

Strategic Sensationalism: Understanding the Use of Emotional Appeals in Supreme Court Opinions

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February 13, 2017

Abstract

Do justices seek to persuade the general public when cases are salient? I argue that they do. Justices have less control over the policy consequences of cases when numerous, non-legal actors get involved. In these situations of high interdependence, Epstein and Knight (1997) and Murphy (1964) suggest justices will use persuasion and emotional appeal to maximize their influence. I hypothesize, and the data confirm, that increased pre-decision salience in a case leads justices to alter the sensationalism of their texts in order to persuade the public through emotional appeal. Furthermore, I find that this relationship has become stronger over time. In this way, Davis's (2011) argument that justices have "gone public" seems to hold true.

Introduction

[A]lthough the general political environment may be beyond the power of a Justice to control, it is rarely beyond his power to influence.

– Walter Murphy (1964, 208)

Supreme Court justices seek to implement their policy preferences (Segal and Spaeth 2002). Institutional constraints internal and external to the Court, however, constrain their ability to do so (Epstein and Knight 1997). There are many examples of such constraints. Despite being free to vote however they wish, a majority of justices must agree on both the dispositional outcome and the rationale of their decision if they want it to have any binding effect in subsequent decisions. Justices need to monitor the implementation of their decisions by lower court justices and administrative officers (McNollgast 1995). They often require support from other branches of government to enforce their decisions (Rosenberg 2008). Their perceived authority and legitimacy is a function of the public’s support for the institution (Gibson, Caldeira and Baird 1998). In summary, justices do not usually achieve their legal or policy goals in isolation; their success depends on the choices of their colleagues and external actors.

The strategic theory of judicial decision making maintains that justices seek policy in an interdependent environment in which their choices depend on the choices of others. Recognizing this, Epstein and Knight (1997) suggest we “invoke the strategic account to understand the choices justices make: to accommodate the concerns of other justices in majority opinions, to bargain, to circulate a dissent from the denial of certiorari, *to engage in persuasion*, and, yes, to vote in a particular way and to change that vote, to name a few” (185, emphasis added). Scholars have invoked the strategic account to explain many of these choices, but rarely have they focused on how justices engage in persuasion. In this paper, I invoke this model to explain how and why justices use persuasion to influence the broader public.

Justices as Policy-Preference Maximizers

It has been a tenet of political science theory that justices act as if they are single-minded seekers of policy (Pritchett 1941; Rohde and Spaeth 1976; Segal and Spaeth 2002). In practice, this means that ideology predicts judicial behavior. The breakdown of norms of consensus in the 1940s provided judicial scholars an opportunity to understand the effect of ideology on judicial decisions. Figure 1 plots the number of dissenting opinions by term on the Supreme Court. As we can see, the number of dissenting opinions skyrocketed after 1940. Since then, the number of dissenting opinions per term almost matches the number of cases decided per term.

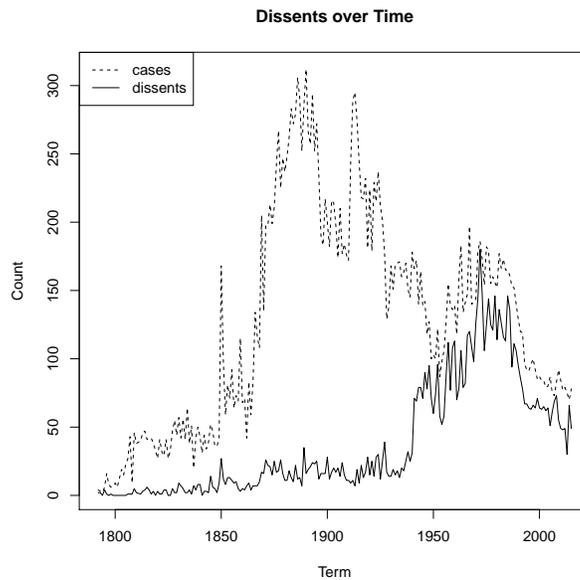


Figure 1

Rohde and Spaeth (1976) and then Segal and Spaeth (1993) convinced the scholarly community that these differences in voting behavior were a function of ideology. “Simply put,” Segal and Spaeth argue, “Renhquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal” (65). That policy matters to justices, however, does not mean that other factors are irrelevant to understanding judicial decisions. Many scholars have provided compelling evidence that things

like self-representation (Baum 2009), personality (Hall N.d.), power motivations (Black et al. N.d.), law (Bailey and Maltzman 2011), and personal reasons (Posner 2010) lead justices to behave in ways that cannot be explained by policy preferences alone. Nevertheless, ideology continues to be one of the most replicated and dominant explanations of judicial behavior.

