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Declaring, Exploring, Instructing, and (Wait for It) Joking: Tonal Variation in Majority Opinions

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ARTICLE

Declaring, Exploring, Instructing, and (Wait for It) Joking

Tonal Variation in Majority Opinions

Lisa Eichhorn*

1. Introduction

Few news reports regarding *Chiafalo v. Washington*,[1] the Supreme Court's 2020 "faithless electors" case, failed to note that Justice Elena Kagan had referred to both *Hamilton* and *Veep* in the majority opinion she authored for herself and seven other Justices.[2] For a few days, legal blogs and social media also noted,[3] celebrated,[4] condemned,[5] or debated[6]

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1 140 S. Ct. 2316 (2020) (rejecting a constitutional challenge to a state statute that imposes fines on electors if they cast their Electoral College ballots for someone other than the candidate whom they had pledged to support).

2 *See, e.g.*, Robert Barnes, *Supreme Court Says a State May Require Presidential Electors to Support Its Popular-Vote Winner*, Wash. Post (July 6, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-electoral-college-faithless-electors/2020/07/06/cf88f706-bf8f-11ea-b178-bb7b05b94af1_story.html; Mark Sherman, *Justices Reference 'Hamilton,' 'Veep' in Electoral College Decision*, Associated Press (July 6, 2020), https://www.dailynews.com/2020/07/06/justices-reference-hamilton-veep-in-electoral-college-decision; Marcia Coyle, *States Can Enforce Laws Punishing Presidential Electors Who Break Pledge, Justices Say*, Law.com (July 6, 2020, 10:29 AM), https://www.law.com/nationallawjournal/2020/07/06/states-can-enforce-laws-punishing-presidential-electors-who-break-pledge-justices-say/; Greg Stohr, *Top Court Lets States Stop 'Faithless' Presidential Electors (2)*, U.S. Law Week (July 6, 2020, 2:13 PM), https://news.bloomberglaw.com/us-law-week/high-court-lets-states-stop-faithless-presidential-electors.

3 *See, e.g.*, Amy Howe, *Opinion Analysis: Court Upholds Faithless Elector Laws*, SCOTUSblog (July 6, 2020, 1:43 PM), https://www.scotusblog.com/2020/07/opinion-analysis-court-upholds-faithless-elector-laws/.

4 For example, "A Hopeful Citizen" tweeted as follows: "Justice Kagan drops a Veep and Hamilton reference in the Chiafalo v. Washington introduction. I love it!" @ThePubliusUSA, Twitter (July 6, 2020, 10:28 AM), https://twitter.com/ThePubliusUSA/status/1280146643413864450.

5 *See, e.g.*, Gerard Magliocca, *Pop Culture References in Judicial Opinions*, PrawfsBlawg (July 6, 2020, 10:33 AM), https://prawfsblawg.blogs.com/prawfsblawg/2020/07/pop-culture-references-in-judicial-opinions.html ("I'm against it . . . . Won't all of this be really dated really quickly?").

6 *See id.* (listing reader comments stating various opinions regarding the propriety of Justice Kagan's references).

her mentioning of the Broadway and HBO hits. But Kagan's title-dropping is only one instance of a feature of any judicial opinion, including any majority opinion, that merits deeper analysis over the long term: tone.

Taking "tone" in the literary sense of a speaker's attitude toward a listener,[7] this article posits that the genre of the majority judicial opinion leaves more room for tonal variation than many writers and readers may have realized. I will first elaborate on the concept of tone, distinguishing it from voice and style. I will next review the literature on tone in legal writing and then describe the specific dynamics of tone inherent in majority opinions. At that point, I will closely analyze the tone of the *Chiafalo* opinion, contrasting it with the tone of another significant 2020 Supreme Court opinion, that of Justice Neil Gorsuch for a majority in the Title VII LGBT-rights case of *Bostock v. Clayton County*.[8] Finally, I will conclude with thoughts regarding the value of focusing on tone and tonal shifts in majority opinions.

2. Tone defined and distinguished

In modern literary theory, the concept of tone has been traced to I.A. Richards,[9] a theorist whose front-page obituary in the *New York Times* noted that he "dazzled Cambridge University in the 1920's with his works on criticism" and then, "decade after decade, generated new interest among intellectuals on both sides of the Atlantic in the . . . power of language."[10] In *Practical Criticism*, his seminal 1929 treatise, Richards defined "tone" as the reflection of a speaker's "*attitude to his listener*"[11] and theorized that tone was one of four ways in which a literary work communicates meaning, along with "sense" (the subject matter of the speaker's utterance), "feeling" (the speaker's attitude toward that subject matter), and "intention" (the speaker's purpose in making the utterance).[12] In the male-centered language of the time, Richards noted that a speaker "chooses or arranges his words differently as his audience varies, in automatic or deliberate *recognition of his relation to them*. The tone of his utterance reflects his awareness of this relation, his sense of how he stands

7 *See* I.A. Richards, Practical Criticism 175 (1929) (discussing tone).

8 140 S. Ct. 1731 (2020) (holding that Title VII prohibits discrimination based on homosexuality or transgender status).

9 M.H. Abrams, A Glossary of Literary Terms 136 (5th ed. 1988) (noting that "[t]he modern concern with tone dates mainly from I.A. Richards' definition of the term as expressing a literary speaker's 'attitude to his listener'").

10 Eric Pace, *I.A. Richards, Author, Teacher and Literary Critic, Is Dead at 86*, N.Y. Times, Sept. 8, 1979, at 1. The same obituary noted his popularity for decades as a teacher at Harvard: "When his audiences overflowed the lecture halls, he lectured in the street." *Id.* at 36.

11 Richards, *supra* note 7 (emphasis in original).

12 *Id.* at 174–76.

towards those he is addressing."[13] While some critics have used "tone" more broadly to encompass the speaker's attitude toward the subject matter and general mood,[14] or, in a different vein altogether, to refer to the quality of words' musicality,[15] I will use the term as Richards used it, in the sense of a speaker's attitude toward a listener.

Critics most often consider the literary speaker in a narrative work to be the persona that the author has assumed—that is, the one whom the reader understands to be telling the story.[16] Thus, tone reflects the storyteller's view of the storyteller's own relationship to the listener or reader. The tone of a literary work, like the tone of a speaking voice, can be "formal or intimate, outspoken or reticent, . . . condescending or obsequious, and so on through numberless possible nuances of relationship and attitude."[17] When a literary work succeeds, according to Richards, its tone represents "the perfect recognition of the writer's relation to the reader in view of what is being said and their joint feelings about it."[18] Tone thus reflects a quintessentially human aspect of writing. Indeed, the perception of tone evidently requires a human heart, as some recent missteps of IBM's Watson Tone Analyzer suggest.[19]

An author reveals tone most directly through word choice.[20] Sentence structure, organization of ideas, and inclusion or omission of certain

13 *Id.* at 175.

14 *See, e.g.*, J.A. Cuddon, The Penguin Dictionary of Literary Terms and Literary Theory 726 (5th ed. 2013) (defining "tone" as "[t]he reflection of a writer's attitude (especially toward his readers), manner, mood and moral outlook in his work; even, perhaps, the way his personality pervades the work"); Kelly J. Mays, The Norton Introduction to Literature 546 (12th ed. 2017) (noting that "tone" is "an effect of the speaker's expressions, *as if* showing a real person's feelings, manner, and attitude or relationship to a listener and to the particular subject or situation"); *see also* Abrams, *supra* note 9 (emphasizing I.A. Richards's definition of "tone" but noting that "some critical uses of 'tone' are broader and coincide in reference with what other critics prefer to call 'voice'").

