# SUPREME COURT RHETORIC

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In 1917, when Professor Thomas Reed Powell of Columbia University addressed the American Political Science Society in Philadelphia on the subject of "The Logic and Rhetoric of Constitutional Law," he emphasized logic, telling his audience he would not "trouble much about rhetoric" because although "[m]an is a rhetorical animal, . . . he uses his rhetoric to market his notions, not to make them. So it is the factory and not the salesroom that" he invited his listeners to explore.[1] Powell was telling his audience that while the logic of judges was worth studying, their rhetoric—which Aristotle defined as "the faculty of discovering in the particular case what are the available means of persuasion"[2]—was not.

Powell's low opinion of the value of studying judicial rhetoric notwithstanding, the Supreme Court did in Powell's time, and continues today to engage in rhetorical activity. Justices engage in persuasive strategies when they write opinions as surely as Presidents and Congressmen employ speechwriters.[3]

The use of rhetoric by the Supreme Court is no mere stylish extravagance. In cases of nationwide impact, it is not enough that an opinion merely produces a just result and provides a clear precedent for subsequent litigation. If the opinion is to be truly effective, it must also persuade the Court's various audiences that the rationale is sound and, more importantly, that the results are in the best interests of the nation.[4] Rhetoric is pivotal in inducing the "cooperation and consent of those to whom [the Court's] rulings are addressed and upon those to whom it must turn for assistance in enforcing those rulings."[5] As Justice Clark once stated,

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1. Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL., PSYCH. & SCI. METHOD 645, 646 (1918).

2. ARISTOTLE, THE RHETORIC 7 (L. Cooper trans. 1932).

3. *See* Hample, *Motives in Law: An Adaptation of Legal Realism*, 15 J. AM. FORENSIC A. 156 (1979) ("In nearly every important respect, law is rhetorical.")

4. *See* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 11-12, 170 (1969); Wright, *Judicial Rhetoric: A Field for Research*, 31 SPEECH MONOGRAPHS 64, 67 (1964).

5. S. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES 7 (1977) [hereinafter cited as S. WASBY].

"we don't have money at the Court for an army and we can't take ads in the newspaper, and we don't want to go out on a picket line in our robes. We have to convince the nation by the force of our opinions."[6]

Convincing the nation of the wisdom of its decisions is necessary not only to enhance the effectiveness of the opinion in the particular case, but also to preserve the Court's institutional integrity. When a controversial decision is made, the Court itself goes on trial.[7]

Despite the importance of rhetoric in the shaping of Supreme Court opinions, the subject has received little scholarly attention.[8] Until quite recently, rhetoricians and political scientists have concentrated their studies of rhetoric on political campaigns and the like, with comparatively little attention being paid to the rhetoric of judicial decisions. Similarly, lawyers "have persisted in the notion that legal processes are best conceptualized in terms of analytical logic, mathematics, and science."[9]

The purpose of this Article is to remind lawyers of the role rhetoric plays in the writing of Supreme Court opinions and to illustrate that role.[10] The first part of the Article will demonstrate why it is natural and necessary for the Supreme Court Justices to engage in rhetorical strategies while shaping their opinions. The second part will briefly sketch an analytical framework for the study of judicial rhetoric. The third part will, by analyzing the decisionmaking and opinion-writing processes in *Brown v. Board of Education*,[11] illustrate how specific rhetorical strategies can shape the content of an important opinion.

The term "rhetoric" will be used in this Article, as it was used by Aristotle, to denote persuasive strategies in discourse. More particularly, the term is not used in the more popular sense of political bombast—"full of sound and fury, signifying nothing."[12] Rather, it is used to refer to writ-

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6. 2 R. KLUGER, SIMPLE JUSTICE 892 (1977).

7. *See* C. HYNEMAN, THE SUPREME COURT ON TRIAL 18 (1963).

8. Anapol, *Rhetoric and Law: An Overview*, 18 TODAY'S SPEECH 12 (1970); Wright, *supra* note 4, at 64.

9. Rieke, *The Rhetoric of Law: A Bibliographic Essay*, 18 TODAY'S SPEECH 48 (1970). However, since preparation of this Article was commenced, some interesting articles touching on legal rhetoric have appeared. *See* Campbell, *How Opinions Can Persuade: A Case Study of William O. Douglas*, 29 FED. BAR NEWS & J. 231 (1982); LaRue, *The Rhetoric of Powell's* Bakke, 38 WASH. & LEE L. REV. 43 (1981); Rogers, *Generic Tendencies in Majority and Non-Majority Supreme Court Opinions: The Case of Justice Douglas*, 30 COM. Q. 232 (1982); Weisberg, *How Judges Speak: Some Lessons on Adjudication in* Billy Budd, Sailor *With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982).

10. It should be emphasized at the outset that this Article is written for lawyers rather than for rhetoricians. It is lawyers who are more likely to need reminding that there is more to the Supreme Court opinion-writing process than meets the eye. Rhetoricians might criticize the descriptive/deductive approach utilized here, *see* Brockriede, *Rhetorical Criticism as Argument*, 60 Q.J. SPEECH 165 (1974), but hopefully some useful points will be made and illustrated. Lawyers customarily focus on the text of an opinion, hoping to predict its future applications, oblivious to the process which produced it. It has been suggested that a society can learn more about itself by studying the process by which decisions are made than by studying the decisions themselves. T. NILSEN, ESSAYS ON RHETORICAL CRITICISM 87 (1968), *quoted in* J. GOLDEN & R. RIEKE, THE RHETORIC OF BLACK AMERICANS 38 (1971). Studying the processes used by the Supreme Court in writing its opinions should be similarly informative.

11. 347 U.S. 483 (1954).

12. K. CAMPBELL, CRITIQUES OF CONTEMPORARY RHETORIC 1-2 (1972). Because "[r]hetoric is a word which we associate with the making of political speeches," P. CORCORAN, POLITICAL

ten discourse, oral discourse, and other types of symbolic activity used to "alter attitudes and mobilize action"[13] or to "induce cooperation."[14] The Article emphasizes not the traditional legal reasoning contained in judicial opinions, although such reasoning clearly constitutes "rhetoric" and will be considered, but focuses on persuasive strategies apart from the strict legal reasoning that we all expect to constitute the bulk if not the entirety of such opinions.

## I. THE NEED FOR RHETORICAL STRATEGIES

The Supreme Court Justice writing an opinion has two primary tasks. First, he[15] must settle in a fair and just way the immediate dispute presented by the litigants. Second, he must provide a rationale for the decision which will serve as a clear and just guide for the resolution of similar disputes arising in the future.[16] Although justice in the individual case is of obvious importance, the Justice must carry out the second task in such a way as to help fulfill the Supreme Court's two major roles in American political life, which have been described as (1) to enunciate a political-legal order through formal adjudication, and (2) to preserve the social-political bonds of the country.[17]

The stark truth is that an opinion consisting solely of technical legal reasoning may succeed in implementing the first suggested role of the Court, but fail miserably at accomplishing the second. Ultimately, it will matter little that a decision is "right" in a technical legal sense if those reading the opinion are not convinced that it is "right," or at least acceptable.[18] The goal must be to "convince an audience that they too would have reached the same result."[19]

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LANGUAGE AND RHETORIC xiii (1979), the study of the persuasive strategies of judges requires some break from the traditional stereotypes.

13. K. CAMPBELL, *supra* note 12.

14. B. BROCK & R. SCOTT, METHODS OF RHETORICAL CRITICISM: A TWENTIETH CENTURY PERSPECTIVE 16 (2d ed. 1980).

Many modern theorists view rhetoric in a more general sense than it is used here. *E.g.*, Brockriede, *supra* note 10, at 106 ("Rhetoric is the relationship of persons and ideas within a situation."). This Article concentrates on the persuasive strategies available.

*See also* R. Parker, Political Vision in Constitutional Argument (Feb. 1979) (unpublished manuscript on file in Harvard Law School Library), *quoted in Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894 n.17 (1982) (judicial rhetoric is a form of argument that seeks to persuade listeners of the legitimacy of particular uses of power).

15. The male pronoun is used throughout this Article for convenience, especially because all of the Justices participating in the *Brown* decision were male. No disrespect is meant to Justice Sandra Day O'Connor or other members of the female gender who, it is hoped, will follow her onto the Court.

16. S. TOULMIN, R. RIEKE & A. JANIK, AN INTRODUCTION TO REASONING 217 (1979) [hereinafter cited as S. TOULMIN].

17. C. MILLER, *supra* note 4, at 189.

18. W. MURPHY, CONGRESS AND THE COURT 263 (1962) ("If a judge wishes, for example, to protect constitutional rights rather than write libertarian tracts, he must try to visualize the possible reactions of other branches of government to any decision.").

19. Pratt, *Rhetorical Styles on the Fuller Court*, 24 AM. J. LEGAL HIST. 189, 220 (1980).

A classic example of the failings of a purely legalistic approach is the case of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Though decided at a time when "[r]everence for the Supreme Court had never been higher," B. STEINER, LIFE OF ROGER BROOKE TANEY 342 (1922), the opinion was penned by Chief Justice Taney who "spoke as a lawyer." C. SMITH, ROGER B.

What truly matters is the result the opinion brings about, not whether the rationale will please the law professors as an exemplary exercise in the gymnastics of legal reasoning. Skillful, insightful legal reasoning which is either consistent with previous holdings or adeptly modified to changed social conditions is, no doubt, an important element in a successful opinion. Nonetheless, there are almost always nonlogical rhetorical strategies available to improve the effectiveness of a given opinion by enhancing its acceptability to one or more of a Justice's constituent audiences.

Because the Supreme Court frequently makes decisions of grave import that can alter the very course of American social evolution,[20] the Justices cannot afford to overlook any strategy that might add to an opinion's persuasive impact. The Court does not sit to make "precatory pronouncements."[21] Instead, it makes decisions which affect virtually the entire American populace. And those decisions are often controversial and immensely unpopular. For example, the political and social consequences stemming from a case like *Brown v. Board of Education* were as great as those resulting from any act of Congress.[22] One author has pointed out that following the decision, "[i]f Stalin had been a reader of U.S. Supreme Court reports . . . he might have asked: 'How many armored divisions has the court?' "[23] Indeed, the Court's desegregation orders did eventually require military action by both Presidents Eisenhower and Kennedy.[24]

If the Justices had the power of fiat, or if they were gods who could immediately transform their judgments into reality, there would be no need for the consideration of persuasive strategies. However, the Court is constrained by the fact that it has no guns, no planes, no troops, and no power of appropriation to enforce its judgments. Because the Court "cannot compel, it must convince, . . . its strength ultimately depends on the support of public opinion."[25] Having little coercive power, the Supreme Court is painfully vulnerable unless its opinions not only settle disputes but also persuade the American public, or other relevant audiences, that the decision is correct.[26]

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TANEY: JACKSONIAN JURIST 173 (1936). Though from a legal perspective the opinion has been deemed one of the best Taney ever penned, a myriad of other shortcomings made the opinion a failure, "a blunder in statecraft." *Id.* at 155. Some of those shortcomings were rhetorical in nature, and shall be mentioned later in this Article. *See generally* Forster, *Did the Decision in the Dred Scott Case Lead to the Civil War?*, 52 AM. L. REV. 875 (1918); Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385, 1401-03 (1962).

20. Barker, *Symposium on Political Culture and Judicial Research*, 1971 WASH. U. L.Q. 169, 170.

21. A. BICKEL, THE LEAST DANGEROUS BRANCH 246 (1962). Bickel also quotes Mr. Freund's remark that the Court does not sit "to compose for the anthologies." *Id.*

22. H. SCHMANDT, COURTS IN THE AMERICAN POLITICAL SYSTEM 8 (1968).

23. Barron, *Decision Without Power—The Dilemma of the Supreme Court*, 40 N. DAK. L. REV. 57, 57-58 (1964).

24. President Eisenhower called out the National Guard in Little Rock in 1957. J. WILKINSON, FROM BROWN TO BAKKE 90 (1979). President Kennedy was forced to act similarly on behalf of James Meredith in Mississippi. A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES 317-27 (1978); T. SORENSON, KENNEDY 484 (1965).

25. P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT xxii (1970). *See also* C. MILLER, *supra* note 4; Blackmar, *The Supreme Court as a Governmental Institution*, 12 ST. LOUIS U.L.Q. 237, 258 (1968).

26. R. HODDER-WILLIAMS, THE POLITICS OF THE U.S. SUPREME COURT 109 (1980):

The Court's ability to persuade is not tied solely to the legal niceties of its arguments. It is well known and accepted that politicians in the other branches of government use more than logic to sell the public on their positions. Speechwriters utilize emotional appeals, symbolism, audience adaptation, and other persuasive techniques to improve the effectiveness of the politician's speech. The judicial opinion can use approaches which are roughly analogous.[27]

The wise Justice will resort to those arguments which are the most persuasive,[28] and this use of rhetorical theory will color the legal arguments and, perhaps, dictate the use of nonlegal means of persuasion. In fact, because technical legal arguments are among the most difficult for a lay public to grasp, the Justice, perhaps even more than the politician, must be aware of rhetorical factors in attempting to persuade the public to accept an unpopular decision on a controversial issue. The more difficult or controversial the case, the more significant the role of rhetoric in shaping the content of the opinion.[29]

This analogy to the political speech is an uncomfortable one because it varies from popular notions of how the Court should operate. While the Supreme Court's prestige has endured and grown since the days of the Founding Fathers, it remains premised largely upon the myth that the Court is merely carrying out the will of the Founders by *finding* the law, not *creating* it. Since at least the heyday of the legal realists, those sophisticated in the law have known that to a large extent the Supreme Court, especially in the realm of constitutional law, *makes* law in that it is frequently presented with multiple solutions to a constitutional problem, all of which are legally viable, but none of which is inescapably "right" in a legal sense. When the Court chooses one of these potential solutions and labels it the "correct" answer to the legal question, it *makes* law.[30] In fact, some have suggested that the very strength of the Constitution is its ambiguity, which allows the Supreme Court to credibly manipulate and mold doctrine to meet modern social problems.[31]

In carrying out its sometimes conflicting functions, the Supreme Court has remained remarkably free of partisan political influence.[32] But to re-

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> Power, it has been said, grows out of the barrel of the gun. If so, then the Supreme Court is indeed the least dangerous branch of the United States political system, for it possesses no guns, only its prestige, some moral authority, hopefully obedience of the lower courts and, in the extreme, sometimes the goodwill of the President and his *guns*.

