

Legal Genres: The Gravity of the Supreme Court Opinion

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The U.S. Supreme Court is the authority in the interpretation of U.S. law that acts both within an activity system and as an activity system itself. The written slip opinion contains a case's complete history and the Court's holding on the case—a distinct genre of legal documents that act as a powerful tool of the judiciary. However, the complexity of the legal dialect, and the Court's operation as a discourse community often muddle the public's ability to understand and engage with the Court. As such, nuances in legal interpretation that would otherwise explain the framework behind major political and social decisions are often lost in communication. This paper analyzes the role of the Court Opinion as an object of the Supreme Court activity system, and the effect of the concept of the "discourse community" on the Opinion's effectiveness and clarity, through the 2018 "travel ban" case, *Trump v. Hawaii*.

Article III of the United States Constitution establishes the court system as the institution wherein the "judicial Power of the United States [has been] vested." U.S. courts are responsible for evaluating the actions of the Executive and Legislative branches at every level of government. Both criminal and civil cases are heard by U.S. courts across the country. If dissatisfied with a court's decision, either party involved in the case can file for an appeal. Following a decision in a Federal District or Appellate Court, a case can further be appealed and brought before the Supreme Court of the United States, where cases of Constitutional significance are reviewed.

Decisions made by the Supreme Court are final and act as the official interpretation of United States law. After the Supreme Court hears a case, its Justices deliberate and vote in private; the majority holding is expressed, and an opinion is published. The

Supreme Court opinion is a powerful document, covering not only the Court's ruling in a case but the case's history and relevant laws (Post). Courts use the opinion as a vehicle to communicate their actions to their constituencies and explain the laws they apply in each case. The legal discipline is one based heavily on precedent—past holdings dictate how courts will hold in the future. The sum of past decisions, recorded in the judicial opinion, contribute to the case law that dictates the behavior of courts in future matters. District and appellate court opinions are generally published online, and opinions promulgated by the Supreme Court are published in volumes of the United States Reports, available to the public online on the Court's website (U.S. Government).

While the documents themselves are accessible to the public, understanding the contents of these legal texts is less easy; this

issue is especially apparent in documents and opinions published by the highest court—the United States Supreme Court. This places the American public at a disadvantage: If they are unable to understand the actions, holdings, and justification being used by the Courts, citizens cannot effectively interact with the legal basis of major contemporary issues—especially in an era where public officials and public institutions are facing heightened scrutiny. A better understanding of the Supreme Court opinion may help address the disconnect between the court and the public, which has vast political and social consequences. This paper uses activity theory to explore the role of the opinion in the Court’s operations. I will argue that an understanding of genre as it functions in the activity system of the Supreme Court is necessary for the American public to meaningfully engage with its legal rulings.

Genre and the Activity System of the Supreme Court

In order to recognize the group of texts that are included under the category of the “Supreme Court opinion,” and to understand the use of these texts as a tool in achieving the goals of the Supreme Court, I will apply Donna Kain and Elizabeth Wardle’s instantiation of activity theory, which defines the ideas of “genre” and the “activity system” in contemporary literacy contexts. Kain and Wardle’s work on activity theory follows David Russell’s definition of an activity system as “any (1) ongoing, (2) object-directed, (3) historically conditioned, (4) dialectically structured, (5) tool-mediated human interaction” (qtd. 276). The Supreme Court fulfills these criteria in that it (1) has been consistent and ongoing since

its establishment in the 18th century, (2) is constitutionally assigned, and strives toward, its object of interpreting and upholding the law, (3) is heavily conditioned by history, given that the entire legal system is based on precedent, (4) adapts with changing social, political, and technological changes, and (5) makes use of tools, including the Court opinion, in a framework of documentary, courtroom, and chambers-based human interaction while evaluating the law. In addition to operating as its own activity system, the Supreme Court can be considered a subject (i.e., a member engaged in an activity) within the larger activity system of the American judicial system (see Figures 1 and 2 opposite).

