Toward a Clearer Democracy: The Readability of Idaho Supreme Court Opinions as a Measure of the Court's Democratic Legitimacy

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by

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Authorization to Submit Dissertation

This dissertation of Brian M. DeFriez, submitted for the degree of Doctorate of Philosophy with a Major in Political Science and titled "**Toward a Clearer Democracy: The Readability of Idaho Supreme Court Opinions as a Measure of the Court's Democratic Legitimacy**," has been reviewed in final form. Permission, as indicated by the signatures and dates below, is now granted to submit final copies to the College of Graduate Studies for approval.

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Abstract:

This study analyzes the quantitative and qualitative readability of Idaho Supreme Court opinions from 1891 to the present. It does so using a statistically relevant sample of 371 court opinions. First, it examines the readability of court opinions using results from the Flesch readability tests and compares them with the more qualitatively relevant Style test results. The study also performs and examines several linear regression tests to confirm its earlier correlation findings and to see if certain variables further affect readability outcomes.

Next, this study examines the issue of opinion readability using two textual analysis models from political science literature. First, it applies Donald Lutz's textual completeness model of analysis. Second, it applies Martin Landau's system redundancy model. Citing illustrations from the Court opinions, it uses these models to demonstrate how text completeness and textual redundancy are superior assessment models for readability.

Based on these analyses, this study concludes that Idaho Supreme Court opinions are becoming more readable over time.

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Lastly, I want to thank my family and friends for their role in this process. I would like to specially thank my father for his ongoing encouragement and generous support.

Dedication:

This paper is dedicated to my wife and children. They have shown tremendous patience with me during this process, and I could not have finished it without their constant encouragement and optimism. This paper is also dedicated to the ideal of great achievements. Teddy Roosevelt once said: “Far better is it to dare mighty things, to win glorious triumphs, even though checkered by failure…than to rank with those poor spirits who neither enjoy much nor suffer much, because they live in a gray twilight that knows not victory nor defeat.”

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"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."

—Oliver Wendell Holmes Jr.

Chapter 1: Introduction

The American common law is progressive. It consists of "felt necessities" of the times, and it is shaped by the external forces of politics, policy, and public prejudices. But it is also shaped by the internal, subjective forces of the judge's own mind. Supreme Court justice Benjamin Cardozo once reflected: "We [as judges] reach the land of mystery when constitution and statute are silent, and the judge must look to the common law for the rule that fits the case. He is the living oracle of the law…when there is no decisive precedent, the serious business of the judge begins. He must fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others."[1] Unquestionably, the American court system plays a unique policy role in American political development. A study of judicial clarity, then, is highly significant to understanding our American political development.

Indeed, judicial writing often bears many similarities to more traditional political texts. Landmark cases, such as *Roe v. Wade* and *Citizens United*, have reshaped the American political and social landscapes. Idaho abortion policy, for instance, still follows the trimester framework set out in *Roe v. Wade.*[2] Considering politics to be the allocation of values for a society, then surely the common law plays an integral part in American policymaking. This recognition highlights the importance of the quality and character of judicial writing. Unclear opinion writing can, and sometimes does, obscure the rules of law (constitutional, legislative, legal, moral, social, or religious) by which society functions, which in turn affects future political decision-making. One of the judge's most important tasks, then, is to make judicial rules of law clear and intelligible. Judges are the final arbiter not just of what the law says,[3] but also the arbiters of how rules law will govern society.

The Common Law and the Role of the Courts

The American court system and the American common law has roots in British common law. Starting in the mid-seventeenth century, King Charles II decreed the universal adherence to English common law throughout the British American colonies—due partly to the chaotic nature of colonial legal structures from the haphazard nature of European conquest and settlement. This mandate was an attractive and cost-effective solution to controlling a complex overseas empire, especially in light of Britain's own economic and political pressures. And though Charles never fully realized his goal of universal colonial compliance, his edict brought at least some degree of commonality to the otherwise fractious American judicial and political systems.[4] Within two decades of Charles's edict, Britain experienced the Glorious Revolution of 1688 and the American colonists inherited a radically new (and soon detested) national system of parliamentary sovereignty. More than ever, Colonists fostered a growing dependence upon the institutions of local courts and local juries as protections from legislative tyranny.[5]

By the time of the 1787 National Convention, the Framers of the new Constitution agreed unanimously on the need for a national judiciary in lieu the Articles of Confederation's bare legislative framework. But while the Framers accepted the Court abstractly, it took some work to define its structure and its purposes. In the end, the Framers created the national courts as an internal policing mechanism over the national legislative power. They also gave the Court an interpretive role. As Hamilton explains in Federalist 78:

> "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred."[6]

This role, *i.e.* the power to interpret and expound the laws, is at the heart of the American judicial policy-making. But Hamilton cautioned that this is not a simple role:

> "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived

> from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges."

The American court system, it seems, was destined to deal in complexity—with judicial rules of law growing larger in volume and in substance over time.

The Court as a Check to Democracy

Starting in the early Twentieth Century, the American court system began to expand its role beyond that of mere interpretation and occasional statutory override. Under the new mandates of the 14th Amendment, the United States Supreme Court began to employ the novel and powerful doctrine of substantive due process. This doctrine was the outgrowth of an expansive judicial view of the Court's role in national policy-making. This view, in turn, has profoundly shaped the nature of American democracy. Consider, for instance, the United States Supreme Court in the 1963 case *Gideon v. Wainwright*, in which the Court declared a sweeping national policy that criminal defendants have a constitutionally protected right to legal representation in criminal prosecutions. This and many other "incorporating" decisions were inherently anti-majoritarian, favoring individual rights over the popular-majority policies. "The existence of non-textual rights, whether found in substantive due process, the Privileges or Immunities Clause, the Ninth Amendment, or for that matter in natural law, is now virtually universally accepted by judges and scholars," says a recent Harvard Law Review article. "The [only] real debate is over which specific rights judges should recognize."[7] In modern American constitutional thought, it is the judge (and not always the Constitutional text) that is controlling the debate.

In this ever-widening policy role, it is easy to see how the American court system has become an important contributor to our democratic political process. The American judge now has a significant and visible role in our national political identity.[8] The need to substantively analyze judicial opinions as political texts seems stronger than ever.

Questions of Democratic Legitimacy

As seen in Chapter Two, legal scholars and political scientists have recently turned their attentions to the study of judicial writing, particularly federal Supreme Court writing, with the goal of assessing the Court in terms of its democratic legitimacy. Joseph Williams, from the University of Chicago, identifies the underlying concern of these studies: "[Lack of clarity] is a problem that has afflicted generations of writers who have hidden their ideas not only from their readers but even from themselves…written deliberately or carelessly, it is a language of exclusion that a democracy cannot tolerate."[9] Judicial writing, especially writing that affects our policy decisions, is not exempt from this kind egalitarian scrutiny.

But the study of judicial writings as a measure of democratic legitimacy presents a paradox. As already shown, the American court system can often play an anti-majoritarian role in our social and political development, *i.e.* policymaking by the few. Moreover, judicial opinion writing is often extremely complex. These difficulties have centered the scholarly quest for judicial legitimacy in terms of opinion readability, with legitimacy defined as "the power of persuasion" and the "tacit approval and obedience of the governed."[10] Consider the difference in clarity and persuasive power in the following opening statements of two New York Court of Appeals opinions in terms of their readability and textual difficulty:

Table 1: Clarity of Opening Statements from NY Court of Appeals	
"Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues." -- Judge Benjamin Cardozo, *Palsgraf v. Long Island R. Co.* (1928).	"In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Queens County (Hart, J.), entered July 10, 2008, as, upon the granting of that branch of the motion of the defendants Stanley Sprecher, Peninsula Radiology Associates, P.C., and Peninsula Hospital Center pursuant to CPLR 4401, made at the close of the plaintiffs' case, which was for judgment as a matter of law dismissing the complaint insofar as asserted against them, upon a jury verdict finding the defendants M. Chris Overby, and Levine Overby Hollis, M.D.s, P.C., 45% at fault, and nonparties Philip Howard Gutin, and Memorial Sloan Kettering Cancer Center 55% at fault for the injuries sustained by the plaintiff Thomas Dockery, and that the plaintiff Thomas Dockery sustained damages in the principal sums of $10,000,000 for past pain and suffering, $27,750,000 for future pain and suffering, $370,000 for past loss of earnings, $80,000 for future loss of earnings over a period of 28 years, and $21,636 for loss of Social Security income, and that the plaintiff Karen Dockery sustained damages in the principal sum of $18,000,000 for past loss of services, and $48,700,000 for future loss of services, and upon so much of an order of the same court entered December 3, 2007, as granted, after the jury verdict, that branch of the motion of the defendants M. Chris Overby and Levine Overby Hollis, M.D.s, P.C., pursuant to CPLR 4401, made at the close of the plaintiffs' case, which was for judgment as a matter of law dismissing the complaint insofar as asserted against them, dismissed the complaint insofar as asserted against the defendants Stanley Sprecher, Peninsula Radiology Associates, P.C., Peninsula Hospital Center, M. Chris Overby, and Levine Overby Hollis, M.D.s, P.C." -- Judge Peter B. Skelos, *Dockery v. Sprecher* (2009).

Justice Cardozo's writing is certainly more readable (and, arguably more intelligible to the public) than the writing of Judge Skelos. "What distinguishes Justice Cardozo's style from that found in most legal writing?" asks Richard C. Wydick in his article *Plain English for Lawyers*. He answers that "…there are no archaic lawyerly phrases, no misty abstractions, no *hereinbefores*…there are no wide gaps between the subjects and their verbs…all but two are in the active voice."[11] It is tempting to conclude that clear legal writing, like that of Justice Cardozo, is legitimate—at least in terms of its public accessibility.

This scholarly demand for clear legal writing, moreover, has strong historical precedent. It is said that a 1596 English chancellor once made an example of a particularly bad and lengthy legal document by cutting a hole in the center of it and ordering its unfortunate author to stuff his head through the hole, after which he was paraded around Wesminister Hall.[12] More recently, states such as New York State have passed "Plain English" laws, requiring intelligible writing in all consumer contracts and leases. In many ways, demands for clearer legal writing has cascaded into the modern "Plain English" movement, which is now one of the hallmarks of modern legal education.[13] Judge Richard Posner of the Seventh Circuit Court of Appeals (and one of America's most well-known federal jurists) says tellingly: "I know that only a few of the readers of my opinions are not lawyers, but the exercise of trying to write judicial opinions in a way that makes them accessible to intelligent lay persons contributes to keeping the law in tune with human and social needs and understandings and avoiding the legal professional's natural tendency to mandarin obscurity and preciosity."[14]

The Purpose of This Study

In keeping with this theme, *i.e.* readability as a measure of legitimacy, this study analyzes the readability of State Supreme Court decisions, specifically the Idaho Supreme Court decisions. This paper focuses on state supreme court writings because they seem to have a much greater impact, *viz.,* democratic impact, on the citizen's everyday political life. One has

only to consider the vast number of democratically relevant state-level legal and political topics—from inheritance laws to marriage laws; from land-use to transportation; from gun rights to voting rights and procedure—to get a sense of the importance of state supreme court opinions. Due to the dynamics of American federalism, state laws and regulations significantly outweigh their federal counterparts in terms of volume and likely relevance to the citizen. In addition, the focus on a single jurisdictional unit is conceptually helpful. Readability, as a trend-over-time, is best measured within a relatively self-containing legal unit, such as the Idaho State Supreme Court. As with all American courts, the Idaho Supreme Court follows the doctrine of *stare decisis,* which means its own internal work-product represents a relevant picture of the changes in writing quality over time.

Research Questions

This study's primary research question is whether the Idaho Supreme Court's judicial opinions are getting longer or shorter, more readable or less readable, over time. A critical part of this research question is how to best define readability, and whether textual analysis plays a role in that determination. The study predicts, due to professional and scholarly emphasis on improving the clarity of writing, that Idaho Supreme Court opinions are getting more readable over time. To test this theory, the study uses both quantitative and qualitative analysis, with illustrations and discussion from the court's own opinions. The study also includes a table of case results and several full-length Court opinions in the appendices.

As explained in Chapter Two, this prediction of increased readability over time is at odds with the existing scholarship. Each of the recent publications in this field has characterized judicial writing as getting less readable over time. While the research of this study confirms a general increase in length, it also suggests that the Idaho Supreme Court opinions have greater clarity over time, at least in terms of style. Moreover, the study demonstrates how political scientists can better approach the topic readability of court opinions in future studies, including the process of assessing potential court reforms based on opinion readability.

Completeness v. Clarity

Measuring statistical readability can only go so far in explaining the clarity and functionality of judicial writing. Statistically "clear" documents, in terms of their word and sentence frequencies, can (and often do) fail to produce clear rules of law. This research is targeted at improving statistical study models on judicial readability and at illustrating how certain textual models can enhance those studies. This dual-methods approach makes sense. If judicial legitimacy in terms of their power of persuasion depended primarily (or even in part) upon statistically clear writing, then the work products of more traditional representative institutions, *e.g.* legislatures and local governments, would suffer a similar loss of institutional credibility. In all actuality, citizens probably expect clear and intelligible work product from any branch of government. There must be additional factors which contribute to legitimacy beyond that of statistical readability. This paper explores and illustrates two such factors, completeness and textual redundancies as measures of legitimacy.

Research Overview

To summarize, this paper focuses on the clarity and completeness of Idaho Supreme Court opinions over time. Chapter Two explores the areas of existing literature on this topic, with discussion of both quantitative and qualitative trends. Chapter Three explains the detailed methodologies and implementations used in this study, with specific examples and illustrations from the research data. Chapter Four discusses evaluations and results, using both quantitative and qualitative textual analysis to illustrate the prediction of increased readability in Idaho Supreme Court opinions. Chapter Five explores the implications of this study and gives some suggestions as to alternate research methods. Chapter Six summarizes the study's conclusions and contributions on the topic, along with illustrative appendices.

This is a relatively novel study. It adds to the existing political science literature by combining the strengths of quantitative and qualitative methods on the topic of readability. It

uses a comparative-analysis approach to several divergent readability tests as a means to exploring the relevancy, and limits, of statistical readability. It scrutinizes those results using textual analysis models and specific case illustrations. In the end, this study challenges us as political scientists to re-think and broaden our views of how we analyze judicial readability as a measure of democratic legitimacy. The more relevant task is to explore whether (and under what conditions) the courts are producing clear rules of law for society, not only in terms of textual plainness but also in terms of completeness and functional stability.

Chapter 2: Literature Review and Discussion

The American Court system, on its face, is not a democratic institution. That is, the courts do not share the institutional features and electoral safeguards of traditional democratic institutions. The federal court system, for instance, still consists of a relatively small number of life-tenured justices, kept in office by a vague and near-impregnable standard of "good behavior." Nor do these justices share in the same political and constituent pressures of more representative officers. Of course, in many states the appellate judiciary is now elected.[15] But the differences between the justices and elected representatives, and even those between justices and executive administrators, are substantial.

Given this institutional uniqueness, legal scholars and political scientists have naturally looked to the court system's internal work product, *i.e.* the readability or clarity of its written decisions, as the measure of its democratic legitimacy. Specifically, scholars have attempted to measure the public's access to judicial thought processes in terms of clear rules of law. Much of the literature finds that this public access is limited. "There is a growing paradox in American common law," writes Michael Serota, that while judicial opinions are supposed to constitute our rule of law "…their sheer complexity and astonishing length render them unintelligible to most Americans."[16] This results, continues Serota, in the "lack of democratic legitimacy" for the Courts.[17] Another scholar observes: "the current Court's jurisprudence has devolved into conceptualism and technicality," riddled with "three or four 'prong' tests everywhere and for everything; with an almost medieval earnestness about classification and categorization." [18] There seems to be little consensus as to why this is so—with theories ranging from a growing complexity of the justiciable issues, to lack of trial court experience, and even to a growing reliance upon sometimes novice law clerks.[19] But the general nature of concern is the same, *i.e.* the courts are getting more insular from the public and less accountable in terms of fashioning clear rules of law for the average citizen.

If substantiated, this trend toward longer and less readable judicial opinions indeed presents a problem for institutional legitimacy. As described in Chapter One, court opinions can

have far-reaching political or policy consequences. Under the doctrine of judicial review, court opinions can interpret, clarify, and sometimes even modify (or extinguish) democratically approved legislation. The notion of an increasingly isolated and obscure judiciary, then, poses a threat to demands for a more transparent democracy. Speaking of the pre-civil war *Dred Scott v. Sanford* decision, Abraham Lincoln expressed alarm at the courts' ability to interfere with the mandates of popular government:

> "The candid citizen must confess that if the policy of the government is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their government."[20]

Of course, the realization of such fears has not necessarily materialized over time. The debate over a "run-away" judiciary has not yet translated into a fully "politicized" American court system.[21] So far, partisan judicial elections for the courts are confined to a small minority of states courts.[22] As one scholar notes, the normal partisan deliberative process tends to obscure, not illuminate, the public's capacity to exercise judgment over matters of substantive legal interpretation.[23] And so for now, the existing scholarship seems content to focus on judicial work product, and not the overall institutional structure, as the measure of legitimacy.

Existing Scholarship on Judicial Readability

As noted in Chapter One, readability is not an easily defined concept. Legal scholars—and more recently, political scientists—have sought to measure it using quantitative research methods, relying primarily on statistical readability software. This kind of numerical scrutiny looks at the frequencies of word and sentence structures as a measure of readability. Rarely, if ever, do such studies focus on the textual content of the opinions.

In one of the first studies of its kind, Professors Ryan J. Ownes (of the Harvard School of Government) and Justin Wedeking (of the University of Kentucky dept. of Political Science) research the complexity of federal Supreme Court opinions in their 2011 article *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*.[24] It should be noted

the authors do not attempt to measure democratic legitimacy. Rather, they engage in a lateral survey of the current sitting Untied States Supreme Court justices as to who writes the clearest opinions. Using LIWC software (Linguistic Inquiry Word Count software), the authors measure and analyze the cognitive complexity of the justice's decisions.[25] The authors' approach seeks to analyze "complexity" in terms of the cognitive difficulty of the justices' words, and clear legal writing in terms of improved cognitive complexity scores. The authors note that there is no single hallmark of clear legal writing, concluding that their statistical approach is not substantively different from approaches using alternate tests such as the Flesch readability tests.[26] Using simple linear regressions against a series of independent variables, the authors then test a series of possible factors, or variables, which make the justices' writing more or less clear. The authors find positive and significant correlations in many of these variables, including coalition size and case-type, though they do not draw any normative conclusions about judicial opinion writing as a whole, nor as a measure of legitimacy.[27]

In a second, highly significant 2014 study, Stephen M. Johnson compares the statistical readability of federal Supreme Court decisions in the 1931–1933 terms and the 2009–2011 terms.[28] Citing to the Owens and Wedeking study, and using the Flesch-Kincaid and Flesch Reading Ease tests, Johnson finds (consistent with earlier criticisms) that judicial opinions have indeed become longer and less readable over time.[29] Johnson's study, unlike the Owens and Wedeking study, attempts to measure clarity as an historical trend. As with Owens and Wedeking, Johnson uses linear regressions to test the impact of several independent factors, such as majority coalition size, opinion type, and the presence of constitutional issues. He concludes that "the [U.S. Supreme] Court's decisions are becoming excessively long and unreadable for the public" and that Court decisions are thus less likely to achieve the goals of "…promoting the legitimacy of the courts."[30] In his conclusions, Johnson finds a clear statistical correlation between the Flesch readility scores and year. This study is perhaps the most recent and the most relevant study on judicial opinion readability and its impact on institutional legitimacy.

While there appear to be no additional studies on statistical measures of judicial readability, there are a handful of additional studies which use quantitative methods to measure influences on judicial opinion writing. In one such study, the author measures the readability of litigant's briefs and how they impact the court's decision (which in turn can affect the readability of those decisions).[31] Another study looks at the readability of federal statutes and the use of legislative history in Court decisions.[32] Though not directly relevant to this study, *i.e.* to a comparative analysis of readability within a single state jurisdiction, these prior studies add to the growing body of literature which uses statistical methods to assess judicial writing. The dominant test used in these studies are the Flesch-Kincaid and the Flesch Reading Ease tests.[33]

Limits of Existing Scholarship

These studies on statistical readability, while instructive, appear to have a somewhat limited application and relevance. While employing statistically rigorous test models, these studies stop short of discussing or analyzing the context and meaning of judicial writing. Some studies (like Johnson's study) attempt to define legitimacy in terms of sheer statistical readability. This approach, as one scholar describes it, puts "blind faith in numbers."[34] Some scholars, like Serota, do not attempt to define readability with any measurable criteria.

There is also a conceptual limitation to a purely statistical approach. As explained in Chapter One, there is no outward indication that more traditional democratic institutions, such as our national Congress, could survive this kind of statistical writing scrutiny and still maintain their institutional legitimacy. To illustrate, the 1995 Supreme Court case *Seminole Tribe v. Florida* case, which deals with the Indian Gaming Regulatory Act, scores much better on both the Flesh-Kincaid and the Flesch Reading Ease tests than does the actual section of the Indian Gaming Act which it discusses.[35] It is not clear from these studies that there is a clear link between statistical readability (as opposed to substantive readability) and democratic legitimacy. Moreover, for scholars to conclude categorically that the courts are less democratically

legitimate due to unclear writing could have severe implications for the other branches of American government. It is probable (based on Owens and Wedeking's assumptions about coalition-clarity) that small-member Courts would fare much better than would legislatures in such a comparison. Basing institutional legitimacy on statistical clarity alone seems unlikely to produce relevant conclusions about democracy in the area of judicial governance.

Due to these limits, a pure statistical approach can only predict (but never fully describe) the clarity or difficulty of the judicial reading experience. A more accurate readability analysis depends on analyzing and improving the underlying test factors. This is because true end-user readability is a function of meaning and structure—and not just a summary of word and sentence frequencies. In many ways, says Williams, clear writing often depends on how the writing makes us feel.[36] Consider the following two fictional passages adapted from William's book—the first one testing much more readable under the two Flesch readability tests:

Table 2: Flesch Readability Comparison No. 1	
Passage No. 1 (clearer)	**Passage No. 2 (less clear)**
Once upon a time, a walk through the woods was taking place on the part of Little Red Riding Hood. The Wolf's jump out from behind a tree occurred, causing her fright.	Once upon a time, Little Red Riding Hood was walking through the woods when the Wolf Jumped out from behind a tree and frightened her.
Flesh-Kincaid Score: 5.0 (better) **Flesch Reading Ease:** 87.4 (better)	**Flesh-Kincaid Score:** 8.7 (worse) **Flesch Reading Ease:** 76.5 (worse)

Based only on its statistics, the first passage scores much better than does the second passage in terms of readability. That is because the Flesch readability tests measure only sentence length and syllable count. In terms of organization and complexity of ideas,[37] however, that the second passage appears to be the clearer passage. The statistical test results, in sum, are simply not relevant in terms of informing us about qualitative readability. "The shortcomings of traditional formulas…become evident when one matches them against psycholinguistic models of the processes that the reader brings to bear on the text. Psycholinguists regard reading

as a multicomponent skill operating at a number of different levels of processing: lexical, syntactic, semantic, and discoursal."[38]

In other words, traditional readability formulas, such the Flesch formulas, are not informative of context and substance. As Dawson summarizes: "The real problem with using these reading tests…lies in what is or is not being measured. The majority of these tests…consider only two aspects of a passage—sentence length and word length. But any experienced teacher recognizes that many other factors influence the reading level of a [text]…and no reading tests takes into account the number of complex ideas that are packed into a single paragraph."[39] Arguably, Owens and Wedeking attempt to account for this shortcoming by looking to word meaning, *i.e.* cognitive complexity, using the LIWC factors.[40] But even this approach does not account for complexity in the sense that Dawson refers to, *i.e.* in terms of complexity of words as part of ideas and not just the inherent word complexity.

Nor do shorter words and shorter sentences always translate into clearer text. Consider the following two additional samples, this time from a hypothetical legal text:

Table 3: Flesch Readability Comparison No. 2	
Passage No. 1 (more clear)	**Passage No. 2 (less clear)**
The notion of *Jus ex injuria non oritur* applies to the parties' dispute at bar. It should be used to resolve said dispute.	As a general principle, a right does not arise out of a wrong ("*Jus ex injuria non oritur*"). The Court will apply this principle to the parties' current dispute, because one party is trying to create a right out of his own wrongdoing.
Flesh-Kincaid Score: 6.3 (better) **Flesch Reading Ease:** 70.1 (better)	**Flesh-Kincaid Score:** 9.8 (worse) **Flesch Reading Ease:** 63 (worse)

Again, Passage No. 1 tests as far more readable under the Flesch-Kincaid test and the Flesch Reading Ease test. But as with the previous comparison, the second passage is much clearer. The first passage only scores better (*i.e.* more readable) because it has shorter words

and shorter sentences. But it gives the reader no context or explanation of its legal phraseology. The first passage is less complete as a text, even though it is more statistically readable. This highlights the most limiting aspect of standard readability tests, *i.e.,* their inability to measure meaning, context, and textual completeness. In the end, this kind of statistical analysis of court opinions tells the reader very little about meaning and completeness.

Alternate Views on Democratic Legitimacy

We must also consider alternate aspects of the court system's democratic legitimacy from the literature, for not all scholars consider the judicial process undemocratic. Steilen notes that the "deliberative process" for legislation is very similar to court adjudication because both processes involve an exchange of reasons about the appropriate collective course of action.[41] In this sense, the American judicial system is highly inclusive and broadly representative. Steilen continues: "In contrast to the legislative process, common-law adjudication is highly participatory…[which] helps make the court responsive to concerns of those bound by its decisions—the hallmark of democratic legitimacy."[42] Thus, Steilen offers a logical framework from which to analyze the court system's democratic legitimacy, despite a complex work product.

In the end, judicial complexity is, to some degree, necessary and unavoidable. "A certain amount of judicial gobbledygook is germane the modern practice of law," says one scholar.[43] It stems from the increasing complexity of modern legal and factual issues.[44] Thus, it is possible to rationally accept longer and more complex opinions independent of the question of legitimacy. As set out in Chapter One, the primary purpose in studying readability is to measure public accessibility to the courts' ideas. We cannot therefore conclude, *a priori* from statistics alone, whether longer judicial opinions are producing less clear rules of law.

The Risk of Scholasticism in Political Science Research

This is not to say that scholars should discard statistical quantitative analysis altogether. As explained and implemented in Chapter Four, this study demonstrates that statistical readability analysis plays an important role in assessing textual clarity and completeness. But there

is a risk, at least in the field of judicial readability, in focusing too much on statistical methodology to the exclusion of substantive textual analysis. Lawrence Mead, professor of politics and public policy at New York University, warns of what he calls a growing trend of "scholasticism" in political science research, or the self-narrowing trend of specialized analysis. "Without qualitative research," he says, "statistical findings can become unrealistic." In the pursuit of unmitigated *rigor*, he continues, we lose sight of the values of "realism, relevance, and audience."[45] This last ideal, *i.e.* audience, is particularly relevant in a study on the clarity of judicial opinions and can only happen with relevant textual analysis. "Inquiry should address the political issues that lay observers—not just academics—talk about."[46] On the topic of judicial readability, scholars must, at some level, seek to account for the actual reading experience of citizens. As shown in Chapter Four, statistical analysis can play an important role in this process when premised on more relevant underlying criteria and when combined with textual analysis.

As Mead aptly concludes: "At its best, political science accepts a tension between rigor and relevance, serving both values to some extent."[47] In the area of judicial readability, this suggests both quantitative and qualitative analysis of the topic.

Models for Textual Analysis

Political scientist Donald Lutz gives a compelling model for this kind of qualitative textual analysis when he describes the criteria of a complete national constitution. For Lutz, textual meaning is the compound result of three related factors: (1) the denotation (or meaning) of words; (2) the author's likely intent as to his words; and (3) the reader's individual appropriation of the text and its meaning.[48] Lutz's model focuses on the qualitative factors of meaning, context, background, structure, and textual purpose. This study employs Lutz's textual completeness model as an analytical framework in which to examine judicial readability. Statistical tests, after all, are limited to describing and approximating denotation, but they are not able to capture meaning or context. As one scholar explains, the end-user reading experience involves critical

perceptions, interpretations, and the re-writing what is read.[49] Lutz's textual model helps us to better appreciate the complexity of this process and its impact on legitimacy.

A second important model for textual analysis comes from political scientist Martin Landau's essay on constitutional design and system redundancy.[50] In his essay, Landau discusses how system redundancy and government system overlap contributes to constitutional stability. This concept is highly relevant to judicial opinion analysis. Using this model, the research question is not one of mere linguistic simplicity, but rather of efficiency and effectiveness, which in turn is often the result of complexity and legal overlap. In judicial opinions, it cannot be said categorically that because judicial opinions are getting longer they are also getting less clear. Opinions must be considered in terms of definitional clarity and stability.

A theme closely related to these two models (employed throughout the Chapter Four analysis) is a recognition of the inherent imprecision in words, especially political and legal words, as described by T.D. Weldon.[51] For instance, modern readers may tend to label certain justices as "conservative" or "liberal"; they may describe their writing as "good," "bad," "clear," "unclear"; and they may tend to categorize the justices as "constrained," or perhaps even as "activist." Any one of these descriptors is subjective to the reader and is likely to confuse the topic when statistically grouped. As Werlin explains, scholars end up trivializing political topics in trying to quantify the unquantifiable (in this case, meaning of words that constitute the rules of law).[52] In judicial opinions, the potential for trivialization is compounded when words, composing the rules of law, are taken and measured in a pure statistical context.

Ironically, a thoroughly rigorous study of judicial opinion readability (without any relevant textual discussions) can sometimes lead to unsystematic results.[53] They can, as seen in Tables 2 and 3, lead to results in which statistically readable texts are actually harder for the average reader to understand. This, in turn, can lead to misguided reform or critique based on such analysis. Textual analysis and illustration is needed to balance the uninformative tendencies of statistical readability analysis.

My Contribution to the Literature

This paper makes both a methodically rigorous and a textually relevant contribution to the literature. It focuses on a statistically relevant trend-over-time analysis of Idaho Supreme Court opinion readability from 1890 to the present. This is the first trend-over-time analysis ofstate supreme court judicial writing of its kind. This approach provides a big-picture sense of writing trends using three different readability models, together with illustrative textual analysis. This comparative approach offers new and more relevant insight into readability. It also invites future scholarship to assess and expand their methodologies on judicial readability.

Nothing in this study is meant to criticize or discount the existing literature on this topic. As already noted, the existing literature has made a valuable contribution to the problem of judicial readability. This study, as with prior studies, is exploring relatively novel territory. And, as with prior studies, this study too has significant limitations. It does not, for instance, answer questions of court legitimacy with finality. It is more suggestive than determinative, and it raises as many questions as it answers. It seeks, in the end, to build upon and enhance the existing methodologies in hopes of suggesting a new direction. If scholars consider citizen access to the rules of law as a democratically salient goal, they must begin to see readability within a broader textual methodology. Specifically, they must begin look for trends not only in the clarity of judicial words, but also in the completeness and sufficiency of its rules.

Chapter 3: Explanation of Research Methods and Procedures

As explained in Chapter Two, measuring the readability of judicial decisions is not a one-dimensional process. The first component, quantitative statistical analysis, can have substantial value, especially when used in a comparative context. This is the starting point of this study. But unlike prior studies, this paper uses a comparative approach to readability which allows readers to assess the strengths and weaknesses of each test, and thus to begin to evaluate the relevance of readability criteria. This is not an exhaustive comparative analysis of readability in general — that would far exceed the scope of this paper. It is expected that future studies which follow this comparative approach will expand the scope of relevant factors.

Why Idaho Supreme Court Decisions

Readability, as a measure of judicial democratic legitimacy, is best seen as a trend-over-time analysis. As explained earlier, change in writing quality is most easily seen within a single jurisdictional unit over time. The Idaho Supreme Court presents an ideal judicial unit for this kind of analysis. Unlike other state supreme courts, such as the New York State Supreme Court, Idaho has a comparatively homogenous legal and political history. It does not, for example, include judicial decisions from eras remote as the American Civil and Revolutionary wars, in which the chances for confounding factors such as culture and political influence would increase. Idaho statehood (1890 to present) avoids the dilemma of having to bifurcate the pool of relevant judicial decisions.

Of course, the study of Idaho as a single jurisdiction limits the applicability of the results. However, the purpose of the study is not necessarily to generalize the readability trend but to introduce a more complete methodology on the topic.

Case Selection and Analysis Method

This study uses a statistically relevant sample size rather than testing the entire body of Idaho Supreme Court decisions. Time and resource constraints were, of course, major factors in this decision. The overall data pool was 16,535 decisions, which consisted of all published

opinions and other court orders. To achieve a relevant sample, this study examined the history of Idaho Supreme Court decisions from 1891 to present and found, on the whole, a relatively consistent number of decisions per year. The study next tabulates the number of decisions per year using *Lexis Advance* research tools. A sample was obtained using random number generators with a specified margin of error of 5%, and with a 95% confidence interval. This produced the resultant sample size of 371 decisions, including opinions and general orders, which case list and data is attached as "Appendix A." This study then matched the random numbers with the *Lexis Advance* case lists in order to select the decisions. For instance, the year 1902 generated random numbers 11 and 34, from which was pulled case nos. 11 and 34 from the *Lexis Advance* results list (sorted by date of decision).

Further, this study measures the text of each opinion as a whole rather than by its individual components (*i.e.* majority opinions, dissenting opinions, concurring opinions). It was felt that this approach was more relevant to assessing end-user readability, because the different components of court opinions are often textually interdependent. Concurring and dissenting opinions, for instance, are often drafted in reference to, and textually dependent upon, the facts and discussions in the majority opinion, even where the opinions diverge in terms of legal or factual reasoning. This approach makes readability test results more relevant to what the reader encounters when examining rules of law within the text of published court opinions.

Flesch-Kincaid: Correlation and Regression Tests

This study begins by using the Flesch-Kincaid readability tests. This test was originally designed to measure technical documents, and it is often used to test the readability of legal texts.[54] It has been described in scientific literature as "the most reliable estimate of required reading comprehension with a high level of consistency across writing samples."[55] It calculates readability by measuring sentence length and syllable count, and it produces a grade-level output score for readability (a K–12 grade scale, with 12 being high school senior, and beyond).

This study used the Oleander Software version of Flesch readability tests.[56] The following table shows how the Flesch-Kincaid grade score is calculated as a grade-level output:

Table 4: The Flesch-Kincaid Formula
G = (11.8 x (B/W)) + (.39 x (W/S)) – 15.59

In this formula, "G" represents grade level, with "W" as the number of words, "B" as the number of syllables, and "S" as the number of sentences in the document. As seen above, the test weighs average syllable count per word much more heavily than it does average word count per sentence, adding the two figures together and subtracting the number 15.59 to give it a measurable grade-level score.[57] The logic of this test is simple: the higher the average syllable count per word (B/W) and the higher the average word count per sentence, the higher (worse) grade level score that is received by the document. For example, a legal document that has a higher number of multi-syllabic words (words such as "constitutional" or "anticipatory") along with a higher number of long sentences (in legal documents, this could include a high number of string-citations or quotations from treatises), will get a worse score under Flesch-Kincaid than a legal document with fewer multi-syllabic words and with shorter sentences.

One of the key studies cited in Chapter Two, *The Changing Discourse of the Supreme Court*, uses the Flesch-Kincaid score as the primary measure of readability of Court decisions. Johnson concludes that Supreme Court decisions are becoming less readable over time due to higher Flesch-Kincaid scores. This test, as with the Flesch Reading Ease test, are validated and used both by Johnson and by Owens and Wedeking, and by scholars in other areas of study.[58] Use of this test on judicial opinions reveals that later decisions have higher average syllable count per sentence and/or higher average word count per sentence than do prior decisions. For Johnson, the Flesch-Kincaid formula sufficiently describes his conclusions on legitimacy.

Following existing literature, this study uses the Flesch-Kincaid test in two ways. First, it measures the linear correlation between the decision year (*e.g.* 1921, 1939, 2003, etc.) and

readability scores from Idaho Supreme Court decisions. It does so using the Pearson correlation coefficient, which measures the associated strength between two variables (giving a value range between -1 and +1 as the absolute negative and positive linear correlation values). Based on the literature, this approach tests whether there is a positive correlation between the year values and the readability scores values, which, if proven, could suggest that Court decisions are getting less readable (*i.e.* higher Flesch-Kincaid scores) over time.

Second, this study uses the Flesch-Kincaid test results and document coding to run three simple linear regressions. The Flesch-Kincaid test scores act as the dependent variable which is tested against three independent variables: (1) year; (2) unified or split decisions; and (3) case type (civil or criminal). The first regression test is substantially similar in approach and outcome to the correlation test, though in the regression analysis gives an independent confirmation of how the dependent variable (test scores) relates to the independent variable (year). The second regression measures how readability scores relate to whether the decision is unified or split, *i.e.,* whether it has one or multiple authors. This regression is similar to that of prior studies, in that it measures whether opinions with more authors will receive higher Flesch-Kincaid scores. The logic of this regression is that majority opinion authors who write for a greater majority coalition will write less clearly due their having to satisfy a higher number of subscribing justices.[59] This study does not distinguish between the *number* of justices joining an opinion, but whether the Court itself is writing as a whole or divided. The third regression measures how readability scores relate to the type of case (criminal or civil) being decided. In each regression, I use a simple binary code system (0 and 1) to test for the presence of such variables.