15 *See* Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 Legal Writing 65, 68 (2010) (referring to rhythm, flow, and tone as "musical elements" that should be incorporated into legal writing); *see also* Richards, *supra* note 7, at 197 n.1 (distinguishing his own definition of "tone" from "the qualities of verse sounds," but noting that such qualities "do enable us to infer differences in the way the reader feels that he is being addressed").

16 Abrams, *supra* note 9, at 135–36.

17 *Id.* at 136.

18 Richards, *supra* note 7, at 198.

19 The Watson Tone Analyzer is an online program that "uses linguistic analysis to detect . . . tones found in text." https://tone-analyzer-demo.ng.bluemix.net/. Professor Jennifer Romig recently ran two versions of a mock email from an attorney to a client through the program. Among other results, Watson reported that the sentence, "This message follows up on discovery in Acme v. Client" indicated "joy" and that the words "enclosed please find" scored "high on emotional range" and indicated "anger." Jennifer Romig, *Emotions in Writing*, Listen Like a Lawyer (July 11, 2017), https://listenlikealawyer.com/2017/07/11/emotions-in-writing/; *see also* Kelly VanBuskirk & Matthew R. Letson, *An IBM Watson Tone Analysis of Selected Judicial Decisions*, 19 Scribes J. Legal Writing 25 (2020) (reporting results of Watson's analysis of 12 criminal-law decisions from New Brunswick, Canada).

20 Mays, *supra* note 14, at A15 (glossary entry).

information also contribute to the tone of an utterance or writing.[21] Consider the difference between these sentences:

- "The patient suffered a low-grade myocardial infarction."
- "I've got some bad news: Michael Walker had a mild heart attack."
- "Mia's daddy got sick and had to go to the hospital, but he's going to be okay."

Each may have been uttered by the same speaker, but each reflects a different attitude on the part of the speaker toward the listener and thus has a different tone. In the first example, the speaker believes the listener shares a sophisticated understanding of medical terminology and is relying on the speaker for a quick, precise report on a patient's condition. The speaker and listener are perhaps colleagues working in a hospital, and the speaker respects the listener as a trained professional. In the second example, the speaker perceives the listener as a layperson with respect to medicine who nevertheless can understand the gravity of even a mild heart attack. In addition, the speaker believes that the listener's emotions deserve respect. In the third example, the speaker views the listener—presumably a young child—as someone less sophisticated and more fragile than the speaker and as someone to whom the speaker owes a duty of reassurance. If we knew that the listener in the third example was someone more sophisticated and mature than a young child—perhaps a seventeen-year-old or even an adult—then we might say that the speaker's tone was condescending or patronizing instead of gentle and solicitous.

Tone in this sense is related to, but distinct from, two other terms from literary criticism: voice and style. Most critics use "voice" to refer to the qualities indicating the "pervasive presence" of a particular author behind a literary work, a "determinate intelligence and moral sensibility" that "has selected, ordered, rendered, and expressed these literary materials in just this way."[22] Voice allows us to recognize a work as the product of a particular author because voice inevitably reflects the author's persona.[23] Thus, unlike tone, voice focuses on the literary speaker independent of that speaker's relation to or attitude toward listeners.

21 *See* Cathren Page, *Not So Very Bad Beginnings: What Fiction Can Teach Lawyers About Beginning a Persuasive Legal Narrative Before a Court*, 86 Miss. L.J. 315, 326 (2017).

22 Abrams, *supra* note 9, at 136.

23 *See* Mays, *supra* note 14, at A15 (defining "voice" in a glossary entry as referring to "the speaker" or "the 'person' telling the story and that person's particular qualities of insight, attitude, and verbal style"); Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 Clinical L. Rev. 501, 503 (2006) [hereinafter McArdle, *Teaching Writing*] (noting that voice "help[s] to distinguish individual writing"). For scholarly explorations of voice in legal writing, see generally Andrea McArdle, *Understanding Voice: Writing in a Judicial Context*, 20 Legal Writing 189 (2015) [hereinafter McArdle, *Understanding Voice*] (positing the simultaneous presence of both

"Style" as a concept in literary criticism is also distinct from tone. Style normally denotes an author's overall manner of expression and is independent of content; diction, rhythm, use of imagery, and various rhetorical devices are all components of style.[24] Style is thus broader than tone: the rhetorical choice to manifest a particular attitude toward the audience—that is, the choice of tone—is just one of many ingredients of an author's style.

3. Scholarly commentary on tone in legal writing

Scholarly treatments of tone in legal writing have tended to focus on advocacy and the appropriate tone to use in briefs; Kathryn Stanchi, Linda Berger, Bret Rappaport, and Elizabeth Fajans have all discussed or mentioned tone in terms of how forcefully attorneys should push their messages toward their audiences in written legal arguments.[25] The work of these scholars represents a consensus that a measured, reasonable tone—as opposed to an emotional, aggressive one—is more respectful to the reader and thus more likely to persuade a court.[26] If we think again of tone as reflecting the authorial persona's attitude toward the reader, then it makes eminent sense to avoid the hard, hyper sell. No judge wants to get the impression while reading a brief that the attorney-author views the court as one of P.T. Barnum's suckers.

Further, while not focusing on tone expressly, scholar Melissa Weresh has explored ethos in persuasive legal writing in a manner that relates to tone.[27] In classical rhetoric, ethos is a means of persuasion based upon

genre-based and authorial voices in judicial writing and recommending analyses of these voices as an aid to deeper understanding of opinions); McArdle, *Teaching Writing, supra*, at 503 (recommending ways in which teachers can help students maintain their individual voices as they enter a new professional discourse community); J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 Legal Writing 67 (2009) (exploring the concept of voice in legal writing and advocating the express teaching of voice-related concepts in legal writing courses).

24 Mays, *supra* note 14, at A13 (glossary entry); Cuddon, *supra* note 14, at 688. Critics may sometimes use the terms "voice" and "style" interchangeably, but voice can encompass choices regarding what to express in addition to choices regarding how to express it. McArdle, *Teaching Writing*, *supra* note 23, at 503 n.6.

25 Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the Science 141–48 (2018) (explaining how attorneys can establish a persuasive tone in their briefs by organizing content logically, acknowledging weaknesses in arguments, and avoiding disparagement of their opponents); Rappaport, *supra* note 15, at 99 (noting that appropriate tone helps establish a writer's credibility with readers); Elizabeth Fajans, *Hitting the Wall as a Legal Writer,* 18 Legal Writing 3, 27–32 (2012) (using introduction sections from two trial briefs to demonstrate persuasive and unpersuasive tone and "pitch"); *see also* Page, *supra* note 21 (explaining how opening sentences in both fictional narratives and legal briefs can set an effective tone).

26 *See, e.g.,* Berger & Stanchi, *supra* note 25, at 141 (instructing that "a more moderate, tempered tone is more persuasive than a one-sided, aggressive tone"); Rappaport, *supra* note 15, at 100 (advising that a "too strident" tone can backfire by making the reader feel "bludgeoned" and thus "angry"); Fajans, *supra* note 25, at 30 (criticizing as unpersuasive a brief excerpt whose tone is "aggressive and heavy handed").

