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978-1-107-13714-1 - U.S. Supreme Court Opinions and their Audiences

Ryan C. Black, Ryan J. Owens, Justin Wedeking and Patrick C. Wohlfarth

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Introduction

In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the U.S. Supreme Court found itself embroiled in another desegregation dispute, this time over school busing. Nearly two decades earlier, in *Brown v. Board of Education* (1954), the Court prohibited segregation in public schools. Yet, racial integration still eluded much of the country's schools, partly because whites and blacks lived apart from one another. Federal judges and local school boards struggled (and evaded) for almost two decades to determine whether federal law compelled or even allowed school busing to achieve racial integration. After years of dodging the issue, the Supreme Court would finally decide whether court-ordered busing was constitutionally permissible. It was a case fraught with difficulties.

Since *Swann* would likely determine the extent of federal authority over state governments, it was poised to divide observers along racial and political lines. For some, allowing federal courts to force schools to bus students in an effort to achieve racial balance would be viewed as another High Court affront to states. Resistance threatened to expose the Court's institutional limitations. Indeed, earlier in the case's history, district court Judge James McMillan was hanged in effigy after he ordered the busing of more than 10,000 black students from inner-city schools to outlying white schools – and ordered some white students to be bused into the black inner-city schools. He received death threats. Crowds demonstrated at the courthouse, and politicians denounced his decision (Schwartz 1986, 21). Put plainly, opponents of a pro-busing decision would (and did) resist ferociously. So, if the Court wanted to allow busing, it would have to write a specially crafted opinion, and the justices knew it.

Not surprisingly, the fur began to fly after Chief Justice Burger circulated his draft majority opinion to his colleagues. Justices made numerous changes to Burger's draft opinions, all in an effort to make the final opinion clearer, with the hope that enhanced clarity would generate enhanced compliance. This endeavor was made more complicated because unlike the other justices in the majority, Burger did not fully support school

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busing. In response to some of Burger's language that sounded sympathetic to segregationists, Justice Brennan admonished Burger and the states' insignificant efforts. He demanded that the language of the Court's opinion not make them sound heroic and thereby indirectly validate them. He stated:

We deal here with boards that were antagonistic to *Brown* from the outset and have been noteworthy for their ingenuity in finding ways to circumvent *Brown's* command, not to comply with it . . . I think any tone of sympathy with local boards having to grapple with problems of their own making can only encourage more intransigence . . . we might court a revival of opposition if we provide slogans around which die-hards might rally

(Wahlbeck, Spriggs, and Maltzman 2009).

Brennan further noted the importance of staying the course and using clear and correct language in light of some nascent southern sympathy toward desegregation:

For me, *the matter of approach* has assumed major significance in light of signs that opposition to *Brown* may at long last be crumbling in the South. The recent inaugural addresses of the new Governors of Georgia and South Carolina, and at least some of the newspaper surveys reported in the last month give concrete encouragement that this may be the case . . . I nevertheless suggest that *our opinion should avoid saying anything that might be seized upon as an excuse to arrest the trend. Some things said in your third circulation seem to me to present that hazard*

(Wahlbeck, Spriggs, and Maltzman 2009) (Emphasis supplied).

As Brennan's comments highlight, Supreme Court justices care deeply about how their "audiences" will respond to their opinions – and with good reason. By constitutional design, justices rely on lower court judges to interpret their opinions, on executive and state officials to implement them, and on the general public to support them and the Court. Brennan knew this, of course, which is why he pushed Burger for clearer language that could limit noncompliance and strengthen the Court's decision. He understood the language of the Court's opinion is linked to compliance with its decisions – and often its institutional support – and that the Court might benefit from tailoring opinion clarity to its audience.

1.1 Audiences and the Supreme Court

Those responding to the Supreme Court's decisions – its audiences – have the ability to circumvent the Court's policies. Whether it is within the

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judicial hierarchy, in the administrative and regulatory apparatus of the federal government, across often politically diverse state governments, or among various groups or individuals in the general public, the Supreme Court's audiences can block or escape the Court's policies. Supreme Court decisions do not mark the beginning of the end for most legal controversies but, rather, the end of the beginning. Rarely does the Court have the last say or take the last action in a case. Instead, others must implement or apply its policies. And these actors can obstruct the Court. The question justices routinely face is: do I seek out my own goals without regard to the responses of my audiences, or do I try to anticipate and manage audience-based obstacles? We believe it is the latter.