Flesch Reading Ease: Correlation and Regression Tests

The Flesch Reading Ease readability formula is fairly similar to the Flesch-Kincaid readability test in that it measures sentence length and syllable count. However, the calculation formula is somewhat different. Instead of using a grade level score, the Flesch Reading Ease test achieves an indexed score between zero (being the lowest readability value) and 100 (being

the highest readability value). This was done, says Rudolf Flesch (the author of the test) in his 1948 article *A New Readability Yardstick*, "…to make the scores more readily understandable for the practical user."[60] Here is the formula used:

Table 5: The Flesch Reading Ease Formula
I = ROUND (206.835 – (84.6 x (B/W)) – (1.015 x (W/S)))

In this formula, "I" represents the indexed score (0 to 100), with "W" as the number of words, "B" as the number of syllables, and "S" as the number of sentences in the document. As with the Flesh-Kincaid test, this test weighs average syllable count per word much more heavily than it does average word count per sentence, subtracting the two figures from 206.835 to give it a predictable indexed score between 0 and 100, with lower scores representing less readable documents. The logic of this test is similar to the Flesch-Kincaid test: the higher the average syllable count per word (B/W) and the higher the average word count per sentence, the lower (worse) indexed score received by the document. As in the Flesch-Kincaid test, judicial opinions with high syllable words (such as "constitutional" or "reciprocal") and long string citations are bound to affect the indexed score, which is as follows:[61]

Table 6: Flesch Reading Ease Index Table	
90–100	Very Easy to Read
80–99	Easy to Read
70–79	Fairly Easy to Read
60–69	Standard Reading
50–59	Difficult to Read
30–49	Difficult to Read

Johnson's study, *The Changing Discourse of the Supreme Court,* also uses the Flesch Reading Ease score as an additional measure to Flesch-Kincaid. Johnson reasoned that if the Flesch-Kincaid results increase over time, then the Reading Ease scores should decrease over time for substantially similar reasons, *i.e.* the similar nature of the tests.

As with the Johnson study, this study uses the Flesch Reading Ease as an addition to the Flesch-Kincaid test results. First, it uses the Flesch Reading Ease test to measure the linear correlation between the decision year (*e.g.* 1921, 1939, 2003, etc.) and readability scores from sampled Idaho Supreme Court decisions, as explained in the prior section. Second, it uses these results and document coding to run the same three simple linear regressions as explained in the prior section, with the same hypothesized results (accounting, of course, for the differences in indexed scores). This study predicts that based on the findings in existing literature, the Idaho Supreme Court scores will get lower over time under both Flesch readability tests.

The StyleWriter "Style" Test Calculations

As discussed in Chapter Two, the Flesch-Kincaid and Flesch Reading Ease tests have substantial conceptual limitations. Most notably, they fail to account for the relevant context of words and sentences in terms of actual readability.

Given these limitations, this study employs a third readability formula from the StyleWriter® software called the "Style" test.[62] This test uses a formula which measures word use in terms of quality and context. Unlike the Flesch tests, which measure only word and sentence length, the Style test looks at twelve different contextual factors, suggested by one scholar as being highly relevant to the adoption of a "Plain English" legal writing style.[63] This test is somewhat similar to Owens and Wedeking's use of the LIWC test using a content-based factored analysis. The following table shows each of the Style test categories:

Table 7: The Style Test Factors	
1	Number of passive verbs
2	Number of hidden verbs
3	Number of complex words
4	Number of abstract words
5	Number of overused words
6	Number of legal words
7	Number of clichés
8	Number of business clichés
9	Number of wordy phrases
10	Amount of overwriting
11	Number of foreign words
12	Number of unusual words

As with the Flesch Reading Ease score, the Style scores are indexed on a scale from 0 to 100, but with lower scores representing more readable documents (the inverse of the Flesch Reading Ease score index). Here's how the formula works:

Table 8: The Style Formula
SI = ((N + SP) x 1000)/W

In this formula, "SI" represents the indexed score (0 to 100), with lower scores representing more readable text. "N" represents the number of long sentences in the document, which is determined by counting only those sentences which exceed the standard deviation of average sentence length. "SP" represents the cumulative number of "style problems" as counted by the above 12 categories. This sum is then multiplied by 1000 and divided by the total number of words to give it a predictable indexed score. The logic of this test is much more compelling

than that of either of the Flesch tests. By combining the total number of style problems and overly long sentences, divided by the number of words (with a multiplying factor of 1000 to achieve an indexed score) the Style test makes a logical connection between the quality of words and phrases the length of the document.

All other factors being equal, a judicial text with fewer long sentences *automatically* receives a better score using the Flesch readability tests, regardless of its style problems or its internal clarity. As seen in Tables 2 and 3 of the previous chapter, the Flesch readability formulas are misleading as to legal readability because short sentences are not necessarily clear or instructive sentences. The Style test improves on this issue because it penalizes only those sentences which exceed the standard deviation within the document. In other words, the Style test is contextual because it measures words and sentences in reference to the document itself. Also, the Style score looks at the quality and context of the words, and not just their syllable count. For instance, a document filled with passive verbs may test well with Flesch-Kincaid if such verbs happen to have few syllables. But the Style test detects passive constructions as "style problems" and penalizes them, somewhat similarly to the cognitive difficulty index described by Owens and Wedeking's in their use of the graded LIWC software.

Validation of the Style Test

The StyleWriter "Style" test does not appear to be used in the existing literature. And so, as an independent measure of validation, this study used the Style test to compare scores over time in a science fiction literature data set.[64] Using a Pearson's correlative analysis to test the relationship between years and writing samples, the study found substantially similar results as in the legal data sets. As shown below, there is a strong correlation in this validation test, suggesting that the Style software works consistently in both legal and literature data sets as a measure of good writing style over time:

Table 9: Sci-Fi Pearson's r Correlation Analysis					
	Year (corr.)	Mean	SD	Min	Max
Style	– 0.652	-	-	-	-

This result in the science fiction literature data set (in which we'd expect writing to get clearer over time in response to plain modern writing styles) is suggestive that the test is also a predictive measure of document clarity in judicial opinions. The validation of this test is discussed in Chapter Four's analysis along with textual illustrations of the different style factors.

Comparative Analysis

As shown in Chapter Four, the Style test results contradict those of the Flesch readability tests. They show that Idaho Supreme Court opinions are becoming much more readable over time. To illustrate the possibility and nature of this contradiction, consider the Little Red Riding Hood text samples from Table 2 in terms of their Style test results:

Table 10: Style Readability Comparison No. 1	
Passage No. 1 (less clear)	**Passage No. 2 (more clear)**
Once upon a time, a walk through the woods was taking place on the part of Little Red Riding Hood. The Wolf's jump out from behind a tree occurred, causing her fright.	Once upon a time, Little Red Riding Hood was walking through the woods when the Wolf Jumped out from behind a tree and frightened her.
Style Score: 62 (worse)	**Style Score:** 40 (better)

Unlike the results from the Flesch readability tests, the Style test shows that the second passage (and not the first) is the clearer passage. This outcome matches the reader's non-qualitative expectations and judgments as to which is the clearer passage. This outcome is also consistent for the legal text examples set out in Table 3:

Table 11: Style Readability Comparison No. 2	
Passage No. 1 (less clear)	**Passage No. 2 (more clear)**
The notion of *Jus ex injuria non oritur* applies to the parties' dispute at bar. It should be used to resolve said dispute.	As a general principle, a right does not arise out of a wrong ("*Jus ex injuria non oritur*"). The Court will apply this principle to the parties' current dispute, because one party is trying to create a right out of his own wrongdoing.
Style Score: 86 (worse)	**Style Score:** 23 (better)

Again, the second passage scores much better under the Style test than it does under the two Flesch readability tests. Not only is the language in the second passage clearer (a critical factor in the Style test), but it is also structurally more complete in terms of reader context and meaning. There is another important observation. The second passage is longer and therefore more statically complex under the Flesch tests. The Style test, because of its use of long-sentence averages in terms of standard deviation, accounts for this and does not penalize it.

As with the Flesch readability tests, this study uses linear regression models to check the accuracy of the correlations between Style scores and year, as well as to test for other possible and likely influencing variables. As explained in Chapter Four, the Style tests does not detect any significant impact in these variables, other than year.

Textual Analysis and Illustrations

Following my comparative discussion of the statistical results, Chapter Four analyzes judicial opinions using two different textual analysis models: (1) Lutz's complete text model; (2) Landau's system redundancy model. These two models are used illustratively to examine what additional (non-statistical) factors contribute to judicial opinion readability, such as structure and reference materials. It further suggests that factors of completeness and redundancy should be included in assessing ultimate textual legitimacy. As discussed in Chapter Five, there is still much work to be done with this approach.

Summary of Methodologies:

My initial methodology consists of quantitative statistical analysis using three separate readability tests, both individually and in comparison. Individually, it examines the two Flesch readability test scores using Pearson's correlation analysis. This analysis shows there is a dis-trict trend between correlation to years as it relates to statistical readability. Then, it examines the Style score trends to show that the Style test scores contradict (but are no less correlative) than the Flesch readability trends, followed by an illustrative discussion of the different Style test factors. This comparative analysis is one of the core features of this study, as it highlights the difficulties of abstract readability measures such as the Flesch readability tests.

Next, my methodology consists of running several linear regression tests as a second measure of trend over time, as well as a measure of two other factors likely to influence judicial decisions: case type and multi-authored opinions. It also discusses an additional regression on the number of words as a factor in overall readability and legitimacy. It uses qualitative docu-ment coding to mark criminal decisions and decisions which have more than one contributing author (*i.e.* concurring or dissenting opinion) with a 1. All other decisions are coded as zero. These latter two regressions, while not directly dispositive of my general research question, help explore whether other factors (besides just time) influence document readability.

Finally, my methodology explores some of the qualitative factors of judicial readability using Lutz's and Landau's textual analysis models, with specific (but randomly selected) illus-trations from the data. Such factors include structure, completeness and context, and redun-dancy of case precedent as a measure of stability. This approach gives further perspective on the benefits of the Style test and the need for more relevant quantitative analysis.

Based on the results of the Style test and the ensuring textual analysis, this study con-cludes that Idaho Supreme Court opinions are getting more readable over time, both in terms of plainness and in terms of completeness and functionality. The limitations and suggested ap-plications of this approach are discussed in Chapter Five.

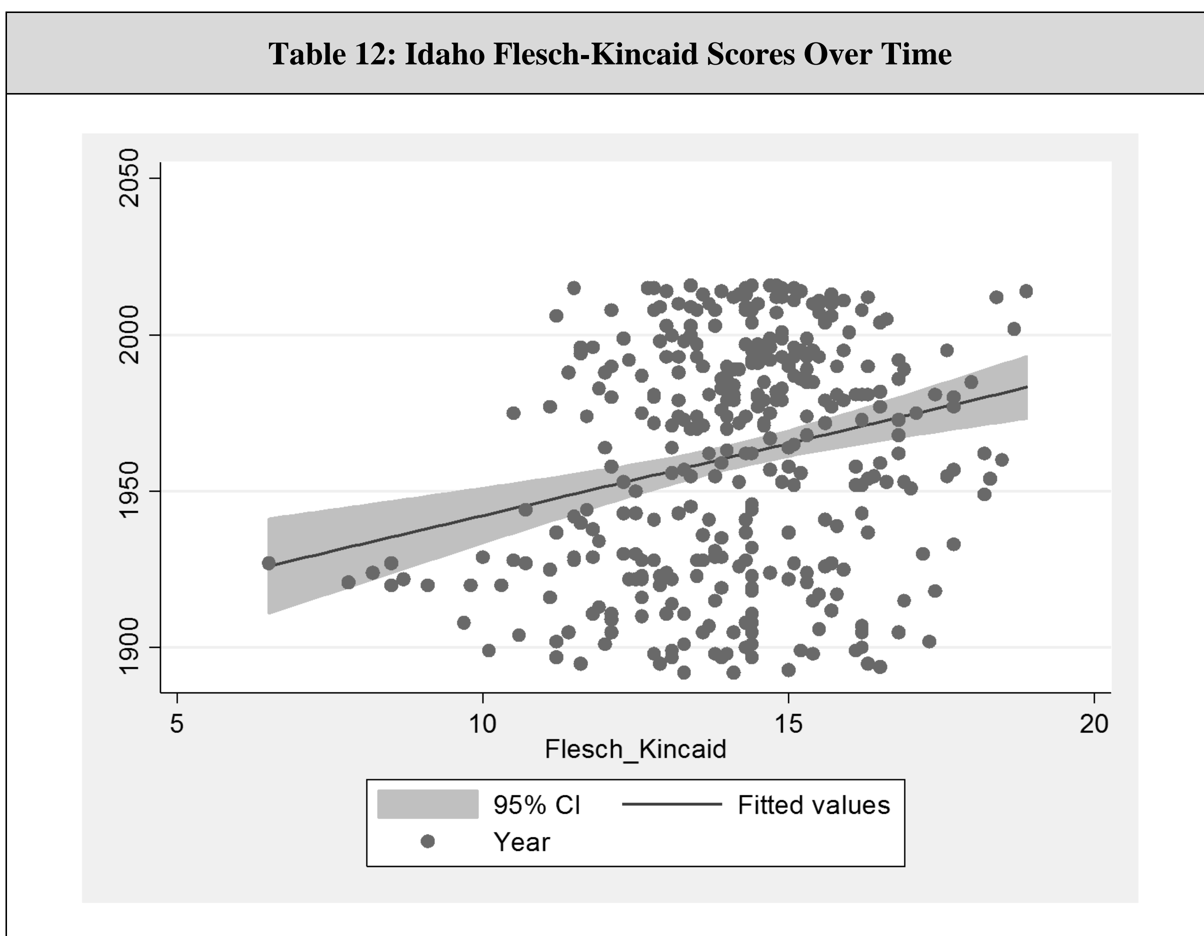
Chapter 4: Results and Evaluations

This Chapter examines my research results. It begins with a review of the statistical correlations between readability scores and year, and then proceeds to examine the various scores in comparison to each other and pursuant to textual analysis models.

Flesch-Kincaid Results and Evaluations

This first chart illustrates the descriptive relationship between Flesch-Kincaid scores and year in Idaho Supreme Court opinions. There is a positive upward relationship between scores and years, which shows that opinions receive higher (worse) scores over time:

Table 12: Idaho Flesch-Kincaid Scores Over Time



This result matches the trends observed in Chapter Two. In context of the actual readability formula, it means that the Idaho Supreme Court opinions have greater word complexity

(*i.e.* longer average syllable count) and longer average sentences from 1891 to the Present. Given the predicted trend toward judicial opinion complexity over time (based on growing complexity of cases and issues), it is not surprising to find this trend in Idaho opinions as well as in federal Supreme Court opinions. The statistical word count research of this study shows that the Idaho Supreme Court opinions are getting longer over time, which predicts higher numbers of long words and sentences. To test the strength of association between Flesch-Kincaid scores and year, I ran a Pearson's r correlation analysis, as shown in the following table:

Table 13: Idaho Flesch-Kincaid Pearson's r Correlation Analysis

	Year (corr.)	Mean	SD	Min	Max
Flesch-Kin.	+ 0.2412	14.11	1.94	6.5	18.9

This table shows a statistically significant association between the Flesch-Kincaid scores and year. This is a somewhat weak positive correlation (a perfect positive correlation being +1). Nonetheless, it corresponds with descriptive observations from prior studies, as well as with my predictions based on these existing studies. The following table demonstrates how the Flesch-Kincaid determines that Idaho Supreme Court decisions experience a weak positive statistical trend toward lengthier words and sentences:

Table 14: Comparison of Lengthy Word Use by Year

Year	Case
1916	*Rathbun v. New York Life Insurance Co.* (Flesch Kin. Score = 11.1): Total Words = 2,243 % of complex words (3+ syllables) = 15% % of long words (6+ characters) = 28% Examples of long words: "beneficiary", "ascertain", "authorized".
1995	*State v. Medley* (Flesch Kin. Score = 14.4) Total Words = 2,427 % of complex words (3+ syllables) = 23% % of long words (6+ characters) = 39.4% Examples of long words: "individual", "supported", "enormous".

As seen in this table, the Flesch-Kincaid test penalized the 1995 *State v. Medley* decision for having a higher percentage of complex and long words per total words. This problem was compounded by the total number of lengthy sentences in that opinion, shown below:

Table 15: Comparison of Lengthy Sentences	
1916	*Rathbun v. New York Life Insurance Co.* (Flesch Kin. Score = 11.1): Number of overly long sentences (22+ words) = 28 Longest sentence word count = 191
1995	*State v. Medley* (Flesch Kin. Score = 14.4): Number of overly long sentences (22+ words) = 47 Longest sentence word count = 54

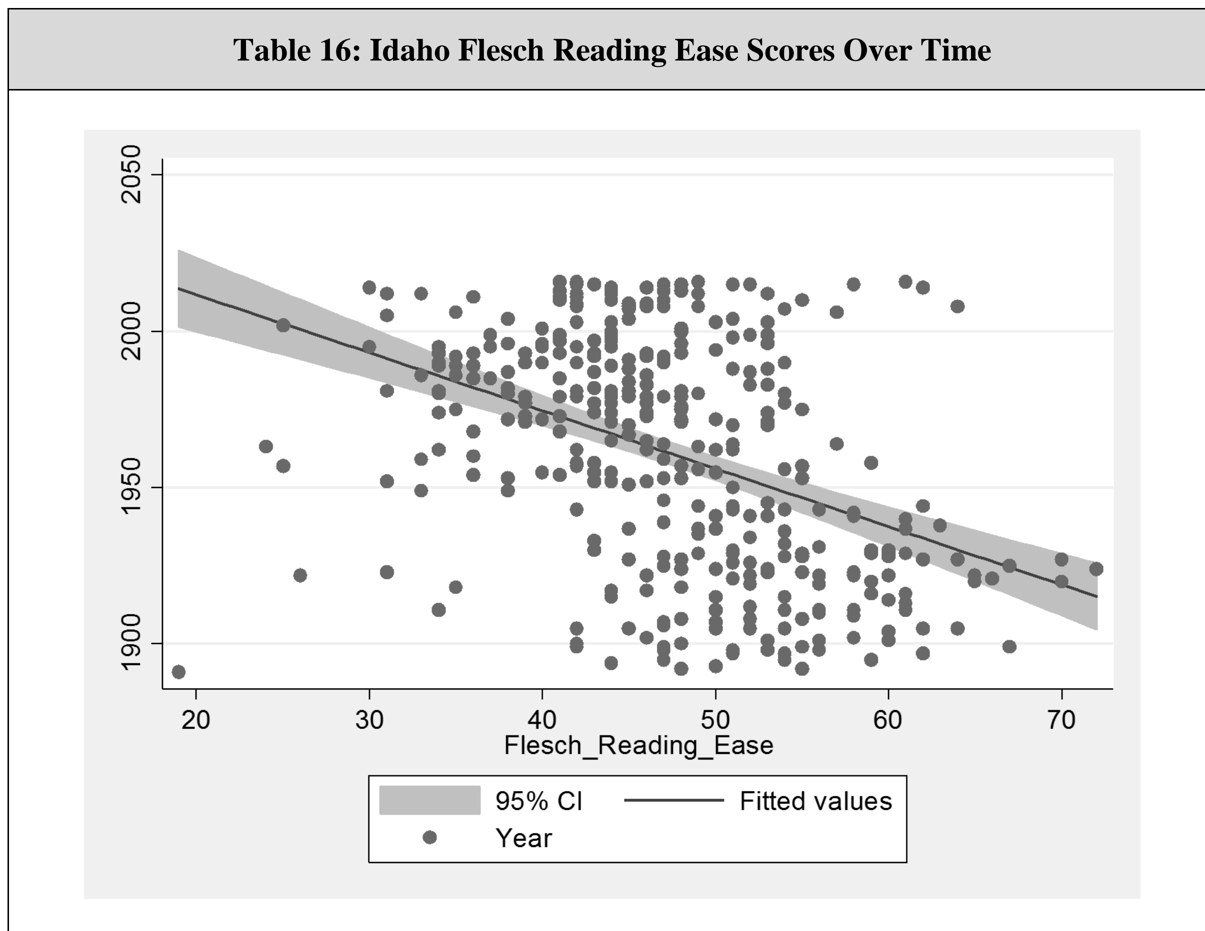
When matched with the total number of lengthy words, the Flesch-Kincaid test gives *State v. Medley* a significantly worse readability score than it does *Rathbun*. Outwardly, this suggests that *Rathbun* is the more readable decision. But that conclusions can only be drawn when considering the abstract statistical data. I have included the full-length text of these two decisions in “Appendix B.” In qualitatively comparing the actual text of the opinions, the *State v. Medley* decision appears considerably more readable and more textually functional than does the 1916 decision in terms of style and structure. When tested using the Style test, described later in this Chapter, the *State v. Medley* decision scores a full 27% more readable than did the 1916 *Rathbun* decision. This comparison, of course, is only illustrative of the larger analytical problem of the Flesch-Kincaid test, *i.e.* its inability to measure meaning and context.

In sum, use of the Flesch-Kincaid test over Idaho Supreme Court opinions reveals that the Idaho Supreme Court is using longer average words and sentences over time—but little else. This result is at odds with the Style test score over the same data, as later shown, which calls into question its use as a relevant measure of opinion readability over time.

Flesch Reading Ease Results and Illustrations

This second chart illustrates the descriptive relationship between Flesch Reading Ease scores and year in the Idaho Supreme Court opinions. As shown below, there is a negative downward relationship between scores and years, which, like the Flesch-Kincaid test, also suggests that Idaho Supreme Court opinions receive worse (lower) scores over time:

Table 16: Idaho Flesch Reading Ease Scores Over Time



As with the Flesch-Kincaid scores, this trend matches those observed in Flesch Reading Ease test scores of U.S. Supreme Court decisions. Of course, this is not surprising given the strong similarities between the two Flesch readability tests. As with the Flesch-Kincaid tests, the Flesch Reading Ease results suggests that Idaho Supreme Court opinions have greater word complexity (*i.e.* longer average syllable count) and longer average sentences from 1891 to the

Present. To test the strength of association between Flesch Reading Ease scores and year, I ran a Pearson's r correlation analysis, as shown in the following table:

Table 17: Idaho Flesch Reading Ease Pearson's r Correlation Analysis					
	Year (corr.)	Mean	SD	Min	Max
Flesch R.E.	–0.4250	47.5	8.5	19	72

This table shows a statistically significant association between the Flesch Reading Ease scores and year, though it is a much stronger correlation than in the Flesch-Kincaid test. The differences in computation and score indexing may account for the variances. Nevertheless, both tests are consistent in showing that the case opinions are getting more complex over time.

It must be remembered that the Flesch Reading Ease test, like the Flesch-Kincaid test, measures both syllable court per word and word count per sentence, but that this approach fails to account for the context and meaning of words and sentences. It is, one might say, a measure of the textual clarity based solely on textual bulk. The following table illustrates this point:

Table 18: Comparison of Lengthy Word Use	
1930	*Glover v. Spraker* (Flesch RE Score = 60): Total Words = 2,597 % of complex words (3+ syllables) = 12.1% % of long words (6+ characters) = 26% Examples of long words: "purchase", "sufficient", "reference".
2013	*Hansen v. Roberts* (Flesch RE Score = 41): Total Words = 3,707 % of complex words (3+ syllables) = 19.3% % of long words (6+ characters) = 37.6% Examples of long words: "removing", "utilizing", "foundation".

In this table, the Flesch Reading Ease test penalized the *Hansen v. Roberts* decision as having a higher percentage of complex and long words per the total number of words. This result is similar to the results shown in Table 14. However, as with those prior results, the Flesch

Reading Ease test did not measure the quality or context of these words. Rather, it scored and penalized the words based solely on their length (*i.e.* by how many syllables they contained). As seen in this table, the quality of the sample "complex" words used in the first case does not appear more difficult linguistically than the quality of those in the second case. As in the prior Flesch-Kincaid example, the problem of statistical word complexity in the Flesch Reading Ease test was compounded by the total number of statistically lengthy sentences:

Table 19: Comparison of Lengthy Sentences	
1930	*Glover v. Spraker* (Flesch RE Score = 60): Number of overly long sentences (22+ words) = 43 Longest sentence word count = 156
2013	*Hansen v. Roberts* (Flesch RE Score = 41): Number of overly long sentences (22+ words) = 74 Longest sentence word count = 56

In this table, the 2013 *Hansen* case received a lower score than the 1930 *Glover* case due to its larger number of lengthy sentences (even though it had a shorter overall longest sentence). The combined weight of more complex words and longer sentences suggests that it was less readable than the 1930 decision. But that conclusions seems at odds with the qualitative text content of these two opinions, included with this study as "Appendix C." As with the sample Flesch-Kincaid opinions listed in "Appendix B," the full text comparison chart here suggest that the 2013 decision is much more readable and more structurally clear than is the 1930 decision. In fact, the 2013 case *Hansen v. Roberts* made a 52% improvement in its Style score over the 1930 case, strongly suggesting that it is the more readable of the two opinions.

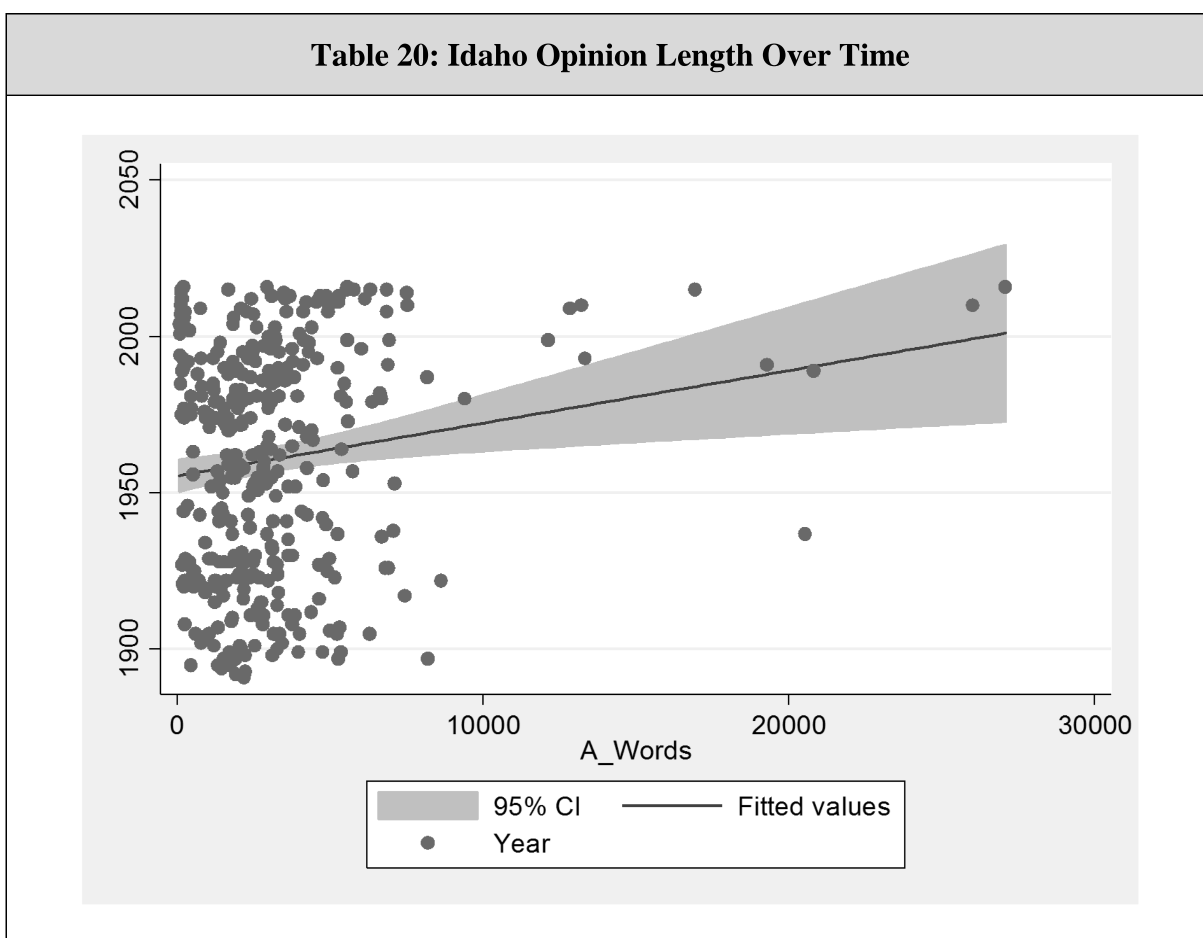
In the end, both Flesch-Kincaid and Flesch Reading Ease scores conformed to the predictions of existing literature that Idaho Supreme Court opinions are using longer average words and sentences over time. This result is not surprising given Hamilton's prediction about the nature and complexity of legal precedent over time. But given the conceptual difficulties of the

Flesch readability tests, it still remains to test whether Idaho Supreme Court readability improves under the functionally divergent Style readability test.

Opinion Length Analysis and Illustrations

As explained in Chapter Two, one of the leading criticism of judicial opinions is that they are getting longer over time. Scholars use this fact to suggest a corresponding lack of clarity over time. This section explores the trends over time as to average opinion length. This third chart illustrates the descriptive trend of decision length in Idaho Supreme Court opinions from 1891 to the Present. There is a positive upward trend toward longer opinions:

Table 20: Idaho Opinion Length Over Time



This table shows that Idaho Supreme Court opinions are getting longer over time, though cases with greater than 10,000 words (right of center) could be considered outliers and not representative of the entire date pool. This finding is consistent with the findings of prior

literature, which also show trend toward longer opinions over time. To test the strength of association between decision length and year, I ran a Pearson's r correlation test, as shown in the following table:

Table 21: Idaho Opinion Length Pearson's r Correlation Analysis					
	Year (corr.)	Mean	SD	Min	Max
# of Words	+ 0.2319	-	-	-	-

This table shows a statistically significant association between decision length and year. This is a somewhat weak positive correlation, but corresponds with descriptive observations and my predictions based on the literature. Of course, sheer document length (as with word and sentence length) is descriptive of literary bulk but not of actual meaning. This result conforms to earlier predictions that cases, of necessity, are getting longer over time.

Interestingly, the correlation results between actual reading scores and the number of words (as opposed to the correlation between number of words and years) shows only a weak correlation for the two Flesch readability tests as well as the Style test:

Table 22: Idaho Opinion Length Pearson's r Correlation Analysis					
	# Words (corr.)	Mean	SD	Min	Max
Flesch Kin.	+ 0.094	-	-	-	-
Flesch RE	–.113	-	-	-	-
Style	+.122	-	-	-	-

These correlations suggest that longer opinions are slightly less readable than are shorter opinions. This is to be expected given the increased probability for linguistic and substantive complexity of longer opinions. It is assumed that courts generally will only write long opinions when the merits and complexity of the case demand such treatment. The fact that the correlations in each instance were so slight is telling of the extent to which the Idaho Supreme Court decisions are relatively consistent in terms of readability scores and length.

Reflections on Decision Readability and Length

So far, the quantitative test results of this study conform to those of existing literature. They show that the Idaho Supreme Court decisions are getting longer, both in terms of words count and average word/sentence length, over time. But these results are only descriptive of the opinions' word and sentence length. Because these tests do not measure the quality or context of the words, the results are, at best, inconclusive as to whether Idaho Supreme Court opinions are getting less readable over time. A review of the two sets of Supreme Court opinions in Appendices B and C are illustrative of this quantitative/qualitative conflict.

Of course, we cannot categorically say that the opposite is true either, *i.e.* that because the Flesch readability tests are not informative of true textual readability, *ergo,* that court opinions are getting more readable over time. The falsity of that position needs no demonstration. As one popular academic research manual suggests: "There is no simple answer [to ideal text size], because ease of reading depends on the vocabulary, sentence structure, and sentence length." [65] In sum, statistical readability based on literary bulk is problematic.

But while the measure of statistical readability is a problem, it is not irresolvable. One possible solution lies in changing the statistically relevant factors. In the next section, this study explores the readability trend-over-time of Idaho Supreme Court opinions using different (and arguably more relevant) readability factors. This gives a comparative picture of the Style readability test results and how they are more suggestive of actual readability over time.

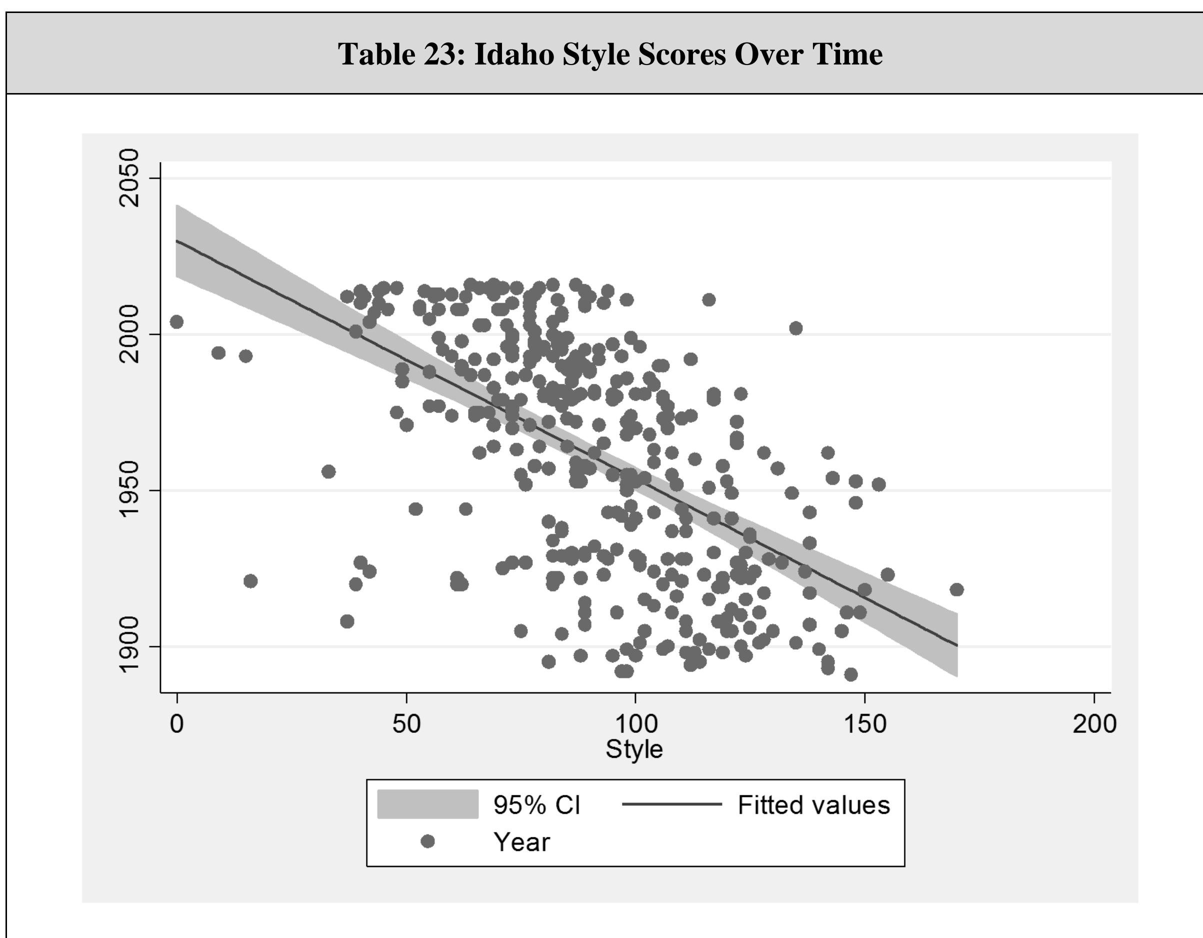
Style Test Results and Illustrations

As explained in Chapter Three, the Style test is designed to do what the Flesch readability tests cannot—measure the quality of the writing and not just its quantity. As seen in its formula, the Style test measures sentence length, but it does so in the context of the document itself, *i.e.* based on the standard deviation from average sentence length. This approach improves upon the use of sentence length as a factor by avoiding an arbitrary selection as to proper word and sentence length. The formula also avoids penalizing words based on sheer word and

sentence volume without first considering the overall length context in which those words appear. This is a substantive improvement to readability, comparable to Owen and Wedeking's use of the LIWC tests.

The following chart illustrates the descriptive relationship between Style scores and year in Idaho Supreme Court opinions from 1891 to the Present. As shown, there is a substantial negative downward relationship between scores and years, which suggests that Court decisions are getting much more stylistically readable over time.

Table 23: Idaho Style Scores Over Time



Unlike the Flesch-Kincaid scores or the Flesch Reading Ease scores, the Style test scores suggests that Idaho Supreme Court decisions are getting more readable over time. While this conclusion contradicts the existing literature, it validates other parts of the notion in literate that the "Plain English" movement has improved writing within the general legal community.[66] It

also validates the textual-analysis models discussed later in this Chapter as to improved structure and context of legal writing.

