

# Washington University Journal of Law & Policy

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Volume 54

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2017

## Supreme Court Opinions and Audiences

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### Recommended Citation

Ryan C. Black, Ryan J. Owens, Justin Wedeking, and Patrick C. Wohlfarth, *Supreme Court Opinions and Audiences*, 54 WASH. U. J. L. & POL'Y 169 (2017),  
[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol54/iss1/17](https://openscholarship.wustl.edu/law_journal_law_policy/vol54/iss1/17)

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## Supreme Court Opinions and Audiences

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For thousands of years, audiences have influenced how speakers and writers behave. The ancient Greeks often had to mollify their audiences before they could even begin to perform on stage. The Romans delivered the spectacle of gladiators, knowing that their audiences wanted to see battle and victory.<sup>1</sup> Likewise, literary giant Ernest Hemingway famously said: “Show the readers everything, tell them nothing.”<sup>2</sup> Audiences similarly influence today’s speakers and writers. Multi-national corporations, teachers, and even Supreme Court Justices must consider how audiences will react to their decisions.

Supreme Court Justices write opinions to explain their legal conclusions, and these opinions are critiqued, and applied, by various audiences. Unlike members of Congress or the president, Justices write and publish the reasons for their decisions. They explain why one party wins a case and why another loses. Audiences read their opinions for guidance as to what the law permits them to do. They also read them to determine whether the Court’s decisions are well-reasoned. They read them to determine how they can follow them.

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<sup>1</sup> See generally CARLIN A. BARTON, *THE SORROWS OF THE ANCIENT ROMANS: THE GLADIATOR AND THE MONSTER* (1993).

<sup>2</sup> PAULA MUNIER, *PLOT PERFECT. HOW TO BUILD UNFORGETTABLE STORIES SCENE BY SCENE*, *BLUE ASH: WRITERS’S DIGEST* 51 (2014).

And sometimes, they read the Court's opinions to see whether and how they can ignore them.

Justices, like everyone else, have audiences who can influence their decisions. Sometimes the Justices placate their audiences. Sometimes they speak directly to them. Sometimes they try to find ways to get around them. Pushing too far in one direction might provoke backlash among important legal and political audiences. Failing to appreciate the capabilities of other audiences may lead to unrealized goals. Simply put, the audience—its capabilities and desires—should always weigh on Justices' minds.

Our recent book, *U.S. Supreme Court Opinions and Their Audiences*, examines this “audience effect” on the Supreme Court.<sup>3</sup> We wanted to determine whether various audiences might influence how Justices write their opinions. Our central claim is that Justices work with (or around) their audiences instrumentally to achieve their broader goals. The point is worth repeating: we believe Justices write their opinions strategically so as to achieve their goals in the face of audiences who agree and disagree with those goals. We analyzed four primary audiences (while recognizing that there are likely others): lower federal courts, state governments, federal bureaucratic agencies, and the mass public. We discovered that Justices strategically anticipate their audiences when they write majority opinions. They write clearer opinions when doing so will help them to achieve their goals. When they believe their relevant audiences might choose not to comply faithfully with their decisions, they write clearer opinions so as to incentivize compliance (or dissuade noncompliance) by making the detection of noncompliance easy. When they believe their relevant audience might not be able to comply fully with their decisions, they write clearer opinions so as to assist with compliance. And, Justices also write clearer opinions to protect the Court's institutional support. Their opinions, in short, are a function of their goals, conditioned by their audiences'

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<sup>3</sup> *Id.*

2017] Supreme Court Opinions and Audiences 171

characteristics.

In what follows, we begin by briefly describing how we examine the Court's opinions. We focus on opinion clarity and how the clarity (or, readability as we measure it) of an opinion changes as a function of the Court's audiences. Next, we break down how the Court's opinions change based on audiences. We conclude with a brief summary of our findings and a discussion about how personal goals might also influence how judges and Justices behave.