The activity system framework is closely related to John Swales’ concept of a “discourse community,” a theory that suggests a disconnect between the authors of the Court Opinion and the readers of the public. The characteristics of a discourse community identified by Swales can be directly applied to the courts; among these criteria are “a broadly agreed upon set of common rules,” “mechanisms of intercommunication [between] members,” the utilization and possession of one or more genres, a “specific lexis,” and a “threshold level of members” (220-22). The nature of these characteristics, especially the lexis and the expertise of members, create a somewhat distant, exclusive image of any given discourse community. While most discourse communities allow for new membership, anyone seeking to enter the community must possess a particular degree of knowledge or experience in a related discipline. The use of discourse community-specific genres and a developed, industry-specific language creates further barriers to entry—and in the

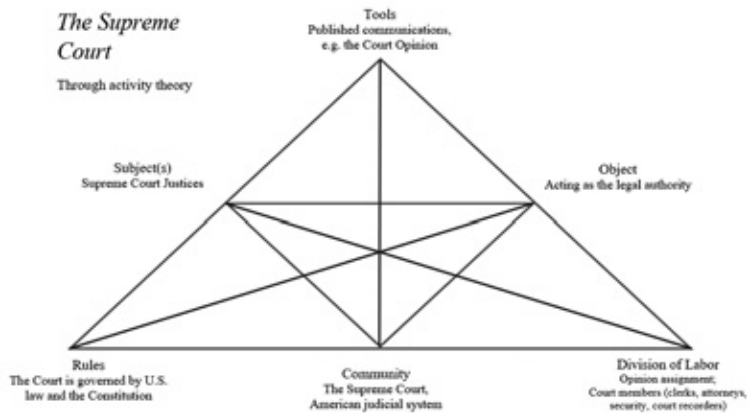


Figure 1
The activity system of the Supreme Court.

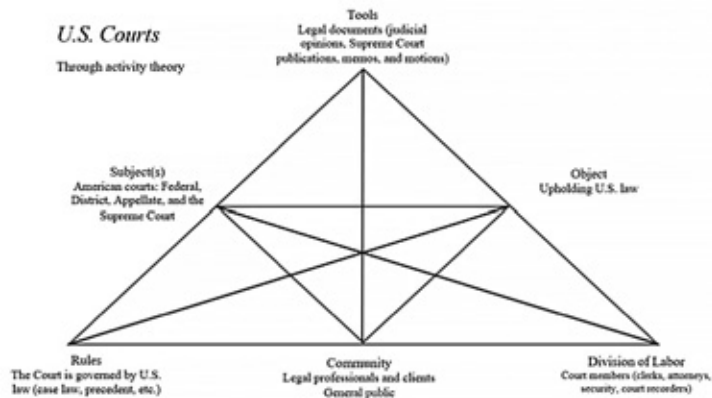


Figure 2
The activity system of the U.S. courts.

case of a highly specialized discourse community like the Supreme Court, these barriers thwart public access.

Within discourse communities and their activity systems, genres, or texts, are analogous to tools in their function and purpose. In *Writing About Writing*, Elizabeth Wardle

and Doug Downs define genre beyond its traditional use; by their definition, a genre is any collection of “recurring text-types” that collectively respond to a rhetorical situation, or “any moment in which people are communicating” (17-18). Rhetoric refers to the “set of principles” that are being utilized

to “shape ... communication and make a decision [about communication]” (18). In essence, the defining characteristics of a genre are its (1) recognizable form and (2) response to a particular rhetorical situation. Understanding genre as a concept allows one who is unfamiliar with a text to still recognize its message and purpose—a skill that is especially useful in examining a text as intimidating and complicated as a Supreme Court opinion. Robert Ferguson, in his study on the appellate opinion genre, writes that genre is “the single most powerful explanatory tool available to a critic,” and that “Writers create with recognizable forms in mind” (202). Ferguson’s study categorizes the rhetorical traits of the appellate opinion as “monologic voice, the interrogative mode, the declarative tone, and the rhetoric of inevitability” (204). Following Ferguson’s recommendation to analyze the mechanical attributes of the genre, I will describe the features that make the Supreme Court Opinion identifiable.

