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Supreme Court rhetoric: Explorations in the culture of argument and the language of the law

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SUPREME COURT RHETORIC: EXPLORATIONS IN THE CULTURE OF ARGUMENT AND THE LANGUAGE OF THE LAW

by

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TABLE OF CONTENTS

WALL, BEVERLY C., Ph.D. Supreme Court Rhetoric: Explorations in the Culture of Argument and the Language of the Law. (1992) Directed by Dr. Walter H. Beale. 230 pp.

Perhaps nowhere in American life is the intersection of language, argumentation, and politics more intense, complex, and dynamic than in the written opinions issued by the United States Supreme Court. This study analyzes a small set of Supreme Court opinions in order to explore, from a rhetorical perspective, the genre of the Supreme Court opinion and the culture of argument as it is realized or symbolized in the texts. The analysis is grounded in the theoretical model of discourse developed by Walter H. Beale, as well as drawing eclectically on a variety of insights from figures such as Aristotle, Kenneth Burke, Michael Oakeshott, Richard M. Weaver, and James Boyd White.

In Part One, Chisholm v. Georgia (1793) and McCulloch v. Maryland (1819) are examined as early examples of multiple-text and single-text opinions, respectively. The two cases suggest the range of generic possibilities in the writing of Supreme Court opinions. They also reveal the parameters of a rhetorical problem that has persisted throughout the Court's history: the conflict between the functions of the texts as deliberative forums and governmental instruments, between the individual roles of justices and their collective institutional identity, and between the justices' multiple voices and the Court's single judicial voice in a culture of argument.

In Part Two, the texts of four modern cases are analyzed: Brown v. Board of Education (1954) and United States v. Nixon (1974) are examined as examples of the Marshall-style single opinion "of the Court"; New York Times Co. v. United States (1971) and Regents of the University of California v. Bakke (1978) are examined as examples of virtually seriatim opinions. The opinions suggest that argument can fail--indeed, the Supreme Court's entire culture of argument can disintegrate--in moments of textual unity as well as multiplicity.

INTRODUCTION

THE GENRE OF THE SUPREME COURT OPINION

In "Language Is Sermonic" Richard M. Weaver formally positions rhetoric "at that point where literature and politics meet, or where literary values and political urgencies can be brought together" (225). Perhaps nowhere in American life is the intersection of literary values and political urgencies more intense, complex, and dynamic than in the written opinions issued by the United States Supreme Court. The politics of these opinions, both their "urgencies" and consequences, have been chronicled, analyzed, interpreted, and debated for approximately 200 years; indeed, as Alpheus Thomas Mason and D. Grier Stephenson, Jr. attest, the accumulated bibliography is "well-nigh boundless" (xiii).[1] Curiously, however, and despite fifteen years of work in what Richard A. Posner calls the "law and literature field," little of this monumental bibliographic material contributes significantly to our understanding of the literary values of Supreme Court opinions. Neither does it explore the implications of Weaver's rhetorical intersection for the language of the law or for the "culture of argument"—to use James Boyd White's provocative expression—as that culture has developed in our society. It is just such an exploration that I wish to pursue in this study.

Representative democracies are by necessity cultures of argument, but the term argument itself always holds in tension at least two potential clusters of meaning. It suggests, on the one hand, positive notions of reasoned debate, of the obligation to explain and persuade, of orderly and logical processes by which competing viewpoints are supported and consensus or agreement is eventually achieved. The term may also evoke, on the other hand, negative images of conflict and division, the bad faith of dispute and confrontation, of discordant and contentious voices engaged in bickering, wrangling, and quarreling. In the institutional context of the United States Supreme Court, the tension between these two possibilities, which might best be thought of as two extremes at either end of a continuum, is embodied dramatically in the structure of the Court, the procedures used to decide cases, and the very shape and substance of the opinions themselves. Some sort of resolution is enacted, a stand taken somewhere along the continuum, each time a case is decided and the opinion-writing process takes its course.

My intention in this study is to conduct a close analytical reading of a small set of Supreme Court opinions in order to examine, from a rhetorical perspective, the culture of argument as it is realized or symbolized in the texts. I attempt to make connections between my examination and the larger province of the language of the law, with some

attention to the vexing linguistic and textual questions raised by critical legal studies and the law and literature movement.[2] While I hope that this study makes a useful contribution to the ongoing contemporary debates in the legal community, I make no claims to speak with the authority or special expertise of a legal academician or legal professional. I speak as a rhetorician in the classical and humanist tradition, as a student of the central art of discourse and a practical critic who is interested, as Walter H. Beale describes, in "the rhetorical contexts in which forms, processes, literary traditions, and cultural knowledge come together in discourse performances" (170–71). I take the rhetorician's central and pluralist viewpoint to be a strength, rather than a weakness, in the interdisciplinary realm in which this study operates.

Law is obviously and deeply embedded in language, and lawyers demonstrate, to use Brenda Danet's phrase, a strong "preoccupation with language qua language" (288). Yet, paradoxically, the notion of Supreme Court opinions as texts or, more generally, of law as rhetoric is strange and oddly unsettling to most lawyers and legal scholars. The legal arena has long been filled with conventional wisdom and unexamined assumptions about the nature of language itself and about the rhetorical processes by which texts are actually generated and interpreted. In The Marble Palace, for example, John P. Frank evaluates the accumulated volumes

of United States Supreme Court Reports:

> This mighty pile is, from the literary standpoint, explored approximately as much as Mount Everest. English-composition classes pass it by, not with ashudder, but with indifference. Anthologies of American writing, except for an occasional passage by Justice Holmes, include no product of these labors.
>
> This is no enormous oversight by the compilers, no prodigious ignorance of the critics which can be corrected by sensational revelation of untold treasures. The critics are right. The treasures are rare. What appears to be a great literary wasteland is just that (130).

The confident bravado and stylistic zestfulness make Frank's attack enjoyable to read, but the picture that emerges of Supreme Court justices as incompetent writers or as willfully obscure and cantankerous in their rhetorical performances is, in the long run, puzzling and grim. To dismiss Supreme Court opinions gleefully, as Frank does, as a "literary wasteland" is ironic because few, if any, pieces of discourse have a more profound or pervasive influence on American life than the written opinions of the United States Supreme Court.[3]

As a continuously evolving set of texts in a changing society, Supreme Court opinions apply and interpret the meaning of a single, history-bound text—the United States Constitution. The language of the Constitution, as James Madison well knew, is a "cloudy medium," its laws "more or less obscure and equivocal, until their meaning be liquidated

[made liquid] and ascertained by a series of particular discussions and adjudications" (Federalist No. 37). This process, both instrumental and deliberative, incorporates a fascinating range of human behavior in speech and writing. As a vital and distinctive body of literature, the opinions reflect the successful development over almost 200 years of multiple, interrelated communication acts. Indeed, the elegantly simple models developed by communication theorists appear simplistic when applied to the interrelated encoders, shifting channels, and multiple decoders of these opinions. Because of their complex and dynamic features, Supreme Court opinions provide an especially fertile ground for examining the production and interpretation of human discourse. A rhetorical study of Supreme Court opinions thus has dual potential for contributing to our understanding of the Supreme Court as a political institution and to the field of discourse theory and rhetoric.

The ever increasing verbosity of the justices, for example, is a popular, volatile issue for debate among lawyers, legal scholars, political scientists, and Court watchers of all types.[4] Preservationists defend judicial writing practices, pointing to the values of tradition and maintaining consistency in conventional usage. Reformists, on the other hand, complain about the "long-windedness" of majority opinions and the proliferation of concurring and dissenting opinions (too many, too long), while

characterizing preservationists as elitists committed to the obfuscation of the language of the law. The problem, undeniably real, is often approached as a bureaucratic matter calling for institutional guidelines and readability formulas to simplify and clarify the message of the Court. But such an approach may be dangerous: not because it disrupts some notion of tradition, but because it may involve serious misunderstandings of how the writing activity of the Supreme Court functions, of the dynamic negotiation of texts, and of the instrumental and deliberative dimensions of the written opinions themselves. The opinions serve both as specific short-term instruments for conducting human affairs and as general long-term forums for interpreting the Constitution and hammering out the fundamental rights and political values of society in a culture of argument.

What happens when current-traditional approaches to rhetoric and discourse are applied to Supreme Court opinions? The justices' opinions constitute a genre of discourse that conventional theories apparently cannot handle very well. Conventional models of discourse tend to ignore judicial opinions entirely or to classify them as oddities, even grotesques, in the orderly universe of rhetorical modes. Equally problematic, but for quite different reasons, are the contemporary applications of the critical legal studies movement, involving essentially the refracted rhetoric of poststructuralist literary criticism, and the growing

attention given to "legal discourse" by social scientists, linguists, and sociolinguists interested in discourse analysis.[5] Interesting and at times useful observations about the language of the law have emerged from both camps, but on the whole both practice a reductive and ultimately futile or impoverished kind of criticism. One approach turns legal texts into black holes, the other into laboratory specimens. Thus, a central theme running through this study is an exploration—to put it most simply—of how best to talk about Supreme Court opinions. Which paradigms or theories or approaches are most valuable to our understanding of the massive generation and interpretation of these culturally significant texts?

I work from the assumption that the written opinions of the Supreme Court are not prose oddities, but have become fully developed, successful, and central pieces of discourse in American life. They constitute fully developed discourse performances, possessing the qualities of extension, unity, design, publicity, and completedness.[6] They are quite obviously extended pieces of discourse, some classifiable as full-length "books." Separate opinions, whether majority or minority, create a sense of unity—of a hierarchical ordering of statements all focused purposefully on a shared question or set of questions. The design or arrangement of parts is deliberate, even at times ritualistic in following the

conventions of past performances of the genre. They demonstrate a highly sophisticated, multifaceted sense of publicity or conscious accommodation to an incredibly diverse array of audiences. And, finally, there is a sense of completedness, of a comprehensive "opinion" with distinct conventions of opening and closing, even when concurring and dissenting opinions create the more complicated interaction of "wholes-within-wholes" (Beale 85).

As fully developed discourse performances, Supreme Court opinions have functioned successfully, despite times of intense controversy, throughout the nineteenth and most of the twentieth centuries. Their success makes it all the more difficult to understand why they have been ignored for so long by discourse theorists. In A Theory of Discourse, to take one major example, James Kinneavy makes only general references to "legal pleadings," apparently all gathered under the umbrella of persuasive discourse, and "constitutions of clubs or countries," oddly categorized as examples of expressive discourse. Neither typological application is very helpful in dealing with Supreme Court opinions. Kinneavy works from the notion that in successful pieces of discourse one aim usually dominates all others. When other aims are not properly subordinated, the result is "overlap" interference--resulting in distortion, impairment, spoilage, or failure of intent (62). This notion of overlap interference is useful, perhaps essential, to the purposes of

Kinneavy's theory, but its application to Supreme Court opinions as a litmus test of their success or failure tends to trivialize rather than clarify. A pragmatic, Aristotelian study of the texts suggests that, while hierarchies of aims can be frozen at various points, they shift in kaleidoscopic fashion from one angle of observation to another. Yet these overlaps, rather than causing interference, are in fact reflective of the successful historical evolution of a rich, highly specialized set of discourse functions.

Supreme Court opinions are not rare or singular instances, but central examples of the possibilities of discourse in American nonfiction prose. They have a long history of normal achievement and successful overlap, to use Kinneavy's terms, as pieces of discourse. Kinneavy does concede occasional instances of successful overlap, but characterizes these instances as "rare" and speculates further: "It might be questioned if any great excellence in one aim can be normally achieved in coordination with another or several aims" (62). While Supreme Court opinions might be characterized as unusual in their dynamic embodiment of multiple communication acts, they represent a continuously evolving culmination in print of the expression of over 100 authors. They constitute a major, legitimate <u>de facto</u> genre of nonfiction prose. Any comprehensive theory of discourse, any "rules" formulated, genre mapping, or system of category markers should be able to take these opinions into account as

important examples of the possibilities of form and meaning in the writing of our culture.

My discussion of Supreme Court opinions draws eclectically from the insights of a number of rhetorical theorists, including Aristotle, Kenneth Burke, Chaim Perelman, Stephen Toulmin, Richard M. Weaver, and James Boyd White. Some interesting notions from the social-constructionist lore of "conversation" are also applied, metaphorically at least, without allegiance to the entire program. My own theoretical compass, both for individual analysis of texts and for the larger critical debate is taken from Walter H. Beale's A Pragmatic Theory of Rhetoric. In a reassertion and extension of Aristotelian rhetorical theory, Beale creates two comprehensive, multidimensional frameworks--one formalistic, one semiotic--for understanding "what human beings do with discourse" (1). The formalistic framework, or "Hierarchy of Discourse Categories," establishes an orderly yet nonreductive system for dealing with concepts such as aim, genus, strategy, and mode as they relate to the formal structures of discourse. The semiotic framework, or "Motivational Axes," draws on the work of Kenneth Burke, J. L. Austin, and John R. Searle to establish a more significant semantic and cultural "system of placement," again orderly yet nonreductive, for the analysis of discourse in terms of motivation, meaning, and substance. The two frameworks

together allow Beale to develop a rich, responsive approach to the idea of genre:

> The crucial point of interchange between these frameworks, and the ultimate focus of this book, lies in the notion of "genre," a concept which in itself denotes a particular coalescence of characteristic meanings/purposes and characteristic forms/strategies in discourse. (15)[7]

In the "genre" of the Supreme Court opinion, what are the characteristic meanings and purposes of the justices? What characteristic forms and strategies can be identified in the texts? How do these distinctive features of discourse—including questions of subject or field, author–audience relation, successconditions, and occasion and context—interpenetrate or coalesce in particular cases? Keeping well in mind in this study the irony of the hermeneutic circle, I attempt what might best be described as an exploratory excursion into the "judicial thicket," an excursion to begin the analytical process of generic description/definition or definition/description.

The following descriptive points are offered as a preliminary orientation to understanding modern Supreme Court opinions as discourse performances:

1. They are "negotiated" texts. After a detailed, highly rule–governed procedure of selecting cases, studying legal briefs (or law clerks' summaries of legal briefs), and

hearing oral arguments, the justices of the modern Supreme Court meet together—without law clerks or other supporting personnel present—in a "case conference" to discuss the issues and take an initial vote. Based on this tentative vote, an assignment to write the majority opinion, or opinion for the Court, is made, again by a rule-governed procedure. An opinion for the Court is, in essence, an argument: a set of statements intended to support (explain, justify, and so forth) the decision of the justices. The detailed, sentence-by-sentence elaboration of the reasoning which supports a particular conclusion of the Court is crucial to its interpretation and application. After the initial vote and opinion-writing assignment, the deliberative process among the justices may continue anywhere from three or four weeks to several months, largely through a dynamic negotiation of languageand texts—the majority opinion and any concurring or dissenting opinions that justices may choose or threaten to generate. The Court's "decision" in a case is never final until the "opinion" is actually published or handed down.

The entire process may involve a complex interactive series of communication acts: preliminary language composed by law clerks, justices' draft opinions, counter-drafts, composite counter-drafts, memoranda of all types going back and forth, proposals for alternative sections or subsections, caucuses of two or three justices in factions, strategy

sessions of justices' law clerks in various combinations. Personal notes scribbled in margins can be important. Even a unanimous ruling such as United States v. Nixon, the 1974 "Watergate Tapes" case, can be deceptive in its public appearance of united resolve, as the justices purportedly "negotiated" line-by-line every detail of legal reasoning to be included or excluded (Friedman; O'Brien 219-22).

2. They serve fundamentally instrumental purposes. The genteel term opinion is in one sense misleading. We all, of course, tend to have opinions about matters of importance to our culture and community. But even the President of the United States can express an opinion about abortion or affirmative action, for example, without in effect doing what the Supreme Court does when it issues a majority opinion. In the justices' fundamental pronouncements, the opinions for the Court do not advise or suggest, but rather they govern and control. They are instruments of government, and their official utterance performs an institutional "speech act" of real consequence for millions of American citizens.

The reality of power, of language used not to reflect but actually to shape and direct experience, adds an interesting dimension to the Aristotelian notion of ethos, of the character of the speaker and the sense of "probity" created or projected by the text (Rhetoric 1.2). In contrast to a President's opinions or to the oral arguments put forward by attorneys before the Court, no matter how

credible, an opinion expressed by a Supreme Court justice carries a special kind of authority. Note the sense a reader must bring to an interpretation, say, of Justice Blackmun's performative utterance in the 1973 abortion case Roe v. Wade: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." And note, in particular, the collective force and operational implications of Chief Justice Warren's "opinion" in the unanimous 1954 Brown v. Board of Education (first case): "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

3. They provide public forums for ongoing debate. While Supreme Court opinions are fundamentally instrumental or performative (in the sense of performing an action), there is also a strong deliberative character both in the immediate interplay of majority, concurring, and dissenting opinions within a single case and in the long-term historical evolution of various cases and the consideration of precedents. Concurring opinions, despite their name, can be just as combative as dissenting opinions since justices, although they may "concur" with the majority in the general decision, may choose to attack some aspect of the legal reasoning or emphasis in the wording of the majority opinion.

The 1971 "Pentagon Papers" case, New York Times Co. v. United States, is a striking example of this interplay. An extremely short, perfunctory opinion was issued per curiam (an unsigned opinion "by the court"), which upheld the New York Times' First Amendment right to publish the Pentagon Papers without prior governmental restraint. Along with the per curiam opinion, the bitterly divided justices produced the following array of nine separate opinions: (1) Justice Black, joined by Justice Douglas, concurring; (2) Justice Douglas, joined by Justice Black, concurring; (3) Justice Brennan, concurring; (4) Justice Stewart, joined by Justice White, concurring; (5) Justice White, joined by Justice Stewart, concurring; (6) Justice Marshall, concurring; (7) Chief Justice Burger, dissenting; (8) Justice Harlan, joined by the Chief Justice and Justice Blackmun, dissenting; (9) Justice Blackmun, dissenting.

The 1978 reverse discrimination case, Regents of the University of California v. Bakke, is another important example of multiple opinions, "concurring in part and dissenting inpart." There was no majority opinion: Justice Brennan, joined by Justices White, Marshall, and Blackmun, wrote an opinion of 55 pages upholding the special admissions program at the University of California at Davis and denying Allan Bakke, a white male, admission; Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, issued a 13-page opinion overturning the Davis program for

minority applicants and ordering that Bakke be admitted; Justice Powell, in a separate opinion of 55 pages, cast a fifth vote to each side, approving some general consideration of race in admissions programs but ordering Bakke admitted in the specific instance. Additional separate opinions, written by Justices White, Blackmun, and Marshall (of 8, 6, and 15 pages, respectively), swelled the Bakke opinion to a total of 156 pages, including the introductory summaries and headnotes. Although such opinions—and the strategic processes of deliberation which are captured by their appearance in print—cannot alter the decision in the specific case, they may become influential in future cases as the Court and society change.