To test the strength of association between Style scores and year, I ran a Pearson's r correlation test, as shown in the following table:

Table 24: Idaho Style Pearson's r Correlation Analysis					
	Year (corr.)	Mean	SD	Min	Max
Style	–0.5516	-	-	-	-

This table shows a statistically significant association between the Style scores and year, by far the most significant association of the three readability tests. This result further confirms (or at least suggests) this study's prediction that testing the readability of Idaho Supreme Court opinions under the Style test would show improved legal writing over time.

Unlike the Flesch readability tests, the Style tests measures and scores the content of words and sentences. While not a perfect statistical match to the reader's actual experience, it is certainly a step in the right direction. The following subsections illustrate each of the twelve Style test factors (some factors combined for ease of discussion), with examples and analysis as to why the factors are highly relevant to end-user readability.

Style Factor 1: Passive Verbs

Passive writing, in general, tends to obscure a text's meaning. It is conceptually problematic in legal writing, which is by nature already complex and difficult to understand. Passive verbs are measured as a text fault in the Style test when they combine the verb "to be" with a past-participle of another verb or an irregular verb. For example: "The savings *could be used to pay* for a new photocopier." We can revise this passive verb use to read: "The savings *could pay* for a new photocopier."[67] Wydick explains that passive voice in legal writing has two main problems: first, it is often too wordy; second, it is often too abstract.[68] Passive legal writing, in

sum, obscures the goal of transparency in the rules of law. The following table illustrates the problems of passive verbs in the 1898 case *Naylor v. Vermont Loan & Trust Co.*:

Table 25: Naylor v. Vermont Loan & Trust Co., 1898	
	Passive Verbs = 6; Passage Style Score = 175 (dreadful)
Examples from opinion:	"He should have collected and received all fees earned by him, and, so far as his liability to the county and the latter's rights are concerned, that which he should have done must be regarded as done…" "The cause was heard upon evidence introduced and upon a stipulation of facts…" "The court overruled the objection, and thereupon the defendant duly excepted, which exception was allowed by the court, and this ruling of the court is assigned as error, and will be relied upon by the defendant on its motion for a new trial as one of the errors committed by the court in the trial of this cause…."

Note how the passive verbs in these examples from the opinion are short words, usually less than 3+ syllables. This means that the Flesch tests would not likely detect them as complex words and penalize the opinion as a result. But unquestionably, the passive verb use makes it hard for average readers to follow the case narrative. As Wydick explains, such verbs make the opinion too abstract for non-legal readers. This is critical in light of the fact that legal rules of law are often described in terms of their factual and procedural context.

While the example in Table 25 might seem relatively benign, consider the effect of repeated passive verbs in the 1953 case *Schmidt v. Village of Kimberly*:

Table 26: Schmidt v. Village of Kimberly, 1953	
	Passive Verbs = 5; Passage Style Score = 193 (dreadful)
Example from opinion:	"It is admitted that a municipality may make and enforce all reasonable rules and regulations essential and appropriate to the preservation of public health, as a valid exercise of its police power. In this state that power is given to the municipalities by the constitution itself. No more appropriate and potent method of promoting public health could be provided by a municipality than the establishment of an adequate sewage disposal system and requiring the discontinuance of previous unsanitary methods. The municipality, in order to effectively exercise its police power for the protection of the public health, must be clothed with authority to compel the widest use of the sanitary sewage disposal system that circumstances will reasonably permit. The power of the municipality in this respect being recognized, the validity of the particular requirement depends upon its reasonableness as applied to a particular individual or class."

It is difficult to follow the narrative in this passage The Court uses too many passive constructions, which makes the narrative feel abstract and unclear. In terms of end-user readability, it does not identify the actors, which in turn affects the reader's ability to understand and apply its rules of law. This passage makes more sense when read as part of the entire case, but the reader still spends considerable time working through the rest of the passive constructions (over 100 in the entire opinion) to understand the narrative and the applicable rules of law.

Style Factor 2: Hidden Verbs

Hidden verbs are also a significant style fault. The government website *PlainLanguage.gov* describes a hidden verb as: "A verb converted into a noun…[which] often needs an extra verb to make sense."[69] Not only do hidden verbs add to overall sentence and document length: they also increase textual complexity. For example: "Please *take into consideration* the costs," can be much more simply written (without hidden verbs): "Please consider the costs."[70] The following table illustrates the problem of hidden verbs in the 1933 case *State v. Burns:*

Table 27: State v. Burns, 1933	
	Hidden Verbs = 6; Passage Style Score = 144 (dreadful)
Example from opinion:	"Under a literal construction of the statute, an attorney who, for example, makes a collection of $ 500 for another, either refuses or neglects, upon demand, to pay that exact amount over to his client, within twenty days after the demand, is guilty of grand larceny. The statute does not even confer upon an attorney the right to contract concerning either compensation for or costs expended in making a collection, and if an attorney makes a deduction from a collection to cover compensation or costs or expenses, he is guilty of grand or petit larceny, depending upon the amount deducted. And if the right to contract for compensation or costs or expenses in making a collection exists, it must be read into the statute, which cannot be done, for obvious reasons. Thus the statute, literally construed, makes a crime of the perfectly innocent act of making a deduction for actual costs expended and compensation earned on account of time given and labor performed in making a collection."

Here, the Court turns simple verbs such as "collect" and "deduct" into hidden verbs such as "makes a collection" and "making a deduction." This use of verbs confuses the narrative within the passage and makes the rules harder to understand. The Style test penalizes such hidden verbs as text faults, while the Flesch tests normally do not (unless, of course, these verb faults show up under the general category of "complex" words of 3+ syllables). In this way, the Style test consistently identifies hidden verbs as observable writing fault while the Flesh tests may not always do so.

Style Factor 3: Complex Words

As explained in Chapter Three, StyleWriter uses a graded dictionary, similar to that used in the LIWC test relied on by Owens and Wedeking, to rate the actual word complexity within the opinion. StyleWriter penalizes any text which uses difficult words in place of simple words. For example: "Please *endeavor* to *ascertain* the truth" can be re-written more simply as: "Please

try to find out the truth."[71] The following table illustrates the overuse of complex words in the 1944 case *J.R. Watkins Co. v. Clark*:

Table 28: J.R. Watkins Co. v. Clark, 1944	
	Complex Words = 7; Passage Style Score = 123 (bad)
Example from opinion:	"Conceding that the surety agreement is to be construed most strongly in favor of the guarantors, the pertinent language in *Cargill Commission Co. v. Swartwood*, on rehearing, leaves no room for construction or interpretation other than that without equivocation the amount of the indebtedness existing at the time the credit was made was accepted and guaranteed by appellant sureties. The refusal to submit the issue of reasonableness of additional credit, therefore, was correct."

This passage seems confusing. The Court could have used words more simple words such as "if" instead of "conceding," "debt" instead of "indebtedness," and even "read" instead of "construed." Arguably, these sample words could have been detected and penalized by the Flesch tests as polysyllabic. But complex words can often be monosyllabic, and so the Style test looks at the graded complexity of the word as to whether a simpler word could be used in its place. This approach is much more suggestive of probable word clarity.

As noted by Owens and Wedeking, judicial writing needs clarity because "…the Supreme Court lacks the power to enforce its decisions…[and] must rely on citizens' and policymakers' belief in its legitimacy."[72] For Radin, the rule of law must be knowable: "…in order for those to whom the rules are addressed to know what they are commanded to do, the commands must be public, congruent, and non-contradictory, clear enough to understand."[73] The Style complexity test, then, is a significant improvement to measuring statistical complexity because it measures the quality (and not just the structural quantity) of the words.

Style Factor 4: Abstract Words

As with complex words, the Style test recognizes abstract words. StyleWriter penalizes writing that uses non-specific words in place of specific words. For example: "To use this facility, one writes and saves an appropriate functional script into a system which is capable of sending the file to an output device," can be re-written more simply as: "To print a file, write and save a script to send the file to the printer."[74] For the most part, StyleWriter captures abstract words as part of its separate "Bog" index, which is not measured (in isolation) in this study. The following table illustrates the use of abstract words in the 1949 case *In re Henry's Estate*:

Table 29: In re Henry's Estate, 1949	
	Total Bog Sentences in Document = 26; Total Style Score = 121 (bad)
Example from opinion:	"Appellant served on counsel for executrix and filed in the Probate Court July 5, 1946, his petitions for decree of distribution and an accounting, particularly as to asserted contributions by appellant to property claimed to constitute separate property of deceased, and for probate homestead in part of said Hotel. Petition for settlement of final accounting and distribution of the estate was likewise filed by executrix, who also filed, but did not serve answers to appellant's petitions."

This passage shows how abstract words can infect not only the rules of law, but also the underlying fact patterns for those rules. Judicial rules of law tend to lose meaning when removed from their supporting context. Consider the recent Idaho Supreme Court decision of *Lepper v. E. Idaho Health Services,* in which the Court established a new rule of law which was narrowly tailored to the facts of the case: "In circumstances where not a single medical provider is willing to consult with a plaintiff's expert regarding the standard of care, the standard becomes indeterminable and the plaintiff may then look to other similar localities or communities outside the state."[75] The Court's rule in *Lepper* only makes sense in context of the case facts, *i.e.* as it applies to instances where no medical providers within the state are willing to opines as to local standards of medical care. This rule would not apply to cases in which in-state providers are

willing to do so. Factual context makes a significance difference in this example. Abstract words tend to obscure rule-context and are therefore penalized.

Style Factor 5: Legal Words

Legal words, or *legalese,* is perhaps the most noxious of all style faults in judicial writing. One recent survey of 650 lawyers, teachers, judges, law professors, and court reporters (all of whom work intimately with the law) described typical legal writing as: “flabby, prolix, obscure, opaque, ungrammatical, dull, boring, redundant, disorganized, gray, dense, unimaginative, impersonal, foggy, infirm, indistinct, stilted, arcane, confused, heavy-handed, jargon and cliché-ridden, ponderous, weaseling, overblown, pseudointellect, hyperbolic, misleading, uncivil, labored, bloodless, vacuous, evasive, pretentious, convoluted, rambling, incoherent, choked, archaic, orotund, and fuzzy.”[76] Williams describes it as writing in which the authors “[hide] their ideas not only from their readers but even from themselves.”[77] Examples include words such as: “forthwith, hereat, whereupon, in said…, aforementioned, etc., etc..”[78] The following table illustrates the use of abstract words in the 1891 case *Goodnight v. Moody*:

Table 30: Goodnight v. Moody, 1891	
	Legal Words = 15; Passage Style Score = 146 (dreadful)
Example from opinion:	"That said applicant was, on the first day of October, 1890, duly elected as a member of the House of Representatives of the legislature of the state of Idaho from the county of Nez Perces, state aforesaid, for the term of two years; that on the eighth day of December, 1890, he duly qualified as such representative, and that ever since said eighth day of December he has been, and now is, a duly qualified and acting member of the House of Representatives of said Idaho legislature for the county aforesaid; that on said eighth day of December the legislature of the state of Idaho was convened in its first session by a proclamation of the governor, and began its duties under and by virtue of said proclamation and the constitution of the state of Idaho, and remained in continuous session from said eighth day of December, 1890, to the twentieth day of December, 1890, at which last-mentioned date said legislature adjourned to the fifth day of January, 1891, and on said fifth day of January reconvened, and remained in continuous session since said fifth day of January; that on the twenty-first day of February, A. D. 1891, the said legislature was in lawful session at the capitol of the state, and that the applicant, as a member thereof, as aforesaid, was present and attended the session on that day, and performed all duties required to be performed by him as such member by the laws and constitution of the state of Idaho…".

This passage is quintessential legalese—full of "said" and "aforesaid" references in which the reader loses all sense of factual narrative. This kind of language makes it hard for the reader to understand the Court's rules of law. Compare the above passage to the opening narrative in the 1998 case *State v. Merwin,* where Justice Linda C. Trout uses a simple narrative approach—consistent with the notion of Plain English:

Table 31: State v. Merwin, 1998	
	Legal Words = 0; Passage Style Score = 34 (good)
Example from opinion:	"On July 18, 1995, appellant Kevin Brent Merwin (Merwin) was left to care for his three children from a previous marriage along with the two children of his then girlfriend, now wife, Michelle Buss-Merwin (Buss-Merwin). During the morning, Merwin supervised the children as they played outdoors in a small pool. At 12:28 p.m., Buss-Merwin called home. During the telephone conversation, Merwin said that everything was fine and, in fact, Buss-Merwin reported that she thought she heard one of her children, Alex, a two-year-old boy, talking in the background. The call ended at 12:31 p.m. At 12:44 p.m., Merwin called the Kootenai County 911 emergency number. Merwin reported to the dispatcher that Alex had seemed tired so Merwin had brought him inside. Merwin further stated that while Merwin was changing him from his swim suit into his pajamas, Alex had fallen from the bed and hit his head on the floor. Merwin told the dispatcher that Alex was unconscious and breathing only occasionally. A paramedic was dispatched at 12:46 p.m. While waiting for the paramedic to arrive, Merwin told the dispatcher that Alex was "all limp" and was making a "weird sound." Merwin later reported that Alex had stopped breathing and that Merwin could not detect a heartbeat. The paramedic arrived at 1:08 p.m. The paramedic observed that Alex had no pulse, was not breathing, and was ashen gray in color. The paramedic was able to resuscitate Alex, who was then airlifted to Sacred Heart Hospital in Spokane. Merwin also told the paramedic that Alex had fallen from the bed."

While still technical, this passage is much clearer to the reader. By using a clear narrative style, Justice Trout provides a meaningful context in which to understand more complex legal concepts later in the opinion. While the Idaho Supreme Court may not ever manage to completely avoid legalese, the Style test suggests that it has managed to use it less often, which in turn should result in clearer rules of law.

Style Factor 6: Clichés and Business Clichés and Overused Words

The Style test also penalizes the use of clichés, business clichés, and overused words. This section groups these categories together because they involve common groups of words and phrases that are devalued through overuse. For example: "at your convenience" and "please be advised" are overused and somewhat devalued phrases. They can be replaced with much simpler phrases (or even single words) such as: "soon" and "be aware."[79] The following table illustrates the use of abstract words in the 1973 case *In re Estate of Cooke:*

Table 32: In re Estate of Cooke, 1973	
	Total Clichés = 2; Passage Style Score = 76 (Poor)
Example from opinion:	"In the case of In re Price's Estate, supra, the testatrix died leaving as heirs at law, two living sons and two grandchildren, the issue of a deceased son. The testatrix bequeathed all her property to her two living sons to be divided between them at her death, share and share alike"

These categories do not appear to be a very prevalent (and hence, not particularly weighty) factors in the Style tests. Still, it is easy to see how devalued phrases can be confusing in context of the Court decisions. Unfortunately, the Flesch readability tests do not penalize clichés or overused words, unless they happen to be particularly lengthy. The Style test, by contrast, factors them in to the cumulative count of style faults.

Style Factor 7: Wordy Phrases, Overwriting

As with the previous combined factors, wordy phrases and overwriting test for similar concepts. The purpose of these factors is to penalize unnecessary words (in StyleWriter, these words are often termed "glue" words), in an effort to substitute them for shorter, simpler alternatives. For example: "at a later date" can be substituted for the much simpler term "later."[80] As with legal words, wordy phrases pose a significant threat to clear writing. The following table illustrates this point in the 1973 case *Dunn v. Silver Dollar Mining Co.*:

Table 33: Dunn v. Silver Dollar Mining Co., 1973	
	Style Score for Passage= 85 (Poor)
Example from opinion:	"We conclude that within the meaning of this section, the claim was made on or before May 12, 1949, and the claimant had one year from that time in which to petition for a hearing."

We could render this passage more simply: "*Under this section, Dunn made a claim on May 12, 1949. He had one year to ask for a hearing*." (Revised Style Score = 0, a perfect score!). Eliminating wordy phrases and overwriting corrects two style problems at once: first, it shortens the length of judicial opinions; second, it makes them clearer to their readers. This factor is a significant improvement to the Flesch readability tests, which cannot distinguish wordy phrases and overwriting from generally long sentences which might otherwise be clear. Some scholars could argue that the concept of wordiness is implied and penalized in the overall sentence length measure of the Flesch tests. Even so, those tests do not address the quality of the words and phrases. The Style test corrects this problem.

Style Factor 8: Foreign and Unusual Words

Finally, the Style test measures the use of foreign and unusual words. These are words that are likely to be outside the known vocabulary of most readers, such as "caliginous" or "calendaring." In legal documents, they are usually Latin-based words such as "res ipsa loquitor" or "inter alia," which makes this category similar (though not entirely synonymous) with the *legalese* category.[81] For most readers, unusual words tend to clog up the factual case narrative. More importantly, they tend to obscure the meaning of the rules of law. The following table illustrates this point in the 1928 case *Arkoosh v. Big Wood Canal Co.*:

Table 34: Arkoosh v. Big Wood Canal Co., 1928	
	Style Score for Passage= 166 (dreadful)
Example from opinion:	"A subsequent appropriator has a vested right as against his senior to insist upon a continuance of the conditions that existed at the time he made his appropriation, provided a change would injure the subsequent appropriator."

This passage illustrates how unusual words can obscure the overall sense of a rule of law. Of course, terms such as "appropriator" can have special legal significance under statute or existing case law. In the above example, for instance, it would take far too many words to explain, in plain everyday terms, the words "appropriator" or "appropriation" each time they are used. One way to fix this problem is to have (as with statutes) a general explanation of definitions, terms, or principles within the case. Most modern judicial opinion writing spends some portion of the opinion explaining the meaning and history of such terms. Consider the following passage from the 1961 case *Boesiger v. Freer* dealing with "equitable estoppel":

Table 35: Boesiger v. Freer, 1961	
Definitional example:	"Equitable estoppel…is a term applied to a situation where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact."

This definition helps us, as readers, to gain more context for the case's subsequent legal discussions on this doctrine. This kind of attention to definition often extends the length of average sentences, thus penalizing it under the Flesch tests. This is not necessarily true with the Style test, as it penalizes extra verbiage only to the extent that it exceeds the standard deviation of average sentence length within the opinion.

Comparative Analysis of Readability Tests:

Having explored the individual results and specific examples from each of these readability tests, we can now analyze their similarities and differences. As to ultimate conclusions,

the Flesch-Kincaid and Flesch Reading Ease test scores both suggest that the Idaho Supreme Court opinions are getting less readable over time. This is consistent with the predictions of earlier literature discussed in Chapter Two. But upon close examination, the underlying factors for these two tests (long words and long sentences) are not ultimately relevant to meaning or context. At most, they are suggestive of increased volume and bulk of the words and sentences. Of course, it is possible that these measures have sporadic relevance within any given opinion. But it is not statistically predictive in terms of relevancy, as Mead suggests. Word and sentence length in an opinion cannot tell the reader much about the clarity of the rules of law. Since the Flesch readability tests do not give us any qualitative insight into the nature of the opinions, we cannot conclude from their raw test scores whether Idaho Supreme Court opinions and the rules of law are any more or less clearly written today than in the past.

By contrast, the Style readability test scores reach the opposite conclusion, *i.e.* that Idaho Supreme Court opinions are getting easier to read over time. As illustrated above, the Style test uses factors with a higher qualitative relevance to the text, *e.g.* the number of passive verbs, the number of legal or unusual words, and the average sentence length as measured by the standard deviation from the document's average sentence length. Rather than analyzing abstract word and sentence volume, the Style test counts relevant style faults as they relate to the actual text. Consider this comparison of results from the 1985 case *Kyle v. Beco Corp.,* which scored very poorly on the Flesch tests, but relatively well on the Style test:

Table 36: Kyle v. Beco Corp. Statistics	
Flesch Syllable Statistics	1 syllable (1,826 words); 2 syllables (549 words); 3 syllables (465 words); 4 syllables (218 words); 5 syllables (46 words); 6 syllables (5 words); Number of Complex Words, 3+ Syllables (734, or 23.6%); Number of Long Words, 6+ Characters (1,098, or 35.3%).
Flesch Sentence Statistics:	Number of Sentences (147); Number of Sentences Longer than 22 Words (58, or 39.5%); Average Sentence Length (21.1 words);
Combined Style Statistics:	52 Passive Verbs; 5 Hidden Verbs; 88 Complex Words; 8 Abstract Words; 5 Legal Words; 37 Wordy Phrases; 3 Instances of Overwriting; 4 Foreign Words; 1 Unusual Word. Number of Sentences Longer than the Standard Deviation (23).

This table shows the comparative raw date for a single opinion, which in turn illustrates visually how the Style test uses more relevant grading factors. For instance, the Flesch tests' focus on sheer syllable count tells us nothing about the content of those words. We are asked to assume that longer syllable count means higher difficulty. But as illustrated earlier, that is not necessarily the case. Sheer word and sentence length tell us nothing of the complexity of the ideas within those words and sentences. While it is probable than these factors are occasionally relevant as to content-readability, they are not logically predictive.

The Style test, by contrast, is outwardly descriptive. It tells us the number of qualitative style faults, such as passive verbs, complex words, and abstractions. It also tells us the number of sentences which exceed the standard deviation for average sentences within the actual document. Though not shown in this study, the Stylewriter software uses a visual coding format to highlight such words and style faults within the document.[82] In the above table, we can observe that the number of long sentences under the Style test ("23") is much lower than the number long sentence count under the Flesch tests ("58"). While still not fully determinative of ultimate readability, it tells us that the opinion had relatively few style faults when compared with the

overall length (3,095 words). As already seen, the measure of "88 Complex Words" tells us that the opinion has at least 88 detectable words that could be replaced by simpler alternatives, and the measure of "52 Passive Verbs" pinpoints the likely use of dense or abstract language. The Flesch readability results do not give such insight.

It should be remembered that while the Style test is arguably more textually relevant than are the Flesch readability tests, it is still not fully descriptive. Like the Flesch tests, the Style test tells us how readable a judicial opinion *should be* but not definitively how readable it actually is. This means that even the Style test's statistical conclusions are limited to the realm of probability and approximation of readability, *albeit* a more relevant approximation than in the Flesch results. To confirm the Style test results, we must also analyze examples from the results using textual analysis models, as set out later in this chapter.

Before discussing these models, I will next analyze the results of my regression analysis tests and their implications for readability.

Linear Regression Tests

This study ran several linear regression tests to measure the effects of certain independent variables, or predictors, and their impact on judicial readability. It was shown in prior literature that certain variables, such as case type and majority size impact the outcomes of readability scores.[83] Similarly, my regression tests involve three independent variables of year (for a second measure of trend-over-time), case type (civil or criminal) and the presence of multiple authors (dissenting or concurring opinions as part of the total published opinion). These tests are similar to those of the literature discussed in Chapter 2, though the outcomes differ.

In particular, these linear regression results confirm the earlier correlation results between test scores and opinion year. However, they do not show a consistent connection, across tests, between case type or multi-authored opinions and readability score. Of course, the application of these results is somewhat limited because the last two variables, case type and multiple

authors, are still subject to the inherent flaws of readability tests in general, *i.e.* the factors are not always fully descriptive of qualitative readability.

Regression 1: Flesch-Kincaid Scores

The first regression analysis in this study involved use of the Flesch-Kincaid scores as the dependent variable, with the independent variables of year, civil/criminal status, and multiple-author opinions. The following table displays the impact of these variables on Flesch-Kincaid scores of the Idaho Supreme Court opinions:

Table 37: Idaho Flesch-Kincaid Regression Analysis

Regression Analysis: Intimacy of Predictors

Predictor	B (Std. E.)	Beta	t	Tol.	VIF
(Constant)	–7.812 (5.784)				
Year	.011 (.003)***	.204	3.808	.909	1.100
Civil_Crim.	–.407 (.278)	–.077	–1.462	.936	1.068
Mult_Opn.	.017 (.262)	.003	.063	.950	1.052

Note: *p<.05, **p<.01, ***p<.001; $F(20.884, 4.068) = 5.133$, p <.01; Adj. $R^2 = .032$.

In this regression, it was found that the year in which the decision was issued had a statistically significant impact on Flesch-Kincaid output scores. This finding matches the Pearson's correlation results and validates the earlier literature as to less readability over time. However, there were no statistically significant results for either civil or criminal case type or for multiple-authored opinions. This breaks from the existing literature, where criminal cases were found to be more readable than civil opinions.[84] Part of the explanation for this may lay in the fact that this study did not segregate opinions into their component parts, but rather tested them as a whole. As already explained, this was done to reflect the reality that readability of the separate components of judicial opinions are often interdependent and not functionally distinct from majority opinions.

From this regression model, the effect of each successive year on Flesch-Kincaid scores is expected to increase .011 units of grade-level score. As seen above, this regression model was statistically significant (p<.01). The adjusted R-squared value indicates that 3.2% of the variation in the Flesch-Kincaid scores are explained based on the three predictors. Also, there was no detected multicollinearity between the variables, meaning they had sufficiently independent impact on the readability scores. However, as explained in the last section, we cannot say from this result that the probable increase in scores means a clear corresponding loss in qualitative textual readability.

Regression 2: Flesch Reading Ease Scores

The second regression analysis of this study measures Flesch Reading Ease scores as the dependent variable, with the same independent variables of year, civil/criminal status, and multiple-author opinions. The following table displays the results:

Table 38: Idaho Flesch Reading Ease Regression Analysis

Regression Analysis: Intimacy of Predictors

Predictor	B (Std. E.)	Beta	t	Tol.	VIF
(Constant)	252.320 (21.7)				
Year	–.105 (.011)***	–.457	–9.416	.909	1.100
Civil_Crim.	4.014 (1.045)***	.184	3.842	.936	1.068
Mult_Opn.	–1.239 (.985)	–.060	–1.258	.951	1.052

Note: *p<.05, **p<.01, ***p<.001; F(1913.09, 57.376) = 33.343, p <.001; Adj. R^2 = 208.

In this regression, it was found that the year in which the decision was issued had a statistically significant impact on the Reading Ease output scores. As with the Flesch-Kincaid scores, this finding matches the Pearson's correlation results and validates the earlier literature as to Supreme Court decisions over time. It was also found that there was a statistically significant result for civil versus criminal opinions, with the results showing improved readability

over time consistent with the prior literature. However, there was no significant result for multiple-authored opinions. This last result breaks from the existing literature.

As seen above, this regression model was statistically significant. The adjusted R-squared value indicates that 20.8% of the variation in the Flesch-Kincaid scores are explained based on the three predictors—a much higher impact than the Flesch-Kincaid scores. This too, is consistent with the Pearson;s r-correlations, which showed a stronger correlation between score and year for Flesch Reading Ease than for Flesch-Kincaid. There was no detected multicollinearity between the variables, meaning they had sufficiently independent impact on the readability scores. However, this result is not revealing as to content.

Regression 3: Opinion Length

The third regression analysis of this study used opinion length (as measured by number of words) as the dependent variable, with the same independent variables of year, civil/criminal status, and multiple-author opinions. However, the results of this regression analysis showed non-normality, and so it was re-run using the Johnson transformed measure to get a normally distributed result. The following table displays the relevant opinion length regression data:

Table 39: Idaho Opinion Length Regression Analysis					
Regression Analysis: Intimacy of Predictors					
Predictor	**B (Std. E.)**	**Beta**	**t**	**Tol.**	**VIF**
(Constant)	–7.290		–2.916		
Year	.004 (.001)	.176	3.037	.911	1.097
Civil_Crim.	.214 (.135)	.091	1.590	.927	1.079
Mult_Opn.	.268 (.109)***	.145	2.460	.885	1.130
Note: *p<.05, **p<.01, ***p<.001; F(5.732, .609) = 9.414, p <.000; Adj. R^2 = .077					

Here, there was no statistically significant increase in scores for either year or for case type. This breaks with the existing literature as to longer opinions over time, though by only a small percentage. There was statistical significance between number of words and multiple-authored opinions, which is to be expected. There was no detected multicollinearity between the variables, meaning they had an independent impact on the readability scores.

Regression 4: Style Scores

The final linear regression test focused on style as the dependent variable, with the same independent variables of year, civil/criminal status, and multiple-author opinions. The following table displays the results:

Table 40: Idaho Style Score Regression Analysis					
Regression Analysis: Intimacy of Predictors					
Predictor	**B (Std. E.)**	**Beta**	**t**	**Tol.**	**VIF**
(Constant)	849.705				
Year	–.387 (.032)***	–.535	–11.969	.909	1.100
Civil_Crim.	–10.741 (3.036)***	–.156	–3.538	.936	1.068
Mult_Opn.	6.517 (2.862)*	.099	2.277	.951	1.052
Note: *p<.05, **p<.01, ***p<.001; $F(29756.86, 484.46) = 61.423$, p <.001; Adj. R^2 = .329.					

As seen above, this regression model was statistically significant in all three areas of analysis, matching the predicted outcome from the literature in the second variable. The adjusted R-squared value indicates that 32.9% of the variation in the Flesch-Kincaid scores are explained based on the three predictors. As with the Flesch readability scores, this finding matches the Pearson's correlation results. I did not detect multicollinearity between the variables, meaning they had sufficiently independent impact on the scores.

Limitations and Importance of Regression Tests

The primary importance of these regression models was to test the correlations between years and scores. In each case, there was a significant relationship between year and test readability scores under each of the regression models, as well as for the second and third variables in certain models. This confirms that each readability test performed as predicted in Chapter Three. However, the relevance of the other regression tests is not immediately clear. In the prior literature, the independent factors of case type and multi-authored decisions were used to help explain what additional factors might impact readability. Here, the results were inconclusive and varied from test to test. As seen above, only the Style test showed a significant impact on both the second and third variables. But even in the Style test, the results of the third variable regression were opposite to those predicted, showing that opinions, when measured as a whole,

are stylistically better written from a unanimous court than when fragmented into several conflicting opinions. One possible explanation for this variance is the difference in readability test factors. Another explanation lies in the fact that this study measured readability of judicial opinions as a whole, rather than by their individual opinion components. In any event, given the high textual relevance of the Style score test factors, the results between score and year suggest that Idaho Supreme Court opinions are indeed getting more readable over time, with the factors of case type and number of opinions having an additional impact on writing style.

Importantly, these results suggest that the mere passage of time is not necessarily the controlling factor which affects the readability scores. As shown, there are other possible statistical factors which could impact the scores, such as testing the writing of individual justices or accounting for the institutional and political arrangements of the courts, as well non-statistical factors such as improved legal education. Judicial writing and common-lawmaking is a complex process, subject to many internal and external factors. As explained by Justice Cardozo in Chapter One, some of these factors are not even known to the justices themselves, making quantification very difficult. It is expected that future research will continue to expand on these quantitative and qualitative factors as a means to better approximating statistical readability.

Having explored the results of statistical and regression analysis, I now go to the third and final part of my study—textual analysis models as an explanation of clarity.

Textual Completeness

So far, this study has analyzed qualitative readability scores and determined that test relevance depends heavily on the test's internal readability factors. The more abstract measurements in the Flesch tests reach opposite and less relevant conclusions than do the more qualitative measurements of the Style test. And yet, neither test group is dispositive on the final issue of clarity and readability. The tests are only suggestive of clarity and cannot be used to draw normative conclusions about actual readability or democratic legitimacy. To achieve this kind

of relevance, as Mead suggests, we must also analyze general qualitative factors which tend to impact end-user readability and functionality.

As explained in Chapter Three, Lutz develops and employs a three-part model for determining the meaning of political/legal texts: (1) the denotation of words; (2) the author's intent; (3) the reader's individual or collective appropriation. This model is well adapted to understanding readability (or meaning) of judicial opinions. In the following sections, this study discusses and applies these factors as a model to understanding judicial clarity. Specifically, I used Lutz's model as a means to confirm the results of the Style test, *i.e.* by examining and illustrating the qualitative factors of opinion readability.

Completeness and Meaning

Lutz uses his completeness model to discuss Constitutional meaning, which itself is highly relevant as a political/legal text. For Lutz, modern debates over constitutional meaning are often misguided because participants tend to view the Constitution itself as a "complete" text. This, he says, is a mistake. First, he notes there are significant ambiguities and gaps in its denotation. The Constitution does not, for instance, tell us the original difference between a citizen and non-citizen, or why the United States needs a two-court judicial system. At this most basic level, *i.e.* definitional, Lutz says the Constitution is therefore incomplete. Aside from denotation, he points to significant ambiguities as to Founders' intentions and the need to reconcile reader-understandings across time ("Only the continued return of readers to the same text over a long period of time with approximately the same reading and same affirmation of its truth will confirm timelessness.")[85] Ignoring these factors, he continues, leads to the danger of "hidden assumptions" about its text. For Lutz, any relevant modern discussion of the Constitution must include other founding documents including the Declaration of Independence, the Articles of Confederation, and the early state constitutions.

This analysis model is particularly appealing to examining judicial opinions, for it permits a view of judicial opinions in terms of textual comprehensiveness. As already noted, the

key focus of judicial readability goes to the question of end-user-functionality. My earlier statistical analysis, *i.e.* a study of statistical denotation, is but one factor of completeness and functionality and is not fully predictive of end-user meaning. Following this model, we must look at the broader context of completeness as the standard for court legitimacy. In many ways, a focus on textual completeness (in addition to statistical readability) solves the dilemma of growing length and complexity. It shifts our focus as political scientists to whether the courts are developing structurally helpful rules of law.

First Factor: Denotation and Supporting Context

"Denotation," says Lutz, "is meaning at the simplest level." In terms of this study, denotation is the meaning of the rules of law. But in analyzing denotation, says Lutz, we encounter an immediate obstacle: "Even determining denotation is potentially complex. Most words denote several things." This is particularly true in legal writing, where words can have a number of meanings and applications over time. For Lutz, the solution to clarify denotation is simple: "But studying the context in which words are used…as well as the structure of the argument, we can go a long way toward solving the problem of denotation."[86] As shown above, statistical word analysis (even within the Style test) can fall short of full contextual analysis.

Of course, relevant context, even under a qualitative analysis, is not always statistically detectable. Consider the following rule of law from a 1926 opinion, both in isolation and within its supporting context. Here, the rule of law is not immediately clear, and the context (*i.e.* the Court's surrounding discussion of the rule) does not make the rule much clearer:

Table 41: Rule of Law from *Page v. Savage* (1926)	
Rule	“When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the person whom he has injured."
Rule + Context	“Coming now to assignment No. 5, complaining of the action of the court in refusing to sustain appellant's motion to strike out the testimony of respondent to the effect that he could and would have removed the ore if he had been permitted to do so, the objection is based upon the ground that the testimony was speculative and called for a conclusion of the witness. Respondent did not only testify that he could and would have removed the ore within the time limited in the lease, but he further testified how he would have removed it and what it would have cost him to take it out. Respondent was an experienced miner, familiar with the methods and means adopted by miners in extracting ore from territory in that immediate vicinity, and was, therefore, qualified to testify in that behalf. The weight of his evidence was for the jury, and was properly admitted. In such a case as this every reasonable intendment in support of the verdict will be indulged in. The trespass of appellant having been established and proof of the wrongful extraction of the ores and the approximate value thereof having been shown, together with the further fact that appellant removed the ore within the life of respondent's lease, clearly obviates the objection urged, and may be considered in connection with respondent's testimony upon that point. (Isabella Gold Min. Co. v. Glenn, 37 Colo. 165, 86 P. 349.) The ruling of the court on this point is supported by another principle: "When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the person whom he has injured." (Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co., 11 Colo. 223, 7 Am. St. 226, 17 P. 760.)

This passages’ surrounding context is too abstract to clarify the rule of law (*i.e.,* denotation). Contrast this with the following example from the 2008 rule of law:

Table 42: Rule of Law from *Stevens-Mcatee v. Potlatch Corp.* (2008)	
Rule	"The claimant must prove to a reasonable degree of medical probability that the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Jensen, 135 Idaho at 412, 18 P.3d at 217 (citing Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997)); Duncan v. Navajo Trucking, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000). "In this regard, 'probable' is defined as 'having more evidence for than against.'"
Rule + Context	"The claimant must prove to a reasonable degree of medical probability that the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Jensen, 135 Idaho at 412, 18 P.3d at 217 (citing Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997)); Duncan v. Navajo Trucking, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000). "In this regard, 'probable' is defined as 'having more evidence for than against.'" Our review of the record overwhelmingly indicates that McAtee was injured during his work shift on March 9, 2004. McAtee provided ample medical evidence that he experienced an acute onset of pain on March 9, 2004. Despite the Referee's finding that, "McAtee's initial reports to his doctors do not support a finding of a compensable accident. Some specific event or sudden onset of pain at a minimum is required," both Dr. Colburn and Dr. Greggain stated that the acute onset of pain which McAtee experienced on March 9, 2004, is consistent with a finding that his disc herniated at that time. A claimant need not show that he suffered an injury at a specific time and at a specific place. Hazen v. Gen. Store, 111 Idaho 972, 992, 729 P.2d 1035, 1055 (1986), rehearing denied (1986); Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983). The accident need only be reasonably located as to the time when and the place where it occurred. See Spivey, 137 Idaho at 33, 43 P.3d at 792 (holding that the claimant need only prove the day and place of the accident). Whether or not McAtee's disc herniation occurred at the moment he struck a drain ditch is not essential to a finding that his injury was the result of a work related accident on March 9, 2004. An employee incurs an injury in the course of employment, if the worker is doing the normal duties that he is employed to perform. Spivey, 137 Idaho at 34-35, 43 P.3d at 793-94. Both Dr. Colburn and Dr. Greggain

	stated that it was not necessary that McAtee had hit a drain ditch or experienced some other catastrophic event for his disc to have herniated at that time. Both Dr. Colburn and Greggain stated that any of his normal work activities on March 9, 2004, could have resulted in his herniated disc."