(Emphasis in original).

27. Wright, *supra* note 4, at 66.

28. Pratt, *supra* note 19, at 192, 220.

29. *See* Levison, *The Rhetoric of the Oral Argument in* The Regents of the University of California v. Bakke, 43 W.J. SPEECH COM. 271 (1979).

30. *See* L. BERKSON, THE SUPREME COURT AND ITS PUBLICS 14 (1978). In fact, Justice Robert Jackson once described the Court as a sort of "continuous constitutional convention." R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY x-xi (1941).

31. A. MASON, THE SUPREME COURT FROM TAFT TO BURGER 208 (rev. ed. 1979). *See also* Parent, *Interpretation and Justification in Hard Cases*, 15 GA. L. REV. 99, 101 (1980) (arguing that "judicial legislation in hard lawsuits, suitably constrained, is morally and politically defensible").

32. A. NORTH, THE SUPREME COURT: JUDICIAL PROCESS AND JUDICIAL POLITICS 195 (1966).

main completely free of such influence, under the circumstances, is impossible.

> Justices are expected to act like statesmen yet be aloof from all considerations of policy; at the same time they are selected through a blatantly political process, frequently for manifestly political purposes, and are asked to decide cases fraught with some of the most controversial of current public-policy issues.[33]

Decisions involving issues such as those presented by *Brown v. Board of Education* are undeniably policy-oriented as much as law-oriented. Such political questions "must have a political answer and not a logical one."[34] So, though uncomfortable, the political analogy fits.

Indeed, Justices of the Supreme Court cannot avoid being political actors.[35] De Tocqueville was and remains right—"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[36] Although the Supreme Court supposedly mirrors the views of the Constitution's framers, few searches for a clear "intent of the framers" produce conclusive results.[37] For this reason, it is inevitable that the Supreme Court must make policy, "for it is an essential characteristic that from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task."[38]

Certainly all this does not mean that the Justices are free to decide cases according to whim. Judicial discretion is constrained to some degree by the wording of the Constitution and statutes, precedents, and legal traditions,[39] which do not to the same extent constrain purely political actors like Presidents and Congressmen. The amount of constraint imposed varies from case to case, but usually one or more of these items must be factored into the analysis to complement the Justices' predilections about the

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33. W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 209 (1964).

34. LaRue, *supra* note 9, at 49.

35. *See* Rothstein, *The Politics of Legal Reasoning: Conceptual Contests and Racial Segregation*, 15 VAL. U. L. REV. 81, 135-36 (1980). *See also* Miller, *Policy-Making in a Democracy: The Role of the United States Supreme Court*, 6 J. PUB. L. 275 (1957).

36. A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 280 (A. Knopf ed. 1946).

37. Horowitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 603 (1979).

38. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 280 (1957). *See also* S. TOULMIN, *supra* note 16, at 217 ("few people seriously believe any longer that the rules of logic can adequately account for the actual procedures involved in legal decisionmaking"); Deutsch & Hoeflich, *Legal Duty and Judicial Style: The Meaning of Precedent*, 25 ST. LOUIS U.L.J. 87, 88 (1981) ("In most controversies submitted to the judiciary, the judge must confront the possibility that the governing norms are either uncertain or overlap. In so doing, the judge is aware of his role as one requiring the creation of new rules on the peripheries of legislation.").

39. *See* Stewart, *The Nine "Guardians of the Constitution,"* 41 FLA. B.J. 1090, 1094-95 (1967). *See also* D. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 174-75 (1980); Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43, 49 (1968).

Walter Murphy has pointed out:

> The Justices are subject to political, legal, institutional, social, ideological, and ethical restraints. Any Justice who wishes to do good—or evil, for that matter—will have to take into account not only the scope and sources of his power and the instruments available to him, but also the restrictions on his power.

W. MURPHY, *supra* note 33, at 12.

best policy.[40]

Despite these constraints, the Justices do have significant discretion in making decisions and choosing arguments to support those decisions. It might be argued that it constitutes a prostituting of the legal reasoning process for a Justice to consider rhetorical factors in the selection and shaping of legal and nonlegal arguments in an opinion. Such an argument would not be realistic. Legal reasoning is not scientific in nature. When judges consider rhetorical factors in fashioning an opinion, they are not putting on blinders that will prevent them from discovering the "correct" legal answer to an issue presented. That is not the nature of the decision-making process in the Supreme Court.

In most cases, the Supreme Court Justices have been presented by the attorneys with virtually every possible decision and rationale before they engage in decisionmaking. These choices have been developed and refined in lower court proceedings. Occasionally, the Justices will themselves contribute a new theory or perspective which must be considered. When it is time to make the decision, the process is not so much investigative as evaluative. There is seldom a search for the clues to a right answer which would be analogous to a detective's search for the clues to a crime. Instead, the Justices weigh the alternatives presented by the attorneys to determine which choice is supported by the more persuasive reasons.[41] Thus, it has been said that the process of argument in many cases

> is not a *chain* of demonstrative reasoning. It is a presenting and representing of those features of the case which severally cooperate in favour of the conclusion, in favour of saying what the reasoner wishes said, in favour of calling the situation by the name by which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain.[42]

A good judicial opinion is one which convinces the Court's audiences that the decision is supported by a good set of "legs." It is not usually investigative; it is always rhetorical.

> One evidence of the rhetorical nature of court decisions is the function they perform. They are written not as investigative enterprises leading to the conclusions drawn by the justices, but as a means of justifying decisions previously arrived at. If well done, they help assure the public and other courts that decisions are not based on pure whim or prejudice.[43]

Given this function, it is only natural to discover, as Charles A. Miller has noted, that the "logic of presentation" in judicial opinions "resembles only faintly the sequence of 'if-then' statements; it is perhaps nearer the

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40. For a discussion on constraints facing the Court as a persuader, *see infra* notes 78-106 and accompanying text.

41. Crable, *Models of Argumentation and Judicial Judgment*, 12 J. AM. FORENSIC A. 113, 117 (1976) (discussing the works of Belgian scholar Chaim Perelman). *See* C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963); C. PERELMAN, JUSTICE (1967); C. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (1969)).

42. Wisdom, *Gods*, in PHILOSOPHY AND PSYCHOANALYSIS 157 (B. Blackwell ed. 1964), *quoted in* Hagan, Roe v. Wade: *The Rhetoric of Fetal Life*, 27 CENT. ST. SPEECH J. 192-93 (1976).

43. Hagan, *supra* note 42, at 192.

classical study of rhetoric."[44] Rhetorical strategies will therefore inevitably affect the content of an opinion because the Court's judgment will be "based upon both what a Justice thinks is important and what a Justice thinks is likely to persuade those who read the opinion."[45]

In summary, the Supreme Court does and must make policy decisions, especially in matters of constitutional law. When a difficult and complex constitutional issue comes before the Court, the attorneys spell out the various alternative judgments and rationales. The Justice must choose that alternative which he considers the most persuasive. In making this choice, the Justice makes policy, though his actions are constrained by a network of legal considerations.

Once the decision is made, the opinion must be written to fairly settle the immediate controversy and give guidance to future litigants. If the decision is in a controversial case, the opinion must also gain acceptance for the Court's holding. Only if the Justice does a credible job of convincing the Court's various audiences, including the public, that a decision is sound, will that decision be willingly accepted so that the prestige of the Court as an institution is maintained. Rhetorical considerations are quite naturally a part of the process by which the Court seeks to justify its decisions. There is nothing sinister in this fact. An effective President is one who can not only devise wise policies, but can also convince Congress and the public of their wisdom. An effective Supreme Court is one that can produce just and wise decisions, and convince the nation that such is the case. Indeed, the very fact that Justices must give reasons for their decisions and that these reasons must stand the test of time helps explain how an undemocratic institution like the Court survives in our democratic system of government.

Given these premises, it is now time to turn our attention to the development of an analytical framework suitable for the study of rhetorical considerations which influence the content and form of Supreme Court decisions.

## II. AN ANALYTICAL OVERVIEW

Bickel once noted that "[i]n American life, the [Supreme] Court is second only to the presidency in having effectively at its disposal the resources of rhetoric."[46] Despite this fact, the Supreme Court's rhetorical practices have received precious little scrutiny. Although numerous modes of analysis have been developed for the campaign speech and the inaugural address, no comprehensive analytical framework has been developed for the Supreme Court's decisionmaking process. Development of a theoretical construct which will adequately consider all the relevant variables is difficult. Nonetheless, as pointed out above, the Court's rhetorical position is sufficiently similar to the more traditional situations that means used to

44. C. MILLER, *supra* note 4, at 14.
45. Pratt, *supra* note 19, at 192.
46. A. BICKEL, *supra* note 21, at 188.

study other forms of rhetoric may be adapted to the judicial setting without great difficulty.

A helpful framework for analysis is that offered by Lloyd F. Bitzer's influential article, "The Rhetorical Situation,"[47] in which he demonstrated the profound impact on rhetoric which is exerted by the rhetorical context in which the communication occurs. According to Bitzer:

> Rhetorical work belongs to the class of things which obtain their character from the circumstances of the historic context in which they occur. . . . [A] work is rhetorical because it is a response to a situation of a certain kind.
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> . . . .
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> We need to understand that a particular discourse comes into existence because of some specific condition or situation which invites utterance.[48]

According to Bitzer, the rhetorical situation may be defined as "a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance."[49] Bitzer persuasively argues that the situation is so controlling that it should be considered "the very ground of rhetorical activity."[50]

Analytically, Bitzer breaks the rhetorical situation down into three elements. All three elements are patently applicable to the rhetorical setting in which the Supreme Court constantly acts.

### A. *The Exigence*

The first element of a rhetorical situation is the "exigence," which Bitzer defines as "an imperfection marked by urgency; . . . a defect, an obstacle, something waiting to be done, a thing which is other than it should be."[51] For example, the assassination of President Kennedy gave rise to the need to explain the events which had occurred, to assure the public that the transfer of governmental power would be orderly, and ultimately to eulogize the dead President.[52] The attack on Pearl Harbor gave rise to an entirely different set of exigences which required rhetorical responses.

In a general sense, every Supreme Court utterance is marked by an exigence consisting of something waiting to be done. That is, there is a dispute which has been brought to the Court through the appellate process.

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47. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1 (1968).

48. *Id.* at 3-4. Bitzer also stated:

> [A] work of rhetoric is pragmatic; it comes into existence for the sake of something beyond itself; it functions ultimately to produce action or change in the world; it performs some task. In short, rhetoric is a mode of altering reality, not by the direct application of energy to objects, but by the creation of discourse which changes reality through the mediation of thought and action. The rhetor alters reality by bringing into existence a discourse of such a character that the audience, in thought and action, is so engaged that it becomes a mediator of change. In this sense rhetoric is always persuasive.

*Id.*

49. *Id.* at 5.

50. *Id.*

51. *Id.* at 6.

52. *Id.* at 9.

That dispute demands resolution, and the institutional framework of our judicial system requires the Court to be the active agency in that resolution. As pointed out earlier, the Court does not sit to issue "precatory pronouncements"; its statements are issued for the very pragmatic purpose of settling a dispute that our Constitution and acts of Congress have placed within the Court's jurisdiction.

On a more specific level, each opinion is issued in response to some defect, obstacle, or situation which is other than it should be. The defect may consist of a plaintiff wronged by the socially unacceptable conduct of a defendant, yet uncompensated. The "situation other than it should be" may consist of a criminal defendant wrongfully convicted by law enforcement methods inconsistent with our Constitutional standards. The rhetorical exigence in *Brown v. Board of Education* has been described as

> the state-imposed separation of one race from another in public, educational accommodations. The exigence, as privation, affected a large number of people directly (white and black school children in seventeen states) and many more indirectly (parents, the public, peoples in other nations aware of the privation).[53]

From today's vantage point, we have no difficulty in seeing the rhetorical exigence in *Brown* primarily in terms of the injustice of the inequality, lack of opportunity, and second-class status inflicted upon the Negro race by state-imposed segregation. Obviously, many rhetorical situations are filled with several different and perhaps conflicting exigences. Counsel for the school districts in the *Brown* case felt that the primary defect lay in the threat to the established order, especially state control of educational systems.

Beyond the injustice to the immediate parties which must be remedied, other exigences to be considered in a case like *Brown* include: (1) an entire body of law needing to be changed or clarified by a new precedent to guide future litigation; (2) a social-political system preaching equal justice for all but producing little of it for substantial segments of the populace; and (3) the threat to the Court's status as an institution by those who demand change. All these matters must be considered for their influence on what the Court decides and how the decision is reached.

Bitzer's point that rhetorical utterances are controlled by situational factors, such as the rhetorical exigence, is well taken when one considers that Supreme Court opinions almost always decide cases, and never consist of the Justices' favorite recipes or fishing stories.[54] When a case like *Brown* is argued, the situation demands and receives a decision on the

53. Hunsaker, *The Rhetoric of Brown v. Board of Education: Paradigm for Contemporary Social Protest*, 43 S. SPEECH COM. J. 92, 92 (1978).

54. This does not mean that irrelevancies do not often creep into judicial opinions. For example, a recent study indicates that judicial opinions involving homosexual litigants frequently contain crude, gratuitous language unnecessary to the decision, but providing "a way for judges, individually and collectively, to distance themselves from homosexuality, a common attribute of homophobic behavior." Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: "Queer Baiting" from the Bench*, 3 POL. BEHAV. 31, 32, 42 (1981). *Cf.* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S. Ct. 2323 (1981) (where the majority gave a landmark legal victory to homosexuals by invalidating New York's anti-sodomy

matter of state-imposed racial segregation in public schools, rather than the Court's views on the international monetary system.