Scholars agree justices are highly constrained in their ability to pursue their policy preferences (Epstein and Jacobi 2010). As a consequence, justices are quite strategic. Justices are constrained because they work in an environment in which their success in achieving policy goals depends on the choices of others. For example, a justice may want to reverse a decision by the lower courts but, by voting to grant review of that decision, allow a majority of individuals on the Court to affirm it; the justice should therefore vote to deny review of the case and maintain the status quo.

There are many other manifestations of the strategic argument. Rosenberg (2008) shows that the Court rarely, if ever, brings about social change without the support of other actors. Hall (2010), on the other hand, shows that the Court is more successful in bringing about change when implementation is largely driven by lower court judges (vertical cases) rather than requiring the action of co-branches of government (horizontal cases). The common thread in these studies is the dependency of justices on the decisions made in other branches of government.

Most scholars, however, have focused on the internal constraints justices face. Maltzman, Spriggs and Wahlbeck (2000) show that the Court's most important output – the judicial opinion – is a product of strategic bargaining. The logic of the argument is easy to understand. Justices are unlikely to join the opinion of a majority opinion writer who uncompromisingly seeks to implement a policy preference because they are free to write and circulate a more acceptable opinion. All actors know this, and so justices bargain and accommodate as they seek to secure a majority coalition. Thus, ideological preferences are moderated by this strategic, internal environment.

Missing from this explanation of opinion content, however, is the role of external

forces. Maltzman, Spriggs and Wahlbeck (2000) themselves suggest external forces may shape opinions. In fact, it is often overlooked that theirs is a minimal theory of how the strategic environment shapes judicial opinions: “To achieve policy outcomes as close as possible to their own preferences, justices must *at a minimum* take into account the choices made by their colleagues, with whom they ultimately must negotiate, bargain, and compromise” (16-17, emphasis added). In a footnote they explain that, “[a]lthough extrainstitutional constraints are theoretically plausible and interesting, we focus on the intra-Court collegial game” (14, footnote 7).

The question before us, then, is straightforward: how might external forces influence the content of Supreme Court opinions? Understanding the content of judicial opinions is important because it is the content, rather than the votes, which determine the meaning of law and govern future disputes. Votes determine the immediate effect of a ruling but do not reach beyond the case in similarly meaningful ways. I look at public attention as a potential source of external influence on opinion content.

The Influence of Public Attention

While the evidence is unclear whether public opinion has a systematic, observable, and direct effect on justice behavior, recent works uncover at least an indirect relationship. For example, we know that justices write clearer opinions when general public mood seems to push against the Court’s decisions (Black et al. 2016). Likewise, Bryan and Kromphardt (2016) show that justices are more likely to vote contrary to their preferences when the case is highly salient or public mood is biased against them. Casillas, Enns and Wohlfarth (2011) make the argument that justices are responsive to public mood in non-salient cases. Hall (2014) found that justices are most influenced by public mood in cases where they rely on non-legal actors for implementation (lateral cases).

These recent findings all rely on the same broad measure of (Stimson’s) public mood

to understand how Supreme Court justices respond to the public.¹ It is important to note that public mood is based on public support for government programs generally rather than on support for the Supreme Court specifically. Furthermore, it is an annual measure.² The upside of using public mood is that it leads to intuitive hypotheses. When public mood is aligned with the Court, then the public should support their decisions (and all other similar decisions by government actors) more. When mood is negative, the public should support them less. The downside is that the measure is not specific to Supreme Court cases or even to the Supreme Court. Despite this, the findings based on it are consistent and the best we have given the lack of Supreme Court and case-specific opinion data.

There is another way to understand the influence of the public on Supreme Court behavior, which is to focus on how justices' behavior may change simply by the mechanism of increased public *attention*.³ The most common measure of public attention to Supreme Court cases, the Epstein and Segal (2000) measure, is a dichotomous measure of whether a case appeared on the front page of the *New York Times* following a decision. This measure presents a causality issue if we want to understand how public attention *before* a decision influences opinion language. Furthermore, the measure is based on one newspaper, only

¹A few scholars have looked at the relationship between regional measures of public mood and circuit court behavior (Calvin, Collins Jr. and Eshbaugh-Soha 2011; Owens and Wohlfarth 2017).

²Bi-annual and quarterly estimates are available but rarely used in the judicial context.