27 Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 Legal Comm. & Rhetoric 229 (2012).

the audience's perception of the speaker. Aristotle's *Rhetoric* lists three attributes that inspire an audience to believe that a speaker is credible: good sense, good moral character, and goodwill.[28] Weresh posits that while these attributes of ethos may reside in the speaker (whom Weresh labels "the source"), the likelihood that the audience will perceive and be persuaded by these attributes depends upon the relationship that the speaker has cultivated with the audience through the speech.[29] If that relationship is one of familiarity, similarity, and attraction, then the speaker is more likely to persuade as a matter of ethos.[30]

While the text of Weresh's article mentions "tone" only in one very short paragraph,[31] the idea inheres in her thesis to the extent that a speaker's attitude toward an audience affects the potential for a positive relationship to form between them. The concept of tone also inheres in some of the advice Weresh offers to attorneys in the article. For example, she notes that attorneys should use "subtle" but persuasive organizational strategies that prevent readers from feeling manipulated[32] and suggests that they might include references to literature.[33] Such techniques signal a writer's respect for the reader's agency, intelligence, and education and thus predispose the reader to feel positively toward the writer. Thus, building on Weresh's work, one could say that a writer persuades by creating a positive relationship with a reader, but also that the creation of a positive relationship depends in part on the reader's perception of the writer's attitude toward the reader—or, in other words, the reader's perception of the writer's tone. Indeed, Aristotle's *Rhetoric* itself teaches that "it adds much to an orator's influence that . . . he *should be thought* to entertain the right feelings towards his hearers."[34]

In terms of judicial writing, scholars and commentators have often focused on style[35] or voice[36] as opposed to tone.[37] When the literature

28 Aristotle, *Rhetoric, in* The Rhetoric and the Poetics of Aristotle 1, 91 (W. Rhys Roberts trans., Modern Library College Editions 1984).

29 Weresh, *supra* note 27, at 235 (positing that "a positive ethos is based not only on the positive characteristics of the source, but on the relationship that the source is able to foster with her audience" and that an advocate should therefore strive both to exhibit "characteristics of ethos" in herself and to develop "positive source-relational attributes").

30 *Id.* at 234.

31 *Id.* at 255 ("Style also influences the tone of legal writing and therefore fosters the relationship between advocate and reader.").

32 *Id.* at 247 (discussing organizational priming as a subtle persuasive technique); *id.* at 248 (discussing foreshadowing as a subtle persuasive technique).

33 *Id.* at 262–64.

34 Aristotle, *supra* note 28, at 90–91 (emphasis added).

35 *See, e.g.*, Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1415–18 (1995) (discussing judicial style and judicial personality).

on judicial opinions does discuss tone in the I.A. Richards sense, it does so primarily in terms of dissenting opinions, where individual judicial writers have the most rein to develop authorial personae and express their attitudes toward readers. J. Lyn Entrikin, for example, has studied the attitudes that Supreme Court dissenters have shown toward their colleagues in the majority, a critical slice of the readership of any dissenting opinion; she documents a declining level of respect toward these readers over the Court's history and focuses on Justice Scalia's notable lack of civility in dissent.[38]

The few scholars expressly considering tone in majority opinions have tended to treat the concept quite generally, casting courts and their readers in two relatively monolithic roles. As a result, these scholars posit that a particular tone, or at most one of two particular tones, either should characterize—or inevitably does characterize—all majority opinions.

For example, in a 1961 essay, Walker Gibson encourages appellate judges to consider four questions when taking up the task of opinion-writing:

1. To whom am I talking – who is my reader?
2. What do I want my reader to do?
3. Who am "I"—that is, what sort of speaking voice shall I project by the manner in which I compose my language?
4. What relation should I express between this "I" and my reader—should I be formal or informal, distant or intimate? To use the literary term, what is my *tone*?[39]

The essay goes on to criticize a tendency of judicial opinions to adopt a "lofty" tone of verbosity and affected certainty.[40] As a remedy, Gibson, in thankfully outdated sexist language, advises judicial writers to acknowledge opposing arguments and to strive for conciseness: "the tone should imply two busy men, writer and reader, both perfectly capable of

36 *See generally* McArdle, *Understanding Voice*, *supra* note 23; Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotions in Supreme Court Opinions*, 59 Wash. & Lee L. Rev. 193 (2002) (analyzing the voices of eight twentieth-century Supreme Court justices); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J.L. & Human. 201, 204–08 (1990) (identifying a "monologic voice" in judicial opinions).

37 While Richard Posner, in an article on judicial style, does briefly discuss "tone," he uses the term more in the sense of register, or level of formality. Posner, *supra* note 35, at 1426–27 (discussing devices that raise or lower tone). Patricia Wald, in exploring judicial rhetoric, also mentions "tone" from time to time, but she most often uses the term to refer to the writer's attitude toward the subject matter rather than toward the reader. *See, e.g.*, Wald, *supra* note 35, at 1412 ("The typical tone of a dissent is troubled, outraged, sorrowful, puzzled.").

38 J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. App. Prac. & Process 201 (2017).

39 Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. Rev. 915, 921 (1961).

40 *Id.* at 924 ("In their effort at dignified conviction, judges may lose a sense of life's mystery and complication, and by adopting too lofty a tone, they remove themselves from their readers.").

following an argument that is succinct, and efficiently composed."[41] Thus, although Gibson encourages the judicial writer to think of himself (or, I would add, herself) as an "I," his prescriptions imply that every "I" behind a majority opinion should be the same "busy man" who should express the same attitude toward the reader—yet another generic "busy man."

A more recent and comprehensive examination of judicial style by William Popkin discusses tone as a rhetorical component of majority opinions and recommends, as does Gibson, that judges avoid a tone of affected certainty, at least for opinions in truly hard cases.[42] However, Popkin theorizes that only two tones can exist in majority opinions: an "authoritative tone," which "speaks down to the audience" with decided confidence, or an "exploratory tone," which "draws the reader into a participatory community with the judge, wondering aloud about how to deal with the complexities of the case."[43] He notes that the authoritative tone, which masks the decisional difficulty in hard cases, leaves a "hollowness" in judicial opinions, and he warns that "a profession aware of its own posturing will provide a weak defense when confronted by a questioning public."[44] For this reason, Popkin recommends the use of the exploratory tone in such cases, noting its better "fit" with modern legal culture.[45]

Scholar Robert Ferguson would contend that an exploratory tone is incompatible with the genre of the majority opinion; in a seminal article, he identifies a "declarative tone"—not unlike Popkin's "authoritative tone"—as inhering generically in majority opinions, which, by their nature and to preserve judicial legitimacy, must "reach[] down from above in a way that can be accepted from below."[46] He posits this tone as one ingredient contributing to a necessary "rhetoric of inevitability" in such opinions and describes the declarative tone as one of "[h]yperbole, certitude, assertion, simplification, and abstraction."[47] Further, Ferguson

41 *Id.* at 923.

42 William D. Popkin, Evolution of the Judicial Opinion: Institutional and Individual Styles 169–70 (2007) (stating that judges should "reject an authoritative tone [and] instead acknowledge the multiple values relevant to a decision and the resulting complexity and uncertainty in determining judicial law").

43 *Id.* at 147. Popkin cites an opinion of Oliver Wendell Holmes as exemplifying an authoritative tone in that the opinion summarily dismisses an opposing argument without explicit reasoning and states the majority's premise with brevity and without substantial analysis. *Id.* at 152 (citing Lucas v. Earl, 281 U.S. 111 (1930)). As examples of exploratory tone, Popkin cites excerpts from dozens of opinions of Judge Richard Posner in which Posner expressly shares doubts regarding the law and its application, thinks aloud regarding his analysis, and rejects bright-line rules in favor of more nuanced standards. *Id.* at 167–75.

44 *Id.* at 173.

45 *Id.* at 177.

