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## The Changing Discourse of the Supreme Court

Stephen M. Johnson  
*Mercer Law School*

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# The Changing Discourse of the Supreme Court

STEPHEN M. JOHNSON\*

## CONTENTS

INTRODUCTION.....	29
I. THE CRITICISMS .....	31
II. THE PURPOSES OF, AND AUDIENCES FOR, SUPREME COURT OPINIONS.....	39
A. Impact on the General Public as an Audience.....	43
B. Impact on Other Professional Audiences.....	45
III. PREVIOUS READABILITY STUDIES .....	47
A. Owens and Wedeking Study.....	51
B. Long and Christensen Study .....	53
C. Law and Zaring Study.....	54
IV. COMPARING THE OPINIONS OF THE 1931-1933 TERMS AND THE 2009-2011 TERMS .....	55
A. Purpose .....	55
B. Methodology.....	56
C. Findings .....	57
1. Readability and Length.....	57
2. Nature of the Issues v. Nature of the Court .....	59
3. Readability of Opinions by Opinion Type and Justice .....	64
CONCLUSION .....	66

## INTRODUCTION

Academics, judges, and other commentators complain that, for the past few decades, the Justices on the Supreme Court have been increasingly writing opinions that are unreadable for most American citizens.<sup>1</sup> Those critics complain that the opinions are too long and too complex, riddled with incomprehensible multi-part tests.<sup>2</sup> They also attack the style of the opinions

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\* Walter F. George Professor of Law, Mercer Law School. B.S., J.D. Villanova University, LL.M. George Washington University School of Law. Edward Cochran and Yane Park provided valuable assistance in collecting, cataloguing, and analyzing the data for this Article.

1. See, e.g., Erwin Chemerinsky, *A Failure to Communicate*, 2012 BYU L. REV. 1705 (2012); Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649 (2012); Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part 1: Back to the Future from the Roberts Court to Learned Hand – Context and Congruence*, 12 BARRY L. REV. 53 (2009).

2. See, e.g., Daniel A. Farber, *Missing the “Play of Intelligence,”* 36 WM. & MARY L.

and assert that recent opinions are more likely to be written in a technocratic, rather than persuasive, style.<sup>3</sup>

There seems to be little consensus among the critics regarding why the Justices are writing opinions that are increasingly unreadable. Some attribute it to the increasing complexity of issues that the Court is considering.<sup>4</sup> Others suggest that the shift could be attributable to the lack of trial court experience among Justices.<sup>5</sup> Some also speculate that a greater reliance on law clerks might be fueling a shift.<sup>6</sup>

Regardless of the reason for the shift, if such a shift is truly occurring, it could have important repercussions, depending on how one views the purposes of the Supreme Court's opinions and the audiences to whom they are directed. If, as some academics assert, Supreme Court opinions are directed, at least in part, toward the public<sup>7</sup> and are designed, at least in part, to advise the public about legal rights and responsibilities and to build public confidence in the rule of law by demonstrating a rational and transparent decision-making process,<sup>8</sup> then unreadable Supreme Court opinions undermine those goals. If, however, Supreme Court opinions are simply directed to the parties before the court, other courts and agencies, lawyers, and law students,<sup>9</sup> the shift is less problematic.

In response to the criticisms, a few academics have conducted empirical research to determine whether certain opinions of the Supreme Court, and other courts, are more readable than other opinions.<sup>10</sup> The authors of those studies have also attempted to identify factors that might influence the

REV. 147 (1994); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

3. See Farber, *supra* note 2, at 152; Schauer, *supra* note 2, at 1455.

4. See Abner Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1359–63 (1988).

5. See Van Detta, *supra* note 1, at 54.

6. See Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 20–21 (2009); Mikva, *supra* note 4, at 1366; Nagel, *supra* note 2, at 178; Richard Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1423–25 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1383–84 (1995).

7. See Chemerinsky, *supra* note 1, at 1707; Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 LAW & SOC'Y REV. 1027, 1030 (2011); Serota, *supra* note 1, at 651–52; Ryan Benjamin Witte, *The Judge as Author/The Author as Judge*, 40 GOLDEN GATE U. L. REV. 37, 40 (2009).

8. See Aldisert, Rasch & Bartlett, *supra* note 6, at 5–6; Chemerinsky, *supra* note 1, at 1706; Serota, *supra* note 1, at 649–55; Wald, *supra* note 6, at 1372.

9. See Aldisert, Rasch & Bartlett, *supra* note 6, at 16; Witte, *supra* note 7, at 39; Chemerinsky, *supra* note 1, at 1706–08; Mikva, *supra* note 4, at 1364–65; Serota, *supra* note 1, at 651; Witte, *supra* note 7, at 39.

10. See, e.g., Lance N. Long & William F. Christensen, *Practice Note: Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?*, 12 J. APP. PRAC. & PROCESS 145 (2011); Owens & Wedeking, *supra* note 7, at 1028.

readability of an opinion, including (1) whether the opinion is a majority or dissenting opinion; (2) the number of Justices joining the opinion; (3) the ideology of the Justice authoring the opinion; and (4) the subject matter of the underlying dispute.<sup>11</sup>

None of the studies, however, have examined whether the Court's opinions have, in general, become less readable over time, as many critics assert. Consequently, this Article compares the readability of the opinions issued by the Supreme Court in the 1931, 1932, and 1933 terms to the opinions issued by the Court in the 2009, 2010, and 2011 terms. Since some commentators have suggested that the obfuscation of Supreme Court opinions is related to the increasing complexity of issues that the Court is addressing, it seemed logical to compare the readability of the Court's opinions from the 1930's, at a time before the explosion of federal legislation and federal administrative programs during the New Deal, to the modern opinions. In addition to exploring whether the Court's opinions have become less readable, this Article also examines whether factors identified in other studies, such as the opinion type or the subject matter in dispute, correlate to the readability of the Court's opinions, either in the 1930's or today, and whether that has changed over time.

Part I outlines the criticisms that have been leveled at the Supreme Court's opinions and some of the possible reasons for the obfuscation of the opinions. Part II explores the purposes of, and intended audiences for, Supreme Court opinions and considers whether it really matters whether the Court's opinions are readable to the American public. Part III reviews the other empirical studies that have focused on the readability of judicial opinions, and describes the Flesch-Kincaid readability analysis that was used in many of those studies. Finally, Part IV outlines the methodology for, and findings of, the study that forms the basis for this Article, comparing the readability of the Court's opinions in the 1931-1933 terms to the modern opinions.

## I. THE CRITICISMS

In a recent article, Professor Michael Serota lamented that, "while the [Supreme] Court's opinions constitute the rule of law, governing a wide array of both public and private affairs, the average American is likely to find them utterly incomprehensible."<sup>12</sup> His complaint has been echoed by numerous judges, journalists, and academics who complain that the Court's

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11. See, e.g., Owens & Wedeking, *supra* note 7.

12. Serota, *supra* note 1, at 649; see also Chemerinsky, *supra* note 1, at 1705 (lamenting the Court's "serious failure in communicating with the American public").

opinions are becoming unnecessarily complex and confusing.<sup>13</sup> Critics also complain that the opinions are dull, and are written in the style of complex legislation or regulation.<sup>14</sup> Regarding a passage in the Supreme Court's opinion in *United States National Bank of Oregon v. Independent Insurance Agents of North America*,<sup>15</sup> Professor Daniel Farber writes, "[t]he tone of this passage is unhappily reminiscent of a software manual or the inscrutable instructions accompanying an IRS tax form."<sup>16</sup>

In addition, commentators have directed significant venom at the Court's frequent use of multi-part tests.<sup>17</sup> Some critics complain that the Court is improperly legislating when it establishes such tests.<sup>18</sup> Others complain that the tests are misleading, because they suggest that there is a degree of certainty and uniformity in the law that is not there when courts ultimately apply the tests.<sup>19</sup> Most of the critics agree, though, that the multi-part tests are generally complex and confusing, contributing significantly to the obfuscation of the modern Supreme Court opinion.<sup>20</sup>

Further, critics complain that the Court's opinions are becoming too long.<sup>21</sup> Indeed, in the 2009 term, the median length of the Court's majority opinions and overall opinions were the longest in its history.<sup>22</sup> The median length of the opinions in that term was 8,265 words, compared to about 2,000 words in the 1950s.<sup>23</sup> Professor Farber has argued that the increase in length

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13. See Serota, *supra* note 1, at 657–58; see also Van Detta, *supra* note 1, at 54. Critics also complain that the opinions provide little guidance for lower courts. See Adam Liptak, *Justices are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1.

14. See Schauer, *supra* note 2, at 1455.

15. 508 U.S. 439 (1993).

16. Farber, *supra* note 2, at 152.

17. See Farber, *supra* note 2, at 155; Nagel, *supra* note 2, at 165; Schauer, *supra* note 2, at 1456–57.

18. See Schauer, *supra* note 2, at 1457–58. As Schauer suggests, when the Court creates such tests, it is “not only usurping the power of a majoritarian body, but also taking on a task better performed by different institutions with different structures.” *Id.*

19. See Schauer, *supra* note 2, at 1458. As Schauer writes, the identification of multi-part tests “is designed to suggest (erroneously) that judicial decision making is a largely mechanical task more determinate and less soaked with policy and political discretion than is actually the case. By writing in heavily formal prose, . . . courts mask the human element and the consequent variability in the conclusions they reach.” *Id.*

20. See Farber, *supra* note 2, at 155.

21. See Serota, *supra* note 1, at 657–58; see also Aldisert, Rasch & Bartlett, *supra* note 6, at 21; Chemerinsky, *supra* note 1, at 1713; Mikva, *supra* note 4, at 1358–63; Schauer, *supra* note 2, at 1459–60.

22. See Debra Cassens Weiss, *U.S. Supreme Court Sets Record for Longest Opinions Ever*, A.B.A. J. (Nov. 19, 2010, 5:30 AM) [http://www.abajournal.com/news/article/u.s.\\_supreme\\_court\\_sets\\_record\\_for\\_longest\\_opinions\\_ever/](http://www.abajournal.com/news/article/u.s._supreme_court_sets_record_for_longest_opinions_ever/).

23. *Id.* An increase in the length of the Court's opinions was described almost two decades earlier by Professor Frederick Schauer, who noted that the Court had not decreased the number of pages in the United States Reports devoted to opinions from the mid-1980s

of the Court's opinions over the last several decades is caused by "a tendency to prove laboriously the obvious" and to include "labored explanation of material that, in the end, turns out to lead nowhere."<sup>24</sup> He is not alone in criticizing the Court's predilection to ramble and include superfluous background material in opinions.<sup>25</sup> Another factor that he and others assert contributes to the increase in the length of opinions is an obsession on the Court with footnoting and endless string citations.<sup>26</sup>

Finally, many academics, judges, and journalists criticize the Court for adopting a technocratic, rather than persuasive, style and tone in its modern opinions.<sup>27</sup> Professor Frederick Schauer describes the modern Supreme Court opinion as "devoid of anything even remotely resembling literary style."<sup>28</sup> This criticism is, perhaps, the most distressing because the form of an opinion is as important as the substance of the opinion if the opinion is written, at least in part, to inspire and persuade the public, as well as to communicate rules of law.<sup>29</sup> Professor Robert Nagel argues that the formulaic style adopted by the Court is ill-suited to engage and inspire the public.<sup>30</sup>

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through the mid-1990s, even though the Court decreased the number of cases that it treated with full argument and opinion from 150 per year through the mid-1980s to 87 in the 1993 term. Schauer, *supra* note 2, at 1459–60.

24. Farber, *supra* note 2, at 154.

25. See Aldisert, Rasch & Bartlett, *supra* note 6, at 21; Nagel, *supra* note 2, at 165 (describing the "tireless, detailed debate among the Justices" and the "consistent pattern of earnest argumentation"). Judge Abner Mikva raises similar concerns, suggesting that "for the ordinary run of cases, it behooves a judge to begin where his predecessors left off and go on from that point. . . . Too many long opinions are merely padded for pedantic display." Mikva, *supra* note 4, at 1361. Mikva also complains that opinions frequently "take on issues that are unnecessary to judgment." *Id.* at 1368.

26. See Farber, *supra* note 2, at 154; see also Aldisert, Rasch & Bartlett, *supra* note 6, at 41; Mikva, *supra* note 4, at 1361; Nagel, *supra* note 2, at 165; Schauer, *supra* note 2, at 1455. Judge Mikva advocates for the elimination of footnotes in judicial opinions, writing "[i]f footnotes were the preferred mode of writing, Darwinian selection would have produced readers whose eyes are placed on a vertical rather than horizontal plane." Mikva, *supra* note 4, at 1367.

27. See Farber, *supra* note 2, at 147 (describing the opinions as "increasingly arid, formalistic, and lacking in intellectual value").