³We know that public attention influences the behavior of other political actors. For example, the presence of C-SPAN has led to significant increases in the lengths of congressional sessions and individual speeches. These speeches are largely nonlegislative (one-minute and special order speeches) and directed at the external audience (Frantzich 2015). We also have evidence that the arrival of C-SPAN and its associated public spotlight has led to decreased levels of collegiality and increased partisan rhetoric (Grundy 2000; Mixon and Upadhyaya 2003; Mixon Jr, Gibson and Upadhyaya 2003).

front-page news coverage, and it cannot capture the wide variation in public attention to cases.

Other common measures, such as whether justices read a decision from the bench (Johnson, Black and Ringsmuth 2008) or ask numerous questions during oral argument (Black, Sorenson and Johnson 2013), usually signify salience to the justices themselves and not to the public. In 2012, Collins and Cooper developed an indexing measure of salience based on all coverage of cases in four newspapers before the release of the decision. This measure, then, is a major improvement for studying the influence of public attention on judicial behavior. In fact, Bryan and Kromphardt, discussed above, used this measure. More recently, Clark, Lax and Rice (2015) developed a latent variable measure of salience based on similar data to Collins and Cooper.

I use the measure of pre-decision salience developed by Clark, Lax and Rice to account for public attention to a case. Until now, we have primarily relied on measures of salience based on post-decision coverage of a decision. Such a measure may be satisfactory for understanding the effect of decisions on the salience or coverage of a case, but it is inappropriate for gauging how justices adjust their behavior in the presence of public attention. Thus, the development of a much more direct measure of public attention to a case before the release of a decision opens the door for a stronger analysis of how justices are influenced by the public on a case-by-case basis. As the Court finds itself in the spotlight, how does it respond? Do justices systematically alter the language of their opinions as public attention increases? Or, are justices unresponsive to the presence of public attention?

Judicial Responsiveness to Public Attention

As argued, justices strategically seek to maximize policy. The increased public salience which attends some cases may lead justices to alter their strategy. First, let's consider the typical case.

Low-salience case:

In most cases, the content of an opinion has a significant impact on policy due to the court's relationship with the most immediately relevant audience: the legal community. Decisions are respected by the legal community due to norms of *stare decisis*. In addition, justices use a number of tools to monitor compliance with their decisions. Justices can reverse lower court decisions as a sanctioning tool (McNollgast 1995). Likewise, justices can apply different legal instruments in order to encourage or constrain lower court judges (Staton and Vanberg 2008). Three-judge panels in the lower courts, whistle-blowing vis-à-vis dissents, *en banc* review of circuit decisions, and legal training all contribute to a favorable bias with the legal community (Baum 1997; Cross and Tiller 1998). Empirical evidence backs up these arguments. Justices appear to be quite effective in controlling the lower courts. Study after study suggests that lower courts comply with judicial decisions (Songer, Segal and Cameron 1994; Klein and Hume 2003).

High-salience case:

High-salience cases are quite different from low-salience cases. Here, justices still control the dispositional outcome of a case, but they are less likely to dominate the policy discussions and debates that we know follow. That is because the broader public now involved is less devoted to or constrained by the Court's rulings. As the public and interest groups become more interested and involved in cases, the justices have less direct impact on policy implications. This can be likened to a room with varying numbers of people. If few people are in the room, then one voice has significant dominance. As the number of individuals and discussions increases, that same voice has less of an impact. To make a difference, that one individual can alter behavior and draw attention to his or her argument.

Schattschneider (1975) made a similar argument using the concept of "scope of conflict." When the immediate audience to a conflict is small, the stronger person in the conflict tends to have the advantage. However, as more bystanders become engaged, the dominant individual or individuals lose their advantage. The scope of conflict expands and the growing

crowd determines the outcome. The original individuals at the center of the conflict now have less control.⁴ In the context of the Supreme Court, the small group of individuals actively engaged at the center consists of all the justices. The immediate and relevant audience is the legal community. The prevailing coalition in any case has an immediate and favorable bias with the legal community due to norms of *stare decisis*. As the public expands the audience, justices have less control over the eventual policy consequences of their decisions.

Murphy (1964) clearly thought justices alter their behavior in salient cases to maximize policy gains: “Even where a Justice chose to act as effectively as possible to achieve his policy goals, there are severe limits to what he could accomplish.” Recognizing their limited abilities, he continued, justices “may succeed in influencing . . . segments of public opinion so that the effectiveness of opposition to the Court’s decisions will be reduced or positive co-operation induced” (207). Murphy’s underlying point is that, if justices care about policy, they do what they can to maximize the effects of their decisions. Given their diminished voice in salient cases, justices may change their voice or strategy to influence the subsequent debates.