This rule is much clearer because of the nature of its context. We can see how the rule is applied by the Court's discussion of the rule in context of the relevant facts. These examples, while not predictive of the overall textual trends, are illustrative of how a rule's surrounding context helps to clarify meaning. This suggest that trend-over-time statistical analysis of opinion readability is difficult due to our inability to statistically measure the nature of a rule's surrounding context. Again, we are left with probabilities and approximations.

Linguistic and Structural Clarity

To help surmount this problem, Lutz explains: "Meaning is not limited to denotation but depends also on broader contexts. This broader sense of significance has two components: significance in terms of how the total linguistic structure fits together, and significance in terms of how the total argument or structure is evaluated."[87] Using these two additional criteria, *i.e.* significance of linguistic structure and argument structure, modern Idaho Supreme Court opinions seem to make tremendous advances from the older cases. Based on a textual review of the cases, Idaho Supreme Court decisions beginning in the mid-1970s started a noticeable structural trend of using case footnotes.[88] By the early 1980s, the decisions began to predictably use descriptive section headings.[89] Cases such as the 1990 case *In re Evangelical Lutheran Good Samaritan Society* made significant structural improvements by separating facts and procedures and ensuing legal discussions.[90] Also about this same time, the Idaho Supreme Court began to identify specific standards of review for deciding cases[91] as well as lists of justiciable appellate issues.[92] These linguistic and structural improvements to case opinions were important developments in readability and persist in almost all modern opinion writing. In this sense, current Idaho Supreme Court opinions offer significant linguistic structural advantages to modern readers. Given Lutz' additional criteria, there is a strong likelihood that the Court's improved textual

arrangement translates into clearer meaning and greater accessibility to the rules of law. See also Appendices "B" and "C" for illustrative structural comparison of the Court's opinions.

Other Structural Advantages

One of the significant structural advantages of modern Idaho Supreme Court opinions is the use of enhanced reference materials, *e.g.* core terms, case overviews, headnotes, and Shepards© indicators. In large, these materials are prepared by third-party services such as Lexis Nexis and Westlaw. Nevertheless, they are an integral part of the official reports accessible to the public, as they allow for improved reader navigation through the text.

The following table contains a case headnote, which is a legal rule summary, from the 2008 case *Nava v. Rivas-Del Toro*:

Table 43: Case Headnote
HN2 "Under the doctrine of respondeat superior, an employer is liable in tort for the tortious conduct of an employee committed within the scope of employment. Scope of employment refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."

Headnotes, as summaries of rules of law, are particularly useful to readability because they compartmentalize the rules of law for ease of reference. A modern reader, for instance, can review the relevant rules of law simply by scanning the headnotes. The reader can also get the relevant case context by scanning the case overview and/or finding the headnote markers within the body of the case. The above headnote was taken from the Idaho case *Nava v. Rivas-Del Toro*, a full copy of which is found "Appendix D." This case further illustrates the clear structural advantages of reference materials in modern Supreme Court opinions.

Opinion Length and Meaning

As already discussed, opinion length does not necessarily correlate with readability, especially under the Style test. Nor does it have a logical correlation with Lutz's meaning factors.

In the *Nava* case, for instance, the supplemental reference material (*i.e.* terms, summary, overview, headnotes) adds thirty-three percent (33%) more word-count length to the opinion. Yet as seen in "Appendix D," this material offers the reader a significant structural reading advantage over the opinion's text. In this sense, and as seen in Table 22 correlation results, opinion length does not necessarily impact readability scores. Consider the following case:

Table 44: State v. Adamcik, 2010	
2010	*State v. Adamcik* (26,029 words) Flesch-Kincaid Score = 13.2 Flesch Reading Ease Score = 47 Style Score = 77

This very lengthy opinion scores well on all three readability tests. In fact, it scored lower than the mean scores for each of the Flesch Tests (F.K. = 14.1, F.R.E. = 47.5), as well as the mean score for Style test (Style = 89). While there was an overall correlation between year and tests scores (positive with Flesch-Kincaid, negative with Flesch Reading Ease and with Style), the *State v. Adamcik* case textually illustrates that length is not always a factor in readability. Instead, Lutz's textual analysis model suggests that length can be an indicium of completeness, and hence improved readability. While too lengthy for inclusion in this study, the *State v. Adamcik* decision proves to be surprisingly readable in terms of Lutz's criteria, including denotation and structural clarity, and textual organization.

The Problem of Judicial Differentiation

One additional problem of relying entirely on statistical readability is that it doesn't account for judicial case differentiation. Differentiation is a tool used by the courts to distinguish (as opposed to overrule) a case which is not entirely relevant to the case at-bar. As the Idaho Supreme Court recently explained: "[The] Court has established that it does not overturn precedent when a case can be resolved without conflicting with said precedent."[93] In practice, case differentiation can create a system of legal sprawl with attorneys and justices citing equally

plausible authorities that lead to drastically different outcomes. Too much differentiation by the Courts can make the applicable rules of law unclear. Measuring statistical readability alone cannot account for the intricacies of case differentiation, nor can it tell us whether the Court is clarifying or obscuring the law over time. Each new distinguishing case can be very well written and score very well statistically. But this tells us nothing about the clarity of its underlying rules. Lutz's textual model allows us to assess the clarity of rules of law within the framework of cumulative case precedent over time, adding significantly to the assessment of whether meaning is complete in terms of its long-term development by the Court.

The Problem of Definitions Over Time

Another problem is that legal terms and definitions change over time. Lutz explains: "Because the choice of one abstract definition over the many available in a purely logical exercise does not preclude another definition from being used later by another court, the meaning of a word, phrase, or sentence can vary a good deal over time without the discipline imposed by consideration of the complete text."[94] This approach, *i.e.* considering the rules of law as part of an evolving case precedent, is more relevant to deciding if a particular rule of law or case type is clear over time. As with Lutz's holistic approach to Constitutional analysis, definitional clarity in judicial opinions involves multi-case analysis, which implies capturing meaning as part of a multi-case evolution over time.

This recognition is particularly relevant to assessing judicial readability. The clarity of the rules of law under statistical readability (including the Style test) is hard to discern in purely numeric results, telling us little of whether those rules of law are fully or partly defined for end-user. As Weldon suggests, legal and political definitions are rarely dispute-free, which means that ultimate (or even recent) meaning of definitions and terms must sometimes be studied textually over a series of cases.

Second Factor: Reader Appropriation

As Lutz points out, we find consistent meaning through the experience of many readers over time sharing similar views about a text.[95] Moreover, "…the purpose we bring to a text," he continues, "carries with it certain implicit questions, which the reader hopes to have answered by reading the text."[96] This makes any meaningful quantitative study of the issue difficult due to the highly subjective nature of the individual reader's appropriation. Average citizens, special interest groups, attorneys, and legislators will each likely have distinct reasons for engaging judicial opinions. "The reader's role in defining a complete text," continues Lutz, "is considerable….whatever meaning is extracted from the text is partly a function of the questions generated by the reader's purpose."[97] This role is difficult to quantify.

Given the difficulty of measuring reader appropriation, it is hard to make relevant conclusions about institutional legitimacy based on purely statistical models. In the end, textual completeness of a judicial opinion is more relevant to analyzing or predicting any one group of readers' likely appropriation. For instance, it is more likely that readers will understand and follow a particular rule of law when that rule is fully defined and contextually illustrated. It is equally likely that readers will fail to understand and follow a particular rule of law when the rule is poorly defined or has little supporting illustrative context.

Perhaps the most critical feature of reader appropriation is the lower court's appropriation of a case or a legal rule following an appeal. As a Supreme Court journalist once explained: "Critics of the Court's work are not primarily focused on the quality of the justices' writing, though it is often flabby and flat. Instead, they point to reasoning that fails to provide clear guidance to lower courts, sometimes seemingly driven by a desire for unanimity that can lead to fuzzy, unwieldy rulings."[98] Readability, in this sense, means producing clear rules of law that can be understood and followed by the lower trial court systems. This, in turn, suggests that readability as a measure of institutional legitimacy goes well beyond measuring the average

citizen's appropriation. Lutz's model invites us to consider meaning in terms of a judicial opinion's more targeted use, *i.e.* to trial court judges as trained legal professionals. In this sense, legal complexity and increase length are not inherent textual flaws.

Third Factor: Author's Intention

The final problem of statistical analysis is that it cannot accurately measure author intentions. "Anyone whose purpose is the determination of an author's meaning," says Lutz, "must carefully examine the use of words as well as the linguistic-social-political-historical context."[99] As with the prior two factors, any relevant discussion of the Court's intention (as a factor of readability) must account for the context surrounding the Court's rules of law. This point is illustrated in the following case study:

Case Study: Idaho Indian Gaming and the Courts

The 1988 Idaho Supreme Court case *Westerberg v. Andrus* illustrates the need to examine the linguistic-social-political-historical context of a court decision. In *Westerberg,* the Idaho Supreme Court struck down Title 63, Chapter 26 of the Idaho Code as unconstitutional. This code section was a recently passed citizen initiative creating the Idaho Lottery Commission. There was immediate concern by lawmakers and the media that the initiative violated the State Constitution's ban on gambling.[100] Within months of its passing, the Idaho Supreme Court accepted a legal challenge to the new citizen law and struck it down as unconstitutional under Article III, Section 20 of the State Constitution.[101] The Court spends considerable time in its opinion discussing the history of Idaho's Constitutional lottery ban and the history of legislative analysis. It also discusses the history of prior lottery attempts. This context, as Lutz suggests, is critical to understanding the *Westerberg* denotation. But in this case, it is not sufficient.

The relevant context goes well beyond the opinion. Following *Westerberg*, the Idaho State Legislature proposed (and eventually passed and ratified) a constitutional amendment to permit the lottery in Idaho.[102] This post-*Westerberg* legal event gives critical social-political-historic context to the *Westerberg* rules of law. It would be an error, in other words, for modern

readers to interpret *Westerberg's* holdings within the narrow confines of the opinion. Doing so would lead to false conclusions about the constitutionality of the lottery in Idaho. This is a clear case in which author's intent (as per the court opinion) is clarified by context.

Lutz's framework for addressing author's intent, then, is a valuable addition to a purely statistical approach. The Flesch tests (and even the Style test) give us little insight into the clarity or completeness of decisions like *Westerberg*. They tell us nothing of the validity of its rules of law. In this way, textual analysis for completeness offers a superior readability model. Understanding author's intention in broader linguistic-social-political-historical context can tell us whether a particular rule of law is complete and therefore still relevant.

Using Lutz's model in the above illustrations, we can see the Style test validated in new dimensions, *i.e.* in terms of improved context, structure, and completeness of modern Idaho Supreme Court decisions.

System Redundancy Analysis Model

One final, and insightful, analysis model for textual readability comes from Martin Landau's *Redundancy and System Reliability*.[103] In his article, Professor Landau explores the somewhat redundant features of American federalism as the key feature of a stable American constitutionalism. He describes these redundancies as giving critical system feedback and protecting against system failure by the duplication of key functions.[104] Both through its vertical redundancies (federal-state-local) and its horizontal stabilizing feedbacks (checks and balances), the American Constitution has proved incredibly resilient over time. Landau concludes: "When such intermediates (*i.e.* system redundancies) are the basis of complex organizational systems, they protect against disintegration."[105]

As with the textual-completeness model, a system redundancy analysis model helps us to view a complex (and often a prolix) common-law system as inherently legitimate. Scholars in this field tend to view case complexity and length as problematic, as explained in Chapter Two. But applying Landau's analysis model to judicial writing, we can better appreciate how

judicial complexity and legal redundancy serve as mechanisms for legal stability. We can assume, for instance, that common law doctrines (such as protections against defamation) will tend to get more complex over time. This is the natural result of successive courts applying established principles of law to new facts and circumstances (as a means of case differentiation). This, in turn, results in longer, more complex rules of law—sometimes with multi-factored tests and distinctions. But viewed from Landau's perspective, this is a key characteristic of system longevity and adaptability. The expansiveness of judicial opinion writing over time is what gives it the ability to absorb new and potentially volatile inputs in the form of novel cases and litigants, while keeping the judicial system viable and progressive. A one-dimensional common law system would be far too rigid. Broad flexibility is especially important for trial court judges. As already shown, judicial rules tend to grow by accretion, usually consisting of multiple layers or rule redundancy from prior precedents. Far from destroying or confusing the rule of law, this kind of complexity offers a flexible and dynamic legal system which can continually accommodate new growth without long-term structural fracture.

Consider the multi-part legal tests in the 2007 Idaho Supreme Court case *Blimka v. MyWeb Wholesaler, LLC.*[106] This case involves long-arm tort jurisdiction, which itself involves a two-prong legal test: (1) first, litigants must determine whether the Court has personal jurisdiction over out-of-state Defendants; and (2) second, litigants must determine if there are sufficient "minimum contacts" over the out-of-state Defendants to satisfy due-process demands of the 14th Amendment. This latter prong involves an additional series of multi-part tests which are designed to measure the sufficiency of the Defendant's contacts with the forum state. Those tests can further vary depending on the kinds of contacts in question (*e.g.* phone calls v. internet advertisements). Due to all these tests, the simple question of jurisdiction appears overly complex for the average citizen. Seen outwardly, this kind of legal writing poses a barrier to intelligibility and accessibility by the citizen. But seen from Landau's model, *i.e.* system redundancy, the complexity becomes a means for common law stability. It is simply not possible to predict the full range of future jurisdictional disputes, and so it would be impractical (as well

as unwise) to reduce jurisdictional rules to a minimum. It would lead to rules so restrictive and inflexible that litigants would soon question the courts' institutional ability to resolve such disputes. It would also plunge readers into hopelessly vague conflicts over denotation.

To illustrate, suppose that the Idaho Supreme Court adopted the following one-line test for long-arm jurisdiction which could not be changed or grown over time: "Any out-of-state Defendant who damages an Idaho citizens can be sued in Idaho Courts." On its face, this rule tells us nothing of the kind of injuries or damages which are actionable. Even trivial harms to Idaho citizens could subject foreign companies and individuals to Idaho jurisdiction, creating strong disincentives to interact across Idaho state lines. If adopted elsewhere, similar rules could subject Idaho citizens to foreign lawsuits for which their involvement was trivial. In the end, a simple jurisdictional rule would prove far too inflexible in the face of increasing political, economic, and social change. It would not permit, as Landau suggest, the internalization of new inputs without causing a system fracture. In this sense, Landau's model is a compelling model to understanding the structural complexity of judicial opinions as a feature of a stable and legitimate system. Judicial simplicity is an admirable goal, but not at the expense of stability. The common law is an appealing a feature of our democracy because it is so flexible. As opposed to statutory law, judicial law consists of relatively spontaneous growth. Rules developed in one case will continue to evolve. This kind of growth implies (and may sometimes even require) a corresponding growth in complexity of the whole body of law. Under Landau's model, this fact need not suggest a loss in the courts' institutional legitimacy. Indeed, it would be strange to find that court decisions and the cannon of judicial rules were getting shorter over time. As with textual completeness, the system redundancy model suggests, with Hamilton, that "…the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them."

Landau's model, coupled with Lutz's textual completeness model, helps us to see and appreciate statistical trends toward longer cases in a different light. Such trends need not imply

a lack of clarity or legitimacy. Indeed, application of the textual model's criteria helps illustrate a trend toward more complete and stable system due to better linguistic and structural clarity.

Summary of Evaluations

This study found that Idaho Supreme Court opinions are getting statistically longer over time. It also found, using the Flesch-Kincaid and the Flesch Reading Ease tests, that the opinions were getting less readable over time. But as shown in this chapter, the Flesch readability tests do not offer a relevant measure of readability criteria. The Style test, using more relevant factors, found that Court opinions are getting clearer and hence more readable over time. Using Lutz's and Landau's textual analysis models, it was discussed and illustrated how length and complexity are contributing factors to readability in terms of textual completeness and stability. This latter analysis, while not methodologically comprehensive, helped to confirm the relevancy of the Style test findings of increased readability over time.

Further, this study highlights the appreciable difference in statistical readability tests—not only in terms of clarity but also in terms of completeness and relevance. If based on sound factors, this study suggests that statistical readability can play an important role in judicial opinion analysis. The Style test, for instance, approaches readability using qualitatively relevant measures. This methodical approach serves as a model for future research on the topic of judicial readability, while attempting to achieve Mead's standard of academic relevance.

Chapter 5: Implications and Suggestions for Further Study

This study has several important implications for understanding judicial readability. First, it suggests that factors used to measure readability of judicial opinions should be carefully considered for relevancy to the underlying textual meaning. Second, it suggests that quantitative analysis alone may not fully capture opinion clarity and completeness, and thus it is not fully suggestive of meaningful court reform. Third, it provides a template (*albeit*, an imperfect one) to better ensure that political science research is both rigorous and relevant.

As to statistical test factors, this study shows that the Style test is a much more relevant measure of readability than are the Flesch readability tests and confirms the literature on the shortfalls of traditional readability. This is not to say that the Style test is the paramount readability test. Rather, it is suggestive that scholars should be mindful of the choice of tests and test factors. Since the 1920s, more than 50 distinct readability formulas have been developed and used to measure textual difficulty.[107] It is certainly plausible that future scholarship in this area will find and employ more relevant tests than the Style test. Such tests would necessarily focus on a quantitative measurement of meaning and context.

As to textual completeness, this study suggests the need for a qualitative research component to research on judicial readability. As with Lutz's model, it places an emphasis on completeness and shifts our focus to content relevancy. In the end, it makes little sense to recommend and pursue institutional reforms to help citizens better understand the law without first analyzing the content of the law (as opposed to only its statistical structure). Complete and functional rules of law may be short or long, simple or complex. They key inquiry is whether they are sufficient to inform while remaining flexible enough to accommodate new growth. As noted by Hamilton in Chapter One, scholars must expect that the common law will continue to get longer and more detailed with time to accommodate such growth.

Finally, as to methodology, this study suggests a more expansive approach to judicial readability, promising results which combine statistical rigor and textual relevance. As Mead aptly summarizes: "The scholastic emphasis on rigor supposedly serves the interests of science.

But taken to extremes, specialized research becomes self-referential—preoccupied with the researchers themselves and their issues. Non-scholastic research is less ambitious methodologically but more humble. The focus is on real world problems rather than the researches, and ultimately this makes for better science."[108] Employing this kind of broad methodology invites a multi-disciplinary approach to the topic. It invites future scholars to continue to assess judicial readability using a wider variety of disciplines and methods.

Expanding the Statistical Research Model

There are several ways to expand the statistical readability model, beyond choice of tests. First, it is possible to extend the model used in this study to other individual states for additional intra-jurisdiction analysis. This approach has the benefit of analyzing other legal jurisdictions to see how results compare under different readability tests. This kind of study would be vastly improved if it were to focus on the trend within particular topics or rules of law in the jurisdictions. Such topic-based studies would go well beyond traditional law review articles, which focus on legal development over time, and with the benefits of statistical and textual analysis from a social-science perspective.

A second statistical approach to this topic could involve a combined study of multiple jurisdictions with respect to a single issue or topic. For instance, such a study could sample judicial opinions from Idaho, California, Delaware, Alaska, and perhaps even some of the federal jurisdictions such as the courts of appeal or the federal tax courts. However, this kind of study becomes difficult to apply in a textual analysis model, such as Lutz's and Landau's analysis models. The study of multiple jurisdictions is likely to greatly increase the possible linguistic-social-political-historical context of the opinions. As seen in Chapter Four, the history of the Idaho state lottery has a unique and highly relevant context in which to interpret the judicial rules of law. Studying lottery development between two disparate jurisdictions, such as Idaho and Florida, would likely complicate the issue of statistical readability. As illustrated in Chapter Four, the 1988 case *Westerberg v. Andrus* gives us the relatively clear rule: "The weight

of authority demonstrates that the constitutional prohibition against lotteries in Article III, § 20, of the Idaho Constitution, extends to all legislative power, whether exercised by the legislature or by the electorate. Certainly, this Court has previously recognized that legislative acts and legislation by initiative are on equal footing and are subject to the same limitations." (Style Score 70). Outwardly, this rule suggests that the Idaho lottery is unconstitutional. But the rule is outdated, and hence, not complete. Statistical comparisons of certain rules across jurisdictional lines would mean little without a corresponding comparative analysis as to historical and political context of those rules.

A third statistical approach to this topic could include a comparative study between jurisdictions, measured separately. This is perhaps the most promising approach for future scholarship as to the broader trends of judicial readability over time. For instance, such a test might examine the trends in two jurisdictions which do not share similar demographics, political preferences, etc., *e.g.* Idaho and Washington. The study could use similar methodologies as in this study to examine the trends in these two states to see how their writing develops over time. As with a single jurisdictional study, the additional use of textual analysis would be appropriate.

Given the importance of specific reader appropriation, one interesting option for future studies could include a statistical survey of clarity from actual readers. This, of course, would have the benefit of directly addressing the factors of meaning and context. However, this kind of approach could face substantial practical difficulties. First, scholars are not likely to find a willing, statistically-significant sample of readers who will commit to this kind of prolonged analysis. Depending on the choice of jurisdictions, such a survey could entail a tremendous number of judicial opinions, thus making it time- and cost-prohibitive. Even among lawyers, judges, and legal scholars (the most likely group of readers), such a survey would probably need to focus on topic-specific rules to have maximum relevance. As Lutz reminds us, readers often go to a particular text with an agenda. Even among such groups, meaningful and prolonged attention to the cases might not be possible. But the concept itself may be helpful in future studies should the researcher develop a methodology sufficiently targeted to the problem.

A final possibility is to continue to improve the approach to statistical word analysis. Software such as WordStat® from Provalis Research allows for robust text analysis including word frequency analysis, relationships between words, advance qualitative coding, and key-word comparisons between texts. This kind of software would work best in a rule-specific study. It could, for instance, give tremendous insight into the textual changes of legal text over time by comparing the historical use of certain key terms or phrases. This approach targets Lutz's concept of denotation and allows for greater examination of particular definitional choice, complexity, and frequency within opinions. This, in turn, could greatly enhance our understanding of completeness and functionality of rules over time.

"100 Years of Dillon's Rule in Idaho"

The value of a topical approach to judicial readability deserves additional consideration and illustration. In his article "Over 100 Years Without True 'Home Rule' in Idaho: Time for a Change", Professor James MacDonald surveys the history and development of the Idaho Supreme Court's treatment of statutory home rule. As key parts of his article, MacDonald surveys the relevant Supreme Court interpretive opinions, the statutory evolution, the definitional uncertainty, and even uses comparative analysis from other jurisdictions.[109] He states that while the Idaho State Legislature intended to implement "home rule" jurisdiction for municipalities in their 1976 revisions of Section § 50-301, the Courts have continually thwarted its development.[110] He goes on to discuss the rules application to a number of democratically relevant local topics, such as taxes and gun rights, which the Idaho Supreme Court's view of the statute has prevented. MacDonald calls for both constitutional and statutory reforms to our persistent "Dillonism."[111] He concludes: "It is now way past time for the Idaho Supreme Court to reject the base metal of arbitrary judicial intervention in local decision making and adopt the more enlightened judicial role epitomized by our neighboring [states]."[112]

MacDonald's article gives a compelling template for future political science studies on judicial readability as a measure of court legitimacy. But where its author focuses largely on

normative arguments about the value of home rule jurisdiction, political scientists could evaluate the development of such rules in terms of statistical word clarity, statutory interpretation, textual completeness and sufficiency, as well as analysis of the overall political salience that such changes would have for local jurisdictions, topically or otherwise. Such a study could include a study of the institutional arrangements and characteristics of the judiciary, as well as political field analysis by seeking actual engagement from Idaho municipalities.[113] In the end, a quantitative and qualitative readability study of this kind would be highly informative regarding the legitimacy of the Idaho Supreme Court's approach to the topic.

Problems of Predictability

Of course, even the most carefully calibrated readability models are bound to fall short in measuring ultimate readability. This is because the common-law process can be highly volatile. For example, in the recent Idaho Supreme Court case *Hoffer v. Shappard,* the Court overturned its long-standing interpretation of Idaho Code § 12-121, which provided for attorney fee recovery in cases involving unfounded or frivolous arguments. Seemingly out of nowhere, the Court announced that it had misunderstood the State Legislature's intent for almost thirty years and would adopt the original legislative standard.[114] This drastic change to the rule of law left the Idaho State Bar confused as to its application,[115] prompting the State Legislature to amend the law yet again to reflect the pre-*Shappard* standards that the Court had rejected.[116]

The *Shappard* case illustrates the ongoing problem of case predictability. The rule of law prior to this case was well-developed, complete, and relatively flexible and functional.[117] The Court's sudden adoption of a new rule upset the rule's precedential value and left citizens without any meaningful guidance. Scholars in this field must accept that courts will not always be predictable in their treatment and perpetuation of the rules of law, no matter how readable the prior or current texts. While this may not specifically affect the issue of readability, it certainly impacts questions of legitimacy and the ability of the Supreme Court to provide predictable guidance to the lower courts and to the citizenry.

Readability as a Basis for Idaho Judicial Reforms

Finally, this study suggests that the best means to achieving meaningful court reform is to embrace a more comprehensive approach to judicial readability. As seen in Chapter Four, the Style test results demonstrate that judicial writing (at least in Idaho) is actually improving with time. One conclusion we could draw is that Idaho court reform, in terms of improving opinion readability, is simply not needed. Of course, the Style test is not itself determinative on the final issues. Continued research on improved statistical and textual models is needed to see how the Court's opinions fare in various statistical and textual models.

At the very least, the Style test results suggest that the legal "Plain English" movement has had a positive impact on Idaho Supreme Court opinion writing. Opinions today seem more plainly written than in the past. One way to continue to foster this trend toward plainer and more accessible writing is to bring awareness to these issues and encourage ongoing legal education (required for lawyers and judges in Idaho) that is targeted at teaching principles of good writing. And judges should be made aware, if they are not already, of the need to overcome negative perceptions about legal writing, both in public and within the profession itself. As Professor Steven Stark of the Harvard Law School writes: "Legal writing has become synonymous with poor writing…like the late Justice Potter Stewart on obscenity, we know it when we see it, and we see it all the time."[118] There is still much room for improvement in this area.

In terms of public accessibility, the Idaho Supreme Court currently publishes its opinions online.[119] Readers can also access these materials, including annotated versions of court opinions and other powerful research tools, at the State law library in Boise and at the University of Idaho law library, at no cost. But without further research as to existing use and anticipated needs, it is not clear that further public expenditure to educate citizens on court opinions would make a noticeable difference in terms of meaningful access. Free access to published court opinions, as with free published state legislation, are simply not a personally cost-effective medium for general citizen education. It is not entirely rational for the general public to consistently following court opinions with the kind of regularity needed for true familiarity. As one

scholar notes, "…rational ignorance and other collective action problems make it difficult for even well-educated citizens to effectively monitor the performance of government."[120] This principle mitigates against any large-scale reforms aimed at increased dissemination of judicial opinions to the public. While this study was not able to identify research to this effect, it is presumed that the news media, coupled with the relative accessibility to lawyers (not considering, of course, affordability concerns) fills the periodic need for legal expertise for most citizens. Some states, such as Maryland, have made extensive public relations efforts to keep the media informed of key issues and decisions.[121] It is not clear, without more research on such efforts, whether such reforms would provide appreciable benefits to Idaho citizens beyond the current media coverage.

Chapter 6: Conclusions

This paper has statistically and textually analyzed the readability of Idaho Supreme Court opinions. Using the Style test and textual analysis models, the results suggest that the Idaho Supreme Court's opinions appear to be getting significantly more readable over time, at least in terms of style, structure, and completeness. This conclusion goes against the literature on judicial readability, but it is consistent with the broader literature about the inherent problems of statistical readability analysis. This study is therefore suggestive of a broader methodological approach to the topic. If political scientists wish to continue to offer meaningful insights into this topic, as well as participate in discussions over needed court reforms, they must ensure that research on readability is both rigorous and highly relevant. As seen in Chapter Four, this is not an easy or intuitive balance to strike. If this study has fallen short in either respect, it is hoped that future research will be able to asses and to cure its deficiencies.

As to results, this study began with the prediction that Idaho Supreme Court cases were stylistically more readable over time. This prediction has been substantiated. This study has also confirmed that cases are getting longer over time, but as noted in Chapter One, this trend toward longer and more complex opinions does not necessarily mean a trend toward less clarity. Many of the results herein show the opposite trend. Our focus as scholars should be on the quality, and not simply the quantity, of the courts' work product. This study has demonstrated how a simple change in readability test factors can lead to dramatically different test outcomes. It is reasonable to conclude, based on Lutz's and Landau's textual models, that longer and more complex judicial opinions can be healthy for stable democracy. Judicial law will continue to be the outgrowth of our experiences, both of the public and of the justices themselves. The rules of law should be as complete and as flexible as possible to accommodate such change.

Toward a Clearer Democracy

"Good writing," says Ambrose Bierce, "essentially is clear thinking made visible."[122] But putting clear thought to paper is not an easy achievement, even for most judges. As Richard

Posner once explained: “It is possible to be a pragmatic judge yet write one's opinions in the conventional pure style. But it is difficult. If you are the kind of judge who thinks that the considerations that bear on a judicial decision range far beyond the canonical materials of formalist legal thought—if you think that values (not just ‘feelings’), history, and policy are legitimate considerations—you will find the ‘pure’ style confining because it is not designed for the expression of those considerations.”[123] We cannot expect textual homogeneity, or even a trend toward statistical simplicity, in modern judicial writing, at least not when the process is so varied and unpredictable. In this sense, readability must look beyond mere statistical word and sentence count. It must consider content and context of the writing, as well as structural completeness and stabilizing features. This does not mean a return to dense writing or formulaic legal writing. Complete judicial writing can be clear writing. The Idaho Supreme Court, as shown, is on its way to meeting this goal.

Beyond Readability

Readability of judicial opinions is a natural starting point for assessing the American court system’s institutional legitimacy. But it need not be the end. As the Idaho Supreme Court reminds us, “An important limitation upon this [Court] is that…judgment can only be rendered in a case where an actual or justiciable controversy exists. This concept precludes courts from deciding cases which are purely hypothetical or advisory.”[124] Unlike positive (or statutory) law, the common law is a relatively confined process and should not be the basis for unrealistic political fears. Judicial law is more reactive than proactive. Perhaps the starting point of future studies should be on inherent legitimacy based on the courts’ ability to fill a unique role in a complex (and, as Landau says, functionally stable) constitutional system. It is, as F.A. Hayek notes, one of the key features of our system’s legitimacy.[125]

In the end, the rule of law is not only about predictability. It is also about change. It is concerned with the expectation that courts can (and will continue to) adapt the rules of law to new circumstances. This kind of political dynamism is structural, not merely semantical. In our

scholarly pursuits to test the democratic legitimacy of the courts, we must remember that much of that legitimacy lies also in the fact that the courts think and act differently than do traditional democratic assemblies. This by design. As Americans, we owe much of our political and social progress to the common law and processes of the courts. We should ensure that any approach to legitimacy, through readability or otherwise, does not tend toward negating what makes the court system truly invaluable to our American politics.