B. *The Audience*

The second element of a rhetorical situation, according to Bitzer, is the "audience." "Since rhetorical discourse produces change by influencing the decision and action of persons who function as mediators of change, it follows that rhetoric always requires an audience. . . ."[55] This is an especially crucial element insofar as judicial rhetoric is concerned, because the Supreme Court Justice who writes an opinion has a number of separate and distinct groups whose interests and reactions must be considered.[56]

In every lawsuit, the Justice must consider the beliefs and feelings of the other Justices in order that a majority vote for the opinion may be obtained.[57] Any Justice engaged in opinion-writing is not a "free agent," but must satisfy the other Justices through a process of compromise and mutual accommodation.[58] The bargaining process may require that an opinion go through several drafts before the other Justices' objections are sufficiently mollified.[59] If the opinion writer is not willing to compromise sufficiently in the face of a well-written proposed dissent, he may find himself the dissenter as the initial majority vote slips through his fingers.[60]

Also, the opinion in every lawsuit must consider the litigants. The litigants will normally follow the Court's decision without question, so the Justices' only concern will be to treat them fairly and (if possible) make even the loser feel as though he has been fairly treated.[61]

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law, despite the fact that the word "homosexual" is conspicuously absent from the text of the majority, concurring and dissenting opinions).

Another example of extraneous material finding its way into an opinion is Flood v. Kuhn, 407 U.S. 258 (1972), involving an antitrust challenge to the organization of the major leagues. Justice Blackmun's love of the game led him to liberally sprinkle the introduction to the opinion with irrelevant information, such as a listing of some of the greatest players of all time. *Id.* at 460-64. *See generally* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 223-26 (1979).

55. Bitzer, *supra* note 47, at 7-8.

56. Haynes, *The Language and Logic of Law: A Case Study*, 35 U. MIAMI L. REV. 183, 187-88 (1981); Stewart, *supra* note 39, at 1094; Wright, *supra* note 4, at 70-71.

57. Perhaps the most fully documented example of the effect that writing for other Justices has upon the content of a particular opinion is Brown v. Board of Educ., 347 U.S. 483 (1954). *See infra* notes 176-82 and accompanying text.

58. *See* Murphy, *Marshaling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640, 656 (1962); Rohde, *Policy Goals and Opinion Coalitions in the Supreme Court*, 16 MIDWEST J. POL. SCI. 208, 214 (1972).

59. H. BALL, COURTS AND POLITICS 260 (1980); D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 62 (1976).

All Justices must become accustomed to this process. Justice Minton, it has been said, "was not in the least hesitant to tailor his opinions to the extent required to satisfy the other Justices." Atkinson, *Opinion Writing on the Supreme Court, 1949-1956: The Views of Justice Sherman Minton*, 49 TEMPLE L.Q. 105, 112 (1975). Justice Holmes once said he was willing to be "reasonably raped." Howard, *supra* note 39, at 44.

This does not mean that the bargaining process is purely pragmatic, having no relation to the Justices' beliefs as to the proper rule of law. Howard's study concluded that "the lawyer's ideal of the judicial process as a system of reasoning" was supported by his findings. *Id.* at 55.

60. S. WASBY, *supra* note 5, at 15; Stewart, *supra* note 39, at 1092-93.

61. Richard D. Rogers, the United States District Judge presently presiding over the recently revived *Brown* case (*see* Brown v. Board of Educ., 84 F.R.D. 383 (D. Kan. 1979)), once advised

Occasionally, litigants will also be powerful actors in the political arena, and therefore constitute an audience which must be given special attention in the shaping of rhetorical strategies. A classic example occurred in the Nixon tapes case[62] when President Nixon's open threat to disobey any adverse Supreme Court decision had a concrete impact on the Court's approach to the opinion.[63]

Frequently the Justices must also consider the lower courts and administrative agencies as important members of the audience, because those entities are "in the trenches" so to speak, charged with implementing the Court's decisions.[64] As much as anything, these audiences need clarity in a decision so as to be able to effectively carry out the Court's will.[65]

In the most important and controversial cases, the President and Congress must also be considered. Because it is the President, not the Court, who controls the coercive means of enforcement, the Supreme Court must count the President as among the most important members of its audience in particularly controversial cases.[66] The Court must be ever aware that Presidents may choose to emulate President Jackson's reputed response when he heard of the decision in the Cherokee Nation case:[67] "John Marshall has made his decision, now let him enforce it."[68]

Congress also has a number of checks on the Supreme Court, such as the power to deny appropriations to fund enforcement efforts, and perhaps the power to prohibit various types of remedies or even to prohibit federal courts from hearing certain types of controversial cases.[69] Many of these

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the author, then a law clerk, that a judge must occasionally "temper the wind for the shorn lamb," that is, give at least a little something to the loser (if possible) so that he goes home unhappy, but not mad. Quotation from H. ESTIENNE, LES' PREMICES (1594), in J. BARTLETT, FAMILIAR QUOTATIONS 163 (15th ed. 1980).

62. United States v. Nixon, 417 U.S. 683 (1974).

63. Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 22 U.C.L.A. L. REV. 76, 86 (1974).

The Supreme Court's approach to Cooper v. Aaron, 358 U.S. 1 (1958), was similarly affected by the openly hostile attitude of the Governor of Arkansas. The Court penned a unanimous decision signed by all the Justices, and directed most of its remarks to the Governor, who was not a litigant in the lawsuit. *Id.* at 17-19. *See also* Recent Decisions, 23 ALBANY L. REV. 405, 408 (1959).

64. L. BAUM, THE SUPREME COURT 121 (1981).

65. Unless an opinion clearly sets forth the Court's doctrine and logic, there will likely be a stream of "repeater" cases seeking clarification. S. WASBY, *supra* note 5, at 20. In addition, clarity will make it more difficult for reluctant lower court judges to avoid enforcing the Court's will by manipulation of ambiguous phrasing. This can be an important factor in controversial cases, where lower courts are less likely to comply with Supreme Court decisions. Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502, 503, 518 (1980).

66. L. BERKSON, *supra* note 30, at 47-48; R. HODDER-WILLIAMS, *supra* note 26; R. JOHNSON, THE DYNAMICS OF COMPLIANCE 25 (1967); W. MURPHY, *supra* note 33, at 26-27; Wright, *supra* note 4, at 71; Note, *The Supreme Court in its Political Milieu*, 46 B.U.L. REV. 386-87 (1966).

67. Worcestor v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

68. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 11 (1955).

69. In recent years, of course, some of the most vitriolic congressional debate has been over bills designed to deny federal funding for desegregation efforts, to ban busing as a remedy for segregation, and even to prohibit the federal courts from hearing any such cases. As this Article was being written, the Senate approved legislation to prohibit federal courts from ordering large-scale busing, Wall St. J., Mar. 3, 1982, at 3, col. 1, and Attorney General William French Smith took the position that such a ban would be constitutional. Wall St. J., May 7, 1982, at 8, col. 2.

checks have been exercised in different contexts over the years,[70] and many others threatened. Thus, the Supreme Court Justices must also write their opinions in light of potential congressional reaction.[71]

Because the most important and controversial cases may affect directly or indirectly the bulk of the American public, and because of the political nature of the executive and legislative branches of the federal government, one of the Court's ultimate concerns must be with public opinion.[72] In fact, history shows that the Supreme Court has seldom been seriously out of step with the mainstream of American thought for long periods of time.[73]

In seeking to reach the public, the Court must take into account "opinion leaders," such as members of the legal community, who constitute yet another important audience. The public is not knowledgeable about complicated legal matters and seldom reads opinions of the Court. Therefore, it "tends to take the word of the lawyers and others who do in fact read the opinions."[74]

With so many different audiences to consider in important cases, the Supreme Court Justice faces a herculean task. Writing for each audience involves somewhat different considerations.[75] For example, in forming a majority coalition, a Justice may write in general terms, omitting details which might be criticized by other Justices needed to form the majority. But such a vague opinion is not suitable for the lower courts and administrative agencies which need specific guidance in their attempts to implement the decision.[76]

Even within a single audience, such as Congress, there will be disparate factions which react differently to various results and rationales. To choose the most important audience or audiences, and the most important

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The federal courts are also under attack in the areas of abortion and school prayer. *See, e.g.*, S. 158, 97th Cong., 1st Sess. (1981) (human life bill); S. 1742, 97th Cong., 1st Sess. (1981) (school prayer bill).

For recent discussions of the constitutionality of such actions by Congress, see Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U.L. REV. 129 (1982); Sager, *Foreward: Constitutional Limitations on Congress; Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981); Redish, *Constitutional Limitations on Congressional Power to Control Federal Court Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982).

70. *See* L. BAUM, *supra* note 64, at 122; J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 56 (1980); W. MURPHY, *supra* note 33, at 26-28.

71. This is particularly true since the Court has become a favorite "whipping boy" in the rhetoric of many congressmen in recent years because these congressmen know that the Justices cannot "fight back." J. SCHMIDHAUSER & L. BERG, THE SUPREME COURT AND CONGRESS 7 (1972).

72. *See* A. BICKEL, *supra* note 21, at 239; C. MILLER, *supra* note 4, at 12.

73. J. CHOPER, *supra* note 70, at 57; A. MILLER, THE SUPREME COURT: MYTH AND REALITY 4 (1978); R. MCCLOSKEY, THE AMERICAN SUPREME COURT 224 (1960); *see* D. ROHDE & H. SPAETH, *supra* note 59, at 66.

When the Court does fall out of step with a broad popular consensus, the results can be disastrous. *See* Carlton, *The Dred Scott Case*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 77, 89 (J. Garraty ed.) (1962) [hereinafter cited as QUARRELS]; Freidel, *The Sick Chicken Case*, in QUARRELS 191, 208 (discussing Schecter v. United States, 295 U.S. 495 (1935)).

74. S. WASBY, *supra* note 5, at 96.

75. *Id.*

76. Beiser, Book Review, 89 HARV. L. REV. 1945, 1950 (1976) (reviewing R. KLUGER, SIMPLE JUSTICE (1976)).

factions within those groups, may require a balancing act worthy of a high-wire artist. But adapting a rhetorical message to the audience is critical, because "[p]ersuasiveness always depends on what the intended audience regards as persuasive."[77] One need only compare a politician's campaign speech on spending for social programs given to an elderly or minority audience with his speech on the same topic given to a group of businessmen to see that Bitzer is correct in arguing that the audience is an important element of the rhetorical situation which directly affects the content of the rhetorical message.

### C. *The Constraints*

The third component of the rhetorical situation, according to Bitzer, is a set of "constraints" "made up of persons, events, objects, and relations which are part of the situation because they have the power to constrain decision and action needed to modify the exigence."[78] These constraints which hinder the persuasive effort may arise from such sources as "beliefs, attitudes, documents, facts, traditions, images, interests, motives and the like."[79] Furthermore, the rhetor himself brings to the rhetorical situation important additional constraints, such as "his personal character, his logical proofs, and his style."[80]

These constraints are easily identified in the rhetorical situation surrounding the Supreme Court. In a case such as *Brown v. Board of Education*, beliefs and attitudes about such matters as equality, racism, liberty, white supremacy, states' rights, and law and order are all implicated. All must be circumvented, utilized, or at least considered in the persuasive effort.

The facts are provided by the lower courts because the Supreme Court is almost exclusively an appellate body. These facts are a confining influence, especially because the trial court's version is normally accepted as "the" accurate description of events, and because the Court is limited to the facts considered "legally relevant."[81] Nonetheless, the use of the Brandeis brief[82] and the well-known "fact" that facts are extremely malleable in the hands of an attorney, give the Supreme Court substantial leeway for

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77. Haynes, *supra* note 56, at 187.

78. Bitzer, *supra* note 47, at 8.

This is certainly no surprise. Many years ago Felix Cohen wrote:

> A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say as a product of social determinants and an index of social consequences. A judicial decision is a social event. . . . Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.

Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

79. Bitzer, *supra* note 47, at 8.

80. *Id.*

81. Hample, *supra* note 3, at 161.

82. One of the classic examples of the utilization of extracurricular factual information is the infamous footnote 11 of Brown v. Board of Educ., 347 U.S. 483 (1954), which contained reference to certain controversial sociological studies. *Id.* at 494-95 n.11. *See generally* Deutsch & Hoeflich, *supra* note 38; *infra* notes 218-28 and accompanying text.

strategic maneuvering in most cases.[83] Still, facts and figures, testimony and documents on such matters as per-pupil expenditures, the mental capacities of the races, and the psychological impact of segregative practices on the minority children would all be important constraints in a desegregation case.

Traditions such as second-class status for blacks in society and *stare decisis* in the legal system, and images of stereotypical blacks and meddling judges in Washington are also constraints which must be considered in forming rhetorical strategies in a case like *Brown*. The interests of whites in the established order, and of blacks in equality of opportunity, and motives such as preservation of the status quo and re-election for politicians are also matters for concern.

Every case presented to the Court will involve a different set of beliefs, attitudes, traditions, and the like, to be analyzed and dissected. In each case, the special blend of constraints present will alter the rhetorical situation and color the content of the rhetorical message, the opinion.

The constraints which the rhetor himself brings into the situation are particularly interesting in the case of the Supreme Court. Bitzer speaks first of the speaker's character. Just as a President must watch the public opinion polls, so must the Justices of the Supreme Court be concerned about the state of their credibility with the populace, because it is generally accepted that the credibility of the source of a message bears heavily upon the effectiveness of the message itself.[84] If a rhetor's character lacks credibility with the audience, the available persuasive mechanisms are definitely limited. Fortunately, the Supreme Court generally fares well in this category. The individual Justices are generally perceived as highly intelligent, supremely educated, and normally objective persons.[85]

More important than the ethos generated by the individual Justices is the perception of the Supreme Court as an institution.[86] The prestige of the Supreme Court is undoubtedly an important source of its power as an actor in America's political system.[87] The Court is blessed in this regard. In 1937, Max Lerner wrote that "[e]very tribe needs its totem and its fetish and the Constitution is ours."[88] Most Americans revere the Constitution.

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83. According to LaRue, *supra* note 9, at 43-44, "A statement of facts can be put together in many different ways, and the persuasiveness of a judicial opinion can be increased or decreased markedly by the skill with which a statement of facts has been assembled." Justice Rehnquist's skillful manipulation of a factual description in Paul v. Davis, 424 U.S. 693 (1976) is discussed in Weisberg, *supra* note 9, at 43-44.