4. They intermix written and oral traits. Opinions contain an interesting, significant mixture of what E. D. Hirsch (extrapolating from Basil Bernstein) designates as the context-free "elaborated code" of written speech and the context-tied "restricted code" of oral speech (21-32).[8] For example, in Reynolds v. Sims, the 1964 climax of a series of one-man one-vote cases, Chief Justice Warren begins his majority opinion with a situational orientation appropriate to written speech:

> Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of Alabama holding invalid, under the Equal Protection Clause of the Federal Constitution, the existing and two legislatively

> proposed plans for the apportionment of seats in the two houses of the Alabama Legislature . . . ."

In contrast, Justice Brennan's majority opinion in Baker v. Carr, the landmark 1962 redistricting case, begins:

> Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote.

These statements are context-tied in Hirsch's terms because they only make sense if the reader brings to the opening lines a well-developed understanding of the background or external situation.

Justice Brennan's example is not unusual. The absence of reader cues may relate to the oral tradition of the law; indeed, the first public announcements of decisions are still delivered orally in court, and justices summarize their opinions, sometimes choosing to read aloud all or part to the litigants, reporters, and tourists gathered in the courtroom. Paradoxically, there may also be an awareness of and dependence on the Reporter of Decisions and various other textual editors of Supreme Court opinions who will "intervene" with syllabi, summaries, headnotes, footnotes, and so on, to establish the needed context on the printed page.

5. They address a non-hierarchical multiplicity of audiences. One of the most difficult aspects of Supreme Court opinions to analyze is the extent and complexity of the relationships between authors and their audiences, all interacting with the same discourse performance. For example, in the 1955 Brown v. Board of Education (second case), Chief Justice Warren accepted Justice Frankfurter's famous, subsequently controversial emendation—"with all deliberate speed"—in issuing guidelines for ending the segregation that the Court had ruled unconstitutional in the first Brown. What audience did Frankfurter have in mind for this special phrase? How did Warren's substitution of "with all deliberate speed" for the original wording, "at the earliest practicable date," change his own crafting of author-audience relationship? How many different interpretations of this phrase were made by various audiences (some factions in the South, for example, reading it as a signal permitting "indefinite delay")?[9]

The sheer number of potential audiences that justices must consider is remarkably large. Even an undergraduate political science textbook, Dynamics of American Politics, lists seven categories of audiences: (a) the two litigants; (b) othersimilarly situated persons and their lawyers; (c) lower courts and administrators; (d) law teachers and other Court watchers; (e) the other participants in the lawmaking process; (f) the publics; and (g) the justices themselves

(Wolfinger 502). But simply to list these various groups of readers does not provide a satisfactory reflection of the dynamic, fluctuating complexity of Supreme Court audiences; neither does it capture the continuously shifting, vortical relationship between authors and audiences as linguistic and textual choices are made.

In the chapters that follow, I focus on a close, detailed reading of six specific cases. In Part One, two early examples, Chisholm v. Georgia (1793) and McCulloch v. Maryland (1819), are presented as establishing the parameters of a rhetorical problem which has persisted throughout the Supreme Court's history. The problem centers on the dilemma of an evolving new genre in a culture of argument: What forms or strategies are best for embodying the conflicting purposes and meanings of Supreme Court opinions?

The early justices assumed that multiple-text opinions were the appropriate generic form. The 1793 text of Chisholm v. Georgia, the first significant written opinion delivered by the Supreme Court, is composed of five separate opinions. Following the custom of the King's Bench of Great Britain, Chief Justice John Jay originated the practice that all justices write separate or seriatim opinions for each case, a practice which has remained a possible, if not necessarily favored, option for individual justices. The multiple voices

heard in Chisholm would seem appropriate to the deliberative dimension of the Court as a public forum for ongoing debate and, indeed, the language of the separate opinions expands with the "spaciousness" of old oratory, to use Weaver's apt phrase. But multiple voices can also create confusion and conflict, complicating the need for opinions to function as effective instruments of government. Chisholm failed significantly, in fact, as a performative utterance intended to serve the instrumental purposes of government. The State of Georgia, the losing party in the case, simply refused to accept the majority vote of the Court (refused, in fact, to appear before the Court at all), and the highly charged issue resulted eventually in the ratification of the Eleventh Amendment, overturning the Court's decision.

An early solution to the rhetorical dimensions of this problem was fashioned after 1801 by Chief Justice John Marshall, who aggressively urged justices to join collectively in single or unanimous opinions. McCulloch v. Maryland provides a particularly eloquent, significant example of Marshall's single institutional voice "expounding" the Constitution. But Marshall's style of opinion-writing, while an effective solution to the "babble" of voices possible in seriatim opinions, could not permanently resolve the very real tensions inherent in Supreme Court opinions—between their deliberative and instrumental functions, between the justices' individual and institutional

roles, between multiple and single voices in a culture of argument. Although the preference that Marshall set for the Court's single judicial voice worked well throughout the nineteenth and into the twentieth centuries, it is not surprising that those inherent tensions have reasserted themselves, with the number of plurality opinions and separate, concurring, and dissenting opinions rising dramatically since the middle of the twentieth century (O'Brien 262–75).

Here is the question that interests me most about the rhetorical nature of the modern Supreme Court: Is the modern return to multiple voices a healthy re–emergence of argument as reasoned debate and deliberation in a mature but increasingly complex and complicated society? Or, to ask the question from a different perspective, is the return to multiple–text opinions symptomatic of a breakdown, of a loss of national identity and ofconsensus in our culture and community, resulting in a rising "babble" of conflicting voices engaged in bickering and dispute? I attempt in Part Two to offer some responses to these questions in the limited but significant contexts of four specific cases: (1) the 1954 landmark opinion of this century, the school segregation cased decided as Brown v. Board of Education; (2) the 1971 Pentagon Papers case, New York Times Co. v. United States; (3) the 1974 Watergate Tapes case, United States v. Nixon; and (4) the 1978 reverse discrimination case, Regents of the

University of California v. Bakke.

There are, of course, many interesting opinions in the nineteenth and twentieth centuries which would illuminate the development of Supreme Court rhetoric. My intention in this study, however, is not to construct a history of the genre but to contribute to our critical and theoretical understanding of the modern Supreme Court opinion: how it comes into being, how it functions, and what informs its rhetorical and stylistic variations. Each of the four modern cases is an important case in its legal and historical effects, but also a quite "difficult" case to analyze from a rhetorical perspective. On the surface, the single-text opinions of Brown and Nixon are in Marshall's rhetorical tradition; the Court speaks with a single judicial voice. The multiple-text opinions of New York Times and Bakke, on the other hand, are virtually seriatim in their form; all of the justices speak individually. But that, of course, is not the whole story. If we can understand how each came into being in rhetorical terms, in what senses they are triumphs of consensus or competition, or failures of conformity or confrontation, then we will be in a better position to understand the opinions themselves and the culture of argument they constitute.

Notes

The Genre of the Supreme Court Opinion

[1] While the bibliography related to the United States Supreme Court is immense, a fairly good general sense of the field can be acquired from the following sources:

Primary Sources

Texts of the written opinions of the United States Supreme Court are available in the following primary forms:

(a) United States Reports. Washington, D. C.: Government Printing Office. This source is the official edition of the written texts of opinions. Opinions reported through 1874 are cited by volume number, the name of the reporter (usually abbreviated), and initial page number, with the year often included in parentheses.

Example: Chisholm v. Georgia, 2 Dall. 419 (1793)

The names of the reporters run chronologically as follows:

1789–1800	Dallas (Dall.)
1801–1815	Cranch (Cr.)
1816–1827	Wheaton (Wheat.)
1828–1842	Peters (Pet.)
1843–1860	Howard (How.)
1861–1862	Black (Bl.)
1863–1874	Wallace (Wall.)

Opinions reported since 1875 are cited as U.S., beginning with the 91st volume.

Example: United States v. Nixon, 418 U.S. 683 (1974)

(b) United States Supreme Court Reports, Lawyers' Edition. Rochester: Lawyers' Cooperative Publishing Company. This source, cited as L.Ed., includes texts of some related materials and provides annotated commentary on the written opinions of the justices.

(c) Supreme Court Reporter. St. Paul: West Publishing Company. This source, cited as S.Ct., is similar to the Lawyers' Edition.

There are countless secondary reprintings of the texts of written opinions, in whole and in part, in sources such as newspapers, monograph studies, and constitutional law textbooks.

Secondary Sources

The extensive bibliographic maze of secondary sources includes general constitutional histories; constitutional law and public policy studies; specific analyses and histories of single issues or single cases in both books and periodicals; biographies of justices; autobiographies, letters, memoirs, commentaries, and speeches by justices and others involved with the Court, and so forth. The following sources, listed alphabetically by author, make for a good nonspecialist's introduction to the nature and range of this material (full citations are given in the Bibliography): Abraham, The Judicial Process; Berkson, The Supreme Court and Its Publics: The Communication of Policy Decisions; Bickel, The Least Dangerous Branch; Brigham, The Cult of the Court; Cardozo, The Nature of the Judicial Process; Congressional Quarterly's Guide to the U.S. Supreme Court; Corwin, The "Higher Law" Background of American Constitutional Law; Edelman, The Symbolic Uses of Politics; Frank, Marble Palace: The Supreme Court in American Life; Friedman and Israel, The Justices of the United States Supreme Court 1789–1978: Their Lives and Major Opinions; Gilmore, The Ages of American Law; Hamilton, Madison, and Jay's Federalist Papers; Hughes, The Supreme Court of the United States; Jackson, The Supreme Court in the American System of Government; Kelly, Harbison, and Belz, The American Constitution: Its Origins and Development; Levi, An Introduction to Legal Reasoning; Levy, Original Intent and the Framers' Constitution; Lewis, Gideon's Trumpet; Mason and Stephenson, American Constitutional Development; McLaughlin, A Constitutional History of the United States; Miller, The Supreme Court: Myth and Reality; O'Brien, Storm Center: The Supreme Court in American Politics; Rohde and Spaeth, Supreme Court Decision Making; Schwartz, The Unpublished Opinions of the Warren Court; Stone et al., Constitutional Law; Sutherland, Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas; Warren, The Supreme Court in United States History; Westin, The Anatomy of a Constitutional Law Case; Woodward and Armstrong, The Brethren: Inside the Supreme Court.

[2] For two excellent surveys of critical legal studies and the law and literature field, respectively, see Mark Kelman, A Guide to Critical Legal Studies (Cambridge: Harvard UP, 1987) and Richard A. Posner, Law and Literature: A Misunderstood Relation (Cambridge: Harvard UP, 1988).

[3] Frank's words appeared over thirty years ago, but his attitude is still current. Richard A. Posner, writing in 1988, comments that the field of law and literature is "still largely unknown to the legal profession, including the legal professoriat" (21).

[4] The long-continuing (and long-suffering) "Plain English" movement as it relates to legal language has been a major force in this debate. For an historical perspective, see David Mellinkoff, The Language of the Law (Boston: Little, Brown, 1963). An interesting update is provided by Tom Goldstein, "Drive for Plain English Gains Among Lawyers," New York Times 19 February 1988: B7.

[5] For a survey of this approach and a useful list of references, see Brenda Danet, "Legal Discourse," Handbook of Discourse Analysis, vol. 1, ed. Teun A. Van Dijk (London: Academic Press, 1985) 273-91.

[6] The criteria for discourse performances are taken from Walter H. Beale, A Pragmatic Theory of Rhetoric (Carbondale: Southern Illinois UP, 1987) 83-86.

[7] Beale places "majority decisions of the Supreme Court" in a category he designates as "instrumental deliberation." My analysis will expand on this and explore some questions in Part Two.

[8] See Basil Bernstein, "Elaborated and Restricted Codes," The Ethnography of Communication, ed. J. Gumperz and Dell Hymes, 55-69.

[9] For a full account, see Bernard Schwartz, The Unpublished Opinions of the Warren Court (New York: Oxford UP, 1985) 445-70.

PART ONE
TWO EARLY CASES

1. Chisholm v. Georgia (1793): A Babble of Voices and Rhetorical Problems

In "Constituting a Culture of Argument: The Possibilities of American Law," James Boyd White claims that the Constitution of the United States is "in a literal sense a rhetorical constitution: it constitutes a rhetorical community, working by rhetorical processes that it has established but can no longer control. It establishes a new conversation on a permanent basis" (When Words 246). White's notion of a conversational process is an interesting way of thinking metaphorically, if not literally, about the interaction of justices as writers and about the structural and substantive dynamics of the texts of Supreme Court opinions. The metaphor of a "conversation" taking place on the printed page, like Bakhtin's voices and the speech acts of Austin and Searle, provides us with a rich and expanded set of possibilities for investigating and coming to some understanding of the rhetorical characteristics of the Court's opinions as they have developed.[1] It is important to emphasize, however, that the justices who were initial

participants in this conversational exchange had no clear sense of a rhetorical genre--of what the new conversation was to be or how it should be conducted to be successful; neither did they approach their newly created judicial roles with any confident feelings of permanence.

Indeed, listening as we do at the end of the twentieth century, we sometimes need to remind ourselves of just how experimental and tentative the new "Union" of American states actually was in the late 1700s. This tentative quality can be seen in the very titles of the early volumes of the United States Reports recorded by Alexander J. Dallas: Volume I is entitled "Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania, Before and Since the Revolution," and the volumes that follow contain cases adjudicated in the "Several Courts of the United States and of Pennsylvania, Held at the Seat of the Federal Government." It is only with the nineteenth century that the volumes become, simply, reports of cases argued "in The Supreme Court of the United States."

The 1793 case of Chisholm v. Georgia, 2 Dallas 419, is generally considered to be the first significant written opinion delivered by the United States Supreme Court.[2] From political and historical perspectives, however, the significance of the Chisholm case was a negative one, lying chiefly in the failure of the Court either to command respect for its proceedings or to establish the authority of its decision. It was not to be, to say the least, an auspicious

start for the first justices. The issue before the Court was one of federalism—of working out one of the many controversial details concerning the division of power and authority between state governments and the new federal government in what James Madison called the "compound republic of America" (The Federalist No. 51).

It is by no means surprising that in 1793 numerous aspects of federalism had yet to be resolved. The debate over federalism, as Jack Rakove explains, had as recently as the mid-1780s been limited to "prosaic" and "narrowly drawn" arguments relating to reforming the Articles of Confederation. By 1787, a dramatic transformation of the debate had occurred, with participants like James Madison and Alexander Hamilton moving the newly independent states "from one agenda to another," from a concentration on more limited concerns to "more complex and open-ended questions about republican government in general" (80-84). Gordon S. Wood points out that many of these questions focused on checking potential abuses of the legislative branch, which Federalists had come to view as a particular threat (550-551). The judicial branch, in contrast, was described by Alexander Hamilton as the "least dangerous" of the three divisions of power:

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be

> said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments (Federalist, No. 78).

Just a short time later, imagine the consternation of Georgia officials upon finding their sovereign state summoned to defend itself before the new justices of this least dangerous branch, the Supreme Court of the United States.

The case, in sum, involved an attempt by a private citizen of South Carolina to collect an unpaid debt from the state government of Georgia. Georgia refused to recognize the jurisdiction of the new federal judiciary in the suit, and the Court was thus faced with this specific question: Could the "sovereign" state of Georgia be sued in the United States Supreme Court by a private citizen of another state? The language of the recently ratified Constitution seemed to suggest that such a suit was possible: Article III, Section 2, states that the "judicial Power" extends to controversies "between a State and Citizens of another State" and that the Supreme Court has original jurisdiction in all cases "in which a State shall be Party." As Charles Warren describes, the highly sensitive, suspicious, and volatile state governments were willing—so long as they were acting as plaintiffs—to be parties to suits in the newly created federal courts, but the states were apparently quite unwilling to be made defendants in such situations (1:

91–123). Critics of the new Constitution had been assured during the ratifying debates that the sovereignty of states would not be affected by the wording of Article III, Section 2. Alexander Hamilton, for example, had explicitly insisted in 1788 that, under the proposed Constitution, a sovereign state would not be "amenable to the suit of an individual without its consent"; he added, perhaps with an ironic twist, that the states would retain "the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith" (The Federalist No. 81).[3]

On February 18, 1793, with intense public interest focused on the Chisholm case and many similar cases threatening, the justices ruled four–to–one that Georgia could indeed be sued in their newly constituted and untested Supreme Court. "The decision," according to Warren, "fell upon the country with a profound shock" (1:96). Declarations, threats, and proposals to amend the Constitution were made, and the political controversy generated by the justices' ruling continued to swirl, remaining unresolved until 1798 when Chisholm was in effect overturned by the ratification of the Eleventh Amendment to the Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Rather than the Court functioning as the calm at the center of the political storm, as later characterized by Oliver Wendell Holmes, Jr., it appeared in the 1790s to be in early danger of disintegrating in the swirling winds of the storm itself.[4]

From a rhetorical perspective, the written text of the Chisholm opinion provides a seminal example of an evolving new genre of constitutional discourse in a culture of argument. Following the practice of England's Courts of King's Bench and Chancery, the justices at that time all formulated separate or seriatim opinions (Marcus et al. 1: 203, 582).[5] They delivered their opinions one after another in a series determined by reverse seniority. Thus, the Chisholm "opinion," heard and decided by Chief Justice John Jay and four of the Court's first Associate Justices, is actually a composite of five separate voices participating in an extraordinary kind of high-stakes conversation—one that can easily fail or degenerate into a "babble" of contradictory premises and unresolved claims. It is a process of public argument which, to be successful, must both command and persuade: The text must function simultaneously as an authoritative instrument of government and as a deliberative forum which wins the respect of its readers.

How can we best understand and evaluate the complex nature of the rhetorical conversation in Chisholm v. Georgia? What kind of "culture of argument," as James Boyd White uses the term, is enacted by the Court? And what possibilities are envisioned in this conversation and culture, what values sanctioned, for public interaction and relationships within the community we call the United States? Some viable answers to these questions are best established through practical description, a close rhetorical analysis of the texts themselves (call it my "working" or "workable" reading, if you will). What might be important to know, to use Beale's set of questions, about the occasion and context to which the opinion as a whole responds? How does each justice define his purpose and deal with problems of subject matter and the relation between author and audience? Given especially the fluid nature of a newly developing genre, one in the process of defining itself, what assumptions does each justice appear to make concerning the conditions he must meet in order to produce a successful piece of discourse? What choices are thus made in language and strategy? And how do these distinctive features of discourse interpenetrate or coalesce in the five separate texts which make up the Chisholm opinion?

In human terms, the Chisholm case was originally about money and bad faith in the context of war. It began in 1777 during the Revolutionary War, as Doyle Mathis relates, when the Executive Council of Georgia sought to purchase cloth, clothing, and blankets for American soldiers who were quartered near Savannah. Two Georgia agents, Thomas Stone and Edward Davies, contracted with Robert Farquhar, a merchant in nearby Charleston, South Carolina, to purchase the supplies: Farquhar agreed to provide cloth, thread, silk, handkerchiefs, coats, jackets, and blankets for the sum of $169,613.33.[6] The deal was struck on October 31,1777, with the arrangement that Farquhar would deliver the supplies and be paid by December 1. Farquhar lived up to his part of the contract, delivering the supplies on November 3, but apparently never received payment for his merchandise, despite repeated attempts to collect the money.