#### OPINION CLARITY

To examine whether the Court's intended audiences influence how Justices write their opinions, we focused on the clarity of the Court's opinions. That is, we examined whether there are conditions that influence how clearly the Justices write their opinions. Do they write clear and easily understandable opinions or do they write unclear and difficult to understand opinions? This is a difficult concept to measure, to be sure. But, we derived a measure based on our theory that Justices will use opinion clarity to enhance compliance with their rulings by assisting external actors with compliance or making the detection of noncompliance easy.

More specifically, to measure the clarity of the Court's opinions we examined rhetorical clarity through text readability. Textual readability is generally defined as the ease with which a layperson can read and understand the superficial language of the Court's opinions. Text readability scores offer "quantitative, objective estimates of the difficulty of reading selected prose." There are dozens of text readability formulas that estimate the readability of a text and these measures were created originally to establish the appropriate reading level for school textbooks. Today, however, people use text readability scores to measure the degree of difficulty in reading a broad array of texts. For example, insurance companies and government agencies are often required by law to employ these measures to enhance the general readability of the documents they generate. As we apply the scores, they measure the difficulty a general reader is likely to encounter when reading a Court opinion.

The readability formulas generate their measures of clarity by examining some combination of the number of words, number of sentences, number of characters, and number of syllables. In numerous studies, these surface characteristics are shown to capture the substantive clarity (or readability) of a text. For our purposes, in choosing a readability formula to estimate the “readability” of a Court opinion, we did not want to pick one or two measures arbitrarily. Rather, we used a combination of twenty-eight different readability measures to capture the commonality of their varied approaches in one measure. Hence, for each opinion we estimated a readability score that encapsulated the many different approaches to measuring textual clarity. Importantly, we then validated our measure by having humans read different segments of opinion text and asked them to rate the clarity of the text. We found a significant correlation between our measure and human’s rating of its readability. This allowed us to use statistical analysis to analyze the conditions under which justices write more or less readable opinions.

#### LOWER FEDERAL COURTS AND OPINION CLARITY

The Supreme Court sits atop the federal judicial hierarchy. Once the Supreme Court resolves a legal question, lower federal courts must apply the Court’s decision. The lower courts are supposed to interpret and apply the Court’s decisions faithfully. Nevertheless, lower court judges often have their own goals—goals that can diverge from those of the Supreme Court. And sometimes they pursue their own goals at the expense of the Supreme Court. As a consequence, Justices know that when they write opinions, lower court judges might try to circumvent them.

So, Justices seek to enhance lower court compliance by writing clearer opinions—especially when they face lower court judges who are ideologically distant from them. But why? How can opinion clarity help enhance compliance and dissuade non-compliance? When the High Court crafts a clear opinion, it accomplishes a few things. First, it makes it easier for friendly judges to follow those decisions faithfully. (Anyone who has ever had to put together a

children’s swing set knows the value of clear instructions.) Second, a clear opinion can constrain unfriendly lower court judges by making it easier for the parties and other interested observers to detect lower court noncompliance. In other words, a clearer opinion helps people to “blow the whistle” on lower courts who circumvent the Supreme Court. The parties can petition the High Court to hear cases involving those wayward courts, and the Court can publicly rebuke the lower courts for their recalcitrance. For example, in *Hutto v. Davis*, the Supreme Court scolded a lower court for “having ignored, consciously or unconsciously, the hierarchy of the federal court system,” stating further: “unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”

We also considered whether Justices write clearer opinions to foster lower court uniformity and to help prevent conflict before it occurs. Justices should write clearer opinions when the federal circuits are more divided ideologically from one another, as lower courts are more likely to conflict with each other when they are heterogeneous. Consistent with our intuitions, we find empirical support for both expectations. That is, Justices are more likely to write clearer opinions when the federal circuits become increasingly distant from the Supreme Court ideologically, and they write clearer opinions when the circuits are more heterogeneous and ideologically scattered. For example, when the average among the circuits moves from very close to the Court to very ideologically distant from the Court, the Justices write opinions that are roughly 0.65 units clearer on the readability scale. Some particular circuits that are highly distant from the Court can generate a readability change that is roughly 0.8 units clearer. And while this may not seem at first glance like a large change, we show in the book that even these changes are indeed noticeable.