Appendix A: Case Data and Test Results

Citation (with year, number, citation)	Year	Case No.	F.K	F.R.E.	#Words	Style	Type	# Authors
1891_43_Goodnight v. Moody, 3 Idaho 7.docx	1891	43	19+	19	2188	147	0	1
1892_17_Nez Perce County v. Latah County, 3 Idaho 413.docx	1892	17	13.3	55	1921	97	0	0
1892_38_Sparks v. Lower Payette Ditch Co., 3 Idaho 306.docx	1892	38	14.1	48	2219	98	0	0
1893_13_McCauley v. Sears, 3 Idaho 676.docx	1893	13	15	50	2239	142	0	0
1894_36_Board of Comm'rs v. McFall, 4 Idaho 71.docx	1894	36	16.5	44	1449	112	0	0
1895_19_Aulbach v. Dahler, 4 Idaho 522.docx	1895	19	12.9	59	1723	81	0	0
1895_43_Morgan v. Board of Comm'rs, 4 Idaho 418.docx	1895	43	16.3	47	1331	142	0	0
1895_50_State v. Griffin, 4 Idaho 462.docx	1895	50	11.6	54	454	114	1	0
1897_15_Brown v. Collister, 5 Idaho 589.docx	1897	15	14.4	51	1526	95	0	0
1897_19_Pyke v. Steunenberg, 5 Idaho 614.docx	1897	19	13.1	54	5265	100	0	0
1897_35_In re Bank of Genesee, 5 Idaho 482.docx	1897	35	13.9	51	1907	124	0	0
1897_59_Gwin v. Gwin, 5 Idaho 271.docx	1897	59	11.2	62	8195	88	0	0
1898_13_King v. Oregon S. L. R.R., 6 Idaho 306.docx	1898	13	12.8	56	2230	111	0	0
1898_21_Naylor v. Vermont Loan & Trust Co., 6 Idaho 251.docx	1898	21	15.4	47	3114	113	0	0
1898_28_BURBANK v. KIRBY, 6 Idaho 210.docx	1898	28	13.8	51	2011	119	0	0
1898_36_Boise City v. Flanagan, 6 Idaho 149.docx	1898	36	14	53	1818	119	0	0
1899_17_Warren v. Stoddart, 6 Idaho 692.docx	1899	17	13.1	55	4764	106	0	0
1899_29_Spaulding v. Coeur D'Alene Ry. & Navigation Co., 6 Idaho 638.docx	1899	29	16.1	42	3973	140	0	0
1899_38_Branstetter v. Mann, 6 Idaho 580.docx	1899	38	10.1	67	1713	98	0	0
1899_75_WILSON v. BOISE CITY, 6 Idaho 391.docx	1899	75	15.2	47	5342	116	0	0
1900_40_Miller v. Smith, 7 Idaho 204.docx	1900	40	16.2	42	3280	107	0	0

1900_46_State v. Kruger, 7 Idaho 178.docx	1900	46	14.3	48	2082	123	1	0
1901_29_Davis v. Devanney, 7 Idaho 742.docx	1901	29	13.3	56	1199	135	0	0
1901_51_First Nat'l Bank v. Sampson, 7 Idaho 564.docx	1901	51	14.4	53	2538	127	0	0
1901_65_Reynolds v. Corbus, 7 Idaho 481.docx	1901	65	12	60	2042	101	0	0
1902_11_Swinehart v. Pocatello Meat & Produce Co., 8 Idaho 710.docx	1902	11	11.2	58	776	128	0	0
1902_34_Walker v. McGinness, 8 Idaho 540.docx	1902	34	17.3	46	3424	114	0	0
1904_102_Phipps v. Grover, 9 Idaho 415.docx	1904	102	10.6	60	864	84	0	0
1905_33_GOODING v. PROFFITT, 11 Idaho 380.docx	1905	33	16.8	42	4019	130	0	0
1905_60_Watson v. Molden, 10 Idaho 570.docx	1905	60	16.2	45	5227	121	0	0
1905_67_Howes v. Barmon, 11 Idaho 64.docx	1905	67	11.4	62	3353	111	0	0
1905_81_Ex parte Snyder, 10 Idaho 682.docx	1905	81	14.4	50	6300	120	0	0
1905_88_Wilson v. Vogeler, 10 Idaho 599.docx	1905	88	13.6	54	3150	102	0	0
1905_91_Walker v. Bacon, 11 Idaho 127.docx	1905	91	12.1	64	1033	75	0	0
1905_95_In re Jay, 10 Idaho 540.docx	1905	95	14.1	52	597	145	1	0
1906_30_McElroy v. Whitney, 12 Idaho 512.docx	1906	30	15.5	47	5004	125	0	0
1907_60_Safford v. Flemming, 13 Idaho 271.docx	1907	60	13.7	50	1322	89	0	0
1907_65_Harris v. Faris-Kesl Constr. Co., 13 Idaho 211.docx	1907	65	16.2	47	5303	138	0	0
1908_18_Richardson v. Ruddy, 15 Idaho 488.docx	1908	18	14.3	48	2789	118	0	0
1908_88_Weiser Nat'l Bank v. Jeffreys, 14 Idaho 659.docx	1908	88	14.4	52	3758	111	0	0
1908_107_Farmers' Coop. Ditch Co. v. Riverside Irrigation Dist., 14 Idaho 464.docx	1908	107	9.7	55	243	37	0	0
1909_68_Smith v. Clyne, 16 Idaho 466.docx	1909	68	12.1	58	1777	120	0	0
1910_57_Morbeck v. Bradford-Kennedy Co., 18 Idaho 458.docx	1910	57	12.6	56	1816	123	0	0
1911_6_Hewitt v. Walters, 21 Idaho 1.docx	1911	6	13	56	3637	127	0	0
1911_12_McGary v. Steele, 20 Idaho 753.docx	1911	12	19+	34	2609	149	0	0

1911_42_Blackfoot State Bank v. Crisler, 20 Idaho 379.docx	1911	42	14.4	50	2756	146	0	1
1911_70_Willson v. Boise City, 20 Idaho 133.docx	1911	70	13.3	54	3844	108	0	0
1911_108_Menasha Woodenware Co. v. Spokane I. R.R., 19 Idaho 586.docx	1911	108	12.1	58	2813	96	0	0
1911_115_State v. Henderson, 19 Idaho 524.docx	1911	115	11.8	61	2393	89	1	0
1912_14_Smith v. Potlatch Lumber Co., 22 Idaho 782.docx	1912	14	15.7	52	4383	121	0	0
1913_95_Miller v. Blunck, 24 Idaho 234.docx	1913	95	11.9	61	2634	104	0	0
1914_54_Zilka v. Graham, 26 Idaho 163.docx	1914	54	13.1	60	3277	89	0	0
1915_3_American Mining Co. v. Trask, 28 Idaho 642.docx	1915	3	15.4	50	2740	116	0	0
1915_16_State v. Mox Mox, 28 Idaho 176.docx	1915	16	13.8	54	2751	102	1	0
1915_41_State v. Twin Falls Canal Co., 27 Idaho 728.docx	1915	41	16.9	44	1223	124	0	0
1916_47_Rathbun v. New York Life Ins. Co., 30 Idaho 34.docx	1916	47	11.1	61	2163	109	0	0
1916_90_Marsh Mining Co. v. Inland Empire Mining & Milling Co., 30 Idaho 1.docx	1916	90	12.6	59	4631	109	0	1
1917_85_Nampa Highway Dist. v. Canyon County, 30 Idaho 446.docx	1917	85	15.5	44	1513	138	0	0
1917_110_Basinger v. Taylor, 30 Idaho 289.docx	1917	110	15.8	46	7442	128	0	1
1918_96_State v. Morton, 31 Idaho 329.docx	1918	96	17.4	35	3310	150	1	1
1918_106_Cole v. Plowhead, 31 Idaho 288.docx	1918	106	14.4	48	908	170	0	0
1919_6_Kettenbach v. Walker, 32 Idaho 544.docx	1919	6	13.9	56	2181	118	0	0
1919_55_Walker v. Edwards, 32 Idaho 257.docx	1919	55	14.4	52	1435	119	0	1
1920_8_Rivers v. Rivers, 33 Idaho 349.docx	1920	8	8.5	59	228	61	0	0
1920_21_Ramsey v. District Court, 33 Idaho 296.docx	1920	21	12.9	59	1267	82	0	0
1920_25_PURKEY v. MABY, 33 Idaho 281.docx	1920	25	10.3	59	853	106	0	0
1920_34_State v. Dwyer, 33 Idaho 224.docx	1920	34	9.8	70	544	62	1	0
1920_54_Delap v. Lawson, 33 Idaho 95.docx	1920	54	9.1	65	227	39	0	0
1921_100_Williams v. Sherman, 34 Idaho 63.docx	1921	100	15.3	51	1309	110	0	0

1921_144_Hatcher v. Newman, 33 Idaho 653.docx	1921	144	7.8	66	184	16	0	0
1922_7_State v. Moore, 36 Idaho 565.docx	1922	7	15	46	8639	123	1	0
1922_12_Moore v. Ashton, 36 Idaho 485.docx	1922	12	13.1	52	2983	88	0	0
1922_46_In re AHRENS, 45 Idaho 783.docx	1922	46	19+	26	402	119	0	0
1922_50_State v. Brown, 36 Idaho 272.docx	1922	50	12.6	60	1608	83	1	0
1922_104_Goldensmith v. Worstell, 35 Idaho 679.docx	1922	104	12.5	56	1220	82	0	0
1922_114_Ryan v. Old Veteran Mining Co., 35 Idaho 637.docx	1922	114	12.4	58	730	82	0	0
1922_127_Beale v. Jones, 35 Idaho 548.docx	1922	127	8.7	65	243	61	0	0
1922_194_Mason v. Ruby, 35 Idaho 157.docx	1922	194	12.6	58	1257	125	0	0
1923_21_McElroy v. Helmer, 38 Idaho 327.docx	1923	21	13.5	53	2003	122	0	0
1923_84_Johnston v. A. C. White Lumber Co., 37 Idaho 617.docx	1923	84	12.9	53	2668	93	0	0
1923_122_Hemminger v. Parks, 37 Idaho 464.docx	1923	122	12.6	58	1968	115	0	0
1923_171_Boise Valley Traction Co. v. Boise City, 37 Idaho 20.docx	1923	171	14.4	55	2360	108	0	0
1923_179_State v. Twin Falls Land & Water Co., 37 Idaho 73.docx	1923	179	19+	31	5153	155	0	0
1924_82_Hoy v. Anderson, 39 Idaho 430.docx	1924	82	15.3	50	3304	126	0	0
1924_90_Carey Lake Reservoir Co. v. Strunk, 39 Idaho 332.docx	1924	90	13	53	2478	104	0	0
1924_118_Ricker v. Twin Falls N. Side Land & Water Co., 39 Idaho 93.docx	1924	118	14.7	48	2018	137	0	0
1924_161_Williams v. Skelton, 38 Idaho 644.docx	1924	161	8.2	72	514	42	0	0
1925_111_Leney v. Twin Falls County, 40 Idaho 600.docx	1925	111	15.9	47	4914	123	0	0
1925_126_Wall v. Woods, 40 Idaho 522.docx	1925	126	11.1	67	561	71	0	0
1926_87_Page v. Savage, 42 Idaho 458.docx	1926	87	15.6	51	6819	123	0	0
1926_122_Smallwood v. Jeter, 42 Idaho 169.docx	1926	122	14.2	52	6922	101	0	0
1927_22_Polson v. O'Harrow, 45 Idaho 290.docx	1927	22	8.5	62	338	76	0	0
1927_43_State v. Marks, 45 Idaho 92.docx	1927	43	10.7	64	2157	73	1	1

1927_111_First Nat'l Bank v. Denbrae Sheep Co., 44 Idaho 447.docx	1927	111	15.7	45	4648	122	0	1
1927_119_Newell v. Lee, 44 Idaho 402.docx	1927	119	6.5	70	150	40	0	0
1927_190_Booth v. Groves, 43 Idaho 703.docx	1927	190	15.1	48	3283	132	0	0
1928_10_Pearson v. Frank, 47 Idaho 115.docx	1928	10	10.5	60	409	110	0	0
1928_34_Kennison v. McMillan Sheep Co., 46 Idaho 754.docx	1928	34	11.5	60	1382	94	0	1
1928_124_Hoebel v. Ray-mond, 46 Idaho 55.docx	1928	124	12.6	54	2073	111	0	0
1928_129_Johnson v. Dunn, 46 Idaho 25.docx	1928	129	13.6	54	3157	86	0	0
1928_133_State v. Smith, 46 Idaho 8.docx	1928	133	14.3	47	1732	107	1	0
1928_136_People's Sav. & Trust Co. v. Rayl, 45 Idaho 776.docx	1928	136	12.8	55	1548	129	0	0
1928_154_Schleiff v. McDonald, 45 Idaho 620.docx	1928	154	13.5	55	2477	101	0	0
1929_15_Walker v. Shell, 48 Idaho 481.docx	1929	15	11.5	60	1035	82	0	1
1929_28_Arkoosh v. Big Wood Canal Co., 48 Idaho 383.docx	1929	28	13.9	51	4966	100	0	0
1929_31_Harbour v. Turner, 48 Idaho 364.docx	1929	31	11.8	55	1170	93	0	0
1929_71_McMillan v. United States Fire Ins. Co., 48 Idaho 163.docx	1929	71	13.8	49	2124	89	0	0
1929_105_Kesler v. Ellis, 47 Idaho 746.docx	1929	105	10	59	271	84	0	0
1929_193_Herring v. Davis, 47 Idaho 211.docx	1929	193	11.8	61	1138	85	0	0
1930_36_Glover v. Spraker, 50 Idaho 16.docx	1930	36	12.3	60	2573	117	0	0
1930_106_Logan v. Carter, 49 Idaho 393.docx	1930	106	17.2	43	3632	124	0	0
1930_166_Snell v. Prescott, 48 Idaho 783.docx	1930	166	12.5	59	1877	89	0	0
1930_187_Williams v. Baldridge, 48 Idaho 618.docx	1930	187	12.5	51	3754	86	0	0
1931_108_Chill v. Jarvis, 50 Idaho 531.docx	1931	108	13.8	56	2098	96	0	0
1932_28_Intermountain Title Guar. Co. v. Egbert, 52 Idaho 402.docx	1932	28	14.4	54	3101	91	0	0
1933_47_State v. Burns, 53 Idaho 418.docx	1933	47	17.7	43	3083	138	1	0

1934_20_Williams v. Intermountain Fireworks Co., 55 Idaho 28.docx	1934	20	11.9	52	905	82	0	0
1935_51_Collard v. Universal Auto. Ins. Co., 55 Idaho 560.docx	1935	51	13.9	49	3626	125	0	0
1936_43_Trolinger v. Cluff, 56 Idaho 570.docx	1936	43	13.6	54	6694	125	0	0
1937_14_Boise Grocery Co. v. Stevenson, 58 Idaho 344.docx	1937	14	15	49	1805	111	0	0
1937_53_Bennett v. Deaton, 57 Idaho 752.docx	1937	53	11.2	61	5243	84	0	0
1937_60_Aetna Casualty & Sur. Co. v. Wedgwood, 57 Idaho 682.docx	1937	60	16.3	45	2937	111	0	0
1937_90_State v. Van Vlack, 57 Idaho 316.docx	1937	90	14.3	50	20544	108	1	1
1938_76_Morgan v. Udy, 58 Idaho 670.docx	1938	76	11.8	63	7059	84	0	0
1939_19_ALBRETHSEN v. STATE, 60 Idaho 715.docx	1939	19	15.8	47	2387	99	0	0
1940_51_Byington v. Horton, 61 Idaho 389.docx	1940	51	11.6	61	4865	81	0	1
1941_20_Arens v. Scheele, 63 Idaho 189.docx	1941	20	14.3	52	3138	100	0	0
1941_52_Roark v. Koelsch, 62 Idaho 626.docx	1941	52	13.7	53	1376	111	0	1
1941_65_Roosma v. Moots, 62 Idaho 450.docx	1941	65	15.6	50	3589	121	0	0
1941_87_Bonded Adjustment Co. v. Brown, 62 Idaho 244.docx	1941	87	12.8	58	1752	117	0	0
1942_28_Benson v. Jarvis, 64 Idaho 107.docx	1942	28	11.5	58	4754	97	0	0
1943_29_Horn v. Cornwall, 65 Idaho 115.docx	1943	29	16.2	42	2319	138	0	0
1943_41_Bishop v. Morrison-Knudsen Co., 64 Idaho 806.docx	1943	41	12.3	54	4247	96	0	1
1943_57_State v. Haynes, 64 Idaho 627.docx	1943	57	12.5	51	739	94	1	0
1943_73_Pacific Fin. Corp. v. La Monte, 64 Idaho 438.docx	1943	73	13.2	56	1517	104	0	0
1944_16_Gem State Mut. Life Ass'n v. Robison, 65 Idaho 813.docx	1944	16	10.7	51	208	52	0	1
1944_45_J. R. Watkins Co. v. Clark, 65 Idaho 504.docx	1944	45	14.4	49	4072	110	0	1
1944_48_Hansen v. Superior Prods. Co., 65 Idaho 457.docx	1944	48	11.7	62	1358	63	0	0
1945_2_Arkoosh v. Arkoosh, 66 Idaho 607.docx	1945	2	13.4	53	1451	99	0	0

1946_52_Union Pac. R.R. v. Riggs, 66 Idaho 677.docx	1946	52	14.4	47	356	148	0	0
1949_8_In re Henry's Estate, 70 Idaho 108.docx	1949	8	19+	33	2340	121	0	0
1949_75_Snyder v. Bock, 69 Idaho 168.docx	1949	75	18.2	38	3235	134	0	0
1950_29_Hancock v. Halliday, 70 Idaho 446.docx	1950	29	12.5	51	1489	98	0	0
1951_56_Dunn v. Silver Dollar Mining Co., 71 Idaho 398.docx	1951	56	17	45	2642	116	0	0
1952_30_Thurman v. Thurman, 73 Idaho 122.docx	1952	30	19+	31	3864	153	0	0
1952_52_Bekins Moving & Storage Co. v. Maryland Casualty Co., 72 Idaho 493.docx	1952	52	16.1	44	2472	109	0	0
1952_60_Boise City v. Better Homes, 72 Idaho 441.docx	1952	60	15.1	46	3630	98	0	0
1952_66_Webb v. Union Pac. R.R., 72 Idaho 387.docx	1952	66	16.2	43	1117	76	0	0
1953_21_Schlueter v. Nelson, 74 Idaho 396.docx	1953	21	12.3	55	1354	100	0	0
1953_40_State v. Johnson, 74 Idaho 269.docx	1953	40	14.9	47	2741	87	1	0
1953_70_Williamson v. Smith, 74 Idaho 79.docx	1953	70	16.6	48	2515	120	0	0
1953_74_Schmidt v. Village of Kimberly, 74 Idaho 48.docx	1953	74	16.9	38	7111	148	0	0
1953_95_Mason v. Mootz, 73 Idaho 461.docx	1953	95	14.2	55	2915	88	0	1
1954_47_Western Gas & Power v. Nash, 75 Idaho 327.docx	1954	47	16.3	41	1404	102	0	0
1954_91_Bainbridge v. Bainbridge, 75 Idaho 13.docx	1954	91	18.3	36	4794	143	0	0
1955_2_Wilson v. Wilson, 77 Idaho 325.docx	1955	2	13.8	50	1765	98	0	1
1955_9_Wolfgram v. Employment Sec. Agency, 77 Idaho 298.docx	1955	9	13.4	50	1901	75	0	0
1955_51_State ex rel. Moscow Concrete v. American Sur. Co., 77 Idaho 17.docx	1955	51	16.4	44	2919	99	0	0
1955_66_Potvin v. Chubbuck, 76 Idaho 453.docx	1955	66	16.4	40	2637	108	0	0
1955_87_Larsen v. Jerome Coop. Creamery, 76 Idaho 439.docx	1955	87	17.6	43	3073	95	0	1
1956_13_Langley v. Deshazer, 78 Idaho 376.docx	1956	13	15.2	49	1813	87	0	0
1956_55_Alligier v. Lapwai, 78 Idaho 130.docx	1956	55	13.1	54	515	33	0	0

1957_26_Jordan v. Securities Credit Corp., 79 Idaho 284.docx	1957	26	19+	25	3300	81	0	0
1957_40_Kopp v. Baird, 79 Idaho 152.docx	1957	40	14.7	48	5747	88	0	1
1957_66_Staten v. Weiss, 78 Idaho 616.docx	1957	66	17.7	42	1999	131	0	0
1957_77_Lemon v. Curington, 78 Idaho 522.docx	1957	77	13.3	55	1309	90	0	0
1958_37_Cloughley v. Orange Transp. Co., 80 Idaho 226.docx	1958	37	12.1	59	4236	89	0	0
1958_44_Gilbert v. Bancroft, 80 Idaho 186.docx	1958	44	16.1	42	2824	78	0	1
1958_58_Taylor v. Neill, 80 Idaho 90.docx	1958	58	15	43	2188	119	0	0
1959_23_Darrar v. Chase, 81 Idaho 398.docx	1959	23	13.9	47	1671	87	0	0
1959_26_Wood v. Boise Junior College Dormitory Hous. Comm'n, 81 Idaho 379.docx	1959	26	16.5	33	2043	104	0	0
1960_51_Koseris v. J. R. Simplot Co., 82 Idaho 263.docx	1960	51	18.5	36	2868	113	0	0
1962_31_Poesy v. Closson, 84 Idaho 549.docx	1962	31	16.8	42	1943	128	0	0
1962_43_In re Brown, 84 Idaho 432.docx	1962	43	14.3	46	2471	66	0	0
1962_44_O'Harrow v. Salmon River Uranium Dev., 84 Idaho 427.docx	1962	44	14.4	50	1884	108	0	0
1962_55_McBride v. Hopper, 84 Idaho 350.docx	1962	55	18.2	34	1630	142	0	0
1962_65_Andrus v. Boise Fruit & Produce Co., 84 Idaho 245.docx	1962	65	13.7	51	3371	91	0	0
1963_60_Weeks v. McKay, 85 Idaho 617.docx	1963	60	14	49	2687	104	0	0
1963_72_Link's Sch. of Business v. Employment Sec. Agency, 85 Idaho 519.docx	1963	72	19+	24	508	74	0	0
1964_59_Veach v. Veach, 87 Idaho 237.docx	1964	59	13.1	51	3060	85	0	0
1964_72_Fish v. Fleishman, 87 Idaho 126.docx	1964	72	15	47	2908	79	0	0
1964_83_Duerock v. Acarregui, 87 Idaho 24.docx	1964	83	12	57	5375	69	0	0
1965_73_Valdez v. Christensen, 89 Idaho 285.docx	1965	73	15.1	46	2936	93	0	0
1965_116_Leonard v. Leonard, 88 Idaho 485.docx	1965	116	15.1	44	3762	122	0	0
1967_61_Ebersole v. State, 91 Idaho 630.docx	1967	61	14.7	45	4453	122	1	1

1968_38_Unity Light & Power Co. v. Burley, 92 Idaho 499.docx	1968	38	15.3	41	3002	98	0	0
1968_44_State ex rel. Tap-pan v. Smith, 92 Idaho 451.docx	1968	44	16.8	36	4232	103	0	0
1970_36_Green v. Beaver State Contractors, 93 Idaho 741.docx	1970	36	13.4	53	1666	107	0	0
1970_79_Biersdorff v. Brum-field, 93 Idaho 569.docx	1970	79	13.5	51	1692	73	0	0
1970_82_Russet Potatoe Co. v. Board of Equalization, 93 Idaho 501.docx	1970	82	14	45	4406	100	0	1
1971_39_Weaver v. Pacific Fin. Loans, 94 Idaho 345.docx	1971	39	14.6	39	1058	50	0	0
1971_48_State v. Gomez, 94 Idaho 323.docx	1971	48	13.6	48	1781	69	1	0
1971_54_Boise City v. Idaho Bd. of Highway Directors, 94 Idaho 302.docx	1971	54	14.6	44	1677	92	0	0
1971_115_State v. Sanchez, 94 Idaho 125.docx	1971	115	13.1	53	3997	77	1	0
1972_57_Highbarger v. Thornock, 94 Idaho 829.docx	1972	57	14.2	48	2041	87	0	0
1972_66_Madron v. Green Giant Co., 94 Idaho 747.docx	1972	66	14.6	40	2097	81	0	0
1972_89_North Idaho Juris-diction of Episcopal Churches v. Kootenai County, 94 Idaho 644.docx	1972	89	15.6	38	3534	98	0	1
1972_110_Zoret v. Breeden, 94 Idaho 552.docx	1972	110	12.8	50	1580	122	0	0
1973_3_In re Estate of Cooke, 96 Idaho 48.docx	1973	3	16.8	39	5580	110	0	1
1973_7_In re Reichert, 95 Idaho 647.docx	1973	7	13.3	46	1513	85	0	0
1973_73_In re Bowen, 95 Idaho 334.docx	1973	73	16.2	41	2147	106	0	0
1974_39_Bone v. Andrus, 96 Idaho 291.docx	1974	39	13.5	44	937	65	0	0
1974_44_Pollard v. Land W., 96 Idaho 274.docx	1974	44	14.3	43	2389	107	0	0
1974_57_Ace Supply v. Rocky--Mountain Mach. Co., 96 Idaho 183.docx	1974	57	14	43	1653	99	0	0
1974_59_State v. Standlee, 96 Idaho 165.docx	1974	59	11.7	53	1002	73	1	0
1974_68_Rinehart v. Farm Bureau Mut. Ins. Co., 96 Idaho 115.docx	1974	68	15.3	34	1268	112	0	0
1974_177_Stobie v. Potlatch Forests, 95 Idaho 666.docx	1974	177	13.2	46	216	60	0	0

1975_15_State v. Flory, 97 Idaho 315.docx	1975	15	10.5	55	457	48	1	0
1975_35_Robinson v. Bodily, 97 Idaho 199.docx	1975	35	14.7	35	1530	66	0	0
1975_129_State v. Cliett, 96 Idaho 646.docx	1975	129	17.1	35	131	68	1	0
1975_162_Springer v. Pearson, 96 Idaho 477.docx	1975	162	12.6	48	1033	65	0	0
1976_122_Farmer's Ins. Co. v. Brown, 97 Idaho 380.docx	1976	122	13.9	48	885	73	0	0
1977_45_State v. Latham, 98 Idaho 558.docx	1977	45	11.1	54	1536	84	1	0
1977_71_Howard v. FMC Corp., 98 Idaho 465.docx	1977	71	16.5	43	2982	107	0	0
1977_103_State v. Zarate, 98 Idaho 342.docx	1977	103	17.7	46	471	55	1	0
1977_145_Duignan v. A. H. Robins Co., 98 Idaho 134.docx	1977	145	14.5	39	1982	73	0	0
1977_148_State v. Holtry, 98 Idaho 140.docx	1977	148	15.7	44	225	57	1	0
1979_18_Hutchins v. State, 100 Idaho 661.docx	1979	18	14.6	47	3067	86	0	0
1979_51_State v. Kellogg, 100 Idaho 483.docx	1979	51	15.6	39	2993	95	1	1
1979_73_Fong v. Jerome Sch. Dist., 101 Idaho 219.docx	1979	73	14.8	41	2096	75	0	0
1979_85_Howard v. Department of Employment, 100 Idaho 314.docx	1979	85	14	44	1224	71	0	0
1979_89_In re Estate of Brown, 100 Idaho 300.docx	1979	89	14.1	46	1342	82	0	0
1979_105_Rueth v. State, 100 Idaho 203.docx	1979	105	14.9	45	6366	117	0	0
1979_109_Bentzinger v. McMurtrey, 100 Idaho 273.docx	1979	109	15.9	42	5544	106	0	1
1979_113_State v. Stewart, 100 Idaho 185.docx	1979	113	13.2	48	1825	70	1	1
1980_35_State v. Burris, 101 Idaho 683.docx	1980	35	12.8	49	2319	80	1	0
1980_45_Washington Water Power Co. v. Idaho Pub. Utils. Comm'n, 101 Idaho 567.docx	1980	45	17.7	34	6671	96	0	0
1980_67_Rexburg Realty, Inc. v. Compton, 101 Idaho 466.docx	1980	67	12.1	54	9417	87	0	1
1980_152_Snake River Homebuilders Ass'n v. Caldwell, 101 Idaho 47.docx	1980	152	14.5	38	1839	106	0	0
1981_9_Shea v. Bader, 102 Idaho 697.docx	1981	9	17.4	31	2041	123	0	0

1981_15_State v. Lopez, 102 Idaho 692.docx	1981	15	16.2	45	454	85	1	0
1981_54_Farber v. State, 102 Idaho 398.docx	1981	54	16.1	42	2954	100	0	1
1981_58_Garrett v. Nobles, 102 Idaho 369.docx	1981	58	14.5	44	5354	88	0	1
1981_63_Gugelman v. Pressure Treated Timber Co., 102 Idaho 356.docx	1981	63	16.3	34	2613	91	0	0
1981_79_In re Adoption of Male Child, 102 Idaho 225.docx	1981	79	13.7	44	3924	102	0	1
1981_110_Joyce Livestock Co. v. Hulet, 102 Idaho 129.docx	1981	110	15.8	44	810	117	0	0
1981_122_State v. Randolph, 102 Idaho 153.docx	1981	122	12.8	48	3331	95	1	1
1981_132_Pierson v. Jones, 102 Idaho 82.docx	1981	102	14.1	45	2099	80	0	1
1982_89_Rice v. Rice, 103 Idaho 85.docx	1982	89	14.8	43	2022	91	0	1
1983_52_Cottonwood Elevator Co. v. Zenner, 105 Idaho 469.docx	1983	52	14.9	46	1203	82	0	1
1983_110_State v. Abel, 104 Idaho 865.docx	1982	110	16.5	38	6625	84	1	1
1983_155_Dingley v. Boise Cascade Corp., 104 Idaho 476.docx	1983	155	11.9	53	2080	82	0	1
1983_186_Nelson v. Northern Leasing Co., 104 Idaho 185.docx	1983	186	13.9	52	1925	69	0	0
1984_123_Masi v. Seale, 106 Idaho 561.docx	1984	123	14.1	45	806	104	0	0
1985_114_Kyle v. Beco Corp., 109 Idaho 267.docx	1985	114	15.3	37	3095	79	0	1
1985_120_Brown v. Fritz, 108 Idaho 357.docx	1985	120	15.4	41	5484	86	0	1
1985_122_Tendoy Area Council, Employer Account No. 700036 v. Department of Employment, 108 Idaho 441.docx	1985	122	18	37	1174	49	0	1
1985_201_Schutte v. Rocky Mountain Realty, 107 Idaho 939.docx	1985	201	14.6	36	125	96	0	0
1986_2_South Fork Coalition v. Board of Comm'rs, 112 Idaho 89.docx	1986	2	16.8	33	2805	98	0	1
1986_70_Airstream v. CIT Fin. Servs., 111 Idaho 307.docx	1986	70	13.9	46	3538	73	0	0
1986_189_Balser v. Kootenai County Bd. of Comm'rs, 110 Idaho 37.docx	1986	189	15.2	35	3267	103	0	0

1987_1_Davidson v. Beco Corp., 114 Idaho 107.docx	1987	1	14	43	2389	67	0	1
1987_26_Peone v. Regulus Stud Mills, 113 Idaho 374.docx	1987	26	15.1	38	8168	76	0	1
1987_42_Paullas v. Andersen Excavating, 113 Idaho 156.docx	1987	42	12.6	52	3828	64	0	1
1988_35_Burrup v. Stanger, 115 Idaho 114.docx	1988	35	11.4	53	653	55	0	0
1988_141_Hine v. Twin Falls County, 114 Idaho 244.docx	1988	141	13.2	45	1666	87	0	1
1988_154_Badell v. Beeks, 115 Idaho 101.docx	1988	154	12	51	2149	90	0	1
1989_61_Harrison v. Osco Drug, 116 Idaho 470.docx	1989	61	14.1	34	1869	62	0	0
1989_67_University of Utah Hosp. ex rel. Scarberry v. Board of County Comm'rs, 116 Idaho 434.docx	1989	67	16.9	36	3009	85	0	1
1989_89_Bruno v. First Fed. Sav. & Loan Ass'n, 117 Idaho 466.docx	1989	89	15.3	35	161	49	0	0
1989_137_Stuart v. State, 1989 Ida. LEXIS 32.docx	1989	137	14.2	44	20824	90	1	1
1990_13_In re Evangelical Lutheran Good Samaritan Soc'y, 119 Idaho 126.docx	1990	13	16.3	34	5244	105	0	1
1990_28_University of Utah Hosp. v. Minidoka County, 1990 Ida. LEXIS 183.docx	1990	28	13.6	42	207	62	0	0
1990_132_Boyd v. Potlatch Corp., 117 Idaho 960.docx	1990	132	15.8	39	1545	106	0	1
1990_155_In re Vogt, 117 Idaho 545.docx	1990	155	12.1	54	1962	88	0	1
1990_181_State v. Carrasco, 117 Idaho 295.docx	1990	181	14	47	3310	84	1	1
1990_191_State v. Randles, 117 Idaho 344.docx	1990	191	15	40	3581	89	1	1
1991_41_State v. Card, 1991 Ida. LEXIS 155.docx	1991	41	14.4	47	19289	86	1	1
1991_72_Sanchez v. Arave, 120 Idaho 321.docx	1991	72	14.5	47	4110	77	0	1
1991_179_Black Canyon Racquetball Club v. Idaho First Nat'l Bank, N.A., 119 Idaho 171.docx	1991	179	15	45	6891	88	0	1
1992_62_McIntire v. Orr, 122 Idaho 351.docx	1992	62	14.7	46	2574	92	0	1
1992_70_Jackson v. Omni-bus Group, 122 Idaho 347.docx	1992	70	14.4	43	1832	65	0	0
1992_71_Huerta v. Huerta, 122 Idaho 278.docx	1992	71	12.4	47	361	69	0	0

1992_125_A.W. Brown Co. v. Idaho Power Co., 121 Idaho 812.docx	1992	125	16.8	35	3770	112	0	0
1993_31_State v. Char-boneau, 124 Idaho 497.docx	1993	31	15.3	41	2347	82	1	1
1993_56_State v. Dopp, 124 Idaho 481.docx	1993	56	15.1	46	4579	78	1	1
1993_60_Selzler v. Indus. Special Indem. Fund, 124 Idaho 144.docx	1993	60	14.9	36	1189	73	0	0
1993_83_Boise Group Homes v. Idaho Dep't of Health & Welfare, 123 Idaho 908.docx	1993	83	13.5	39	1192	60	0	1
1993_119_Curtis v. Firth, 123 Idaho 598.docx	1993	119	15.5	41	13337	87	0	0
1993_125_Baker v. La. Pac. Corp., 123 Idaho 799.docx	1993	125	13.2	43	2320	77	0	0
1993_128_Dunlap v. Garner, 1993 Ida. LEXIS 110.docx	1993	128	14.6	34	189	15	0	0
1993_142_Mecham v. Mecham, 123 Idaho 219.docx	1993	142	13	48	792	97	0	0
1994_62_State v. Lynch, 1994 Ida. LEXIS 80.docx	1994	62	11.6	50	101	9	1	0
1995_19_In re Certification License of Russet Valley Produce, 127 Idaho 654.docx	1995	19	15.9	34	4300	84	0	1
1995_43_Mickelsen v. Smith, 127 Idaho 401.docx	1995	43	15.2	42	1304	58	0	0
1995_65_Dohl v. Psf Indus., 127 Idaho 232.docx	1995	65	17.6	30	3336	89	0	0
1995_67_State v. Weaver, 127 Idaho 288.docx	1995	67	14.5	44	2304	73	1	1
1995_76_State v. Medley, 127 Idaho 182.docx	1995	76	14.4	40	2458	80	1	0
1995_111_Scrivner v. Serv. Ida Corp., 126 Idaho 954.docx	1995	111	15.4	37	2152	92	0	0
1996_2_Berglund v. Potlatch Corp., 129 Idaho 752.docx	1996	2	14.7	40	3057	84	0	0
1996_16_State Farm Mut. Auto. Ins. Co. v. Robinson, 129 Idaho 447.docx	1996	16	11.6	48	3109	80	0	0
1996_54_State v. Zichko, 129 Idaho 259.docx	1996	54	11.8	53	6027	72	1	1
1996_83_Rincover v. Dep't of Fin., 128 Idaho 653.docx	1996	83	15.1	38	3763	101	0	0
1997_2_Smalley v. Kaiser, 130 Idaho 909.docx	1997	2	13.5	41	3123	83	0	1
1997_53_Keller v. Keller, 130 Idaho 661.docx	1997	53	14.3	44	2846	95	0	1
1997_111_Kessler ex rel. Kessler v. Payette County, 129 Idaho 855.docx	1997	111	14.5	43	2469	78	0	0

1998_59_State v. Merwin, 131 Idaho 642.docx	1998	59	12.9	51	4327	62	1	1
1998_126_State v. Crowe, 131 Idaho 109.docx	1998	126	13.3	44	1408	78	1	0
1999_9_Mc Kinney v. State, 133 Idaho 695.docx	1999	9	15.3	41	6945	73	1	0
1999_28_State v. Miller, 133 Idaho 454.docx	1999	28	12.3	52	3241	73	1	1
1999_33_Farmers Ins. Co. v. Talbot, 133 Idaho 428.docx	1999	33	14.9	37	4135	83	0	0
1999_35_Cook v. State, 133 Idaho 288.docx	1999	35	12.3	53	5550	57	0	0
1999_93_Kingsbury v. Genesee Sch. Dist. No. 282, 132 Idaho 791.docx	1999	93	15.3	41	3141	85	0	0
1999_113_Great Plains Equip. v. Northwest Pipeline Corp., 132 Idaho 754.docx	1999	113	14.7	44	12122	99	0	1
2000_10_Lewis v. Cedu Educ. Servs., 135 Idaho 139.docx	2000	10	13.4	44	2979	73	0	0
2000_13_Appel v. Lepage, 135 Idaho 133.docx	2000	13	13.1	48	3207	82	0	0
2001_39_Porter v. State, 2001 Ida. LEXIS 116.docx	2001	39	16	48	102	39	1	0
2001_72_State v. Coassolo, 136 Idaho 138.docx	2001	72	14.9	40	4013	78	1	1
2002_134_Idaho State Bar v. Miner (In re Miner), 141 Idaho 5.docx	2002	134	18.7	25	400	135	0	0
2003_39_State v. Mc Cool, 2003 Ida. LEXIS 157.docx	2003	39	13.8	53	247	72	1	0
2003_111_State v. Hansen, 138 Idaho 791.docx	2003	111	13.4	50	3189	66	0	0
2003_132_Dillon v. Montgomery, 138 Idaho 614.docx	2003	132	13.8	44	2617	77	0	0
2003_181_Purdy v. Farmers Ins. Co., 138 Idaho 443.docx	2003	181	13	42	4413	67	0	0
2004_128_State v. Maynard, 2004 Ida. LEXIS 79.docx	2004	128	16.5	45	66	0	1	0
2004_184_State v. Maynard, 139 Idaho 876.docx	2004	184	15.6	38	119	42	1	0
2004_187_Ambrose v. Idaho State Tax Comm'n, 139 Idaho 741.docx	2004	187	14.4	51	1840	82	0	0
2005_42_Dominguez v. Evergreen Res., Inc., 2005 Ida. LEXIS 156.docx	2005	42	16.6	31	144	55	0	0
2006_9_Spelius v. Hollon (In re Estate of Miller), 143 Idaho 565.docx	2006	9	11.2	57	1848	77	0	0
2006_146_State v. Porter, 2006 Ida. LEXIS 16.docx	2006	146	-	-	-	-	1	0

2006_156_Cunningham v. Jensen, 2006 Ida. LEXIS 8.docx	2006	156	15.7	35	226	84	0	0
2007_88_State v. Christiansen, 2007 Ida. LEXIS 154.docx	2007	88	15.5	54	114	43	1	0
2007_212_Moreland v. Adams, 143 Idaho 687.docx	2007	212	14.8	45	2510	84	0	0
2008_15_Mc Kay v. State, 2008 Ida. LEXIS 207.docx	2008	15	12.1	64	242	57	1	0
2008_126_Beco Constr. Co. v. J-U-B Eng'rs, Inc., 145 Idaho 719.docx	2008	126	14.3	42	3562	61	0	0
2008_138_State v. Lippert, 2008 Ida. LEXIS 77.docx	2008	138	16.2	49	128	46	1	0
2008_150_Arreguin v. Farmers Ins. Co., 145 Idaho 459.docx	2008	150	12.8	45	4122	70	0	1
2008_189_Stevens-Mcatee v. Potlatch Corp., 145 Idaho 325.docx	2008	189	13.8	47	6855	71	0	0
2008_200_State v. Arthur, 145 Idaho 219.docx	2008	200	14.4	46	2271	53	1	0
2008_210_Baldwin v. State, 145 Idaho 148.docx	2008	210	13.5	45	4936	62	1	0
2009_6_State v. Cobler, 2009 Ida. LEXIS 234.docx	2009	6	13.4	45	2091	89	1	0
2009_16_BHC Intermountain Hosp., Inc. v. Ada County (In re Hospitalization of B. L.), 148 Idaho 294.docx	2009	16	12.9	46	762	53	0	0
2009_39_St. Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 148 Idaho 479.docx	2009	39	14.3	42	12834	77	0	1
2010_21_Nava v. Rivas-Del Toro, 151 Idaho 853.docx	2010	21	13.7	47	4955	73	0	0
2010_25_State v. Adamcik, 2011 Ida. LEXIS 158.docx	2010	25	13.2	47	26029	77	1	1
2010_70_Taylor v. McNichols, 149 Idaho 826.docx	2010	70	15.7	41	13223	89	0	1
2010_104_State v. Wheeler, 2010 Ida. LEXIS 134.docx	2010	104	15.4	55	134	44	1	0
2010_145_State v. Munoz, 2010 Ida. LEXIS 85.docx	2010	145	15.5	55	123	40	1	0
2010_178_Bach v. Bagley, 148 Idaho 784.docx	2010	178	14.5	44	7520	93	0	0
2010_218_St. Alphonsus Diversified Care, Inc. v. MRI Assocs., 2010 Ida. LEXIS 22.docx	2010	218	-	-	-	-	0	0
2011_97_McDevitt v. Sportsman's Warehouse, Inc., 151 Idaho 280.docx	2011	97	15.1	42	5275	98	0	0