28. Schauer, *supra* note 2, at 1455.

29. See Nagel, *supra* note 2, at 170–71. Justice Cardozo, in opinions, asserted that form and substance are inseparable. *Id.* at 170. As Professor Nagel points out, though, if judicial opinions are designed merely to communicate to the public, rather than to inspire or persuade, "form is important only to the extent that it renders essential information too unclear to be understood." *Id.*

30. Nagel, *supra* note 2, at 190. Nagel suggests that while the Court, in its opinions, is obliged to attempt to convince others that its choices are desirable, "persuasion in this sense requires an unconstrained audience and a responsible speaker, for common volition is impossible without both." *Id.* However, he argues that the formulaic style of modern opinions

Writing more generally about judicial opinions, and not merely Supreme Court opinions, Judge Richard Posner has noted that many judges are disdainful of traditional literary rules of style, so they ignore them, with the result that they frequently make stylistic “mistakes” that “obscure readability with no offsetting benefit to any purpose of the writer.”<sup>31</sup> Posner has also drawn attention to a distinction between what he refers to as a “pure” style of opinion writing, adopted by formalist jurists, and an “impure” style, favored by pragmatic jurists.<sup>32</sup> Posner explains that:

Judicial opinions in the pure style tend to be long for what they have to say, solemn, highly polished and artifactual—far removed from the tone of conversation—impersonal . . . and predictable in the sense of conforming closely to professional expectations about the structure and style of a judicial opinion. . . . The standard “pure” opinion uses technical legal terms without translation into everyday English, quotes heavily from previous judicial opinions, includes much detail concerning names, times, and places, complies scrupulously with whatever are the current conventions of citation form, avoids any note of levity, conceals the author’s personality, prefers familiar and ready-made formulations to novelties, and bows to the current

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creates a “specious sense of certainty” and that the formulas in the Court’s opinions are “frequently impervious to common understanding,” thus constraining the audience. *Id.* at 192–94. Regarding the formulae adopted by the Court in many opinions, Nagel writes:

Their design suggests that all the relevant issues have been identified, separated and answered. The doctrine is comprehensive and definitive. Only one answer can emerge from the machine. . . . A fortiori, the formulaic style forecloses independent judgment by the wider publics that are affected by the decisions but that have no special claims to understanding or authority.

*Id.* at 195. Nagel is equally pessimistic with regard to the role of the speaker in the formulaic style:

The tone of the formulaic style . . . is distinctively mechanical. Its operative metaphor is the observer. The opinions describe the performance of contestants, not the judgment of the Court. . . . [T]he words, once in place, will do the work as the judges watch, recording the score. The formulaic style strains . . . too hard to convince. By disqualifying the reader and reducing the judge to observer, it achieves a false definiteness [*sic*] rather than persuasive power.

*Id.* at 196–97.

31. See Posner, *supra* note 6, at 1424.

32. *Id.* at 1421.

norms of "political correctness" (corresponding to the euphemisms for which the Victorians became notorious) at whatever cost in stilted diction. The familiarity of the pure style makes it invisible to practitioners of the style and to the intended audience of lawyers. But it is not at all a plain or transparent style.<sup>33</sup>

By contrast, Posner describes the "impure" style as follows:

Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is. These judges eschew the "professionalizing" devices of the purist writer—the jargon, the solemnity, the high sheen, the impersonality, the piled-up details conveying an attitude of scrupulous exactness, the fondness for truisms, the unembarrassed repetition of obvious propositions, the long quotations from previous cases to demonstrate fidelity to precedent, the euphemisms, and the exaggerated confidence corresponding to the declamatory mode of "pure" poetry. . . . [Impure stylists] like to be conversational, to write as if it were for the ear rather than for the eye.<sup>34</sup>

Modern Supreme Court opinions are generally written in the "pure" style described by Posner. Opinions written by former Justice Oliver Wendell Holmes and Judge Learned Hand are exemplars of the more personal and conversational "impure" style.<sup>35</sup> Although Posner stresses that few judges write exclusively in one style<sup>36</sup> and that neither style is superior,<sup>37</sup> he acknowledges that the "pure" style is much more accessible to lawyers and judges than to the public.<sup>38</sup> Of the "impure" style, on the other hand, he writes, "the primary audience . . . consists not of legal insiders but of those readers, both laypeople and lawyers, who can 'see through' the artifice of judicial pretension."<sup>39</sup> Consequently, most modern Supreme Court opinions are written in a style that is inaccessible to the public.

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33. *Id.* at 1429.

34. *Id.* at 1430.

35. *Id.* at 1429.

36. *See id.* at 1431.

37. *See* Posner, *supra* note 6, at 1428–29.

38. *Id.* at 1431.

39. *Id.*



In a recent article, Professor Ryan Witte agreed that “impure” opinions are much more accessible to the general public, but raised concerns that labeling the style as “impure” would deter judges from adopting that style.<sup>40</sup> Accordingly, he labeled the contrasting styles of opinion writing as “traditional” and “non-traditional.”<sup>41</sup> In his article, Witte advocated the injection of humor, prose, poetry, or popular culture into judicial opinions.<sup>42</sup> However, few Supreme Court opinions incorporate those features.

Although there is a growing consensus that the Supreme Courts opinions are becoming long, boring, and inaccessible to the general public, there is less agreement regarding the reasons for the shift. Some commentators speculate that opinions are becoming more complex because the issues that the Court is addressing in the opinions are more complex.<sup>43</sup> As Judge Abner Mikva has eloquently noted, “[t]he case of ‘replevin for a cow’ lives on only in textbooks.”<sup>44</sup> Mikva and others also speculate that judges are writing more complex opinions because they are attempting to write for a broader variety of audiences in their opinions, including the parties before the court, other courts, the practicing bar, law students, and the general public.<sup>45</sup> Judges are, in essence, trying to make the opinions do too many different things for too many different people.<sup>46</sup> In attempting to do that, critics argue,

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40. See Witte, *supra* note 7, at 40–41. Witte wrote that “[t]he same characteristics that may render an opinion ‘impure’ are the very characteristics that make decisions understandable to a broader base of the American public. Branding these easy-to-understand opinions with the scarlet letter of ‘impurity’ may dissuade judges from utilizing these useful and important literary tools.” *Id.* at 41.

41. *Id.* at 41.

42. *Id.*

43. See Mikva, *supra* note 4, at 1359, 1363 (noting the increasingly complex scheme of statutory and constitutional rights and responsibilities). Because of this complexity, Judge Mikva argues, “judges must make every effort to focus our analyses, shun theoretical digressions, avoid unnecessary facts or issues, and streamline the disposition of cases.” *Id.* at 1363.

44. *Id.*

45. *Id.* at 1365–66; Nagel, *supra* note 2, at 177–80; Posner, *supra* note 6, at 1431–32.

46. See Mikva, *supra* note 4, at 1366. Judge Mikva writes:

We have taken to addressing unnecessary points raised in parties’ briefs to persuade not only the lawyers and litigants but also the commentators and the media that we have fully considered the cases. We have addressed theoretical questions and tangential issues to keep up with the academic critics. We have explained the facts of our cases and the ramifications of our judicial decisions in great detail, mindful of our nonlegal audience. Given the explosion of judicial opinions, however, we can no longer afford judicial encyclopedists. I do not say we should ignore our audiences. But I believe that if we subject sprawling decisions to the scalpel, our audiences will in fact be better served.

*Id.*

they are serving none of the audiences well.<sup>47</sup> Other critics take the opposite approach and complain that modern Supreme Court opinions are unreadable for the general public because they are not written for the general public, or because the Justices are not writing their opinions with any specific audience in mind.<sup>48</sup> Professor Dan Farber writes:

[T]he Justices seemingly grind out written products without any real consciousness of purpose. . . . If a Justice stopped to think about what he or she was doing and why, the result might be to rethink how the opinion was written. . . . The Court's failure to write more persuasively is unfortunate for more than stylistic reasons. We expect the Court not only to solve legal problems, but to explain why important issues should be resolved in one way rather than the other.<sup>49</sup>

Commentators have identified a few other factors that may be contributing to the increasing complexity of Supreme Court opinions. For instance, Professor Jeffrey Van Detta suggests that the lack of trial court experience among modern Justices could play a role in the transformation of the opinions.<sup>50</sup> Van Detta notes that today's Court is "a far cry from the days of Justices like John Marshall or Joseph Story, who spent much of each year acting as federal district court judges while riding throughout their respective

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47. See Mikva, *supra* note 4, at 1364.

48. See Farber, *supra* note 2, at 153–54; see also Nagel, *supra* note 2, at 177–80; Posner, *supra* note 6, at 1431.

49. Farber, *supra* note 2, at 157. Farber argues that the opinions are missing "the play of intelligence." *Id.* at 165. He writes:

Good legal writing comes from the head. You must see through and around your subject, measuring it by more than one measuring stick, turning it over, testing it, arriving at a just and clear-headed assessment of its position in the hierarchy of things. . . . [C]areful reading of the Supreme Court opinions . . . does not suggest that their authors '(saw) through and around (their) subject . . . turning it over (and assessing) its position in the hierarchy of things.' Rather the Justices seem to have moved along the line of least resistance to crank out an opinion.

*Id.* at 166. Farber further argues:

[L]egal writing is addressed to a particular kind of audience. . . . This audience, whether virtual or actual, is reading with a purpose—not for enjoyment or personal enlightenment, but to make a specific decision or to analyze a particular problem. For this audience, and this kind of writing, the 'play of intelligence' is crucial.

*Id.* at 167–68.

50. See Van Detta, *supra* note 1, at 54.

Circuits.”<sup>51</sup> Judge Richard Posner offers a more straightforward explanation for the general complexity of appellate court opinions, noting that it is much easier to write an opinion in the “pure” style than the “impure” style.<sup>52</sup> As he indicates, “[u]nless one is a particularly gifted writer, it takes much effort to make an opinion seem effortless.”<sup>53</sup> Along similar lines, commentators attribute a decline in the quality of judicial opinions to the absence of any editing for the opinions.<sup>54</sup> As Professor Robert Leflar wrote, “[i]t is no wonder that most appellate judges tend to become self-satisfied with their opinion writing. No one ever tells them that there is something wrong with it.”<sup>55</sup>

It should not be surprising that the nature of the Supreme Court’s opinions has changed over time because the Constitution provides little direction for the Court, or any other court, regarding the purposes of opinions, structure of opinions, or even the situations, if any, in which courts must issue written opinions.<sup>56</sup> As Professor Michael Serota notes, “Article III of the Constitution tasks judges with deciding ‘cases’ and ‘controversies,’ but says nothing about how judges ought to communicate their decisions to the public.”<sup>57</sup> Consequently, judges have broad discretion in choosing the format and style of writing for opinions, as well as in choosing whether to write opinions at all. As the number of cases brought at both the trial and appellate levels has increased, judges are increasingly disposing of cases without issuing written opinions.<sup>58</sup> While the Supreme Court is issuing fewer

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51. *Id.*

52. *See* Posner, *supra* note 6, at 1430–31.

53. *Id.* He adds that “one of the things that law school and legal practice teach . . . is to forget how one wrote before one became a lawyer.” *Id.*

54. *See* Mikva, *supra* note 4, at 1366.

55. Robert Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–19 (1961), *reprinted in* APPELLATE JUDICIAL OPINIONS 161 (Robert A. Leflar ed., 1974). Leflar notes that “[u]nlike ordinary editors or publishers, the state reporters and the West Publishing Company never refuse to print [a judge’s] opinions.” *Id.*

56. *See* Serota, *supra* note 1, at 651.

57. *Id.*

58. *See* Aldisert, Rasch & Bartlett, *supra* note 6, at 5–7 (describing the practice on the U.S. Courts of Appeals to resolve a significant number of cases through judgment orders, memorandum opinions, published per curiam opinions, or unpublished opinions). *See also* Wald, *supra* note 6, at 1373–74 (noting that the majority of federal cases were being decided, at the time of the article, without a published opinion). Citing Justice Cardozo, Judge Aldisert suggests that published opinions should be reserved for cases “where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law.” *See* Aldisert, Rasch & Bartlett, *supra* note 6, at 8 (citation omitted). Judge Wald, on the other hand, argues that even in an era of increasingly clogged judicial dockets, courts should dispose of cases without an opinion “only in the clear cut cases.” Wald, *supra* note 6, at 1376. However, she notes that, at the time of the article, the U.S. Court of Appeals for the D.C. Circuit disposed of seventy-two percent of criminal

opinions, that decrease is caused primarily by the Court's reduction in the number of cases that it accepts to hear, as opposed to a decision, as in lower courts, to resolve more disputes that the court hears through unwritten or unpublished opinions.<sup>59</sup>

## II. THE PURPOSES OF, AND AUDIENCES FOR, SUPREME COURT OPINIONS

Since judges have such broad discretion in structuring their opinions, the style and form of a Supreme Court opinion, or any judicial opinion, can be influenced to a great extent by the author's perception of the purposes of the opinion and the audience for the opinion. Judicial opinions can serve many different purposes. At the most fundamental level, the opinion resolves the dispute between the litigants.<sup>60</sup> However, commentators identify several loftier purposes for judicial opinions. First, judicial opinions inform the public about their rights, responsibilities, and the law that governs their future private and public transactions.<sup>61</sup> In addition to informing the public about the rule of law, persuasive, well-reasoned and transparent opinions also foster public confidence in the legitimacy of the judicial branch and the rule of law.<sup>62</sup> Finally, publication of written opinions by courts facilitates oversight of the courts by judges and the public.<sup>63</sup> In short, judicial opinions

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appeals without an opinion. *Id.* at 1374.