Twelve years later, in 1789, Farquhar was dead, having drowned in a boating accident in 1784, but his claim against the state of Georgia, now part of the newly formed United States of America, was very much alive for three people: Alexander Chisholm, also a merchant in Charleston, South Carolina, and the executor of Farquhar's estate; Farquhar's principal heir, his daughter Elizabeth, who had been only ten years old when her father died; and Peter Trezevant, who in 1789 married Elizabeth Farquhar, then aged fifteen. Elizabeth's marriage to Peter Trezevant apparently

precipitated a series of attempts by her husband and Alexander Chisholm to collect the money owed to Farquhar's estate. They petitioned the Georgia legislature in that year, but failed to win any relief. Georgia refused to pay the claim because, according to the determination of a legislative committee, the state had given Farquhar's payment (in continental loan office certificates) to the agents Thomas Stone and Edward Davies. Chisholm and those he represented apparently felt that nothing would be gained by suing the former agents, especially as Davies by that time had died insolvent, and so they decided to sue the state of Georgia in the new federal courts (Mathis 21–22).

In early 1790, what had begun as a wartime business transaction became Farquhar's Executor v. Georgia, a suit for payment and damages in the recently formed United States of America's Circuit Court for the District of Georgia. At this level Georgia was a predictable victor, the case being decided in the state's favor in 1791 at Augusta, Georgia, by two judges: the Georgian Nathaniel Pendleton, a judge of the United States District Court for Georgia, and—quite interestingly—the North Carolinian James Iredell, a justice of the United States Supreme Court who was fulfilling his duty to "ride circuit" in the periods between the February and August terms of the Supreme Court. Iredell characterized the case as "very important business" in a letter to his wife Hannah (Marcus et al. 2: 225; qtd. in Mathis 23).

The Circuit Court's ruling was very unacceptable business to Chisholm, of course, who decided in 1792 to try his luck in the equally new United States Supreme Court, then only in its third year. Chisholm's suit, first appearing in the Court's records of August 11, 1792, was listed by the clerk Samuel Bayard as "Alexr. Chisholm. Exor. of Robt. Farquhar. decd. v The State of Georgia" (Marcus et al. 1: 360). The suit, now to be heard in the federal government's capital of Philadelphia rather than in the local arena of Augusta, Georgia, asked for $500,000 from the state government for the unpaid debt and damages (Mathis 23).

Whatever actually happened to Robert Farquhar's money in the late 1770s, a true accounting of which we will probably never have, the case was transformed into something quite different and dramatic, a controversy of broad significance on a national scale, once it had entered the federal court system of the newly constituted United States of America. What had been merely a detail of geography in the story—the fact that Chisholm and, originally, Farquhar were citizens of South Carolina and not of Georgia—became a crucial issue in the case. The shift in context would have a profound effect on the dynamics of the argument. Essentially local questions of fact (what happened to Farquhar's money) and of responsibility (who, if anyone, should be held accountable for the failed business transaction) would be superseded by highly charged national questions of federalism—of the

sovereignty of states and the jurisdiction of the federal judiciary—and of constitutional interpretation.

The first mention of the case in the Supreme Court's records immediately brings to the foreground the new dimensions of the argument. Georgia's governor and attorney general had been served with a summons requiring the state to appear as a defendant in the case that August, but the state vehemently refused to do so, despite the fact that the state as plaintiff was simultaneously pursuing another case, Georgia v. Brailsford, in the very same court (an irony not lost upon the justices). In a draft order, Samuel Bayard recorded, then marked out, that Georgia officials "were solemnly called, but came not"; the clerk, perhaps nervous, decided to settle for something less dramatic and more bureaucratic in "the original summons in thiscause [having been?] served . . . [and no appea?]rance being now entered in behalf of the said state" (Marcus et al. 1: 479). Keep in mind that the solemnity of the Supreme Court was not enhanced in 1792 by the symbolic surroundings of a marble temple or palace, let alone its own building. The justices, variously wearing English-style wigs and colored robes (Warren 1: 48), were commanding feisty Georgia officials to appear as defendants in the modest Mayor's Court Room at the Old City Hall in Philadelphia.[7]

The private counsel for the plaintiff Alexander Chisholm was, of course, present. Chisholm had hired the doubt-filled

and debt—ridden Virginian Edmund Randolph, who was at the same time serving as our reluctant first Attorney General of the United States (Reardon). Julius Goebel, Jr. suggests that Chisholm's cause, rather than other similar suits in the new federal system, was "pressed with vigor" because Edmund Randolph needed the money so badly (726). Whether this was the case or not, Randolph's participation produced an odd confusion of his roles as private counselor and public official. Addressed as "the Attorney General" throughout, Randolph moved that the Court rule in Chisholm's favor—a judgment by default—and award a writ of inquiry of damages unless the state of Georgia, provided with reasonable notice, appear in court by the next term or "shew cause to the contrary" (Marcus et al. 1: 205). The justices postponed even the consideration of this motion to the next term in order, according to Dallas, to "avoid every appearance of precipitancy, and to give the state time to deliberate on the measures she ought to adopt" (419).

Six months later on Monday, February 4, 1793, the Supreme Court opened its term with five justices present: Chief Justice John Jay and Associate Justices William Cushing, James Wilson, John Blair, and James Iredell. The attorney general Edmund Randolph was also present and waiting, as private counsel for Chisholm, to argue his motion for a judgment by default. Pennsylvania lawyers Jared Ingersoll and Alexander J. Dallas (also the reporter of court

opinions) were also there in the courtroom as counselors for Georgia in Georgia v. Brailsford, but they had been instructed not to participate in "arguing the question" in the Chisholm case. They did present the justices with "a written remonstrance and protestation on behalf of the state, against the exercise of jurisdiction in the cause" (2 Dall. 419). The justices agreed to hear Randolph's oral argument the next day and moved on to the Brailsford case and other business.

The next day, Tuesday, February 5, Randolph spoke for two-and-a-half hours before the justices. His oral argument has been preserved for us by Dallas, who included a full text of the speech in reporting the Chisholm case. In fact, Randolph's speech arguing the plaintiff's position oddly occupies the first ten pages of the sixty-page text of Chisholm v. Georgia (419-429). Why did Dallas include Randolph's argument? Did he admire the speech as legal oratory or was he making a confusedassumption that the attorney general's words would have an official status commensurate with the justices' opinions, even though Randolph was in this case serving as a private counsel? Randolph himself may have contributed to such confusion, claiming that it would be "official perfidy" for him to argue against the Court's jurisdiction in this suit (on behalf of a client who had hired him exactly to argue for it). Whatever the reason, the inclusion reflects the sense of contributors

to a new genre casting about in different directions, sometimes awkwardly, attempting to work out and establish a new form. And it does effectually allow Edmund Randolph to participate to some degree, although unable to vote, in this first Supreme Court conversation. His voice is heard along with the five justices, and the text thus casts an ironic rhetorical shadow on Georgia's strategy of courtroom silence.[8]

Randolph's argument, while not a Supreme Court opinion, does contribute to our understanding of choices made by the justices in writing their opinions (especially as Randolph becomes the primary audience for at least one justice). Randolph lays out four questions that had been posed by the Court in August:

> 1st. Can the state of Georgia, being one of the United States of America, be made a party-defendant in any case, in the supreme court of the United States, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the state of South Carolina?
>
> 2d. If the state of Georgia can be made a party defendant in certain cases, does an action of assumpsit[9] lie against her?
>
> 3d. Is the service of the summons upon the governor and attorney general of the state of Georgia, a competent service?
>
> 4th. By what process ought the appearance of the state of Georgia to be enforced?

The first question had, of course, become the principal issue in the case, and Randolph's answer to it accordingly takes up nine of the ten pages. The second question involved a technical issue of legal practice (although Iredell would argue otherwise), as did the third. The fourth question was, paradoxically for the newly formed federal government, both technical and apocalyptic in its implications.

On the principal question of jurisdiction Randolph argues, in sum, that the language of the Constitution and the "judicial act" passed by Congress (the Judiciary Act of 1789) support Chisholm's right to sue the state of Georgia in the United States Supreme Court. States as "parties" can be defendants as well as plaintiffs. Randolph unfolds his constitutional interpretation first by examining the "letter" and then the "spirit" of the document, a textbook strategy of forensic discourse at least as old as Ciceronian rhetoric.[10] For background and context, he appeals to the intentions of the "framers of the constitution" and to the recent history which had produced a "new order of things" in the relation of states to the federal government: ". . . there is nothing in the nature of sovereignties, combined as those of America are, to prevent the words of the constitution, if they naturally mean, what I have asserted, from receiving an easy and usual construction."[11] He surveys possible analogies from the history of confederacies, drawing on what Goebel

calls "the well-fingered chestnuts of the pamphleteers" (728). And he concludes his main argument by considering possible consequences of policy and the problem of executing a judgment, closing with a gothic-style warning of the threat of violence in the "wide and gloomy theatre" and the fear of the "federal arm uplifted": "Scenes like these are too full of horror, not to agitate, not to rack, the imagination."

The second, third, and fourth questions are given extremely brief treatment. In a paragraph on the second question, Randolph claims that an action of assumpsit can be brought against a state as a state can make a promise, being "an assemblage of individuals, who are moral persons." In another short paragraph on the third question, Randolph simply affirms as common sense the appropriateness of serving the summons upon Georgia's governor and attorney general, and he includes an ironic reference to the governor's willing representation of the state in the concurrent Brailsford case. And, on the volatile fourth question of how to make Georgia appear in court, Randolph spendsa paragraph talking in a circle and saying, perhaps wisely, virtually nothing.

Finally, Randolph closes his entire argument with a return to the initial confusion between his public and private roles. He makes an ethical appeal, an appeal to the credibility of his own character as a speaker addressing "the world," in an interesting example of an a fortiori argument or argument "from the stronger" case (Aristotle 2.23). To

those who might view his "purely legal" argument as a political attempt to "consolidate" the power of the national government, Randolph makes a strong personal claim that if he, as a well-known champion of states' rights, can argue Chisholm's case with confidence that no harm will be done to state sovereignty, then others should also feel confident that the states "need not fear an assault from bold ambition, or any approaches of covered stratagem." With Randolph's oral argument concluded, as the clerk Samuel Bayard relates, the justices invited counter-arguments, expressing "a wish to hear any gentleman of the Bar who might be disposed to take up the gauntlet in opposition to the Attorney General" (qtd. in Warren 1: 95).[12] No one responded to this invitation, despite the fact that Georgia counselors Ingersoll and Dallas were apparently there, silent, in the courtroom. And so the justices held Chisholm v. Georgia "under advisement" and moved on to the case of Georgia v. Brailsford and other matters.

Thirteen days later, on Monday, February 18, 1793, the justices delivered their opinions to a "numerous and respectable audience," according to Bayard, with James Iredell speaking first for about one-and-a-quarter hours (qtd. in Warren 1: 95). It is important to note here the sense of a speech occasion, of language spoken in front of

actual people at a formal event, a factor reflecting the oral tradition that has always been a strong component of the language of the law (Mellinkoff). It is discourse as performance, spoken discourse at the center of a public or institutional act. Each justice, thinking naturally in terms of this speech occasion, begins his opinion with embedded or context-tied language that is typical in a text of transcribed speech:

> "This great cause comes before the court ...."
> (James Iredell)
> "In considering this important case, I have ...."
> (John Blair, Jr.)
> "This is a case of uncommon magnitude."
> (James Wilson)
> "The grand and principal question in this case is ...."
> (William Cushing)
> "The question we are now to decide ...."
> (John Jay)

To understand the antecedents of these references—what is "this case," who are "we," when is "now"—the reader must bring to the text an outside understanding of occasion and context.

But the text of Chisholm v. Georgia is not simply a collection of transcribed speeches; it is also written

discourse. We know that Iredell and the other justices composed their opinions in writing beforehand, so that the words spoken in court were also words read aloud (all or in part). And there is evidence to suggest that the justices not only wrote their opinions beforehand, but they developed their arguments without formal consultation or negotiation. It is difficult to believe that no informal discussion took place, but the justices apparently did not formally discuss the Chisholm case together before writing their separate opinions, in contrast to the modern practice of holding case conferences. At least one justice, John Blair, indicates clearly in his opinion that he is unaware, as he writes, what the outcome of the case will be.[13]

The linguistically rich and complex event that we designate as the text of Chisholm v. Georgia is further complicated by the obscurity of early publication. While some of the justices may have had more general and distant audiences in mind, distant in terms of time as well as place, their rhetorical efforts were not immediately or widely distributed. Most of the newspapers of the day published short summaries of the justices' opinions, but not the complete texts. Warren quotes at length from a letter in the National Gazette of August 10, 1793, complaining about the limited publication of the full reasoning of the justices in the Chisholm case:

> Good policy would have induced an unlimited publication, but a more effectual mode could not have been adopted, than the one chosen, to prevent these important opinions from being read by the great body of the people: a large pamphlet, price 50 cents, was made of them and claimed as a copyright, in order to prevent their being republished in the gazettes, whereas they ought to have been public property, that they might be published in a six penny pamphlet and in all the newspapers, in order that the great body of citizens might be informed of the great principles of this important decision (1: 98).

The general assumption, quite the contrary, was that the "great body of citizens" would not be a part of the prospective audience for these first Supreme Court opinions and that interest in the full texts would be found only or primarily among legal, technical, and professional readers.

Even legal professionals, however, had trouble securing the full texts of the opinions; the second volume of Dallas, containing the five opinions reported in Chisholm v. Georgia, was not published until 1798 (Goebel 665). Dallas' leisurely pace of publication was not unusual in the context of the times and of the legal profession. As David Mellinkoff comments, judges had given oral opinions for centuries in the English tradition, and the "casual" reporting of court decisions had been historically "an avocation, born of a lawyer's notes for the refreshment ofhim and his friends" (267). Mellinkoff marks the late 1700's as the beginning of a crucial American transition from oral to written opinions, a transition that "loosed the floodwaters of precedent" and

"soon overwhelmed writer, reporter, and reader" in the rapidly expanding United States of the nineteenth century: "The race of the reports was on, continuing from state to territory to state, from supremest court to town court, from bureau to board, on into reports of unreported cases" (267–68). Chisholm might be described as positioned at the starting line of this race, the justices looking both back to an older oral tradition and forward to a thoroughly "written" medium of professional discourse.

All of these factors contribute to a dynamic interweaving and compounding of oral and written traits in Chisholm v. Georgia. This intriguing intermix may help to explain what appear to modern readers to be enormous prose oddities in the written opinions of the justices. The "dead letter" quality of the text, especially after 200 years, is reinforced graphically by closely printed pages with no titles or highlighted demarcations as the reader moves from one justice's opinion to another. A close look is needed to discern even the basic divisions of the fifty pages of opinions which follow Randolph's oral argument. The justices each speak, in turn, as follows:

(1st)	James Iredell	21 pages	(429–50)
(2nd)	John Blair, Jr.	3 pages	(450–53)
(3rd)	James Wilson	13 pages	(453–66)

(4th)	William Cushing	3 pages	(466–69)
(5th)	John Jay	10 pages	(469–79)

The explicit rules for "turn-taking" in this strange seriatim conversation had been prescribed beforehand: Each justice would write an opinion, regardless of the vote or the dynamics of substance or purpose, in a set order based on the principle of reverse seniority. Thus, all who are entitled to speak in fact do so in this judicial conversation, but they are not necessarily fulfilling any institutional goal or talking in response to each other. We do get a fascinating judicial rehearsal of a variety of possible roles and generic structures for this new community of argument, but the final result is a text filled with five voices neither instrumental nor deliberative in their effect.

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1. The Justice as Traditionalist and Amateur Historian

Unintended consequences of the set structure undermine ironically, almost amusingly, the rhetorical force of Chisholm v. Georgia from the very beginning. As the Court's most junior member, Associate Justice James Iredell speaks first. As the one justice already familiar with the case from the Circuit level, and as a garrulous and prolific writer by habit, he also happens to speak the longest, by far, of the five justices. His opinion accounts for 42 per cent of the justices' text (21 of 50 pages). Yet, by odd coincidence, Iredell's opinion is the one dissent in the justices' four-to-one vote supporting the right of Chisholm to sue the state of Georgia in the United States Supreme Court. Iredell's dissent is not, however, a radical document; quite the contrary, it is filled with the language of prudent moderation and moral balance, of pragmatic concern and ethical consideration. Iredell reaches out extensively—one might even say lovingly—to make connections with the long history and tradition of the English common law, both as context for the case and as criterion for deciding the argument.

For Iredell and his peers in the newly formed United States, connections with the common law tradition of England were, in one sense, natural and inevitable; but, as Grant Gilmore explains, decisions about the nature and extent of

such connections were extraordinarily complicated and problematic (19–40). In the new conversation begun by these first Supreme Court justices, who would be allowed to speak? What voices would be included in the texts of opinions? What kinds of testimony and evidence would be considered valid and relevant to the case? It is not surprising that James Iredell, consistent with his background, would choose to look back before 1783, indeed before 1776, and to include voices he considered "material" from the tradition of English common law.

The junior justice from North Carolina was, as Fred L. Israel describes, the only one of the five justices hearing Chisholm actually born in England. In 1768, at age 17, Iredell had been sent by his merchant family to Edenton, North Carolina, to establish a career for himself as a King's officer. Unlike the other justices, Iredell did not attend an American college, but he had been well-schooled in England and was clearly an intelligent, hard working, and ambitious young man with, as Israel points out, the "Episcopalian" outlook and tastes of Carolina's coastal aristocracy and conservative planter culture. He studied law as an apprentice with the highly respected Samuel Johnston, married Johnston's sister Hannah, and devoured issues of the Tatler, Guardian, and Spectator—his favorite reading being "Mr. Addison's Discourses on Fame," which he found "incomparably elegant and sublime" (qtd. in Israel 122).

Like most of the other justices, Iredell had originally been a reluctant revolutionary. Once committed, however, he became a strong supporter of the American cause in North Carolina and a public advocate for the new Constitution. Iredell conducted asuccessful private law practice and briefly held positions as superior court judge and attorney general of North Carolina, but his real arena of political action was in writing. "Although not an effective public speaker as he tended to lisp," according to Israel, "Iredell nevertheless entered actively into political affairs through an extensive correspondence with the leading Carolina politicians—his letter file was so extensive that one friend described him as 'the letter writer of the war'" (123). Iredell wrote not only letters, but also numerous essays and addresses; and, in leading the ratification fight for the new Constitution in North Carolina, he composed a Federalist-style paper (using the pen name "Marcus") which won him national recognition.

