out his view on the government providing the contraceptive methods for women employed at corporations like Hobby Lobby with religious objections. Overall, the argument focused far less on the broad meanings of a ruling for a non-religious corporation to claim First Amendment religious rights. Far more of the argument centered on costs for Hobby Lobby between opting out of the mandate, increasing the pay of their employees to purchase their own healthcare, or having the government institute an opt-out procedure resembling that used for religiously affiliated groups.

As with *Hall v. Florida*, this argument made me realize how much more there is to be gained from an oral argument witnessed in person as opposed to listening to a recorded oral argument. The asides the Justices have with one another, their level of attention to the argument, and their facial expressions all give a much fuller picture of their argumentation styles. Picking up on patterns in the argument, likewise, becomes much easier when one follows a conversation, as oppose to listening to a pre-recorded dialogue. Thus, the contribution of the female Justice's and their ability to build on one another's arguments were particularly striking to witness in person. Spread out as they are on the bench, it often appears that the petitioner is being attacked from the left and right by Sotomayor and Kagan, both with unique but effective approaches to questioning. Still, attending the *Hobby Lobby* oral argument also highlighted the inaccessibility of the Court's functions. Attending an argument as a guest with a ticket is a relatively easy process. As a member of the public, however, witnessing the Supreme Court in action can become a full-time occupation for some, as seen in the case of the professional line sitters. Had the Oyez Project not digitized the oral argument recordings, they would still be in tape cassettes stored in the National Archives. More measures like the ones taken by the Oyez Project need to be implemented in order to ensure as much access as possible. My study required enormous amounts of time and effort, and only scratched the surface of oral argumentation on the Supreme Court. So much more can be realized if access to the Court is made more easily attainable or if, for example, video recordings can give every curious member of the public easy access to oral argument.

There were also important differences between attending a gender case as opposed to a non-gender case. The issues at stake in *Hall* were certainly important, but the entire dynamic of the courtroom in *Hobby Lobby* was intense and forceful in an entirely different way. The

implications for administering the death penalty to intellectually disabled criminals simply does not have the same every-day implications as a contraceptive case. The sheer day-to-day impact of the contraceptive issue sparked more tension among the listeners, and among the nation as a whole, as demonstrated by the press and protests the case received. Yet the Court remained focused in both cases on the technical and legal issues at hand. This focus made Justice Kagan's comment in *Hobby Lobby*, analyzed in Chapter 5, all the more profound and distinctive. While *Hall* had a rare moment in which Justice Breyer alluded to racial bias in jury selection, his comment lacked the power that comes with personal experience. Thus, while the Justices themselves seemed to aspire to treat each case as a technical challenge, there remained a stark difference between a case that called upon the empathy of none of the Justices, and a case demonstrating the empathy of three.

V. Important Findings of My Study

Despite the limitations of access to oral arguments, my study found surprising and important patterns in the behavior and treatment of the female Justices, and discovered the presence of many key perspective statements throughout the oral argument of gender cases. My study discovered a trend for three of the female Justices: they gradually increased the amount they spoke over time. While Justice Ginsburg deviated from the norm, she is now well into her tenure on the Court and may be looking to step down soon. These numbers demonstrate that, as more women join the Court, the amount that they speak during oral argument has indeed increased. Justice O'Connor has the lowest rates of speaking on the Court, while Justice Sotomayor, the second newest female Justice, has the highest. Justices Ginsburg and Kagan are not far behind her. Additionally, these trends for increased verbal output over time also prove another of my hypotheses correct: namely, that the women on the Court increased their confidence over time to contribute more substantially, in terms of words spoken, as they gained

experience on the Court. With the exception of Ginsburg, the most notable feminist on the Court, these women all increased or continue to increase the amount that they speak the longer they serve on the Court.

Another variable with strikingly similar results was that of the female Justice's interruptions of the petitioners and of their fellow colleagues. Justice Sotomayor, who led the women on the Court with the highest level of speech, also leads in terms of interruptions. Similarly, Justice Ginsburg comes in second, Kagan in third, and O'Connor a distant fourth. This breakdown demonstrates an important correlation between speaking on the Court and interrupting on the Court. Clearly, in order to be heard one must feel comfortable interrupting the conversation. Most often this involves interrupting petitioners, but Justices too are occasionally interrupted. Most notably, with the exceptions of Justice Ginsburg in 2011 and Justice Kagan in 2012, all of the female Justices interrupt their female colleagues far less than their male colleagues. When it comes to male versus female petitioners, few significant differences to the patterns mentioned above emerge. This may have more to do with the fact that cases were studied as a whole, and not divided by the petitioner's argument.