59. See Schauer, *supra* note 2, at 1459–60 (noting the decline in cases accepted by the Supreme Court for argument from over 150 in the 1980s to 87 in the 1993 Supreme Court Term).

60. See Serota, *supra* note 1, at 651; see also Aldisert, Rasch & Bartlett, *supra* note 6, at 5; Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451, 1453 (1995).

61. See Aldisert, Rasch & Bartlett, *supra* note 6, at 5–6; Serota, *supra* note 1, at 655.

62. See Serota, *supra* note 1, at 649–55 (noting that judges secure the “tacit approval and obedience of the governed” by providing reasoned justifications for their rulings); Aldisert, Rasch & Bartlett, *supra* note 6, at 5. The legitimating function is vital since the Justices are not elected by the public and have few enforcement tools. See Witte, *supra* note 7, at 38 (noting that the “judiciary’s power comes from its words alone”); see also Owens & Wedeking, *supra* note 7, at 1030. In light of the fact that federal judges are not elected, and are only subject to removal “through a cumbersome impeachment process reserved for extraordinarily bad behavior,” Judge Wald has remarked that “[j]udges are like family; though alternatively beloved or resented, the people are bound to us through thick and thin. One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.” Wald, *supra* note 6, at 1372.

63. See Aldisert, Rasch & Bartlett, *supra* note 6, at 12; Serota, *supra* note 1, at 655. Judge Wald writes:

[U]nder a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike. Optimally, that means that more than eight hundred federal judges should interpret the same laws in the same way. Since this will not likely happen by itself, the system creates devices to improve consistency and correct the judges who err.

inform the public about the rule of law, promote legitimacy of courts, and facilitate judicial constraint.<sup>64</sup>

Just as judicial opinions can serve many purposes, they can also be directed at many audiences. Indeed, it is difficult to consider the purposes of opinions without considering the audiences, and vice versa. While the parties before the Court are most directly affected by the Court's decisions,<sup>65</sup> and are one of the audiences for whom opinions are written,<sup>66</sup> they are certainly not the only audience. So, who are the other audiences for judicial opinions? Frequently, an opinion is directed at, and provides guidance for, other courts or other branches of government, including agencies and the legislature.<sup>67</sup> Similarly, judicial opinions provide guidance not only to the attorneys involved in the instant litigation, but to all other attorneys.<sup>68</sup> Commentators have also noted that judicial opinions are a cornerstone of Christopher Columbus Langdell's "case method" approach to legal education, which focuses on learning the law by reading and analyzing appellate court decisions.<sup>69</sup> Thus, law students and academics are additional

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Wald, *supra* note 6, at 1372. Professor Serota elaborates on the constraining function, noting that "judges who issue poorly reasoned decisions may over time invite 'limits on jurisdiction, constitutional amendments, or changes in the way that litigants, the public, or the popular branches respond' to their rulings." See Serota, *supra* note 1, at 654.

64. See Serota, *supra* note 1, at 655.

65. Professor Ryan Witte explains that a court's opinion:

provides the parties with the rationale and legal reasoning behind the judge's decision. For most litigants, this is an extremely personal matter. . . . For those litigants who are lucky enough to actually get a judicial opinion, as opposed to a simple per curiam order without an opinion, it serves as the light at the end of a very long tunnel. Regardless of the outcome, a judicial opinion should provide the parties with satisfying evidence that the judge has made a thoughtful and thorough decision based on the merits of the case.

Witte, *supra* note 7, at 39.

66. See Aldisert, Rasch & Bartlett, *supra* note 6, at 16; Chemerinsky, *supra* note 1, at 1706–07; Mikva, *supra* note 4, at 1364; Serota, *supra* note 1, at 651.

67. See Chemerinsky, *supra* note 1, at 1707–08 (courts, agencies, and the legislature); Aldisert, Rasch & Bartlett, *supra* note 6, at 16 (courts and the legislature); Witte, *supra* note 7, at 39 (courts); Mikva, *supra* note 4, at 1364 (courts); Owens & Wedeking, *supra* note 7, at 1031 (agencies).

68. See Aldisert, Rasch & Bartlett, *supra* note 6, at 16; Mikva, *supra* note 4, at 1364.

69. See Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643, 646–47 (2013); A. Benjamin Spencer, *The Law School Critique in Historic Perspective*, 69 WASH. & LEE L. REV. 1949, 1973–75 (2012); W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 6 (1997); Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 596–608 (1997); Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1428–29 (1997).

audiences for judicial opinions.<sup>70</sup> Finally, and perhaps most importantly for purposes of this Article, judicial opinions are written for the general public.<sup>71</sup> In fact, most of the purposes outlined in the preceding paragraph—communicating the rule of law, promoting the legitimacy of courts, and facilitating judicial constraint—reflect purposes of opinions that are directed at the general public.<sup>72</sup> Judge Abner Mikva asserts that the increase in the public audience for judicial opinions coincided with the “statutorification” of America and the rise of the administrative state in the twentieth century, when law “entered individuals’ lives to an extent never before imagined.”<sup>73</sup>

There is, however, no consensus among judges or commentators regarding which audience is the primary audience for the Supreme Court’s opinions, or any judicial opinion. Judge Ruggerio Aldisert, for instance, argues that the audiences for judicial opinions can be divided into a primary market, consisting of the court, the parties before the court, and the lower court that issued the decision being reviewed, and a secondary market, consisting of everyone else.<sup>74</sup> An opinion should be drafted, he argues, in a way that ensures that those persons and institutions in the *primary market* understand the opinion.<sup>75</sup> Although the secondary market should not be ignored, Aldisert stresses that “their interests are subordinate to those of primary market consumers.”<sup>76</sup> Professor Michael Serota identifies a similar split among commentators regarding the preferred audience for judicial opinions. Instead of describing the split as a split between primary and secondary markets, though, Serota contrasts a “professional approach” and a “populist approach” adopted by commentators.<sup>77</sup> The “professional approach” envisions the primary audience for judicial opinions to be the “legal professionals and government elites,” while the “populist approach”

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70. See Aldisert, Rasch & Bartlett, *supra* note 6, at 16; Chemerinsky, *supra* note 1, at 1707; Mikva, *supra* note 4, at 1364–65; Witte, *supra* note 7, at 39–40.

71. See Chemerinsky, *supra* note 1, at 1707; Owens & Wedeking, *supra* note 7, at 1030; Serota, *supra* note 1, at 651–52; Witte, *supra* note 7, at 40.

72. Of course, many of those purposes are relevant when opinions are written for other audiences as well. For instance, most of the other audiences have an interest in communication of the rule of law by courts, and the other branches of government play an important role in constraining the court.

73. See Mikva, *supra* note 4, at 1365.

74. See Aldisert, Rasch & Bartlett, *supra* note 6, at 17–20.

75. *Id.* at 17. Judge Aldisert suggests that the opinion should be understandable to the “lay parties” to the lawsuit, rather than the general public as a whole. *Id.* at 17–18. Thus, it should be “clear, logical, unambiguous, and free of . . . the lingua franca of the legal profession — Jabberwocky.” *Id.* at 18. In addition, though, since the court is another audience, Aldisert notes that the authors of the opinions must consider “consequence, consistency and coherence” in drafting opinions. *Id.*

76. *Id.* at 19.

77. Serota, *supra* note 1, at 655.

envisions the primary audience to be the general public.<sup>78</sup> Serota recounts Justice Hugo Black's declaration that "people in barber shops, [and] your momma" should be able to understand the Court's opinions.<sup>79</sup>

Serota also notes, though, that it could be difficult to draft opinions that are accessible to the general public because of the exceedingly low level of civic literacy among American citizens.<sup>80</sup> Since, as he notes, one-third of Americans cannot name a single branch of government and ninety-eight percent cannot identify two rights in the Fifth Amendment, "the average American simply does not possess enough substantive legal knowledge to be able to comprehend judicial opinions covering the range of complex issues the Court confronts."<sup>81</sup> Further, he and others argue that most of the general public does not have the time or inclination to read the Court's opinions.<sup>82</sup> Frequently, the public rely on the media to decipher and translate the law and the issues of the day for them, rather than reading the primary source materials.<sup>83</sup> American newspapers rarely publish the actual words of the Court.<sup>84</sup>

Obviously, the audiences for whom an opinion is written and the purposes that the opinion is intended to serve will influence the manner in which judges write the opinion. An opinion that may seem overly complex and technocratic to the general public may, nevertheless, provide guidance to agencies, courts, and other professional audiences. To some extent,

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78. *Id.* at 655–56.

79. *Id.* at 656.

80. *Id.* at 659–61.

81. *Id.*

82. *Id.* at 658; *see also* Chemerinsky, *supra* note 1, at 1707; Schauer, *supra* note 2, at 1463–64.

83. *See* Chemerinsky, *supra* note 1, at 1707; Mikva, *supra* note 4, at 1366. Professor Robert Nagel notes that the Court's opinions are "obscured by inattention and by layers of imprecise reports from newspapers, attorneys, [and] word-of-mouth within bureaucracies." Nagel, *supra* note 2, at 169.

84. *See* Aldisert, Rasch & Bartlett, *supra* note 6, at 16; Schauer, *supra* note 2, at 1464. Judge Aldisert laments that "[w]hen the media occasionally do report opinions, the courts' statements are subject to merciless editing or compressed to sixty-second TV or radio sound bites . . ." Aldisert, Rasch & Bartlett, *supra* note 6, at 19. Critics also describe the quality of the media's reporting on the Court as "shallow and divisive." Serota, *supra* note 1, at 655. Professor Frederick Schauer is less troubled, however. He notes that:

If we believed that unmediated primary legal materials ought to be part of the public debate, we would behave quite differently in terms of how we made (or did not make) those materials available. . . . [U]nless there is to be a dramatic transformation of American public and political culture, it seems strange to criticize the authors of judicial opinions for not writing in a style designed to be comprehensible to what is in fact a virtually nonexistent audience.

Schauer, *supra* note 2, at 1464–65.

therefore, the increasing complexity of Supreme Court opinions may be less problematic if the Court is not writing for the general public. However, if the critics of the Court are correct that the opinions are becoming increasingly unreadable, that trend has implications for all of the audiences for those opinions. While the general public may be the audience that suffers the most, litigants, courts, agencies, the legislature, law students and academics also suffer when the Court issues an unreadable opinion.<sup>85</sup>

#### A. Impact on the General Public as an Audience

If the Supreme Court directs its opinions, at least in part, at the general public, and if the opinions are intended to serve informational, legitimating, and constraining roles, as discussed above, it is vital that the opinions be comprehensible to the public. As Professor Serota argues:

First, the rule of law function necessitates a broad level of public comprehension, given that each citizen is bound by the precedents judicial opinions create. . . . Second, the democratic legitimacy that reason-giving and justification confer on judges similarly requires a broad standard of public accessibility due to the public consent principle that undergirds persuasion on a societal scale. In other words, the “consent of the governed” demands persuasion of the entirety of the governed, rather than of some elite subsection of it. And finally, a judicial opinion’s function as a facilitator of public oversight also establishes a concomitant principle of public comprehension, since the only way members of the public can scrutinize a judge’s decisionmaking is if they are able to understand the opinions that record it.<sup>86</sup>

Many commentators who view the general public as a target audience for the Court’s opinions are troubled by the increasing unreadability of the opinions. Professor Ryan Witte advocates the inclusion of humor, poetry, and popular culture in judicial opinions and the adoption of a non-traditional opinion writing style.<sup>87</sup> Witte suggests that the approach would make the

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85. See Aldisert, Rasch & Bartlett, *supra* note 6, at 2–3 (stressing the need for a “serviceable, cogent and elegant end product” for all audiences).

