

Litigation #40

Judicial Musings: How Rhythm Helps Characterize Opinions

At the time of the writing of this essay, in 2022, our country finds itself widely dichotomized into a far left and a far right. Tempers flare. People listen to each other with less patience than at any other time I can recall. That makes it hard to write about judicial decisions: Anything I might say about the rhetoric that supports and conveys an opinion might be hard to separate from how any individual reader might feel about the issue. So I have chosen to look at a case whose issue is not considered by most people to be earthshaking. It called for a decision on whether or not a physically disabled professional golfer, Casey Martin, should be allowed by the Professional Golf Association, against its normal rules, to ride in a golf cart during competition.

I have chosen it also because the majority decision and the dissent are composed with such different rhetorical musics. It pits the orderly, stately prose of Justice John Paul Stevens against the highly witty, slash-and-burn style of Justice Antonin Scalia. Both writers are excellent at what they are trying to do. Understanding their contrasting use of prose rhythms helps us

understand how and why they communicate with us. That, in turn, can make us more in charge of our own prose. Even in the Law – and perhaps especially in the Law – we should be concerned with the music of our prose.

The facts behind *PGA Tour, Inc. V. Martin* (532 U.S. 661 (2001)) raised a question arising under the Americans with Disabilities Act (1990). The court found that the PGA Tour should be viewed not as a private club but rather as a commercial enterprise operating in the entertainment industry for the economic benefit of its members. It held that the statutory definition of public accommodation included a "golf course"; it rejected the Tour's argument that its competitions are only places of public accommodation in the areas open to spectators. In a 7-2 decision, the Court held for the golfer, Casey Martin.

Justice John Paul Stevens wrote well. We have no difficulty following any story he wished to tell because he consistently fulfilled two major reader expectations about how stories get communicated. Readers tend to read a clause or sentence as being the story of the sentence's grammatical subject; and they tend to expect that the action of a clause or sentence will be found in the verb. When those two expectations are constantly fulfilled, the outlines of a story become clear. Here is a

list of the subjects and verbs of the passage in which Justice Stevens relates the litigation history of the case:

<u>Subject</u>	<u>Verb(s)</u>
PGA	sponsors
Any member of the public	may enter (Q-School)
The rules	include
Martin	is (a talented golfer)
	is (afflicted with a disorder)
His disorder	constitutes (a disability)
When Martin	turned pro and entered Q-School
(he)	made a request (for a cart)
The PGA	refused
Martin	filed (this action)
Magistrate Judge	rejected (PGA contention)

District Court	entered injunction found re: fatigue found fatigue (not significant) determined (M's fatigue great) concluded (for Martin)
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Ninth Circuit	affirmed
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A cart	would not fundamentally alter
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Clarity. In addition, he is quite consistent (much more than most writers) in depositing the most stress-worthy words in his sentences in the stress positions that naturally occur at any moment when the grammatical structure of the sentence comes to a full halt – at a properly used colon, semicolon, or period.

As a result, his reader uses a minimal amount of “reader energy” to get from the beginning to the end of each sentence. The justice then makes the linkage between sentences clear by putting the backwards-linking words near the beginning of most of his sentences.

As important as these issues of clarity are, complying with them alone will not produce elegance; and it is from the combination of clarity and elegance that prose attains power. That elegance is created here in large

part by the music of his prose – by his dividing each long sentence into sub-units that allow the reader to experience mini-arrivals within a sentence, even as the expectation for ultimate arrival continues until the sentence ends. These sub-units are most easily and effectively fashioned by controlling the number of prose stresses they contain.

Readers tend to be quite comfortable reading a sentence's sub-unit (anything that has some kind of beginning and end) that contains either 3 or 4 rhythmic stresses. These act as the default value musical expectations of readers. An expansion to 5 beats ought to bring with it an expansion of emphatic concern for the unit; and units of 2 beats can often indicate an increase in tension. Justice Stevens seems to have an innate sense of this – a comfortable musical capability for it. Here is a typical example:

In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients. And even under conditions of severe heat and humidity, the critical factor in fatigue is fluid loss rather than exercise from walking.