There are a number of strategic choices a justices could make to influence broader debates. Judicial norms, however, limit their possible actions (Davis 2011). Whereas other political actors are free to make speeches, grant interviews, or take to Twitter, the same activities are deemed inappropriate for judges. The only available platform for a justice to systematically and consistently discuss a case and its implications is within judicial opinions themselves. In fact, some complain that *dicta* (arguments made in an opinion not directly necessary for deciding the case at hand) is quite pervasive (Leval 2006). But this is the point. The opinion is a platform through which justices can influence broader debates.

⁴Schattschneider (1975) develops this theory to explain the desirability of a governing system based on competitive parties. In his view, competitive parties are more likely than interest groups or other entities to engage the largest swath of the American public, and thereby be a less-biased governing entity.

Murphy (1964) suggests that these attempts at persuasion in judicial opinions would “take the form of an intellectual or emotional appeal”:

As always persuasion would be an important element in any strategic plan. It may take the form of an intellectual or emotional appeal. It may be directed specifically at the executive department, at particular interest groups, or at the public opinion generally in the hope that pressure will be exerted against the administration. It may be contained in a Court opinion, a public speech, a message related through mutual confidants, or in private correspondence or communication. (147)

In sum, my primary hypothesis is that, because justices seek to maximize their influence over policy, the new environment created through public salience leads them to engage in persuasion through the inclusion of emotional appeals in Supreme Court opinions.⁵ This is a strategic decision to influence external actors. Whether justices systematically engage in persuasive writing in judicial opinions to maximize policy gains is an untested proposition.

Change Over Time

I also expect the relationship between salience and emotional appeals to be stronger in recent years. Davis (2011) argued that justices have been more willing to “go public” in the past quarter century. He outlines a number of important events leading to this behavior, such as changes in how the media covers the Court, the rise of interest group influence, and the increasing politicization of processes directly connected to justices, such as Senate confirmations of presidential Supreme Court nominees.⁶

⁵I do not test Murphy’s argument that justices use intellectual appeals to persuade.

⁶While Davis’ book is rich with anecdotal evidence supporting this argument, the empirical analysis is slimmer. Rather than directly observing justice behavior, he analyzes news coverage of the justices over time and finds that the justices have become more prominent in the news since the year 2000. I test his argument by directly observing the behavior of the justices.

Justice Scalia was quite forthright when he explained his decision to become more public, and Davis argues that his willingness to engage the public is part of a more general trend in how justices are beginning to behave:

[T]hat's one reason I've sort of come out of the closet and in recent months done more interviews and allowed my talks to be televised more than I did formerly. I've sort of come to the conclusion that the old common law tradition of judges not making public spectacles of themselves and hiding in the grass has just broken down. It's no use, I'm going to be a public spectacle whether I come out of the closet or not. . . (as quoted in Davis 2011, 33)

Collins and Cooper (2012) show how coverage of Supreme Court cases has actually decreased in recent years, at least in terms of newspaper coverage. Clearly, then, justices must vie for attention when it comes to newspaper coverage of their decisions. The ability of a justice to frame the issues in a case is increasingly challenged by interest groups, polarized media, and their colleagues in separate opinions. As argued, justices will seek to persuade the public in this highly interdependent environment. The primary means to do so is through opinions, and justices seek to draw the media to its opinion through the only way possible — language.

Measuring Emotional Appeal through Opinion Sensationalism

As the pre-decision salience of a case increases, justices will use emotional appeals to persuade and influence the broader public. I account for emotional appeals in an opinion through measuring the sensationalism of the text. I do this for a few reasons. First, a sensational term is indicative of efforts to persuade others through emotional appeals. An emotional appeal is more likely to use sensational terms than a typical opinion meant to articulate legal rules and instruct lower court judges. In addition, sensationalism reflects the purpose of these emotional appeals in my theory. They direct the attention of the public to

the justices' arguments in an environment where their voice is more likely to be ignored.