46 Ferguson, *supra* note 36, at 213.

47 *Id.* While Ferguson's article uses excerpts from two Supreme Court flag-salute cases from the 1940s to illustrate his theory, it also notes that this choice is "an arbitrary one in that any case or series of cases or level of cases might serve." *Id.* at 203 (explaining the author's reasons for choosing as examples Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

theorizes that "the listener-reader of the judicial opinion" inevitably "welcomes the declarative tones that make [the enterprise of judgment] possible."[48] Ferguson's theory, while widely cited,[49] spends little time on the individuality of writers and readers of judicial opinions. Thus, neither Gibson's prescriptions, nor Popkin's bivalent view, nor Ferguson's theory leave much room for the possibility of tonal diversity in majority opinions.

I.A. Richards himself notes that some contexts will constrain a writer's tone. He offers the example of the author of a scientific treatise, whose tone is "settled" by "academic convention."[50] The treatise author, if "wise" enough to hew to convention, will show respect for readers and take pains to facilitate their accurate understanding and acceptance of his content. In the case of majority judicial opinions, convention—and the institutional role of the court—similarly dictate that authors demonstrate respect for readers and take pains to be understood by them. The legitimacy of the judicial system also depends on societal acceptance of majority opinions, and this dependence similarly constrains tone, as Ferguson explains. But within these constraints, a variety of tones can and does exist, largely as a function of how individual judicial authors envision themselves and their readers, who are actual humans, unlike Gibson's one-dimensional "busy man."

4. The dynamics of tone in majority judicial opinions: As whom and to whom do their authors write?

4.1. Personae and majority opinions

If tone, in the I.A. Richards sense, is the attitude of a speaker toward a listener, then it depends on the identities of both the speaker and the listener. In the context of a majority opinion, the speaker is the persona of the opinion's author—the "I" as whom the author has chosen to write. Of course, in the broadest sense, the authorial persona in a majority opinion is the court; by definition, a majority opinion speaks for the court.[51] But different judges may choose to speak *as* the court in different ways.

Indeed, Christopher Rideout has noted that although "the task of the writing judge is to appropriate" the voices of all judges who voted in the majority "into a single authoritative voice of the court,"[52] the persona of

48 *Id.* at 211.

49 A Westlaw search on January 3, 2021, revealed over 100 citations to Ferguson's article, occurring, among other places, in multiple articles in both the *Harvard Law Review* and the *Yale Law Journal*, as well as in four articles in *Legal Communication and Rhetoric* and another four articles in *Legal Writing: The Journal of the Legal Writing Institute.*

50 Richards, *supra* note 7, at 177.

51 Ruggero J. Aldisert, who was a federal circuit judge and noted authority on opinion-writing, once explained that the author of a majority opinion, "for the purposes of the case, is the designated representative or spokesperson for the court to all future readers." Ruggero J. Aldisert, Meehan Rash & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 Cardozo L. Rev. 1, 18 (2009).

the majority opinion is not completely pre-ordained: "The individual act of writing . . . represents an instantiation of those voices in a particular moment and context, and through a particular subjectivity."[53] Thus, there is some room to maneuver within the authorial persona, despite the constraints of the genre.

Some judges, for fear of making the court appear partial (or perhaps fallible), may choose a traditionally formal, institutional persona that sits well within boundaries of conventional constraints. For example, Judge Edith Hollan Jones of the Fifth Circuit has explained that she resists using the word "we" in opinions because she believes "that this pronoun casts an air of subjectivity upon statements that ought to reflect the objectivity of the law and legal process."[54]

Others, such as Judge Patricia Wald, who presided over the District of Columbia Circuit, have applauded opinions whose words flow from a more particular, human persona:

> I think it a good thing that judges write and reason differently—and recognizably so. It is no sin if the personality of the individual judge colors the opinion. It should be at least minimally comforting to a litigant to know that a live human being has brought her faculties to bear on his problem . . . .[55]

Even Judge Wald herself, however, confessed that she might have been, like most judges, "too timid" to inject too much personality and informality into opinions, lest she be viewed as insufficiently "serious" or accused of pandering to the public or the media.[56] And, sometimes, a human persona can suffer from human failings, especially when colleagues on the bench disagree pointedly on a case: "If a dissent is outraged and self-righteous, the majority author will frequently rejoin in kind."[57]

Judge Posner's opinions, even when written for the majority, have a distinct persona. He once explained that he tried make his opinions "sound conversational rather than declamatory."[58] His persona has been described as someone in the process of thinking through the analysis of a case, openly admitting to doubt and exploring various avenues of

52 Rideout, *supra* note 23, at 88.

53 *Id.* at 90.

54 Edith Hollan Jones, *How I Write*, 4 Scribes J. Legal Writing 25, 29 (1993).

55 Patricia M. Wald, *How I Write*, 4 Scribes J. Legal Writing 55, 61 (1993).

56 *Id.* at 63.

57 *Id.* at 57.

58 Richard A. Posner, *How I Write*, 4 Scribes J. Legal Writing 45, 47 (1993).

resolving issues.[59] Because his majority opinions explain the reasoning that moved him personally, rather than the common-denominator reasoning of the majority, they are more likely than others' opinions to appear in the reporters followed by concurrences and dissents from colleagues.[60] Nevertheless, Posner once wrote that his "nonstandard" practice of self-focus made his opinions "strong and honest," which was better than being "unanimous."[61] The Posner persona thus resides at the edge of the envelope of conventional constraints regarding the majority-opinion genre.

Justices of a system's highest court find themselves in a slightly different position when it comes to the formulation of personae. On the one hand, their authority is famously final,[62] so perhaps a justice has more leeway to be unconventional, even when writing for the majority, than does a judge on an intermediate appellate court.[63] On the other, an individualistic persona may be "too intimate" to represent so august an institution, and Popkin has noted that Justices of the United States Supreme Court "might feel especially burdened by their responsibility and anxious to project an air of authority that could be undermined by the familiarity and uncertainty of a personal/exploratory style."[64]

4.2. Audience and majority opinions

The readership of a majority judicial opinion may be varied and vast. Some readers are insiders to the case: the lower-court judge or judges whose court's opinion is being reviewed and the parties' attorneys. The parties, depending on their level of legal sophistication and direct involvement with the litigation, may read the opinion as well. If the opinion was not unanimous, then the judges or justices not joining the majority will be the ultimate insider-readers. Indeed, when draft opinions are circulated among the appellate judges who have heard the case, then a judge or justice who originally voted against the majority may actually be persuaded by a draft of the majority opinion to switch votes and join in it, before the final version is publicly announced.[65] A final group of insider-

59 Popkin, *supra* note 42, at 159 (noting that a Posner opinion "reads as though the author is thinking out loud about how to work through the issues").

60 Posner, *supra* note 58, at 47.

61 *Id.*

62 As Justice Robert Jackson wrote, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (Jackson, J., concurring).

63 *See* Rideout, *supra* note 23, at 103 (explaining that Justice Stevens had the freedom to insert more of an "authorial presence" in a particular opinion in part because the opinion was a dissent but also simply because "as a Supreme Court justice he ha[d] both the legal and the rhetorical authority" to do so).

64 Popkin, *supra* note 42, at 175–76.

readers is only potential but nevertheless important: if the opinion comes from an intermediate appellate court, then the justices of the highest court in the system will of course read the opinion if a litigant appeals and the highest court agrees to review it.