86. Serota, *supra* note 1, at 656.

87. See Witte, *supra* note 7, at 48. Witte complains that opinions are generally written “in such a way as to befuddle and bewilder the layperson.” *Id.* at 47. He argues that “since ‘style and substance are intimately connected,’ the opinions that are easiest to understand are often



decisions more persuasive and more accessible to law students as well as the general public.<sup>88</sup> As an added benefit, Witte argues that “disposing of certain cases in a humorous way can also act as a deterrent against the filing of baseless claims.”<sup>89</sup>

Professor Serota advocates a different approach. Instead of focusing on encouraging the Court to draft opinions that are more readable, he suggests that the Court should publish “public opinions,” or simplified translations of the Court’s opinions, to accompany each opinion.<sup>90</sup> He proposes that the Court create an Office of Public Opinion,<sup>91</sup> which would translate the Court’s opinions into a format that would be accessible to the general public, taking into account the “low rates of civic literacy and the limited time the average American has to devote to reading the Court’s work.”<sup>92</sup> While recognizing that such an undertaking would involve significant financial and human resources, Serota argues that it would have benefits beyond making the Court’s rulings more accessible, in that it would help reduce negative public opinions about the judiciary and “lead to a better-informed, more engaged citizenry and a healthier democracy.”<sup>93</sup>

It is also possible to view the public as a target audience, but to view the purposes of judicial opinions more narrowly, focusing simply on the communication of the rule of law. As Professor Robert Nagel suggests,

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written in a manner that grabs the reader’s attention . . . .” *Id.* at 48. He also argues that humor demystifies the law, making it and the courts more transparent and thereby increasing public confidence in both. *Id.* He recognizes, though, that humor and the other tools of non-traditional opinion writing need to be used in a way that recognizes the decorum of the judicial system and the relative position of power of a judge over litigants. *Id.* at 41–45.

88. *Id.* at 47–48. Witte notes that “[b]ecause law is . . . learned by reading opinion after opinion, the rare gem that breaks free from formality is more likely to resonate with the student and be remembered.” *Id.* at 48.

89. *Id.* at 49 (arguing that the use of humor to dispose of baseless claims could encourage attorneys to “think twice before wasting the court’s time”).

90. *See* Serota, *supra* note 1, at 650. The public opinion would consist of (1) an “essentials” section, which explains the essential facts and legal concepts in the opinion in a straightforward manner; (2) a “background” section, which outlines the factual and procedural background of the case and a succinct overview of the legal issues “in an engaging narrative style that highlights the relevant human drama or high stakes involved in the case”; and (3) a “decision” section, which condenses the essential rationale of the Court’s decision, including concurrences and dissents, into “an accessible capsule summary expressed as simply as possible and lacking formalistic hurdles, such as footnotes, citations or legalese . . . .” *Id.* at 662–63.

91. *Id.* at 664. Professor Serota envisions an office within the Supreme Court composed of lawyers, educators, and psychologists. *Id.* He stresses, though, that the “public opinions” must be reviewed by the Justices who authored the underlying opinions in order to ensure that the “public opinion” is a fair and accurate translation of the underlying opinion. *Id.*

92. *Id.* at 662.

93. *Id.* at 669.

it is certainly plausible to believe that only the substance of judicial opinions matters. . . . [N]o one doubts the profound importance of the Court's declaration that racial segregation in schools and other public arenas is unconstitutional. The great mass of the public . . . was made to understand this result. But it is doubtful that the Court's reasoning, much less the manner of its presentation, filtered past a few elite groups.<sup>94</sup>

Commentators who believe that judicial opinions need only convey the rule of law to the public are less troubled if the actual opinions are more complex and inaccessible, as long as the basic rule can be re-stated in a form fit for *Reader's Digest* or *U.S.A. Today*.

Finally, some commentators assert that the general public should not be, or at least, is not, an audience for the Court's opinions, and those commentators are not concerned about whether the general public can understand the opinions as long as the opinions are accessible to the other audiences.<sup>95</sup>

#### B. Impact on Other Professional Audiences

If the primary audience for the Supreme Court's opinions is the "professional" audience of courts, litigants, agencies, and the practicing bar, rather than the general public, the opinions need only be accessible to those groups.<sup>96</sup> Professor Robert Nagel defends the formulaic style of modern Supreme Court opinions as appropriate for those audiences.<sup>97</sup> He suggests that the Court's primary audience is the Court itself, the clerks, and lower courts, and he argues that the "complex, layered, and equivocal" or

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94. Nagel, *supra* note 2, at 169.

95. *See supra* notes 81–84, and accompanying text.

96. While commentators have also suggested that law students and legal academics are audiences, albeit secondary audiences, for judicial opinions, most commentators do not feel that the increasing complexity of the opinions will have detrimental effects on law students because students generally are only reading heavily edited versions of judicial opinions in law school and schools are adopting a variety of teaching methods beyond the case method to educate students today. *See Mikva, supra* note 4, at 1359–60; Schauer, *supra* note 2, at 1471–74. Few tears are shed for academics in this debate, as commentators have suggested that the Court's opinions are increasingly resembling law review articles, with the same "pattern of laborious footnoting and detailed argumentation," "formalized analysis," and endless analysis. *See Nagel, supra* note 2, at 178–80. Thus, one could argue that the opinions are actually becoming *more* accessible to academics.

97. *See Nagel, supra* note 2, at 177–78.

“bureaucratic” style of the opinions is useful when “used to achieve cohesion within a profession or control within official hierarchies.”<sup>98</sup>

Similarly, Professor Frederick Schauer argues that the primary audience for the Court’s opinions includes other judges and practicing lawyers, rather than the general public.<sup>99</sup> Consequently, he suggests that it is appropriate that the Court’s opinions, replete with multi-part tests, resemble complex statutes and regulations more closely than they resemble literary works because the opinions are being written to serve purposes similar to those served by statutes and regulations.<sup>100</sup> A primary function of the Court’s opinions, he argues, is to provide guidance, and he notes that “the legal rules that are easiest to follow are frequently the most complex,” whereas the “legal rules that are less successful in performing the guidance function are the ones that are simple and vague.”<sup>101</sup>

However, other commentators stress that increasingly complex Supreme Court opinions can raise concerns even if one views the primary audience for the opinions to be a professional audience. Professor Schauer, for instance, points out that even if other courts are an audience for the Court’s opinions, the opinions should promote the legitimacy and constraint functions outlined above by explaining and justifying the Court’s rationale.<sup>102</sup> Thus, the Court’s opinions must be written in a manner that is sufficiently clear to promote confidence and respect for the Court’s opinions by lower courts and to facilitate oversight of the Court.<sup>103</sup> Even if the opinions only provide guidance and do not serve the legitimating and constraining functions, Professor Ryan Witte argues that judicial opinions must, at a minimum, be “clear, thoughtful and legally sound.”<sup>104</sup> Similarly, Professor Ryan Owens argues that judicial clarity is essential when a primary audience for the Court’s opinions is administrative agencies.<sup>105</sup> He notes that agencies adopt major policy changes in response to Supreme Court opinions much more

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98. *Id.*

99. *See* Schauer, *supra* note 2, at 1465.

100. *Id.* at 1455–56. Schauer notes that “most of the properties that draw scorn when found in judicial opinions—complexity, inaccessibility to nonspecialists, and dullness—exist with far less disapproval when those same properties are present in statutes and regulations.” *Id.* at 1462.

101. *Id.* at 1467–68. Schauer argues that the guidance function of opinions is perhaps their most important function in light of the decreasing number of opinions being issued by the Supreme Court and other appellate courts. *Id.* at 1470.

102. *Id.* at 1465–66.

103. Professor Schauer argues, however, that complex, un-stylistic opinions are not necessarily “any more likely to fail as a piece of legal reasoning” than opinions that are “elegant, and simple.” *Id.* at 1466.

104. *See* Witte, *supra* note 7, at 39.

105. *See* Owens & Wedeking, *supra* note 7, at 1031.

frequently when the Court issues clear opinions than when the Court issues unclear opinions.<sup>106</sup>

Noted jurists also argue that the Supreme Court must write readable opinions even if they are writing for a professional audience. Judge Ruggerio Aldisert, for instance, argues that litigants, lawyers, judges, and clerks “tend to be very busy” and have “highly selective reading habits,” and therefore “need and expect to learn quickly what the case is about, what the key issues and the relevant facts are, what legal precedent governs the situation and how it applies, and what ultimate conclusion and resulting rule of law emanates from the case.”<sup>107</sup> Judge Abner Mikva is also concerned that the increasingly complex opinions are not accessible to many practicing attorneys.<sup>108</sup>

Consequently, even if one views courts, litigants, and other professionals as the primary audience for the Court’s opinions and views the general public as merely a secondary audience (if an audience at all), there can be negative repercussions caused by the increasing complexity of the Court’s opinions.

### III. PREVIOUS READABILITY STUDIES

As critics assailed the Supreme Court’s opinions as increasingly unreadable, academics conducted empirical research to explore the validity of those criticisms. Over the past few decades, academics have studied the complexity of Supreme Court and other judicial opinions, as well as the complexity of the briefs filed in court and the statutes being reviewed. Generally, though, those studies have focused on which opinions are more readable than others and whether various factors influence whether an opinion is more or less readable. None of the studies examined whether the opinions issued by the Supreme Court, or any other court, are becoming less readable over time.

Academics have speculated that several different factors could affect the readability of a court’s opinion, regardless of whether the court issues the opinion today or issued the opinion decades ago. Many commentators suggest that a court’s opinions are likely to become more complex and less readable as the number of judges joining the opinion increases.<sup>109</sup> Coalition building among many judges with diverse ideological backgrounds will often necessitate adopting more complex opinions that attempt to address the

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106. *Id.* (citing major policy changes by agencies 95.5% of the time when the Court issued clear opinions and 3.4% of the time when the Court issued unclear opinions).

107. See Aldisert, Rasch & Bartlett, *supra* note 6, at 2.

108. See Mikva, *supra* note 4, at 1360.

109. See Owens & Wedeking, *supra* note 7, at 1032–33.

divergent concerns of the judges joining the opinion.<sup>110</sup> Similarly, commentators speculate that judicial opinions will be less readable when the court is overturning precedent because the court must simultaneously justify the departure from the prior precedent, despite a stare decisis presumption in its favor, and the wisdom of the court's new rule.<sup>111</sup> Some commentators have also speculated that judges with less tenure on the bench may author less readable opinions.<sup>112</sup>

On the opposite side, judges and academics alike have speculated that dissenting opinions are likely to be more readable, in general, than majority opinions.<sup>113</sup> As Judge Patricia Wald notes, “[a] dissent is liberating. No other judge need agree or even be consulted. . . . It is, of course, possible to write a calm, moderate, restrained dissent, but the question arises: if the difference between the majority and dissent is so mild, why write at all?”<sup>114</sup>

In addition to the above factors, academics have speculated that the subject matter of the dispute before the court, the complexity (if any) of the statute being reviewed, the number of issues being reviewed by the court, and the ideology of the judge authoring the opinion might impact the readability of an opinion.<sup>115</sup>

At the outset of each of those studies, as at the outset of this study, the researchers had to determine an appropriate way to evaluate the complexity or readability of the materials being evaluated. As Professors Ryan Owens and Justin Wedeking have outlined, the clarity of judicial opinions could be measured by focusing on (1) rhetorical clarity – how clearly written an opinion is; (2) doctrinal clarity – how consistently a court has treated doctrine over time; or (3) cognitive clarity – how clearly an opinion outlines the ideas in the opinion.<sup>116</sup> Most of the studies discussed in this Article examined the rhetorical clarity of opinions and other materials, although Owens and Wedeking examined the cognitive clarity of opinions in their study.<sup>117</sup>

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110. *Id.*

111. *See id.* at 1034–35.

112. *Id.* at 1037.

113. *Id.* at 1034; *see* Wald, *supra* note 6, at 1413.

114. Wald, *supra* note 6, at 1413.

115. *See* Owens & Wedeking, *supra* note 7, at 1037–38. Owens and Wedeking speculate, for instance, that the rule of lenity and other rules and norms of society should lead courts to issue opinions in criminal procedure cases that are more readable than other opinions. *Id.* They also speculate that judges writing opinions in cases involving multiple issues “may need to balance competing claims across issues to justify a holding or to appease varying constituencies on the Court.” *Id.*

116. *Id.* at 1038.

117. *See infra* Part III.A.