The central effort of this book is to examine whether justices modify the clarity of their opinions to enhance compliance with their decisions and to manage support for the Court.

Of course, we are not the first to suggest audiences can influence how judges and justices behave – though we are the first to examine systematically how justices change the clarity of their opinions because of those audiences. In 2006, Baum published a book called *Judges and Their Audiences: A Perspective on Judicial Behavior*. Baum's argument was that judges and justices might alter their behavior for a number of reasons, chief of which were personal or instrumental.

On the personal level, some judges, he argued, might cast votes or take positions so as to improve their reputations and to maintain favor with key groups. For example, some justices appear to value the support of legal academics, and might therefore pay attention to the views of legal academia when deciding cases. Other justices have strong ties to philosophical groups like the ACLU or the Federalist Society and might behave so as to protect or enhance those relationships.

Additionally, and in line with the argument we propose in this book, Baum argued judges and justices might pay attention to their audiences for *instrumental* reasons. By currying favor with key audiences – or, less skeptically, by not offending them – judges are less likely to lose legitimacy. And when they maintain judicial legitimacy, judges maintain their own power. Accordingly, by anticipating audiences' responses, judges can protect their institutions and their power to make legal policy. Baum's ideas have spread. Ginsburg and Garoupa (2009) distinguish not only between individual and collective viewpoints, but also between internal versus external audiences. As they note, “[b]y internal, we mean audiences within the judiciary itself; by external, we mean audiences such as lawyers,

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the media or the general public” (Ginsburg and Garoupa 2009, 453). As they later explain (2009, 458–489):

External incentives come from outside of the judiciary, reflecting the views of society or public opinion in general, but also the interests of the particular relevant constituencies with power over the courts. These constituencies might include the bar, academic commentators, other branches of government, as well as political parties and others, depending on the institutional environment of courts. How the judges respond to these external constituencies, individually and collectively, shapes the social and political influence of the judiciary as a whole.

We build upon this foundation of thought. We argue the Supreme Court wants to enhance compliance with its decisions and manage public support for the Court. Accomplishing those goals depends upon the behavior of actors within the judiciary and those external to it. That is, it depends on the Court’s audiences.

In the next chapter, we provide more justification for our theoretical argument, but here we offer some brief foreshadowing to extoll the theory’s plausibility. Consider the following comment by Justice Thomas. Thomas was asked why he wrote short and seemingly simple opinions. His response?

There are simple ways to put important things in language that’s accessible . . . [t]he editing we do is for clarity and simplicity without losing meaning . . . We’re not there to win a literary award. We’re there to write opinions that some busy person or somebody at their kitchen table can read and say, I don’t agree with a word he said, but I understand what he said

(Friedersdorf 2013).

Clearly, Thomas believes opinion clarity has consequences. And he is not alone. Justice Powell’s office manual to his law clerks stated:

Although all work for the Court is important, the substance and form of Court opinions have first priority with Justice Powell

(Wahlbeck, Spriggs and Sigelman 2002, 175).

The link between opinion clarity and the Court’s audiences is important because opinion language will influence how audiences comply with and respond to Supreme Court decisions. Thinking back to *Brown* and the phrase that schools should desegregate “with all deliberate speed” provides an easy example of how a lack of clarity corresponds with diminished compliance. Without knowing what “all deliberate speed”

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meant, it was difficult to tell whether courts and implementers met the Court's goals.

Murphy (1964) agrees with respect to the importance of opinion clarity. Clear opinions are among the conditions he says are necessary for the Court to make efficacious policy: "The first condition is an unambiguous commitment to a policy, an unambiguous commitment unambiguously stated" (93). This point becomes even more important when viewed from Murphy's framework that emphasized the Court's *outputs* and their *impacts* "may in turn generate *feedbacks* into the judicial process, creating fresh *demands* or altering old ones ..." (Murphy 1964, 35).¹ Similarly, Wheeler (2006) cites a lengthy list of legal scholars who have argued for the importance of clarity, and adds: "the clarity of a judicial opinion and the manner in which it is communicated can have an important effect on those responsible for implementing that opinion" (1187). Wheeler examines the well-known case, *INS v. Chadha* (1983), which deals with the constitutionality of the legislative veto, and asks a very basic question: did opinion clarity influence the implementation (or lack thereof) in *Chadha*? Through his in-depth case study, Wheeler highlights that while the opinion was clear in the sense that the legislative veto was unconstitutional, the opinion was far less clear on other crucial aspects (such as the severability issues) that were important for lower courts to know. In other words, this case illustrates the important policy consequences that a lack of opinion clarity can have. At the same time, it emphasizes how opinion clarity can be an important tool to manage audience concerns. While we go into greater detail about how and why the Court adapts to its audiences in later chapters, the bottom line is this: *if the Court wants to maximize the impact of its decisions, it must adapt to its audiences*. And one way it can adapt is to modify the clarity of its opinions in the process.