Iredell's talent for rhetorical copiousness—Erasmus's "golden stream"—is a defining feature of his text in Chisholm v. Georgia. His special brand of fullness of expression is slow, contextually broad, and endlessly expansive. The audience is invited figuratively to settle into a comfortable chair for a long, leisurely deliberation. In the first paragraph of the text, Iredell opens his argument by suggesting that the "attorney general" Edmund

Randolph is attempting to move too quickly on such an "important question," and that the justices must do what is "proper," examine the suit carefully, and be "fully persuaded" the Court has authority to act. Weaving terms such as "propriety," "duty," and "warrant" throughout the text, Iredell speaks what Michael Halloran calls the "neoclassical rhetoric ofmoral commitment," a way of speaking and writing in an "oratorical culture" that would remain dominant in America into the nineteenth century.[14]

Like a highly civilized and courteous participant in the gentleman's—club conversation envisioned by Michael Oakeshott, Iredell will not make his audience guess about his intentions. In his introduction or exordium he seeks first to establish a sense of continuity and to widen the historical context for considering the issues by referring to the "compromise" of an earlier Maryland case, similar to Chisholm in its question, about which he had had doubts (i.e., the Chisholm case is not unique and should not be judged in isolation).[15] Then, in the very second paragraph, following a classical or anti-climactic scheme of arrangement, he states his central proposition or key judgment—the claim or thesis he will support in the argument to follow:

> Those doubts have increased since, and, after the fullest consideration, I have been able to bestow on the subject, and the most respectful attention to the

> able argument of the attorney general, I am now decidedly of opinion that no such actions as this before the court can legally be maintained" (emphasis added).

Note that the language and syntax of this long, compound–complex sentence encapsulate several of the characteristics that pervade Iredell's text. The slow, winding, carefully qualifiedclaim with its personal use of "I" and passive punch line suggests a deliberate and deliberative thinker who is in no hurry to rush to judgment and who sees himself as playing an individual role in a larger drama—one among multiple voices. Iredell's ethos, the authorial voice he constructs and projects in the text, suggests what Walter Beale calls the character type of the statesman: "a generalist, a 'normal' personality, gregarious, and accustomed to hearing and negotiating a variety of points of view" (78–79). For this character, the key value is "balance": "Historically, it is this type that reveals the greatest affinity for mixed, at least partially consensual forms of government and for pluralism in the social sphere" (79). Often referred to as a "states' rights Federalist," Iredell tries in Chisholm to strike a careful balance not only between state sovereignty and the new "general government," but also between the powers granted to the judicial and legislative branches of the new federal union.

Iredell's primary audience, oddly enough, is Edmund

Randolph in his public identity as the attorney general. Iredell says that he has given "the most respectful attention to the able argument of the attorney general," but it turns out to be a kind of attention that may have made Randolph wince. The justice takes great pains to critique Randolph's argument, refuting the Virginian's points again and again with polite but dismissive counter-arguments (refutatio). Warren gives us some insight into Randolph's feelings about Iredell and others in the following quote from Randolph's scornful letter to James Madison in 1792 concerning the Brailsford case:

> It [an injunction] was granted with a demonstration to me of these facts; that the Premier (Jay) aimed at the cultivation of Southern popularity; that the Professor (Wilson) knows not an iota of equity; that the North Carolinian (Iredell) repented of the first ebullition of a warm temper; and that it will take a score of years to settle, with such a mixture of Judges, a regular course of chancery" (1: 104).

The verbal duel between "the North Carolinian" Iredell and "the Virginian" Randolph is great fun to follow, but it contributes little to resolving the question in the case or to any effective judicial conversation among the justices.

Iredell chooses to focus the heart of his argument on the technical question of assumpsit (Latin for "he undertook" or "he promised"), the second question in Randolph's list of four and a question that Iredell himself had specifically

posed in August, 1792. In nonspecialist terms, the question is essentially this: Can a state be sued for failing to carry out an informal contract or promise made to a person—in this case, an agreement to pay Robert Farquhar for his goods? The question seems at first to have been an odd choice, in that the others participating in the conversation, some with much more experience on the bench than Iredell, either ignore the question or do not know what to make of its significance. Randolph's first question, involving the national issues of state sovereignty and jurisdiction of the new federal judiciary, would seem to supersede the smaller question of assumpsit. But Iredell cautions against "taking too large a view," wishing to anchor his practical reasoning in the concrete and the historical and feeling decidedly uncomfortable with broad, sweeping issues of political philosophy, national identity, and the nature of sovereignty in the newly formed United States. This "particular question before the court," the issue of assumpsit, was obviously a strategic choice for the North Carolinian, taking him where he wanted to go in constructing his argument.

With assumpsit as the central question of the case, Iredell proceeds to arrange or unfold his text as an extended and exhaustive search for an authoritative answer, first, in the United States Constitution and, second, in the long history of English common law. If an action of assumpsit will "lie against a state," Iredell reasons, its authority

must come from the Constitution and the Judiciary Act of 1789. He uses what Kenneth Burke calls a "proportional strategy of interpretation," an inclusive approach that involves the complex weighing and assessing of all potentially relevant constitutional language (Grammar 380–84). Iredell concludes that these texts are explicit about what parties, but not about what kinds of controversies, except for the Judiciary Act's addition of the term "civil," a qualification which the justice believes "every reasonable man will think well warranted." The question is thus modified to the following: What civil controversies can be maintained against a state by individual citizens?

To answer this question, Iredell offers a classical argument by division, reminiscent of James Madison's strategy in The Federalist No. 10, guiding his audience through a carefully crafted either/or choice to his final conclusion. If Alexander Chisholm's suit can be maintained against the state of Georgia, then authority for the action, where the Constitution is not explicit about what kinds of controversies, will be found either (1) in congressional laws or (2) in the common law. Iredell argues that the "framers of the constitution" intended that we look either to laws passed by Congress to carry the Constitution into effect or to "antecedent laws for the construction of the general words they use."[16]

With regard to the first option, Iredell reasons that Congress has the power to pass all "necessary and proper" laws to carry the Constitution into effect, a power granted by Article I, Section 8 of the Constitution, but the legislators have not spoken on this issue. Thus, no laws yet cover this type of suit, and the Supreme Court's duty is "only to judge." Ironically, Iredell makes a special plea for judicial restraint in a case cited by Leonard W. Levy as "exhibit number one" of "a rampaging judicial activism" among the Court's early decisions (56). The theme of judicial restraint appears again and again in the North Carolinian's text: he insists that the Court cannot fill legislative gaps "by making new laws for new cases"; he declares that the justices "have no right to constitute" themselves an "oficina brevium"; he commends Congress for helping "to guard against that innovating spirit of courts of justice"; he cautions against turning courts into "makers of a new law, instead of being (as certainly they alone ought to be) expositors of an existing one"; he asserts that "the application of law, not the making of it, is the sole province of the court"; and, in the midst of a series of asides or obiter dicta, he amusingly advises that "it is of extreme moment that no judge should rashly commit himself upon important questions, which it is unnecessary for him to decide."

With regard to the second option, Iredell dismisses the "particular" state laws of Georgia and argues that the

appropriate "antecedent laws," those "principles and usages of law already well known" and common to all the states, can be found only in the tradition of English common law. Iredell searches that tradition, finding the sole remedy against sovereignty ("the Crown") to be the "petition of right," a recourse that depends upon "grace" rather than "compulsion." By analogy, a sovereign state of the United States can only be petitioned with its "express consent," the outcome depending upon the "discretion and good faith of the legislative body." (Note, here, how Iredell begs the question of the nature of state sovereignty in the newly formed republic.) Thus, no authority can be found in "the old law" for this suit.

With his search for authority in the English common law, Iredell in effect invites a host of traditional voices to join in this new American judicial conversation. In the voluminous citations and quotations, there is much talk—rather strange to us after 200 years—of the King and of princes and barons, of subjects and freeholds, of Westminster Hall and Lord Chief Justice Mansfield, of Carnarvon castle and the case of Yerward de Galeys, of Blackstone's Commentaries and soit droit fait al partie (Iredell translates as "let right be done to the party"). We hear testimony not only from the popular English legal scholar Sir William Blackstone, but also from a long list of legal reporters, expositors, and philosophers: Comyns,

Theloall, Finch, Freeman, Skinner, Puffendorf, Stamford (Staundfort), and Hargrave. Iredell is particularly interested in Hargrave's "case of the Bankers" during the reign of Charles II, quoting over two pages from the "celebrated argument" of Lord Somers. While Iredell's search is a long performance of "book learning," as Goebel calls it (730), it is not so much the learning of a legal professional. It suggests more the temper of an amateur historian, of one in love with original source materials, long quotations, and the sheer accumulation of facts and details.[17]

Like a well-trained orator, Iredell concludes the presentation of his main argument (confirmatio) by summarizing his points and restating the central proposition: "The consequence of which, in my opinion, clearly is, that the suit in question cannot be maintained, nor, of course, the motion madeupon it be complied with." Unfortunately, however, he does not stop there. The garrulous North Carolinian writes so fully and extensively, in fact, that he develops almost comic problems in concluding his remarks—he cannot seem to stop, keeps saying that it is unnecessary to speak further, and then proceeds to do so. Unable to exit gracefully, Iredell leaves his audience with a conclusion or peroratio comprised of "extra-judicial" one-liners, policy comments, and a final parting shot at the "attorney general" Edmund Randolph. While judicial restraint may have been an

important theme for Iredell, it was apparently not a principle he could practice comfortably when it came to writing this judicial opinion.

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2. The Justice as Legal Technocrat

The contrast could not be more explicit or striking for readers who turn from James Iredell's long, garrulous, and sometimes rambling opinion to the short, laconic, tightly constructed opinion of Associate Justice John Blair, Jr. of Virginia. The differences suggest the classic distinction between the "open hand" of rhetoric and the "closed fist" of logic. Iredell's copious and inclusive deliberation—21 pages denying Chisholm's suit—looks verbose and overblown next to the plain-style presentation of Blair's three crisp pages (actually only two paragraphs—one long, one short) in support of Chisholm's right to sue Georgia in the United States Supreme Court. Like Iredell, Blair saw Chisholm v. Georgia as an "important case," but the highly educated and experienced judge from Virginia obviously had quite different notions about the purpose, audience, and composition of judicial opinions. Directive rather than deliberative in his overall tenor, Blair writes as the consummate professional insider; his ethos suggests what Walter Beale calls the character type of the technician (78), in this case a legal technocrat concerned largely with formulating simple, abstract procedures for effective problem-solving and institutional operations.

Blair's background distinguishes him as one of the most experienced and highly trained judges among the Supreme Court

justices hearing Chisholm v. Georgia. Born into a landed,aristocratic Virginia family with extensive wealth and a tradition of public service, as Fred L. Israel describes, "Gentleman" John Blair received what was at the time the best available American education and English training in the law. He graduated with honors in 1754 from the College of William and Mary, a major institution in colonial times whose students read Latin and Greek classics, studied the medieval trivium of rhetoric, logic, and grammar, and defended theses before large public crowds at Commencement (Walsh). After studying law in the professional inner sanctum of London's Middle Temple, Blair returned to Williamsburg to a successful law practice and to what would turn out to be a substantial lifetime of public service.

Like Iredell, Blair was a cautious, conservative thinker who, once committed to the American revolutionary cause, became an important contributor to the formation of the new nation. Before being appointed by Washington to the United States Supreme Court, Blair served Virginia in a number of different positions, accumulating 12 years of experience as a judge at the highest levels. To summarize briefly a very long list of credentials, Blair served as a representative in Virginia's House of Burgesses, Clerk of the Governor's Council, delegate to the Virginia Convention of 1776, one of five judges and then Chief Justice of the General Court in Virginia's newly constituted judiciary, judge on Virginia's

first Court of Appeals, Chancellor of Virginia's High Court of Chancery, delegate to the Constitutional Convention at Philadelphia and subsequently signerof the newly drafted Constitution in 1787, delegate to the Virginia ratifying convention in 1788, and one of five judges chosen for Virginia's reorganized Supreme Court of Appeals in 1789.

In the Chisholm case, Blair speaks only to the immediate audience of legal professionals and interested parties. There is no setting of the case in context or elaboration of the occasion or related actions, no accommodation to a wider or more distant audience of the general public. There is no translation of legal jargon or terms of art such as the argument ab in utile or coram non judice. While Iredell generates an expansive rhetoric of moral commitment grounded in an oratorical culture, Blair practices what Halloran calls a rhetoric of "expertise" based on a "professional culture" that values notions of objectivity, neutral logic, and the criterion of sufficiency in persuasion. Blair's opinion becomes, thus, "the construction of a knowledge-bearing object, a mechanism by which professional expertise can be made available for use" (169).[18]

How does Blair construct this mechanism? In contrast to Iredell's proportional strategy, Blair uses what Burke calls an "essentializing strategy," reducing the dynamics of constitutional interpretation to one or two simple and efficient questions: "'It all boils down to this'" (Grammar

382). After a one-sentence dismissal of Randolph's analogies with European confederations as irrelevant, Blair establishes his warrant orauthority for deciding the principal question of the case:

> The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the union; for no state could have become a member, but by an adoption of it by the people of that state.

Where the pragmatic Iredell sees in the Constitution an unavoidable multiplication of "interpretive crises" in need of complex negotiation and resolution, Blair is confident in his ability to reduce the politically-charged issues to a single, simple question of textual analysis and to find a compelling answer in the "true language" of the document.[19]

Blair never mentions Iredell's question of assumpsit, but neither does he cast the argument in broad terms of political philosophy, national identity, or the nature of sovereignty. For the justice from Virginia, the issue is primarily a professional one of the Supreme Court's jurisdiction. The steps Blair takes to resolve the issue suggest the orderly, well-defined "algebraical exercises" that he was fond of doing (qtd. in Israel 115). In a spare, linear, chain-like sequence, he builds his text by rogatio, a classical rhetorical strategy of reasoning by question and

answer.[20] What can be found in the "true language" of the Constitution, Blair asks, "requiring the submission of individual states to the judicial authority of the United States?" His answer, quite simply, is to cite Article III, Section 2, which extends the Court's jurisdiction to controversies between a state and citizens of another state. The next logical question for Blair is the classical forensic issue of definition—*quid sit* (what it is): "Is then the case before us one of that description?" With the reply, "Undoubtedly it is . . . ," Blair's argument is essentially over, only seven sentences into his opinion.

In the remainder of his long first paragraph, Blair takes up three counter-arguments—the word-order argument, the argument *ab in utile*, and the petition of right—refuting each in turn in the same laconic question-and-answer style and with the same sense of certainty ("I have no doubt," "surely," "To me it seems clear"). While counter-arguments suggest the presence of other voices in the conversation, Blair handles his *refutatio* in an oddly sterile and disassociated manner. No names are mentioned, no personal voices heard. The arguments are simply there, disembodied, as opposing points to be raised and defeated in quick, utilitarian fashion.

To the word-order argument—the claim that Article III, Section 2 intends states to be plaintiffs (because appearing first) but not defendants—Blair appeals to common sense,

stating that a "dispute between A. and B. is surely a dispute between B. and A." Randolph had made a similar point in his oral argument, but Blair makes no reference to this. Blair also cites other places in the text of the Constitution where states could bedefendants. He cautions that it is the "duty" of the justices to insist upon their jurisdiction, to play their proper role in the federal government as established by the Constitution, but his admonition suggests more a professional and institutional concern than Iredell's moral and personal sense of duty and propriety. To the argument ab in utile—based on the claim that Congress has yet to pass laws covering execution of this type of suit (obviously one of Iredell's points, although Blair does not mention Iredell by name)—Blair refers to the "clear and positive directions" of the Judiciary Act of 1789 and the Constitution. He suggests that the justices should simply play out their institutional role, allowing consequences to develop as they may, and hinting that a judgment "possibly may be in favor of the state." And to the petition of right—Iredell's argument based on English common law (again, Iredell is not mentioned by name)—Blair simply dismisses as invalid the analogy between British sovereignty and the state of Georgia: ". . . when a state, by adopting the constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."

In the second of his two paragraphs, Blair concludes his

opinion by briefly addressing Randolph's third and fourth questions. With regard to the third question, Blair finds the service of the summons to the governor and attorney general of Georgia to be "as proper as any which could be devised," especially given the similarity to Georgia v. Brailsford (yet another ironic reference). The fourth question, how to make Georgia appear before the Court, is for the legal technocrat Blair an unnecessary question to decide at this point. In a comment suggesting the justices' lack of consultation, certainly the absence of a preliminary vote among the justices before the writing and handing down of the Chisholm opinions, Blair expresses his version of judicial restraint: "If the opinion which I have delivered . . . should be the opinion of the court, it will come in course to consider, what is the proper step to be taken for inducing appearance, none having been yet entered in behalf of the defendant." Blair then ends his opinion (still in the same second paragraph) without any concluding remarks or conventional summary or peroratio. His opinion, a mechanism or instrument for doing the business of government, simply comes to a halt with a practical suggestion for the wording of the "order" to be issued by the Court.

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3. The Justice as Scholar and Poet–Orator

The third official opinion rendered in Chisholm v. Georgia, the 13–page text of Associate Justice James Wilson of Pennsylvania, provides yet another distinctive voice in the Supreme Court's new conversation. Like James Iredell, Wilson felt it appropriate to view the case "from every possible point of sight." For "Professor" Wilson from the College of Philadelphia, however, this judicial duty meant an expansive inclusion not only of a variety of legal perspectives, but also of voices from the widest imaginable spectrum of western civilization, from Demosthenes to Bacon to Frederic of Prussia. A justice who had never been a judge, Wilson was one of the most unusual of the first Supreme Court justices, a man of many talents who aspired to be, in his own words, "the scholar, the philosopher, and the patriot" of his age (not to mention the wealthiest of land speculators). He agreed with John Blair that Alexander Chisholm had the right to sue Georgia in the United States Supreme Court, but the judicial opinion crafted by Wilson, quite unlike Blair's utilitarian instrument, is a grand–style oration worthy of first prize in any literary or debating society contest. It is a set piece with the contradictory effects of a well–made play, admirable in its structural perfection yet somehow ultimately unsatisfying in its too–perfect, self–conscious artifice.

James Wilson's entire life is puzzling in the same odd, contradictory way. Born into a poor Scottish farming family, as Robert G. McCloskey relates, Wilson was sent with a scholarship to the University of St. Andrews to study for the ministry. But he left school after his father died and immigrated to America in 1765 at the age of 23 (three years before James Iredell). In a surprisingly short time, Wilson established himself as a tutor at the College of Philadelphia (now the University of Pennsylvania), served a legal apprenticeship with the prominent lawyer John Dickinson, and began his own practice of the law. With extensive knowledge of political philosophy and jurisprudence and a "taste for syllogisms and intellectual leaps," Wilson found himself drawn into pamphlet writing and the swirling political debates of the late 1760s and early 1770s (McCloskey 83).

Unlike either Iredell or Blair, Wilson jumped headfirst into the intellectual excitement of the American Revolution, becoming one of only a few famous citizens to sign both the Declaration of Independence and the final draft of the Constitution. He is often cited as playing a major role, next to James Madison, in the Constitutional Convention of 1787. As the first Professor of Law at the College of Philadelphia (while simultaneously serving as Associate Justice of the Supreme Court), Wilson wrote and lectured extensively on his ideas of a new American jurisprudence. But he also remained throughout his life a close friend of

many prosperous Pennsylvania conservatives, such as his mentor John Dickinson, and gained a negative reputation as an elitist and an "opponent of the popular cause" (McCloskey 85). Wilson opposed the Pennsylvania Constitution of 1776, defended Quaker Tories and other wealthy clients in court, wrote a pamphlet defending the charter of a bank to which he owed a lot of money (he was also the bank's attorney and on the board of directors), and left Philadelphia in a hurry in 1779, his house the "scene of a bloody siege" when "an anti-profiteering mob attacked his residence in which his friends and clients had sought refuge" (Morris, "Jay Court" 167).