#### FEDERAL AGENCIES AND OPINION CLARITY

We next analyzed whether justices write clearer opinions when

they decide cases dealing with federal agencies. Over 22% of the Supreme Court's 1641 decisions during the 1946 through 2012 Court terms involved disputes that originated in federal administrative agencies.<sup>4</sup> Just as lower courts have ways to circumvent High Court decisions, so too do agencies.<sup>5</sup> And sometimes these agencies defy the Court—or at least do as much as they can to skirt the Court's rulings.<sup>6</sup>

Agency characteristics might lead an agency to be more (or less) likely to defy the Court. For example, some agencies are more competent and professional. These agencies, often well-funded, have large staffs and professionalized legal advisors. Other agencies, however, are less competent and professionalized. They have small budgets, can afford to hire only a small staff, and may not even have effective legal advisors. In short, some agencies have the capacity and the motive to shirk High Court rulings.<sup>7</sup>

Knowing this, Justices occasionally will make it more difficult for agencies to shirk or misapply their rulings. They are likely to write clearer opinions when dealing with less competent agencies. Doing so, again, allows the Justices to detect noncompliance more easily, and it makes it harder as a textual matter for the agency to shirk the Court.<sup>8</sup>

Using data from the Program Assessment Rating Tool (PART) created by the Office of Management and Budget (OMB),<sup>9</sup> we were

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<sup>4</sup> To generate this number, we looked to the Supreme Court Database *adminAction* variable. We excluded instances where the administrative agency was established under an interstate compact (*adminAction*=65) and those that involved a state agency (*adminAction*=117) as well as those cases where there was no administrative action preceding the case (*adminAction*=124). Cases included were decided during the 1946 through 2012 Court terms. Data include orally argued signed, and per curiam opinions and judgments of the Court. Data exclude original jurisdiction cases.

<sup>5</sup> James F. Spriggs II, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122 (1996).

<sup>6</sup> *Id.* See also James F. Spriggs II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50(3) POL. RES. Q. 567 (1997).

<sup>7</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3.

<sup>8</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3.

<sup>9</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3 (chapter 5).

able to create an indicator of which agencies appeared to be more or less competent.<sup>10</sup> OMB gave each agency program an overall grade that derived from four component grades. In a series of interviews with different agencies over time, OMB examiners asked agencies four categories of questions:<sup>11</sup>

The purpose and design of specific programs (i.e., whether the program design and purpose was clear and defensible);

The strategic planning that went to the long-term planning of the agency vis-a-vis the program (i.e., whether the agency set long-term goals);

- Program management (i.e., how well the programs were administered and overseen);

The results of the program (i.e., rate the overall performance of goals met).<sup>12</sup>

Interviewers asked their respondents a series of yes or no questions on each of these four dimensions. For example, if a respondent answered “yes” to 5 out of 10 questions in a category, the score for that category would be 50 out of 100.<sup>13</sup> OMB then gave each agency program a score on each of these four dimensions. Then, it generated a weighted score (ranging from 0–100) for each program based on the four scores. Based on this final weighted score, programs received one of four possible ratings from OMB: ineffective (final scores from 0–49), adequate (final scores of 50–69), moderately effective (final scores of 70–84), or effective (final scores of 80–100).<sup>14</sup> We examined the correlation between High Court

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<sup>10</sup> U.S. Off. Mgmt. & Budget, *The Program Assessment Rating Tool (PART)*, EXPECTMORE.GOV, <https://georgewbush-whitehouse.archives.gov/omb/expectmore/part.html> (last visited Apr. 11, 2017).

<sup>11</sup> DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 174 (2008).

<sup>12</sup> *Id.*

<sup>13</sup> See John B. Gilmour & David E. Lewis, *Assessing Performance Budgeting at OMB: The Influence of Politics, Performance, and Program Size*, 16 J. PUB. ADMIN. RES. & THEORY 169, 179 (2005).