The Center for the Study of Emotion and Attention at the University of Florida provides a set of ratings (Affective Norms for English Words or ANEW) that measures the sensationism of an extensive number of English words. To create this dictionary, a team of researchers gave a large number of participants overlapping subsets of words and asked them to rate those words on a scale. (Bradley and Lang 2010). While participants rated words based on pleasantness/unpleasantness and dominance, the relevant ratings for us were based on sensation.⁷ Participants read a word and then rated it on a scale from 1 to 9. A set of images that ranged from a relaxed, sleepy figure to an excited, wide-eyed figure were placed over these numbers. Participants were asked to assign a value for each word based on their initial, emotional response to the word. Higher values indicate higher levels of sensationism.

The ANEW dictionary contains the average sensationism score for each of these words that is directly applicable to my research. For one, the original purpose of the dictionary is to provide stimuli in studies of emotion and attention. My theory is that justices are using words as a sort of stimuli to engage and then persuade the audience - the very purpose for which these dictionaries were meant to be used. The use of more sensational words in more salient cases suggests that justices use opinion language to evoke an emotional response and to attract attention to their arguments.

There are over 2000 words in this dictionary. As with any dictionary applied to a legal context, there are technical words included which may distort my findings. For example, the nouns "dissent" and "party" may evoke stronger emotions outside the Court than they do inside it. To protect from having such legal jargon bias results, I remove nouns from the

⁷Middling scores on the pleasantness/unpleasantness scale correlate with low levels of sensationism while both pleasant and unpleasant terms correlate with high levels of sensationism. Thus, the sensationism measure allows us to capture emotional response to words with both a negative *and* positive connotation used in Supreme Court opinions.

dictionary. The remaining words include only descriptive and actions terms. This left me with 860 words. I also account for the issue area of the case and opinion author in my analysis to control for any bias individual justices or case topic may unintentionally introduce.

Data

Through LexisNexis I obtained all of the majority and dissenting opinions in cases with oral argument from the 1955 to 2008 Supreme Court terms. I then matched words in each majority and dissenting opinion with those which also existed in the ANEW dictionary. After obtaining the sensationalism score for each matched word in each majority or dissenting opinion, I operationalized opinion sensationalism as the average sensationalism score of all words scored in an opinion. I retained the Supreme Court citation for each case and merged my dataset with the Supreme Court Database (Spaeth et al. 2016) and Clark, Lax and Rice's (2015) measure of pre-decision salience.

Clark, Lax and Rice developed their measure of salience to test questions regarding its influence on justices *before* they release their decisions. Most measures of political salience rely on newspaper coverage of a decision. A measure derived, even in part, from this type of coverage is inappropriate for my study because sensationalism of opinion writing may very well lead to more newspaper coverage. In other words, using measures of salience derived from newspaper coverage of decisions will raise obvious questions regarding causality. I therefore rely on Clark, Lax and Rice's (2015) pre-decision estimates of political salience of cases. The most recent version of the pre-decision salience measure covers the time period during Supreme Court terms 1955 to 2008.

To measure pre-decision salience, the authors expanded upon earlier measures to include the coverage of cases during the entire life of a case. To start, they recorded all coverage of cases in the *New York Times*, the *Washington Post*, and the *Los Angeles Times* between 1953 and 2009. They categorized the coverage into four types: coverage before

oral argument, coverage of oral argument, coverage of cases pending decision, and coverage of decisions. Last, they extracted the common dimension that explained media coverage across the three newspapers across the four types of stories using a latent variable model. For the pre-decision measure, the fourth type of coverage (coverage of decisions) is excluded. Thus, any relationship I find between salience and sensationalism cannot be driven by the sensationalism of the opinions themselves. The measure represents the extent to which these newspapers are attentive to a case. Newspaper coverage is the mechanism through which justices discern public attention.⁸

My full dataset contains 9,225 observations of case-level data from the 1955 to 2008 Supreme Court terms. More specifically, there are 5,705 majority opinions and 3,520 dissenting opinions in my dataset.⁹ Only 11 of these opinions did not include at least 1 term from the ANEW dictionary. Opinion Sensationalism varies from 4.11 to 6.63, with a mean of 5.18 and a standard deviation of 0.23.

I will regress Opinion Sensationalism on a number of relevant explanatory variables. To control for trends over time I include the Supreme Court term as both a linear and a non-

⁸Anecdotal and qualitative evidence strongly suggests justices follow coverage of their cases. Supreme Court justices pay close attention to their political environment, whether it is revealed by more innocuous behavior, such as placing friendly bets on election outcomes, or by their serious attempts to track media coverage of the Court, as indicated by the hundreds of clippings found in the papers of retired justices (see Epstein and Knight 1997).