84. L. BERKSON, *supra* note 30, at 6, 14-15; M. KARLINS & H. ABELSON, PERSUASION: HOW OPINIONS AND ATTITUDES ARE CHANGED 108 (2d ed. 1970); P. ZIMBARDO, E. EBBESON & C. MASLACH, INFLUENCING ATTITUDES AND CHANGING BEHAVIOR 125 (2d ed. 1977).

85. Berkson, *Supreme Court Justices: Effective Encoders of Supreme Court Decisions*, 14 AM. BUS. L.J. 391, 393-94 (1977). Berkson points out that in public opinion polls investigating occupational status, the job of Supreme Court Justice ranks first. Berkson concludes: "It is clear that Supreme Court Justices are highly respected in this country and come from backgrounds and have experience which would indicate that they are very well educated, well informed and exceedingly competent individuals." *Id.* at 404. *See also* D. GREY, THE SUPREME COURT AND THE NEWS MEDIA 13-14 (1968).

86. L. BAUM, *supra* note 64, at 199.

87. W. MURPHY, *supra* note 33, at 19.

88. Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1292, 1294 (1937).

The Constitution specifically provides for the Supreme Court, and because of the extraordinary success of Chief Justice Marshall in *Marbury v. Madison*[89] in establishing the Supreme Court as the ultimate interpreter of the Constitution, the Court is generally perceived as acting properly when it renders its decisions.[90] The Court is accepted as a legitimate actor in our democratic landscape, and the electorate will normally hesitate to disobey even those decisions with which it disagrees.[91]

With this prestige comes constraint. The Court's legitimacy is closely tied to the public's perception of the Court as the voice of the Founding Fathers. Although it is clear to the student of law that the Supreme Court *makes* law and may therefore be considered a political institution, the myth persists. The Court's effectiveness would be compromised if the general public discontinued giving credence to the myth of the Constitution as totem and the Court as its defender. As Archibald Cox has noted:

> The acceptance of constitutional decisions—the habit of compliance or force of legitimacy, if you prefer—seems to rest, in turn, at least partly upon the understanding that what the judge decides is not simply his personal notion of what is desirable but the application of rules that apply to all men equally, yesterday, today, and tomorrow.[92]

This need to appear as the voice of the Founding Fathers rather than as a policy-making branch of government places substantial constraints upon the discretion of Supreme Court Justices in formulating our evolving constitutional law.[93] The law must evolve and adapt, but if the Supreme Court changes the rules too sharply or unpredictably, it "would disturb the general feeling of the law's stability and lead to criticism of the Court for usurping the functions of the legislature."[94]

The Court's need to maintain the appearance of following the doctrine of *stare decisis* is complicated and compromised by the simple fact that on occasion the Court must also be bold enough to act as a "national conscience,"[95] forging standards of behavior beyond the sometimes limited vision of the more political branches of government.

Regarding logical proofs as constraints, the Court must conform generally to accepted patterns of legal reasoning. Use of legislative histories, principles of statutory interpretation, and *stare decisis* precedents is expected. "Unlike other participants in the public forum, [the judge's] arguments must move within the inflexible context established by legal method. He may use formal logic, history, custom, and utility, but beyond these

89. 5 U.S. (1 Cranch) 137 (1803).
90. R. JOHNSON, *supra* note 66, at 27-28.
91. L. BAUM, *supra* note 64, at 194; L. BERKSON, *supra* note 30, at 24.
92. A. COX, THE WARREN COURT 25-26 (1968).
Before he became Chief Justice, Charles Evans Hughes noted that "[s]tability in judicial opinions is of no little importance in maintaining respect for the Court's work." C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 53 (1928). *But see* Kairys, *Why Precedents Aren't Treated Equally*, NAT. L.J., June 9, 1980, at 15 (contending that the doctrine of *stare decisis* serves a primarily ideological and therefore rhetorical purpose, rather than a functional one).
93. A. GRAGLIA, DISASTER BY DECREE 20-21 (1976).
94. S. WASBY, *supra* note 5, at 8.
95. A. MILLER, *supra* note 73, at 20.

materials he may not go."[96]

Nonetheless, rationales and principles can also be extremely malleable in the hands of judges and attorneys. There always seem to be "plenty of precedents to go around."[97] As noted earlier, there are frequently several legally plausible alternatives presented to the Justices by the attorneys, and several of them can probably be justified in a variety of ways.[98]

Finally, there is also evidence that a Justice's style of writing, like a politician's style of public speaking or debating ability, has an impact on the effectiveness of the message. According to Cardozo, the unparalleled opinion writer:

> The argument strongly put is not the same as the argument put feebly any more than the "tasteless tepid pudding" is the same as the pudding served to us in triumph with all the glory of the lambent flame. The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of substance. They are tokens of the thing's identity. They make it what it is.
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> . . . .
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> The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and maxim. Neglect the help of these allies and it may never win its way.[99]

Like facts and logic, writing styles may be manipulated to achieve desired rhetorical effects. An interesting illustration arises from a comparison of Cardozo's very sparse, magisterial language in *Palsgraf v. Long Island Railroad*[100] (a decision refusing recovery to a sympathetic plaintiff) with his flowery, expansive language just seven months later in *Meinhard v. Salmon*[101] (a decision granting recovery to a businessman against his partner for breach of fiduciary duty).[102]

The collegial nature of the Supreme Court's decisionmaking process also affects the style and content of the opinions issued. Variations in individual writing style are moderated by the necessity for each Justice to write the opinion in such a way as to please at least four colleagues.

An additional very important constraint is institutional in nature. That the Supreme Court has no physical mechanism for enforcing its decisions means the Court is in a precarious spot as an institution in the political system. The Court can ill afford to allow a single decision to create so much popular clamor that the Court itself is damaged. According to traditional realist theory, "[a]part from substance and style, a court—above all

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96. Wright, *supra* note 4, at 68. *See also* S. TOULMIN, *supra* note 16.

97. J. FRANK, LAW AND THE MODERN MIND 152 (1963).

98. Jones, *Justification in Judicial Opinions: A Case Study*, 12 J. AM. FORENSIC A. 121, 129 (1976).

99. B. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS 6, 9 (1931), *quoted in* Wright, *supra* note 4, at 70.

100. 248 N.Y. 339, 162 N.E. 99 (1928).

101. 249 N.Y. 458, 164 N.E. 545 (1928).

102. Deutsch & Hoeflich, *supra* note 38, at 93-95 (1981). For a similar comparison of *Palsgraf* with another case, Hynes v. New York Cent. R.R., 231 N.Y. 229, 131 N.E. 898 (1921) (Cardozo, J.), see Weisberg, *supra* note 9, at 34 n.203.

the United States Supreme Court—is expected to pursue institutional concerns, to keep a realistic eye on the possible effectiveness of its action, on the likelihood of its success, and on its position as one institution among others."[103]

Classic examples of institutional self-defense, where the substantive output of the Court was affected by the Justices' awareness of threats to the Court as an institution include the delay in deciding *Ex parte McCardle*[104] in 1868 until after Congress had removed jurisdiction, thus avoiding a confrontation with the Reconstructionists,[105] and the more famous "switch in time that saved nine," the 1937 response to Franklin D. Roosevelt's "Court-packing" threat.[106]

To summarize this analytical backdrop, the Supreme Court's opinions are heavily influenced by the rhetorical situation it faces, this being no different from the plight of any rhetor. The exigences, audiences, and constraints combine to directly influence the form and substance of the Court's opinions. The key to the effectiveness of any Supreme Court opinion may well rest upon how effectively the authoring Justice identifies the most important exigences to be resolved, adapts to the most important audiences, and copes with the most significant constraints.

It is now time to turn to a case study designed primarily to *describe*, by painting in detail the rhetorical situation in which the Court found itself and explaining in historical context the rhetorical responses and strategies used.

## III. A RHETORICAL CASE STUDY

### A. *Introduction to* Brown v. Board of Education

Because of the challenging situation it presented the Court, *Brown v. Board of Education*[107] has been chosen to illustrate how rhetorical considerations can affect the content of a Supreme Court opinion. *Brown* is the most important decision the Supreme Court has issued this century.[108] More is known about the decisionmaking process in *Brown* than in any other case.[109] More importantly, the area of desegregation presented the most political of issues to the Court,[110] as well as a situation where the

103. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 228 (1972).
104. 74 U.S. (7 Wall.) 506 (1868).
105. W. MURPHY, *supra* note 33, at 193-94.
106. G. SCHUBERT, CONSTITUTIONAL POLITICS 165-171 (1960).
107. 347 U.S. 483 (1954) (hereinafter cited as *Brown I*). The opinion in *Brown I* is the subject of this study, though the companion case of Bolling v. Sharpe, 347 U.S. 497 (1954), and the subsequent opinion on remedies, Brown v. Board of Educ., 349 U.S. 294 (1955) (hereinafter cited as *Brown II*), will necessarily receive incidental attention.
108. H. HUDGINS, PUBLIC SCHOOL DESEGREGATION: LEGAL ISSUES AND JUDICIAL DECISIONS 1 (1973); H. SPEER, THE CASE OF THE CENTURY: A HISTORICAL AND SOCIAL PERSPECTIVE ON BROWN V. BOARD OF EDUCATION OF TOPEKA WITH PRESENT AND FUTURE IMPLICATIONS 1 (1968).
109. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 33 (1979).
110. Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-1970*, 64 VA. L. REV. 485, 485 (1978).

probability of disagreement and disobedience was quite high.[111] The Justices and the legal community were well aware of the importance and difficulty of the task which confronted the Court in *Brown*. Two law professors predicted in early 1954 that whatever the Court decided, massive litigation would follow because Supreme Court opinions are not self-executing and "nobody will really be satisfied with the Court's decision."[112]

Aware that whatever the decision, large numbers of people deeply interested in the explosive issue would be displeased, the Justices realized very early that "*how* the Court presented its ruling would be no less important than the substantive content of the opinion."[113] Thus, from the beginning, rhetorical considerations played a large part in the Court's opinion-writing process. *Brown* has been termed a classic example of judicial rhetoric.[114]

The background of *Brown v. Board of Education* should be familiar. Following the Supreme Court's promulgation of the doctrine of "separate but equal" in *Plessy v. Ferguson*[115] in 1896, the practice of segregation of the races in public education was widespread and apparently legal. From 1938 to 1950, however, the Supreme Court delivered a number of blows to the practice of segregation at the graduate school level.[116] In the summer and fall of 1952, the Court decided to hear appeals in five cases involving the practice of segregation in public schools in South Carolina,[117] Kansas,[118] Virginia,[119] Delaware,[120] and the District of Columbia.[121] Arguments were heard on December 9-11, 1952. When the Justices were unable to decide how the cases should be resolved, they issued an order on June 8, 1953, setting the cases for re-argument.[122] Before the re-argument occurred, Chief Justice Fred Vinson died and was replaced by Earl Warren.

Following re-argument, Chief Justice Warren presided over his first conference regarding the desegregation cases on December 12, 1953.[123] The Court's momentous decision, which did not address the matter of remedy, was issued on May 17, 1954. A second order, *Brown II*, addressing the matter of remedy with the infamous "all deliberate speed" language,

111. Rohde, *supra* note 58, at 213.
112. Leflar & Davis, *Segregation in the Public Schools*, 67 HARV. L. REV. 377, 379-80 (1954).
113. R. KLUGER, *supra* note 6, at 759.
114. Hunsaker, *supra* note 53, at 95 n.9.
115. 163 U.S. 537 (1896).
116. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gains v. Canada, 305 U.S. 337 (1938).
117. Briggs v. Elliott, 344 U.S. 1 (1952).
118. Brown v. Board of Educ., 344 U.S. 1 (1952).
119. Davis v. County School Bd., 344 U.S. 1 (1952).
120. Gebhart v. Belton, 344 U.S. 891 (1952).
121. Bolling v. Sharpe, 344 U.S. 873 (1952).
122. 345 U.S. 972 (1953).
123. Though appointed by the President and acting as Chief Justice, Warren had not yet been confirmed by the Senate at the time of the oral argument.

The Associate Justices under Chief Justices Vinson and Warren were Justices Frankfurter, Black, Douglas, Minton, Clark, Jackson, Burton, and Reed.

was issued in May of 1955.[124]

## B. *Before Pen Meets Paper*

### 1. *Accepting the Cases*

Perhaps the first rhetorical strategy exercised by the Supreme Court in the desegregation cases was the actual decision to hear them when it did. It was well known that the National Association for the Advancement of Colored People (NAACP) was attempting to prepare a case which would force the Court to re-examine the "separate but equal" doctrine in the context of public schools.[125] However, had it chosen to do so the Court could have postponed addressing this difficult and explosive issue, at least for a time. Through a number of well-known devices—such as utilization of the doctrines of standing, political question, ripeness, exhaustion of remedies, mootness, and the like—the Supreme Court has substantial control over the content of its own docket and the cases which will receive disposition via a full opinion.[126]

But the persistence of the NAACP meant that the Court could not indefinitely avoid the public school desegregation issue without eventually losing, in the eyes of many, its exalted status as the guardian of Americans' constitutional rights. It has been pointed out:

> The prominence of the Supreme Court means that its case-selection decisions will either add to or detract from its public image. Although the possibility of refusing decision can protect the Court from being compelled to issue a politically damaging decision on the merits, this opportunity for side-stepping conflict must be exercised with circumspection. If the Court is popularly perceived to be ducking important issues by denying review, its reservoir of popular acceptance may suffer.[127]

When it did decide to act, the Court moved cautiously. The South Carolina case was first docketed for the October Term, 1951, but in January of 1952 it was remanded for a progress report by the district judge.[128] The effect was to postpone consideration of the case until the 1952 Term when the Kansas and Virginia cases were added. At the same time the Court took the extraordinary action of actually inviting an appeal by stating that it would entertain a petition for certiorari in the District of Columbia case, *Bolling v. Sharpe*.[129] Then, shortly before oral argument was scheduled to be heard, the Delaware case was added.[130]

By consolidating these cases, the Court accomplished several rhetorical objectives. First, it emphasized that the issue was one of national con-

124. 349 U.S. 294, 301 (1955).
125. *See* A. NORTH, THE SUPREME COURT: JUDICIAL PROCESS AND JUDICIAL POLITICS 172 (1966); Deutsch, *A Comment on "The Rhetoric of Powell's* Bakke," 38 WASH. & LEE L. REV. 63, 69 (1981).
126. L. BERKSON, *supra* note 30, at 92; D. PROVINE, *supra* note 39, at 72.
127. D. PROVINE, *supra* note 39, at 2-3.
128. 342 U.S. 350 (1952).
129. 344 U.S. 1 (1952).
130. Gebhart v. Belton, 344 U.S. 891 (1952).

sequences and concern, and not just a Southern problem.[131] Expecting the most resistance to a possible overruling of *Plessy* to come from the South, this strategy was a way to blunt any subsequent criticism that the southern region of the country was being singled out and harrassed by a liberal court. As Justice Clark later explained, "We felt it was much better to have representative cases from different parts of the country, and so we consolidated them and made *Brown* the first so that the whole question would not smack of being a purely southern one."[132]

Second, the consolidation of several cases underscored the Court's concern that the matter was as much a social problem as a legal one.[133] Indeed, the ultimate decision which emerged eighteen months after initial argument has been characterized as emphasizing sociological matters while minimizing legal reasoning.[134]

Finally, this consolidated case approach was meant to give the impression to those who would find the ultimate decision—be it to overrule segregation or not—unpalatable, that the Court was considering a fair cross-section of cases in a comprehensive and deliberate manner.[135] After carefully collecting and consolidating the five cases, the Court heard extensive oral argument in December 1952, and again in December 1953, with the latter argument focusing on issues the Justices deemed particularly important. *Brown I* was not issued until May 17, 1954, and even then it did not address the critical issue of remedy which was not settled until a year later after *yet another* round of oral argument. Just before *Brown I* was issued, one lawyer wrote:

> If our Supreme Court . . . has hitherto given less than due attention to the tremendously important question now under consideration, the mistake will not now be repeated. . . . *Plessy v. Ferguson* will now stand or fall after as careful a study as has ever been given to

131. The point was later emphasized in the opinion itself: "It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern." *Brown I*, 347 U.S. at 491.