So, who are these audiences to whom the Court must adapt? Perhaps the most well-known classification of the Court's various audiences comes from Canon and Johnson (1999), who categorize the Court's audiences into four groups – the interpreting audience, the implementing audience, the consumer audience, and the secondary audience. Though we do not hew precisely to their categories in this book, we find their four groups

¹ Though, it should be noted Murphy also acknowledges when an opinion writer is sure about the goal but uncertain about the best means of achieving it, vagueness can be valued if it provides implementers discretion that provides the Court an empirical choice at a later date (93).

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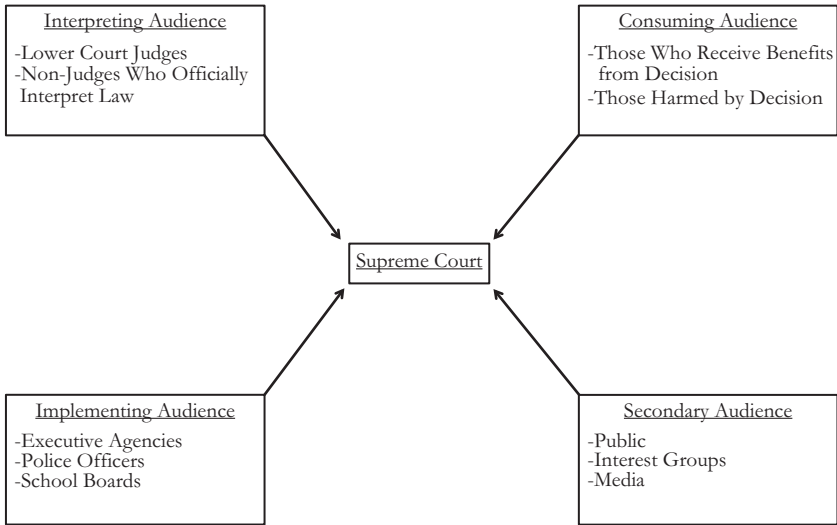


Figure 1.1: Audiences that can constrain the U.S. Supreme Court (Canon and Johnson 1999).

useful in a broad presentational sense.² Figure 1.1 displays Canon and Johnson's four groups.

Interpreting audience. The interpreting audience includes those who interpret and apply Supreme Court decisions – a group Canon and Johnson (1999) argue consists almost entirely of lower court judges. There are 13 circuit courts of appeals and 94 federal judicial districts (each with at least one district judge), comprising a total of 865 Article III judges.³ Each of these judges interprets and applies Supreme Court precedent. In addition, there are a number of Article I courts that apply Supreme Court precedent. The states and territories also have courts that apply U.S. Supreme Court precedent.

Not surprisingly, the Court's interpreting audience is busy. A simple glance at caseload data confirms the importance and activity of the lower courts. During the Supreme Court's 2012 term (which ran from October

² Our hesitancy stems from the fact that there is considerable overlap among the four groups, where implementing audiences can be the same as interpreting audiences who can also be part of the consumer audience. For example, school boards in the *Swann* case are part of all three categories.

³ Data from www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx. Data current as of September 29, 2014.

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2012 – October 2013), the High Court decided 74 cases.⁴ In the 12 months preceding March 31, 2013, however, the federal circuit courts terminated just under 60,000 cases. And, the federal district courts terminated roughly 350,000 cases.⁵ State court dockets, combined, dwarf these numbers. So, while the Supreme Court renders significant decisions, it is predominantly the lower courts who then interpret and apply them to new situations.