⁹I exclude concurrences and *per curiam* opinions from my analysis. The ambiguity of the purpose of these opinions make them theoretically inappropriate to include. Concurrences are ambiguous in that they can be “regular,” and support the majority opinion, or “special” and be similar to a dissenting opinion. Even regular concurrences vary in their purposes (Corley 2010). *Per curiam* opinions are unsigned opinions. It is unclear what strategic decisions lead justices to *per curiam* opinions, and how these decisions are related to the decision to persuade.

linear (squared) continuous variable. To test for the influence of public attention, I include the measure of pre-decision salience discussed above and I also interact this term with both the linear and non-linear time trends to test how the impact of public attention may have varied over time. To understand any potential differences between majority and dissenting opinions I include an indicator for opinion type as well as an interaction between opinion type and relative size advantage of the majority coalition. The relative size advantage of the majority coalition (Majority Coalition Size) is the number of individuals in the minority coalition subtracted from the number of individuals in the majority coalition. I also control for whether the Supreme Court’s grant of *certiorari* referenced a split in the lower courts. If my theory is correct, an otherwise important measure of legal salience (here I use whether the Court explicitly granted review of the case to resolve division between lower courts) should, all else equal, be irrelevant to opinion language sensationalism. A positive relationship between legal salience and sensationalism would suggest that sensationalism is not a specific adjustment to engage the general public, but is simply a function of case importance. Finally, I include fixed effects for issue areas and opinion authors.

The results of my analysis provided in the next section are based on a linear, ordinary least squares regression model. My theory suggests that justices will write opinions with higher levels of sensationalism as public attention increases. Furthermore, I test for whether this responsiveness to public attention has increased over time. To control for varying behavior between majority and dissenting coalitions, I control for the effects of majority type and coalition sizes.

Results

Table 1 contains the coefficients from my estimated regression.

Table 1

	<i>Dependent variable:</i>
	Opinion Sensationalism
Public Attention	0.001 (0.004)
Public Attention X Term	1.109* (0.358)
Public Attention X Term Squared	0.479 (0.358)
Term	-0.118 (0.472)
Term Squared	-0.904* (0.315)
Majority Opinion	-0.008 (0.009)
Majority Coalition Size (X majority opinion)	-0.005* (0.002)
Majority Coalition Size (X dissenting opinion)	0.008* (0.002)
Lower Court Disagreement	0.005 (0.006)
Constant	5.218* (0.040)
Observations	9,214
R ²	0.033
Adjusted R ²	0.028
Residual Std. Error	0.224 (df = 9163)
F Statistic	6.268* (df = 50; 9163)
<i>Note:</i>	*p<0.05

We see public attention has the hypothesized positive effect. In general, as public attention increases, justices use opinions with more sensational terms. It also appears that there is a strong interactive effect between public attention and the linear measure of Term. This suggests that the Court has become responsive to public attention in more recent terms. To see this effect, I plot the relationship between Opinion Sensationalism and Public Attention for each Supreme Court term in Figure 2. As we can see, the responsiveness to public attention came into existence in the late 1980s. This is directly in accordance with the argument of Davis (2011) that the justices have been willing to go public only in the last quarter-century.

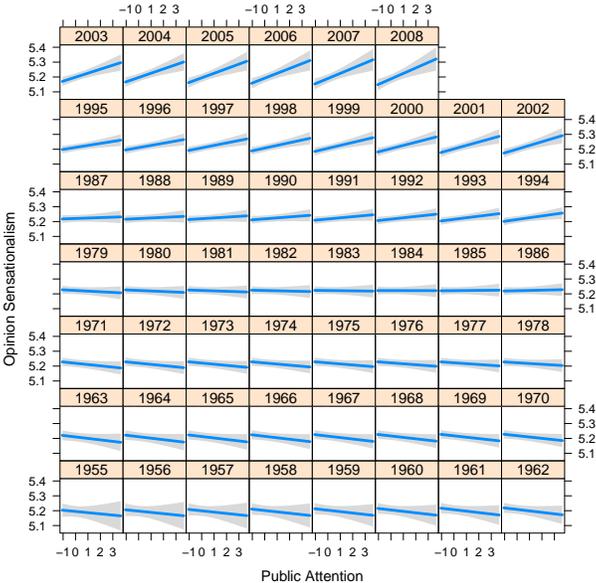


Figure 2: Predicted values for every Supreme Court term in the data. Shaded area is the 95 percent confidence interval. All other variables held at their median or mode.