To his eventual undoing, Wilson found himself compulsively attracted to a high-stakes world of money, privilege, and extraordinary adventures in land speculation. According to McCloskey, Wilson invested wildly in an evergrowing number of questionable land deals and business ventures, all of which made him for a time incredibly wealthy, but would eventually bankrupt him. Wilson would spend the last years of his life trying to avoid angry creditors. Indeed, while still a Supreme Court justice riding circuit, he was put in jail, bailed out, and then pursued to Iredell's Edenton, North Carolina, where he was again jailed. McCloskey concludes that Wilson "wanted too many things, and he seemed congenitally unable to choose

between them, or even to believe that choice was necessary" (95).

As Wilson had presumed to suggest himself to President Washington for the Chief Justice's position, his appointment as Associate Justice of the United States Supreme Court was, ironically, a disappointment to this odd, intellectually gifted man. And Chisholm v. Georgia turned out to be, as McCloskey comments, "the only case that gave Wilson a fair chance to show his mettle" (94). Having had to settle for less than he wanted, Wilson seems determined in Chisholm, which he describes as "a case of uncommon magnitude," to demonstrate the perfect judicial opinion. Wilson's opinion is thus a curious mixture of intelligence, insight, and hyper-conscious compositional posturing. From the very first appearance of the opinion, the foregrounding of rhetorical and literary elements seems to have had a strong effect on conventional readers of the law. In a letter to James Iredell, for example, contemporary William Davie comments on Wilson's opinion that "perhaps, notwithstanding the tawdry ornament and poetical imagery with which it is loaded and bedizened, it may still be very 'profound'" (qtd. in Goebel 731). Davie also characterizes Wilson's definition of state sovereignty as "more like an epic poem than a Judge's argument" (qtd. in Monaghan 321).

If Wilson did intend to create an epic poem, it turned out to have a strong didactic flavor. The Professor cannot

help but lecture his students, an audience of present and future citizens, on everything from what he terms the "politically correct" way to toast the new people's union to the ultimate nature of the United States as a nation. He also gives his readers a simultaneously running commentary on how his argument is being developed and directions on how to read his text. Every text has some amount of what Joseph M. Williams calls metadiscourse or "writing about writing," words that are used to signal "our own thinking and writing as we think and write" and to help readers understand the structure of texts and arguments (40, 125).[21] When Iredell declares "I am now decidedly of opinion" and Blair refers to "the argument ab in utile," they are using metadiscourse (perhaps the term "meta-argument" would be useful here). Wilson obviously loves the language of rhetoric and argumentation as only an academic can, weaving through his text innumerable references to rhetorical and logical terms of art: "genus and species in logic," "by example the most splendid, and by authority the most binding," "an argument a fortiori," "a more particular illustration," "anecdote" and "maxim," the "inference, which necessarily results," "fair and conclusive deductions," "so many trains of deduction." Indeed, the Professor's judicial opinion becomes hyper-saturated with such terms and running commentary:

> Having thus avowed my disapprobation of the purposes, for which the terms, state and sovereign, are frequently used, and of the object to which the application of the last of them is almost universally made; it is now proper that I should disclose the meaning which I assign to both, and the application, which I make of the latter. In doing this, I shall have occasion incidently to evince . . . .

Here he has reached, even for the patient 18th-century legal reader, the point of the ridiculous.

Wilson's sense of his text as text is extraordinarily strong, at times obviously excessive; he wants his judicial opinion to be, if not an epic poem, a literary creation of some sort, like a well-formed oration. To this end, Wilson cannot be bothered with Randolph's second, third, and fourth questions. They are never mentioned, never allowed to clutter the clean lines of his judicial plot structure. The first question, the jurisdiction of the federal judiciary over the state of Georgia, is recast to make it more "conspicuous and interesting":

> The question to be determined, is, whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this--"do the people of the United States form a nation?"

Imagine Iredell's reaction to such a large and dramatic rendering of the central issue. For Wilson, everything must

be at stake and must be stated. The Pennsylvanian thus makes explicit an underlying political question—quite real and thus very dangerous—that the other more circumspect justices knew well but refrained from expressing directly.

To answer his explosive question, Wilson sets up an ambitious proportional strategy that goes beyond matters of constitutional interpretation. He proposes a three-part examination by (1) "the principles of general jurisprudence," (2) "the laws and practice of particular states and kingdoms," and "chiefly" (3) "the Constitution of the United States." In supporting Chisholm's right to sue Georgia in the United States Supreme Court, Wilson shares with Blair the advantage of being able to claim an "easy and usual construction" of the language of Article III, Section 2, of the Constitution. But Blair's single authoritative "fountain" becomes for Wilson "that valuable instrument," a legal text of primary importance, of course, but not the only legitimate source for analyzing the case and presenting a convincing argument to a widely varied, potentially hostile, and in some cases dangerous audience. In this respect, Wilson shares with Iredell the pragmatic character of a statesman, of one who understands the need for persuasion and consensus-building in the real world and who values an inclusive, comprehensive approach to solving problems.

Paradoxically, however, there is also a sense in which Wilson is simply showing off, his comprehensive approach a

virtuoso exercise, a performance intended to display his rhetorical artistry, intellectual powers, and substantial learning. His deliberate attempt at artfulness can be seen in the almost perfect, indeed almost too perfect, dramatic structuring of the opinion. Wilson crafts an overarching structure that delays his main statement or judgment until, quite literally, the last sentence of the last page: "From all, the combined inference is, that the action lies." The key sentence itself is constructed to suspend full meaning until the very last word. The justice may have arranged his opinion in this order, in what Richard Whately calls an investigative structure, because in part it was a conventional option of forensic rhetoric or because he was trying what Beale calls a "dispositional strategy" to keep hostile readers reading.[22] But something more seems to be going on here. The opinion's investigative or climactic structure is also mirrored in each of Wilson's three subdivisions or areas of examination. In three successive, interconnected sequences, we are invited to enjoy (and to admire) an exploratory narrative of Wilson's mind at work, considering each question in turn, tying and untying the knot of inquiry, and building artfully toward a grand conclusion of the whole.

In the first subdivision of the opinion, an examination of the question by "the principles of general jurisprudence," Wilson begins his argument by focusing on the definitions of

two key terms—state and sovereign. To choose a strategy of definition, particularly stipulative definition, according to Richard Weaver, is to engage ethically in "the highest order of appeal" (212–13). For Wilson, the choice suggests paradoxically both a compulsive display of academic pedantry (he can't help himself) and an important understanding of the role of language in shaping ideas and of the need to establish new meanings for old terms,especially if the "radical" goal of a new national identity is to be successfully pursued. With both terms, state and sovereign, Wilson insists upon definitions which view "the people" collectively—not state by state—as the "supreme or sovereign" governmental power:

> (1) By a state I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. . . . we should never forget, that, in truth and nature, those who think and speak and act, are men.
>
> (2) Suffice it at present to say, that another principle . . . forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the consent of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.

Wilson reasons that "the people," including the people of Georgia, ratified the United States Constitution and that Georgia is thus not a sovereign state when "the purposes of the union" are involved.

To build the definitions in this first section, which Goebel calls nothing more than an "essay in political science" (731), Wilson cites for praise and blame an array of voices, including Francis Bacon, Thomas Reid, Cicero, Henault, William the Conquerer, and William Blackstone. He also indulges himself in an academic's critical and rhetorical feast, lecturing his audience on the philosophy of mind, the feudal systems of France and England, and the limitations of Blackstonian jurisprudence. Here are just two examples of his obvious delight in words and the making of texts. In reference to the absence of the word sovereign in the Constitution, Wilson claims a special kind of significance: "For, in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive." And in an analysis of the king's power in the system of English sovereignty, Wilson uses antimetabole, a rhetorical figure that neatly repeats words in inverted grammatical structures: "While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him."

In the second section, an examination of the question by "the laws and practice of different states and kingdoms," also termed an irrelevant "essay in political science" by Goebel, Professor Wilson ignites a pyrotechnic display of a fortiori arguments. Each example points to successful situations of "subjects instituting and supporting suits against those who were deemed their own sovereigns." If such

examples can be demonstrated, Wilson claims, then surely Chisholm (not a "subject" but a "citizen") has the right to sue Georgia in the United States Supreme Court: "These instances are stronger than the present one; because between the present plaintiff and defendant no such unequal relation is alleged to exist." Wilson's a fortiori examples range from the "ancient Greece" of Isocrates to the courts of Frederic of Prussia, a king who "disdained to mount upon the artificial stilts of sovereignty." Along the way, the audience is treated to mini-lectures on Columbus and his son Don Diego; the Ephori of Sparta and the constable of France; the Spaniards of Arragon as described "by the famous Hottoman, in his book entitled Francogallia"; and the Saxon government, with another critical jab at Blackstone (a running theme for Wilson) and a complex of branching allusions to the "Mirror of Justice," Sir Edward Coke, Edward I, Bracton, Henry III, and the judge of the high court of admiralty. For the Scottish farmer's son, his life literally remade by education and scholarship, all of these voices and texts belong in the new conversation begun in the United States Supreme Court. They belong there because he considered them an integral part of his own identity, his mature understanding of life and the law, and the process by which his judicial decisions were made.

The third and last of Wilson's three "touchstones," an examination of the question by the United States

Constitution, is presented as a dramatic climax to the unfolding inquiry. Here the justice's large-scale strategy of dividing the question is repeated in miniature, elaborated, refined, and over-refined. The third question is immediately divided into two parts: "1. Could the Constitution of the United States vest a jurisdiction over the state of Georgia? 2. Has that constitution vested such jurisdiction in this court?" With the first subdivided question, Wilson takes up again his theme of the sovereignty and "majesty of the people." Using historical examples, he mounts excited attacks on the "despotic governments" of France (Louis XIV and L'Etat) and especially of England, with yet another jab at Blackstone combined with a Shakespearean flourish from The Tempest: "The parliament form the great body politic of England! What then, or where, are the people! Nothing! No where! They are not so much as even the 'baseless fabric of a vision!' From legal contemplation they totally disappear!" Wilson continues a marked transition from the middle to the grand to the swollen style[23] as he addresses an ode to "classically more correct" Athens, Homer, Troy, and Demosthenes, then shifts without quotation in and out of the language of the preamble to the Constitution, with a critical addition:

> In order, therefore, to form a more perfect union, to establish justice, to ensure domestic tranquillity, to provide for common defense, and to secure the

> blessings of liberty, those people among whom were the people of Georgia, ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested. (emphasis added)

With a few more deliberate twists and variations on the phrase, "the people of Georgia," Wilson finally answers his first subdivided question, dramatically proclaiming that, yes, the people's Constitution can vest such a jurisdiction over the state government of Georgia.

With the second subdivided question ("Has the constitution done so?"), Wilson again divides this question into two further sub-questions: (1) what can be deduced from the people's intentions? and (2) what are the Constitution's "direct and explicit declarations"? Even conventional readers of the law must shake their heads when the justice next divides his first question concerning "deductions" (the first question in the second subdivided question of the third area of examination) into three separate considerations of the legislative, executive, and judicial branches, along with an investigation of the "declared objects" and the "general texture" of the Constitution. Wilson's cleverness has by this point become tiresome, his use of rhetorical questions increasingly strident, his posturing and dramatic ethos so far removed from the traditional values of a James Iredell or the professional values of a John Blair as to verge on the comic.

The effect is a shame because it is just at this point that the Professor answers the larger question he had begun with, concluding that "the people of the United States intended to form themselves into a nation for national purposes." For the times, it was a "radical" statement, and it would prove to be prophetic. Wilson then ends his opinion where Blair began and ended, with a confirmation of the Court's jurisdiction over Georgia in "the strictest legal language" of the Constitution. The last paragraph is a metadiscursive summary of his approach to the case and the final resolution of his argument:

> I have now tried this question by all the touchstones, to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of states and kingdoms; and by the constitution of the United States. From all, the combined inference is, that the action lies.

His opinion now ended, Wilson withdraws, leaving his audience to contemplate the dramatic, perhaps at times melodramatic, effects of the text he has created.

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4. The Justice as Journeyman

If the composite text of Chisholm v. Georgia were to be interpreted as a literary work in the same spirit that James Wilson envisioned his single opinion, the rising action would reach its turning point at the third complete sentence on page 467, 48 pages into the full 60 pages of text. At that point Associate Justice William Cushing of Massachusetts, the fourth voice to speak in the seriatim unfolding of opinions, announces his judgment in favor of Chisholm's right to sue Georgia in the United States Supreme Court. In the linear sequence of opinions, Cushing's judgment provides the third and conclusive vote for Chisholm from among the five justices hearing the case; Chief Justice John Jay's subsequent opinion will lend additional but not necessary weight to the outcome. But the modest text composed by the "Brahman" William Cushing cannot bear such a dramatic burden. Nor did Cushing have any such intent. Cushing's three-page opinion, described as a "journeyman's job" by Goebel (731), provides readers with a strikingly similar repetition of John Blair's professional treatment, but without Blair's confidence, tight logic, or instrumental crispness.

William Cushing shared with the Virginian John Blair backgrounds of old, socially prominent families with long traditions of public service and the best educations for their sons. But Cushing was by no measure an accomplished

legal technocrat. He seems to have struggled hard all of his life to perform successfully in his professional career, with his judicial appointments, according to Herbert Alan Johnson, coming more as "a result of the accident of birth than because of his natural abilities" (57). Johnson paints an odd picture of a very limited man who nonetheless worked hard and showed personal courage (or at least doggedness) in fulfilling his judicial duties. Cushing studied classics at Harvard from 1747 to 1751, taught for a year, studied law with noted Boston lawyer Jeremy Gridley, and began his own practice in 1755. His law practice, both in Massachusetts and later in Maine, was barely adequate. When "a matter was to be argued on appeal at the bar of the Superior Court," Johnson comments, "his clients removed it from Cushing's care or insisted that he accept co-counsel in the presentation of the case" (61).

In 1772, the man who needed co-counsel to argue a case was made an Associate Justice of the Superior Court, replacing his father on the highest court in Massachusetts. Cushing worked steadfastly through the 1770s as Massachusetts and the other colonies transformed themselves, his position toward the American Revolution described as "ambivalent" and his judicial duties interrupted for only one month in 1775 (Johnson 59). He served as Chief Justice of the Superior Court (1777-1780) and the renamed Supreme Judicial Court (1780-1789), accumulating 17 years of judicial experience

before being named to the United States Supreme Court, the most of any of the five justices hearing Chisholm. There are comic anecdotes of outrageous judicial wigs and shopping lists doodled by the bored Cushing in the midst of historic constitutional debates, but there are also impressive stories of the justice doggedly holding court in the face of real personal danger in western Massachusetts, including during Shay's Rebellion in 1786. Cushing did demonstrate firm support for the newly proposed Constitution, serving as vice-president of the Massachusetts ratifying convention and, as a member of the first Electoral College, voting for George Washington in 1788. Warren notes that President Washington's selection of Cushing for the United States Supreme Court was a surprise to many who had expected another Massachusetts judge, John Lowell, to be appointed. A letter writer complained cryptically in 1789 that Cushing "now 56 years of age, cannot long be an active member of the Court, and he has new habits and new modes of legal decision to acquire" (qtd. in Warren 1: 39). For better or worse, Cushing would in fact end up spending 20 years on the Court, the longest of any of Washington's original appointments.

Cushing's text in Chisholm v. Georgia is almost identical in its basic structure to Blair's opinion. Without background or context, Cushing starts immediately with the "grand and principal question" to be answered: "whether a state can, by the federal constitution, be sued by an

individual citizen of another state?" With the same essentializing strategy used by Blair, Cushing establishes the language of the Constitution as his single warrant. Although he does allow that the question "may be in some measure elucidated" by English common law, he finds that "the point turns" in particular upon the constitutional language of Article III, Section 2. He quotes the key passage and, six sentences into his opinion, delivers his judgment: "The case, then, seems clearly to fall within the letter of the constitution." But unlike Blair, Cushing hedges somewhat with the word "seems" and produces for the most part a kind of amorphous, bureaucratic prose that is difficult to follow and has no discernible audience. Where Blair quickly and clearly establishes his own authoritative role in the process ("I have thought it best," "I shall draw," "I shall appeal"), Cushing generally constructs a passive world devoid of agents ("It is declared that," "It may be suggested that it could not be intended," "But still it may be insisted").[24]

Again like Blair, Cushing finds his early and easy answer self-evident and devotes the rest of his opinion to refuting counter-arguments. But Cushing does not handle his refutatio in the same tightly logical, procedurally focused manner. Rather, he briefly throws in everything but the kitchen sink, giving quick treatments of serious and complex issues related to the nature of state sovereignty and the suability of the United States. He touches upon the

intentions of the framers, policy arguments for "managing the great affairs of peace and war," the danger of "the sword," the rights of individuals, and states as corporations. Except for a collective reference to "the framers" of the Constitution, Cushing makes no allusions, no references to the testimony of other texts or voices, in distinct contrast to the arguments crafted by Iredell and Wilson. In passing, Cushing characterizes the Supreme Court as a "national tribunal," a "disinterested civil tribunal," and a "common umpire," all well-worn expressions of the times and quite beside the point, if not misleading, as far as the state representatives of Georgia were concerned.

His handling of counter-arguments amounts, in sum, to two claims: (1) states have had their powers "abridged" for the "greater indispensable good of the whole"; and (2) it is unlikely that the United States can also be sued in this manner, although it is unnecessary to decide that question in this case. Interestingly, Cushing does make the only reference among all five opinions to what, in fact, will actually happen to the Chisholm decision: "If the constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment." Cushing concludes his main argument by restating his judgment, with somewhat less certainty than he began: "Upon the whole, I am of opinion, that the constitution warrants a suit against a state by an individual

citizen of another state." He then follows with two brief paragraphs on Randolph's second and third questions—whether an action of assumpsit will lie and whether the summons was properly served. The answer to both is yes. No mention is made of Randolph's fourth question. With neither the open hand of rhetoric nor the closed fist of logic, Cushing extends to readers what might best be described as a limp handshake by a well-meaning but intellectually limited technician.