The general court opinion manifests in a recognizable form: it begins with a syllabus, which contains the “facts” and procedural history of the case, followed by a recitation of the relevant laws, a discussion of the reasoning (known as the “rationale”) in support of the decision, and finally, the Court’s official holding. The Supreme Court opinion is distinguished from other judicial opinions by the rhetorical situation to which it responds. It is authored by a Supreme Court Justice at the conclusion of a Supreme Court case—it deals with laws of utmost importance in the nation’s highest courtroom. The context of this situation is broadened by its audience: the public subject to the laws it is interpreting. While court documents are generally a part of the public record, cases

heard in the Supreme Court are associated with increased media coverage and public discussion. This significance is further emphasized by the period of deliberation between when the Court agrees to hear a case and when a ruling is announced; the process of reviewing case materials, hearing arguments, and casting votes can take several months. Given the authority of the Court, any opinions that its members publish face the highest standard of scrutiny. The Court’s holding is recorded, filed, and disseminated. The task of writing the majority opinion is assigned to one of the Justices, either by the Chief Justice himself or a senior Justice on the side of the majority. The remaining Justices may file additional opinions, either in support of or contrary to the majority opinion, respectively known as “concurring” and “dissenting” opinions. These supplementary opinions are included in the published document.

The court opinion as a genre is the avenue of communication between a judge and the other actors within a court, including attorneys, plaintiffs, and defendants. As Ferguson writes, the court opinion is “the most creative and generally read literary form in the law,” and therefore the most relevant document for this study; the Supreme Court Opinion is the highest form of appellate opinions, as cases cannot be further appealed (201-02). In the arena of the Supreme Court, slip opinions are used to communicate rulings with lower courts, the federal government, and the general population. As such, the judicial opinion is a valuable tool for communicating the actions of any court, either to other members within or to observers outside the discourse community. However, given the complexities behind any legal case, and the additional weight that

comes through association with the Supreme Court, the purpose of the opinion and its importance as a genre are easily misunderstood. By extension, the activities of the courts are often misread.

Understanding the Court opinion allows one to understand the essence of what is actually being deliberated in any given court case—and then, to properly engage with the issue. For example, without understanding the genre of the opinion, a person studying the 1999 case *U.S. v. Morrison* might find it disturbing that the Supreme Court ruled in favor of convicted rapist Antonio Morrison. Though the Court held in Morrison’s favor, he was not being absolved of guilt for the crime he committed, because the Court did not deal with the criminal aspects of his case. Rather, the issue the case examined was whether 2 U.S.C. §§13701-14040 (laws passed as a part of the 1994 Violence Against Women Act) were aligned with the Constitution. Morrison appealed the case to the Supreme Court with the argument that the crime he was convicted of was invalid—because the laws governing his case had no basis in the Constitution. Though this information is contained within the Court opinion, it is not apparent without proper examination of the argument used in deciding the case. The next section will analyze a sample Court Opinion to show how analysis of these documents can reveal their significance to the public.

Genre Features in *Trump v. Hawaii*

Trump v. Hawaii was brought to the Supreme Court by President Donald Trump in April 2018. The issue began in early 2017, not long after his inauguration, when President Trump signed a number of “travel bans” that restricted the entry of foreign nationals from

a defined list of seven countries (Pierce et al.). Each of these bans garnered immediate media coverage, legal backlash, and public outrage; they seemed to perpetuate a racial bias towards Muslim-majority nations, the main targets of the entry restrictions. The ensuing case, *Trump v. Hawaii*, evaluates the validity of one ban (Pierce et al. 2-5).

As cited in the “syllabus” of the slip opinion, the ban being reviewed was signed into effect as Presidential Proclamation #9645 in September 2017. The Proclamation was struck down by the Ninth Circuit Court on the grounds that it was an over-extension of the powers of the President as afforded to him by Congress and the U.S. Constitution. The Supreme Court granted review of the Case in January 2018. Ultimately, the Court found that the ban was not unconstitutional—though not without dissent, both inside and outside the Court—and was thus upheld.

Hawaii’s slip contains key features of the opinion genre—and exemplifies the distance that exists between the Court and the public’s understanding of a case. The published opinion contains Chief Justice John Roberts’ majority opinion, two concurring opinions, and two dissenting opinions—one of which contains near-scathing commentary by Justice Sonia Sotomayor, who is joined by Justice Ruth Bader Ginsburg (i.e., Sotomayor’s views are shared by Ginsburg). The contrast between Roberts’ and Sotomayor’s opinions is striking: the two arguments showcase two different interpretations of the case. The dichotomy represented in these two texts is characteristic of the diversity of thought that is present in American courts—a conversation with which many Americans are not engaged. Further, the timeliness of this case has

produced relevant social and political consequences that have made public engagement increasingly vital.