This interpreting audience can evade the Court's decisions. Given the sheer number of cases they decide, lower court judges have many opportunities to circumvent Court policies. And they sometimes do (see, e.g., Dolbeare and Hammond 1971; Milner 1971; Peltason 1971).⁶ Consider Judge Stephen Reinhardt, a liberal judge on the Ninth Circuit Court of Appeals, who once stated lower court judges should not change their views "in order to please the Supreme Court" (*cited in* Cross 2005, 379). He claims to "follow the law the way it used to be, before the [conservative] Supreme Court began rolling back a lot of people's rights" (Carlsen 1996; *cited in* Baum 2006). Other judges have made similar comments. One judge remarked: "We follow [Supreme Court rulings] when we can't get around them" (Baum 1978, 212). And, District Court Judge Brevard Hart once wrote an opinion stating: "This Court's independent review of the relevant historical documents ... convinces it that the U.S. Supreme Court has erred in its reading of history" (Caminker 1994*b*, 819).⁷ Hart went on to ignore the Supreme Court's Establishment Clause precedents.⁸

Lower court judges have numerous ways to limit, or, "underrule" (Paulsen 1990) Supreme Court decisions (Murphy 1959). For example, judges can ignore the Court's decisions and cite one of their own instead (Manwaring, Reich, and Wasby 1972). They can criticize or question the Court's opinion in an effort to weaken that decision's perceived authority (Tarr 1977). They can distinguish the Court's previous decisions by

⁴ These are signed opinions and per curiam opinions with oral argument.

⁵ Data come from Tables B-1, C-1, and D-1 of the Federal Judicial Caseload Statistics, which are available at: www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx.

⁶ To be sure, while lower court judges often comply (e.g., Benesh 2002*b*; Benesh and Reddick 2002; Wahlbeck 1998; Songer and Sheehan 1990; Baum 1980; Gruhl 1980), their compliance is not guaranteed.

⁷ See *Jaffree v. Board of School Commissioners*, 545 F. Supp. 1104, 1128 (S.D. AL 1983).

⁸ See also *Stell v. Savannah-Chatham County Board of Education*, 220 F. Supp. 667 (S.D. GA 1963)(finding that social science data undercut *Brown v. Board's* factual findings).

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claiming a particular decision does not apply because the facts are too different from the case currently before them. In a similar capacity, they can simply interpret the Supreme Court decision narrowly by stating the holding only applies in limited situations. And, not to be ignored, lower court judges can dismiss cases on procedural grounds rather than apply the Court's decisions at all. In short, lower court judges frequently interpret Supreme Court policies and have the opportunity to use their discretion to evade those policies. Justices, if they want to effectuate their goals, may need to adapt in anticipation of judges' likely responses to their decisions.

Implementing audience. Next, the implementing audience consists of the authorities who actually execute the Court's decisions. As Canon and Johnson (1999) state: "implementors apply the system's rules to persons subject to their authority" (19). For example, when the Court holds a practice in public schools is unconstitutional, local school boards, administration, and state education departments implement new policies to accommodate the decision. When the Court holds searches or seizures violate the Fourth Amendment to the U.S. Constitution, law enforcement officials must implement the decision. And, when the Court holds the federal government has (or does not have) certain specified regulatory powers, the executive branch, through administrative agencies, implements the decision.

Implementors, like interpreters, can use their discretion to advance or frustrate the Court's decisions. They, too, can evade a decision by finding the Court's policy irrelevant to the circumstances at hand. One study, focusing specifically on implementation after *Adarand Constructors, Inc. v. Peña* (1995) (limiting the power of federal agencies to use racial preferences in federal contracts), found little agency compliance (Gao 2012, 4). Another study found newer federal agencies, and those dedicated to certain programmatic dynamics, are less likely to implement Supreme Court policies faithfully (Spriggs 1996). Mountains of books on desegregation highlight how some school boards and education officials refused to implement the Court's decision in *Brown*. The take-home point from these studies and others we will discuss later is that implementers can obstruct justices' goals. So justices must adapt.

Consuming audience. The consuming audience consists of those who will receive benefits or suffer injuries because of the Court's decision (Canon and Johnson 1999, 20). For example, in a taxpayer suit against the federal government, the taxpayer involved in the dispute, all taxpayers similarly situated, and the federal government would be the consuming

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audiences. In a labor dispute case, the consuming audience would be employees, unions, employers, and possibly stockholders. And in an abortion case, the consuming audience would include, at a minimum, the unborn baby and the mother.