<sup>14</sup> *Id.*



opinion clarity and agency competency. The results accord with our expectations. We discovered that Justices write opinions with a view toward an agency's performance record as they issue a ruling contrary to that agency's position. When the Court decides a case against a federal agency, the agency's professionalism strongly predicts opinion clarity. When the Court rejects a highly professional agency, we estimate that its opinion has a readability score of around 1.4, which is the 62nd percentile across all opinions in our data. When the Court rejects a highly *unprofessional* agency, however, the Court writes in a way that is significantly clearer.<sup>15</sup>

#### STATES AND OPINION CLARITY

We also considered how the characteristics of state governments might influence the clarity of the Court's opinions. We focused on state legislative and gubernatorial professionalism. Specifically, we looked at whether Justices might write clearer opinions based on each state legislature's degree of professionalization and each state governor's institutional power rating. For three reasons, citizen legislatures are likely to be more problematic from the Supreme Court's perspective than professional legislatures. First, the literature suggests citizen legislatures contain fewer "quality" members than professional legislatures.<sup>16</sup> It also suggests citizen legislatures are more reliant on interest groups for information.<sup>17</sup> Second, citizen legislatures may be more likely to pass anti-Court legislation than professionalized legislatures.<sup>18</sup> Third, because they are smaller, citizen legislatures are likely to employ fewer "whistleblowers" who

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<sup>15</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3.

<sup>16</sup> See, e.g., Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Re-visited*, 7 ST. POL. & POL'Y Q. 211 (2007); David C. King et al., *The Management Performance of the U.S. States* (KSG Working Paper No. RWP04-028, 2004), <http://ssrn.com/abstract=571821> or <http://dx.doi.org/10.2139/ssrn.571821>.

<sup>17</sup> Michael B. Berkman, *Legislative Professionalism and the Demand for Groups: The Institutional Context of Interest Population Density*, 26 LEGIS. STUD. Q. 661 (2001).

<sup>18</sup> William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483 (2002). The states that attacked the Warren Court, as identified in the study, had less professionalized legislatures overall.

will stand up to, or point out, a state's obstruction to High Court decisions.<sup>19</sup>

Once again, the results for state legislative professionalism support our hypothesis. We discovered that the Court writes increasingly readable opinions when it rules in cases dealing with less professionalized state legislatures (we find no effects for the role of governors' institutional powers). What is more, these effects are enhanced when the state government is controlled by the same party.<sup>20</sup> In other words, when the state has both institutional limitations and political ability to fail to comply with the Court, Justices write clearer opinions. Doing so helps them, yet again, keep tabs on potentially wayward actors.

#### THE PUBLIC AND OPINION CLARITY

Do Justices change the clarity of their opinions when they face a public that is hostile to their general ideological tendencies? Though the general public is surely not as direct and immediate as the other audiences we considered, the public holds the key to the Court's legitimacy. A public that supports the Court lends it legitimacy.

Justices are likely to follow—or at least pay attention to—public opinion for two reasons. First, even though the Justices are not linked to the public through election, those who implement the Court's decisions are subject to elections. Justices who want to see policies effectuated must contemplate just how faithful the elected implementors will be. Those who are charged with implementing may not want to do so when dealing with a decision strongly contrary to public opinion. Second, the Court's legitimacy serves as the foundation of its support. As Justice Frankfurter once claimed: “The Court's authority . . . rests on sustained public confidence in its moral sanction.”<sup>21</sup> A consistent pattern of shirking public opinion, though,

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<sup>19</sup> See generally James E. Alt & David Dreyer Lassen, *The Political Economy of Institutions and Corruption in American States*, 15 J. THEORETICAL POL. 341 (2003).

<sup>20</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3.

<sup>21</sup> *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

could damage the Court's legitimacy."<sup>22</sup> Members of the public may respond negatively to Court decisions they dislike. Given that the Court's power ultimately comes from its legitimacy—and that sustained negative news and unpopular decisions can erode public support for the Court<sup>23</sup>—ustices should avoid calling that legitimacy into question. A Court that consistently rules against the public will surely see opposition grow. Knowing this, Justices are likely to want to dull the edge of decisions where they rule against public opinion.<sup>24</sup>