Several tools are available to evaluate the readability of judicial opinions or other documents. Linguists, educators, psychologists, and scholars have analyzed readability of writing using various formulas for almost one hundred years.<sup>118</sup> By the 1980s, there were several hundred readability formulas and thousands of studies validating those formulas.<sup>119</sup> Each of the formulas calculates “readability” of documents based on different semantic and syntactic factors, but most focus on word complexity and sentence length.<sup>120</sup> Although formulas that focus on word complexity and sentence length may not directly assess the content, grammar, or organization of the documents being evaluated, decades of research have demonstrated that word complexity and sentence length are the best predictors of readability based on reading comprehension tests that consider content, grammar, and organization.<sup>121</sup> As Lance Long and William Christensen note, “the addition of more factors [in a readability formula] does little to increase the accuracy of readability predictions and renders the formulas much more difficult to use.”<sup>122</sup>

One of the most popular readability formulas, the Flesch Reading Ease formula, was developed in the early twentieth century as a tool to evaluate the readability of adult reading material, since most of the earlier formulas were developed to evaluate the readability of primary and secondary school textbooks and reading material.<sup>123</sup> The formula focuses primarily on counting syllables and words in reading material and produces a readability score that ranges from 0-100, with higher scores indicating that the material is more readable.<sup>124</sup> A variant of the test, the Flesch-Kincaid (F-K) test, was originally developed for use by the Navy in evaluating the readability of technical material, but continues to be widely used today.<sup>125</sup> The F-K test examines factors similar to those examined in the Flesch Reading Ease test, but the Flesch-Kincaid test calculates the grade level readability of a document, instead of scoring on a range from 0-100.<sup>126</sup> Obviously, higher F-K scores indicate that the document is readable to fewer people.

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118. See Long & Christensen, *supra* note 10, at 148–49.

119. *Id.* at 149.

120. *Id.*

121. *Id.*

122. *Id.* (alteration in original).

123. See Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV. 147, 153–54 (2007).

124. See Long & Christensen, *supra* note 10, at 150. The formula for reading ease (RE) under the Flesch Reading Ease test is  $RE = 206.835 - (84.6 \times \text{average number of syllables per word}) - (1.015 \times \text{average number of words per sentence})$ . *Id.* at 151.

125. See Sirico, *supra* note 123, at 159.

126. See Long & Christensen, *supra* note 10, at 150–51. The formula for grade level (GL) using the Flesch-Kincaid Grade Level formula is  $GL = (0.39 \times \text{average number of syllables})$

Several other popular readability formulas focus on sentence and word length, including the Simple Measure of Gobbledygook (SMOG) formula and the Gunning Fog Index.<sup>127</sup> Other tests take different approaches. The Dale-Chall Readability formula, for instance, measures the occurrences of “difficult” words in a document in combination with sentence length, to calculate a readability score.<sup>128</sup> The Linguistic Inquiry and Word Count (LIWC) software program, by contrast, searches documents for occurrences of 2300 different words, which are categorized in 70 different “dimensions,” and draws conclusions regarding the cognitive complexity of the document based on the frequency of use of words in the various “dimensions.”<sup>129</sup>

While hundreds of readability formulas have been developed, the Flesch Reading Ease formula and Flesch-Kincaid formula are probably the most popular and influential formulas because they are easy to use and have been tested and validated over decades.<sup>130</sup> Further, for many years Microsoft has incorporated the formulas into its Word software, so that users can easily analyze the readability of a Word document under either test.<sup>131</sup> In addition, several states have adopted laws that require various legal documents to be written in plain English, and some specifically require the use of the F-K test or the Flesch Reading Ease test to measure the readability of the documents.<sup>132</sup>

Although they have been broadly adopted, the Flesch tests have also received some criticism. Some scholars claim that these tests, and most readability tests, are too simplistic, as readability depends more on the literacy, motivation, and background of the reader than on word complexity or sentence length.<sup>133</sup> Critics also complain that computerized versions of a

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per word) + (11.8 × average number of words per sentence) – 15.59. *Id.* at 151.

127. *See* Long & Christensen, *supra* note 10, at 150. The SMOG formula measures the number of words with more than two syllables in a thirty word sample, while the Gunning Fog Index measures both the average number of words per sentence and the number of words with more than two syllables in a one hundred word sample. *Id.*

128. *See* Sirico, *supra* note 123, at 162. However, the test requires analysts to subjectively modify the mathematically-derived reading level based on an analysis of certain features that might make the text more or less difficult than predicted mathematically, including “(1) the prior knowledge that the reader would be expected to have, (2) the familiarity of the vocabulary and the concepts in the text, (3) the overall organization of the text, and (4) the helpfulness to the reader of headings, questions, illustrations and physical features . . . in the text.” *Id.* at 163–64.

129. *See* Owens & Wedeking, *supra* note 7, at 1039–40.

130. *See* Long & Christensen, *supra* note 10, at 150–51; Sirico, *supra* note 123, at 147–48.

131. *See* Long & Christensen, *supra* note 10, at 150–51.

132. Sirico, *supra* note 123, at 148; *see also* Long & Christensen, *supra* note 10, at 153.

133. *See* Long & Christensen, *supra* note 10, at 151–52; *see also* Sirico, *supra* note 123, at 149. However, as Professor Louis Sirico acknowledges, sophisticated testing that focuses on the intellectual complexity of documents and syntactical complexity of the writing style in the documents “can be inefficient and may require subjective judgments before yielding results.”

formula may not always faithfully execute the formula or may otherwise be flawed, resulting in different readability scores for the same document depending on the software used to analyze the document.<sup>134</sup> Nevertheless, supporters of the Flesch tests and similar readability tests stress that they “correlate well with more sophisticated, content-based measures of reading comprehension.”<sup>135</sup> In addition, several of the flaws associated with the implementation of the Flesch-Kincaid formula in early versions of Microsoft Word were addressed in more recent updates to the software.<sup>136</sup> Consequently, several of the studies discussed in this Article utilized the Flesch-Kincaid test to analyze readability.<sup>137</sup>

#### A. Owens and Wedeking Study

Ryan Owens and Justin Wedeking conducted the most comprehensive study of the clarity of Supreme Court opinions.<sup>138</sup> Owens and Wedeking reviewed every opinion and judgment of the Court over a twenty-five year period from 1983-2007.<sup>139</sup> Their study examined 2735 cases and 5799 opinions.<sup>140</sup> As noted above, they employed the LIWC software program to analyze the cognitive complexity of each of the opinions in their database.<sup>141</sup>

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*Id.* at 149.

134. See Long & Christensen, *supra* note 10, at 152; Sirico, *supra* note 123, at 151–52, 167. Professor Sirico charges, for instance, that the old versions of Microsoft Word counted characters in words, rather than syllables, in conducting an F-K Grade Level analysis, and used an undisclosed algorithm to convert character counts to syllable counts. *Id.* at 165. Professor Sirico admits, though, that his charges are based solely on speculation. *Id.* at 166–67. Professor Sirico also asserts that because copies of the original F-K study are “comparatively inaccessible,” it is likely that there are several rules in the F-K test that are not incorporated into the Microsoft version, such as the appropriateness of counting symbols or numbers as words, whether a sentence containing a colon is one sentence or two, and the method for determining the number of syllables in numbers. *Id.* at 167.

135. See Long & Christensen, *supra* note 10, at 150.

136. See Sirico, *supra* note 123, at 151. Professor Sirico asserted that, in versions of Microsoft Word prior to Word 2003, the program would identify significantly different F-K Grade Level scores for a document depending on where the cursor was placed (at the beginning, middle, or end of the document) at the time of the F-K analysis. *Id.* In addition, older versions of Word would not cap F-K Grade Level scores at 12.0. *Id.* Neither one of those limitations exist in the most recent version of Word.

137. See, e.g., David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1692 (2010).

138. See Owens & Wedeking, *supra* note 7.

139. *Id.* at 1042.

140. *Id.*

141. *Id.* at 1039. While the LIWC assesses documents across seventy “dimensions,” Owens and Wedeking focused on the following ten dimensions, which they determined are directly connected with cognitive complexity: (1) causation; (2) insight; (3) discrepancy; (4) inhibition; (5) tentativeness; (6) certainty; (7) inclusiveness; (8) exclusiveness; (9) negations;



Their objectives in the research were to identify which Justices write the clearest opinions and to determine the conditions under which Justices write the clearest opinions.<sup>142</sup>

Based on their analysis, Owens and Wedeking concluded that Justices Scalia and Breyer wrote the clearest majority opinions and Justice Ginsburg wrote the most complex majority opinions.<sup>143</sup> They also determined that those divergences were maintained regardless of the subject matter of the opinion.<sup>144</sup> However, they concluded that all of the Justices wrote their clearest opinions in cases involving criminal procedure.<sup>145</sup> In addition to those findings, Owens and Wedeking concluded that ideology did not predict opinion clarity in majority or concurring opinions, as conservative and liberal Justices were equally likely to author clear opinions.<sup>146</sup>

Regarding coalition size and opinion types, Owens and Wedeking determined that Justices generally write clearer dissenting opinions than majority opinions, and that Justices write clearer opinions as the number of Justices joining the opinion decreases.<sup>147</sup> They concluded that Justices write the clearest opinions when they are writing for a majority of five or six.<sup>148</sup> Unanimous opinions or opinions joined by seven or eight Justices are generally more complex.<sup>149</sup> Owens and Wedeking also concluded that the Court's opinions are more complex when the Court is overruling precedent.<sup>150</sup> Interestingly, they did not find that majority or dissenting opinions were more complex when cases involved multiple issues, nor did they find that there was any relationship between the political importance of a case and the complexity of the opinion.<sup>151</sup>

Owens and Wedeking also addressed the suggestion that more complex opinions might be simply the result of a "law clerk effect."<sup>152</sup> They sought to determine, to the extent possible, whether the Justices who wrote the least clear opinions were more likely to rely on law clerks to author their

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and (10) percentage of words containing six or more letters. *Id.*

142. *Id.* at 1028.

143. *Id.* at 1043.

144. Owens & Wedeking, *supra* note 7, at 1046.

145. *Id.*

146. *Id.* at 1044.

147. *Id.* at 1027.

148. *Id.* at 1049. In determining majority coalition size, Owens and Wedeking included Justices who wrote or joined regular concurrences, as opposed to special concurrences, as part of the majority coalition. *Id.* at 1042.

149. *Id.* at 1048–49.

150. Owens & Wedeking, *supra* note 7, at 1051–52.

151. *Id.* at 1053. In order to measure the political importance of the case, Owens and Wedeking focused on whether the case was reported on the front page of the *New York Times*. *Id.* at 1042.

152. *Id.* at 1054.

opinions.<sup>153</sup> Relying on research conducted outside of their study, they determined that: (1) contrary to anecdotal claims, few Justices systematically rely on law clerks to draft their opinions;<sup>154</sup> and (2) those Justices who some studies suggest may rely on law clerks to draft their opinions did not generally write more complex opinions than their peers.<sup>155</sup>

#### B. Long and Christensen Study

While the Owens and Wedeking study examined the readability of the Supreme Court's opinions over a twenty-five year term, Lance Long and William Christensen conducted a study of the readability of litigants' briefs, as well as the opinions of the court in which those briefs were filed.<sup>156</sup> Long and Christensen's primary goal was to determine whether parties who wrote more readable briefs were more likely to prevail in their lawsuits, but the study also examined the readability of the opinions issued in those cases.<sup>157</sup>

Long and Christensen focused their study on the petitioners' and respondents' briefs in every case in which the Supreme Court issued an opinion over a three and one half year period between 2006 and 2009, eight hundred additional randomly selected federal and state appellate briefs, and the opinions in those cases.<sup>158</sup> The database included 648 opinions and 882 briefs from 266 Supreme Court cases, 90 state supreme court cases, and 100 federal appellate cases.<sup>159</sup> Long and Christensen used the Flesch Reading Ease Scale and the Flesch-Kincaid Grade Level Scale to evaluate the readability of each brief and opinion in the database.<sup>160</sup>

Regarding the briefs, which was their primary focus, Long and Christensen determined that most of the briefs were written at about the same level of readability, and that there was not a statistically significant relationship between the readability of briefs and success on appeal.<sup>161</sup> However, they concluded that the courts' opinions were generally less readable than the parties' briefs.<sup>162</sup> Surprisingly, they also determined that

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153. *Id.*

154. *Id.* at 1054. Numerous judges have described the important role that law clerks may play in drafting versions of opinions, but stress that the judges are ultimately responsible for the final version. See Aldisert, Rasch & Bartlett, *supra* note 6, at 20–21; Mikva, *supra* note 4, at 1366; Posner, *supra* note 6, at 1425; Wald, *supra* note 6, at 1384.

155. See Owens & Wedeking, *supra* note 7, at 1054–55.

156. See Long & Christensen, *supra* note 10, at 154–55.

157. *Id.* at 147.

158. *Id.* at 147–48.

159. *Id.* at 155.

160. *Id.* at 147.

161. *Id.*

162. Long & Christensen, *supra* note 10, at 147.

the opinions of dissenting judges or Justices were significantly less readable than majority opinions.<sup>163</sup>

### C. Law and Zaring Study

Another recent study focused on the readability of statutes, rather than opinions, and the effect, if any, that the readability of statutes has on the analysis employed by Supreme Court Justices in the opinions analyzing the statutes.<sup>164</sup> In particular, Law and Zaring explored whether the complexity of a statute, among other factors, was related to a Justice's decision to cite legislative history.<sup>165</sup> While their study did not focus on the readability of the opinions, it provides some insight into the manner in which Justices analyze complex statutes, from which one might form hypotheses regarding the complexity of opinions Justices might author to resolve disputes involving complex statutes.