Among outsiders to the case, the most likely readers of a majority opinion are attorneys and judges performing research on the issues addressed, who need to understand the opinion's precedential implications. Laypersons with a particular interest in the issues may sometimes read a majority opinion, especially one issuing from the Supreme Court, although most lay readers probably see only those snippets that have made it through the filters of journalists and bloggers. Academics and law students studying the issues are outsider-readers as well.

These groups each have differing levels of legal sophistication, knowledge of the case, familiarity with the conventions of legal writing generally and opinion-writing in particular, and motivations for reading the opinion in the first place. And judges, while certainly conscious of all these potential readers, may aim particularly at one group or another when drafting a majority opinion.[66] Naturally, the groups to whom a given judge primarily writes will affect the tone of the resulting opinion.

The Federal Judicial Center's manual on opinion-writing explains that appellate opinions are written primarily for litigants, their counsel, and the lower courts whose decisions are being reviewed.[67] However, a 1960 discussion at a conference for state and federal appellate judges turned up a wide variety of responses when the judges were asked for whom they wrote, ranging from "posterity" to "the losing lawyer," from "law students" to "the bar," and from "the legislature" to "the readers of the *New York Times*, or comparable local newspapers."[68] The discussion naturally included comments on these and other responses, with one judge noting that "posterity" was so vague as to be meaningless, another confessing that the idea of writing for law students "never occurred to me," and another commenting that unless one is on the Supreme Court, having one's opinion featured in a newspaper was so rare as to be "just a judge's dream."[69]

65 The official website of the U.S. federal court system explains that Supreme Court justices may "switch their votes" in the process of reading circulated draft opinions. *See Supreme Court Procedures*, U.S. Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited July 28, 2020).

66 *See* Posner, *supra* note 35, at 1431 (discussing audiences at which opinion-writers "seem[] particularly to be aiming"); Patricia M. Wald, *A Reply to Judge Posner*, 62 U. Chi. L. Rev. 1451, 1453 (1995) (identifying "litigants and lawyers" as the "primary audience" for judicial opinions and explaining that the author, a federal appellate judge, included detailed facts in a particular opinion to help "prosecutors, defense attorneys, and trial judges in future cases" understand the precise holding).

67 Fed. Jud. Ctr., Judicial Writing Manual: A Pocket Guide for Judges 5 (2d ed. 2013).

68 Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810, 813–14 (1961) (describing a conference session led by Walker Gibson at the Appellate Judges Conference in 1960).

Such very human differences among judges did not disappear in 1960,[70] and these differences allow for, and surely produce, a wide variety of tones in majority opinions. A writer addressing "posterity" will adopt a different attitude toward the reader than will a writer who is focused on explaining to "the losing lawyer" why certain arguments were rejected. A writer envisioning a classroom of law students will project a still different tone, and one implicitly lobbying a legislature to amend an unworkable statute yet another. Indeed, in moving from one passage of an opinion to another, a writer may envision different audiences as the focus and purpose of the opinion's passages change. Thus, even a single majority opinion may exhibit a diversity of tones.

5. A comparative study of tone in two recent majority opinions

At this point, some concrete examples of diverse tones are in order, and this section will focus on two recent Supreme Court majority opinions, one authored by Justice Elena Kagan and the other by Justice Neil Gorsuch. Both Justices have been noted for their writing,[71] and both will likely remain on the Court for quite some time, perhaps continuing to evolve their tones and certainly influencing the writing of future judges and justices.

Justice Kagan was an absolute beginner in terms of authoring opinions in her own name when she joined the Court in 2011; she remains the only sitting Justice who had never served as a judge before her confirmation.[72] Of course, as a clerk for Judge Abner Mikva and then for Justice Thurgood Marshall, as a Harvard Law School professor and dean, and as the United States Solicitor General, she had influenced, written about, and generally marinated in Supreme Court opinions for decades.[73] Her opinion-writing style has been praised for its accessibility to lay readers[74] and also for its

69 *Id.*

70 *See, e.g.,* Thomas M. Reavley, *How I Write*, 4 Scribes J. Legal Writing 51, 54 (1993) (explaining, as a Fifth Circuit judge, that "[w]e write to be read by lawyers and judges"); Jones, *supra* note 54, at 29 (asserting that opinions should be "comprehensible to an intelligent nonlawyer"); Posner, *supra* note 35, at 1431 (noting that some judges, so-called "impure judicial stylist[s]," write for a primary audience of lawyers and laypeople who can "'see through' the artifice of judicial pretension"); *see also* Laura Krugman Ray, *"The Hindrance of a Law Degree": Justice Kagan on Law and Experience*, 74 Md. L. Rev. Endnotes 10, 10 (2015) (quoting Justice Elena Kagan as saying that she tries to make her opinions "understandable to a broad audience").

71 *See, e.g.*, Mark Joseph Stern, *Elena Kagan Is the Best Writer on the Supreme Court*, Slate (Mar. 1, 2016, 2:07 PM), https://slate.com/news-and-politics/2016/03/elena-kagans-dissent-in-lockhart-v-united-states-shows-shes-scalias-successor-as-the-best-writer-on-the-supreme-court.html; Ross Guberman, *Neil Gorsuch Is a Gifted Writer. He's a Great Writer. But Is He a "Great Writer"? Part One: Four Gifts*, Legal Writing Pro (Feb. 7, 2017), https:// www.legalwritingpro.com/blog/judge-gorsuch-gifts/.

72 Margaret Talbot, *The Pivotal Justice,* New Yorker, Nov. 18, 2019, at 36.

"wit and pizzazz."[75] Indeed, she has been called the Court's "most innovative writer"[76]—and sometimes its best.[77] Commentators have noted her frequent use of colloquialisms, analogies between legal issues and quotidian situations, and vivid language.[78] She has explained that she wants her opinions to be "understandable to a broad audience" and to "sound like" herself.[79] She recognizes, however, that when writing for a majority of the Court, she "can't go to town" with her personal voice and may need to leave "some of [her] favorite lines" on the "cutting room floor."[80]

Justice Gorsuch had served as a judge on the Tenth Circuit for over ten years and had authored 175 published majority opinions before joining the Supreme Court in 2017.[81] Like Kagan, he had worked as a United States Supreme Court clerk, in his case for Justice Byron White and then for Justice Anthony Kennedy. [82] His experience also included service as the Principal Deputy Associate Attorney General at the United States Department of Justice.[83] When he received his Supreme Court nomination, commentators frequently praised his writing style.[84] Indeed, an academic study of his Tenth Circuit majority opinions has noted that "Gorsuch's writing style conforms in large part to the guidance of legal writing experts, who urge judges to write accessible, engaging, and even entertaining opinions."[85] Critics have been more divided regarding Gorsuch's writing style in recent years, with some citing a tendency to overexplain that has inspired a hashtagful of mockery,[86] but others continuing to note a gift for writing readable prose.[87]

73 *Current Members*, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Aug. 1, 2020).

74 *See, e.g.,* Jeffrey Rosen, *Strong Opinions*, New Republic (July 28, 2011), https://newrepublic.com/article/ 92773/elena-kagan-writings (praising Kagan's ability to explain "the constitutional stakes in plain language that all citizens can understand").

75 Stern, *supra* note 71.

76 Ray, *supra* note 70.

77 Stern, *supra* note 71.

78 Ray, *supra* note 70.

79 *Conversation with Supreme Court Justice Elena Kagan*, C-SPAN (Sept. 20, 2012), https://www.c-span.org/video/?308291-1/conversation-supreme-court-justice-elena-kagan&start=2782.

80 *Id.*

81 Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. Rev. Online 75, 76 (2018).

82 *Current Members*, *supra* note 73.