Here again is the passage, separated into its seven rhythmical sub-units. I note the number of stresses for

each in parentheses; and I bold the syllables I hear as inviting stress. (You may disagree with any of my numbers of stresses; and I might change my mind tomorrow. But the numbers help clarify a way in which the prose can flow.)

- (3) In **fact**, the **expert** **concluded**,
- (4) because **golf** is a **low** **intensity** **activity**,
- (5) **fatigue** from the **game** is primarily a **psychological**
phenomenon
- (4) in which **stress** and **motivation** are the **key ingredients**.

- (5) And **even** under **conditions** of **severe heat** and **humidity**,
- (3) the **critical factor** in **fatigue**
- (4) is **fluid loss** rather than **exercise** from **walking**.

We can experience a crescendo of sorts over the first 3 sub-units: The 3 beats for the background material expand to 4 beats for the statement of causation and then to the height of 5 beats that deals with the important issue of fatigue and psychological stress. The sentence then backs off to the more usual 4 beats to effect grammatical closure. Then another 5-beat unit ramps up the energy again. This makes the retrenching back to 3 beats (through which each word gains in emphasis, as the 3 beats try to fill the reading space of the 5 beats they follow); and, once again, the sentence reverts to the safety of a 4-beat closure, neatly balancing its first two beats against its second pair. It is a lovely piece of music for a subject that would not

seem to invite a moment of music.

Varying rhythms in an orderly fashion can, as long as they are directly connected to the substance of each sub-unit, not only organize the flow but choreograph it as well. Here is one of Justice Stevens's sentences that English teachers might well consider "too long," It contains 47 words – more than twice what the teachers recommend; because of its rhythmic structure, the sentence seems just the right length to do what it does. We always know, rhythmically, where we are coming from and where we are going.

- (1) **Certainly,**
- (4) among the "**privileges**" **offered** by petitioner on the **courses**
- (3) **are those** of competing in the **Q-School**
- (2) and **playing** in the **tours**;
- (1) **indeed,**
- (4) the **former** is a **privilege** for which **thousands** of individuals
- (3) from the **general public pay**,
- (2) and the **latter** is **one**
- (2) for **which** they **vie**.

The two halves of the sentence (divided by the stress position at the semicolon) are meant to talk to each other. The semantic markers "former" and "latter" divide the second half in half again; and they more

clearly divide (in retrospect) the first half in half.

That is a complex structure. To make the two halves of the sentence refer to each other more easily, Justice Stevens repeats in each his rhythmic organization: 1 beat is followed by 4 and then by 3 and then by 2 – forming a gentle cascade motion. The final, “extra” 2 beat unit that ends the sentence gains by its rhythmic repetition an even more secure sense of arrival. There is almost a hint of rhyme in “the former . . . pay” balanced off against “the latter . . . vie.” The 47 words succeed in great part because they sing such an accessible and recognizable tune.

Justice Stevens knows how – quietly – to indicate growth in the intensity of his subject matter by representing it in the growth of the sentence’s music. He tells us the history of something never considered dramatic – how golf clubs are carted around a golf course – in a manner dramatic enough to suit the main dramatic concern of this law suit. Watch and listen to the way he fashions the music:

- (2) **O**ver the **y**ears,
- (2) there have been **m**any **c**hanges
- (2) in the **p**layers' **e**quipment,
- (2) in **g**olf course **d**esign,
- (2) in the **R**ules of **G**olf,
- (5) and in the **m**ethod of **t**ransporting **c**lubs from **h**ole to

hole.

- (4) **Originally, so few clubs were used**
- (4) **that each player could carry them without a bag.**

- (2) **Then came golf bags,**
- (1) **caddies,**
- (3) **carts that were pulled by hand,**
- (3) **and eventually motorized carts**
- (4) **that carried players as well as clubs.**

In his first sentence, all the golf history that precedes the concept of club transportation is summed up in phrases of equal musical length – 2 beats apiece. The jump from 2 beats to 5 beats is an extraordinary one. By itself, it might suggest that in all of golf history, *this* is the most remarkable thing to contemplate. And for this case – and perhaps no other case – it is. But he also indicates its fatiguing arrival by his having given us not three but four changes in golf’s history. We all can handle three members of a list; but four might as well be a million. Four is more than we care to handle. Here that is used to good effect.