In several studies,<sup>25</sup> we examined this dynamic in two different ways. First, we identified polls that match public opinion to individual Supreme Court cases.<sup>26</sup> That is, we used individual polls addressing issues featured in Supreme Court cases (before the Court decided them), and then determined whether the Court ruled for, or against, prevailing public sentiment on the issue. We then examined whether opinion clarity differed in counter-majoritarian decisions compared to those that conformed to prevailing popular sentiment. We discovered that when the Court ruled against the position a majority of Americans supported, it wrote a significantly clearer opinion. Doing so allows Justices to explain their position to the public—to tell the public why they ruled the way they did. For example, when the Court decides a case inconsistent with public opinion in a specific case, its opinion readability score is almost two units clearer than when it rules consistent with public opinion. As we state in the book, this is roughly the difference between an opinion in the 40th percentile (consistent with public opinion) and the 57th

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<sup>22</sup> Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80(4) AM. POL. SCI. REV. 1209 (1986).

<sup>23</sup> Robert H. Durr, Andrew D. Martin & Christina Wolbrecht, *Ideological Divergence and Public Support for the Supreme Court*, 44(4) AM. J. POL. SCI. 768 (2000).

<sup>24</sup> Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55(1) AM. J. POL. SCI. 74 (2011).

<sup>25</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3; Ryan C. Black et al., *The Influence of Public Sentiment on Supreme Court Opinion Clarity*, 50 L. & SOC'Y REV. 703 (2016).

<sup>26</sup> THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE REHNQUIST COURT* (2008).

percentile (inconsistent with public opinion) in terms of readability.<sup>27</sup>

Second, we looked at the mass public's general ideological mood—aggregate shifts in public opinion for or against “more” government—when the Court handed down its opinions and how that general mood predicted the average, term level clarity over time (with separate analyses for liberal and conservative Court opinions). If the public was generally liberal (conservative) but the Court ruled conservatively (liberally), its opinions were, again, clearer on average over time.

#### COMPLIANCE AS A FUNCTION OF CLARITY

Lastly, we test the major implication of our argument about whether opinion clarity can, in fact, enhance compliance. Specifically, we look at lower court compliance, using data from Shepard's citations on how lower courts treat Supreme Court opinions.<sup>28</sup> We examine whether the lower courts treated the Supreme Court's opinion positively, negatively, or neutrally, an approach now standard in compliance studies. Using our measure of opinion clarity, and after controlling for a wide assortment of other factors that might also influence compliance (for example, the size of the majority coalition, ideological differences between the lower court and Supreme Court, case complexity, etc.) we find that when Justices write opinions that are more readable, then lower courts treat that opinion more positively (or less negatively). This confirms a strong link between opinion clarity and compliance.<sup>29</sup>

#### DISCUSSION

In our book, we examined just one important dimension—opinion clarity—to show how Justices deal instrumentally with audiences.<sup>30</sup>

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<sup>27</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3.

<sup>28</sup> See *Shepard's Citation Services*, LEXISNEXIS, <https://www.lexisnexis.com/en-us/products/shepards.page>.

<sup>29</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3.

<sup>30</sup> BLACK ET AL., *supra* note **Error! Bookmark not defined.**3.

That is, we claim that Justices have goals and work with (or around) their audiences to achieve those goals by altering the clarity of their opinions. And the results accord with our expectations. Yet, that is not the end of it. Not by far. Justices have other means of modifying opinion language to address audience considerations. For example, Justices can adjust the amount of negative rhetoric in their opinions. In addition, Justices also have personal audiences that might influence Justices' behavior. In his influential book, *Judges and Their Audiences*, Larry Baum focused on how personal audiences could influence judges' behavior.<sup>31</sup> He asked a number of questions: Would judges who value the esteem of lawyers change their behavior when the lawyerly class opposed overturning a precedent? Would judges who value the respect of interest groups render more conservative or liberal decisions than they otherwise might in order to retain those groups' support? Would judges who value professional advancement change their behavior so as to get elevated?<sup>32</sup> These questions are all important and deserving of attention. We did not examine them empirically in our book, but we suggest that others do. Doing so will help us to develop more realistic conceptions of judicial behavior.

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<sup>31</sup> LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

<sup>32</sup> *Id.*

Document7

12/22/2017

2017]

Supreme Court Opinions and Audiences

181