83 *Id.*

84 *See, e.g.,* Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. Times (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html?searchResultPosition=2 (praising Gorsuch's "talent for vivid writing" and calling him "a lively and accessible writer"); Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSblog (Jan. 13, 2017, 12:53 PM), https://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/ (referring to Gorsuch as "a particularly incisive legal writer" whose opinions have "flair").

85 Varsava, *supra* note 81.

Stylistically, both Kagan's and Gorsuch's opinions share a number of features. Both writers use narrative techniques from time to time, both dispense with legalese whenever possible, and both use colloquial language, giving their prose a relatively informal flavor, at least for judicial writing.[88] Commentators have gone so far as to describe at least one opinion of each as "breezy."[89] Yet for all this stylistic similarity, each deploys different tones in majority opinions, and each can use a different range of tones within a single opinion.

A. *Chiafalo v. Washington*: A case study in Kagan's majority-opinion tones

A "faithless elector" is a member of the Electoral College who has pledged to cast a ballot for the winner of a state's popular vote but then violates that pledge.[90] The Supreme Court held in *Ray v. Blair*[91] that states may extract such pledges from the electors whom they appoint, and *Chiafalo*[92] raised the issue of whether states may constitutionally enforce such pledges—for example by fining faithless electors as the State of Washington fined Peter Chiafalo, Levi Guerra, and Esther John.[93] These three electors challenged their thousand-dollar fines, arguing that the United States Constitution allowed them to cast their electoral ballots however they pleased.[94] An eight-Justice Supreme Court majority held against the electors, finding no such right in the Constitution.[95] Justice Elena Kagan authored the Court's opinion. Justice Clarence Thomas concurred in the judgment but filed a separate opinion.[96]

86 *See* Dan Epps (@danepps), Twitter (Jan. 23, 2018, 4:18 PM), https://twitter.com/danepps/status/955912760629526528 ("Let's rewrite some classic lines from SCOTUS ops . . . #GorsuchStyle.").

87 Adam Liptak, *#GorsuchStyle Garners a Gusher of Groans. But Is His Writing Really That Bad?*, N.Y. Times (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/justice-neil-gorsuch-writing-style.html (discussing critics' mixed opinions).

88 *See* Varsava, *supra* note 81 (describing Gorsuch's style as using narrative suspense, eschewing technical language, and being much less formal than average); Laura Krugman Ray, *Doctrinal Conversation: Justice Kagan's Supreme Court Opinions*, 89 Ind. L.J. Supp. 1, 6 (2012) (noting that Kagan's style shows a recognition of opinions as "narratives"); *id.* at 9 (noting Kagan's lack of "legalese"); *id.* at 4 (noting Kagan's "informal and even colloquial diction").

89 Mark Joseph Stern, *Neil Gorsuch Just Handed Down a Historic Victory for LGBTQ Rights*, Slate (June 15, 2020, 12:19 PM), https://slate.com/news-and-politics/2020/06/supreme-court-lgbtq-discrimination-employment.html (referring to a Gorsuch majority opinion as "breezy"); Noah Feldman, *It's Okay to Laugh at the Supreme Court*, Bloomberg (Mar. 4, 2016, 9:10 AM), https://www.bloomberg.com/opinion/articles/2016-03-04/it-s-ok-to-laugh-at-the-supreme-court (describing a Kagan dissent as "breezy").

90 *Chiafalo*, 140 S. Ct. at 2321–22 (explaining the concept of "so-called faithless voting" by electors and the history of states' treatment of "faithless electors").

91 343 U.S. 214 (1952).

92 140 S. Ct. 2316.

93 *Id.* at 2322.

94 *Id.*

95 *Id.* at 2320.

While Kagan's majority opinion hews to conventions of the genre in that it is organized around traditional Roman-numeral headings and contains citations in the Court's usual style,[97] its tone is almost never the "declaratory" one that Robert Ferguson described, which speaks with "hyperbole, certitude, assertion, simplification, and abstraction."[98] The opinion does exhibit "certitude" in that it is never tentative in its analysis or conclusions (and thus does not exhibit William Popkin's "exploratory" tone, either), but the opinion is devoid of hyperbole and contains a wealth of concrete details rather than simplification and abstraction. Nor does the opinion "speak down" to the reader in William Popkin's "authoritative" tone. The opinion's authority, of course, is inherent, and Kagan takes advantage of this fact as a writer to let tones do other work.

Indeed, the *Chiafalo* majority opinion exhibits a palette of tones as it proceeds from a brief introduction, to a detailed explanation of the issue (which necessitates elaboration of some Constitutional history), to the Court's legal analysis, to—finally—a one-paragraph summary of that analysis. The introduction, in three short paragraphs, speaks respectfully and directly to a reader who is certainly an outsider to the case and probably to the legal discourse community. With the exception of a single citation, the introduction uses no technical or legal language as it describes the issue and states the Court's holding:

> Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few "electors" then choose the President.
>
> The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State's popular vote. Most States also compel electors to pledge in advance to support the nominee of that party. This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution "demands absolute freedom for the elector to vote his own choice." *Ray v. Blair*, 343 U.S. 214, 228, 72 S.Ct. 654, 96 L.Ed. 894 (1952).

96 *Id.* at 2329 (Thomas, J., dissenting).

97 The United States Supreme Court has its own guide to style and citation. *See* Office of the Rep. of Decisions, Supreme Ct. of the U.S., The Supreme Court's Style Guide (Jack Metzler ed., 2016), https://budgetcounsel.files.wordpress.com/2018/10/supreme-courts-style-guide.pdf.

98 *See supra* note 36 and accompanying text.

> Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote. We hold that a State may do so.[99]

The tone is respectful from the first sentence, which assumes no knowledge of the subject matter on the part of the reader but also avoids pedantry. It simply states, as a journalist might, a fact that would work for anyone as an easy point of access to a complex issue. The second sentence, with its informal "though" instead of "however," adds a conversational note, as though a speaker is warming up to her subject in the presence of interested listeners. This straightforward, non-legalistic tone continues through the rest of the introduction. Indeed, the giveaway that this text is in fact a judicial opinion does not come until the seventh sentence of the introduction, with the reference to "This Court." In the last two sentences, the "Court" becomes the eight-Justice *Chiafalo* majority with a formulaic "we," but, based on the tone established earlier, the "we" does not sound particularly royal.

Part I of the opinion proceeds to a more precise explanation of the issue, which requires a constitutional history lesson regarding the Electoral College along with a tonal shift that establishes more intimacy with the reader. This part begins with the sentence "Our Constitution's method of picking Presidents emerged from an eleventh-hour compromise."[100] Now the first-person plural no longer refers to the Court; instead, it refers to the speaker and all (American) readers as one unified group. The "eleventh-hour compromise" hints of a good story to come, perhaps one told between acquaintances. The diction becomes less formal as Kagan describes how the delegates to the Constitutional Convention accepted a proposal for an Electoral College, "but with a few tweaks," resulting in Article II, § 1, clause 2, which requires states to appoint a certain number of electors in any manner their legislatures deem appropriate.

From there, as the text elaborates on Article II, § 1, the tone becomes even less formal and more intimate: "The next clause (but don't get attached: it will soon be superseded) set out the procedures the electors were to follow." This is not communication between Walker Gibson's "busy men"; the speaker and her audience have become friends. Kagan's joking aside is both ironically self-deprecating ("Surely you've been loving and memorizing everything I've told you so far, right?") and slightly apologetic ("I'm sorry to bog you down with this legal detail, but trust me; I'm

99 *Chiafalo*, 140 S. Ct. at 2319–20.