2011_114_Fuller v. Callister, 150 Idaho 848.docx	2011	114	15.5	41	4549	116	0	0
2011_125_Fazzio v. Mason, 150 Idaho 591.docx	2011	125	15.9	36	4211	83	0	0
2012_34_State v. Doe, 153 Idaho 588.docx	2012	34	14.1	42	2429	77	1	0
2012_135_State v. Davis, 2012 Ida. LEXIS 97.docx	2012	135	15.7	49	146	41	1	0
2012_136_State v. Forbes, 2012 Ida. LEXIS 96.docx	2012	136	14.9	53	134	37	1	0
2012_159_Bridge Tower Dental, P.A. v. Meridian Computer Ctr., Inc,, 152 Idaho 569.docx	2012	159	14.8	44	3522	63	0	0
2012_183_State v. Adamcik, 2012 Ida. LEXIS 47.docx	-	-	-	-	-	-	1	0
2012_208_Pines Grazing Ass'n v. Flying Joseph Ranch, LLC, 2012 Ida. LEXIS 21.docx	2012	208	18.4	31	160	56	0	0
2012_213_State v. Hanson, 152 Idaho 314.docx	2012	213	16.3	33	6150	90	1	0
2013_21_Clark v. Shari's Mgmt. Corp., 155 Idaho 576.docx	2013	21	14.2	44	4673	60	0	1
2013_67_Roesch v. Klemann, 155 Idaho 175.docx	2013	67	15.7	47	3097	57	0	0
2013_131_Edwards v. Mortgage Elec. Registration Sys., 154 Idaho 511.docx	2013	131	13.6	48	4873	78	0	0
2013_139_Hansen v. Roberts, 154 Idaho 469.docx	2013	139	14.3	41	3706	56	0	0
2013_199_Duspiva v. Fillmore, 154 Idaho 27.docx	2013	199	13.6	47	5293	69	0	0
2014_6_Doe v. Doe, 339 P.3d 1169.docx	2014	6	13.9	44	3486	89	0	0
2014_35_Cummings v. Stephens, 2014 Ida. LEXIS 296.docx	2014	35	18.9	30	148	40	0	0
2014_121_Groves v. State, 2014 Ida. LEXIS 189.docx	2014	121	13	62	136	44	1	0
2014_173_Credit Suisse AG v. Teufel Nursery, Inc., 156 Idaho 189.docx	2014	173	14.9	46	7507	94	0	0
2014_193_State v. Mc Neil, 2014 Ida. LEXIS 67.docx	2014	193	15.2	46	146	54	1	0
2015_20_Chadwick v. Multi-State Elec., LLC, 159 Idaho 451.docx	2015	20	14.9	43	5532	71	0	1
2015_25_State v. Neal, 159 Idaho 439.docx	2015	25	14.3	47	6860	79	1	1
2015_74_State v. Smith, 2015 Ida. LEXIS 215.docx	2015	74	14.3	58	132	45	1	0

2015_107_Pines v. Idaho State Bd. of Med., 158 Idaho 745.docx	2015	107	12.7	51	5782	68	0	0
2015_127_State v. Ehrlick, 2015 Ida. LEXIS 122.docx	2015	127	12.8	48	16946	66	0	0
2015_131_Poledna v. Idaho DOL, 2015 Ida. LEXIS 118.docx	2015	131	11.5	52	1661	74	0	0
2015_150_Cedillo v. Farmers Ins. Co., 158 Idaho 154.docx	2015	150	15.1	42	6313	48	0	0
2016_8_Wolford v. Montee, 2016 Ida. LEXIS 373.docx	2016	8	14.8	49	5563	69	0	0
2016_92_Ballard v. Kerr, 378 P.3d 464.docx	2016	92	14.7	41	27098	82	0	1
2016_104_Padilla v. State, 2016 Ida. LEXIS 225.docx	2016	104	13.4	61	195	87	1	0
2016_199_JBM, LLC v. Cin-torino, 159 Idaho 772.docx	2016	199	14.4	42	2945	64	0	0

Appendix B: Case Comparison No. 1

Rathbun v. New York Life Insurance Co.: **Flesch Kincaid Score = 11.1 (better score)**	***State v. Medley:*** **Flesch Kincaid Score = 14.4 (worse score)**
Supreme Court of Idaho June 30, 1916, Decided No Number in Original **Reporter** 30 Idaho 34 *; 165 P. 997 **; 1916 Ida. LEXIS 127 *** JULIA M. RATHBUN and ERASTUS A. RATHBUN, Her Husband, Appellants, v. NEW YORK LIFE INSURANCE COMPANY, Respondent. **Prior History:** APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge. Action to recover on a life insurance policy. Judgment for defendant. Affirmed. **Disposition:** Judgment affirmed, with costs in favor of respondent. **Counsel:** A. L. Morgan, for Appellants. "Any agreement, declaration, or cause of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the expressed letter of the contract." (New York Life Ins. Co. v. Eggleston, 96 U.S. 572, 24 L. Ed. 841.) There is nothing in the contract, either in the application or in the policy itself, which required anyone to notify the New York Life Insurance Company of Rathbun's physical condition at the time such policy was ready for delivery. It was the company's right to	Supreme Court of Idaho June 29, 1995, Filed Docket No. 20174, 1995 Opinion No. 78 **Reporter** 127 Idaho 182 *; 898 P.2d 1093 **; 1995 Ida. LEXIS 90 *** STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL MEDLEY, Defendant-Appellant. **Subsequent History:** Released for Publication July 21, 1995. **Prior History:** Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John P. Luster, Magistrate Judge; Hon. Gary M. Haman, District Judge. Appeal from an order of the magistrate court denying appellant's motion to suppress. **Disposition:** Reversed. **Counsel:** Jonathan B. Hull, Kootenai County Public Defender, and Joel K. Ryan, Deputy Public Defender, Coeur d'Alene, for appellant. Joel K. Ryan argued. Hon. Larry EchoHawk, Idaho Attorney General; Douglas A. Werth, Deputy Attorney General, Boise, for respondent. Douglas A. Werth argued. **Judges:** TROUT, Justice. Chief Justice McDEVITT, Justices JOHNSON and SILAK, and Justice Pro Tem WALTERS CONCUR. **Opinion by:** TROUT TROUT, Justice.

refuse to deliver. It therefore became its duty to ascertain Rathbun's condition before exercising its option. (Grier v. Mutual Life Ins. Co. of New York, 132 N.C. 542, 44 S.E. 28.)

It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured. (Moore v. Aetna Life Ins. Co., 75 Ore. 47, Ann. Cas. 1917B, 1005, 146 P. 151, L. R. A. 1915D, 264; Hoffman v. Aetna Ins. Co., 32 N.Y. 405, 413, 88 Am. Dec. 337; Darrow v. Family Fund Society, 116 N.Y. 537, 15 Am. St. 430, 22 N.E. 1093, 6 L. R. A. 495; American Surety Co. v. Pauly, 170 U.S. 133, 18 S. Ct. 552; 42 L. Ed. 977; Sneck v. Travelers' Ins. Co., 88 Hun, 94, 34 N.Y.S. 545; Union Accident Co. v. Willis, 44 Okla. 578, 145 P. 812, L. R. A. 1915D, 358.)

An insurance company cannot take an applicant's money by way of premium without giving in return insurance for all of the period covered by that premium. (Anderson v. Mutual Life Ins. Co., 164 Cal. 712, Ann. Cas. 1914B, 903, 130 P. 726; Gordon v. United States Casualty Co. (Tenn. Ch.), 54 S.W. 98; Unterharnscheidt v. Missouri State Life Ins. Co., 160 Iowa 223, 138 N.W. 459, 45 L. R. A., N. S., 743.)

Clency St. Clair, J. H. Forney and Frank L. Moore, for Respondent.

The negotiations between parties making a life insurance contract are the same in the eye of the law as are the negotiations between parties making a contract for any other purpose. (Stephens v. Capital Ins. Co., 87 Iowa 283, 54 N.W. 139; Weidenaar v. New York Life Ins. Co., 36 Mont. 592, 122 Am. St. 330, 94 P. 1; Quinlan v. Providence- Wash. Ins. Co., 133 N.Y. 356, 28 Am. St. 645, 31 N.E. 31; Conway v. Phoenix Mut. Life Ins. Co., 140 N.Y. 79, 35 N.E. 420; Dwight v. Germania Life Ins. Co., 103 N.Y. 341, 57 Am. Rep. 729, 8 N.E. 654; Liverpool & L. & G. Ins. Co. v. Kearney, 180 U.S. 134, 21 S. Ct. 326, 45 L. Ed. 460; Wells Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397.)

The merits of the case, therefore, must be determined according to the established rules of the law of contracts. (Iowa Life Ins. Co. v. Lewis, 187 U.S.

Michael Medley appeals his conviction for the misdemeanor offenses of driving under the influence (DUI) and possession of a firearm while intoxicated, both entered upon conditional pleas of guilty. Specifically, Medley challenges the trial court's denial of his motion to suppress all evidence obtained by police when he was stopped at a Department of Fish and Game highway check station. Medley contends that the stop was unreasonable in violation of the United States and Idaho Constitutions.

I.

BACKGROUND AND PROCEDURAL HISTORY

On November 17, 1990, from 10:00 a.m. until 10:00 p.m., the Idaho Department of Fish and Game (the Department) set up a check station on U.S. Highway 95. This check station was pre-approved by the Department's regional supervisor and, by invitation of another Department official, officers from the Kootenai County Sheriff's Office, the United States Border Patrol, the United States Fish and Wildlife Service, the Kootenai County Law Enforcement Auxiliary, and the Kootenai County Interagency Drug Task Force participated in the operation.

The checkpoint was situated at a weigh station on the west side of U.S. Highway 95. The record reveals that only Department officers were involved in the actual stopping of vehicles. All southbound vehicles, with the exception of large trucks, emergency vehicles, and law enforcement vehicles, were stopped by a P.O.S.T. (Police Officers Standards and Training) certified Department conservation officer acting as flagperson. Signs were set up ahead of the check station to warn vehicles of the upcoming stop.

After the vehicles were stopped, the Department flagperson asked the drivers whether they had been fishing or hunting and whether they possessed any fish or game. If a driver answered affirmatively, the flagperson directed that driver to a spot in the weigh station parking lot for further inquiry. The flagperson also diverted persons with expired vehicle registration and persons suspected of driving under the influence, possession of drugs, or other offenses. Once parked, these drivers were questioned by another Department officer. If a violation not pertaining to fish and game

335, 23 S. Ct. 126, 47 L. Ed. 204; Behling v. Northwestern Nat. Life Ins. Co., 117 Wis. 24, 93 N.W. 800.)

No insurance took effect because the first premium was not paid nor the policy delivered to and received by the applicant during his lifetime and good health. (Nyman v. Manufacturers' & M. Life Assn., 262 Ill. 300, 104 N.E. 653; Gallop v. Royal Neighbors of America, 167 Mo. App. 85, 150 S.W. 1118; Reese v. Fidelity Mut. Life Assn., 111 Ga. 482, 36 S.E. 637; Metropolitan Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N.E. 560.)

Judges: SULLIVAN, C. J., FLYNN, District Judge. Budge, C. J., and Rice, J., concur. Morgan, J., did not sit at the hearing and did not take any part in the decision of this case.

Opinion by: SULLIVAN; FLYNN

SULLIVAN, C. J.--This is an action brought by the mother and father to recover on a life insurance policy issued to their son, Ernest C. Rathbun. A demurrer to the complaint was overruled and answer filed by the Insurance Company denying its liability. Thereupon the issues were tried to the court without a jury and judgment was entered against the plaintiffs, from which this appeal was taken.

The action of the court in overruling plaintiffs' demurrer to the defendant's answer and in overruling plaintiffs' objection to the introduction of any testimony under the allegations of the answer, and in making findings of fact and conclusions of law and entering judgment in favor of the defendant, is assigned as error.

The following facts appear from the record:

On the 9th day of April, 1913, Ernest C. Rathbun, son of the plaintiffs, made application to the defendant, New York Life Insurance Company, for a $ 2,000 insurance policy upon his life, in which policy the plaintiff Julia M. Rathbun was made the beneficiary. Thereafter on April 17, 1913, the Insurance Company issued the policy and the policy recites that the insurance is granted in consideration of the payment of the first premium amounting to $ 41.68, and the policy contains an acknowledgment of the

was suspected, the Department officer was accompanied by a law enforcement officer. Vehicles that were not diverted from the main flow of traffic were only momentarily detained; vehicles that were diverted from the main flow were detained for a short time unless there was a violation.

At approximately 8:00 p.m., conservation officer Greg Johnson, acting as flagperson, waived Medley into the weigh station. Johnson testified that he observed Medley's truck approach faster than normal and that the truck did not slow down soon enough, actually going past the stop sign and triangle cone where Johnson was standing. On approaching the vehicle, Johnson detected the odor of alcohol on Medley's breath and observed that Medley's eyes were red and watery. By radio, Johnson informed the Department officer in charge of the operation, Wayne Weseman, that Medley was possibly under the influence. He then directed Medley to the weigh station parking lot. Officer Weseman alerted law enforcement officers of the possibility that Medley was driving under the influence. Those officers apparently took charge at that point. Deputy Sheriff Gary Dagastine of the Kootenai County Sheriff's Office observed signs of intoxication and ultimately arrested Medley. Medley was charged with DUI, possession of marijuana, a weapons violation, and an open container violation.

Thereafter, Medley moved to suppress all evidence seized and observations made as a result of the check station stop, and to dismiss the charges against him, alleging that the initial stop was unlawful and without legal justification in violation of the United States and Idaho Constitutions. After a hearing and after reviewing the transcript of another case involving the same check station, the magistrate denied the motion. On December 24, 1991, Medley entered a conditional plea of guilty to the DUI and weapons violations and the State dismissed the other two charges. The magistrate entered judgments of conviction for driving under the influence and possession of a firearm while intoxicated based on Medley's conditional pleas. The district court upheld the magistrate's ruling and this appeal followed.

II.

STANDARD OF REVIEW

receipt of such payment. The policy also contains the following, among other, recitations: "After its delivery to and receipt by the insured, the policy takes effect as of the 9th day of April, 1913, that being the date upon which the application for such policy was made."

It is alleged in the complaint that subsequent to the execution of said contract and prior to the 10th day of May, 1913, the policy was delivered to said insured and that during the month of June, 1913, the beneficiary made due proof of the death of Ernest C. Rathbun in accordance with the terms of said policy, and demanded from said insurance company the payment of the sum of $ 2,000 as provided in such policy, which payment said company refused, one of the grounds for such refusal being, as appears from the answer, that said policy was issued by the company upon application and that the applicant paid at the date of application $ 5 in cash and executed and delivered to the agent who took said application his promissory note for the balance of the amount due for the first premium, and that the policy was forwarded by registered mail addressed to the insured from the company's branch office in Spokane, Washington, and the same was receipted for by one C. L. Williamson, and on the 5th day of May was by said Williamson delivered to Ernest C. Rathbun. On the 28th day of April, 1913, the applicant became ill with appendicitis and died on the 10th day of May, 1913. It is further alleged that the application for said policy contains, among other things, the following stipulation or agreement:

"That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application.

"That any payment made by me before delivery of the policy to, and its receipt by, me as aforesaid shall be binding on the Company only in accordance with

In reviewing an order granting or denying a motion to suppress evidence, an appellate court will defer to the trial court's factual findings unless the findings are clearly erroneous. However, free review is exercised over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *State v. Weber*, 116 Idaho 449, 451-52, 776 P.2d 458, 460-61 (1989). Further, when an appeal is initially taken to the district court, any subsequent review will be conducted independent of, but with due regard for, the decision of the district court. *Smith v. Smith*, 124 Idaho 431, 436, 860 P.2d 634, 639 (1993) (citing *McNelis v. McNelis*, 119 Idaho 349, 806 P.2d 442 (1991)).

III.

THE SEIZURE THAT OCCURRED IN THIS CASE WAS UNREASONABLE IN VIOLATION OF THE UNITED STATES CONSTITUTION

The issue before this Court is whether the magistrate properly denied Medley's motion to suppress based on his determination that the initial stop did not violate Medley's constitutional right to be free from unreasonable searches and seizures. We hold that there was a violation under the United States Constitution. Therefore, we reverse the denial of the motion to suppress.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures conducted by government officials. [1] The essential purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions conducted solely at the unfettered discretion of government officials. *E.g.*, *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930 (1967). However, the prohibition is not absolute and applies only to those searches and seizures which are found to be unreasonable. *E.g., Elkins v. United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 1446, 4 L. Ed. 2d 1669 (1960).

[1] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

the terms of the Company's receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made and is the only receipt the agent is authorized to give for such payment."

As stated above, on the trial of the case judgment was entered in favor of the respondent insurance company.

In its answer and on the trial of the case, the main contentions of the insurance company were, first, that under the terms of the contract the first premium was to be paid in cash; and, second, the policy was not to take effect unless the insured was in good health at the time it was delivered to him. Said contentions are partly based upon the stipulations above quoted from the application for said insurance.

The court in its findings of fact among other things found as follows:

"The court further finds that Ernest C. Rathbun, the plaintiffs' son, applied in writing for insurance on his life, agreeing therein that the insurance thereby applied for should not take effect unless the first premium was paid and the policy was delivered to and received by him during his lifetime and good health. After applying for the policy and before its delivery, the applicant was taken with appendicitis, from which he died. While he was in the hospital, the soliciting agent at Spokane, in total ignorance of the changed condition of the applicant's health, mailed him the policy. The applicant's friends thereafter paid the first premium, which the company promptly returned when it discovered the facts."

The evidence is clearly sufficient to sustain this finding of fact.

Then if the parties understood and agreed that the policy should not become effective unless the first premium was paid and the policy was delivered to and received by the applicant during his lifetime and while he was in good health, and both of those conditions failed, the contract of insurance was never completed and the policy was of no force and effect. It is a well-recognized rule that life insurance results from contract and that the true rule is that no other or different rule is to be applied to a contract of insurance than is applied to other contracts. (*Quinlan v.*

When a vehicle is stopped at a checkpoint by law enforcement officials, a "seizure" within the meaning of the Fourth Amendment has occurred. If such a seizure is not made pursuant to a warrant, probable cause, or one of the well-recognized exceptions to the probable cause rule, a balancing test is used to determine its reasonableness. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). This test was most clearly articulated by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

> Consideration of the constitutionality of such seizures involves a weighing of [1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty.
>
> . . . .
>
> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.

443 U.S. at 50-51, 99 S. Ct. at 2640 (citations omitted). Accordingly, we will identify and balance these three elements in light of the fear of arbitrary invasions conducted at the unfettered discretion of law enforcement officers.

A. The State's Interest

The State has a compelling interest in the management and conservation of its natural resources, including wildlife. This interest is of such importance that the legislature has asserted pervasive control over it. *See* I.C. § 36-103. Moreover, we note that the legislature has provided statutory authority supporting the use of check stations maintained by the Department for the purpose of checking fish and game licenses and lawful possession of wildlife. I.C. § 36-1201. While this does not end our inquiry, it is a strong indication of the legislature's perception that fish and game violations are matters of grave public concern which justify minimal intrusion into the public's right of privacy.

Providence- Washington Ins. Co., 133 N.Y. 356, 28 Am. St. 645, 31 N.E. 31.) In life insurance contracts, the assent of both parties is required as in any other contract. (*Stephens v. Capital Ins. Co.*, 87 Iowa 283, 54 N.W. 139; *Weidenaar v. New York Life Ins. Co.*, 36 Mont. 592, 122 Am. St. 330, 94 P. 1.) In the determination of this case, the application and the policy itself must be examined and considered in order to ascertain the true situation of the parties under the negotiations and agreements between them. (*Iowa Life Ins. Co. v. Lewis*, 187 U.S. 335, 23 S. Ct. 126, 47 L. Ed. 204; *Behling v. Northwestern Nat. Life Ins. Co.*, 117 Wis. 24, 93 N.W. 800.) If we concede in this case that the first premium was paid by the payment of the five dollars and the delivery of the insured's promissory note to the agent of the company for the balance, the plaintiffs would not be entitled to recover, for the reason that the policy was not delivered to and received by the applicant while he was in good health but when he was fatally ill. He became ill with appendicitis on the 28th of April, 1913, was operated on that day and thereafter died on the 10th day of May, 1913, five days after receiving the policy. Upon a proper construction of the contract between the applicant and the insurance company and on the evidence introduced on the trial, the plaintiffs are not entitled to recover. The judgment must therefore be affirmed, and it is so ordered, with costs in favor of respondent. Budge, J., concurs. Morgan, J., did not sit at the hearing and did not take any part in the decision of this case. (June 26, 1917.) **ON REHEARING.** FLYNN, District Judge.--A rehearing having been granted, this case was submitted on briefs. We concur in the conclusion reached by the court in its original opinion, that the policy in question never took effect, because it was not delivered to and received by the applicant while he was in good health.	**B. The Severity of Interference With Individual Liberty** With regard to the individual interest implicated in this case, there is clearly an interest in unrestrained travel on public roadways. Although, the intrusion on that interest that actually occurred in this instance was minimal, the manner in which the checkpoint was carried out did create the potential for a greater degree of intrusion. Intrusion is measured from both an objective and a subjective standpoint. *See, e.g.*, *Martinez-Fuerte*, 428 U.S. at 558, 96 S. Ct. at 3083. Objective intrusion is measured by the duration of the seizure and the intensity of the investigation. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451-52, 110 S. Ct. 2481, 2486, 110 L. Ed. 2d 412 (1990). In this case, the objective intrusion resulting from the check station was slight. Vehicles not diverted from the main flow of traffic were only momentarily detained; vehicles that were diverted were detained for a short time unless a violation was found. Subjective intrusion is measured by the potential for generating fear and surprise on the part of lawful travelers. *Id.* The level of subjective intrusion flowing from the actual stop in this case appears to have been minimal. The stop was systematic; all vehicles other than large commercial trucks and emergency and law enforcement vehicles were stopped. Safety precautions were taken and there were warning signs in advance. However, the Kootenai County Sheriff's Office set up a roving patrol to prohibit people from avoiding the check station by using alternative routes. This type of patrol could cause concern or fright on the part of lawful travelers. *See Id.* at 453, 110 S. Ct. at 2486-87 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)). **C. The Degree to Which the Seizure Advances the State's Interest** The critical element in this case is the degree to which the seizure advances the public's interest in the conservation and management of wildlife resources. Routine fish and game check stations are indeed an effective method for advancing this interest. The area covered in this case was large and remote and the number of enforcement officers limited. Requiring conserva-

The policy provides that "the policy and the application therefor constitutes the entire contract between the parties"; and under the terms of the application, it was made a condition precedent to the policy's taking effect that the insured should be in good health when the policy was delivered and received. (14 R. C. L. 900, sec. 78.)

We are not in accord, however, with the intimation that the first premium was not paid, though we are probably precluded from holding otherwise, because of the fact that the trial court found that the giving and acceptance of a note for the balance of the first year's premium, after paying five dollars cash thereon, was a personal matter between the applicant for insurance and the agent, and that defendant had no rights thereunder or interest therein. The evidence not being before this court, it will be presumed that it supports this finding. (*McCornick v. Brown*, 22 Idaho 52, 125 P. 197.)

The former judgment of this court is therefore reaffirmed.

Budge, C. J., and Rice, J., concur.

tion officers, under these circumstances, to have probable cause before stopping suspected violators would be an enormous burden. Further, the checkpoint was set up on a date which would encompass both fishing and hunting seasons and at a time when both fishermen and hunters would be returning to their homes. The station was located on a highway leading from potential hunting areas and was set up where there was adequate room for vehicles to pull off the highway safely and without much delay. [2]

However, the checkpoint at issue in this case was hardly a routine fish and game check station. Although it was established by the Department of Fish and Game, the officer in charge of the operation issued a blanket invitation to any additional law enforcement agency that wished to participate so that violations of laws not pertaining to fish and game could be detected and dealt with. The record reveals that a large number of other agencies readily accepted this invitation and played an active role in the operation. The record also reflects that in many instances where vehicles were diverted for fish and game purposes, once Department officers had completed their inquiry, law enforcement officers conducted their own inquiry as to violations unrelated to fish and game. Because of this, it appears that the government officials involved did not intend the check station operation to be confined to the advancement of the State's interest in the conservation of wildlife.

D. Balancing

The overriding concern in the application of the *Brown* test is the nature and extent of the discretion wielded by law enforcement officers in the field. *Brown* at 50-51, 99 S. Ct. at 2640. We note that the legislature has provided statutory authority supporting the use of routine Department check stations, I.C. § 36-1201, and that such operations are apparently conducted pursuant to established Department policy. [3]

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[2] In applying the "advancement of the public interest" element of the *Brown* test, we will not second-guess reasonable determinations by law enforcement officials regarding which enforcement techniques are appropriate to address a specific public issue. We emphasize that "the choice among . . . reasonable alternatives remains with the government officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of [law enforcement] officers." *Sitz* at 453-54, 110 S. Ct. at 2487.

[3] Legislative authorization is not a free-standing constitutional requirement for a reasonable seizure since such authorization cannot save an otherwise unconstitutional seizure. Rather, the existence of legislative authorization

	However, there is no statutory authorization for a "dragnet" checkpoint, such as that conducted here, where all passersby are stopped and screened for any conceivable violation. Furthermore, Department officials admit that there was no specific Department policy or other neutral criteria in place governing the procedure to be followed in the event a person stopped appeared intoxicated. Rather, the Department relied on the discretion of the officers operating the station to act as "reasonable officers." This is precisely the type of unfettered discretion which the Fourth Amendment to the United States Constitution was designed to prevent. *See, e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 662-63, 99 S. Ct. 1391, 1400-01, 59 L. Ed. 2d 660 (1979). In balancing the three factors identified above, we conclude that the Department checkpoint, as conducted in this case, resulted in an unreasonable seizure under the Fourth and Fourteenth Amendments to the United States Constitution. **IV.** **WE NEED NOT DETERMINE WHETHER THE IDAHO CONSTITUTION PROVIDES GREATER PROTECTION IN THIS CASE** We have recognized that "in interpreting provisions of our constitution that are similar to those of the federal constitution we are free to extend protections under our constitution beyond those granted . . . under the federal constitution." *State v. Thompson*, 114 Idaho 746, 748, 760 P.2d 1162, 1164 (1988) (emphasis added). However, where the State has violated the minimum requirements imposed by the federal constitution, any such extension by this Court would be *obiter dicta*. In *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988), we expressed no view as to whether fish and game roadblocks complied with state constitutional requirements. *Id.* at 299 n.4, 756 P.2d at 1063 n.4. Because we conclude that the stop in this case violated the minimum protections mandated by the federal constitution, we do not determine whether it also violated Idaho Const. art. 1, § 17, and whether

is an element to be considered in determining whether the officials conducting the checkpoint are exercising unfettered discretion. Moreover, a warrantless seizure is, by definition, one that is not made pursuant to prior judicial authorization. Thus, prior judicial authorization is likewise not a prerequisite to a finding of constitutionality.

	that provision provides greater protection than its federal counterpart since such a determination would be unnecessary to the resolution of this appeal. **V.** **CONCLUSION** The magistrate's denial of Medley's motion to suppress and Medley's judgment of conviction are reversed. Chief Justice McDEVITT, Justices JOHNSON and SILAK, and Justice Pro Tem WALTERS CONCUR.

Appendix C: Case Comparison No. 2

Glover v. Spraker: **Flesch Reading Ease Score = 60 (better score)**	***Hansen v. Roberts* (Flesch RE Score = 41): Flesch Reading Ease Score = 41 (worse score)**
Glover v. Spraker Supreme Court of Idaho October 25, 1930, Decided No. 5562. **Reporter** 50 Idaho 16 *; 292 P. 613 **; 1930 Ida. LEXIS 3 *** ORVILLE W. GLOVER, Respondent, v. I. J. SPRAKER, Appellant. **Prior History:** APPEAL from the District Court of the Sixth Judicial District, for Bingham County. Hon. Ralph W. Adair, Judge. Action by Orville Glover against I. J. Spraker for damages for breach of contract and for the purchase price of hay. Cross-complaint by Spraker for loss of livestock entrusted to Glover. Judgment for plaintiff and cross-defendant. Affirmed as to the cross-complaint and reversed and remanded as to the original action. **Disposition:** Judgment affirmed. Costs to be equally divided between parties. Petition for rehearing denied. **Counsel:** P. C. O'Malley and G. F. Hansbrough, for Appellant. The delivery of the horses and the two cows to the plaintiff under the lease was pleaded and the death of same while in the use, possession and control of the plaintiff, which was a sufficient pleading under the statutes of the state of Idaho. (Bates v. Capital State Bank, 18 Idaho 429, 110 P. 277.)	Hansen v. Roberts Supreme Court of Idaho April 16, 2013, Filed Docket No. 38904, 2013 Opinion No. 47 **Reporter** 154 Idaho 469 *; 299 P.3d 781 **; 2013 Ida. LEXIS 117 ***; 2013 WL 1569563 LARRY HANSEN, Plaintiff-Appellant, v. MATTHEW ROBERTS, Defendant-Respondent. **Prior History:** Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. William H. Woodland, Senior District Judge. **Disposition:** District court decision on jury trial, affirmed. **Counsel:** Gordon Law Firm, Inc., Idaho Falls, for appellant. Brent Gordon argued. Powers, Tolman, PLLC, Twin Falls, for respondent. Jennifer K. Brizee argued. **Judges:** BURDICK, Chief Justice. Justices EISMANN, J. JONES, W. JONES, and HORTON CONCUR. **Opinion by:** BURDICK This is an appeal from the Bonneville County district court by Larry Hansen (Hansen). Hansen was involved in an automobile accident with the respondent Matthew Roberts (Roberts). At trial, Hansen sought to recover damages for his injuries and Roberts sought to recover property damage for his vehicle. The jury found Hansen to be 90% at fault and awarded Roberts

"In the construction of a contract, the court will endeavor to arrive at the real intention of the parties." (Wood River Power Co. v. Arkoosh, 37 Idaho 348, 215 P. 975.)

"A contract is to be construed so as to give effect to the intention of the parties making it." (D. M. Ferry & Co. v. Smith, 36 Idaho 67, 209 P. 1066.)

"In the construction of a contract, the court should endeavor to arrive at the real intention of the parties, and if there is some room for doubt as to its true meaning, the facts and circumstances out of which such contract arose should be considered and the contract construed in the light of such facts and circumstances, so that the intention of the parties to the contract may be ascertained, if possible, and given effect." (Twin Falls etc. Fruit Co. v. Salsbury, 20 Idaho 110, 117 P. 118; State v. Twin Falls Canal Co., 21 Idaho 410, 121 P. 1039, L. R. A. 1916F, 236.)

J. H. Andersen, for Respondent.

Allegations for a cross-complaint are not to be helped out by any allegations or admissions contained in the main pleadings. (Dunham v. McDonald, 34 Cal. App. 744, 168 P. 1063; Coulthurst v. Coulthurst, 58 Cal. 239; Harrison v. McCormick, 69 Cal. 616, 11 P. 456.)

The laws of Idaho contemplate, recognize and provide for leases of livestock as distinguished from bailments. (C. S., sec. 1955; Hare v. Young, 26 Idaho 682, 146 P. 104.)

Judges: LEE, J. Givens, C. J., and Budge, Varian and McNaughton, JJ., concur.

Opinion by: LEE

Plaintiff and respondent, Glover, on November 30, 1925, entered into a contract of lease with defendant and appellant, Spraker, for the rent of the latter's farm, together with certain work horses and milk cows, for a period of one year. Plaintiff brought this action to recover damages arising from defendant's failure to furnish feed for the stock as contemplated by the contract, which provided:

damages for his vehicle. Hansen now appeals the Bonneville County district court's decision to allow Roberts's experts, an accident reconstructionist and a biomechanical engineer, to testify. Hansen also appeals the district court's ruling that he waived his objections to Roberts's deposition testimony. Finally, Hansen appeals the district court's decision to grant Roberts's motion in limine so far as it limited him from asking whether prospective jurors or one of their family members were or had ever been employed by an insurance carrier.

I. Factual and Procedural Background

Hansen and Roberts were in a car crash that caused injuries to Hansen and property damage to Roberts's vehicle. Hansen was making a right hand turn into a business parking stall when Roberts hit the passenger side of his vehicle while attempting to pass Hansen on the right.

On May 26, 2009, Hansen filed a complaint against Roberts to recover damages for the injuries he sustained in the car accident. Three months later Roberts filed a small claims complaint for the damage to his car. Pursuant to a stipulation between the parties, these two matters were consolidated into one case.

A jury trial was held on October 19, 2010. Hansen was able to present his entire case on this first day of trial. After the conclusion of the first day of trial, Roberts received news that a matching liver had been found for him. The court continued the trial and the second day of trial was held on December 15, 2010. Because of Roberts's condition following the transplant, he was not able to appear in court and the parties arranged to have his trial testimony videotaped. Both parties made objections during Roberts's testimony, which were included on the video with the understanding that the court would rule on these objections before trial. On the second day of trial, Hansen moved to raise the objections he made in Roberts's deposition testimony before the video was played for the jury. The court concluded that Hansen had waived these objections by not presenting them at the pretrial conference when the court addressed Roberts's objections. Hansen also sought to exclude Roberts's expert testimony from Scott Kimbrough, an accident reconstructionist, and John Droge, a biomechanical engi-

"It is further agreed and understood that the party of the first part is to furnish hay to feed said work stock during the entire term of this lease, and grain during the heavy portion of the farm work. Also hay to feed said cows from the beginning hereof until new hay is harvested and available for feed, from which time to the termination hereof, the milk cows are to be fed from the hay raised upon said premises, undivided, and the work stock from hay furnished by the party of the first part as aforesaid. Provided, However, that if said lease should be determined at the end of one year, then the party of the second part is to leave as much hay on said premises for the use of the party of the first part as is delivered to him by the party of the first part for the purpose of feeding said milk cows, same to be divided equally."

Below the signature of the parties was a memorandum reciting that at the time of signing the lease the hay to be furnished by defendant had been measured and delivered and consisted of 59 tons. At the end of the year, the parties renewed the lease, agreeing, in writing, that the terms of the original contract should apply *in toto*.

Charging defendant's failure to furnish hay as provided by the contract, plaintiff alleged:

"That the defendant has failed to furnish the hay to feed said cows from the beginning of said lease until new hay was harvested and available for feed during each of the years of 1926 and 1927, and has failed to furnish to exceed one-half of the hay as provided in said lease for feeding the work stock as aforesaid during the two years covered by said lease and the renewal thereof.

"That by reason of the failure of the defendant to furnish the hay to feed said cows and work stock as aforesaid, plaintiff was compelled to and did furnish the hay to feed said cows from the beginning of the lease to the time when new hay upon said premises became available in each of the years 1926 and 1927 and plaintiff was compelled to and did furnish one-half of the hay for feeding the work stock as aforesaid for the entire time that said lease and the renewal thereof remained in force as aforesaid, to-wit, for the years 1926 and 1927."

neer, as untimely and insufficient. The court heard argument from both parties and ruled that the experts would be allowed to testify.

Following trial, the jury returned a verdict finding both parties at fault and attributing 90% of the negligence to Hansen and 10% of the negligence to Roberts. The trial court then entered a judgment awarding Roberts $3,399.14 in damages.

II. ISSUES ON APPEAL

1. Whether the trial court abused its discretion by allowing Roberts to introduce expert testimony from an accident reconstructionist and a biomechanical engineer.

2. Whether the trial court abused its discretion by ruling that Hansen waived the right to object at trial to the introduction of portions of Roberts's deposition.

3. Whether the trial court abused its discretion by partially granting Hansen's motion in limine to limit references to insurance during voir dire and trial.

III. STANDARD OF REVIEW

"When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard." *Edmunds v. Kraner*, 142 Idaho 867, 871, 136 P.3d 338, 342 (2006). "These include trial court decisions admitting or excluding expert witness testimony, and excluding evidence on the basis that it is more prejudicial than probative." *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 50-51, 995 P.2d 816, 820-21 (2000) (internal citation omitted). The scope of voir dire examinations is also within the discretion of the trial court. *State v. Bitz*, 93 Idaho 239, 244, 460 P.2d 374, 379 (1969). To determine whether a trial court has abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion consistent with applicable legal standards; and (3) reached its decision through the exercise of reason. *Chapman v. Chapman*, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009). Even where a trial court's evidentiary ruling is an abuse of its discretion, the rul-

He then alleged that the market value of the hay so furnished by him was the sum of $ 624, and that defendant had refused, after demand, to pay said damage.

For a second cause of action, he alleged that the defendant had purchased nine tons of hay from him at the agreed price of $ 13 per ton, no part of which had been paid, and the same was past due.

Defendant admitted the execution of the lease and denied generally the remaining allegations of the complaint. As a further defense, he plead that the parties had arrived at a complete settlement regarding the hay, about March 20, 1928, at which time he owed plaintiff $ 87.51, and that plaintiff had subsequently removed some seven tons of hay from the premises. He also filed a cross-complaint, consisting of five causes of action, only two of which are involved in this appeal. In the first of these he alleged that according to the terms of the lease he provided plaintiff with four head of good work horses. That during the month of July, 1927, plaintiff negligently permitted one of said horses to die, to his damage in the sum of $ 100. For his second cause of action in the cross-complaint, he alleged that under the terms of the lease plaintiff was obligated to feed and care for the milk cows in a prudent and farmer-like manner; that he failed to perform his duties in this respect, and negligently allowed the cows to get into a green alfalfa field, whereby two of them became bloated and died, plaintiff making no effort to save them. That the cows were of the reasonable value of $ 100 each, in which sum defendant was damaged. Plaintiff's demurrer to the cross-complaint was overruled.