Law and Zaring identified all of the Supreme Court cases decided from the 1953 term through the 2006 term that involved statutory interpretation.<sup>166</sup> From that collection of 2723 cases, they identified the forty statutes that were interpreted by the Court in nine or more cases over that time period, and limited their study to the cases that involved interpretation of any of those forty statutes.<sup>167</sup> Law and Zaring used the Flesch-Kincaid Grade Level test to determine the complexity of each of the forty statutes in their study.<sup>168</sup> In addition to examining whether there was any relationship between the complexity of a statute and a Justice's choice to cite legislative history in a case interpreting that statute, Law and Zaring examined several other factors, including the age of the statute, the bulk of the statute, the novelty of the statute, the obscurity of the statute, and the extent to which it was amended, in order to determine whether there was any statistically significant relationship between those factors and a Justice's choice to cite legislative history.<sup>169</sup> Finally, they "collected information on the ideological leanings of the Justices themselves," the Court's decisions, and the "ideological character of the Congresses that enacted each of the statutes" reviewed in the study.<sup>170</sup>

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163. *Id.*

164. Law & Zaring, *supra* note 137.

165. *Id.* at 1689.

166. *Id.* at 1683.

167. *Id.* at 1684.

168. *Id.* at 1691–92.

169. *Id.* at 1689.

170. Law & Zaring, *supra* note 137, at 1695.

Their findings suggest that Justices cite legislative history when seeking guidance in interpreting statutes, but also that Justices are motivated by ideology to cite legislative history.<sup>171</sup> Specifically, Law and Zaring concluded that Justices were significantly more likely to resort to legislative history when interpreting more complex statutes and were significantly less likely to resort to legislative history when interpreting statutes that had been amended numerous times.<sup>172</sup> They also found that Justices were far less likely to cite legislative history in dissenting or concurring opinions than in majority opinions.<sup>173</sup> In addition, they concluded that liberal Justices are more likely than conservative Justices to cite legislative history, and that “the fact that a Justice is of the same ideological bent as the legislators who enacted the statute increases the likelihood that he or she will turn to legislative history.”<sup>174</sup>

#### IV. COMPARING THE OPINIONS OF THE 1931-1933 TERMS AND THE 2009-2011 TERMS

##### A. Purpose

While the studies outlined above examined which judicial opinions are more readable than others and whether certain factors might influence whether an opinion is more or less readable, none of the studies examined whether, as critics are asserting, the Supreme Court’s opinions are longer and less readable today than they were in the past. The study that is the subject of this Article attempts to explore those questions. Since some of the critics assert that the Court’s opinions are becoming less readable because the issues that the Court is exploring are increasingly complex, this study compares recent opinions issued by the Court to opinions issued before the expansion of federal administrative programs during the New Deal and the “statutorification” of law. This study explores whether today’s opinions are longer and less readable than the older opinions and whether the opinions that the Court issues today regarding administrative law or statutory interpretation are less readable than other opinions that the Court issues today. This study also explores the findings of the Owens and Wedeking study that (1) dissenting opinions are more readable than majority opinions; and (2) opinions addressing criminal procedure issues are generally the most readable opinions. This study attempts to verify those findings and

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171. *Id.* at 1658–59.

172. *Id.* at 1721–22, 1733.

173. *Id.* at 1725, 1732.

174. *Id.* at 1659.

determine whether those patterns have changed over time.<sup>175</sup> Finally, this study compares the number of opinions issued by the Court in recent years to the number of opinions issued before the expansion of federal administrative programs during the New Deal and the “statutorification” of law.

## B. Methodology

In order to examine those questions, I reviewed each opinion issued by the Supreme Court during the 1931, 1932, and 1933 terms and the 2009, 2010, and 2011 terms.<sup>176</sup> I analyzed majority, plurality, concurring, and dissenting opinions separately in the study.<sup>177</sup> For each opinion, I collected the following data:<sup>178</sup> (1) opinion author; (2) type of opinion (majority, dissent, etc.); (3) number of Justices joining the opinion; (4) whether the case involved review of a constitutional question; (5) whether the case involved statutory interpretation; (6) whether the case involved federal administrative law;<sup>179</sup> (7) whether the case involved a question of criminal law; (8) the Flesch-Kincaid Grade Level score for the opinion; and (9) the Flesch Reading Ease score for the opinion.<sup>180</sup>

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175. However, this study uses the Flesch tests to examine readability, as opposed to the LIWC test used by Owens and Wedeking. See Owens & Wedeking, *supra* note 7, at 1039.

176. Admittedly, the selection of the 1931, 1932, and 1933 terms is somewhat arbitrary, as there is no definitive date that marks the beginning of the modern era of administrative law or the commencement of the era of the “statutorification” of American law. However, I chose that time frame because it predates the Supreme Court challenges to most of the “New Deal” federal regulatory programs, and predates landmark Supreme Court administrative law decisions like *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

177. I downloaded each of the decisions for those terms from Westlaw in Microsoft Word format, removed the syllabus and material added by Westlaw, and saved the separate opinions from each case into separate Microsoft Word documents. This made it possible to use the readability analysis tool in Microsoft Word’s “Spelling and Grammar” check to calculate the F-K Grade Level and Flesch Reading Ease scores for each separate opinion.

178. The data for each three-year period was entered into Excel spreadsheets. Stephen M. Johnson, *2009-2011 Opinions*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Opinions.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Opinions.pdf) (data for the 2009-2011 terms); Stephen M. Johnson, *1931-1933 Opinions*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Opinions.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Opinions.pdf) (data for the 1931-1933 terms).

179. I included cases in this category if the case involved a challenge to a decision made by a federal agency or if the case involved an interpretation of a federal agency action, regardless of whether the agency was involved in the case as a party.

180. In addition to the challenges leveled against the Flesch tests mentioned above, critics have complained that the tests do not provide a precise measure of the readability of material. See Sirico, *supra* note 123, at 167–68. While that defect may be problematic when the test is being used to determine whether a document meets a precise required reading level established by a statute or regulation, it is not problematic when the test is being used to

After collecting that information, I reviewed the data to determine: (1) whether the opinions issued by the Court during the 2009-2011 terms were more readable than the opinions issued by the Court during the 1931-1933 terms;<sup>181</sup> (2) whether the opinions issued during the 2009-2011 terms were longer than the opinions issued during the 1931-1933 terms;<sup>182</sup> (3) which type of opinions were the most readable during the 2009-2011 terms (i.e., those dealing with constitutional questions, statutory interpretation, administrative law, or criminal law); (4) whether the opinions addressing constitutional questions, statutory interpretation, administrative law, or criminal law were less readable during the 2009-2011 terms than during the 1931-1933 terms; (5) which type of opinions are most readable (majority, dissenting, concurring), during the 2009-2011 terms, during the 1931-1933 terms, and over both time periods; and (6) whether particular Justices wrote more readable opinions during the 2009-2011 terms and the 1931-1933 terms. Finally, the study compared the number of cases decided, and opinions issued, during the 2009-2011 terms and the 1931-1933 terms.

### C. Findings

#### 1. Readability and Length

A comparison of the Supreme Court's opinions issued during the 1931-1933 terms and the 2009-2011 terms confirms that the Court's opinions are, indeed, less readable and much longer today than they were three-quarters of a century ago. Based on the Flesch Reading Ease formula, the opinions issued during the 2009-2011 terms were, on average, about twenty-five percent less readable than the 1931-1933 opinions.<sup>183</sup> Moreover, the Flesch-Kincaid Grade Level Formula showed that the 2009-2011 opinions were written at about a grade level higher reading level than the 1931-1933

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compare the readability of one document against another, as in this study.

181. I compared the mean and median Flesch-Kincaid Grade Level and Flesch Reading Ease scores of the opinions issued in the 1931-1933 terms and the 2009-2011 terms.

182. I compared the mean and median page lengths of the opinions, as printed in United States Reports, issued in the 1931-1933 terms and the 2009-2011 terms. I examined the length of each opinion separately, and also examined the length for all the opinions issued in each case the Court decided.

183. The Mean Reading Ease score for all opinions issued during the 1931-1933 terms was 43.85. Stephen M. Johnson, *1931-1933 Opinions by Opinion Type*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Opinions By Opinion Type.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Opinions%20By%20Opinion%20Type.pdf). The Mean Reading Ease score for all opinions issued during the 2009-2011 terms was 33.55. Stephen M. Johnson, *2009-2011 Opinions by Opinion Type*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Opinions By Opinion Type.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Opinions%20By%20Opinion%20Type.pdf).

opinions.<sup>184</sup> The average opinion length has more than tripled from about nine pages for all of the opinions in a case (majority, concurring, and dissenting) during the 1931-1933 terms to about twenty-eight pages during the 2009-2011 terms.<sup>185</sup> Opinions in cases involving constitutional law were the longest during the 2009-2011 terms, averaging 35.2 pages, followed by administrative law (29.7 pages), statutory law (29.4 pages), and criminal law (27.3 pages).<sup>186</sup> While the length of opinions has increased, the number of cases decided by the Court has significantly decreased. Indeed, during the 2009-2011 terms, the Court issued written opinions in 249 cases compared to 485 cases during the 1931-1933 terms.<sup>187</sup>

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184. The Mean F-K Grade Level for all opinions issued during the 1931-1933 terms was 12.19. See Johnson, *1931-1933 Opinions by Opinion Type*, *supra* note 183. The Mean F-K Grade Level for all opinions issued during the 2009-2011 terms was 13.30. See Johnson, *2009-2011 Opinions by Opinion Type*, *supra* note 183.

185. See Stephen M. Johnson, *1931-1933 Page Length*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Page Length.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Page%20Length.pdf) (mean of 9.26 pages for 1931-1933 opinions); Stephen M. Johnson, *2009-2011 Page Length*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Page Length.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Page%20Length.pdf) (mean of 27.975 for 2009-2011 opinions). The average length of individual opinions has also increased from 8.2 pages during the 1931-1933 terms to 12.9 pages during the 2009-2011 terms. See Johnson, *1931-1933 Opinions by Opinion Type*, *supra* note 184; Johnson, *2009-2011 Opinions by Opinion Type*, *supra* note 184. The longest opinion during the 1931-1933 terms was a forty page dissent by Justice Brandeis in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (Brandeis, J., dissenting), whereas the longest opinion during the 2009-2011 terms was the mammoth ninety page concurring/dissenting opinion by Justice Stevens in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J., concurring).

186. Stephen M. Johnson, *2009-2011 Page Length Ad Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Page Length Ad Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Page%20Length%20Ad%20Law.pdf); Stephen M. Johnson, *2009-2011 Page Length Con Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Page Length Con Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Page%20Length%20Con%20Law.pdf); Stephen M. Johnson, *2009-2011 Page Length Crim Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Page Length Crim Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Page%20Length%20Crim%20Law.pdf); Stephen M. Johnson, *2009-2011 Page Length Stat Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Page Length Stat Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Page%20Length%20Stat%20Law.pdf). By contrast, during the 1931-1933 terms, opinions in cases involving constitutional law averaged 11.9 pages, followed by criminal law (11 pages), administrative law (9.6 pages), and statutory law (8.9 pages). See Stephen M. Johnson, *1931-1933 Page Length Ad Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Page Length Ad Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Page%20Length%20Ad%20Law.pdf); Stephen M. Johnson, *1931-1933 Page Length Con Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Page Length Con Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Page%20Length%20Con%20Law.pdf); Stephen M. Johnson, *1931-1933 Page Length Crim Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Page Length Crim Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Page%20Length%20Crim%20Law.pdf); Stephen M. Johnson, *1931-1933 Page Length Stat Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Page Length Stat Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Page%20Length%20Stat%20Law.pdf).

187. Johnson, *1931-1933 Page Length*, *supra* note 185; Johnson, *2009-2011 Page Length*, *supra* note 185. During the 2009-2011 terms, there were six cases in which the Court issued a one sentence denial of certiorari, a dismissal on the grounds that certiorari was improvidently granted, or an affirmance by an equally divided court. I did not include these cases in my analysis for page length or readability.

## 2. Nature of the Issues v. Nature of the Court

It does not appear, however, that the decrease in readability or increase in length of the Court's opinions is necessarily related to the statutorification of law or the expansion of federal administrative programs following the New Deal. Regarding page length, opinions addressing administrative law or statutory law issued during the 2009-2011 terms were generally about six and one-half pages shorter than opinions addressing constitutional law, and were only about two pages longer than opinions addressing criminal law.<sup>188</sup> Thus, while there has been a tremendous increase in the average page length of all opinions since the 1930s, opinions involving administrative law or statutory law are not significantly outpacing their competitors.