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5. The Justice as Vir Bonus Dicendi Peritus

The fifth and final opinion in Chisholm v. Georgia was delivered, according to the seriatim order of reverse seniority, by John Jay of New York, the Court's first Chief Justice. The Chief Justice had been an eloquent, though limited, contributor to The Federalist Papers and brought to the Court a solid reputation as a statesman and diplomat of wisdom and high moral principles. The "Premier," as Randolph called Jay, was certainly not cultivating Southern popularity in ruling that Alexander Chisholm of South Carolina could sue the state of Georgia in the United States Supreme Court. Jay could barely control his anger at what he saw as the hypocritical behavior of Georgia officials in simultaneously challenging the Court's jurisdiction in Chisholm and seeking advantage from the Court's justice in Georgia v. Brailsford. With the exception of one short section, however, the ten-page text of Jay's opinion is not a document filled with the language of contempt or disdain. Like Marcus Cato's ideal orator, vir bonus dicendi peritus, "a good man skilled in speaking," Jay uses the writing of his judicial opinion as a vehicle to articulate the "great moral truth" of justice and the "leading principles of a free and equal national government." Strongly deliberative rather than directive, he speaks to inform and influence a wide audience of new citizens or "joint tenants" who have, as he sees, an

extraordinaryopportunity to establish a new kind of community with different values and different definitions for terms such as sovereignty.

With his credentials as a "Founding Father," John Jay remains for us today the most well-known of the five justices who heard the Chisholm case.[25] Like Blair and Cushing, Jay was born into an old colonial family of wealth, connections, and education. Of devoutly religious French Huguenot and Dutch descent, as Irving Dilliard explains, Jay learned English, Latin, and French as a child in Rye, New York, studied the classics at King's College (now Columbia University), and served as an apprentice to prominent New York lawyer Benjamin Kissam. Frank Monaghan describes Jay's education as including an "extensive reading" of Plato and Montesquieu, along with Aristotle, Isocrates, Virgil, Seneca, Livy, Plutarch, several of Shakespeare's plays, Dr. Johnson's Dictionary, Locke's Essay on Human Understanding, papers from The Spectator, and 21 volumes of Cicero (23-40). The influence of Cicero, in particular, can be seen in Jay's argument in Chisholm v. Georgia. Especially concerned as a student about his ability to speak and write well, Jay practiced before a mirror each day, studied John Holmes's Art of Rhetoric made easy . . . and Thomas Sheridan's Course of Lectures on Elocution, and participated actively in the Moot, a debating club of the New York bar. To prepare for "an English essay" while in college, according to Monaghan, Jay

"placed paper and pencil by his bedside that he might record ideas and phrases that came to him during the night" (27–28).

It is important to note that Jay did not, in fact, accumulate a great deal of experience as a lawyer or as a judge. Before being appointed the first Chief Justice of the United States Supreme Court in 1789, he had actually practiced law for about six or seven years, from 1768 to the mid–1770s, and had served for two years, from 1777 to 1779, as Chief Justice of the Supreme Court of New York. What he did accumulate before 1789 was experience as a public servant in a wide–ranging number of roles: he was a member of the New York Committee of Correspondence; he served as delegate to the First Continental Congress (1774) and the Second Continental Congress (1775); he worked on New York's new state constitution; he served as president of the Continental Congress in 1778, described by Dilliard as "the chief civilian post in the rebelling colonies" (3); he became a foreign diplomat as Minister to Spain for the Continental Congress; he went to Paris in 1782 to negotiate, with John Adams and Benjamin Franklin, the Treaty of Paris; he was elected by the Continental Congress to be Secretary for Foreign Affairs and Secretary of State during the 1780's; and, in late 1787 and 1788, he contributed to the crucial writing of <u>The Federalist Papers</u>, along with Alexander Hamilton and James Madison.[26]

Richard B. Morris calls Jay "a prudent revolutionary" (Jay 3), an amusing yet telling description which is particularly applicable to the Chief Justice's approach to the newly formed Supreme Court. It was Jay in his administrative role who set the Court's practice, including the writing of seriatim opinions, to follow the British custom (Marcus et al. 1: 203, 582). Conservative and cautious in temperament, Jay was similar to James Iredell and John Blair in his concern for the details of the law and the orderly processes of government. In the Chisholm case, however, Jay reasons more like James Wilson, with a touch of the visionary and the philosopher as he expounds upon the history of the new nation and the general principles of what he hoped would be its justice. But Jay's opinion, unlike Wilson's academic and artfully self-posed text, explicates broad issues with the ethos of a genuine voice speaking, of a man who was a close personal friend and advisor to George Washington, of an insider who would later relate to James Fenimore Cooper the secret anecdote for The Spy, of a careful, meticulous, hard-working diplomat who had earned his generalizations and his vision.

We hear the clear thought and deliberative character of this voice from the very beginning of Jay's text. For Jay, as for Wilson, Randolph's first question is the only serious one to be decided: "Is a state suable by individual citizens of another state?" With the question simply stated, the

Chief Justice gives voice, in neutral rather than loaded language, to Georgia's position: "It is said, that Georgia refuses to appear and answer to the plaintiff in this action, because she is a sovereign state, and therefore not liable to such actions." Of all five justices, Jay seems to have understood best the need for the Court to establish a rhetorically healthy and ethical kind of conversation, or dialogue, or debate. What Jay desired, in brief, was to foster a culture of argument with the Ciceronian combining of sapientia and eloquentia, honestum and utile.[27] In his "Address to the People of the State of New York," written at the same time as The Federalist Papers, Jay offers what I take to be his definition of an effective argument or good conversation in a representative democracy:

> While reason retains her rule, while men are as ready to receive as to give advice, and as willing to be convinced themselves as to convince others, there are few political evils from which a free and enlightened people cannot deliver themselves (Correspondence and Public Papers 3: 295).

Note, however, that Jay is not able in his seriatim opinion to give voice to or refute Iredell's dissenting argument. (Iredell's argument was not the same as Georgia's position, of course, although the immediate effect would have been if Iredell's judgment had prevailed.) Neither, in these five intersecting monologues, do we find Jay representing or

responding to the various points of reasoning used by Blair, Wilson, and Cushing.

Jay establishes the overall structure for his text as a three-part examination of Georgia's claim or "objection" to appearing before the United States Supreme Court:

> In order to ascertain the merits of this objection, let us enquire, 1st. In what sense Georgia is a sovereign state. 2d. Whether suability is incompatible with such sovereignty. 3d. Whether the constitution (to which Georgia is a party) authorizes such an action against her.

In his approach to writing this judicial opinion, Jay obviously shares with both Iredell and Wilson what Beale calls the character type of the statesman—contextually oriented, pluralistic, ethical/pragmatic—"accustomed to hearing and negotiating a variety of points of view" (78-79). But while Jay shares their comprehensive and proportional strategy in his approach to judging constitutional questions, he cites no authors—legal or otherwise—to support his argument. There are no long quotations from Lord Somers, no defenses or critiques of Sir William Blackstone, no Shakespearean flourishes from The Tempest. His reasoning is grounded rather in the historical and political context, in the here-and-now of his own eyewitness experiences.

Jay also shares with Wilson an investigative or climactic structure, delaying the key statement of his judgment to the end of the text. But while Wilson's

three-part plot structure narrates the justice's mind at work, examining the central question from three different "touchstones" or warrants, Jay's three-part disposition focuses on the subject with a logical progression of sub-questions, each one building upon the other in attempting to answer the central question. With the first sub-question--"determining the sense in which Georgia is a sovereign state" in the newly formed United States--Jay addresses the core problem of definition. Like Wilson, Jay seems to have understood the need for new meanings for old terms, for a revolution of language as well as of politics and armed conflict. But unlike Wilson's academically staged definitions, Jay's persuasive strategy is contextual and pragmatic. He seeks to define "the whole people" as sovereigns of the new nation by a thematic retelling of his audience's recent history and by comparing this new concept of sovereignty with European feudalism, a system obviously and unfavorably familiar to his audience.

Goebel quite misses the point when he criticizes Jay for his "hand-tailored history" and the "lamentable standards of American judicial historiography" (732). Jay is contributing here to a special kind of national mythmaking, weaving throughout the text variations on his central claim that "the sovereignty of the nation is the people of the nation." To use Richard Weaver's categories, the "ultimate" or "god" term for Jay is <u>the people</u>; the "devil" terms are <u>feudal system</u>,

aristocracy, the crown, the prince and his subjects. As Jay reconstructs the "political situation we were in, prior to the revolution" and the "political rights which emerged from the revolution," he refers again and again to "one people," "the people already united for general purposes," "the people, in their collective and national capacity," and "the people acting as sovereigns of the wholecountry." Richard B. Morris concurs with Monaghan and George Pellew in identifying Jay's nationalist argument as a precursor to Chief Justice John Marshall's "classic finding" (Jay 57) in the 1819 case of McCulloch v. Maryland: "The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people."

Jay also uses his devil terms to good effect in contrasting this "new" popular sovereignty, in which all the people are "joint tenants" of government and "sovereigns without subjects," with the "old" nature of sovereignty in the governments of Europe, where "feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject."[28] Without explicitly naming Georgia or Georgia officials, Jay attributes Georgia's objection to appearing in the United States Supreme Court to a confusion about the state's new nature and status and about the two kinds of sovereignty: "There is reason to suspect that some of the difficulties which embarrass the present question, arise from inattention

to differences which subsist between them." Modulating his prose to a markedly plain style, Jay seeks to explicate these differences, offering his audience some simple definitions, a stark comparison, and a relational analogy:

> Sovereignty is the right to govern; a nation or state—sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the prince; here it rests with the people;there, the sovereign actually administers the government; here, never in a single instance; our governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns.

Of course, both Jay and Georgia officials knew well that Chisholm v. Georgia was not a matter resulting from confusion or "inattention," but rather a particular arena where the bright lines of power had yet to be drawn and competing ideas of community and identity were being tested.

Having established his definition of the nature of Georgia's sovereignty, Jay turns to the second sub—question: "whether suability is compatible with state sovereignty." With this structural turn, Jay also shifts his pace and style, moving into a brisk sequence of questions and answers, similar to Blair's use of rogatio. Jay divides this section into two general sets of questions: (1) "Suability, by whom?" and (2) "If there be any such incompatibility as is pretended, whence does it arise? In what does it consist?" With the first question of agency, Jay works his way through

a hypothetical example involving suits between the city of Philadelphia (40,000 citizens) and the state of Delaware (50,000 citizens). He attempts to show that, where all are sovereign and equal, the argument of incompatibility cannot be supported by size or numbers: "In this land of equal liberty, shall forty odd thousand in one place be compellable todo justice, and yet fifty odd thousand in another place be privileged to do justice only as they may think proper?"

With the questions of the origin and nature of Georgia's "pretended" incompatibility, Jay shifts his tone to sarcasm and momentarily loses the high ground. He points to the "strong undeniable fact" that states may sue and be sued by other states in the new Supreme Court, and he concludes that it cannot be the fact of having to appear or the process of suing to which Georgia objects. Indeed, as Jay drives home, Georgia finds it "no degradation" at all to sue others, even an "inferior" number of citizens in Georgia v. Brailsford: ". . . the truth is, that the state of Georgia is at this moment prosecuting an action in this court against two citizens of South Carolina." We can sense the Chief Justice's disdain as he strips away the final "remnant" of what he sees as hypocrisy in Georgia's willingness to be a plaintiff but not a defendant in his court. With an interesting combination of the plain style and a Wilson-like use of antimetabole, Jay concludes this section: "That rule is said to be a bad one, which does not work both ways; the

citizens of Georgia are content with a right of suing citizens of other states; but are not content that citizens of other states should have a right to sue them."

The Chief Justice returns to the high ground with the third sub-question: "Whether the constitution (to which Georgia is a party) authorizes such an action against her." Jay announces that he will divide the question into an examination of (1) the "design" of the Constitution and (2) the "letter and express declaration in it." To establish context and background, he turns again to his thematic narration, focusing in this section on the historical and political reasons for creating a "common" or "national tribunal"—the United States Supreme Court. We hear about the problems associated with the Articles of Confederation, the potential "animosities" and "hostilities" among the separate states, and the need to respond appropriately and collectively to the "laws of nations." The Court, according to Jay the statesman and foreign diplomat, was created from "motives both of justice and of policy" in order to establish what the Chief Justice valued so strongly—"a stable, sedate, and regular course of judicial procedure." Imagine his consternation at Georgia's refusal even to appear or participate in the process.

Jay's treatment of the design of the "people's" Constitution is a loving recitation of its components. He quotes all six of the objectives declared in the preamble and

then appears to draw a line based on his sense of what is appropriate to the writing of his judicial opinion:

> It would be pleasing and useful to consider and trace the relations which each of these objects bears to the others; and to shew that they collectively comprise every thing requisite, with the blessing of Divine Providence, to render a people prosperous and happy: on the present occasion such disquisitions would be unreasonable, because foreign to the subject immediately under consideration.

In effect, Jay has it both ways, perhaps more. He makes his point, without in fact tracing the interconnections, and he is simultaneously the clever orator and the genuine patriot. The rhetorical technique, paralipsis, is an old form of irony, where the speaker pretends to pass over a subject and in doing so draws attention to it. Yet the ethical appeal of Jay's text is so strong that we cannot help but believe the sincerity of his claim. While resisting the temptations of the preamble, Jay does proceed to elaborate upon all ten types of cases listed in Article III, Section 2, with special attention to "controversies between a state and citizens of another state." The jurisdiction of the Supreme Court is important in this type of case, Jay concludes, if we want to preserve "the tranquility, the equal sovereignty, and the equal right of the people."

Finally, Jay narrows his examination to the "letter" of the Constitution, the specific language of Article III,

Section 2, dealing with "controversies between a state and citizens of another state." Jay again gives neutral voice to Georgia's position: "It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a state may be plaintiff." He is able to argue easily against Georgia's claim, calling upon the "ordinary rules for construction" and finding—like Blair, Wilson, and Cushing—that the direct meaning of the words is quite clear.[29] Note, however,that Jay the contextualist and co-author of The Federalist Papers makes no mention of the ratifying debates on these very words, nor of Alexander Hamilton's assurances to the contrary in The Federalist No. 81. Neither does Jay stop there. Not only does he find that the "obvious, plain, and literal sense of the words" makes states suable as defendants, but he insists, slipping back into larger and morally-weighted questions of constitutional design or "spirit," that Georgia's construction of the language is "repugnant" to the Constitution: "The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to insure justice to all." Indeed, Jay the visionary concedes "fair reasoning" to the counter-argument that the United States might also be sued (but does not see it as a question necessary to decide in this case):

> I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.

His three sub-questions answered, Jay has trouble, like James Iredell, in bringing his text to conclusion. The effect in this instance, however, is engaging rather than comical. As Jay winds down his opinion and approaches the key statement of his judgment, he shifts the tone and the focus of his remarks, deliberately breaking off the logical flow of the text in what Beale calls a "shattering of discursive presentness" (38). The paradoxical illusion of a real voice speaking, broken and reconstituted, is strong and personal:

> As this opinion, though deliberately formed, has been hastily reduced to writing between the intervals of the daily adjournments, and while my mind was occupied and wearied by the business of the day, I fear it is less concise and connected than it might otherwise have been.

Jay then comments metadiscursively on what does <u>not</u> appear in his opinion: he includes no precedents because he knows "of none that are not distinguishable from this case"; and he rejects arguments padded by the testimony of authorities, in contrast to Iredell and Wilson. Complimenting his imagined audience, Jay finds it unnecessary "to show that the

sentiments of the best writers on government and the rights of men" are in accord with his judicial principles because, "to the honor of the United States, it may be observed, that in no other country are subjects of this kind better, if so well, understood."

In the penultimate paragraph, Jay conveys a sense of his personal convictions concerning the Chisholm case, repeating some of his previous points and driving home the larger view of what he feels is at stake and what he hopes will be valued by the new nation's "sovereigns." The argument, without question, is one of policy, combining Jay's special vision and pragmatic statesmanship. Jay asserts that federal jurisdiction over Georgia in this controversy makes for good policy: it is "wise, because it is honest, and because it is useful." It is honest, in Cicero's sense of honestum, because it "performs the promise which every free government makes to every free citizen, of equal justice and protection." It is useful, in Cicero's sense of utile, "because it is honest" and because, among a long and eloquent list of reasons, it "recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man."[30] The effect Jay creates is not based on an artistic use of original or unique language; quite the contrary, his words are taken from the popular and political materials of his time. Despite this (or perhaps ironically because of this),

Jay's text reads as an eloquent and heartfelt speech. Indeed, the Chief Justice is at his rhetorical best here, a Ciceronian statesman–orator who combines wisdom and eloquence as he spins out the collective dream of a new political fiction.

Unfortunately for any aesthetic considerations he may have had, Jay must add one more paragraph because he has yet to make the key statement of his judgment in the investigative structure of his text. Although the accumulated points of his deliberative argument obviously and strongly suggest his judgment, the instrumental dimension of the judicial opinion calls for an explicit statement. Thus, Jay attempts to meet this need, and in doing so he appears to fall, surprisingly and awkwardly, into a new consideration of legal points and technical limitations:

> For the reasons before given, I am clearly of opinion, that a state is suable by citizens of another state: but lest I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, viz.: That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions.

Jay then ends his opinion on an example, citing "bills of credit issued before the Constitution" as a possible exception and suggesting his anticipation of future legal questions for a particular audience. We hear a different kind of judicial opinion in these long, muddy sentences, a

hint of what Mellinkoff calls an "appalling deposit of judge's-words-for-lawyers" (269).

Chisholm v. Georgia continued in slow motion from docket to docket, while the rest of the country moved toward passage of the Eleventh Amendment negating all such suits. The state of Georgia in fact settled with Peter Trezevant on December 9, 1794, obtaining a release from the claims of Farquhar's estate for "eight audited certificates for the sum of just over £7,586" (Mathis 27). Elizabeth Farquhar Trezevant--who as orphaned daughter and young wife linked Robert Farquhar, Alexander Chisholm, and Peter Trezevant--remains virtually invisible to us today. John Jay, disappointed with many aspects of the new Supreme Court, turned his attention back to foreign affairs and resigned as Chief Justice in 1795 to become Governor of New York. When Jay was reappointed Chief Justice in late 1800, he rejected the invitation to resume circuit riding with these words to John Adams:

> I left the Bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess (qtd. in Warren: 1: 173).

In a surprise move, Adams then nominated John Marshall of Virginia, a Chief Justice of extraordinary rhetorical skills who would devise an early solution to the problems of seriatim opinions.

Notes

Chisholm v. Georgia

[1] In "The Voice of Poetry in the Conversation of Mankind," Michael Oakeshott presents an often-cited formulation of the idea of discourse as conversation (see Rationalism in Politics 197-247). Oakeshott defines "conversation" (his positive, most civilized of all terms) over and against "inquiry" and "argument" (less interesting, more limited terms). I find his distinction disappointing as it appears to be based on a reductive concept of argument, a term which is both simple and, at the same time, complex, rich, evocative, and wonderfully ambiguous. (For a revealing attempt to pin down the term, see Robert C. Rowland, "On Defining Argument," Philosophy and Rhetoric 20 (1987): 140-59.)