Interpreting the Opinion

The activity system framework can be used to examine the holding in this case and to better understand the slip opinion's role as the conduit between the Court and the public. The slip opinion of *Trump v. Hawaii* highlights the case's distinguishable features. The "syllabus" includes relevant facts, discussing the timeline of the case's procession through Federal Court and the fact that the President himself is the "petitioner" (i.e., Trump is the one who requested the Supreme Court to hear the case) (pp. 1-2). The syllabus follows with the primary issue in the case, which is the legality of the Presidential Proclamation that halted all forms of legal immigration from a list of defined countries. The end of the syllabus is marked with a holding: the final decision of the Court was in favor of Trump, a 5-4 vote, declaring the President's actions to be valid and effectively upholding the ban.

The five opinions filed in this case are representative of different interpretations of the law surrounding it. The difference in opinion largely arose from the choice to include certain comments made by President Trump when Justices evaluated the motivations underlying his Presidential Proclamation. Because the Court majority chose to look at the ban in a vacuum, considering its statutory applications without the "Islamophobic" commentary surrounding it, the Court understandably held in favor of the Administration. However, when a judge chooses to consider these comments (as Justice Sotomayor did), the legal implications of the ban change. This nuance is

shown in the opinion, but a person must sift through the 94 page document to decipher it; the high threshold of knowledge required to interpret the document is typical of a discourse community. This reality is poignant; these two potentially different holdings would have had entirely different effects on the social and political landscape of the United States. Understanding that slip opinions can represent different theories of judicial applications (and different possible outcomes) would help the public engage more effectively with the operations of the Supreme Court. The perspectives represented in these opinions are evaluated by a voting majority—which means that issues of public concern, like the appointment of Justices, have a direct impact on how cases will be decided. The public has the opportunity to engage with the Court in meaningful ways—but only if they are educated to do so.

In *Trump v. Hawaii*, Chief Justice Roberts elected to write the majority opinion. The Chief Justice can assign the writing of the opinion to any Justice at his discretion but will assume the role himself when a case is of exceptional significance. In *Hawaii*, the President's status as the petitioner was cause enough for Roberts to make this decision; however, this also gave Roberts the ability to control the narrative of the opinion. Paul J. Wahlbeck, Dean of the Columbian College of Arts and Sciences at George Washington University, claims that the process of opinion assignment designates a great deal of power to the Chief Justice, who can "influence the course of legal policy through agenda setting" in his assignment of the opinion (1729). Naturally, this "agenda" aligns with the political and judicial ideologies of the Chief, though these goals are secondary to the Court's objective to conserve U.S. law and

maintain an equitable division of work (e.g., opinion assignments). As such, the presence of this agenda is subtle, but is active here in Roberts' decision to compose the opinion in a case such as *Hawaii*, where the Court has held a conservative position. Looking at genre features within the context of the case reveals the Court activity system's relationship to other political systems.

The collection of supplementary opinions in *Hawaii* display the range of potential outcomes of the case, and how different subsequent immigration policy might have looked, had the vote shifted. The difference in content between Roberts' and Sotomayor's opinions is most prominent in each Justice's treatment of racially charged comments made by President Trump. These public comments have been extensively recorded by news media from the beginning of Trump's Presidential campaign in 2015 through his first year in office and beyond (see Sotomayor's dissent for these recorded comments). Without including this commentary in their scope of review, Roberts and the voting majority have reduced the issue in the case to one that is simply statutory (did the travel ban overextend the powers of the President?), failing to address the influence of malicious intent behind the ban.

In Section B of the Majority Opinion, Roberts writes that although the plaintiffs (*Hawaii*, et. al) argue that the President's past comments about immigrants and Muslims are harmful and unconstitutional, "the issue before [the Court]" is not about his prior statements but the extent of executive power. Roberts claims that the Proclamation is "facially neutral toward religion"; he defends this statement even though five of the seven countries included in the ban were of Muslim majority. By excluding the

connection between these countries and President Trump's animus toward Islam, Roberts and the majority treat the travel ban as an action occurring in isolation, instead of recognizing the actions of the president as a reflection of his prejudiced remarks. The Court has not necessarily introduced an invalid holding but has made a decision with severe social and political consequences. The Supreme Court activity system is dialectical in that its rules and practices are ever-evolving as cases are heard and laws are applied and refined; by protecting Trump's ability to restrict the legal entry of foreign nationals with a low standard of evidence, the Court has permitted an act of discrimination by the President of the United States to become law and set a dangerous precedent.