At the close of defendant's case, the court sustained a motion for nonsuit as to these two causes of action, on the ground that no act of negligence or want of ordinary care was shown.

The jury returned a verdict for plaintiff in the sum of $ 559.90. Judgment for this amount was entered, from which said judgment, defendant has appealed.

In his first specification of error, appellant attacks the order of nonsuit, contending that respondent, as bailee of the animals, was, under the terms of the lease, liable for more than ordinary care. There is no

ing will not be disturbed on appeal unless the admission or exclusion of evidence affected a substantial right of the party. I.R.C.P. 61.

IV. ANALYSIS

A. The trial court did not abuse its discretion by allowing Roberts to introduce expert testimony from an accident reconstructionist and a biomechanical engineer.

Hansen challenges the trial court's admission of Roberts's expert testimony in three ways: (1) Roberts's pretrial expert disclosures were untimely and insufficient; (2) the testimony invaded the province of the jury; and (3) there was a lack of foundation to support the opinions because they were not scientifically reliable.

1. The trial court did not abuse its discretion by admitting expert testimony disclosed after the court's scheduling deadline.

Hansen claims that the trial court abused its discretion by allowing Roberts to introduce testimony from expert witnesses when Roberts violated the trial court's scheduling order and failed to make timely and sufficient pretrial disclosures pursuant to discovery requests.

In this case, the district court issued an order requiring disclosure of expert witnesses at least 90 days before trial (or by July 21, 2010) and that discovery should be completed 70 days before trial (or by August 9, 2010). However, the court included the following footnote with respect to these deadlines:

> The disclosure cut-off date, discovery completion date and motion dates are for the benefit of the Court in managing this case. They will be enforced at the Court's discretion. The disclosure date should not be relied on for discovery purposes. The disclosure, discovery and motion dates will not be modified by the Court without a hearing and assurance from parties that the modification will not necessitate continuance of the trial.

Therefore, the court recognized and established from the outset that enforcement of these deadlines was

foundation in the pleadings for such contention, as he did not plead the lease, either directly or by reference. His allegation that "the lease provided etc.," falls far short of pleading a contract upon which to found a special liability. It is settled that a cross-complaint must state a cause of action with the same degree of exactness as an original complaint, and its averments cannot be helped out by the allegations contained in the main pleadings. (*Denton v. Detweiler,* 48 Idaho 369, 282 P. 82; *Dunham v. McDonald,* 34 Cal. App. 744, 168 P. 1063.) Respondent was but a bailee for hire, and as such, was responsible only for reasonable care. The rule is settled in such case that when a *prima facie* case is made, the burden is on the bailee to account for the loss of the article; but when that is shown, the burden is then upon the bailor to establish negligence on the part of the bailee. (*Scott v. Columbia Compress Co.,* 157 Ark. 521, 249 S.W. 13.) It necessarily follows that if the bailor himself accounts for the loss, and charges it to the bailee's negligence, he has lifted the burden from the bailee's shoulders, and until negligence is proven, the bailee need not open his mouth. (*McCarthy v. Wolfe,* 40 Mo. 520. See, also, Story on Bailments, secs. 410 and 454; *James v. Orrell,* 68 Ark. 287, 82 Am. St. 293, 57 S.W. 931.)

The only evidence introduced on the issue of negligence in the first cause of action was that respondent failed to notify appellant that the horse was sick. No such duty being shown, the mere failure to notify appellant is manifestly insufficient to prove negligence, and the court properly granted the nonsuit.

The same thing is true as to the second cause of action. With the exception of some statements alleged to have been made by respondent that "they got out on him and bloated" and died from eating green alfalfa, the record is silent as to a negligent act of respondent.

Appellant next contends that the court erred in instructing the jury, as a matter of law, that respondent contracted to leave on the premises the same amount of hay originally delivered to him, conceded to be 59 tons, and that one-half of such amount belonged to each party. Also in instructing them that appellant did not supply 59 tons at the beginning of the second year of the lease as he contracted to do, but furnished

within its discretion and that these deadlines were put in place for the benefit of the court, not the parties.

Both parties present substantial argument in their briefs as to why their disclosures were timely and the other party's disclosures were untimely. Looking at the record, both parties produced somewhat untimely disclosures and discovery. Hansen argues that Roberts's disclosures were untimely and insufficient as to Scott Kimbrough, an accident reconstructionist, and John Droge, a biomechanical engineer. He points out that Roberts's responses to his Rule 26(b)(4) disclosure requests were submitted past the deadline the court set in its scheduling hearing and that Roberts did not disclose Droge until a few weeks before trial. Hansen is correct that some of Roberts's disclosures were made just weeks before trial began on October 19, 2010, but he ignores the fact that some of his own disclosures came just weeks before trial began. Roberts presented his entire case on October 19, 2010, and then the trial was delayed until December 15, 2010. Thus, Hansen had significantly more time to prepare for Roberts's experts than Roberts had to prepare for Hansen's experts.

Moreover, Hansen did not raise the issue of untimely disclosures until the second day of trial, which was almost two months after the trial began. When Hansen sought exclusion of the expert testimony based on untimely disclosures, he had actually been in possession of the disclosures for well over two months. Consequently, Hansen had significant time to prepare for Roberts's experts during the recess of trial. Because the trial court explicitly stated in its scheduling order that disclosure and discovery deadlines would be enforced at its discretion, both parties produced disclosures past this deadline, and Hansen had significant time to prepare for Roberts's experts, the trial court was within the bounds of its discretion when it ruled that Roberts's experts could testify.

2. Hansen did not preserve his objections to Kimbrough's testimony.

Hansen next argues that the court erred in allowing Kimbrough to testify because his testimony invaded the province of the jury. Hansen argues that Kimbrough invaded the province of the jury because he "did nothing beyond review the evidence that was

only one-half of that amount, and again giving respondent credit for 29 1/2 tons.

The dispute arises over the construction of the following clause:

". . . . Provided However, that if said lease should be determined at the end of one year, then the party of the second part is to leave as much hay on said premises for the use of the party of the first part as is delivered to him by the party of the first part for the purposes of feeding said milk cows, same to be divided equally."

Ambiguous as this clause may be, it definitely establishes the amount of hay to be left, namely, that "delivered for the purpose of feeding the milk cows," and not the amount originally delivered. Consequently, the court's instruction that the contract provided that "the plaintiff Glover is to leave as much hay on the premises for the use of the party of the first part as was delivered to him at the commencement of the lease, such hay to be divided equally," is erroneous, as is also his instruction: "The court as a matter of law construes this contract to mean, that at the end of the lease in 1926, the tenant Glover contracted to leave on the place the same amount of hay originally delivered to him in the fall of 1925, which it is conceded was 59 tons, and that one-half of such amount at the end of the term belonged to each party," and that "the defendant did not again supply the 59 tons of hay for the year 1927, as he contracted to do in the lease but only furnished 1/2 of that amount. That being true as a matter of law, under the terms of the lease plaintiff would be entitled to one-half of the 59 tons left on the place." Considering the fact that both the horses and cows were fed from the original 59 tons for a period of about six months, the difference will be considerable.

The difficulty arises in reconciling the statement that such hay is to be left for the use of appellant, with that requiring it to be divided equally. In construing an ambiguous contract, the object to be attained should be given prime consideration. (*In re City and County of San Francisco,* 191 Cal. 172, 215 P. 549.) That this contract was intended as a fifty-fifty deal cannot be doubted. The contract specifically provided that "the party of the second part shall yield and pay in consideration of the use of the premises,

presented to the jurors to reach his conclusions." Hansen also argues that Kimbrough invaded the province of the jury in the specific instance when he stated "that this accident was precipitated by a careless right-hand turn by [Hansen]." Roberts responds that Kimbrough did not invade the province of the jury because he provided information not known to the jury and not within the jury's common knowledge. Roberts further contends that Hansen waived his objections to Kimbrough's testimony because he failed to object to the questions asked during the testimony.

At the start of Kimbrough's testimony, Hansen asked the court if he could "make an objection to all of his testimony as to invading the province of the jury," but did not explain how Kimbrough's testimony invaded the province of the jury. The court noted Hansen's continuing objection and allowed Kimbrough to testify. Hansen did not object to individual questions asked on direct examination nor did he object to Kimbrough's opinion that Hansen's right hand turn had been careless.

For an objection to be preserved for appellate review, "either the specific ground for the objection must be clearly stated, or the basis of the objection must be apparent from the context." *Slack v. Kelleher*, 140 Idaho 916, 921, 104 P.3d 958, 963 (2004); I.R.E. 103(a)(1). For example, this Court has held that an objection that "no proper foundation has been laid," was not sufficiently specific because it failed to state "wherein the foundation for the opinion was insufficient." *Hobbs v. Union Pac. R.R. Co*., 62 Idaho 58, 74, 108 P.2d 841, 849 (1940). In *Hobbs*, the grounds for the objection were not stated with specificity, nor were the grounds apparent from the context of the testimony. It follows that a continuing objection made at the start of testimony would need to specifically state the grounds for the objection because there would be no context from which to determine the basis for the objection.

Hansen's broad, general objection that Kimbrough's testimony invaded the province of the jury is not a proper objection to preserve either of his challenges to Kimbrough's testimony under Idaho Rule of Evidence 702. Under I.R.E. 702, an expert witness may provide an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

etc., one-half of all crops raised, subject to the provisions hereinabove mentioned with reference to the hay." The exception as to the hay undoubtedly refers to the hay to be fed to the work stock, which appellant was to furnish. The purpose of the clause, then, must have been to provide a method of dividing the cost of feeding the cows during the entire term of the lease. Respondent had no hay to start with, or money to buy any, and appellant agreed to furnish it until new hay could be harvested, with the understanding that half of the amount so furnished would be returned to him. That is, the hay was to be divided before any was left for appellant's use.

Appellant testified to substantially such an agreement, as follows:

"Well, first I says how are we going to start out on the hay. I says I have got the hay here and it is going to be a fifty-fifty deal all the way through. You buy the hay and go on with it that way. He hadn't the money to buy the hay, and we agreed we would measure up the hay and when you go away you can leave me that much hay.

"Q. What did Mr. Glover say as to that?

"A. That was all satisfactory. That was all he could do he couldn't pay me for it."

By the court's instruction, respondent was given credit for 29 1/2 tons of hay for each of the years 1926 and 1927, whereas he should have been credited with only one-half of the hay fed to the milk cows from December 1st of each year till new hay was harvested the following year. Or, to put it another way, appellant was charged twice for part of the hay fed to the horses. He was charged for the full amount of hay, belonging to respondent, which was fed to the horses, and under this instruction, he was again charged for that portion of the 59 tons which the horses ate from December of each year until new hay was harvested the following year.

The judgment is reversed and the cause remanded, for the sole purpose of ascertaining the amount of hay fed to the cows during the periods indicated, which is to be equally divided. The difference between this amount and the amounts credited to respondent under the court's instruction, is to be de-

Therefore, after the court qualifies a witness as an expert, it "must determine whether such expert opinion testimony will assist the trier of fact in understanding the evidence." *State v. Pearce*, 146 Idaho 241, 246, 192 P.3d 1065, 1070 (2008). Pursuant to I.R.E. 704, an expert's testimony is not inadmissible merely because it embraces an ultimate issue to be decided in the case; however, "[e]xpert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible." *State v. Ellington*, 151 Idaho 53, 66, 253 P.3d 727, 740 (2011). Additionally, evidence is generally inadmissible under I.R.E. 702 if it vouches for the credibility of another witness. *State v. Perry*, 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003). Thus, there are a number of different reasons an attorney may object to evidence on I.R.E. 702 grounds and an objection that expert testimony invades the province of the jury, without more, is not sufficiently specific to preserve an objection to any of them.

Moreover, a broad continuing objection not based upon the proper standard or ground and made at the start of Kimbrough's testimony did not preserve an objection to Kimbrough's opinion that the accident was precipitated by Hansen's careless right-hand turn. Continuing objections are difficult for trial courts to properly police unless there has been a meaningful argument and specific ruling on the subject matter of the objection. Proper practice is to frame an objection as to the specific area that preserves it for appellate review and then request a continuing objection on that ground. If it is not clear to the trial court as to the specific area, the court should inquire further.

In this case, Hansen objected to all of Kimbrough's testimony as invading the province of the jury at the start of his testimony when Kimbrough had only explained his qualifications and what accident reconstruction generally entails. Hansen gave no explanation as to why Kimbrough's testimony was inadmissible nor was there any context from which to determine the basis for the objection. Therefore, we hold that Hansen's objections to Kimbrough's testimony were not preserved for consideration on appeal.

3. *The trial court did not abuse its discretion by overruling Hansen's objection to the admission of Droge's expert testimony as a biomechanical engineer.*

ducted from respondent's judgment. In all other particulars, the judgment is affirmed. Costs to be equally divided between the parties.

Givens, C. J., and Budge, Varian and McNaughton, JJ., concur.

Petition for rehearing denied.

Hansen argues that the trial court erred by allowing Droge to testify because Roberts failed to provide adequate foundation that Droge's testimony concerning biomechanical engineering was scientifically reliable. Roberts responds that Hansen failed to preserve his objections and even if he did preserve them, Droge's area of expertise is valid and scientifically reliable.

On appeal, Hansen provides substantial argument questioning the scientific reliability of biomechanical engineering. However, none of this argument was presented to the trial court. Rather, Hansen merely objected that insufficient foundation has been laid and stated that, "biomechanical engineering isn't considered a legitimate science." Following this objection, Roberts proceeded to lay more foundation for Droge's testimony including an explanation of what biomechanical engineering is and where Droge received his masters in biomechanical engineering. Hansen then asserted the same objection and declined to cross-examine Droge in aid of his objection.[1]

While Hansen may have preserved his objection to the foundation of Droge's testimony, he cannot now argue more grounds than were before the trial court. *See Slack*, 140 Idaho at 922, 104 P.3d at 964. Hansen merely stated that biomechanical engineering was not a legitimate science, but provided no factual or legal explanation to support this objection. After Hansen's first objection, Droge expounded upon the science of biomechanical engineering and his qualifications as an expert. "Whether or not a proper foundation has been laid for the admission of the evidence is a discretionary decision to be made by the trial court." *Id.* at 921, 104 P.3d at 963. Hansen provided nothing to contradict Droge's testimony and declined to cross-examine Droge in aid of his objection. If Hansen had presented any of the evidence or argument he now raises on appeal, we might have more of a question as to whether the trial court abused its discretion in admitting Droge's testimony. Indeed, the trial court may have made a different ruling. However, under the circumstances in this case we cannot find that the trial court abused its discretion by admitting Droge's testimony.

[1] This opinion is not commenting on whether properly objected to biomechanical engineering expert testimony is helpful to a jury. This opinion only addresses whether a proper objection was made in this case.

B. The trial court did not abuse its discretion by ruling that Hansen waived the right to object at trial to the introduction of portions of Roberts's deposition.

Hansen argues that he did not waive his objections to Roberts's deposition testimony and he has the right to object to this testimony at trial under Idaho Rule of Civil Procedure 32(b). He also asserts that Roberts introduced a substantial amount of inadmissible evidence that was harmful to his case. Roberts responds that Hansen waived his objections by not addressing them at the scheduled hearing.

After the first day of trial on October 20, 2010, Roberts received news that a matching liver had been found and he had to leave immediately for a transplant. The trial was continued until December 15, 2010. Because of his weakened immune system and inability to travel, his trial testimony was videotaped. Both parties made objections which were included on the video with the understanding that the court would rule on these objections before trial. Roberts filed a motion with his objections before trial and the court decided this motion would be addressed at the jury instruction conference that had already been set for December 8, 2010. Hansen did not file a motion with his objections and claims that Roberts told him he would be provided with a transcript of the deposition, but it was never provided. Hansen claims that Roberts only brought a partial transcript to the December 8 hearing and so he was unable to address his objections. Roberts responds that Hansen never requested a transcript and it was not Roberts's duty to raise Hansen's objections.

At trial on December 15, 2010, Hansen moved to raise his objections contained in Roberts's deposition testimony for the first time. The trial court concluded that Roberts had waived these objections by not presenting them at the December 8 hearing. The court stated that it had a hearing the week before trial to address the objections so that the video could be edited before trial. Hansen did not raise any objections at this hearing, nor did he state that he needed a transcript of the video.

	Idaho Rule of Civil Procedure 32(b) states, "Subject to the provisions of subdivision (d) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." The language of the rule provides that objections may be made "at the trial or hearing to receiving in evidence any deposition." In this case the court received the evidence of the video deposition at a hearing specifically set for objections, not trial. Hansen was free to raise any of his objections at this hearing, but failed to do so. Therefore, he waived his objections to portions of Roberts's video testimony. The trial court was within its discretion when it ruled that Hansen had waived any objections to the deposition testimony. **C. The trial court did not abuse its discretion by partially granting Roberts's motion in limine to limit references to insurance during voir dire and trial**. Hansen argues that the trial court abused its discretion by prohibiting Hansen from asking during voir dire whether a prospective juror or a prospective juror's family member was or had ever been employed by an insurance carrier. Roberts responds that Hansen did not preserve this argument for appeal because the only objection Hansen made to his motion in limine was that he wanted to be able to ask jurors about both their current occupations and that of their spouses. A review of the trial transcript indicates that Hansen never mentions wanting to ask if prospective jurors or their family members were or had ever been employed by an insurance carrier. His only objections related to the question of whether the jurors or their spouses worked for insurance companies. In response to this objection the court made sure that these questions were on the juror questionnaire and indicated that if jurors failed to fill out their employment or that of their spouses it would be remedied. Hansen failed to object to this decision and responded that he had nothing further on this issue. Generally Idaho's appellate courts will not consider an alleged error on appeal unless a timely objection to the alleged error was made at trial. *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010); I.R.E.

	103(a)(1). For an objection to be preserved for appellate review, "either the specific ground for the objection must be clearly stated, or the basis of the objection must be apparent from the context." *Slack*, 140 Idaho at 921, 104 P.3d at 963; I.R.E. 103(a)(1). The only exception to this rule is when plain error occurs as I.R.E. 103 does not "preclude taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." I.R.E. 103(d). The court's decision to grant Roberts's motion in limine excluding questioning on insurance except with regard to the occupation of a juror or the juror's spouse was not plain error. Therefore, this Court will not consider this issue on appeal. **D. Roberts is not entitled to attorney fees on appeal**. Roberts claims that he is entitled to attorney fees pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1) because Hansen's position is not supported by Idaho law and he does not argue or include any support for a change in Idaho law. Idaho Code section 12-121 provides in relevant part: In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. This Court only awards attorney fees under this statute when "an appeal was brought, pursued, or defended in a manner that was frivolous, unreasonable, or without foundation." *Clair v. Clair*, 153 Idaho 278, 291, 281 P.3d 115, 128 (2012). Because Hansen did not pursue this appeal frivolously, unreasonably, or without foundation, Roberts is not entitled to attorney fees on appeal. **V. CONCLUSION** We hold that the trial court did not abuse its discretion by admitting expert testimony over Hansen's objections. Nor did the trial court abuse its discretion by determining that Hansen waived his objections to Roberts's video testimony. Costs, but not attorney fees, are awarded to Roberts as the prevailing party.

	Justices EISMANN, J. JONES, W. JONES, and HORTON CONCUR.

Appendix D: Nava v. Rivas-Del Toro

Nava v. Rivas-Del Toro

Style Score = 73 (case intro materials highlighted)

Nava v. Rivas-Del Toro

Supreme Court of Idaho

November 30, 2011, Filed

Docket No. 37613, 2011 Opinion No. 124

Reporter
151 Idaho 853 *; 264 P.3d 960 **; 2011 Ida. LEXIS 159 ***

BEATRIZ NAVA, individually and as the next friend of SARAI N. VICTORINO, a minor child, Plaintiff-Appellant, v. CHRISTIAN R. RIVAS-DEL TORO, Defendant/Respondent/Cross-Appellant, and WILLARD CRANNEY, MICHAEL CRANNEY, and DOUGLAS CRANNEY, d.b.a CRANNEY FARMS, d/b/a CRANNEY BROTHERS FARMS, Defendants-Respondents-Cross-Respondents.

Subsequent History: Released for Publication December 22, 2011.
Later proceeding at Nava v. Rivas-Del Toro, 2011 Ida. LEXIS 195 (Idaho, Dec. 22, 2011)

Prior History: [***1] Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Cassia County. The Hon. Michael R. Crabtree, District Judge.

Disposition: The judgment of the district court is vacated.

Core Terms

Farms, summary judgment, driving, apparent authority, cause of action, route, truck, amended complaint, district court, permission, summary judgment motion, scope of employment, employer-employee, memorandum, tortious, damages, tire, reasonable likelihood, act or omission, drove, night, operation of a vehicle, time of the accident, current employee, motor vehicle, trial court, circumstances, deviation, opposing, Highway

Case Summary

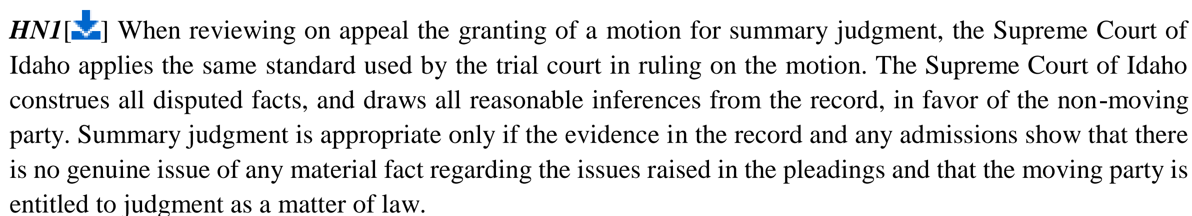
Procedural Posture
Plaintiff motorist filed suit against defendants, the driver and the owner of a truck, to recover for property damage and personal injuries. The truck owner moved for summary judgment pursuant to Idaho Code Ann. § 6-1607. The District Court of the Fifth Judicial District of the State of Idaho, in and for Cassia County, rendered a judgment dismissing the action against the truck owner. Plaintiff appealed and defendant driver cross-appealed.

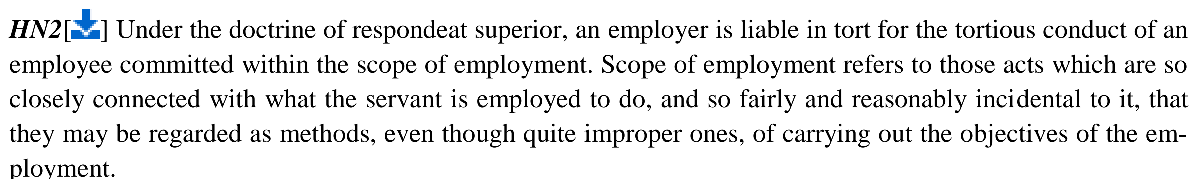
Overview
When plaintiff filed suit against defendants, the driver and the owner of a truck, to recover for property damage and personal injuries after an accident, plaintiff did not allege that the truck owner was liable in tort based upon

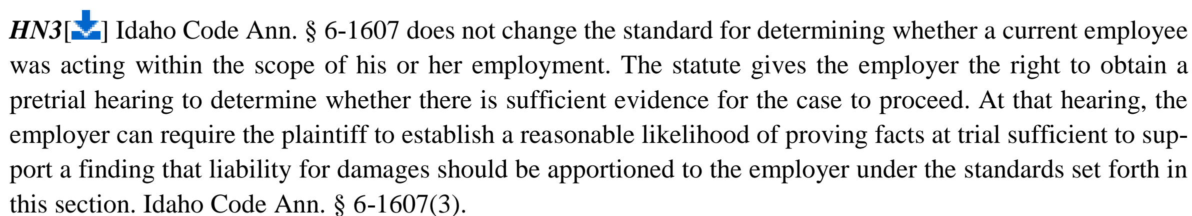
an employer-employee relationship. Absent that allegation, the amended complaint did not allege a cause of action under the doctrine of respondeat superior; therefore, the district court erred by dismissing the truck owner from the action under Idaho Code Ann. § 6-1607(2). In its motion for summary judgment, the truck owner made no mention of plaintiff's claim that the owner was liable for knowingly permitting a dangerous vehicle to be operated on the roadway; therefore, the district court erred in granting summary judgment on that claim.

Outcome
The partial judgment was vacated, and the case was remanded to the district court for further proceedings.

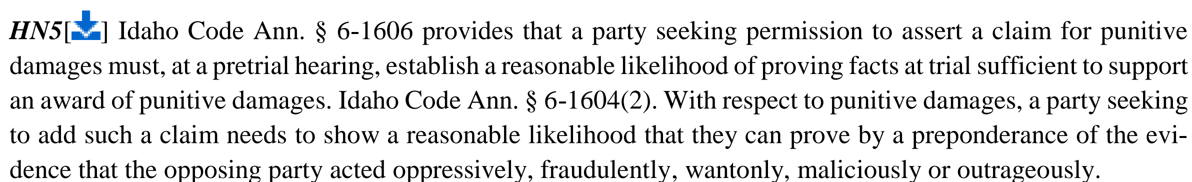
LexisNexis® Headnotes

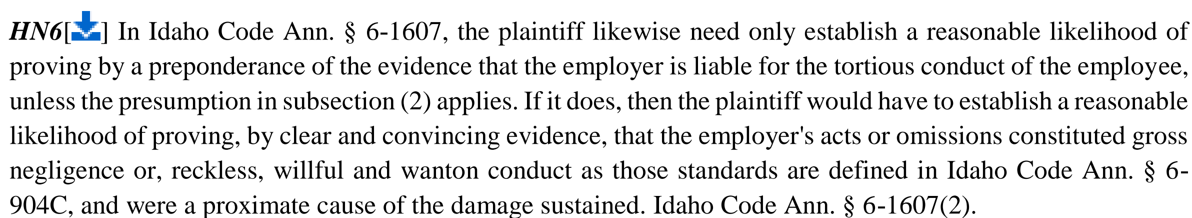

HN1[] When reviewing on appeal the granting of a motion for summary judgment, the Supreme Court of Idaho applies the same standard used by the trial court in ruling on the motion. The Supreme Court of Idaho construes all disputed facts, and draws all reasonable inferences from the record, in favor of the non-moving party. Summary judgment is appropriate only if the evidence in the record and any admissions show that there is no genuine issue of any material fact regarding the issues raised in the pleadings and that the moving party is entitled to judgment as a matter of law.

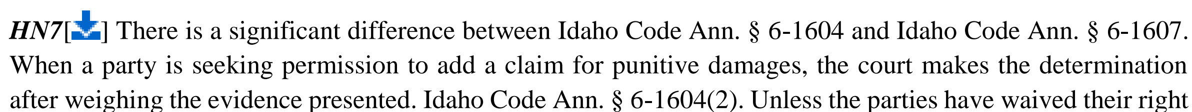

HN2[] Under the doctrine of respondeat superior, an employer is liable in tort for the tortious conduct of an employee committed within the scope of employment. Scope of employment refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.


HN3[] Idaho Code Ann. § 6-1607 does not change the standard for determining whether a current employee was acting within the scope of his or her employment. The statute gives the employer the right to obtain a pretrial hearing to determine whether there is sufficient evidence for the case to proceed. At that hearing, the employer can require the plaintiff to establish a reasonable likelihood of proving facts at trial sufficient to support a finding that liability for damages should be apportioned to the employer under the standards set forth in this section. Idaho Code Ann. § 6-1607(3).

HN4[] See Idaho Code Ann. § 6-1607(3).


HN5[] Idaho Code Ann. § 6-1606 provides that a party seeking permission to assert a claim for punitive damages must, at a pretrial hearing, establish a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Idaho Code Ann. § 6-1604(2). With respect to punitive damages, a party seeking to add such a claim needs to show a reasonable likelihood that they can prove by a preponderance of the evidence that the opposing party acted oppressively, fraudulently, wantonly, maliciously or outrageously.


HN6[] In Idaho Code Ann. § 6-1607, the plaintiff likewise need only establish a reasonable likelihood of proving by a preponderance of the evidence that the employer is liable for the tortious conduct of the employee, unless the presumption in subsection (2) applies. If it does, then the plaintiff would have to establish a reasonable likelihood of proving, by clear and convincing evidence, that the employer's acts or omissions constituted gross negligence or, reckless, willful and wanton conduct as those standards are defined in Idaho Code Ann. § 6-904C, and were a proximate cause of the damage sustained. Idaho Code Ann. § 6-1607(2).


HN7[] There is a significant difference between Idaho Code Ann. § 6-1604 and Idaho Code Ann. § 6-1607. When a party is seeking permission to add a claim for punitive damages, the court makes the determination after weighing the evidence presented. Idaho Code Ann. § 6-1604(2). Unless the parties have waived their right

to a jury trial, the trial court is not permitted to weigh the evidence in determining whether the claim can proceed against any employer under Idaho Code Ann. § 6-1607. There is no such provision in that statute. Indeed, allowing the court to re-weigh the evidence would infringe upon the parties' right to a jury trial under Idaho Const. art. I, § 7.

HN8[] Idaho Code Ann. § 6-1607(2) creates a presumption of nonliability on the part of the employer where the action in tort is based upon an employer-employee relationship for any act or omission of a current employee. It then specifies four circumstances in which that presumption does not apply.

HN9[] See Idaho Code Ann. § 6-1607(2).

HN10[] The presumption created by Idaho Code Ann. § 6-1607(2) does not apply where the employee was wholly or partially engaged in the employer's business. Under the "dual-purpose" doctrine, an employee's tortious conduct may be within the scope of employment even if it was partly performed to serve the purposes of the employee or a third person. An employee's purpose or intent, however misguided in its means, must be to further the employer's business interests. If the employee acts from purely personal motives in no way connected with the employer's interest, then the master is not liable. Thus, in order for the employer to be liable, service to the employer need not have been the employee's only or even primary purpose.

HN11[] The better reasoned authorities dealing with deviations by an employee from the geodesic route have generally recognized that a proportionately slight or expectable deviation will not relieve an employer of vicarious liability, and except where the deviation is gross, the jury should determine the scope of employment question as one of fact. An employee who is driving from one place to another in performing his or her duties is not outside the scope of employment merely because the employee does not drive the most direct route, even if the deviation from the most direct route is for personal reasons. The employer's liability does not terminate until there has been a marked departure or deviation from the employee's line of duty.

HN12[] The presumption created by Idaho Code Ann. § 6-1607(2) does not apply if the employee reasonably appeared to be engaged in the employer's business. The presumption in Idaho Code Ann. § 6-1607(2) can only apply when an employer is alleged to be liable in tort based upon an employer/employee relationship for any act or omission of a current employee. Apparent authority is not based upon the employer-employee relationship, nor does it create an employer-employee relationship. Apparent authority does not presuppose any prior or existing agency relationship; it can be applied to someone who appears to be the agent of another but actually is not. In addition, the wording of the exception itself does not indicate that it is referring to apparent authority. The issue in apparent authority is not whether it reasonably appeared to the plaintiff that the tortfeasor was acting within the course or scope of his or her employment, but whether the plaintiff reasonably believed, based upon the principal's conduct, that the tortfeasor had authority to act on the principal's behalf.

HN13[] Under Idaho law, justifiable reliance is not required in order to establish apparent authority. "Apparent authority" can also be called "apparent agency," "agency by estoppel," "ostensible agency" and "agency by operation of law."

HN14[] The presumption created by Idaho Code Ann. § 6-1607(2) does not apply if the employee reasonably appeared to be engaged in the employer's business. Whether or not it reasonably appeared that the employee was engaged in the employer's business must be determined from all of the facts shown in the record. If the employee reasonably appeared to be so engaged, then it is for the trier of fact to determine, based upon the evidence presented at trial, whether the employee was actually engaged in the scope of his or her employment. In determining whether it reasonably appears that an employee was engaged in the employer's business, the trial court should keep in mind the statement approved by the Supreme Court of Idaho: If the automobile causing the accident belongs to the defendant, and is being operated at the time of the accident by one in the general

employ of the defendant, there is a reasonable presumption that at such time he was acting within the scope of his employment and in furtherance of his master's business. That is not to say that there would still be a presumption in such a case, but such facts, standing alone, could certainly create a reasonable inference.

HN15[] The presumption created by Idaho Code Ann. § 6-1607(2) does not apply if the employee was on the employer's premises when the allegedly tortious act or omission of the employee occurred. The fact that the tortious act occurred on the employer's premises merely makes the presumption inapplicable. It does not establish that the conduct was within the scope of employment.

HN16[] The presumption created by Idaho Code Ann. § 6-1607(2) does not apply if the employee was otherwise under the direction or control of the employer when the act or omission occurred. Because this is prefaced with the word "otherwise," this category refers to circumstances, not included in the first three categories, if the employee is under the direction or control of the employer.

HN17[] The four circumstances in which the presumption of nonliability created by Idaho Code Ann. § 6-1607(2) does not apply are stated in the disjunctive. Therefore, if one of the circumstances exists, the presumption does not apply. It is not necessary to find that all of the circumstances exist.

HN18[] Idaho Code Ann. § 6-1607(2) applies in an action against an employer based upon a claim in tort based upon an employer/employee relationship for any act or omission of a current employee.

HN19[] The only issues considered on summary judgment are those raised by the pleadings. A cause of action not raised in the pleadings may not be raised on appeal, even if the trial court considered the issue.

HN20[] Under the doctrine of respondeat superior, an employer is liable in tort for the tortious conduct of an employee committed within the scope of employment.

HN21[] With respect to Idaho Code Ann. § 49-2417(1), under Idaho law, the owner of a motor vehicle is liable when any person using or operating the vehicle with the permission, expressed or implied, of the owner operates that vehicle negligently. A cause of action under Idaho Code Ann. § 49-2417(1) is not based upon an employer-employee relationship. It is based upon the owner of a vehicle expressly or impliedly giving another permission to operate the vehicle. It is not limited to an employee who is driving his or her employer's vehicle. The statute specifically states that it applies if the permissive user was operating the motor vehicle in the business of the owner or otherwise. Idaho Code Ann. § 49-2417(1).

HN22[] See Idaho Code Ann. § 49-2417(1).

HN23[] When filing a motion for summary judgment, the moving party must notify the opposing party of the particular grounds for the motion. The motion must state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought. Idaho R. Civ. P. 7(b)(1). Typically, parties moving for summary judgment merely state the relief or order sought in the motion, and then state with particularity the grounds for the motion in a supporting memorandum. If a ground for summary judgment is not stated with particularity in the moving papers, the opposing party need not address that ground.

HN24[] For purposes of summary judgment, the moving party bears the initial burden of proving the absence of material fact issues. Only then does the burden shift to the non-moving party to come forward with sufficient evidence to create a genuine issue of material fact.

Counsel: Wm. Breck Seiniger, Jr.; Seiniger Law Offices; Boise, argued for appellants.

John Bailey, Racine Olson Nye Budge & Bailey Chtd., Pocatello, argued for respondents Cranney.

Brendon C. Taylor, Merrill & Merrill Chartered, Pocatello, argued for respondent Rivas-Del Toro.

Judges: EISMANN, Justice. Chief Justice BURDICK, Justices J. JONES, W. JONES, and HORTON CON-CUR.

Opinion by: EISMANN

Opinion

EISMANN, Justice.

This personal injury action arising out of a traffic accident was dismissed against the owners of the truck driven by the person who was allegedly at fault on the ground that he was an employee of the owners and was outside the course and scope of his employment. Because that is not a defense to the claims alleged in the complaint, we vacate the judgment of the district court.

I.

Factual Background[1]

Christian Rivas-Del Toro is a Mexican citizen who was residing and working in the United States illegally. In the summer 2005, he began working as a truck driver for Willard, Michael, and Douglas Cranney, who are collectively called "Cranney Farms," the name under which they did business. When he began work for Cranney Farms, Rivas-Del Toro had a valid Mexican chauffeur license.

On January 30, 2006, Rivas-Del Toro was driving for Cranney Farms and received a citation at a weigh station for failing to stop at an open port of entry and driving a vehicle that was over length for that section of highway. Rivas-Del Toro showed his Mexican license to the officer, who stated that Rivas-Del Toro had three months within which to obtain an Idaho license and warned him that it would be worse if the officer stopped him again. Rivas-Del Toro gave the ticket to the secretary in Cranney Farms's office, and Cranney Farms apparently paid it.

Ryan Cranney was Rivas-Del Toro's supervisor and Raymond Sanchez was the foreman. On June 15, 2007, during the lunch hour, Ryan Cranney and Raymond Sanchez came to the shop where Rivas-Del Toro was eating lunch. With Sanchez interpreting, Cranney told Rivas-Del Toro to drive a truck with a trailer to a particular farm to load bales of hay.