While the last figure is useful for pinpointing when the justices began to respond to public attention, Figure 3 provides for a more direct comparison of predictions for the 1955 and 2008 levels of opinion sensationalism side-by-side. In 1955 there was no relationship between public attention and opinion sensationalism. By 2008, a switch from the least to most salient case increases Opinion Sensationalism by nearly a full standard deviation.

The results also make clear there are trends in opinion sensationalism over time. The

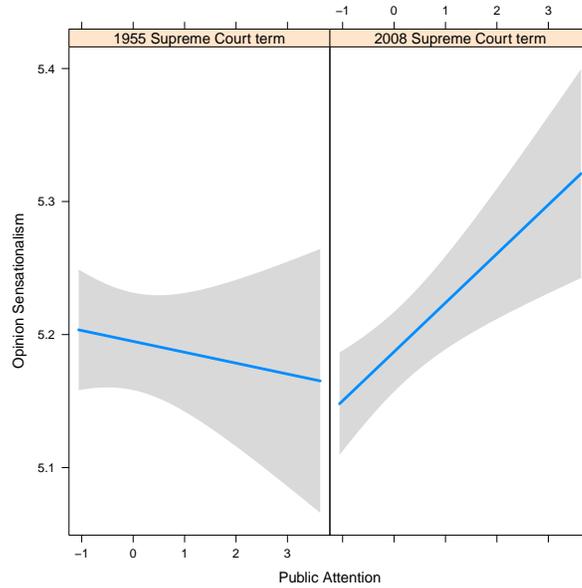


Figure 3: Predicted levels of Opinion Sensationalism as public attention increases for the earliest (1955) and latest Supreme Court terms (2008) in the data. Shaded area is the 95 percent confidence interval. All other variables held at their median or mode.

non-linear measure of Term has a negative effect on Opinion Sensationalism. Average opinion sensationalism per term has first increased and then decreased over time. In Figure 4, I plot predicted levels of average opinion sensationalism over time. Accounting for these trends in the data allows me to more accurately estimate the relationships we are more interested in. The data suggest that the 1980s was a time of relatively higher levels of rhetorical writing.

I also consider opinion type and the interaction between opinion type and relative size of the coalition majority. When the majority coalition size is small (the case is closely divided), majority and dissenting opinions use similar levels of opinion sensationalism. As the size of the majority coalition increases relative to the dissenting coalition, both opinions use higher levels of sensationalism, but at a much higher rate for the dissenting opinion. This is depicted in Figure 5 in the appendix.

The results for fixed effects (see appendix) show little variation in behavior among different justices. The dependent variable is clearly influenced by the issue area of the case, however. For example, First Amendment cases tend to lead to opinions with more sensational

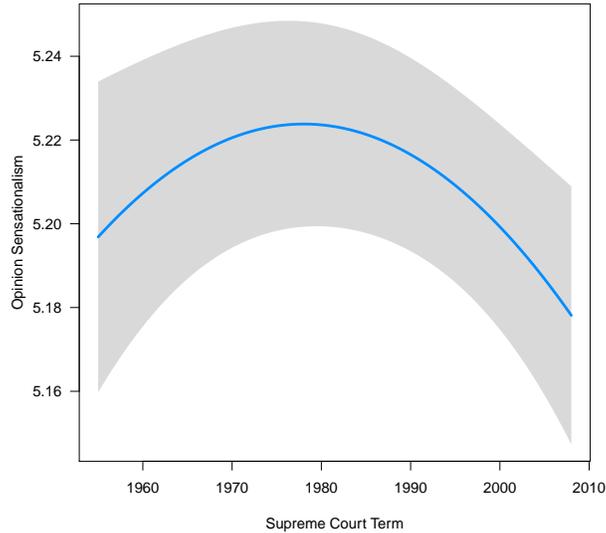


Figure 4: Predicted levels of Opinion Sensationalism over time. Shaded area is the 95 percent confidence interval. All other variables held at their median or mode.

words. I find no evidence of a relationship between lower court disagreement and opinion sensationalism. This suggests that justices are not simply responding to the importance of a case but to the particular salience of the case to the broader public.

Conclusion

Justices are cognizant of external actors and engage with those actors (Baum 2009). One way they do so is by adjusting the language of their opinions (Black et al. 2016). My paper specifically uses this argument to understand the impact of public attention on Supreme Court opinion content. There are three primary findings. First, justices use more sensational language in their opinions as case-specific public attention increases. Second, justices do appear to have “gone public” (Davis 2011). Third, the behavior reflects the need to persuade in an interdependent environment.