Other variables that I examined were less clear. For example, in terms of the correlation between speaking first and words spoken, only O'Connor and Kagan demonstrated a positive pattern. For Ginsburg and Sotomayor, the two most vocal female Justices, the trend did not exist. However, these results indicate that the two quieter female Justices do speak first during oral argument and perhaps feel more strongly about the cases in which they speak first, hardly a negative trait. Similarly, any correlations between the amount that the Justices spoke and the amount that they were referenced did not exist in any significant or positive way. This variable, too, may have suffered from the fact that it required the Justices to be obvious in their references.

Rather than referring to an argument or question made by a colleague, my data collection required that they reference their colleague by name. A more subtle study of their actual arguments may reveal a trend. This lack of a correlation may also indicate that the female Justices may be making valuable points without speaking verbosely throughout the argument. Conversely, the Justices may make many points in an argument that have limited applicability for their colleagues. Additionally, Justices do not reference their colleagues to a great degree, making this variable a difficult one to draw conclusions from.

Some variables that I studied led to varied results. When I studied the amount that the female Justices reference their fellow female colleagues, I found that some, like Justice O'Connor and Justice Ginsburg, clearly formed a close collegial relationship, and subsequently referenced one another a good deal. With newer Justices, however, Ginsburg's tendency of referencing her female colleagues greatly decreased. For Justices Sotomayor and Kagan, their rates of referencing their male versus their female colleagues show inconclusive patterns and demonstrate that perhaps, as with the previous variable, direct references to fellow colleagues on the Court may not be tied to any significant pattern of behavior.

The stylistic variables I chose to study revealed an extremely unexpected yet notable trend. For all of the female Justices, their rate of questions per case remained relatively constant while their rate of statements seemed to correlate strongly with their overall participation on the Court. This seems to indicate that, as they gained more confidence and surety on the Court, the female Justices felt more comfortable inserting their opinions into the argument, rather than using arguments as a time to clarify questions.

In addition to the behavior of the female Justices, I also examined their treatment on the Court. Nowhere was their treatment more apparent than in the frequency of their interruptions

during oral argument. Most striking was the change between 1981 and 1993 for Justice O'Connor. Her fellow Justices interrupted her far more than any other subsequent female Justice ever was interrupted. These findings point directly to Jeffrey Toobin's earlier statement, "Justice O'Connor was very aware of sexist treatment that she received, both before and after her appointment to the Supreme Court and she, like Justice Ginsburg, had excellent radar for being patronized by her colleagues — most especially Justice Scalia."¹²⁷ Her radar did not need to be excellent in order to notice the change that occurred between 1981 and 1993. The year that Justice Ginsburg joined her as the second woman on the Court, her rate of interruption by her colleagues dropped to zero. Clearly, her treatment as the lone woman on the Court changed dramatically as she established herself as a powerful voice on the Court, and especially when another woman joined her. Justice Ginsburg's interruption numbers support this notion of an evolving Court, given that Justices never interrupted her more often than petitioners. Sotomayor and Kagan have received similar treatment while on the Court, indicating that petitioners and Justices alike do not avoid interrupting them, but also signaling that as a critical mass, they are no longer treated as a block but rather as individuals with their own independent argumentation styles.

The most unexpected and dramatic finding of my treatment study was the comparison of interruptions of a female Justice by male versus female petitioners. In this study, due to the tiny number of cases in which two petitioners were both women, I counted a "female petitioner" case as one in which at least one of the petitioners was a woman, whereas a "male petitioner" case was one in which both petitioners were men. In a rather dramatic finding, female Justices were consistently interrupted less often by female petitioners, or cases in which at least one of the petitioners were women. These findings indicate that despite the fact that male petitioners were

¹²⁷ "Ruth Bader Ginsburg: The Supreme Court's 'Heavyweight.'"

included in the mix of female petitioners, the mere presence of female petitioners in the cases was enough to reduce dramatically the number of interruptions a female Justice received. As with female Justices and their lower rates of interruption by their female colleagues, these findings indicate a higher level of awareness on the part of female petitioners for the Justices with whom they debate during oral argument.