100 *Id.* at 2320.

going somewhere.") The speaker knows the listener well enough to have confidence that all of these messages will be received.

This intimate, friendly tone reaches its height with two paragraphs in Part I that recount what the opinion later calls "a pair of fiascos."[101] The first occurred in 1796. Because Article II originally required electors to each cast two ballots, with the ballot-winner becoming President and the runner-up his Vice President, it allowed for candidates from two warring parties, Federalist John Adams and Republican Thomas Jefferson, to become President and Vice President, respectively. Kagan's opinion, after relating this story, notes parenthetically that "One might think of this as fodder for a new season of Veep."[102] Now speaker and listener are on the couch binge-watching together.

The intimacy continues in the recounting of the second fiasco:

> Four years later, a different problem arose. Jefferson and Aaron Burr ran that year as a Republican Party ticket, with the former meant to be President and the latter meant to be Vice. For that plan to succeed, Jefferson had to come in first and Burr just behind him. Instead, Jefferson came in first and Burr . . . did too. Every elector who voted for Jefferson also voted for Burr, producing a tie. That threw the election into the House of Representatives, which took no fewer than 36 ballots to elect Jefferson. (Alexander Hamilton secured his place on the Broadway stage—but possibly in the cemetery too—by lobbying Federalists in the House to tip the election to Jefferson, whom he loathed but viewed as less of an existential threat to the Republic.) By then, everyone had had enough of the Electoral College's original voting rules.[103]

One can almost hear the rimshot after the "did too." And the reference to Hamilton, while unnecessary to the story and to the legal analysis to come, maintains the tone of close connection between speaker and listener, writer and reader, by drawing on common cultural knowledge.

The remainder of Part I explains how the Twelfth Amendment, ratified in 1804, ushered in our modern system of electors who vote specifically for President and Vice President with distinct ballots, and how states instituted popular presidential elections and statutory measures requiring electors to cast ballots for the winner of the popular vote. The opinion at this point also describes the state of Washington's system of extracting from would-be electors a pledge of faith to the popular vote

101 *Id.* at 2327.

102 *Id.* at 2320.

103 *Id.* at 2320–21.

before finalizing their appointments, and of enforcing that pledge through monetary fines.

This passage of the opinion eases off the intimate, joking tone of earlier paragraphs and moves toward a more pedagogical one, aimed at explaining legal complexities to an interested beginner. For example, a lead-in to a block quote from a portion of the Twelfth Amendment refers not to what its "operative language provides" but instead to what its "main part . . . says."[104] Another sentence refers to what Washington does "[w]hen the vote comes in" rather than "when the election returns are reported."[105] And, like a treat for those who complete all of the assigned reading, Kagan drops the following self-referential note describing two states with anomalous electoral voting rules: "Maine and Nebraska (which, for simplicity's sake, we will ignore after this footnote) developed a more complicated system . . . ."[106] The "we" here refers literally to the majority, but it seems just as much to refer to Kagan and her implied students.

After explaining the procedural history and noting that the Tenth Circuit, in a different case, had reached a different holding on the ultimate issue than had the Supreme Court of Washington, Part I ends, as did the introduction, with another tonal shift: "We granted certiorari to resolve the split. We now affirm the Washington Supreme Court's judgment that a State may enforce its pledge law against an elector."[107] The "we" is now unmistakably the majority, and the tone very briefly shifts from pedagogical to authoritative.

Part II of the majority opinion describes the Court's reliance on the text of Article II, § 1 and of the Twelfth Amendment, as well as on historical context, to conclude that the Constitution does not give electors the right to vote how they please. Kagan reverts back to a pedagogical tone, sometimes articulating a concept in two different ways to aid comprehension: "And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect."[108] This pedagogical tone also manifests itself in down-to-earth analogies. For example, in explaining that the Twelfth Amendment's use of the words "vote" and "ballot" do not necessarily give electors discretion, the opinion invites readers to "[s]uppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no

104 *Id.* at 2321.

105 *Id.* at 2322.

106 *Id.* at 2321 n.1.

107 *Id.* at 2323 (citation omitted).

108 *Id.* at 2324.

problem saying that he 'votes' or fills in a 'ballot.' In those cases, the choice is in someone else's hands, but the words still apply . . . ."[109] Note that the "we" has now shifted back to embrace both the majority and the audience, teacher and students.

The rest of Part II maintains this teacherly tone, often speaking directly to the audience: "Begin at the beginning";[110] "Recall that in this election . . ."; "Remember that the Amendment grew out of a pair of fiascos . . . ."[111] The diction remains free from gratuitous technical language and sometimes becomes colloquial: under the old system, electors "risked the opposite party's presidential candidate sneaking into the second position," and states enacted statutes "requiring electors to pledge that they would squelch any urge to break ranks with voters."[112] Thus, as the analysis proceeds, the tone is not as intimate as it was in Part I, but it remains engaging and cordial.

The final section of the opinion, Part III, is a one-paragraph summary of the Court's reasoning that represents another tonal shift:

> The Electors' constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Here, the diction is more formal and sophisticated. The opinion is no longer speaking to a friend or a student; it is speaking officially, for the record, and the tone is much less personal and more self-conscious, dressed up for posterity. The "We" in "We the People" is not referring to a group of specific individuals but instead to a population with a public role. In this conclusion, which immediately precedes the Court's judgment

109 *Id.* at 2325.

110 *Id.* at 2326.

111 *Id.* at 2327.

112 *Id.* at 2328.

affirming the decision of the Supreme Court of Washington, the opinion comes closest to manifesting Robert Ferguson's declaratory tone.

In all, then, the majority opinion contains a few major points of tonal shift and manifests attitudes from warm and intimate to official and impersonal toward the reader, as the text seeks to accomplish different purposes. And even though the opinion speaks for eight Justices, it frequently bears the tonal hallmarks of its author such as informal diction and parenthetical asides.

5.2. *Bostock v. Clayton County*: A case study in Gorsuch's majority-opinion tones

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individual employees "because of . . . sex."[113] *Bostock*, a consolidated appeal of three separate cases, raised the issue of whether an employer violates this provision of Title VII by terminating an employee based on the employee's homosexual or transgender status.[114] A six-Justice majority held that such conduct indeed violates Title VII, and Justice Neil Gorsuch authored the Court's opinion.[115] That opinion drew two dissents, one by Justice Samuel Alito, in which Justice Clarence Thomas joined, and another by Justice Brett Kavanaugh.[116] Thus, *Bostock* represents a more contested decision than *Chiafalo*, where all nine Justices joined in the result. This increased level of contention is evident in the tone of the *Bostock* majority opinion, whose implied audience most often appears to be those who would disagree with the holding: the dissenters, the losing litigants, and their attorneys. Presumably because of this differing dynamic, Gorsuch's opinion in *Bostock* uses a different range of tones than does Kagan's in *Chiafalo*, with the *Bostock* opinion relying more on the declaratory and authoritative tones described by Robert Ferguson and William Popkin.

The introduction to the majority opinion exhibits a more emphatic, argumentative tone than does the *Chiafalo* introduction:

> Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace

113 42 U.S.C. § 2000e-2(a)(1).

114 140 S. Ct. 1731, 1737 (2020).

115 *Id.* at 1733 (noting that Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in the majority opinion).

116 *Id.* at 1754 (Alito, J., dissenting); *id.* at 1822 (Kavanaugh, J., dissenting).