A common example of how the consumer audience can hinder the Court from achieving its policy goals is, again, the issue of school desegregation. While *Brown* had the goal of integrating schools, in many places desegregation did not occur because of “white flight” (whites leaving public schools for private or suburban schools). While this effect was more immediate in parts of southern states, white flight occurred in many places. For example, whereas in 1973, 55% of school children in the Boston public schools were white, that number plummeted to 13% by 2009 (Monahan and Walker 2009, 218).⁹

Secondary audience. Finally, the secondary audience refers to the general public (Canon and Johnson 1999). The public stands in a position to assist the Court by supporting its decisions or, alternatively, opposing them and the Court. The Court relies on public support to maintain its institutional legitimacy (Gibson, Caldeira, and Baird 1998). As Alexander Hamilton (1788) noted, the Court has “no influence over either the sword or the purse” and must instead rely on public respect for its opinions to have any force. Public support can provide the Court with considerable power to stand up to elected officials when necessary. Conversely, public opposition and diminished legitimacy can limit its power.¹⁰

Prevailing empirical evidence supports our theoretical claim and shows public opinion is an obstacle that can influence justices’ decision making. For example, Casillas, Enns, and Wohlfarth (2011) find public opinion can directly influence justices’ decisions. Knowing the Court lacks formal institutional power to coerce compliance with its decisions, justices seek to avoid widespread negative scrutiny and public opposition that could undermine the Court’s legitimacy and jeopardize subsequent implementation. McGuire and Stimson (2004) also discover justices are highly responsive to changes in public mood. Flemming, Bohte, and Wood (1997) find a strong link between justices and public mood (see also, Enns and Wohlfarth 2013; Flemming and Wood 1997; Giles, Blackstone, and Vining 2008; Mishler and Sheehan 1993, 1994; Stimson,

⁹ We do not examine the consuming audience in this book because they are so varied. It would be nigh impossible to make generalizations about them.

¹⁰ See, e.g., *Ex Parte McCordle* (1869) (where the post-*Dred Scott* Court lost legitimacy and conceded Congress could strip the Court of jurisdiction).

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Mackuen, and Erikson 1995). Indeed, as Hall (2014) notes, the popularity of the Court's decision is an important component for the Court's ability to enact social change.

In summary, the Court faces various audiences that can obstruct its policies. Lower court judges can use their discretion to evade High Court rulings. Implementers can dig in their heels to circumvent the Court's decisions. And the public's reaction to Court decisions can influence judicial legitimacy and power. Accordingly, if justices want to effectuate their goals – and we have every reason to believe they do – they must adapt to these audiences and manage the constraints they present.

The question, though, is *how* can justices navigate those potential obstacles? How can they best achieve their goals in the face of actors who can circumvent them? Our answer is simple: they anticipate and manage those obstacles *by writing clear opinions*.

1.2 Overcoming audience-based obstacles using opinion clarity

Clear opinions can help justices achieve their goals for four primary reasons, all of which we discuss more extensively in the next chapter. We point to Figure 1.2 as a useful way to understand the four primary reasons we discuss. It contains two main components – enhancing compliance and managing legitimacy. First, as Figure 1.2 shows, opinion clarity can *remove discretion* from actors opposed to the Court's decision. For example, when the Court renders a clear decision, a lower court judge's ability to evade it decreases. This was a key finding of Romans (1974) in his study on compliance with the Supreme Court's criminal procedure cases. Only after the Court's "clear and to the point" decision in *Miranda v. Arizona* (1966) did lower courts come around to accept the holding of *Escobedo v. Illinois* (1964) (criminal suspects have a right to counsel during police interrogations) (Romans 1974, 51). By writing a clear opinion, the Court removes ambiguity opponents can manipulate to evade it.

Second, opinion clarity can help whistle-blowers *monitor* and report on the behavior of actors who defy the Court (Cross and Tiller 1998). Literature suggests justices – and actors who are friendly to them – may have an easier time monitoring whether actors comply with their decisions when the decisions themselves are clear. For example, Staton and Vanberg (2008, 507) argue: "[t]he more clearly an opinion states the policy implications of the decision, the easier it is to verify whether policy makers have faithfully complied, making it more likely that external actors