As with my referencing variables, my hypotheses concerning the usage of “ma’am” and “sir” versus “Your Honor” or “Justice” missed the mark. The greatest trend I discovered when examining this variable was the likelihood that it was in fact a greater marker of changing times than of latent sexism on the part of petitioners. Its overall usage declined by massive rates between 1981 and 1993, and by the 2000s had become virtually unused.

Thus, several of my hypotheses were borne out in encouraging ways and substantiated many of my hunches concerning growing confidence for female Justices over time as more women joined the Court. Others were unsubstantiated, revealing that certain trends in behavior are difficult to measure quantitatively, or that other trends may be due to unrelated factors, such as changing customs on the Court. Overall, however, these behavioral and treatment findings on the Court paint a compelling picture of life on the Court for the female Justices, and the many ways in which their speech may be influenced.

The second crucial aspect of my thesis dealt with the actual contributions of the female Justices in terms of discovering a broader justification for female participation on the Court, beyond democratic goals. Towards that end, I examined statements from the female Justices from gender cases in all seven of the years I used in my behavioral study. From these cases, I pulled the most compelling statements I discovered, then justified and analyzed the perspective I found in them. The results revealed important moments of personal and general experience for

the female Justices as they inserted their gender-based perspectives into the argument in subtle yet telling ways. These statements were often intended for the larger audience of the Court, not merely for the petitioner, and often were used as rhetorical statements rather than questions in need of an answer. "Perspective speech" such as this indicates that all of the four female Justices have felt at times that they can bring a particular and unique experience to the courtroom when the case or issue calls for it. This perspective speech was used most often to bring their colleagues' attention to aspects of a particular case they may have unintentionally overlooked or failed to find important. The presence of these perspective statements proves, however subjectively, that a compelling "difference" case can be made for gender on the Court.

VI. Future of My Study

My study seeks to contribute as substantively as possible to the scholarly and political debates concerning Feminist Legal Theory, Supreme Court appointments, and the role of life experience in jurisprudence in general. I feel that I have introduced a quantitative and qualitative approach not often found in studies of gender or oral argument on the Supreme Court.

Nevertheless, there were limitations, due to time and resources, which necessarily constrained the scale of my contribution. I hope in the future to see studies integrating my data with data on male Justices on the Court. Even starting in 2004 with the available transcripts, this comparison would give more context to my data and provide at least some answers to questions of gender comparison. I hope also to see studies that use my method of interpretation from my perspective statements chapter in order to analyze the confirmation hearings of the four female Justices, contrasted with the confirmation hearings of four similarly situated male Justices. Due to the public nature of the hearings, and the various outside factors that tend to bear on the outcome, there would be ample opportunity to delve into the language used by Senators and the nominees themselves. Given the small sample size provided by the Supreme Court, further studies could

also delve into the makeup of Courts at all levels of American jurisprudence. All things considered, the study of gender and life experience as it pertains to the systems of justice in the United States still requires far more exploration than my study was able to provide. Nevertheless, I hope that others will continue where my study leaves off in this exploration.

VII. Conclusion

My study initially sought to answer the question of the importance of gender on Supreme Court jurisprudence. Does a larger justification exist for the nomination of women to the Supreme Court, beyond democratic values of equal representation? I believe that my study demonstrates that a value does lie in the specific contribution of women to the Court. Their perspective as pertains to gender is an invaluable contribution to oral argument, and thus the discussion of the Court. Democratic institutions operate through the input of all of citizens because these citizens bring different life experiences to bear on the issues faced by democracies. Our judicial system, as a natural, if more closed, extension of our political system, must also operate with these same ideals and justifications in mind. While many might shy away from the impact life experience has on the ways in which our judges approach the cases which they decide, it should come as no surprise that subjectivity is informed by personal experience. The white, male lens should not be considered a neutral perspective, but instead one among many perspectives that can contribute to a better understanding of the impact of our laws on the individual rights of our citizenry. The increased representation of women on the Supreme Court, and on every court, will make huge strides in ensuring the representation of those interests in the laws of our country.

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