The second sentence in this example is a calm, well-balanced, pair of 4-beat units. It suits his telling us that this was the way it “originally” was. We should be expecting a more dramatic “then.”

We get the expected “then,” in a 2-beat unit that established the beginning state of this historical expansion. The 2-beat “golf bags” then recoils into a 1-beat “caddies,” drawing the bow string for a dramatic musical expansion. The hand-pulled carts jump to 3 beats; and then the motorized carts on the one hand balance off the 3 beats of the hand-pulled carts, but on the other hand combine grammatically with the 4 beats of the carrying players as well as clubs. We have proceeded through history all the way from no bag in which to carry clubs to a machine that carries not only the clubs but the players.

Stevens summons an elegant music of balance to grace his conclusion. Watch the four 3-beat units of the first sentence come to closure with an elegant, elongated 5-beat unit. In the second sentence, watch the 3 beats recoil to 2 beats, recover themselves as 3 beats, expand to a pair of 4-beats, and resolving at the end, once again, into a 5-beat closure. The second musical statement is an embroidered variation of the first. His final sentence, especially when compared to the complexity of the previous two, achieves the elegance of simplicity. He returns us to the default value expectation of 4 beats.

- (3) A **modification** that **provides** an **exception**
 - (3) to a **peripheral tournament rule**
 - (3) **without impairing** its **purpose**
 - (5) **cannot be said** to "**fundamentally alter**" the **tournament**.
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- (3) What it **can be said** to **do**,
 - (2) on the **other hand**,
 - (3) is to **allow Martin** the **chance**
 - (4) to **qualify for**, and **compete in**,
 - (4) the **athletic events** petitioner **offers**
 - (5) to those **members of the public** who have the **skill** and **desire** to **enter**.
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- (4) **That** is **exactly** what the **ADA requires**.

Justice Scalia, the most recognizable stylist on the Court for 30 years, can sound just as controlled and balanced when he wants to – as when he states the basis of a law before he breaks into arguing about it. Note how neatly he balances 3-beat lines, expanding to 4 beats and resolving the rhythm back to 3 beats before the semicolon; as a rhythmic echo, he then gives us another 4-beat line, which then again resolves to a 3-beat line for closure.

- (3) On **such** an **interpretation**,
- (3) The **employees** and **independent contractors**
- (4) of **every place** of **public accommodation**
- (3) **come** within **Title III**:
- (4) The **employee enjoys** the "**privilege**" of **employment**,
- (3) the **contractor** the "**privilege**" of the **contract**.

If you have been reading my analyses of the prose of Lincoln, Kennedy, and Martin Luther King over the past two years of this column, you might notice how very often these good writers will resolve a 4-beat line to 3 beats at the end of a grammatical structure. This is no accident: In fact, it has been a standard not only of prose but of poetry for centuries. The highly popular and widely memorized Border Ballads from the Anglo-Scottish border consistently alternated 4-beat and 3-beat lines as their standard rhythm. From *Sir Patrick Spens*:

The king sits in Dunfermline toune
 drinking the blude reid wine,
 "O whar can I get skeely skipper,
 To sail this ship o' mine?"

Or the still widely performed *Barbry Allen*:

In Dublin town, where I was born,
 There was a fair maid dewllin’;
 Made every lad cry “well-a-day”;
 Her name was Barbry Allen.

The relationship between the 4-beat and 3-beat lines is somewhat akin to the drawing back of a bow string (4 beats) and the consequent loosing of the arrow (3 beats). It also is closely connected in music to the resolution of a dominant chord to its home-based tonic chord. Sing it for yourself:

Happy birthday, dear Harry,
 Happy birthday to you.

The “to” is sung to the dominant chord; the “you” resolves it to the tonic chord.