> on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.
>
> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[117]

Each paragraph of the introduction contains an express declaration that no valid contrary arguments exist: "The answer is clear," and "it's no contest." The use of "exactly" only bolsters this message. These words and phrases denoting certainty are markers of Robert Ferguson's declaratory tone.

Nevertheless, the opening sentence anticipates an objection raised by the defendant-employers and by the dissenters: that Congress in 1964 did not expect that Title VII would prohibit discrimination against homosexual and transgender persons. The reader encounters the word "unexpected" in the first, short sentence, and the final sentence emphasizes that the statutory language, rather than supposed legislative expectations, must govern the analysis. This strategy of anticipating and responding to a counterargument gives the text the persuasive, argumentative tone of an oral argument opening.

Gorsuch's *Bostock* opinion also differs from Kagan's *Chiafalo* opinion in its use of the first-person plural, which in *Chiafalo* sometimes appears to refer to the author and her layperson readers, along with the majority. In *Bostock*, if the phrase "our time" in the third sentence of the introduction is ambiguous regarding who "we" are, the "we must decide" just a few lines later leaves no doubt that the "we" refers to the *Bostock* majority. For the rest of the opinion, the first-person plural will refer only to the majority or, in a few instances and with even greater force, to the Supreme Court itself, as when the opinion asks readers to "[c]onsider three of our leading precedents."[118] Indeed, later on, the opinion twice refers to the "cases" at issue in the *Bostock* appeal as being "ours."[119] This we-as-

117 *Id.* at 1737.

118 *Id.* at 1743.

119 *See id.* at 1744 ("The lessons these cases hold for ours are by now familiar."); *id.* at 1753 ("Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions.").

entire-Court usage gives the *Bostock* opinion a tone that is more expressly authoritative than the tone of the majority opinion in *Chiafalo*.

Part I of the *Bostock* opinion proceeds to explain the facts and procedural history in straightforward language, neither technical nor colloquial, and Part II then sets forth the majority's analysis regarding its interpretation of the key statutory terms: "sex," "because of," and "discriminate." At this point, the opinion indulges in some of the over-explaining for which Gorsuch has been mocked:

> In the language of law, . . . Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.[120]

This section of the analysis, like some parts of the majority opinion in *Chiafalo*, has a pedagogical tone, but in this case the teaching method seems more like lecturing than leading a discussion. Questions followed immediately by answers move the audience through the talking points: "What did 'discriminate' mean in 1964? As it turns out, it meant then roughly what it means today . . . . So how can we tell which sense, individual or group, 'discriminate' carries in Title VII? The statute answers that question directly." [121] Further, the implied audience for the lecture is not the lay public—who are referred to twice at the start of Part II in the third person as "the people"[122]—but rather the dissenters, and perhaps the losing litigants and their attorneys.

As Kagan did in *Chiafalo*, Gorsuch in Part II of *Bostock* sometimes makes direct requests of the reader, in this case posing a series of hypotheticals that clarify the majority's reasoning as to why "sex" is an inherent cause of discrimination based on homosexual or transgender status. The opinion, for example, asks the audience to "Consider, for example, an employer with two employees, both of whom are attracted to men."[123] And to "take an employer who fires a transgender person who was identified as a male at birth." And to "[i]magine an employer who has a policy of firing any employee known to be homosexual."[124] At these points, the opinion

120 *Id.* at 1739 (citations omitted).

121 *Id.* at 1740.

122 *Id.* at 1738 ("If judges could add to, remodel, update, or detract from old statutory terms . . . we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on . . . .").

123 *Id.* at 1741.

124 *Id.* at 1742.

is no longer talking down to its audience; the pedagogical tone becomes more engaging, as if the speaker is reaching out more directly to foster among all audience members a precise understanding of the reasons underlying the majority's interpretation of the statutory terms.

A tonal shift then occurs in Part III, where the opinion moves from explaining the majority's reasoning in a relatively moderate, pedagogical tone, to discussing the employer-defendants' losing arguments in a more confrontational one. Here, the attitude toward the implied readers—the dissenters—ranges from mildly tried patience to vexed disbelief. The most notable devices communicating these tones are a host of rhetorical questions. Part III itself, which follows the majority's explanation of its analysis, in fact begins with one: "What do the employers have to say in reply?"[125]

Some of these rhetorical questions put words in the mouths of the employers so that the opinion can then respond to each opposing argument. For example, after explaining that the Court has previously held that employers discriminate because of sex when they refuse to hire women, but not men, with young children, or when they require women to make higher pension-plan contributions than men, the *Bostock* majority opinion proceeds as follows: "Aren't these cases [i.e., the three cases consolidated in *Bostock*] different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? . . . Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?"[126] The response is immediate and short: "No, it doesn't." Of course, a detailed explanation follows, but this abrupt first sentence gives that explanation its impatient tone.

Other rhetorical questions, posed in the voice of the majority itself, follow quick paraphrases of various employer arguments. For example, the opinion at one point explains that Congress considered, but rejected, several proposals to add sexual orientation as a characteristic protected by Title VII, and the opinion's text then proceeds as follows: "This postenactment legislative history, [the employers] urge, should tell us something. But what?"[127] The "But what?" indicates again that the Court's patience is growing short in the face of vague, unsupported contentions.

The most, and the most pointed, rhetorical questions appear in the final section of Part III, where the opinion addresses the employers' "extra-textual" arguments, which run most afoul of Justice Gorsuch's textualist philosophy.[128] In response to the argument that few in 1964 would have

125 *Id.* at 1744.

126 *Id.* at 1746.

127 *Id.* at 1747 (citations omitted).

expected Title VII to prohibit discrimination against gay and transgender people, the opinion first asks, "But is that really true?"[129] Then, after citing contemporary examples of people who argued or predicted this broader application of Title VII, the opinion asks, "Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as 'expected'?"[130] And five more rhetorical questions immediately follow these two, after which the paragraph ends by commenting that "[n]one of these questions have obvious answers, and the employers don't propose any."

The question that most persuasively makes its point does not need a follow-up comment. After noting that applications of Title VII to prohibit sex-segregated employment advertising and various forms of sexual harassment were once unexpected, the opinion simply ends a paragraph by asking, "Would the employers have us undo every one of these unexpected applications too?"[131] Here, the tone has reached its you-must-be-kidding crescendo of confrontation.

Finally, like the *Chiafalo* majority opinion, the *Bostock* majority opinion shifts its tone one last time at the start of its conclusion, where the opinion takes on a less heated, more declaratory tone that connects the ruling to its broader societal and institutional context:

> Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.
>
> But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.[132]

128 *Id.* at 1749.

129 *Id.* at 1750.

130 *Id.* at 1751.

131 *Id.* at 1752.

132 *Id.* at 1754.

6. Conclusion

As the tonal analyses of the *Chiafalo* and *Bostock* opinions demonstrate, authors of majority opinions can draw from a universe of possible tones that extends well beyond the declaratory, exploratory, and authoritative. Even within an opinion, the tone may shift as the text moves from one purpose to another—from describing the issue in context, to detailing the majority's reasoning, to dispatching possible counterarguments, to announcing the ruling.

Paying attention to tones and tonal shifts deepens a reader's understanding of a majority opinion by forcing the reader to consider why the author feels the need to address a particular implied audience in a particular manner at any given point in the text. Advocates, in particular, can benefit from studying tones in opinions because many of the devices that create forceful or persuasive tones in opinions can be adopted in briefs. And, finally, even though a majority opinion speaks for multiple judges or justices, its tone or tones can reveal something of its author's judicial persona—the way in which that particular individual speaks as the court to the society the court serves.