132. R. KLUGER, *supra* note 6, at 683. The Court's plan for a cross-section of cases was almost damaged when neither the Attorney General of Kansas nor the Topeka school board wanted to defend on appeal. The Court solved the problem by virtually ordering the Attorney General to appear. Brown v. Board of Educ., 344 U.S. 141, 141 (1952).

Another reason for the importance of the Kansas case was that while the other cases could have been disposed of by merely holding that facilities for blacks and whites were not *equal* as required by the "separate but equal" doctrine, in Kansas the trial court had found that the facilities were equal and it was clearly correct in so ruling. Therefore, the Kansas case most directly presented the question of the validity of the *Plessy* doctrine. R. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION? 34 (1977); Wilson, *Speech on* Brown v. Board of Education, 30 U. KAN. L. REV. 15, 19 (1981).

The Court's determination to stick to this rhetorical strategy is illustrated by the fact that the *Brown* case was not dismissed and remained the lead case despite the fact that plaintiff's counsel admitted in the December 1953 oral argument that the Kansas case had largely become moot because of integration implemented by the Topeka School Board earlier that fall. 2 W. SWINDLER, COURT & CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY, 1932-1968 267 (1970).

133. Ulmer, *Earl Warren and the* Brown *Decision*, 33 J. POL. 689, 691 (1971).

134. R. BLAND, PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL 83 (1973).

135. Sacks, *The Supreme Court, 1953 Term: Foreward*, 68 HARV. L. REV. 96, 97 (1954).

any matter in any judicial tribunal.[136]

Thus, before the first words of the opinion had been committed to paper, the Supreme Court had attempted to pave the way for acceptance of its eventual decision, whatever it might be, by giving the appearance of impartiality and thoroughness.

2. *Unanimity*

Another rhetorical consideration undoubtedly playing a significant role in the re-argument preceding *Brown I* was the desire to find a basis for a unanimous decision.[137] The Supreme Court Justices have been characterized as "notorious individuals."[138] In fact, Justice Jackson once wrote that "the Court functions less as one deliberative body than as nine."[139] The process of getting the approval of five Justices, let alone all nine, for a single decision, let alone a single opinion, can be very difficult since multiple options are available to the Court.[140] The problem was particularly acute for the Court hearing the first round of arguments in the desegregation cases. Dissents occurred in eighty percent of the cases in Chief Justice Vinson's last term.[141] In fact, Professor Jaffe had criticized the Court in 1951 for lacking "institutional awareness and pride" as manifested by what he viewed as unnecessary concurrences and dissents.[142]

It appeared that the desegregation cases would also result in a deeply divided Court. Although no formal vote was taken at the December 1952 conference, there are indications that the Court, had it voted, would have been split five to four as to the proper outcome of the case. Whether the majority was in favor of ending or reaffirming *Plessy's* "separate but equal" doctrine is unclear,[143] but the split was quite significant because

136. Waite, *Race Segregation in the Public Schools: Jim Crow at the Judgment Seat*, 38 MINN. L. REV. 612, 621 (1954). *See* M. BERRY, STABILITY, SECURITY, AND CONTINUITY, MR. JUSTICE BURTON AND DECISION-MAKING IN THE SUPREME COURT 1945-1958 154 (1978); Sacks, *supra* note 135, at 98 ("Thus, the decision was made fully two years later than was possible. There can surely be no quarrel in any event with such deliberateness. It not only assured full and fair consideration of the issues, *but made it clear to all* that such consideration had been given." (emphasis added)).

137. S. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 23 (1978).

138. R. MCCLOSKEY, THE MODERN SUPREME COURT 131 (1972).

139. R. JACKSON, *supra* note 68, at 16.

140. W. MURPHY, *supra* note 33, at 23.

141. TIME, Sept. 21, 1953, at 22. *See also* 4 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, 2641-42 (1969).

142. Jaffe, *Foreward: The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107, 113 (1951).

Professors Tribe, Kamisar, Kurland and others have recently criticized the present Supreme Court for a similar lack of institutional pride as manifested in personal attacks traded by the Justices in recent opinions. *Low-Roading on the High Court*, Wall St. J., Sept. 13, 1982, at 22, col. 3. *But see* Rehnquist, *"All Discord, Harmony Not Understood": The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973 (1980).

143. That the Court was deeply divided as to outcome and potential rationale is clear. The exact head count is not clear. The following sources appear to conclude that the vote was five (Vinson, Frankfurter, Reed, Jackson, and Clark) to four (Burton, Minton, Douglas and Black) to affirm the lower courts in upholding *Plessy* and "separate but equal": W. DOUGLAS, THE COURT YEARS 113 (1980); G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 314 (1977); Ulmer, *supra* note 133, at 691-92. However, other sources add Justice Clark to the list of Justices prepared to end segregation, making the vote five to four to reverse. R. BERGER, GOVERNMENT BY JUDICIARY 128 (1977); M. BERRY, *supra* note 136, at 124-25. Still other sources give strong evidence that Frankfurter was also ready to overrule the lower courts. R. KLUGER, *supra* note 6, at

Justices do not switch cavalierly from their initial positions.[144]

Nonetheless, there were alterations in position. Especially significant, of course, was the death of Chief Justice Vinson and the appointment of his successor, Earl Warren. At the December 1953 conference following re-argument, again no formal vote was taken. However, Chief Justice Warren made it clear that he favored the end of the "separate but equal" doctrine. Again the evidence is not conclusive, but Warren probably inherited a six to three or seven to two majority.[145] Justice Clark, though still concerned with the matter of enforcement, was apparently willing to reverse the lower court decisions if the matter of remedy were handled delicately. Justice Frankfurter was clearly willing to reverse in the District of Columbia case, *Bolling v. Sharpe*, but was less enthusiastic about interfering with the states. Justice Jackson thought it would take a purely political decision to overrule the long-established *Plessy* doctrine, but was willing to vote to do so if the matter were properly handled. Justice Reed still seemed to feel that segregation was properly within the state police power.[146]

Warren was determined to produce a unanimous decision, if possible. He sensed, as did the other Justices, a two-fold reason for attempting to achieve unanimity. The first reason was strictly rhetorical and relates to the concept of source credibility. Chief Justices Taft and Hughes have expressly argued that the number of dissents should be minimized because they weaken the impact of the majority decision.[147] The need for unanimity is easily seen in a context such as the desegregation cases, where the opinion would inevitably be met with a hail of criticism and resistance:

> Unanimous decisions are thought to convey the message more forcefully than split decisions . . . .
>
> Split decisions, it is generally argued, weaken the thrust of the message. The concurring and dissenting opinions give dissidents a base from which to launch a case for noncompliance, evasion or delay. Moreover, it is widely recognized that radically split decisions (5 to 4) may be easily overturned at a later date and thus should not be

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777; Maidment, *Changing Styles in Constitutional Adjudication: The United States and Racial Segregation*, 1977 PUB. L. 168, 170. Kluger reports that Justice Frankfurter thought the Court stood five to four to reverse, with himself in the majority and Justice Clark in the minority; that Justice Jackson counted anywhere from two to four dissenters if the vote were to reverse; and that Justice Burton thought the Court stood six to three to reverse. R. KLUGER, *supra* note 6, at 777.

144. Brenner, *Fluidity on the United States Supreme Court*, 24 AM. J. POL. SCI. 526, 532 (1980). For additional information, see Brenner, *Ideological Voting on the U.S. Supreme Court: A Comparison of the Original Vote on the Merits with the Final Vote*, 22 JURIMETRICS 287 (1982).

145. Justice Douglas has put the count in December of 1953 at five to four for reversal. W. DOUGLAS, *supra* note 143, at 114. But most sources place the vote at seven to two or six to three with Justices Reed, Jackson and perhaps Frankfurter as the holdouts. S. WASBY, *supra* note 5, at 89; Ulmer, *supra* note 133, at 696-97. There is strong evidence, as noted *supra* note 143, that Justice Frankfurter intended all along to vote to reverse.

146. *See generally* W. DOUGLAS, *supra* note 143, at 113-115; R. KLUGER, *supra* note 6, at 737-779; Hutchinson, *supra* note 109, at 30-44.

147. R. HODDER-WILLIAMS, *supra* note 26, at 103. *See also* Halpern & Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. Q. 471 nn.3-9 (1977). The obviously greater problem of plurality opinions was discussed recently in Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

relied on to any great extent.[148]

Observers at the time of the decision stated that "the comparative novelty of the unanimity . . . has not been without its value in educating the country at large to accept the decision."[149] Twenty years later it was suggested that had there been a substantial minority bloc willing to publicly support the maintenance of segregated schools, "[r]esistance would surely have been stronger and more widespread."[150]

The second reason the Court strove for unanimity was also rhetorical in nature. As later explained by Justice Frankfurter, the purpose was to make "the transcending issue" not the merits of the desegregation issue, but "respect for law as determined so impressively by a unanimous Court in construing the Constitution of the United States."[151] Thus, the Court sought to strengthen its hand in a difficult situation by making a withdrawal from the reservoir of prestige it had built up over the years, banking on the observation that the American people "have accepted the doctrine that it is fundamentally unethical to refuse to respect an adverse decision" of the Court.[152] This is not a strategy the Supreme Court can use often without depleting its stockpile of public respect, but the desegregation cases were perceived to be of sufficient importance that all nine Justices apparently felt the gambit should be used. There is some evidence that it was at least partially successful.[153]

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148. L. BERKSON, *supra* note 30, at 48-49. A classic example of an opinion being weakened by lack of solidarity is the Dred Scott case, where although the vote was seven to two, nine separate opinions were filed. W. LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY 396 (1964); *see* B. STEINER, *supra* note 19, at 418.

149. McWhinney, *An End to Racial Discrimination in the United States?*, 31 CAN. B. REV. 545, 548 (1954).

150. Rohde, *supra* note 58, at 216. *See also* D. BERMAN, IT IS SO ORDERED 107 (1966); W. MURPHY, *supra* note 33, at 66; Hutchinson, *supra* note 109, at 2; Pollak, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment*, 67 YALE L.J. 304 (1957); Ulmer, *supra* note 133, at 702.

It should be noted, however, that there is at least one study providing some evidence that "the degree of Supreme Court support or nonsupport for a particular case" as measured by factors such as size of the voting majority, size of the opinion majority, number of dissents, and the like, "has little or no bearing on the eventual treatment of that case" by one of the Supreme Court's audiences—the lower courts. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792, 802 (1979). And others have suggested that the very unanimity of the *Brown* decision may have led some people to feel they were being " 'put upon' by a super-legislature," concluding that "[d]oubts that the justices differed did not vanish simply because they all joined the opinion. A dissenting opinion might even have been a plus. . . . [O]pponents of the result might have been somewhat mollified by a dissent, perhaps feeling that someone was listening to them." S. WASBY, *supra* note 5, at 102-03.

> In a similar vein, Charles Evans Hughes wrote many years before *Brown* that
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> unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges.

C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 67 (1928).

151. Letter to C.C. Burlingham, Nov. 12, 1958, *quoted in* G. DUNNE, *supra* note 143, at 320. *See also* Beiser, *supra* note 76, at 1950 ("Unanimity permitted the Court to wrap itself in the cult of the robe, invoking the mysteries of 'The Law.' ") (reviewing 2 R. KLUGER, SIMPLE JUSTICE (1977)).

152. L. BERKSON, *supra* note 30, at 24 (quoting David Lawrence). The Court's overall good reputation is "capital" which can be drawn upon when it must make an unpopular decision. Haynes, *supra* note 56, at 217.

153. One survey has concluded that "it is universally the case that objections to the *Brown* decision turned on the relationship between the Court and other groups rather than on the par-

There is no doubt that Chief Justice Warren deserves substantial credit for his initiative and persistence in achieving a unanimous vote.[154] Although he made his position quite clear at the conference in December of 1953, he did not allow a vote to be taken for fear of dividing the Court.[155] Frequent discussions of the case continued until a vote was finally taken in February or March.[156] During this time, and continuing until May, Chief Justice Warren bargained, wheedled and cajoled until the most important members of his audience, Justices Clark, Reed, Frankfurter and Jackson were all convinced to join in a single unanimous opinion.