We seem to love both going away from home and – perhaps even more – returning there. We see this over and over again with the 4-beat resolution to 3 beats. It can also happen if 3 beats take us away from home, allowing 4 beats to bring us back. It is a simple principle. All very fine writers seem to have a sense of it, even if not consciously. All of us can become better writers if we pay more attention to our rhythmic patterns.

Just two paragraphs after the calm and rhythmically orderly setting forth of a bit of law, Justice Scalia launches into demonstrating how little sense he thinks the majority opinion makes. He intentionally varies the number of beats, with a dramatic jump from a 4 to a 1, or a 2 to a 5, or even a 5 to a 1. The rhythms jolt the reader and create mockery.

(4) The **persons "gathering"** at an **auditorium**
 (4) are presumably **covered** by **Title III**,
 (4) but **those** contracting to **clean** the **auditorium**
 (1) are **not**.

(4) **Title III** is **said** to **cover** a **"zoo"**
 (4) or **"other place of recreation."**
 (4) The **persons "recreating"** at a **"zoo"**
 (2) are presumably **covered**,
 (5) but the **animal handlers** **bringing** in the **latest**
panda
 (1) are **not**.

Twice over, he establishes 4 beats as the default value norm. In the first half of this example, he draws back the bow string for three of these 4-beat lines and then looses the arrow in a surprising and highly definitive 1-beat "are NOT." And those two words occupy the stress position at the end of a long and winding rhetorical road.

The second half makes a parallel and contrasting point. To accomplish that, he uses the same build up of three 4-beat lines; and the noticeably shorter 2-beat line, “are presumably covered,” sings us something that now sounds familiar. But we are in for a shock. That was not the end. There is a comma, not a period. And the unit that follows is a long, unexpected, and crescendo-building 5-beat line. Then, suddenly, we encounter another dramatic 1-beat line -- “are NOT.” It is, in a quiet way, an explosion.

The contents of both halves are parallel – and are presented in parallel form. But the parallelism is greatly heightened by the parallel rhythmic structure – which at its end takes advantage of our sense of knowing where it is likely to end.

To make that 5-beat line even more dramatic, he indulges in sound repetitions that enrich the crescendo. The “an” sounds in “animal and handlers” are the same, as are the pairs of “n” and “l” sounds. The “an” gets repeated again in “panda.” And the “b” and “p” of “bringing” and “panda” are related by being the voiced and unvoiced versions of the same vocal sound production. The passage is a miniature masterpiece.

This is no accident, no singular occurrence. Watch him, in this next passage, create an only slightly different kind of crescendo by establishing 3 beats as the

beginning base, growing from there to a single 4-beat line, and then swelling first to a 5-beat line and then (a rarity!) to a 6-beat line; and just when you think this must be coming to closure soon, he crashes us from the 6 beats all the way back down to 2 beats. It is an emphatic arrival – again in a stress position created by grammatical closure.

- (3) The **only distinctive feature**
- (3) of **places of public accommodation**
- (3) is **that** they **accommodate the public,**
- (4) and **Congress could have no conceivable reason**
- (5) for **according the employees and independent contractors of such businesses**
- (6) **protections that employees and independent contractors of other businesses**
- (2) **do not enjoy.**

He can manage the 6-beats in one unit because it adds only the legally significant word “other” to its repetition of the rest of the words of the 5-beat line.

He makes the first three 3-beat lines into a neat passage by his use of chiasmus – repeating “public” and “accommodation” in the reverse order. He controls our attention.

The majority opinion held that golfer Martin was essentially a “customer” of the PGA; if he was, then the PGA, under the Disabilities Act, had to go out of its normal way to treat him equally with its other professional customers. Justice Scalia begged to differ: Martin was not a buyer in this situation, but rather a seller. Watch the way in which the progress of his rhythms land us in the place of emphasis where he makes that point.

- (3) Respondent **did not seek**
- (4) to "**exercise**" or "**recreate**"
- (3) at the **PGA TOUR** events;
- (2) he **sought** to make **money**
- (4) (which is **why** he is **called** a professional **golfer**).

- (2) He was **not** a **customer**
- (4) **buying** recreation or **entertainment**;
- (3) **he** was a professional **athlete**
- (1) **selling** it.