In her dissent, Sotomayor, on the other hand, draws a connection between President Trump's comments and the origins of the travel ban. She discusses President Trump's recent comments at length:

"Even before being sworn into office, then-candidate Trump stated that 'Islam hates us,' and warned that '[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country,'...[and] promised to enact a "total and complete shutdown of Muslims entering the United States,' and instructed one of his advisers to find a 'lega[l]' way to enact a Muslim ban."

Sotomayor finds President Trump's public statements about Muslims to be inextricable from the ban itself. Though she never denies the statutory core of the case, she emphasizes the significance of these comments in understanding the motivations behind the Proclamation. She holds that while it may be

within the President's powers to halt legal immigration with just cause, President Trump's claim to national security issues—his “just cause”—is a cover for discrimination against a group of people toward whom President Trump is clearly biased.

The Court opinion as a published text is a means of communicating these two perspectives. Each Justice has their own holding and rationale, both of which are included in their filed opinion. Members within the Court are able to vote in different ways given different applications of the law, none of which can necessarily be stated to be objectively correct or objectively incorrect. Their spectrum of opinions is contained within the laws and evidence they analyze in the case—differences that can seem minute in some instances. Each perspective is the result of “actors” within the activity system interpreting its “rules” in different contexts. These degrees of difference are contained within the Court opinion, a fact which only further cements the importance of understanding this genre and its use as a tool of the Justices—though unfortunately a disconnect between the author and many readers persists. Members of the American legal discourse community can clearly comprehend the contents of these documents given their experience in the courts and a prior understanding of the legal lexis. However, these professionals and academics do not encompass the entirety of the activity system's audience. The Court Opinion as a document remains esoteric to the general population that is affected by its own judiciary. This disconnect is the consequence of the nature of any discourse community, as exclusivity allows the community to distinguish and define their operations. However, in this situation, the

discourse community of the Supreme Court directly influences broader communities who are unable to actively engage with the Court's genres. Unless it is overturned or otherwise challenged by Congress, the outcome of *Hawaii* now stands as the accepted position of the Court for all cases of similar grounds in the future—a decision that will affect tens of thousands of legal migrants, including families, children, and refugees.

Conclusion

Beyond the Court, the outcome of a case affects the United States' domestic and foreign affairs, especially in a case as pertinent as *Hawaii*. A study from the TransAtlantic Council on Migration looks at changes President Trump has made to U.S. immigration policy, including the implementation of the travel ban, and their consequences. The study cites a significant drop in international arrivals and in international students applying to study in the United States between 2016 and 2017 to show how Trump-era rhetoric and immigration policy have contributed to growing anxieties for those living in and seeking to enter the United States (Pierce et al.). In part, these consequences can be traced back to policies such as the one upheld in *Hawaii*—an example of the rippling effect of Court decisions. More explicit consequences have become apparent in the following years.

Because the public looks to the Court as the legal and moral authority of the nation, the Opinion and its contents influence our social perception on issues such as immigration. This has directly affected the cases of thousands of migrant families. Data published by Reuters shows that the State Department denied 1,000 visas due to the travel ban in 2017, before it had been fully

implemented, and denied over 37,000 in 2018 when it took its full effect (Torbati, “U.S.”). In San Francisco, the mother of a 2 year old on life support waited a year before being granted a waiver in December 2018 (Garcia). Despite promises from the Trump administration that waivers would be easily granted, only a fraction of exemptions were actually approved (Torbati, “Exclusive”). These statistics showcase how results in the Supreme Court extend into other activity systems, and in turn affect real lives in the social and political systems in the U.S.

In *Hawaii* or any case argued in the Supreme Court, the Court opinion is a valuable tool—one that furthers the Court’s

objective to uphold the law in its truest interpretation—and a tool that must be studied to understand the essence of the Court’s actions. A barrier to entering this discourse community exists, but an understanding of activity systems and genre can contribute to the enfranchisement of the public. The Opinion is a powerful tool of the court—one that bears a task of great gravity. Further, the role of this genre is a testament to the Supreme Court’s dialectical structure. The Court is designed to keep the country moving forward through an everchanging social and political climate; however, there are instances in which progress is stalled—as is the case with *Hawaii*.

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