Perhaps it should not be surprising that unanimity was ultimately reached in *Brown I*. Once Chief Justice Warren replaced Chief Justice Vinson, the vote was *at least* five to four to end segregation and the only remaining questions were the size of the majority, the number of opinions, and the rationale to be used. The potential dissenters were just as aware as the other Justices of the challenge facing the Court.[157] "United we stand, divided we fall" had to be on the minds of the Justices about to issue an opinion which would surely bring much opprobrium down upon the Court.

Issuing a unanimous opinion to serve notice that the Justices stand together is a limited response to the institutional threat, but still one that affects the substantive output of the Court. Studies have indicated that unanimous opinion coalitions are much more likely to occur in situations where the Court as an institution is threatened.[158] In 1954, Professor

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ticular findings of the Court." Dunbar & Cooper, *A Situational Perspective for the Study of Legal Argument: A Case Study of* Brown v. Board of Education, in DIMENSIONS OF ARGUMENT: PROCEEDINGS OF THE SECOND SUMMER CONFERENCE ON ARGUMENTATION 230 (G. Ziegelmueller & J. Rhodes eds. 1981).

154. W. DOUGLAS, *supra* note 143, at 115 ("It was a brilliant diplomatic process which Warren had engineered."); L. JUSTON, PATHWAY TO JUDGMENT: A STUDY OF EARL WARREN 115 (1966). However, Hutchinson has provided substantial evidence for his conclusion that unanimity was the conclusion of a process begun while Vinson was still Chief Justice. Hutchinson, *supra* note 109, at 86. Others have stressed the important role that Justice Frankfurter appears to have played in securing unanimity. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 83 (1975).

155. J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 174 (1979). Chief Justice Warren's approach was consistent with studies of persuasion which have shown that "[o]pinions which people make known to others are harder to change than opinions which people hold privately." M. KARLINS & H. ABELSON, *supra* note 84, at 59. By not committing themselves in the form of a formal vote, the Justices preserved some degree of flexibility.

156. Warren later recalled that the vote was unanimous to end segregation, E. WARREN, THE MEMOIRS OF EARL WARREN 285 (1977), though Kluger concluded the vote was probably eight to one, with Justice Reed intending to dissent. R. KLUGER, *supra* note 6, at 877. Certainly Reed, Jackson and Frankfurter all considered at least writing concurring opinions during the spring of 1954. Hutchinson, *supra* note 109, at 42.

157. Even the most likely dissenter, Justice Reed, a southerner, realized that "even a lone dissent by him would give a lot of people a lot of grist for making trouble." R. KLUGER, *supra* note 6, at 882 (quoting Justice Reed's clerk, Mickum).

158. Rohde, *supra* note 58, at 218. Rohde found unanimity in only 8% of the "non-threat" situations, but in 26% of the "threat" situations. *See also* Rohde, *A Theory of the Formation of Opinion Coalitions in the U.S. Supreme Court*, in PROBABILITY MODELS OF COLLECTIVE DECISIONMAKING 169 (R. Niemi & H. Weisberg eds. 1972). For a debate on Rohde's methods, see Giles, *Equivalent Versus Minimum Winning Coalition Size*, 21 AM. J. POL. SCI. 405 (1977); Hoyer, Mayer & Bernd, *Some Problems in the Validation of Mathematical and Stochastic Models of Political Phenomena*, 21 AM. J. POL. SCI. 381 (1977); Rohde, *Some Clarifications Regarding a Theory of Supreme Court Coalition Formation*, 21 AM. J. POL. SCI. 409 (1977).

Mishkin correctly concluded that in the desegregation cases, "the single voice was, at least to some extent, the product of institutional awareness among the Justices.[159]

3. *Choosing the Author*

Just as the Court spoke unanimously to increase the credibility of the source and acceptability of the opinion, so was the choice of the opinion's author no doubt a strategic one. Since the time of John Marshall, the Chief Justice, if he is in the majority, decides who will write the majority opinion. If the Chief Justice is not in the majority, the opinion is assigned by the senior Associate Justice in the majority.[160] The assignment of Court opinions is normally a matter of internal Court strategy.[161]

In difficult cases, extra-Court influences may come to the fore in the matter of opinion assignment. For example, in the Texas white primary case, *Smith v. Allwright*,[162] the opinion was originally assigned by Chief Justice Stone to Justice Frankfurter. But the decision clearly would be unpopular with a large segment of the country, and an opinion written by Justice Frankfurter could have exacerbated the potential resistance. Justice Jackson, worried that an opinion penned by Frankfurter would "grate on Southern sensibilities," informed the Chief Justice:

> Mr. Justice Frankfurter unites in a rare degree factors which unhappily excite prejudice. In the first place, he is a Jew. In the second place, he is from New England, the seat of the abolition movement. In the third place, he has not been thought of as a person particularly sympathetic with the Democratic party in the past.[163]

The opinion was reassigned to Justice Reed, a protestant Democrat from a border state.[164]

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159. Mishkin, *Prophecy, Realism and the Supreme Court: The Development on Institutional Unity*, 40 A.B.A. J. 680 (1954). Twenty years later, Professor Mishkin viewed in a similar light the Burger Court's unanimous decision in the Watergate Tapes case, United States v. Nixon, 417 U.S. 683 (1974):

> In that situation, the Court's response had to be a major effort to close ranks. A divided Court would invite resistance. Even separate concurrences—let alone dissents—could diffuse the impact of the Court's judgment, thus decreasing the certainty of congressional sanctions for defiance and enhancing the chances of disobedience.

Mishkin, *supra* note 63, at 87.

A similar attempt to close ranks in the face of resistance to desegregation by the State of Arkansas occurred in Cooper v. Aaron, 358 U.S. 1 (1958). The decision was not only unanimous, but in an unprecedented attempt to show the Court's determination and solidarity, all nine Justices signed the Court's opinion. *See* E. WARREN, *supra* note 156, at 298; Hutchinson, *supra* note 109, at 82. However, Justice Frankfurter did file a concurring opinion.

160. D. ROHDE & H. SPAETH, *supra* note 59, at 172.

161. It has been hypothesized that the assigner would normally have the opinion written by the Justice holding views closest to the assigner's. Rohde, *supra* note 58, at 663. There is evidence to the contrary. Rathjen, *Policy Goals, Strategic Choice, and Majority Opinion Assignment in the U.S. Supreme Court: A Replication*, 18 AM. J. POL. SCI. 713, 721 (1974). Sometimes the assignment may be made not to produce the opinion closest to the assigner's views, but simply to hold a thin majority; hence, "there is a tendency to assign the opinion in a closely divided case to the pivotal fifth Justice of the majority," that is, the least committed member of the majority. R. HODER-WILLIAMS, *supra* note 26, at 99-100.

162. 321 U.S. 649 (1944).

163. *Quoted in* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 615 (1956).

164. Rohde gives three other examples of such assignments for rhetorical purposes: Korematsu v. United States, 323 U.S. 214 (1944) (involving the constitutionality of the relocation of

A similar approach could have been taken in *Brown* by assigning the opinion to be written by a conservative southerner, such as Justice Reed or Justice Clark. However, Chief Justice Warren followed another rhetorical approach. The southern Justices all eventually agreed to join the majority opinion, which meant that having one of them author the opinion probably would not add much persuasive impact. Rather, at the suggestion of the other Justices, Chief Justice Warren undertook to write the opinion himself on the theory that in great cases the opinion should be written by the Chief Justice to give added weight and authority to the decision.[165] This approach is frequently taken in critical cases because of the Chief Justice's status as "first among equals."[166]

### C. *As Pen Meets Paper*

For such a momentous and complex case—one which had received extended attention following argument, re-argument, and the submission of massive briefs—the *Brown* opinion was quite brief.[167] It contained: (1) a brief recitation of the procedural background of the cases;[168] (2) the determination that the history of the fourteenth amendment was "inconclusive" as regards the issue of the permissibility of segregation in public schools;[169] (3) a short attempt to distinguish prior case law;[170] (4) a statement as to the importance of public education in modern society;[171] (5) a terse framing of the issue;[172] (6) a concise rationale for holding segregation in the schools violative of the equal protection clause—one which tied the consideration of "intangible factors" in *McLaurin v. Oklahoma State Regents*[173] to the Kansas trial court's finding that segregation itself has a detrimental effect on the psychological state of black children;[174] and (7) a brief conclusion setting the case for re-argument as to the matter of remedy.[175]

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Japanese-Americans in World War II in which Justice Black, one of the foremost civil libertarians on the Court, wrote the majority opinion upholding the government's action); Abington School Dist. v. Schempp, 364 U.S. 203 (1963) (the school prayer case, in which the majority opinion was written by Justice Clark, a prominent Presbyterian layman); and Mapp v. Ohio, 367 U.S. 643 (1961) (the case applying the fourth amendment fully to the states, in which Justice Clark, a former U.S. Attorney General, wrote the majority opinion). Rohde, *supra* note 58, at 657 n.22.

Other instances include: Taylor v. Georgia, 315 U.S. 25 (1942), in which the opinion was assigned to Justice Byrnes, a leading southerner, to make more palatable the holding that a Georgia statute violated federal prohibitions against peonage, S. WASBY, *supra* note 5, at 9, and the frequent use of conservative Justice John Harlan to write opinions favoring suspects' rights in the heyday of the Warren Court. R. HODDER-WILLIAMS, *supra* note 26, at 99.

165. L. BAUM, *supra* note 64, at 119; Rohde, *supra* note 58, at 656-57.

166. Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 AM. J. POL. SCI. 60, 75 (1979).

167. R. FUNSTON, *supra* note 132, at 35 (deeming the "remarkably brief" opinion "a sort of *tour de force*" in "a back-hand way").

168. 347 U.S. at 486-88.

169. *Id.* at 489.

170. *Id.* at 491-92.

171. *Id.* at 492-93.

172. *Id.* at 493.

173. 339 U.S. 637 (1950).

174. 347 U.S. at 493-94.

175. *Id.* at 495-96.

1. *Omission of Remedy*

The most significant influence on the content of the *Brown* opinion arose from Chief Justice Warren's need to satisfy his most immediate audience—the other Justices. The difficulty of the task was magnified because he had to mollify not just four other Justices to secure a simple majority, but all eight remaining Justices to obtain the unanimity perceived necessary under the circumstances. The largest stumbling block to unanimity was the matter of remedy.[176] The primary concern of all the Justices was about the possibly explosive consequences of an order that the nation's schools be *immediately* desegregated. As he lobbied to produce a unanimous agreement in the spring of 1954, Chief Justice Warren "backed and filled with the issue of remedy as his major ploy,"[177] ultimately convincing the doubters that the *principle* of desegregation could be separated from the matter of remedy, which could be the subject of re-argument and a later decision. The omission of the remedy issue from the opinion in *Brown I* was the strategic step that made unanimity possible.[178] This rhetorical ploy elicited the following comment from Professor Sacks:

> [The opinion's] most notable feature lay in separating the issue of constitutionality from the problem of formulating a decree. The former was decided; the latter was held for reargument in the coming term. If the phrase 'judicial statesmanship' has not lost its meaning through excessive use, it is appropriate for this action. Present attention was focused on the basic principle which was decisive of the merits, and the problems of enforcement, difficult as they are, were assigned a subordinate status. Unanimity of viewpoint was achieved at a vital stage, whereas it may not exist on the intricate administrative issues. Additional time was secured—time not only for further deliberation in the Court, but also for adjustment of views outside the Court.[179]

2. *Conciseness*

Other specific effects that the negotiation process had upon the content of Chief Justice Warren's opinion are difficult to discern with certainty.[180] One important aspect, however, may be the sparseness of the opinion. Obviously, the less substance Chief Justice Warren placed in the

176. R. KLUGER, *supra* note 6, at 709, 774. The most pointed questions at the 1953 re-argument related to the matter of remedy. Hutchinson, *supra* note 109, at 38.

177. G. DUNNE, *supra* note 151, at 321.

178. A. BLAUSTEIN & C. FERGUSON, DESEGREGATION AND THE LAW 29 (1957); J. POLLACK, *supra* note 155, at 175.

179. Sacks, *supra* note 135, at 97. The re-argument on the issue of remedy also had the advantage of reinforcing the impression that the Court was carefully and thoroughly deliberating as to these most important issues. R. FUNSTON, *supra* note 132, at 38.

Although the Justices hoped the delay would give southerners a chance to embrace or at least accept the new rule, it did not work out that way, and the decision to omit the remedy has been criticized as having substituted hesitation and uncertainty for a conclusion that could have ended with a "ringing declaration that the petitioners had been illegally and unconstitutionally deprived of their rights" and were entitled to immediate relief. S. WASBY, *supra* note 5, at 105-06. For an explanation of why Chief Justice Warren chose a less bombastic approach, see *infra* notes 193-98 and accompanying text.

180. Analysis is hindered because the Court's deliberations were conducted in utmost secrecy,

opinion, the less there was for potential dissenters to complain about,[181] and it has been speculated that the brevity (and consequent vagueness of rationale) of the opinion may have been the "price" of unanimity.[182]

Factors other than the quest for unanimity also contributed to the brevity of the opinion. Perhaps brevity should have been expected, for Chief Justice Warren's normal style was concise and simple.[183] But the choice of style is itself a strategic choice with rhetorical ramifications. Justice Frankfurter's writing, for example, "was not meant for those untrained in the law or its sister disciplines,"[184] and it is generally conceded that the Court's opinions are not formulated "for consumption by the public at large."[185] This fact creates a serious problem, because the effectiveness of a message is normally tied directly to its clarity.[186] Because the Supreme Court Justices do not write for the general public, the public receives most of its information about the Court's work through the popular press,[187] a

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so there is "almost no hard evidence" of those deliberations between December, 1953 and May, 1954. Hutchinson, *supra* note 109, at 41.

However, there is evidence that a sentence in the opinion noting the advances of blacks in various fields of endeavor was added by Chief Justice Warren specifically to placate Justice Jackson who late in the game had not completely ruled out the notion of filing a concurring opinion. R. KLUGER, *supra* note 6, at 881.