The first 3 swells to a 4 and recedes back to a 3. The noticeably shorter, more dramatic 2 is equivalent to his raising his voice; and if he were reading this aloud, I think we could hear him giving extra emphasis to each of the 4 beats in the “which is why he is called a professional golfer” – which brings the whole sentence to emphatic closure.

Then the initial 2 – “He was NOT a CUSTomer,” echoes the 2 beats of “he SOUGHT to make MONey.” The echo is both in the substance of the point he is making and in the snappy 2-beat units that make his point in both words and music. The much longer 4-beat unit echoes his earlier 4-beat unit: He repeats the “recreation” word and offers similarly sounding words in “exercise” and “entertainment.”

Then, as judges often do, he uses the verb “to be” to bring into creation his pronouncement of judgment: “He was a professional golfer. He began the sentence with 2 beats, expanded to 4, seemingly resolved into 3 – and then surprised us with a snappy 1-beat unit at the end. Read the passage aloud as if you were an instrument and he was conducting you with his rhythms.

A few sentences later, he counters the majority’s finding that the Qualifying School through which golfers must go in order to be allowed to play in Tour events should be considered a “privilege.” If it is a privilege, it should be covered by the ADA regulations. He does this in one melodious sentence, starting us off with 3 beats, expanding to 4, and then repeating those 4 beats so we know where the sentence’s end will be. You can hear the smile on his face when he gives us that witty closure:

- (3) But the **Q-School** is **no** more a "**privilege**"
- (4) **offered** for the **general public's** "enjoyment"
- (4) than **is** the **California Bar Exam**.

It is clear that on well-chosen occasions he writes with intentional humor and sarcasm; it is not equally as clear that the humor stems in large part from how he sets us up with heavy-handed, pompous rhythmical units that become intentionally burdensome for our ability to sustain ourselves to the end of the sentence – and then surprises us with the intentional anti-climax of an abrupt ending. Here is a masterful instance of this in the Martin case:

- (3) It has been **rendered** the **solemn duty**
- (4) of the **Supreme Court** of the **United States**,
- (3) **laid upon** it by **Congress**
- (4) in pursuance of the **Federal Government's power**
- (4) "to **regulate Commerce** with **foreign Nations**,
- (4) and **among** the **several States**,to **decide**
- (2) **What Is Golf**.

That was a 43-word sentence – twice as long as writing teachers urge their students to produce, and half again as long as the revered Rudolph Flesch (author of *The Art of Readable Writing*) claims is readable. But Justice Scalia's sentence is intended to feel long and burdensome. How better to produce the comical anti-climax at its end?

But having turned out this little rhetorical gem, he doubles down in his very next sentence, which more than doubles the length to 98 words – and still ends in a comical pseudo-climax.

I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer?

As his readers, having been battered by the onslaught of these two Gargantuan sentences, we are then finished off by the sarcasm of his next, conclusive sentence, which requires only 6 words.

The answer, we learn, is yes.

If you want to investigate the passage to see what its rhythmic breakdown is, here are the units as I perceive them: 4/3/3/5/4/3/2/2/4/5/6: 5/2. 3.

The 5s are as fussy and stentorian as he can make them. The 2s (borrowing a twosome from the previous 3) are clearly a virtuosic revving of the engine: “sooner or later”/ “golf and government”/ “the law and the links.” Look at the rhetorical devices he crams into these few words: alliteration rules (the two “g”s and the three “l”s); and the latter two pairs are built into a chiasmus, with “golf” and “links” pairing up against “government” and “law.” It all comes to a suspensful climax of tension at the colon. And then the almost anti-musical, clearly silly question -- “Is someone riding around a golf course from shot to shot really a golfer?” – is left to absorb all the energy that the previous 84 words have generated. We end not with a bang but a whimper. It is the rhetorical construct here, together with its inherent music, more than any strictly logical argument could have managed, that prepares us at least to consider and possibly to accept his conclusion. He ridicules the majority’s position – “The answer, we learn, is yes” – by making its size, its shape, and its overly simple music seem ridiculous.

*The author would like to thank Chloe Milloy for bringing this case to his attention.