Regarding readability, one might infer that a reduction in readability is related to the statutorification of law or expansion of federal administrative programs if (1) the Court's opinions that address statutory law or administrative law issues are less readable than other opinions; and (2) the percentage of opinions issued by the Court in those areas increased since the 1930s.

Based on the F-K Grade Level Formula, administrative law opinions issued during the 2009-2011 terms *were* the most difficult to read, followed by statutory law opinions, constitutional law opinions, and finally criminal law opinions.<sup>189</sup> However, the difference between the average reading level of the administrative law opinions and the criminal law opinions (the most readable during that time frame), was only about one-quarter of a grade.<sup>190</sup> The difference between the average reading level of statutory law opinions and criminal law opinions was even smaller.<sup>191</sup> By contrast, during the 1931-1933 terms, the administrative law opinions were the most difficult to read,

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188. See *supra* note 186.

189. The mean F-K Grade Level for administrative law opinions was 13.496. Stephen M. Johnson, *2009-2011 Opinions Ad Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Opinions Ad Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Opinions%20Ad%20Law.pdf). The mean F-K Grade Level for statutory law opinions was 13.396. Stephen M. Johnson, *2009-2011 Opinions Stat Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Opinions Stat Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Opinions%20Stat%20Law.pdf). The mean F-K Grade Level for constitutional law opinions was 13.35. Stephen M. Johnson, *2009-2011 Opinions Con Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Opinions Con Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Opinions%20Con%20Law.pdf). The mean F-K Grade Level for criminal law opinions was 13.24. Stephen M. Johnson, *2009-2011 Opinions Crim Law*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Opinions Crim Law.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Opinions%20Crim%20Law.pdf).

190. See Johnson, *2009-2011 Opinions Ad Law*, *supra* note 189; Johnson, *2009-2011 Opinions Crim Law*, *supra* note 189 (identifying a difference of 0.256 between F-K Grade Level for criminal law opinions and administrative law opinions).

191. See Johnson, *2009-2011 Opinions Crim Law*, *supra* note 189; Johnson, *2009-2011 Opinions Stat Law*, *supra* note 189 (identifying a difference of 0.156 between F-K Grade Level for criminal law opinions and statutory law opinions).



followed again by statutory law opinions, constitutional law opinions, and criminal law opinions.<sup>192</sup> However, the difference between the average reading level of the administrative law opinions and the criminal law opinions (the most readable during that time frame), was more than a grade.<sup>193</sup> The difference between the average reading level of the statutory law opinions and criminal law opinions was also about one grade level during that time frame.<sup>194</sup> Thus, the readability gap between administrative law and statutory law opinions and other types of opinions appears to have narrowed significantly between the 1930s and today.

Even if there were a greater difference between the readability of administrative law and statutory law opinions and other types of opinions today, that would not necessarily suggest that the statutorification of law or the expansion of federal administrative programs is to blame for the decrease in readability of Supreme Court opinions, since the Court has not significantly increased the percentage of administrative or statutory law cases that it decides. Of the opinions issued during the 2009-2011 terms, sixty percent addressed statutory law issues and twenty-five percent addressed administrative law issues,<sup>195</sup> while fifty-five percent of the opinions issued during the 1931-1933 terms addressed statutory law issues and thirty-three percent addressed administrative law issues.<sup>196</sup> Thus, while there has been an increase in the percentage of cases addressing statutory law issues, it has been a small increase and there has been a fairly significant decrease in the percentage of cases addressing administrative law issues.

It is interesting to note, though, that the percentage of cases addressing criminal law issues increased from eight percent during the 1931-1933 terms

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192. The mean F-K Grade Level for administrative law opinions was 12.62. Stephen M. Johnson, *1931-1933 Opinions Ad Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Opinions Ad Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Opinions%20Ad%20Law.pdf). The mean F-K Grade Level for statutory law opinions was 12.44. Stephen M. Johnson, *1931-1933 Opinions Stat Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Opinions Stat Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Opinions%20Stat%20Law.pdf). The mean F-K Grade Level for constitutional law opinions was 12.34. Stephen M. Johnson, *1931-1933 Opinions Con Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Opinions Con Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Opinions%20Con%20Law.pdf). The mean F-K Grade Level for criminal law opinions was 11.49. Stephen M. Johnson, *1931-1933 Opinions Crim Law*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Opinions Crim Law.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Opinions%20Crim%20Law.pdf).

193. See Johnson, *1931-1933 Opinions Ad Law*, *supra* note 192; Johnson, *1931-1933 Opinions Crim Law*, *supra* note 192 (identifying a difference of 1.13 between F-K Grade Level for criminal law opinions and administrative law opinions).

194. See Johnson, *1931-1933 Opinions Stat Law*, *supra* note 192; Johnson, *1931-1933 Opinions Crim Law*, *supra* note 192 (identifying a difference of 0.95 between F-K Grade Level for criminal law opinions and statutory law opinions).

195. See Johnson, *2009-2011 Page Length Ad Law*, *supra* note 186 (25.3%); Johnson, *2009-2011 Page Length Stat Law*, *supra* note 186 (60.2%).

196. See Johnson, *1931-1933 Page Length Ad Law*, *supra* note 186 (33.2%); Johnson, *1931-1933 Page Length Stat Law*, *supra* note 186 (55.1%).

to forty-one percent during the 2009-2011 terms.<sup>197</sup> Significantly, too, the average reading level for criminal law opinions issued during the 2009-2011 terms is one and three-quarters grade levels higher than the reading level for criminal law opinions issued during the 1931-1933 terms.<sup>198</sup> The change in the average reading level for criminal law opinions between the 1930s and today exceeded the changes for administrative law, statutory law, and constitutional law, each of which were about a grade level.<sup>199</sup> While the Court's criminal law opinions are still the most readable of the types of opinions examined in this study, they have become increasingly less readable than they were during the 1930s, and constitute a much greater percentage of the Court's opinions today than they did during the 1930s.

While the data in this study does not support an inference that the statutorification of law or the expansion of federal administrative programs has contributed to a decrease in the readability of the Supreme Court's opinions or an increase in the length of the opinions, it is clear that, at some point after the 1931-1933 terms, there was a shift in the manner in which the Justices on the Supreme Court reach consensus and express their views on cases. Whereas the Justices in the 1930s frequently reached consensus on opinions or refrained from issuing separate written dissenting or concurring opinions, today's Justices are much more willing to engage in academic debate and dialogue through dissenting and concurring opinions. While academics disagree regarding what factors motivated that change, the nature of that debate and dialogue in the dueling opinions necessarily leads to longer and less readable opinions, as the Justices seemingly feel compelled to respond to each point raised in the separate opinions.

In almost ninety percent of the cases decided during the 1931-1933 terms, the Court issued a single written opinion.<sup>200</sup> In many of those cases, if Justices concurred or dissented, the opinion of the Court merely indicated the

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197. See Johnson, *2009-2011 Page Length Crim Law*, *supra* note 186 (40.96%); Johnson, *1931-1933 Page Length Crim Law*, *supra* note 186 (8.45%).

198. See Johnson, *2009-2011 Opinions Crim Law*, *supra* note 189; Johnson, *1931-1933 Opinions Crim Law*, *supra* note 192 (identifying a difference of 1.75 between F-K Grade Level for criminal law opinions in the 1931-1933 terms and criminal law opinions in the 2009-2011 terms).

199. See Johnson, *2009-2011 Opinions Ad Law*, *supra* note 189; Johnson, *1931-1933 Opinions Ad Law*, *supra* note 192 (identifying a difference of 0.876 between F-K Grade Level for administrative law opinions in the 1931-1933 terms and 2009-2011 terms); Johnson, *2009-2011 Opinions Stat Law*, *supra* note 189; Johnson, *1931-1933 Opinions Stat Law*, *supra* note 192 (identifying a difference of 0.956 between F-K Grade Level for statutory law opinions in the 1931-1933 terms and 2009-2011 terms); Johnson, *2009-2011 Opinions Con Law*, *supra* note 189; Johnson, *1931-1933 Opinions Con Law*, *supra* note 192 (identifying a difference of 1.01 between F-K Grade Level for constitutional law opinions in the 1931-1933 terms and 2009-2011 terms).

200. See Johnson, *1931-1933 Opinions*, *supra* note 178.

concurrence or dissent of those Justices, without providing any explanation for the Justices' disagreement with the majority opinion.<sup>201</sup> In other cases, the Court's opinion included one or two sentences explaining the concurring or dissenting views of Justices who departed from the majority opinion.<sup>202</sup> Only ten percent of the separate written opinions issued by the Court during the 1931-1933 terms were dissenting opinions and only two percent were concurring opinions.<sup>203</sup> By contrast, during the 2009-2011 terms, the Court issued a single written opinion in only about twenty percent of all of the cases decided.<sup>204</sup> Only forty-three percent of the separate written opinions issued by the Court during that period were majority opinions.<sup>205</sup> Almost thirty percent of the opinions were concurring opinions and about twenty-five percent of the opinions were dissenting opinions.<sup>206</sup>

Academics have traced the shift in the Court's opinion delivery process to the 1940s.<sup>207</sup> While the percentage of the Court's cases decided unanimously held relatively steady at eighty to ninety percent from the beginning of the Marshall Court through the 1930s, the percentage of cases decided by a non-unanimous Court exploded in 1941 and peaked in 1947, when only fourteen percent of the Court's cases were decided unanimously.<sup>208</sup> Similarly, while majority opinions made up eighty to ninety

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201. See, e.g., *Reynolds v. United States*, 292 U.S. 443 (1934) (Cardozo, J., and Stone, J., dissenting without opinion); *Alabama v. Arizona*, 291 U.S. 286 (1934) (Stone, J., concurring without opinion); *Seattle Gas Co. v. Seattle*, 291 U.S. 638 (1934) (Butler, J., McReynolds, J., Sutherland, J., and Van Devanter, J., concurring without opinion). This practice was not unusual at the time, although concurrences without explanation were sometimes considered insulting to the majority opinion author. Louis Lusky, *Fragmentation of the Supreme Court: An Inquiry Into Causes*, 10 HOFSTRA L. REV. 1137, 1139 (1982).

202. See, e.g., *Burnet v. Brooks*, 288 U.S. 378 (1933) (one sentence describing the basis for Justice Butler's dissent); *Burnet v. Guggenheim*, 288 U.S. 280 (1933) (one sentence describing the dissenting opinions of Justices Sutherland and Butler).

203. See Johnson, *1931-1933 Opinions by Opinion Type*, *supra* note 184.

204. See Johnson, *2009-2011 Opinions*, *supra* note 178 (finding that a single opinion was issued in only 21.29% of the cases). The Court issued 564 separate written opinions for the 249 cases that it decided during the 2009-2011 terms, as compared to the 554 separate written opinions that it issued for the 485 cases that it decided during the 1931-1933 terms. *Id.*; see also Johnson, *1931-1933 Opinions*, *supra* note 178.

205. See Johnson, *2009-2011 Opinions By Opinion Type*, *supra* note 184 (43.26%).

206. *Id.* The precise percentages vary depending on whether opinions that concur or dissent in part are included with concurring or dissenting opinions. Concurring opinions, including concurring and dissenting opinions, made up 31.38% of the opinions issued during the 2009-2011 terms, while concurring opinions, excluding concurring and dissenting opinions, made up 28.01%. Similarly, dissenting opinions, including concurring and dissenting opinions, made up 27.84% of the opinions issued during the 2009-2011 terms, while dissenting opinions, excluding concurring and dissenting opinions, made up 24.47%. *Id.*

207. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L. Q. 137, 175-79 (1999).

208. *Id.* at 175.

percent of the Court's opinions from the time of the Marshall Court through the 1930s, the percentage of dissenting and concurring opinions almost doubled in 1941 and the number of dissents and concurrences exceeded the number of majority opinions beginning in 1948.<sup>209</sup> Perhaps the most dramatic increase during the time period was the increase in concurring opinions. The Court issued only 1 concurring opinion for the 149 majority opinions that it issued during the 1936 but issued 42 concurring opinions for the 136 majority opinions that it issued during the 1945 term.<sup>210</sup>

Professor Louis Lusky, who served as a law clerk to Justice Harlan Fiske Stone during the 1937 term, attributes the fragmentation of the Court to (1) a landmark concurring opinion by Justice Frankfurter in *Graves v. New York ex rel. O'Keefe*,<sup>211</sup> in which Justice Frankfurter advocated returning to the Supreme Court's pre-1800 "healthy practice whereby the Justices gave expression to individual opinions,"<sup>212</sup> and (2) a trend in the Court, at the time, away from a textualist interpretation of the Constitution, leading Justices to advocate for more innovative interpretations of the Constitution.<sup>213</sup> Lusky argues that both of these factors sparked an increase in the willingness of Justices to author their own separate opinions.<sup>214</sup> Some scholars, though, attribute the fragmentation of the Court to ineffective leadership of the Court by Justice Stone and to Stone's articulated belief that "imposed unanimity was no virtue in developing the law."<sup>215</sup> Other scholars suggest that the fragmentation of the Court exploded in the 1940s because the Judiciary Act of 1925 gave the Justices greater control over their docket, so that "developing and articulating a coherent judicial philosophy perhaps took on a greater significance for individual Justices after the Act."<sup>216</sup>

Regardless of the reasons for the shift, a comparison of the opinions issued during the 1931-1933 terms and the 2009-2011 terms vividly demonstrates the shift. In the format adopted beginning in the 1940s, the Justices are speaking to each other and debating more than they are outlining a rule of law for the public. Their primary audience is more likely an academic or "professional" audience, rather than the public. That may not be surprising in light of the fact that more than half of the Justices appointed to the Supreme Court since 1939, including eight of the sitting Justices, had

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209. *Id.* at 177-78.