Hutchinson's studies have also produced evidence that the compromises necessary to achieve unanimity substantially gutted Warren's opinion in *Brown's* companion case, Bolling v. Sharpe, 347 U.S. 483 (1954), where he was forced to withdraw his original theory that access to education was a "fundamental liberty." Hutchinson, *supra* note 109, at 44-50. *See also* White, *Earl Warren as Jurist*, 67 VA. L. REV. 461, 473-75 (1981).

181. J.H. WILKINSON, *supra* note 24, at 31. The less there was for potential dissenters to complain about, the less there was for later critics of the Court to attack. Sometimes the Justices do well to heed the words of John Stuart Mill:

> Almost everyone knows Lord Mansfield's advice to a man of sound common sense, who, being appointed governor of a colony had to preside in its courts of justice without previous judicial practice or legal education. The advice was to give his decision boldly, for it would probably be right, but never to venture on assigning reasons, for they would almost infallibly be wrong.

1 J.S. MILL, A SYSTEM OF LOGIC 210 (7th ed. 1868).

182. Pollack, *The Supreme Court Under Fire*, 6 J. PUB. L. 428, 442 (1957). Whether the price was worth paying has been the matter of some dispute. In the same law review, Professor Kurland described *Brown* as "shabby, disingenuous . . . [and] the result of desperate negotiations aimed at securing unanimity rather than clarity," Kurland, "Brown v. Board of Education *was the Beginning," The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U.L.Q. 309, 317, while Professor Goodman felt the opinion "surely deserves its place of honor among the Court's greatest contributions to a just society" and concluded: "The weaknesses of the opinion can be excused, at least in part, by the political sensitivity of the issue and the Court's felt need for unanimity." Goodman, *The Desegregation Dilemma: A Vote for Voluntarism*, 1979 WASH. U.L.Q. 407, 408.

183. J. POLLACK, *supra* note 155, at 168. Indeed, Warren's theory of judging, as well as his writing style, has been deemed by many to be simplistic, although this view was recently disputed. White, *supra* note 180, at 461.

184. H. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 345 (1960).

185. J. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 131 (1968); D. GREY, *supra* note 85, at 33.

186. R. JOHNSON, *supra* note 66, at 59-60. On the other hand, ambiguity, such as exists in *Brown I* can have its advantages. It gives needed flexibility to the lower courts administering the law and to the Supreme Court in future cases to adapt to circumstances unforseen at the time of the original opinion. S. WASBY, *supra* note 5, at 97. The desegregation cases presented the classic situation in which it would have been utterly impossible for the Court to foresee all the complications which would eventually have to be considered in attempting full-scale desegregation.

187. P. KURLAND, *supra* note 25, at 205; Sobel, *News Coverage of the Supreme Court*, 56 A.B.A. J. 547 (1970).

fact which dramatically increases the chance for misinterpretation of the Court's true message.[188] Such misinterpretation, of course, reduces the chance that an opinion will result in behavior "congruent with the message."[189]

Perhaps innately aware of these facts, Chief Justice Warren, he later explained, tailored the opinion so it could be directly communicated to the public without distortion: "It was not a long opinion, for I had written it so it could be published in the daily press throughout the nation without taking up too much space. This enabled the public to have our entire reasoning process instead of a few excerpts from a lengthier document."[190]

Constrained by the brevity prerequisite to communicating with the public directly, Chief Justice Warren was unable to explain in detail the Court's deliberative process. Surely a longer opinion could have been more persuasive (at least to the law professors), but such is the nature of rhetorical choice.[191] A court must always decide whether to add or delete arguments, or whether an opinion will be stronger refuting directly or merely ignoring contrary arguments.[192]

A final reason for the conciseness of the opinion arises from Chief Justice Warren's decision not to include in the opinion language which would have incited the passions of the large number of pro-segregationists. Chief Justice Warren must have considered placing in the opinion that ended segregation a strong moral condemnation of the practice, yet the opinion was devoid of any such language. Throughout the decade preceding *Brown*, Justice Frankfurter had cautioned the other Justices to minimize anti-racist rhetoric on the ground that the Court "should avoid exacerbating the very feelings which we seek to allay."[193] Chief Justice Warren apparently took the advice to heart, noting in a May 7, 1954 memo to the other Justices that the forthcoming opinion "should be short, non-

188. S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT 84 (1970).

189. R. JOHNSON, *supra* note 66, at 60.

190. E. WARREN, *supra* note 156, at 3. *See* C. HYNEMAN, THE SUPREME COURT ON TRIAL 6 (1963); Craven, *The Impact of Social Science Evidence on the Judge*, 39 LAW & CONTEMP. PROBS. 150, 153 (1975).

191. Several commentators at the time praised the opinion for its "clarity, brevity, and directness." McWhinney, *supra* note 149, at 549; Sacks, *supra* note 135, at 98. But others have argued that the price of brevity was a lack of persuasiveness and have suggested additional arguments the Court could have made. *See, e.g.*, R. KLUGER, *supra* note 6, at 898. Additional arguments, however, constitute additional targets for critics, as pointed out *supra* note 181. No additional argument suggested by Kluger or any other scholar is itself completely free of logical or rhetorical flaws.

At the very least, a more detailed opinion might by its very length have added to the Court's attempt to create an aura of careful deliberation. A lengthy opinion "might by association of ideas lead one to posit care in the author of the opinion and thus give rise to some presumption of credibility." LaRue, *supra* note 9, at 44.

192. Hagan, *supra* note 40, at 199.

193. *Quoted in* Howard, *supra* note 39, at 53. Frankfurter also said:

> It does not help toward harmonious race relations to stir our colored fellow citizens to resentment by even pertinent rhetoric or by a needless recital of details of mistreatment which are irrelevant to a legal issue before us. Nor do we thereby wean whites, both North and South, from what so often is merely the momentum of the past in them.

Hutchinson, *supra* note 109, at 12 (quoting a letter to Justice Rutledge).

rhetorical, unemotional and, above all, non-accusatory."[194]

3. *Factual development*

Along the same lines, the *Brown* opinion contained very little in the way of factual development. Again Chief Justice Warren must have considered the possibility that the opinion would be more persuasive if it contained a detailed litany of the sordid mistreatment accorded blacks over the years, coupled with a detailed factual indictment of the failure of the "separate but equal" doctrine to bring about anything even approaching actual equality between white and black schools. Chief Justice Warren apparently concluded that such language would serve primarily to persuade those who already were in agreement with the decision. Those who supported segregation likely would not have changed their minds upon hearing such language, but instead might have reacted even more adversely to an opinion which added insult to injury.

The facts were well known. One author who believed the excusable fault of the opinion was its failure to spell out the evil motives behind segregation conjectured "that the motive for this omission was reluctance to go into the distasteful details of the southern caste system. That such treatment is generally not good for children needs less treatment than the Court gives it."[195]

To have spelled out these matters in gruesome, if accurate, detail would have exposed the Court to charges of partisanship and bias. The substance of the decision was bound to arouse enough hostility without exacerbating the problem with unneeded bombast and harsh detail.[196] The moderation of the opinion's language is striking when viewed in the context of strident debate that marked the issue at the time.[197]

This bland style may have had a more ambitious purpose than merely not to offend:

> The judges who wrote these opinions [such as *Brown*] . . . perhaps saw their job as educating the public into higher aspirations, so they stated the principles of decision in terms of abstract aspirations which could be future goals. The rhetorical strategy here has often

194. *Quoted in* S. WASBY, *supra* note 5, at 90. Warren was obviously using the term "rhetoric" in the sense of empty bombast. *See also* J. WILKINSON, *supra* note 24, at 31.

195. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960).

196. Professor Mishkin's analysis of United States v. Nixon, 417 U.S. 683 (1974), suggested that the content of that opinion was greatly affected by the perceived need to present a "totally neutral appearance." He noted that "in even the most ordinary opinion" there is a real sense that it is good to "give something" to the losing party. He also suggested that certain matters in the Watergate Tapes case were not explored because their consideration would have required "a rehearsal of a long sequence of facts (including specifically what has been dubbed the 'Saturday Night Massacre' and the reaction thereto) which would almost inevitably carry some suggestion of possible presidential involvement" and thereby open the Court up to charges of bias. Mishkin, *supra* note 63, at 88-89.

197. Hunsaker, *supra* note 50, at 101 notes:

> The litigation over civil rights involved the proof of many opposites—equality-inequality, black-white, rights-duties, oppressed-oppressors, reasonable-unreasonable, justice-injustice, benevolent-malevolent, etc. None of these paired terms admit of middle ground. The resulting rhetoric is one of polarity and polarization of beliefs, values, concepts, and attitudes.

> seemed to be an attempt to change the facts for the future by moderating one's description of the facts of the past; the plea for the future being a plea of moderation, the facts as to the past have typically been described in moderate language.[198]

Chief Justice Warren's brief discussion of the legislative history of the fourteenth amendment regarding segregation in public schools might be regarded as a "lawyer-like" approach to the problem, indicating "caution and restraint" by the Court.[199] This approach emphasizes to the audience that the Court is attempting, though it appears to be frustrated in the attempt, to *find* rather than make law by simply carrying out the will of the framers.

### 4. *Appearance of consistency*

In a similar attempt to avoid the appearance of concocting new law, Chief Justice Warren tried, probably unsuccessfully, to harmonize the ruling with past decisions, even though it was obvious that a tremendous revolution in the law was being wrought. Chief Justice Warren was well aware of the importance of the doctrine of *stare decisis* to the public's perception of the Court. To appear to be overruling prior cases would tend to encourage disobedience of the decisions. Opponents would charge: "The desegregation ruling is not law, but the dictate of nine men. In time, with nine different men, the Court will return to its earlier decisions."[200]

Chief Justice Warren approached the problem by saying that "there have been six cases involving the 'separate but equal' doctrine in the field of public education."[201] This statement implied that *Plessy v. Ferguson* was not directly controlling because it had involved segregation in transportation, not education. Surprisingly, this approach allowed Chief Justice Warren to avoid explicitly overruling *Plessy*. Two cases involving education and upholding (if indirectly) the "separate but equal" rule were *Cumming v. County Board of Education*,[202] and *Gong Lum v. Rice*.[203] Chief Justice Warren distinguished these cases by noting that in them "the validity of the doctrine itself was not challenged."[204] Thus, they too could be swept aside without offending the doctrine of *stare decisis*.

The remaining four cases involving education—all on the graduate level—*Missouri ex rel. Gaines v. Canada*,[205] *Sipuel v. Board of Regents*,[206]

198. La Rue, *supra* note 9, at 46.

199. *Id.* at 44. Regarding a similar approach by Justice Powell in his *Bakke* opinion, LaRue notes that such an approach "might be expected to have some persuasive value by increasing our confidence in Justice Powell." *Id.*

200. A Cox, *supra* note 92, at 26. Professor Cox felt the opinion failed in its attempt to project an image of consistency with prior law. For an analysis of Justice Rehnquist's similarly unsuccessful attempt to disguise new law as consistent with prior decisions in Paul v. Davis, 424 U.S. 693 (1976), see Weinberg, *supra* note 9, at 56.

201. *Brown I*, 347 U.S. at 491.

202. 175 U.S. 528 (1899).

203. 275 U.S. 78 (1927).

204. *Brown I*, 347 U.S. at 491.

205. 305 U.S. 337 (1938).

206. 332 U.S. 631 (1948).

*Sweatt v. Painter*,[207] and *McLaurin v. Oklahoma State Regents*[208]—were all distinguished (though they supported the *Brown* result) because actual inequality was found in those cases. Where equality does not exist, the doctrine of "separate but equal" is not directly in issue. "Since the Court had not been called upon to weigh the merits of 'separate but equal' when it enforced the doctrine in the past, Warren was saying, it had never really endorsed the doctrine; consequently, the present Court was free to announce a new doctrine."[209]

Warren's effort to give the appearance of adherence to *stare decisis* as a technique for enhancing the acceptability of the opinion to the general public has been characterized as a "weak attempt."[210] *Brown* was a revolutionary decision and after its pronouncement it is doubtful that many people expected that *Plessy* would continue to be the law in areas other than public education.[211] Indeed, it has been suggested that Chief Justice Warren should not have distinguished *Sweatt* and *McLaurin*, but should have analyzed them in detail, relying on them to indicate "that *Brown* was simply one more incremental step following from previous cases."[212] This different approach to the same rhetorical goal probably would have failed also. *Brown* did represent a revolution in the law. In effect it overruled *Plessy* and therefore was obviously not consistent with the doctrine of *stare decisis*.[213] No rhetorical strategy could successfully disguise this fact.[214]

5. *Emphasis on Education*

After distinguishing *Plessy* implicitly because it involved transportation rather than education, the opinion turned to an exposition of the importance of public education to modern American life. This discussion not only provided a basis for accentuating the differences with *Plessy*, it also provided a substantial discussion of a noncontroversial issue. It is presumed that even the more ardent of the Court's critics would agree with the general statements about education made in this portion of the opinion. Because a "communicator's effectiveness is increased if he initially expresses some views that are also held by his audience,"[215] this may also

207. 339 U.S. 629 (1950).

208. 339 U.S. 637 (1950).

209. L. BOZELL, THE WARREN REVOLUTION 48-49 (1966).

210. L. GRAGLIA, *supra* note 93, at 26. Perhaps this characterization under-appreciates the fact that Warren's attempt to appear consistent with *stare decisis* was not aimed solely at the public, but also helped make the proposed course of action more palatable to potential dissenters Reed and Clark. Hutchinson, *supra* note 109, at 43-44.

211. Indeed, the Court subsequently dismantled the system of legal segregation across a broad spectrum of activities in a series of *per curiam* opinions. Lewis, *Earl Warren*, in THE WARREN COURT: A CRITICAL ANALYSIS 28 (R. Sayler, B. Boyer & R. Gooding eds. 1969).

212. S. WASBY, *supra* note 5, at 98.

213. For analysis of a similar attempt to maintain the image of objectivity in a different context—Justice Douglas' majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1975), see Rubin, *Gottlieb's Model of Rule Guided Reasoning: An Analysis of Griswold v. Connecticut, 15* J. AM. FORENSIC A. 77, 85 (1978).