How else might justices anticipate the responses of subsequent actors when making decisions? The choice of legal instruments in opinions may be based on their trust of lower

court judges or of federal administrations responding to their decisions. Willingness to bargain with others in internal deliberations over the opinion content may be a function of the preferences of relevant actors. Or majority opinions may be more likely to attack the dissenting opinion when they perceive a high probability that subsequent actors will take note of it. There are other ways justices may influence subsequent actors beyond their votes and opinions. For example, justices may use their travels and speeches to influence specific actors. The fact that their messages and travels are indexed and amplified by both local and national news coverage strengthens the potential effects of these visits.

Scholars ought to continue to seek to understand how opinion content and the development of opinions is influenced by external actors and the strategies justices engage in to maximize policy gains.

Appendix

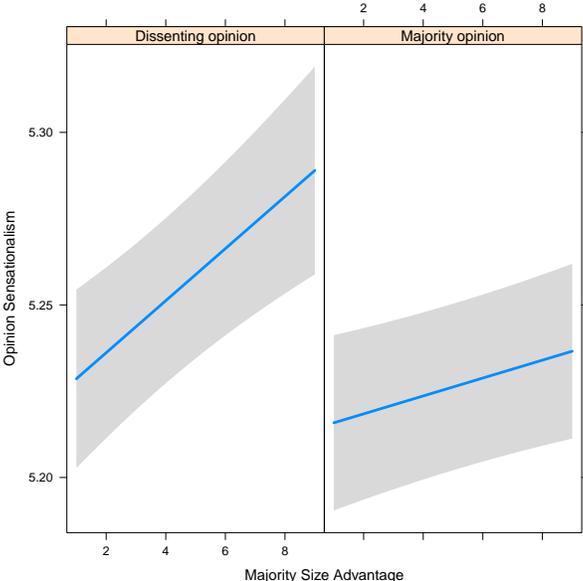


Figure 5: Predicted levels of Opinion Sensationalism for majority and minority coalitions as the relative size of the majority coalition varies. Shaded area is the 95 percent confidence interval. All other variables held at their median or mode.

Table 2

	<i>Dependent variable:</i>
	Opinion Sensationalism
Constant	5.218* (0.040)
Public Attention	0.001 (0.004)
Majority Opinion	-0.008 (0.009)
Majority Coalition Size (X majority opinion)	-0.005* (0.002)
Majority Coalition Size (X dissenting opinion)	0.008* (0.002)
Term	-0.118 (0.472)
Term Squared	-0.904* (0.315)
Public Attention X Term	1.109* (0.358)
Public Attention X Term Squared	0.479 (0.358)
Lower Court Disagreement	0.005 (0.006)
Civil Rights	-0.032* (0.007)

First Amendment	0.016 (0.009)
Due Process	-0.022 (0.012)
Privacy	-0.041* (0.020)
Attorneys	-0.066* (0.021)
Unions	0.009 (0.012)
Economic Activity	-0.025* (0.007)
Judicial Power	-0.069* (0.009)
Federalism	-0.049* (0.012)
Interstate Relations	-0.295* (0.031)
Federal Taxation	-0.005 (0.014)
Miscellaneous	-0.069 (0.045)
Black	-0.006 (0.042)
Blackmun	-0.027 (0.041)
Brennan	-0.038 (0.040)
Breyer	-0.019 (0.041)

Burger	-0.021 (0.042)
Burton	0.028 (0.055)
Clark	-0.034 (0.043)
Douglas	-0.008 (0.041)
Fortas	-0.077 (0.051)
Frankfurter	-0.027 (0.045)
Ginsburg	-0.054 (0.041)
Goldberg	-0.074 (0.051)
Harlan	-0.048 (0.042)
Kennedy	-0.028 (0.041)
Marshall	-0.035 (0.041)
Minton	0.119 (0.082)
O'Connor	-0.052 (0.040)
Powell	-0.044 (0.041)

Reed	0.052 (0.064)
Rehnquist	-0.025 (0.040)
Roberts	0.016 (0.051)
Scalia	-0.037 (0.040)
Souter	-0.045 (0.041)
Stevens	-0.022 (0.039)
Stewart	-0.017 (0.041)
Thomas	-0.044 (0.040)
Warren	-0.034 (0.044)
White	-0.046 (0.040)
Whittaker	-0.008 (0.049)

Observations	9,214
R ²	0.033
Adjusted R ²	0.028
Residual Std. Error	0.224 (df = 9163)
F Statistic	6.268* (df = 50; 9163)

Note: *p<0.05

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