210. See Lusky, *supra* note 201, at 1138, Table I.

211. 306 U.S. 466 (1939).

212. *Id.* at 487 (Frankfurter, J., concurring).

213. See Lusky, *supra* note 201, at 1143-47.

214. *Id.*

215. See Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 379-84 (1988).

216. See Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, The Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471, 482-83 (1977).

some law school teaching experience prior to their appointment.<sup>217</sup> It should also not be surprising, therefore, that opinions written for an academic or professional audience in the style of a debate or academic dialogue are longer, more complex, and less readable.

### 3. Readability of Opinions by Opinion Type and Justice

As noted above, the Owens and Wedeking, and Long and Christensen studies reached conflicting conclusions regarding the types of opinions that were the most readable, with Owens and Wedeking concluding that dissenting opinions are clearer than majority opinions, and Long and Christensen concluding that majority opinions are more readable than dissenting opinions.<sup>218</sup> In light of the small number of concurring and dissenting opinions issued during the 1931-1933 terms, it is difficult to draw comparisons between the readability of opinions by opinion type for the time periods covered by this study. Nevertheless, during the 1931-1933 terms, concurring opinions were the most readable, averaging an F-K grade level of 10.85, followed by dissenting opinions (11.3), and majority opinions (12.33).<sup>219</sup> During the 2009-2011 terms, concurring opinions were again the most readable, averaging 12.9, followed by majority opinions (13.44) and dissenting opinions (13.49).<sup>220</sup> Thus, for the opinions examined in this study, concurring opinions were the most readable. Dissenting opinions were more readable than majority opinions during the 1931-1933 terms, but slightly less readable during the 2009-2011 terms. Concurring opinions were also the shortest type of opinion, averaging about four pages during the 1931-1933 terms (compared to eight-page majority opinions and nine-page dissents)<sup>221</sup>

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217. This assertion is based on an analysis of the data in the United States Supreme Court Justices Database. See Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, *The U.S. Supreme Court Justices Database* (March 2, 2013), <http://epstein.usc.edu/research/justicedata.html>. Eighteen of the thirty-five Justices appointed since 1939 had prior law teaching experience. *Id.* All of the sitting Justices, other than Justice Thomas, had law school teaching experience prior to their nomination to the Court. *Id.* By contrast, only twelve of the seventy-nine Justices (fifteen percent) appointed to the Court prior to 1939 had prior law teaching experience. *Id.*

218. See Owens & Wedeking, *supra* note 7, at 1047; Long & Christensen, *supra* note 10, at 160. As noted above, Owens and Wedeking used the LIWC formula to analyze the opinions, while Long and Christensen used the F-K formulas. See Owens & Wedeking, *supra* note 7, at 1039; Long & Christensen, *supra* note 10, at 148.

219. See Johnson, *1931-1933 Opinions By Opinion Type*, *supra* note 183.

220. See Johnson, *2009-2011 Opinions By Opinion Type*, *supra* note 183.

221. See Johnson, *1931-1933 Opinions By Opinion Type*, *supra* note 183 (finding a mean page length of 3.8 pages for concurring opinions, 8.18 pages for majority opinions, and 9.33 pages for dissenting opinions).

and about six pages during the 2009-2011 terms (compared to seventeen-page majority opinions and fifteen-page dissents).<sup>222</sup>

Owens and Wedeking's study also examined the clarity of the Court's opinions by individual Justice and determined that Justices Scalia and Breyer wrote the clearest majority opinions, while Justice Ginsburg wrote the most complex majority opinions.<sup>223</sup> Based on an analysis of a more limited universe of opinions than the Owens and Wedeking study, and utilizing the F-K readability formulas rather than the LIWC formulas used by Owens and Wedeking, this study found that Justices Kagan (12.64 F-K score) and Roberts (13.13 F-K score) wrote the most readable majority opinions, and most readable opinions generally, during the 2009-2011 terms, while Justices Stevens (14.1 F-K score) and Sotomayor (14.27 F-K score) wrote the least readable majority opinions and least readable opinions generally, although the most readable and least readable were separated by only about a grade and a half in reading levels according to the F-K Grade Level Formula.<sup>224</sup> By contrast, during the 1931-1933 terms, Justices Cardozo (11.36 F-K score) and Brandeis (11.49 F-K score) wrote the most readable opinions, while Justices Hughes (12.64 F-K score) and Stone (13.18 F-K score) wrote the least readable opinions.<sup>225</sup> Justice Holmes' opinions during that time period were even more readable by almost two grade levels (9.64 F-K score), but he only authored seven opinions.<sup>226</sup>

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222. See Johnson, *2009-2011 Opinions By Opinion Type*, *supra* note 183 (finding a mean page length of 5.54 pages for concurring opinions without concurring/dissenting opinions, 6.5 pages for concurring opinions with concurring/dissenting opinions included, 16.5 pages for majority opinions, 14.58 pages for dissenting opinions without concurring/dissenting opinions, and 14.57 pages for dissenting opinions with concurring/dissenting opinions included).

223. See Owens & Wedeking, *supra* note 7, at 1044.

224. See Stephen M. Johnson, *2009-2011 Opinions By Justice*, available at [http://www2.law.mercer.edu/elaw/readability/2009-2011 Opinions By Justice.pdf](http://www2.law.mercer.edu/elaw/readability/2009-2011%20Opinions%20By%20Justice.pdf). Although the data suggest that Justice Kagan's opinions were the most readable opinions based on the F-K Grade Level scores, it is worth noting that she only authored twenty opinions during the 2009-2011 time frame due to her more recent appointment to the Court. *Id.* The F-K scores for the other Justices were: Breyer (13.30); Kennedy (13.33); Ginsburg (13.53); Scalia (13.89); Thomas (13.96); and Alito (13.97). While Justice Kagan's opinions were the most readable, they were also, on average, the longest at 17.75 pages. *Id.* The average page length of the opinions of the other Justices were: Stevens (16.66 pages); Kennedy (15.35 pages); Sotomayor (14.5 pages); Alito (13.18 pages); Ginsburg (12.9 pages); Breyer (12.42 pages); Thomas (10.98 pages); and Scalia (10.5 pages). *Id.*

225. See Stephen M. Johnson, *1931-1933 Opinions By Justice*, available at [http://www2.law.mercer.edu/elaw/readability/1931-1933 Opinions By Justice.pdf](http://www2.law.mercer.edu/elaw/readability/1931-1933%20Opinions%20By%20Justice.pdf). Justice Van Devanter's opinions were less readable, by F-K Grade Level score (12.88), than any Justice other than Justice Stone, but he only authored twelve opinions during the 1931-1933 Supreme Court terms. *Id.*

226. *Id.* Justice Holmes' opinions during the 1931-1933 Supreme Court terms were also the shortest, averaging 2.43 pages each. *Id.* Justices Van Devanter (11.83 pages) and Brandeis

Thus, most of the Justices writing during the 1931-1933 terms were writing opinions that could be understood by persons with a high school education (F-K of 12 or less), while most of the Justices writing during the 2009-2011 terms were writing opinions that are targeted to persons with at least some college education.<sup>227</sup> The most readable opinion authored during the 1931-1933 terms, Justice Brandeis' majority opinion in *Van Huffel v. Harkelrode*,<sup>228</sup> was written at a level (8.3) that could be understood by someone with little more than a grade school education,<sup>229</sup> while the most readable opinion authored during the 2009-2011 terms, Justice Roberts' majority opinion in *Blueford v. Arkansas*,<sup>230</sup> was written at a level (11.0) appropriate for a junior in high school.<sup>231</sup>

#### CONCLUSION

A comparison of the opinions issued by the Supreme Court in the 1931-1933 terms and the 2009-2011 terms confirms the claims of critics that the Court's decisions are becoming excessively long and unreadable for the public. Today's opinions are three times as long as the Depression era opinions and are twenty-five percent less readable, based on the Flesch Reading Ease formula.<sup>232</sup> However, the transition does not appear to be related to increasing legal challenges spurred by the "statutorification" of law or the expansion of federal administrative programs following the New Deal.<sup>233</sup> Indeed, the Court's opinions are getting longer and less readable in all types of cases, with the greatest increase in obfuscation arising in cases involving criminal law.<sup>234</sup> It appears more likely that a cultural change in the Court, the expansion of concurring and dissenting opinions in the 1940s, could have played an important role in changing the nature of the dialogue in the Court's opinions, sparking a more academic and professional tone in the

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(10.28 pages) averaged the longest opinions during that time frame. *Id.*

227. While the Court's opinions are written on a higher level today, based on the F-K formulae, than they were in the 1930s, the percentage of the American population twenty-five years and older who completed high school in 1940 was about twenty-five percent, compared to more than eighty percent in 2009. See U.S. Census Bureau, *Educational Attainment in the United States: 2009* (Feb. 2012) at 3, available at <http://www.census.gov/prod/2012pubs/p20-566.pdf>. Similarly, the percentage of the American population twenty-five years and older who completed college has grown from less than five percent in 1940 to about thirty percent in 2009. *Id.*

228. 284 U.S. 225 (1931).

229. See Johnson, *1931-1933 Opinions*, *supra* note 178.

230. 132 S. Ct. 2044 (2012).

231. See Johnson, *2009-2011 Opinions*, *supra* note 178.

232. See *supra* notes 183-85 and accompanying text.

233. See *supra* notes 188-96 and accompanying text.

234. See *supra* notes 197-99 and accompanying text.

opinions.<sup>235</sup> Regardless of what factors motivated the shift, the Court's opinions today are less likely to achieve the goals identified for them by many commentators: (1) informing the public about the rule of law; (2) promoting the legitimacy of courts; and (3) facilitating judicial constraint.<sup>236</sup>

Dean Erwin Chemerinsky has proposed several reforms of Supreme Court practice and procedure that would help meet those goals.<sup>237</sup> Like Professor Serota, Dean Chemerinsky suggests that the Court's opinions should be accompanied by a short, succinct, non-precedential summary of the opinion.<sup>238</sup> The summary proposed by Chemerinsky would be much shorter than the "public opinions" proposed by Serota, and would be written by the Justices, rather than a new administrative office, as proposed by Serota.<sup>239</sup> Like other reformers, Chemerinsky also proposes word and page limits for the Court's opinions.<sup>240</sup> Chemerinsky's other reform proposals do not directly address the format of the Court's opinions, but are targeted at improving communication between the Court and the public and promoting the informing, legitimizing, and constraining goals outlined above. Specifically, he proposes that the Court broadcast oral arguments and other proceedings.<sup>241</sup> Such broadcasts, he argues, would help the public understand the issues before the Court, understand the judicial process, and understand the Court.<sup>242</sup> Further, he proposes that the Court should spread out the release of opinions at the end of the term and announce, in advance, which opinions will be released on a particular day.<sup>243</sup> Since the public relies heavily on the media to translate the Court's opinions for them and outline the implications of the opinions, Chemerinsky argues that his reform proposals will make it easier for the media to research and report the opinions accurately.<sup>244</sup>

Although the proposals to impose page or word limits on the Court's opinions and to broadcast the Court's proceedings are likely to face opposition from the Court, the others are fairly modest. At a time when the

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235. *See supra* notes 200–16 and accompanying text.

236. *See supra* notes 61–64 and accompanying text.

237. *See* Chemerinsky, *supra* note 1, at 1716.

238. *Id.* at 1712.

239. *Id.*

240. *Id.* at 1716.

241. *Id.*

242. *Id.* at 1709–10. Chemerinsky notes that most Americans, without the ability to watch the Supreme Court's arguments, thought that the central issue before the Court in the case challenging the Affordable Care Act was whether people had a right to purchase health insurance. *Id.* at 1709. In reality, though, "the Court's focus was entirely on the scope of congressional power and the ability to force states to comply with federal requirements." *Id.*

243. Chemerinsky, *supra* note 1, at 1716.

244. *Id.* at 1712.



Court's opinions are becoming excessively long and unreadable for the public, exploring these proposals is the least that the Court can do to re-open the lines of communication.