214. Many critics have suggested different and conflicting ways the Court could have utilized precedent in *Brown*. The differences of opinion merely highlight that "[s]uch a choice is a rhetorical one based on 'probabilities,' not one based on logical absolutes." Hagan, *supra* note 42, at 193.

215. M. KARLINS & H. ABELSON, *supra* note 84, at 120 (citing Weiss, *Opinion Congruence with A Negative Source on One Issue as a Factor Influencing Agreement on Another Issue*, 54 ABNOR-

be viewed as a rhetorical strategy.[216]

The emphasis on education went hand-in-hand with the Court's framing of the issue as primarily sociological, rather than legal: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[217] The Court concluded that the answer to the question was in the affirmative, and based its conclusion on a finding of fact from the trial court in Kansas,[218] and the infamous footnote eleven, which listed a number of sociological studies which supposedly supported the finding.[219]

This approach had the rhetorical advantage of framing the issue in such a way that all but the most die-hard segregationists would have to agree with the answer supplied by the Court, even though they might still disagree with the framing of the issue and the result. It would have been difficult to state the issue as a legal one, because the ambiguous historical evidence made it impossible to write a strong opinion based on the intent of the authors of the fourteenth amendment. Further, *Plessy* had been in place for over fifty years; any analysis of legal precedent was bound to disclose that "[t]he law was on the side of the South."[220] In fact, the

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MAL & SOC. PSYCH. 180 (1957)). *See* Campbell, *supra* note 9, at 233; Hart, *On Applying Toulmin: The Analysis of Practical Discourse*, in EXPLORATIONS IN RHETORICAL CRITICISM 93 (G. Mohrmann, C. Stewart & D. Ochs eds. 1973).

216. This is a partial answer to those critics who have been unable to find a reason for Chief Justice Warren's "prereration on the importance of education," who concluded that it did not play any part in the Court's reasoning process. Maidment, *supra* note 143, at 179-80, 182-83. The purpose of the inclusion was rhetorical, not logical. A similar utilization of the "common ground" strategem by Justice Powell in *Bakke* is discussed in LaRue, *supra* note 9, at 45.

Perhaps Chief Justice Warren also meant to increase the acceptability of the decision to the South by stressing that the Court was dealing only with education, thereby implying that other areas were "off the hook," at least for the moment.

217. 347 U.S. at 493.

218. This is the text of the trial court's finding:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

*Id.* at 494. District Judge Huxman, author of the finding, intentionally placed it in his opinion to give the Supreme Court something to "hang its hat on" if it decided, as he hoped it would, to reverse his ruling. R. KLUGER, *supra* note 6, at 534.

219. This is the text of footnote 11, which was used to support the claim that the trial court's finding was "amply supported by modern authority":

> K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

347 U.S. 494-95 n.11.

220. Virginia Attorney General Lindsey Almond, Jr., *quoted in* Maidment, *supra* note 143, at 170-71.

"weight of precedent overwhelmingly supported the 'separate but equal' doctrine,"[221] and to word the issue as a strictly legal one would have required Chief Justice Warren to make clear that which he desired to conceal—that the Court was dramatically altering the prior law.

### 6. *Sociological Approach*

The rhetorical decision to frame the question in sociological rather than legal terms had its drawbacks as well. Whatever reasons the Court gave to support the judgment were bound to be the target of much criticism, and the sociological evidence came to be a veritable lightning rod for criticism.[222] By citing such sources as Gunnar Myrdal's *An American Dilemma*, the Court "raised the spectre of a judiciary which rules by social theory rather than by law."[223] Other criticisms centered around the facts that such controversial studies as those contained in footnote 11 seemed a "thin reed" upon which to base the plaintiffs' rights, and that further dispute was encouraged because those opposing the holding felt they might succeed if they could controvert the cited studies.[224]

Actually, the sociological evidence was not critical to the decision. The psychological harm which the studies supposedly showed "was relevant under the circumstances only to illustrate that such a construction of the amendment was especially justified and . . . the opinion did not imply that absent a finding of such 'harm' racial segregation would be constitutional."[225]

Furthermore, most criticism of the methodology of the studies or the

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221. H. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION 53 (1979).

222. *See, e.g.*, R. BLAND, *supra* note 134, at 83-84; L. GRAGLIA, *supra* note 93, at 27; Bishop, *The Warren Court is Not Likely to be Overruled*, in THE SUPREME COURT UNDER EARL WARREN 93, 96-97 (L. Levy ed. 1972); Linde, *Judges, Critics, and the Realist Tradition, 82* YALE L.J. 227, 239-40 (1972); Wechsler *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959). Indeed, the use of sociological data in *Brown* has become the centerpiece for a continuing debate over the role of such evidence in courts generally. *See, e.g.*, A. DAVIS, THE UNITED STATES SUPREME COURT AND THE USES OF SOCIAL SCIENCE DATA 65 (1973); Goss, *Communications Research and the Rule of Law: An Opportunity for Access to Judicial Decision Making*, 22 TODAY'S SPEECH 47, 48 (1974); Levin & Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROBS. 50 (1975); Rosenblum, *The Place of Social Science Along the Judiciary's Constitutional Frontier*, 66 NW. U.L. REV. 456 (1971).

223. Abrams, *Desegregation and the Courts*, 62 COMMENTARY 84, 85 (1970).

224. S. WASBY, *supra* note 5, at 104-05.

225. Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CAL. L. REV. 104, 105 (1961). This view of the essential superfluity of the sociological data is consistent with Warren's later recollections; Warren's law clerk Earl Pollock added that footnote 11 was included merely "as a rebuttal to the cheap psychology of *Plessy* that said inferiority was only in the mind of the Negro." R. KLUGER, *supra* note 6, at 891-92. *See also* A. DAVIS, *supra* note 222.

> This interpretation is also consistent with the events which immediately ensued: Within a short time after the segregation cases, the Court, in a number of per curiam opinions simply citing *Brown*, struck down segregation on public golf courses, on beaches, in parks, in seating in public facilities, in athletic contests, and in other situations where there was separation by racial classification, although there was no sociological evidence of harm, and no possibility of harm except from the stigma inherent in racial segregation.

Wisdom, *Random Remarks on the Role of Social Sciences in the Decision-Making Process in School Desegregation Cases*, 39 LAW & CONTEMP. PROBS. 134, 141 (1975).

proper role of social science in jurisprudence was essentially irrelevant because such evidence had no true bearing on the validity of the *Brown* decision. Those opposing the outcome would have attacked any rationale supplied, and the sociological evidence was a vulnerable feature. Nonetheless, the evidence in footnote eleven "was only corroborative of what was really decisive—the justices' human awareness that segregation is 'invidious.' "[226] As Anthony Lewis wrote, "[a] person of common sense needed no learned treatise to understand that [segregation adversely affected black children], any more than to understand that there was something invidious when the Nazis made Jews wear yellow stars for identification."[227] Still, because the sociological evidence was essentially superfluous to the decision, in retrospect the wiser rhetorical choice might well have been to have omitted it from the opinion.

### 7. *Language*

Almost every argument included in the *Brown* opinion, and the scores of arguments omitted, were included or omitted for rhetorical as well as "legal" reasons. Because the main matters have been discussed and only minutiae remain, attention shall turn briefly to the matter of language. One recent study focused on *Brown's* language in an attempt to analyze the field of legal argument.[229] The study noted, *inter alia*: (1) that the Court relied heavily on the verb form "to be"[230] to place the decision in the active voice, subtly underlining the Court's role as the entity which "determines what is and what is not";[231] (2) that the Court seldom used language patterns supplied in the briefs and oral arguments, "lend[ing] a factual quality to the discourse by purging statements made during a conditional process,"[232] from the "final product";[233] and (3) that the Court seldom used qualifiers such as "probably", "might", or "could", thus emphasizing the absolute nature of its ruling.[234] The ultimate conclusion of the study, simply put, is that the Court reinforced the appearance of its

226. Pollak, *supra* note 182, at 437.

227. Lewis, *The Brown Decision* (letter to editor), 63 COMMENTARY 17 (1977). *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426-27 (1960).

228. Lewis, *supra* note 211, at 28.

229. Dunbar & Cooper, *supra* note 153.

230. The authors give these examples:

Separate educational facilities *are* inherently unequal. . . .

[The investigations regarding the Fourteenth Amendment] *are* inconclusive.

[The] question *is* directly presented.

[Education] *is* the very foundation of good citizenship.

[Equality of educational opportunity] *is* a right.

*Id.* at 217.

231. *Id.*

232. Arguments made by counsel are viewed as "conditional" because the Court can accept them or not; the Court's final decision, on the other hand, is absolute. It appears more absolute if it does not draw freely from arguments which were conditional just a short time before.

The authors also point out in this section that instances of quotation are rare. The oracular image which may be important to lay acceptance of the Court's decision is impaired if the Court relies on outside "mortal" sources rather than its own inherent authority. *Id.* at 218.

233. *Id.*

234. *Id.*

own authority by cloaking its discussion in authoritative terms.[235] This conclusion should not be surprising; nor, of course, is it unique to the *Brown* decision. This is a rhetorical technique commonly used by most judges in most opinions.[236]

Probably Chief Justice Warren did not consciously view the formation of every aspect of the *Brown* opinion in the rhetorical terms discussed here. But rhetorical considerations pervade the writing of any judicial opinion, especially one as controversial and sweeping as *Brown*. Kluger concluded that "*Brown* did what Earl Warren, operating *by instinct* as much as design, wished it to."[237]

### D. *After the Opinion was Written*

Even the completion of the writing of the opinion did not mean an end to the persuasive strategies designed to bolster the effectiveness of the opinion. On May 17, 1954, the opinion was read in full by a robed[238] Chief Justice Warren in the impressive courtroom of an imposing building—trappings designed to foster the "cult of the robe."[239] This process and setting provided effective support for the Court's oracular image; "from a dramaturgical point of view the formal announcement of the decision is of great importance."[240] This part of the ritual was deemed so important that Justice Jackson left the hospital, where he had been confined for several weeks following a heart attack, to lend his symbolic support to the unanimously decided case.[241]

The time-consuming procedure of reading opinions seems wasteful and unnecessary in view of the tremendously burdensome caseload which the Justices carry. But the drama created by the process serves to focus attention on the Court's actions. Less than five minutes after Chief Justice Warren had delivered the *Brown* opinion, the Associated Press had transmitted it throughout the United States; within the hour it had been translated into thirty-four languages by the Voice of America and broadcast throughout the world.[242]

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235. Less simply put, the authors conclude:

> The Court's role is that of a powerful, ultimate definer and creator of discursive reality. The relationship between legal statements and the Court's role is circular and reinforcing: the nature of legal statements reflects the power and authority of the institution from which those statements arise; and, likewise, the nature of the Court's role constrains the type of statements which can emerge from that institution. An institution which is expected to resolve a dispute and define the situation can only issue definitive statements. To do otherwise would undermine its role.

*Id.* at 234.

236. It would obviously be unsatisfactory for a judge to hold: "In my opinion, which is really no better than anyone else's, the plaintiff's position might be better than the defendant's." A major role of language in a court's opinion is to "convey the legal tradition and embod[y] the attitude of respect and reason the law demands." Hample, *supra* note 3, at 160.

237. R. KLUGER, *supra* note 6, at 901 (emphasis added).

238. Even the wearing of black robes is a rhetorical strategy designed to inspire awe and respect for the Justices and their opinions. J. FRANK, COURTS ON TRIAL 255 (1949).

239. D. GREY, *supra* note 85, at 40; A. MILLER, *supra* note 73, at 3.

240. R. JOHNSON, *supra* note 66, at 36. *See* A. BICKEL, *supra* note 21, at 188.

241. H. ABRAHAM, JUSTICES AND PRESIDENTS 241-42 (1974); 2 W. SWINDLER, *supra* note 132, at 268.

242. Comment, The Supreme Court and Segregation, 18 U. DET. L.J. 64 (1954).

Thereafter, it has been speculated, the Court continued to work to enhance the effectiveness of *Brown* through control over its docket. There is evidence that the Court "kept its powder dry" by avoiding for a time cases on miscegenation and cemetery desegregation which could have increased resistance to *Brown*.[243] Similarly, the Court substantially withdrew from the field of education, perhaps hoping to recharge its reservoir of public respect before again returning to the hard decisions which eventually would have to be made.[244]

## CONCLUSION

*Brown v. Board of Education* illustrates that persuasive strategies engaged in by the Supreme Court Justices affect not only the form but also the substance of opinions in important and controversial cases. The Court's decisions are not self-executing, and the opinion can be used to reach audiences beyond the litigants[245]—the President, Congress, the general public—whose cooperation or at least tolerance are needed to enforce the judgment and implement the policies the Court enunciates.

An opinion in a controversial case which is written without any regard for rhetorical strategies will be as ineffective as the brief of a lawyer who merely staples together some pages of a law school outline. So much of law is communication and persuasion. The quintessential legal message—a Supreme Court opinion—may well have to utilize rhetorical strategies to be truly effective. The Justices must keep in mind what Charles Warren pointed out a half-century ago—"while the Judges' decision makes the law, it is often the people's view of the decision which makes history."[246]

243. Wasby, *The United States Supreme Court's Impact—Broadening Our Focus*, 49 NOTRE DAME LAW. 1023, 1028 (1974). As to the miscegenation issue, for example, the Court denied certiorari in one case, Jackson v. State, 37 Ala. App. 519, 72 So. 2d 114, *cert. denied*, 348 U.S. 888 (1954), and side-stepped the issue in two others. In Naim v. Naim, 350 U.S. 985 (1956), the Court straind to find that the case lacked a proper federal question, and in McLaughlin v. Florida, 379 U.S. 184 (1964), the Court avoided a challenge to Florida's miscegenation statute by deciding the case on the basis of another Florida statute. It was not until Loving v. Virginia, 388 U.S. 1 (1967), 13 years after *Brown I*, that the Court finally declared anti-miscegenation statutes unconstitutional.

244. S. WASBY, *supra* note 5, at 14.

245. LeDuc, *"Free Speech" Decisions and the Legal Process: The Judicial Opinion in Context*, 62 Q.J. SPEECH 279 (1976).

246. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 14 (1926).