Despite this reservation, Oakeshott's general approach to discourse as conversation is a useful and powerful tool for rhetorical analysis. The approach has ties both with some very old notions of discourse (from classical rhetoric) and with some fairly modern ones (from the discourse theories of J. L. Austin and John R. Searle, M. M. Bakhtin, Kenneth Burke, and Walter H. Beale, for example). It captures the sense that to write a Supreme Court opinion is as much a matter of doing something as it is of saying or making something; it is as much to take an action--to engage in a "discourse performance," as Beale terms it--as it is to create a monologic document or to make a discourse product. And when justices take such actions, they are joining in and responding to an ongoing series of similar actions and counter-actions by other writers and a vast array of potential voices and audiences. While this constitutional dialogue or conversation is more formalized than the gentleman's club atmosphere of Oakeshott, it is still very much a "meeting-place" filled with the playfulness, diversity of voices, and the "unrehearsed intellectual adventure" that Oakeshott so admires (197-98).

Two applications of Oakeshott's idea can be seen in Richard Rorty's Philosophy and the Mirror of Nature and Donald N. McCloskey's The Rhetoric of Economics. For a short overview of social constructionist theory as it relates to writing and notions of conversation, see Gregory Clark,

Dialogue, Dialectic, and Conversation. Another interesting approach to conversation can be found in H. P. Grice, "Logic and Conversation," Syntax and Semantics 3: Speech Acts, ed. Peter Cole and Jerry L. Morgan.

[2] See, for example, Friedman and Israel 1:23; Goebel 728; Haines 133; Mathis 19; McLaughlin 301; and Pfeffer 50.

My main sources for the history of Chisholm v. Georgia are Marcus et al., eds., The Documentary History of the Supreme Court of the United States, 1789–1800, vols. 1 and 2; Warren, The Supreme Court in United States History, vol. 1; Goebel, History of the Supreme Court of the United States, vol. 1; and Mathis, "Chisholm v. Georgia: Background and Settlement," Journal ofAmerican History 54 (1967): 19–29. Other sources include Friedman and Israel; Haines; Kelly, Harbison, and Belz; Levy; McLaughlin; Morris; Pfeffer; Sutherland.

[3] James Madison and John Marshall gave similar assurances to the state of Virginia (Haines 135). For some views on the Supreme Court from the anti–federalist side of the ratifying debates, see The Anti–Federalist Papers and the Constitutional Convention Debates, ed. Ralph Ketcham.

[4] In fact, the decisions of the Supreme Court have been reversed by constitutional amendments on only four occasions in two–hundred years, despite thousands of proposed amendments (O'Brien 313; Rohde and Spaeth 74).

[5] According to Black's (1226) and Rothenberg in The Plain–Language Law Dictionary (315), the Latin term seriatim as used in this context means "one by one"—severally, separately, individually in a sequence or series.

[6] Richard B. Morris reports the sum as "$69,613.33" (John Jay 49).

[7] The Mayor's Court Room in Philadelphia's Old City Hall was only one of several courtrooms that the justices would use over the years until the completion in 1935 of their own government building in Washington, D. C.

[8] Georgia was by no means silent outside of the courtroom. See Warren and Mathis.

[9] Assumpsit (Latin for "he undertook" or "he promised") is a promise or agreement made (but not under seal) "by one person to do something or pay a certain sum to another person." An "action of assumpsit" is in legal practice "a suit to recover damages for failure to carry out a contract" of this sort (Rothenberg 27). See also Black's for a longer definition (112). Keep in mind, however, that dictionary definitions—even extended definitions from specialized legal dictionaries—have a limited usefulness. Like literary terms, legal terms such as assumpsit have complex histories and context-sensitive associations.

[10] See Cicero's De Oratore and the anonymous Rhetorica ad Herennium of the first century B.C.E. See also Vickers (27). While not literally "catalogued" in textbook fashion, the strategy can be found even earlier in Aristotle (1.15).

[11] For a view of the rules of construction or interpretation of a legal text in the eighteenth century, see Blackstone's Commentaries (1: 59–61).

[12] Bayard's romantic words appeared in an account issued to the newspapers. His entry in the official "fine minutes" of the Supreme Court reads as follows:

> The Court proceeded to hear the Attorney General in support of his motion in this cause but considering that no appearance had been entered on the part of the State of Georgia and regarding the question involved in the suit as highly important suggest to the Counsellors of the Court that if any are disposed to offer their sentiments on the subject now under Consideration the Court are willing to hear them (Marcus et al. 1: 209).

[13] John Blair writes, "If the opinion which I have delivered respecting the liability of a state to be sued in this court, should be the opinion of the court, it will come in course to consider . . . ." Goebel suggests that there are "hints" of an absence of consultation in two of the opinions, but does not specify (728). A number of indirect references in all five opinions could be interpreted as showing that no case conference took place.

[14] For a short presentation of Halloran's fruitful ideas, see "From Rhetoric to Composition: The Teaching of Writing in America to 1900," in A Short History of Writing

Instruction, ed. James J. Murphy (151–82). Halloran notes (161) that he takes the notion of an "oratorical culture" from Gerald Graff's Professing Literature and expands upon it.

[15] Goebel relates that the Maryland case "was an action of assumpsit by the Amsterdam bankers Nicholas and Jacob Van Staphorst against the state of Maryland, February term 1791 . . . . No case papers remain in the Maryland case although a declaration, plea and replication were filed. We know also that a summons was returned and that Luther Martin appeared for the state. At the next term the Court, apparently relying upon section 30 of the Judiciary Act, and on motion, ordered a commission to take testimony issue. The cause was continued until August 6, 1792, when it was ordered that the action be discontinued, the matter having been compromised" (724).

[16] Iredell in fact announces these options in reverse order from the order in which he then develops them.

[17] My characterization of Iredell as an "amateur historian" in the handling of supporting material is not the same as Philip Bobbitt's typological category of "historical argument" in Constitutional Fate. Bobbitt defines his category as "argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution" (7).

[18] Halloran describes the rhetoric of "professional expertise" as something that gradually developed during the nineteenth century. Perhaps Blair was an early example of a phenomenon that later became predominant; or perhaps, at least in the area of legal writing, Halloran's developmental sequence needs a closer look.

[19] For an interesting discussion of the "fountain of power" and James Wilson's "pyramid of power" as popular metaphors in the second half of the eighteenth century, see Michael Kammen, Sovereignty and Liberty.

In Doing What Comes Naturally, Stanley Fish ascribes the desire to reduce interpretive crises to legal interpreters and the desire to multiply interpretive crises to literary critics (137).

[20] It is interesting to ask whether rogatio is, in Beale's terms, a dialectical strategy or a stylistic strategy. Chief Justice Jay shifts to rogatio in one section of his opinion, then shifts back to other syntactic styles. For Blair's rhetoric of professionalism, the question is probably beside the point.

[21] I do not intend the term metadiscourse in its strictly technical sense as used by linguists and discourse analysts. For citations to the technical literature and a good practical discussion for nonspecialists, see William J. Vande Kopple, "Some Exploratory Discourse on Metadiscourse," CCC 36 (1985): 82–93.

[22] See Whately on investigative vs. deductive structures and Beale's comments (52, 117–118).

[23] In the Rhetorica ad Herennium, the author cautions against misuse of the plain, middle, and grand styles:

> But in striving to attain these styles, we must avoid falling into faulty styles closely akin to them. For instance, bordering on the Grand style, which is in itself praiseworthy, there is a style to be avoided. To call this the Swollen style will prove correct. For just as a swelling often resembles a healthy condition of the body, so, to those who are inexperienced, turgid and inflated language often seems majestic—when a thought is expressed either in new or in archaic words, or in clumsy metaphors, or in diction more impressive than the theme demands . . . . Most of those who fall into this type, straying from the type they began with, are misled by the appearance of grandeur and cannot perceive the tumidity of the style.

[24] To be fair, Cushing does refer at points to his own participation in deciding the case and drafting his argument ("two other clauses I have remarked upon," "But I conceive the reason of the thing," "I doubt the consequence," "I am of opinion"). But these few examples of metadiscourse do not set the dominant impression. For the most part, readers encounter a soft, hazy, slightly out-of-focus text where governments are designed, courts are instituted, arguments are made, and intentions float free.

[25] Background sources for John Jay include Correspondence and Public Papers, ed. Johnston; Dilliard; Monaghan; Morris, "The John Jay Court: An Intimate Profile" and John Jay, the Nation, and the Court; and Pellew.

[26] Jay wrote five of The Federalist Papers (nos. 2–5 and 64); his contributions were limited, according to Dilliard, because of illness, "perhaps the dyspepsia which troubled him throughout his life" (8). Morris attributes Jay's illness to arthritis and an "unfortunate accident" in 1788:

> On a Monday afternoon in mid–April, Jay and General Clarkson came to the rescue of a group of city doctors who had taken refuge in the New York city jail to protect themselves from a mob objecting to the allegedly sacrilegious autopsy activities of the medical profession. When Jay reached the jail, near the present site of City Hall, he was struck on the forehead by a stone and fell inert. For a time it was thought that he had suffered permanent brain injury, but he evidently recovered some time that spring . . . . (29).

[27] For an excellent discussion of Ciceronian rhetoric and the relationship of honestum and utile, in particular, see Thomas O. Sloane, Donne, Milton, and the End of Humanist Rhetoric.

[28] Here is the passage that follows Jay's discussion of "feudal ideas":

> No such ideas obtain here: at the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty (emphasis added).

Jay was an early and lifelong opponent of slavery, and his sons became leading abolitionists (Morris 14). While I take Jay's comment here to be commendably ironic, it is perhaps more ironic to note how completely invisible women were, even to a loving husband and highly principled man such as Jay, in this country of "sovereigns without subjects."

[29] See p. 108, note 11.

[30] Sloane argues that the direct translations of honestum as "honest" and utile as "useful" do not convey fully what these terms meant to Cicero: honestum includes aspects of moral goodness or rightness, public virtue, and honorable behavior; and utile suggests more "Isocratean" notions of what is advantageous rather than utilitarian calculations. "Cicero's master stroke," Sloane concludes, "was to equate utile with honestum and so to bring the statesman's process of making decisions into alignment with his public, moral character. The equation is Cicero's version of finding rhetorical 'advantage' in the Isocratean sense: argumentative efficaciousness becomes the skillful means of advancing causes in the public good" (113). I have no way of knowing if John Jay, as a student of Cicero, understood the Latin rhetorician in exactly this way, but I find that Sloane's analysis of honestum and utile illuminates precisely and beautifully the use that Jay makes of "honest" and "useful"—in a passage that is otherwise strange to read.

2. McCulloch v. Maryland (1819): An Early Rhetorical Solution

On March 6, 1819, Chief Justice John Marshall of the United States Supreme Court delivered the unanimous opinion of the justices in McCulloch v. Maryland, a landmark decision of long-lasting political and historical significance. Unlike Chisholm v. Georgia, which turned out to be a dead-end case for the early Court, McCulloch v. Maryland still lives as perhaps the most famous opinion of the Court's most famous Chief Justice. In the twenty-six years between 1793 and 1819, between the failure of Chisholm and the success of McCulloch, the Supreme Court's national standing improved dramatically and its institutional and rhetorical practices changed radically. John Jay, in refusing a second appointment as Chief Justice in late 1800, had warned President Adams that the Court would never thrive nor gain the public's "respect and confidence" under "a system so defective" (qtd. in Warren: 1: 173). But Jay's gloomy prophecy did not hold true, despite the fact that circuit riding continued to be a major problem for the justices. Indeed, perhaps ironically because of Jay's refusal, the Court's power and stature were gradually established and its rhetorical dynamics were successfully transformed by John

Marshall of Virginia, Adams' subsequent choice for Chief Justice.[1]

John Marshall appears to have understood the rhetorical problems of an evolving new genre of judicial opinions: the inherent tensions between the deliberative dimension of the Supreme Court as a public forum for ongoing debate and the instrumental function of its opinions as vehicles for carrying out the purposes of government; the persistent conflict between justices' individual roles and their collective institutional identity; and the significant contrast between multiple and single voices in a culture of argument. While the justices who participated in Chisholm v. Georgia had no clear sense of what the new judicial conversation was to be or how it should be conducted to be successful, Marshall recognized all too well the institutional weaknesses of seriatim opinions. He feared their potential for disarray, for public displays of judicial wrangling and bickering, for the confusion of conflicting premises and unresolved claims, and he felt strongly the administrative need to establish a different form.

Under Marshall's long-term leadership, the justices thus shifted in the years following 1801 from the general practice of writing seriatim opinions to a preference for single opinions "of the Court."[2] With a clear sense of how he wanted the new conversation to be conducted, the Chief

Justice worked successfully to fashion a rhetorical genre emphasizing the instrumental function of the Court, the justices' collective institutional identity, and the unified effect of a single public voice. Marshall's particular rhetorical brilliance was in the nature of that voice. We usually think of instrumental discourse—at least the rhetoric of bureaucracy—as dull, ugly, and impersonal. But when Marshall spoke for the Court, as he often did, he made it interesting, beautiful, and charged with the personal energy of his own ethos, despite his use of the collective institutional "we."

Where did John Marshall acquire such extraordinary rhetorical skills? For a figure so important to American history, politics, and law, the biographical evidence is oddly ambiguous and inconclusive. While the "frontiersman" lore of Marshall's origins has been appropriately revised, as Herbert Alan Johnson explains ("Marshall" 302), the meagerness of Marshall's formal education remains a mystery, a puzzle similar to Ben Jonson's description of Shakespeare's "small Latine and lesse Greek." Marshall was born in the western part of Virginia to a respected and comfortable, but not wealthy, farming family (his mother was related to Thomas Jefferson, his father a close friend of George Washington). He was taught at home by his parents until the age of fourteen and subsequently received two years of formal education—one as a classmate of James Monroe in a Virginia

clergyman's school, and one as the tutee of a young Scottish Episcopalian deacon, newly ordained, who was contracted to live with the Marshalls.[3] During this period, Albert J. Beveridge reports that Marshall loved novels and poetry, especially Pope's "Essay on Man," and was first introduced to Blackstone's Commentaries (1: 44–45, 56). Marshall's legal education later amounted to a few weeks of George Wythe's law lectures at the College of William and Mary. At the time formal legal studies were not the rule, but the absence of any sort of apprenticeship with a practicing lawyer was unusual.

If John Marshall's rhetorical expertise did not come from formal education, then we can only speculate that he was self–taught, developing his special skills in the course of his adult experiences and through his personal preferences in reading. Marshall actually fought in the Revolutionary War, serving first as a "citizen soldier" in Virginia's Battle of Great Bridge and later as a deputy judge advocate and close member of Washington's inner circle at Valley Forge. All of Marshall's biographers, whatever their perspective or particular axe to grind, draw a generous picture of a smart, sociable, and well–liked young man, an athlete who loved to compete in footraces (for which he was nicknamed "Silverheels"), and a respected officer who led by example. After the war, as Herbert Alan Johnson relates, Marshall built a successful law practice in Richmond, held a number of

local and state offices in Virginia during the 1780s, and played an important role in defending the newly proposed Constitution at Virginia's ratifying convention. Among the many book purchases in Marshall's "Account Book" during this period, Beveridge lists "Blair's Lectures," "Dionysius Longinus on the Sublime," "The Orations of Aeschines and Demosthenes on the Crown," "Blackstones Commentaries," Montesquieu's "Spirit of Law," "Mason's Poems," and "Works of Nicholas Machiavel" (1: 184–86).

In 1796 Marshall argued and lost Ware v. Hylton in the United States Supreme Court, appearing before Associate Justices James Wilson, William Cushing, James Iredell, William Paterson, and Samuel Chase. Two years later, most likely because of financial problems, he refused a nomination to the Court as Associate Justice. He did subsequently serve the new federal government as Minister to France (he was involved in the XYZ Affair), as a member of the House of Representatives from Virginia, and as Adams' Secretary of State. With Marshall's appointment as Chief Justice in 1801 and the decision in Marbury v. Madison soon after in 1803, the Supreme Court and the nation, as so many commentators have remarked, would be dramatically transformed. Marshall's encouragement of single opinions of the Court, called by Jefferson a "dangerous engine of consolidation," would help to drive that transformation (qtd. in Warren 1: 655).

In the promotion of this shift to single opinions of the Court, Marshall was a master of what Kenneth Burke calls "administrative" rhetoric. In an intriguing discussion of Machiavelli's The Prince, Burke situates administrative rhetoric in the world of politics and bureaucracy, a context where "administrative acts themselves are not merely 'scientific' or 'operational,' but are designed also with an eye for their appeal" (Rhetoric of Motives 685). To persuade an audience and to gain rhetorical "advantage," according to Burke, such an administrator understands that "nonverbal acts and material instruments themselves have a symbolic ingredient" and that"persuasion cannot be confined to the strictly verbal; it is a mixture of symbolism and definite empirical operations" (Rhetoric of Motives 684–85). For the Supreme Court, the persuasive mixture that John Marshall liked best combined the deliberative eloquence of his own words as Chief Justice and the issuance, in as many cases as possible, of a single opinion—the text enhanced by the sheer act of its single delivery and its public presentation of judicial and institutional unity. For the power and instrumental purposes of the Court, Marshall believed that one well-written opinion was more effective than a number of opinions (even if they were all "well-written" and even if the justices all voted the same).

How Marshall achieved this striking effect in McCulloch v. Maryland, as in many other cases, is not entirely known.

Public presentations of institutional unity generate a need for secrecy, for the resolution of disagreements in private, hidden from public scrutiny, from official history, even from institutional memory. The modern Court's semi-secret rituals and deliberative processes seem wide-open when compared with the dark backdrop behind McCulloch. We do know that in 1819, in addition to Chief Justice Marshall, there were six Associate Justices serving on the Supreme Court: Bushrod Washington of Virginia, George Washington's nephew and Marshall's close friend, appointed to the Court by Adams in 1798; William Johnson of South Carolina, a vocal and independent-minded Republican appointed by Jefferson in 1804; H. Brockholst Livingston of New York and New Jersey, another Jefferson appointee in 1806 and troubling brother-in-law to John Jay; Thomas Todd of Virginia and Kentucky, yet another Jefferson appointee who wrote 14 opinions in 19 years (1807-1826) on the Court[4]; Gabriel Duvall of Maryland, a Madison appointee of 1812 who in 1787 had been selected but declined to attend the Constitutional Convention at Philadelphia; and Joseph Story of Massachusetts, also a Madison appointee of 1812, a youthful poet, Harvard man, and talented scholarly jurist.

Beyond Marshall's report of a unanimous vote, virtually nothing is known about how these various justices approached McCulloch v. Maryland during the crucial days of oral argument and decision. We do not know how the opinion's

details may have been debated, or what compositional processes produced such an extraordinary document in such a short time. Biographers like Donald G. Morgan, writing on William Johnson, and R. Kent Newmyer, writing on Joseph Story, are reduced to speculation when it comes to discussing the roles of their subjects in one of the defining cases of constitutional law. Morgan relates that his "voluble South Carolinian remained silent" (116), and Newmyer describes Story's contributions to McCulloch as "lost in the secrecy of conference" (126).[5]

We do know generally, from G. Edward White's picture of the second stage (1812–1823) of the Court's "working life," that the justices all lived together in a boardinghouse, without their families, during the February–to–March sessions. In what is a wonderful example of the gentleman's–club conversation envisioned by Michael Oakeshott, the justices apparently dined together each evening as cases were being argued in court, holding informal case conferences both during and after dinner. Joseph Story seems to have been particularly fond of the sense of fraternity, the "frank and unaffected intimacy" of the closed boardinghouse life. White quotes from a letter by Story, written soon after joining the Court, which suggests something about the rhetorical dynamics of the justices' conversations:

> [W]e are all united as one, with a mutual esteem which makes even the labors of Jurisprudence light. The mode of arguing causes in the Supreme Court is excessively prolix and tedious; but generally the subject is exhausted, and it is not very difficult to perceive at the close of the cause, in many cases, where the press of the argument and of the law lies. We moot every question as we proceed, and [our] familiar conferences at our lodgings often come to a very quick, and, I trust, a very accurate opinion, in a few hours. . . . (qtd. in G. Edward White 184–85).