Rivas-Del Toro checked the truck and the trailer, and determined that he needed to fill the truck with diesel fuel and to have two tires on the trailer repaired. He went to the office to talk to the secretary, and had someone in the office interpret for him. Through the interpreter, he asked the secretary if she could call the tire shop to authorize fixing the tires, and she said it was fine and to go ahead. That procedure to authorize tire repairs had been used in the past.

After filling the truck with diesel, Rivas-Del Toro drove towards the tire store. The most direct route would have been to use State Highway 27. Because the speedometer on the truck was not accurate and he wanted to avoid problems with the police, Rivas-Del Toro took an alternate route. The distance would have been 15.1

[1] There is evidence supporting the facts stated, although some of them are disputed by Cranney Farms.

miles using Highway 27, and 17.9 miles using the alternate route. After traveling about 4.6 miles, Rivas-Del Toro failed to stop at a stop sign and struck another vehicle in an intersection. He contended that the trailer brakes malfunctioned.

Beatriz Nava was driving the other vehicle, and her minor daughter was a passenger. She filed this action seeking to recover for property damage and personal injuries to herself and her daughter. In her amended complaint, she alleged that Cranney Farms was liable because it was the registered owner of the truck and Rivas-Del Toro was driving with Cranney Farms's permission and that Cranney Farms had recklessly allowed the vehicle to become unsafe to operate.

Cranney Farms moved for summary judgment on the ground that pursuant to Idaho Code section 6-1607 it was not liable for the negligence of its employee because he was outside the course and scope of his employment at the time of the accident. After the motion was briefed and argued, the district court held that because Rivas-Del Toro chose a longer route to the tire store in order to avoid law enforcement because he was in the country illegally, Plaintiffs failed to satisfy Idaho Code section 6-1607(2). It ordered that Cranney Farms was entitled to a judgment dismissing the action as to it. Plaintiffs and Rivas-Del Toro moved for reconsideration, which the court denied. It entered judgment dismissing the action with prejudice as to Cranney Farms, and it certified that judgment as final pursuant to Idaho Rule of Civil Procedure 54(b). Plaintiffs appealed and Rivas-Del Toro cross-appealed.

II.

Standard of Review for Summary Judgment

HN1[] When reviewing on appeal the granting of a motion for summary judgment, we apply the same standard used by the trial court in ruling on the motion. *Infanger v. City of Salmon*, 137 Idaho 45, 46-47, 44 P.3d 1100, 1101-02 (2002). We construe all disputed facts, and draw all reasonable inferences from the record, in favor of the non-moving party. *Id*. at 47, 44 P.3d at 1102. Summary judgment is appropriate only if the evidence in the record and any admissions show that there is no genuine issue of any material fact regarding the issues raised in the pleadings and that the moving party is entitled to judgment as a matter of law. *Id*.

III.

Respondeat Superior Liability and Idaho Code Section 6-1607.

HN2[] Under the doctrine of respondeat superior, "an employer is liable in tort for the tortious conduct of an employee committed within the scope of employment." *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007). Scope of employment "refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." *Richard J. and Esther E. Wooley Trust v. DeBest Plumbing, Inc*., 133 Idaho 180, 183-84, 983 P.2d 834, 837-38 (1999) (quoting W. Page Keeton et al., Prosser And Keeton On Torts § 70, at 502 (5th ed. 1984)).

HN3[] Idaho Code section 6-1607 does not change the standard for determining whether a current employee was acting within the scope of his or her employment. The statute gives the employer the right to obtain a pretrial hearing to determine whether there is sufficient evidence for the case to proceed. At that hearing, the employer can require the plaintiff to "establish a reasonable likelihood of proving facts at trial sufficient to

support a finding that liability for damages should be apportioned to the employer under the standards set forth in this section." I.C. § 6-1607(3).[2]

We have construed a similar requirement in ***HN5***[] Idaho Code section 6-1606, which provides that a party seeking permission to assert a claim for punitive damages must, at a pretrial hearing, establish "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." I.C. § 6-1604(2). With respect to punitive damages, we have held that a party seeking to add such a claim "needed to show a reasonable likelihood that they could prove by a preponderance of the evidence that [the opposing party] acted oppressively, fraudulently, wantonly, maliciously or outrageously." *Vaught v. Dairyland Ins. Co*., 131 Idaho 357, 362, 956 P.2d 674, 679 (1998). ***HN6***[] In section 6-1607, the plaintiff likewise need only establish a reasonable likelihood of proving by a preponderance of the evidence that the employer is liable for the tortious conduct of the employee, unless the presumption in subsection (2) applies. If it does, then the plaintiff would have to establish a reasonable likelihood of proving, by clear and convincing evidence, that the "employer's acts or omissions constituted gross negligence or, reckless, willful and wanton conduct as those standards are defined in section 6-904C, Idaho Code, and were a proximate cause of the damage sustained." I.C. § 6-1607(2).

However, ***HN7***[] there is a significant difference between section 6-1604 and section 6-1607. When a party is seeking permission to add a claim for punitive damages, the court makes the determination "after weighing the evidence presented." I.C. § 6-1604(2). Unless the parties have waived their right to a jury trial, the trial court is not permitted to weigh the evidence in determining whether the claim can proceed against any employer under section 6-1607. There is no such provision in that statute. Indeed, allowing the court to re-weigh the evidence would infringe upon the parties' right to a jury trial under Article I, sec. 7, of the Idaho Constitution. *See Kirkland v. Blaine County Med. Ctr*., 134 Idaho 464, 469, 4 P.3d 1115, 1120 (2000); *Anderson v. Gailey*, 97 Idaho 813, 821, 555 P.2d 144, 152 (1976); *Van Vranken v. Fence-Craft*, 91 Idaho 742, 745, 430 P.2d 488, 491 (1967).

HN8[] Subsection (2) of the statute creates a presumption of nonliability on the part of the employer where the action in tort is based upon an employer-employee relationship for any act or omission of a current employee. It then specifies four circumstances in which that presumption does not apply.[3]

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[2] ***HN4***[] Idaho Code section 6-1607(3):

> In every civil action to which this section applies, an employer shall have the right (pursuant to pretrial motion and after opportunity for discovery) to a hearing before the court in which the person asserting a claim against an employer must establish a reasonable likelihood of proving facts at trial sufficient to support a finding that liability for damages should be apportioned to the employer under the standards set forth in this section. If the court finds that this standard is not met, the [***7] claim against the employer shall be dismissed and the employer shall not be included on a special verdict form.

[3] ***HN9***[] Idaho Code section 6-1607(2) provides:

> There shall be a presumption that an employer is not liable in tort based upon an employer/employee relationship for any act or omission of a current employee unless the employee was wholly or partially engaged in the employer's business, reasonably appeared to be engaged in the employer's business, was on the employer's premises when the allegedly tortious act or omission of the employee occurred, or was otherwise under the direction or control of the employer when the act or omission occurred. This presumption may be rebutted only by clear and convincing evidence that the employer's acts or omissions constituted gross negligence or, reckless, willful and wanton conduct as those standards are defined in section 6-904C, Idaho Code, and were a proximate cause of the damage sustained.

First, ***HN10***[] the presumption created by subsection (2) does not apply where "the employee was wholly or partially engaged in the employer's business." I.C. § 6-1607(2). "[U]nder the 'dual-purpose' doctrine, . . . an employee's tortious conduct may be within the scope of employment even if it was partly performed to serve the purposes of the employee or a third person." 27 Am. Jur. 2d *Employment Relationship* § 385 (2004). "'An employee's purpose or intent, however misguided in its means, must be to further the employer's business interests. If the employee acts from "*purely personal motives . . . in no way connected with the employer's interest*". . . then the master is not liable.'" *Wooley Trust*, 133 Idaho at 184, 983 P.2d at 838 (quoting *Podolon v. Idaho Legal Aid Services, Inc*., 123 Idaho 937, 945, 854 P.2d 280, 288 (Ct. App. 1993)) (emphasis added). "Thus, in order for the employer to be liable, service to the employer need not have been the employee's only or even primary purpose." 27 Am. Jur. 2d *Employment Relationship* § 385 (2004) (footnote omitted). Two Idaho cases illustrate an employer being liable where an employee was at least partly engaged in the employer's business.

In *Manion v. Waybright*, 59 Idaho 643, 86 P.2d 181 (1938), the employee had permitted a friend to ride with him when the employee drove from Coeur d'Alene to Kellogg on a business trip so that the friend could look for work in Kellogg. The employee had to be in Spokane, Washington, the next morning as part of his employment. That night, the employee began the return trip with his friend as a passenger. Had the employee been alone, he would have driven to his home in Coeur d'Alene to spend the night. However, he decided to drive to Spokane in order to take his friend to his home and to then spend the night in Spokane. Between Coeur d'Alene and Spokane, the employee ran off the road, killing his friend. Even though "[the employee's] main purpose in going to Spokane that night was to take [his friend] home," *Id*. at 651, 86 P.2d at 184, this Court held that the employee was in the scope of his employment when doing so. "Whether he went that night or the next morning was for him to decide and his going when he did was neither departure from, nor inconsistent with, the duties of his employment." *Id*. at 657, 86 P.2d at 187.

In *Van Vranken v. Fence-Craft*, 91 Idaho 742, 430 P.2d 488 (1967), a mill manager would regularly drive from Weippe to Lewiston to obtain parts for the mill. On the day in question, he drove to Lewiston to obtain some parts and to take his wife to the dentist to have some of her teeth extracted. He purchased some parts and then took his wife to the dentist. After the extractions, he drove her to a friend's house to spend the night. He then drove to the drug store to pick up his wife's prescription for a pain killing medication and walked to another store to see if some parts he needed were in stock, but they were not. He drove onto the highway headed back to Weippe, but made a left turn onto a cross street in order to take his wife her medication before returning to Weippe. When doing so, he collided with another vehicle. At the conclusion of the plaintiff's case, the trial court granted a motion to dismiss on the ground that there was insufficient evidence to show that the mill manager was within the scope of his employment at the time of the collision. This Court reversed, holding, ***HN11***[] "the better reasoned authorities dealing with deviations by an employee from the geodesic route have generaly [sic] recognized that a proportionately slight or expectable deviation will not relieve an employer of vicarious liability, and except where the deviation is gross, the jury should determine the scope of employment question as one of fact." *Id*. at 749, 430 P.2d at 495. According to the dissent, "[the mill manager] admitted that the real purpose of the trip to Lewiston was to have his wife's teeth extracted, and as an 'incidental part' he was also going to see about some belts and teeth for the saw-edger." *Id*. at 750, 430 P.2d at 496 (Spear, J., dissenting). The dissent also wrote, "That at the time of the accident [the mill manager] was on a mission completely personal to himself, i.e., the delivery of pain-killing medicants to his wife at the home of the friends in North Lewiston, completely divergent from any route to Weippe, Idaho, the location of the Fence-Craft plant." *Id*. That is an accurate summary of the facts stated in the majority opinion. An employee who is driving from one place to another in performing his or her duties is not outside the scope of employment merely because the employee does not drive the most direct route, even if the deviation from the most direct route is for personal reasons. "The employer's liability does not terminate until there has been a marked departure or deviation from the employee's line of duty." 8 Am. Jur. 2d *Automobiles* § 671 (2007).

Second, ***HN12***[] the presumption created by subsection (2) does not apply if the employee "reasonably appeared to be engaged in the employer's business." I.C. § 6-1607(2). The district court incorrectly held that "[t]his exception is the apparent authority or detrimental reliance exception."[4] The presumption in section 6-1607(2) can only apply when an employer is alleged to be liable "in tort based upon an employer/employee relationship for any act or omission of a current employee." *Id*. Apparent authority is not based upon the employer-employee relationship, nor does it create an employer-employee relationship. *Jones v. HealthSouth Treasure Valley Hosp*., 147 Idaho 109, 206 P.3d 473 (2009) (under doctrine of apparent authority, the tort liability of an independent contractor can be imputed to the principal); *Bailey v. Ness*, 109 Idaho 495, 708 P.2d 900 (1985) (under doctrine of apparent authority, the tort liability of another can be imputed to the principal where the other had no contractual relationship of any kind with the principal). Apparent authority does not presuppose any prior or existing agency relationship; it can be applied to someone who appears to be the agent of another but actually is not. *Jones*, 147 Idaho at 113, 206 P.3d at 477. In addition, the wording of the exception itself does not indicate that it was referring to apparent authority. The issue in apparent authority is not whether it reasonably appeared to the plaintiff that the tortfeasor was acting within the course or scope of his or her employment, but whether the plaintiff reasonably believed, based upon the principal's conduct, that the tortfeasor had authority to act on the principal's behalf. *Id*. at 114, 206 P.3d at 478.

This provision should be construed according to its plain language. ***HN14***[] The presumption created by subsection (2) does not apply if the employee "reasonably appeared to be engaged in the employer's business." I.C. § 6-1607(2). Whether or not it reasonably appeared that the employee was engaged in the employer's business must be determined from all of the facts shown in the record. If the employee reasonably appeared to be so engaged, then it is for the trier of fact to determine, based upon the evidence presented at trial, whether the employee was actually engaged in the scope of his or her employment. In determining whether it reasonably appears that an employee was engaged in the employer's business, the trial court should keep in mind the statement approved by this Court in *Manion v. Waybright*, 59 Idaho 643, 656, 86 P.2d 181, 186 (1938):

> [I]f the automobile causing the accident belongs to the defendant, and is being operated at the time of the accident by one in the general employ of the defendant, there is a reasonable presumption that at such time he was acting within the scope of his employment and in furtherance of his master's business

That is not to say that there would still be a presumption in such a case, but such facts, standing alone, could certainly create a reasonable inference.

Third,***HN15***[] the presumption created by subsection (2) does not apply if the employee "was on the employer's premises when the allegedly tortious act or omission of the employee occurred." *Id*. The fact that the tortious act occurred on the employer's premises merely makes the presumption inapplicable. It does not establish that the conduct was within the scope of employment. For example, in *Scrivner v. Boise Payette Lumber Co*., 46 Idaho 334, 268 P. 19 (1928), an employee who was employed as a watchman in a town owned by the employer shot and killed a man at a dance hall with a pistol provided by the employer. As this Court stated, "The fact that [the employee] was engaged in his general line of duty in going about the premises as a watchman,

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[4] The district court's language and analysis indicates that it equated "apparent authority" and "detrimental reliance" as being the same. It referred to them as being one exception, and it held that the exception did not apply because "[t]here are no facts to indicate a dispute regarding whether or not Ms. Nava relied in any sense upon the appearance that Rivas-Del Toro was engaged in the Cranneys' business." ***HN13***[] Under Idaho law, justifiable reliance is not required in order to establish apparent authority. *Jones v. HealthSouth Treasure Valley Hosp*., 147 Idaho 109, 117, 206 P.3d 473, 481 (2009). "Apparent authority" can also be called "apparent agency," *id*. at 113, 206 P.3d at 477, "agency by estoppel," "ostensible agency" and "agency by operation of law." Black's [***16] Law Dictionary 62 (7th ed. 1999).

and even as such carrying the pistol, does not of itself serve to render the [employer] liable for his act in drawing and pointing it at deceased, if that were done as a joke." *Id*. at 343, 268 P. at 21.

Fourth, ***HN16***[] the presumption created by subsection (2) does not apply if the employee "was otherwise under the direction or control of the employer when the act or omission occurred." I.C. § 6-1607(2). Because this is prefaced with the word "otherwise," this category refers to circumstances, not included in the first three categories, if the employee is under the direction or control of the employer.

Finally,***HN17***[] the four circumstances in which the presumption of nonliability does not apply are stated in the disjunctive. Therefore, if one of the circumstances exists, the presumption does not apply. It is not necessary to find that all of the circumstances exist.

IV.

The District Court Erred Applying Idaho Code Section 6-1607(2) to the Causes of Action Alleged in this Case.

HN18[] Idaho Code section 6-1607(2) applies in an action against an employer based upon a claim "in tort based upon an employer/employee relationship for any act or omission of a current employee." I.C. § 6-1607(2). We need not address the district court's erroneous analysis of the scope of employment because it erred in even applying section 6-1607(2) to the causes of action alleged in this case.

HN19[] "'[T]he only issues considered on summary judgment are those raised by the pleadings.' A cause of action not raised in the pleadings may not be raised on appeal, even if the trial court considered the issue." *Nelson v. Big Lost River Irrigation Dist*., 148 Idaho 157, 160, 219 P.3d 804, 807 (2009) (quoting *Vanvooren v. Astin*, 141 Idaho 440, 444, 111 P.3d 125, 129 (2005)) (citation omitted).

The amended complaint in this case does not allege a tort claim based upon the employer-employee relationship. The language alleging causes of action is as follows:

> 8. On or about June 15, 2007, Beatriz Nava and her minor child Sarai Victorino were occupants of a vehicle being operated with due care and in compliance with all state and local laws in the vicinity of 1000 South Road and 400 West Road.
> 9. At the same time Christian R. Rivas-Del Toro was operating a vehicle own by Willard Cranney, Michael Cranney, and Douglas Cranney d.b.a. Cranney Farms, d.b.a. Cranney Brothers Farms with their permission at the same location in a careless and negligent manner and in violation of Idaho law. As a direct and proximate result of the negligence of the Defendnants [sic] there and then collided with great force and violence with the vehicle occupied by Beatriz Nava and and [sic] her minor child Sarai Victorino.
>
> 10. Defendants Willard Cranney, Michael Cranney, and Douglas Cranney d.b.a. Cranney Farms, d.b.a. Cranney Brothers Farms were the registered owners of the vehicle being operated by Defendant Christian R. Rivas-Del Toro.
> 11. Upon information and belief: the vehicle being driven by Defendant Christian R. Rivas-Del Toro was recklessly allowed to fall into a state of dangerous disrepair such that it was not safe for operation upon the roads and highways of the State of Idaho.
> 12. Notwithstanding the Defendants' knowledge of the dangerous state of disrepair of the vehicle owned by Cranney Brothers Farms, the Defendants recklessly, willfully and wantonly did operate the vehicle with indifference to the safety of the Plaintiffs.

HN20[] Under the doctrine of respondeat superior, "an employer is liable in tort for the tortious conduct of an employee committed within the scope of employment." *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007). There is no allegation in the amended complaint that Rivas-Del Toro was an employee of Cranney

Farms. There is no allegation that Cranney Farms is liable in tort based upon any employer-employee relationship. Absent that allegation, the amended complaint does not allege a cause of action under the doctrine of respondeat superior.

The amended complaint alleged two causes of action. First, it alleged that Rivas-Del Toro was driving a motor vehicle owned by Cranney Farms with its permission and that he negligently caused the accident. That alleges a cause of action under Idaho Code section 49-2417(1).[5] As we recently said ***HN21***[] with respect to that statute, "Under Idaho law, the owner of a motor vehicle is liable when any person using or operating the vehicle 'with the permission, expressed or implied, of the owner' operates that vehicle negligently." *Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho*, 148 Idaho 47, 52, 218 P.3d 391, 396 (2009). A cause of action under Idaho Code section 49-2417(1) is not based upon an employer-employee relationship. It is based upon the owner of a vehicle expressly or impliedly giving another permission to operate the vehicle. It is not limited to an employee who is driving his or her employer's vehicle. The statute specifically states that it applies if the permissive user was operating the motor vehicle "in the business of the owner or otherwise." I.C. § 49-2417(1).

Second, the amended complaint alleged that Cranney Farms knowingly permitted a vehicle in a dangerous condition to be operated on the public roadway. The allegation is broad enough to include not only an allegation of common-law negligence, but also negligence per se for violating Idaho Code section 49-902. There was no allegation that Cranney Farms's liability under this cause of action was based upon an employer-employee relationship.

Because neither of the causes of action alleged in the amended complaint was a tort claim based upon the employer-employee relationship, Idaho Code section 6-1607(2) had no application to this case. Therefore, the district court erred in applying the statute to this case.

V.

The District Court Erred in Dismissing a Claim Upon Which Cranney Farms Had Not Moved for Summary Judgment.

Cranney Farms moved for summary judgment and filed a memorandum setting forth the basis of the motion. The memorandum commenced by stating the issue as follows: "The present motion arises from the fact that Defendant Rivas-Del Toro (hereafter Del Toro) was not acting within the course and scope of his employment under Idaho statutory and common law at the time of the accident, and therefore, Cranney Farms is not vicariously responsible for Del Toro's actions." Cranney Farms then stated facts and presented argument supporting its assertion that Rivas-Del Toro was not acting within the scope of his employment at the time of the accident. It summarized its argument as follows:

> Del Toro made some terrible choices on the day of the collision. He chose not to follow his employer's instructions and did not follow the alleged instructions he claims were given to him. He chose to take a route to the tire store that was not the direct route. He chose to go the longer way for the purely personal reason of doing his best to avoid detection by the police or any other law enforcement including INS. None

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[5] ***HN22***[] Idaho Code section 49-2417(1) states:

> Every owner of a motor vehicle [***22] is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of his motor vehicle, in the business of the owner or otherwise, by any person using or operating the vehicle with the permission, expressed or implied, of the owner, and the negligence of the person shall be imputed to the owner for all purposes of civil damages.

> of this was within the course and scope of his responsibilities for Cranney Farms. All of it was for purely personal reasons. Cranney Farms respectfully requests that its motion for summary judgment be granted.

In its motion for summary judgment, Cranney Farms made no mention of the Plaintiffs' claim that Cranney Farms was liable for knowingly permitting a dangerous vehicle to be operated on the roadway. In its memorandum opposing summary judgment, Plaintiffs brought that fact to the district court's attention, stating, "As an initial matter, the Cranney Defendants have not moved for summary judgment on Plaintiffs' claims for direct negligence . . . ." Plaintiffs then quoted the portion of their amended complaint alleging the claim of negligent maintenance. In its memorandum decision, the district court did not address this claim, but it nevertheless ordered that "[t]he Cranneys' motion for Summary Judgment dismissing the action against them is granted."

Plaintiffs and Rivas-Del Toro filed motions for reconsideration. In support of their motion, Plaintiffs pointed out in their supporting memorandum that "[t]he Court Has Not Addressed Plaintiffs' Direct Claim Against Cranney Farms." Plaintiffs again quoted the above-quoted portion of their amended complaint and pointed out that in its motion for summary judgment Cranney Farms had not presented any evidence opposing that claim. After the motions for reconsideration were argued, the district court denied them on the ground that "Mr. Rivas-Del Toro was not engaged in his employer's business at the time of the subject accident." The court again did not mention the claim based upon knowingly permitting a dangerous vehicle to be operated upon the roadway.

HN23[] When filing a motion for summary judgment, the moving party must notify the opposing party of the particular grounds for the motion. The motion must "state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought." Idaho R. Civ. P. 7(b)(1). Typically, parties moving for summary judgment merely state the relief or order sought in the motion, and then state with particularity the grounds for the motion in a supporting memorandum. If a ground for summary judgment is not stated with particularity in the moving papers, the opposing party need not address that ground. ***HN24***[] "For purposes of summary judgment, the moving party bears the initial burden of proving the absence of material fact issues. Only then does the burden shift to the non-moving party to come forward with sufficient evidence to create a genuine issue of material fact." *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 746, 215 P.3d 457, 466 (2009) (citation omitted). Because the burden never shifted to Plaintiffs to provide evidence regarding their claim of negligent maintenance, the district court erred in granting summary judgment on that claim.

On appeal, Cranney Farms argues that it did move for summary judgment on the Plaintiffs' claim that Cranney Farms was negligent in permitting operation of an unsafe vehicle. It does not point to any argument on this issue in its memorandum in support of its motion for summary judgment, or even any place where it even mentioned Plaintiffs' claim that the vehicle was known to be in an unsafe condition. It asserts on appeal that it challenged this claim because it argued that Rivas-Del Toro was not permitted or asked to drive the truck. In its memorandum supporting the motion for summary judgment, Cranney Farms wrote:

> After lunch, Del Toro claims that he was told by Ryan Cranney that he was to pick up some hay on a truck and haul it to Wybenga dairy. This fact is expressly denied by Mr. Cranney, but for purposes of this summary judgment argument, we can assume these facts and Defendant Del Toro is still not within the scope of his employment.

Cranney Farms's assertion that it challenged this claim for relief in its motion for summary judgment is frivolous.

VI.

Conclusion

We vacate the partial judgment and remand this case for further proceedings that are consistent with this opinion. We award costs on appeal to appellants and cross-appellant.

Chief Justice BURDICK, Justices J. JONES, W. JONES, and HORTON **CONCUR**.

Selected Bibliography

Primary Sources:

See "Appendix A," herein for case citations used in this study.

See also:

Idaho Code § 18-608.

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Chapter Notes:

[1] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1949), 19-21.

[2] Idaho Code § 18-608.

[3] Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 U.S. LEXIS 352, 1 Cranch 137 (U.S. 1803).

[4] Nelson, William E. *The Common Law in Colonial America: Volume II: The Middle Colonies and the Carolinas, 1660-1730.* New York, NY: Oxford University Press, 2013, pp. 1-8.

[5] Nelson, p. 1-8.

[6] Arguably, this language points to the views of Hamilton and to the later views of John Marshall, and not to the views of the convention as a whole. Nevertheless, this view passed with little controversy and soon became predominant within the federal judiciary. See Treanor, William Michael. *Judicial Review Before "Marbury."* Stanford Law Review, Vol. 58, No. 2 (Nov., 2005), pp. 457.

[7] Segall, Eric J. "The Constitution Means What the Supreme Court Says it Means." 129 Harvard. Law Review, F. 176 (2016), p. 186.

[8] Segall, p. 188.

[9] Williams, Joseph M., and Gregory Colomb. *Style: The Basics of Clarity and Grace*. 4th ed. Boston: Longman, 2012, p. 2.

[10] Serota, Michael. "Intelligible Justice." University of Miami Law Review, Vol. 66 (2012), p. 649.

[11] Wydick, Richard C. *Plain English for Lawyers*. Durham: Carolina Academic Press, 2005, p. 729-729.

[12] Wydick, p. 727.

[13] See for example: Kimble, Joseph. "The Great Myth that Plain Language is Not Precise: Just Say No to that Lawyerly Concept of: 'Why Say Something in Five Words When You Could Say it in 10?'" Business Law Today, Vol. 9, No. 6 (2000), p. 48-51.

[14] Domnarski, William. "Judges Should Write Their Own Opinions." New York Times, May 31, 2016.

[15] https://www.americanbar.org/content/dam/aba/.../fact_sheet.authcheckdam.pdf, last accessed 1/17/2017.

[16] Serota, p. 649.

[17] Serota, p. 650. Serota references a wide body of recent literature on judicial readability in his essay, which is not reproduced here for the reader.

[18] Farber, Daniel A. "Missing the 'Play of Intelligence." William & Mary Law Review, Vol. 36, Issue 1 (1994) p. 149.

[19] Johnson, Stephen M. "The Changing Discourse of the Supreme Court." University of New Hampshire Law Review, Vol. 12, No. 1 (2014), p. 29-30.

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[21] As one scholar notes: "But it is far from clear that the judiciary is so much less predictable and more political today than it was at the Founding as to render it incapable of fulfilling a role analogous to its original one. For one thing, even if a historical inquiry were to demonstrate that the judiciary is more political or less principled today than it was two centuries ago, the judiciary nonetheless remains - and by design always will remain - less political than the other branches of government. Judicial independence from politics is a core feature of our constitutional design. While changes in our perceptions of law and interpretation may alter the judiciary's function at the margins, they will never change its fundamental attribute of being independent of the political branches." See Molot, Jonathan T. "The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role." 53 Stanford Law Review, 1 (2000), p. 57.

[22] www.americanbar.org/content/dam/aba/migrated/.../fact_sheet.authcheckdam.pdf, last accessed 2/20/2017.

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[24] Owens, Ryan J. and Justin P. Wedeking. "Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions." Law & Society Review, Vol. 45, No. 4 (2011).

[25] Id., p. 1040. The authors use ten different LIWC indicators that are directly connected with cognitive complexity: causation, insight, discrepancy, inhibition, tentativeness, certainty, inclusiveness, exclusiveness, negations, and percentage of words containing six or more letters.

[26] Owens, p. 1038-1039.

[27] Owens, p. 1053-1054.

[28] Johnson, p. 66-67.
[29] Johnson., p. 57.
[30] Johnson, p. 66–67.
[31] Long, Lance N. and William F. Christensen. "Does the Readability of your brief affect your chance of winning an appeal?" The Journal of Appellate Practice and Process, Vol. 12, Issue 1 (2011), p. 146.
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[33] Johnson, p. 50-55.
[34] McConnell, Campbell. "Blind Faith in Numbers?" The Journal of Economic Education." Vol. 14, No. 1 (1983), p. 65-71.
[35] *Seminole Tribe v. Florida*., 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (U.S. 1996). The Seminole case scored 16.4 on the Flesch-Kincaid test compared with 16.6 (worse score) for U.S.C. 25-2710. It also scored a 38 on the Flesch Reading Ease test compared with 31 (worse score) for U.S.C. 25-2710.
[36] Williams, p. 8.
[37] McConnell, p. 66.
[38] Crossley, Scott A. and Jerry Greenfield and Daniel S. McNamara. "Teachers of English to Speakers of Other Languages, Inc. (TESOL)." TESOL Quarterly, Vol. 42, No. 3 (2008), p. 447.
[39] Dawson, George and Lois Wilson and Kelvin L. Kean. "Readability and Science Texts." The Science Teacher, Vol. 41, No. 7 (1974), p. 48-49.
[40] Owens, p. 1028.
[41] Steilen, Mattew. "The Democratic Common Law." The Journal of Jurisprudence. No. 437 (2011), p. 439.
[42] Id., p. 439.
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[44] Manz, William H. "Citations in Supreme Court Opinions and Briefs: A Comparative Study." Law Library Journal. Vol. 94 (2002), Appendix A. The Author notes that the total number of cases cited in Federal Supreme Court majority opinions increased from 59 in 1840 to an average of 1334 in 1996.
[45] Mead, Lawrence M. "Scholasticism in Political Science." Perspectives in Politics, Vol. 8, No. 2 (2010), p. 453, 460.
[46] Mead., p. 460.
[47] Mead, p. 460. See also p. 462.
[48] Lutz, Donald S. "The United States Constitution as an Incomplete Text." The Annals of the American Academy of Political and Social Science, Vol. 496 (1988), p. 26.
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[52] Werlin, Herbet. "Hard Science Soft Science, Primitive Science." Political Science and Politics, Vol. 35, No. 4 (2002), p. 660.
[53] Mead, p. 454.
[54] Johnson, p. 55.
[55] Rogers, Richard and Kimberly S. Harrison. "An Anlysis of Miranda Warnings and Waivers: Comprehension and Coverage." Law and Human Behavior, Vol. 31, No. 2 (2007), p. 181.
[56] Information on this software can be found at: http://www.oleandersolutions.com/readabilitystudio.html.
[57] In theory, the lowest possible Flesch-Kincaid score is a -3.4. But there is little risk of this result, as that would require study of a single monosyllabic word, which most tests won't perform.
[58] Plucinski, Kenneth J. and Mojtaba Seyedian. "Readability of Introductory Finance Textbooks." Journal of Financial Education, Vol. 39, No. ½ (2013).
[59] Owens, p. 1028-1029.
[60] DuBay, William. *The Principles of Readability*. William Dubay (2004), p. 101.
[61] Based on Orleander software index summaries.
[62] See https://www.stylewriter-usa.com/. Last accessed 2/25/2017.
[63] Wydick, p. 729-756.
[64] For this particular test, I selected 30 random samples of science fiction from the Project Gutenberg. See https://archive.org/details/gutenberg?&sort=-downloads&and[]=subject%3A%22Science+fiction%22, last accessed on 3/08/2017.

[65] See https://books.google.com/books?id=NS6dVK-Bnw4C&pg=PA227&lpg=PA227&dq=how+long+is+a+%22overly+long%22+sentence&source=bl&ots=uWKqUWC631&sig=LGp9Kt_UvQDfYc_F-K0oG-OG-wQ&hl=en&sa=X&ved=0ahUKEwjyxOSIksDPAhVB62MKHfy9BooQ6AEISDAI#v=onepage&q=how%20long%20is%20a%20%22overly%20long%22%20sentence&f=false.
[66] See for instance: Phillips, Lucinda and Christopher Balmford. "Plain Language—It Just Plain Works." The Complete Lawyer, Vol. 12, No. 3 (1995), p. 27.
[67] StyleWriter help guide.
[68] Wydick, p. 746.
[69] http://www.plainlanguage.gov/howto/wordsuggestions/hiddenverbs.cfm, last accessed 1/31/2017.
[70] StyleWriter help guide.
[71] StyleWriter help guide.
[72] Owens, p. 1030.
[73] Radin, Margaret J. "Reconsidering the Rule of Law." 69 B.U.L. Rev. 781, 786.
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[75] *Lepper v. E. Idaho Health Servs*., 369 P.3d 882, 893, 2016 Ida. LEXIS 63, *33, 160 Idaho 104 (Idaho 2016).
[76] Ludlow, Lynn. "Legalese." ETC: A Review of General Semantics, Vol. 47, No. 3 (1990), p. 257-258.
[77] Williams, p. 1.
[78] StyleWriter help guide.
[79] StyleWriter help guide
[80] StyleWriter help guide
[81] StyleWriter help guide
[82] See https://www.stylewriter-usa.com/how-does-stylewriter-work.php, last access 3/29/2017.
[83] See Owens, supra.
[84] See Johnson, supra.
[85] Lutz, p. 29.
[86] Lutz, p. 26.
[87] Lutz, p. 26.
[88] See for instance *Robinson v. Bodily*, 97 Idaho 199, 541 P.2d 623, 1975 Ida. LEXIS 390 (Idaho 1975), in which the Court uses extensive footnotes to remove much of its technical citations from the main body of the opinion.
[89] See for instance *State v. Burris*, 101 Idaho 683, 619 P.2d 1136, 1980 Ida. LEXIS 536 (Idaho 1980).
[90] *In re Evangelical Lutheran Good Samaritan Soc'y*, 119 Idaho 126, 804 P.2d 299, 1990 Ida. LEXIS 200 (Idaho 1990).
[91] *State v. Dopp,* 124 Idaho 481, 861 P.2d 51, 1993 Ida. LEXIS 150 (Idaho 1993)
[92] *In re Certification License of Russet Valley Produce*, 127 Idaho 654, 904 P.2d 566, 1995 Ida. LEXIS 147, 37 U.S.P.Q.2D (BNA) 1307 (Idaho 1995)
[93] *State v. Meyer*, 2017 Ida. LEXIS 35, *10 (Idaho Feb. 3, 2017).
[94] Lutz, 28.
[95] Lutz, 29.
[96] Lutz, 27.
[97] Lutz, 27.
[98] Liptak, Adam. "Justices Are Long on Words but Short on Guidance." New York Times. Nov. 17, 2010.
[99] Lutz, 28-29.
[100] Beebe, Paul. "Partial Returns Show Lottery Hits Jackpot in Idaho." Idaho Statesman, November 5, 1986, pp. 1. See also, Idaho Statesman, Associate Press Article, pp.1. The *Statesman* interviewed opponents of the law following the elections, and their initial response was to wait and see whether the commission could actually be established due to lack of funding.
[101] *Westerberg v. Andrus*, 114 Idaho 401, 757 P.2d 664, 1988 Ida. LEXIS 57 (Idaho 1988).
[102] H.J.R. No. 3, General laws of the State of Idaho: Passed by the First Regular Session of the Forty-Ninth Idaho Legislature. Caldwell, ID: The Caxton Printers, Ltd., 1987 (Session Laws 1987), 801.
[103] Landau, Martin. "Federalism, Redundancy, and System Reliability." Publius, Vol. 3, No. 2 (1973).
[104] Landau, p. 183-185.
[105] Landau, p. 193-194.
[106] *Blimka v. My Web Wholesaler, LLC*., 143 Idaho 723, 152 P.3d 594, 2007 Ida. LEXIS 25 (Idaho 2007).
[107] Crossley, p. 476.

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[108] Mead, p. 462.
[109] MacDonald, James S. and Jacqueline R. Papez. "Over 100 Years Without True 'Home Rule' in Idaho: Time for Change." 46 Idaho L. Rev. 587.
[110] MacDonald, p. 606.
[111] MacDonald, p. 616.
[112] MacDonald, p. 617.
[113] Mead, p. 461.
[114] *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681, 2016 Ida. LEXIS 290 (Idaho 2016). The new standard announced by the court was a "substantial justice" standard.
[115] Fletcher, William. "New I.C. 12-121 Standard Will Permit Attorney Fees When Justice So Requires." The Advocate, Vol. 60, January 2017, p. 25.
[116] See H.B. 97, Idaho State Legislature, 2017.
[117] See annotations to I.R.C.P. 54.
[118] Stark, Steven D. *Writing to Win: The Legal Writer*. New York: Three Rivers Press (2012), p. 5.
[119] https://isc.idaho.gov/appeals-court/opinions, last accessed 2/06/2017.
[120] Macey, Jonathan R. "Getting Beyond Criticism: New Theories of the Regulatory Statecynicism and Trust in Politics and Constitutional Theory." 87 Cornell L. Rev. 280 (2002), p. 306.
[121] http://www.courts.state.md.us/communications/, last accesssd on 2/06/2017.
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