Marshall also projected a collegial picture of the justices at work behind the boardinghouse doors. Writing as "A Friend to the Union" in the Philadelphia Union just a few weeks after McCulloch, he responded to critics with this general description:

> The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the considerationof all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all (Gunther 80–81).

We can be fairly certain that the "opinion" submitted to the justices during Marshall's tenure was oral rather than written. It would not be until the second half of the nineteenth century, as David O'Brien relates, that the Court would institute "the practice of circulating draft opinions for comments and changes before a final vote and announcement" (110).

A very different picture of the justices' internal culture of argument emerges from the comments of Thomas Jefferson and other critics of the Court. By Jefferson's enraged reactions we can tell, in fact, that the rhetorical shift away from seriatim opinions mattered, that it was more than just a question of the internal practices and preferences of the Court. Long an adversary of the Federalist John Marshall, as Charles Warren relates, the state-rights Republican Jefferson waged a persistent war to dilute, if not destroy, the Supreme Court's growing authority and nationalism (1: 652-85). Jefferson accused the Supreme Court of treating the Constitution as "a mere thing of wax" which the justices "may twist and shape into any form they please" and called the justices a "corps of sappers and miners, steadily working to undermine the independent rights of the states" (qtd. in Haines 520, 521). In the Court's 1819 term alone, McCulloch v. Maryland was but one of three major nationalist opinions, along with Dartmouth College v. Woodward and Sturges v. Crowninshield, which curtailed the powers of state governments in one way or another.

Warren dates Jefferson's campaign against Marshall's single opinions of the Court from McCulloch's appearance in 1819 (1: 654). Thoroughly frustrated, especially as five of the sitting justices had been appointed by Republican presidents, Jefferson bitterly criticized the justices for the "cooking up of a decision and delivering it by one of

their members as the opinion of the Court without the possibility of our knowing how many, who, or for what reasons each member concurred . . ." (qtd. in Warren 1: 654). Both Jefferson and James Madison saw a forced return to writing seriatim opinions as one solution to what Jefferson described as Marshall's "practice of making up opinions in secret and delivering them as the orders of the Court" (qtd. in Warren 1: 653). In the name of judicial reform, a variety of bills would be introduced in Congress during the 1820's, including provisions to require seriatim opinions (but none in fact succeeded).

We can wonder whether Jefferson would have cared so much about rhetorical dynamics if the results of justices' decisions had been different, but his criticisms nonetheless deserve a hearing for what they contribute to understanding the Marshall Court's culture of argument and the generation of an opinion such as McCulloch v. Maryland. Jefferson's image of this process is comic:

> An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty Chief Judge, who sophisticates the law to his mind, by the turn of his own reasoning (qtd. in Haines 518).

To remedy this picture of deception and incompetence, Jefferson proposed to Associate Justice William Johnson in 1822 that the South Carolinian encourage his fellow justices

to return to the practice of seriatim opinions and abandon the "habit of caucusing opinions" instituted for a time in England by Lord Mansfield and copied in America by Chief Justice Marshall: "That of seriatim argument shews whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another's sleeve." Official recording of seriatim opinions, Jefferson adds, would create "the best possible book of reports, and the better, as unincumbered with the hired sophisms and perversions of Counsel" (qtd. in Morgan 168–69). Such reports would also have provided evidence, of course, for Jefferson's impeachment schemes.

Johnson's famous, often quoted reply to Jefferson does not share all of the elements of Jefferson's caricature, but neither does it vindicate Marshall or the Court's practices. Johnson relates his surprise, upon joining the Court years earlier in 1804, at finding the Chief Justice "delivering all the opinions in cases in which he sat," even when Marshall disagreed with the outcome, and the South Carolinian offers the following insight:

> But I remonstrated in vain; the answer was he is willing to take the trouble and it is a mark of respect to him. I soon however found out the real cause. Cushing was incompetent. Chase could not be got to think or write—Patterson [sic] was a slow man and willingly declined the trouble, and the other two judges [Marshall and Bushrod Washington] you know are commonly estimated as one judge (qtd. in Morgan 182).

Johnson then explains why he also, at least for a time, "bent to the current":

> Some case soon occurred in which I differed from my brethren, and I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other. . . . At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all (qtd. in Morgan 182).

Johnson did eventually have some effect on the justices' practice, going on to earn a reputation as the Court's "first dissenter" in face of the norm Marshall had established. In 1819 in McCulloch v. Maryland, however, Johnson and the other justices remained silent, apparently in agreement that Marshall's single voice should speak for all.

From the beginning the case of McCulloch v. Maryland was manipulated, as Charles Warren relates, as a "test case" by all parties (1: 506). Like Chisholm v. Georgia, McCulloch involved unresolved issues of federalism, state sovereignty, and states' rights—of attempting to define and clarify another aspect of the division of power between state governments and the Union. Also, like Chisholm, McCulloch was about money and bad faith, but James William "M'Culloch," cashier of the Baltimore branch of the second Bank of the United States, was a very different figure from Alexander Chisholm. Operating in the context of a broader, more

cynical and manipulative kind of economic war, McCulloch was a low-level cashier who was apparently conspiring with others--while the case was in progress--to embezzle enormous amounts of money from the Bank. The appearance of his name in this famous suit as the "plaintiff in error," representing the Bank of the United States, is one of those ironic quirks of history.

The bad faith in this situation existed on both sides. The second Bank of the United States, incorporated in 1816 with one-fifth of its shares controlled by the federal government, was "by far the largest corporation in America," possessing at one time $35 million in capital and branches in eighteen cities (Hammond, "Bank Cases" 33-34). The government, as Bray Hammond explains, found a "central bank" useful, some claimed necessary, as a public depository and fiscal agent and regulator (33). But the Bank quickly accumulated a record of what Warren describes as "reckless mismanagement, wild speculation in its shares, and fraudulent and unwarranted overloans" (1: 506). Hammond comments that in 1819 the Bank "came before the Supreme Court suing for its legality when its solvency was in doubt. It was a half-sunk creditor, harassed and harassing" (Banks 264). The state government of Maryland, on its part, was claiming the high ground of states' rights with regard to the power of taxation. Maryland officials were arguing hypocritically for mutual "confidence" between the states and the Union, while

at the same time targeting a tax intended literally to break the second Bank of the United States.

In bringing the case to the United States Supreme Court, the representatives of the Bank were appealing lower state court rulings that would have effectually closed its Baltimore branch, and quite likely destroyed the entire institution (other states, such as Ohio, had passed similarly prohibitive measures). The legitimacy of a national bank, as would be argued before the Court, had been a controversial question since 1791 when the Secretary of the Treasury Alexander Hamilton had defended the establishment of the first Bank of the United States. Maryland was but one of several states in the southern and western regions who saw the bank as an "Eastern Monster"—large, powerful, corrupt, and unfairly competitive with smaller state banks, especially in a time of serious financial problems throughout the country, problems that would lead to the Panic of 1819 (Baxter 170).

Warren traces the quick unfolding of the case in 1818: in February, Maryland passed a deliberately prohibitive tax intended to stop the Bank's operations in the state; by May, McCulloch was charged with refusing to comply with the Maryland statute; by June, Maryland had won (of course) its case against the Bank in two of its own state courts—the County Court of Baltimore County and the Maryland Court of Appeals; and, by September 18, 1818 a "writ of error"

appeared on the Supreme Court's docket appealing the lower court decisions. On Monday, February 22, 1819, seated in the newly restored basement courtroom of the Capitol, the justices began to hear the oral arguments in the case of McCulloch v. Maryland. Simultaneously, a "heated debate" was being conducted upstairs in Congress over whether to repeal the Bank's charter (Warren 1: 509). The courtroom below the Senate was crowded, Joseph Story commenting that the "hall was full almost to suffocation, and many went away for want of room" (qtd. in Beveridge 4: 284).

Unlike Georgia officials in 1793, Maryland's representatives had come to argue. Political hostility, suspicion, and ill feelings were just as intense between the state and federal governments, but there was no bill in the Maryland legislature threatening to hang federal marshalls as there had been in Georgia. More significantly for the United States Supreme Court, there was no directed silence in the courtroom, no one-sided conversation as Edmund Randolph had conducted in arguing Chisholm's position. Accepting its status as "defendant in error,"[6] Maryland did take up the gauntlet, putting its Attorney-General to work and hiring the best lawyers available.

Because of the national interest and importance of McCulloch, the Court allowed three counsel to argue on each side. In what might best be described as a remarkable oratorical enactment of legal theater or legal spectacle, the

case was debated for nine days by six of the "greatest lawyers in the country" (Warren 1: 507). The second Bank of the United States was represented by the following counsel: Daniel Webster, perhaps the most famous statesman–orator of the times and "warm friend" to the bank that granted him generous fees and personal loans (Baxter 169); United States Attorney–General William Wirt, prominent lawyer and popular author of "The Letters of the British Spy," an intense literary man with a "florid imagination" (G. Edward White 265); and William Pinkney, a brilliant diplomat, eloquent speaker, and "foppish" dresser who wore ballroom gloves to argue in court, considered the "greatest advocate of his age" (G. Edward White 242, 254). At the end of Pinkney's three–day oration, Joseph Story would write that he had never heard a "greater speech" in his whole life (qtd. in Baxter 175).

The state of Maryland was also represented by three prominent counsel: Joseph Hopkinson, a "learned" member of the Philadelphia bar who had argued successfully on Webster's side in the Dartmouth College case (Warren 1: 477); Walter Jones, a "legal genius" who served as United States attorney for the District of Columbia (Beveridge 4: 285; G. Edward White 289); and Maryland Attorney–General Luther Martin, at age seventy–one often intoxicated and "long, rambling, and exhaustive" in court, one of the original "Framers" of the Constitution and successful defender of Aaron Burr (G. Edward

White 238). It is important to understand the extent to which these lawyers carried on another of Oakeshott's gentleman's-club conversations, in various combinations and interactions with the justices over a number of years. But this conversation did not take place behind the justices' boardinghouse doors; rather, it was a public event of high drama, with an audience fully expecting to be entertained socially and intellectually (G. Edward White 203).

Both sides had agreed to a statement of the facts, and the Court was thus asked to decide two constitutional questions:

(1) Does Congress have the power to incorporate a bank?
(2) If so, can the state of Maryland tax the branch of that bank operating in its territory?

Webster argued these two questions for the Bank on the first day, Monday, February 22, followed by Hopkinson speaking for Maryland on February 23. Wirt then responded for the Bank on February 24, and Jones next spoke for Maryland on February 24 and 25. Martin finished out the week by arguing for Maryland all day on Friday and Saturday, February 26 and 27. Pinkney's grand performance for the Bank lasted from Monday, March 1, through Wednesday, March 3. Amazingly, just three days later, on Saturday, March 6, Chief Justice Marshall

delivered his thirty-seven-page unanimous opinion "of the Court" (Warren 1: 507-10).

Marshall's thirty-seven pages account for only about thirty per cent of the full printed text of M'CULLOCH v. THE STATE OF MARYLAND et al., 4 Wheaton 316, as the case was officially recorded by Court Reporter Henry Wheaton. The remaining eighty-five pages consist of approximately seven pages of supplementary materials (contextual, explanatory, and technical) and seventy-eight pages of substantive condensations of the oral arguments addressed to the Court. As with Dallas, a close look is still needed to discern the basic divisions and components of the text:

(1)	Introductory Materials	6+ pages	(316-322)
	Opinion Abstract		
	History of Case		
	Statement of Facts		
	Maryland Law		
(2)	Report of Oral Arguments	78 pages	(322-400)
	Webster (8+ pages)		
	Hopkinson (22 pages)		
	Wirt (10 pages)		
	Jones (9+ pages)		
	Martin (5 pages)		
	Pinkney (23 pages)		

(3) John Marshall's Opinion	37 pages	(400–437)
(4) Judgment and Order	1 paragraph	(437)

For modern lay readers, the prose oddities of the text are not as marked as Dallas's reporting of Chisholm v. Georgia, but the pages still in no way invite general readers or suggest a public forum. What we get, instead, in the larger document is the appearance of a closed, dense, uninviting world of legal explication—for professional eyes only, as it were.

In the midst of this world, Chief Justice John Marshall's single opinion is remarkably paradoxical in its rhetorical nature: it can be easily isolated from the larger document, and yet it is significantly embedded in it. It can be easily isolated from its larger technical context, on the one hand, because Marshall chooses not to speak the language of the law's professional culture. Unlike the legal technocrat John Blair in Chisholm v. Georgia, Marshall uses no terms such as ab in utile or coram non judice. Neither does he argue by citing the authority of previous cases.[7] Rather, he writes what Newmyer calls a "state paper" (Supreme Court 44), especially in the first section, addressing in a beautifully written, deliberative, essay-like fashion the widest possible public audience. The persuasive effect of Marshall's "magisterial" style is striking, as Benjamin N. Cardozo describes it, creating the impression of a

stand-alone document in which we "hear the voice of the law speaking by its consecrated ministers" (10). It is little wonder that Marshall's text, unlike the varied seriatim opinions of the justices in 1793, was "reprinted in full by many newspapers throughout the country, irrespective of their concurrence in its doctrines" (Warren 1: 511). And, indeed, two hundred years later Marshall's opinion remains a touchstone text for students of constitutional law.

But there is some degree of sleight-of-hand involved in Marshall's pose as national statesman and essayist. When we read the six oral arguments of the counsel representing the Bank and Maryland in conjunction with Marshall's opinion, we find a fascinating insiders' conversation taking place, with a considerable amount of borrowed material appearing in Marshall's "magisterial" pronouncements. In this regard, Marshall's text directly responds to the various voices of counsel, and his argument is dynamically embedded in the larger document. Almost all scholars note the borrowing but do not know what to do with this information. Newmyer comments most straightforwardly on the opinion: "Original it was not" (Supreme Court 45). Certainly, the question of Marshall's originality is interesting, but we should keep in mind that it is a modern question, one that takes on somewhat different dimensions in an older, oratorical culture. In the dramatic setting of the courtroom, Marshall read his opinion out loud to the very counsel from whom he borrowed, using

"we" throughout to emphasize his institutional role as the voice of the Court. Compare the collective ethos Marshall creates, as administrative rhetor, with Chief Justice John Jay's use of the singular "I" in Chisholm v. Georgia, as well as with Marshall's own use of "I" in anonymous public letters he wrote defending McCulloch against its critics in the spring and summer of 1819. In these amazing letters to the Philadelphia Union and the Alexandria Gazette (Gunther), Marshall quotes and supports his own words by pretending to be someone else quoting and supporting the institutional oracles of the Court.

Perhaps more significant than the question of originality raised by Marshall's borrowing are questions of the Court's rhetorical dynamics. In the culture of argument the Chief Justice encouraged, who gets to say what to whom? The ruling in McCulloch v. Maryland was unanimous, but was the unanimity easily established or hard won among the other Supreme Court justices? Was there unanimous agreement to all the points of reasoning presented by Marshall in the opinion? What was the nature of the debate at the boardinghouse supper table? When Marshall's contemporary critics asked these questions, with undertones of Jeffersonian charges of deception, Marshall responded with three arguments in one of his anonymous letters to the Philadelphia Union. First, he states simply that the "opinion is delivered, not in the name of the chief justice, but in the name of the whole court"

(Gunther 80). Second, he insists (perhaps a little disingenuously) that throughout "the whole opinion, the chief justice never speaks in the singular number, or in his own person, but as the mere organ of the court" (Gunther 80). And, third, Marshall points to the reading of the entire opinion with all of the justices there in the courtroom, asking us rhetorically "to determine whether the judges of the Supreme Court, men of high and respectable character, would sit by insilence, while great constitutional principles of which they disapproved, were advanced in their name, and as their principles" (Gunther 80).

But even if we are fully persuaded by Marshall's arguments, we still simply do not hear the voices of the other justices. What we do hear is a conversation masterfully orchestrated by the Chief Justice, with the six counsel arguing the case as his primary audience. It is a more complex version of James Iredell arguing with Edmund Randolph in the Chisholm case. When read in isolation, Marshall's text appears to address all citizens, indeed, to speak to the world and to history. When read with the oral arguments, the opinion engages in a complex, detailed insiders' exchange, with all the intellectual playfulness of Oakeshott's gentleman's club. Either way, the other justices do not openly participate. In the unfolding text of McCulloch v. Maryland, we hear the six arguments of Webster, Hopkinson, Wirt, Jones, Martin, and Pinkney—what Jefferson

would describe as "hired sophisms"—and Marshall's voice, claiming to be "the mere organ of the court" in his institutional role.

Marshall divides the structure of his opinion into two distinct parts, paralleling the two constitutional questions posed to the Court, and prefaced by a one-paragraph exordium. Marshall's famous, often quoted introductory paragraph encapsulates the rhetorical paradox of the entire text:

> In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty (400-01).

On the one hand, to an outside audience, these five eloquently crafted sentences represent the "grand style" so praised by Cardozo (12). James Boyd White sees this opening paragraph as a "claim for the judiciary itself," for the

competence and authority of the Court, and for the "reader's confidence in judicial reasoning of just the sort Marshall is about to demonstrate" (251). Indeed, Marshall's compositional clarity and logic, his Wilson-like flair for the dramatic, and his sense ofthe sound and rhythm of his sentences are admirable. To understand the effect, imagine the last sentence in the paragraph arranged in a more direct syntactical order:

> The constitution of our country has devolved this important duty on the Supreme Court of the United States.

It is not surprising to find Marshall the master of the sentence, especially if he did, in fact, learn his rhetoric from reading Hugh Blair and Longinus--with their emphasis on taste, beauty, and the sublime, the literariness of their rhetoric, and their love of intricate, sentence-by-sentence effects.

But to the insiders who actually gathered in the courtroom to hear Marshall read these words, and who had both argued and listened to the various conversations conducted that term, Marshall's exordium must have seemed like a set piece, a nice variation perhaps, but not much more than a formula familiar to all. The jurisdictional question, unlike Chisholm v. Georgia in 1793, was not a real issue for debate in McCulloch in 1819. The threat-of-hostility argument was a

commonplace of the times (remember Randolph's "fear of the federal arm uplifted"). And, perhaps most revealing, marked sentence-level similarities exist among various introductions composed by Marshall. Compare, for example, three sentences in the opening of McCulloch with similar statements in the opening of Dartmouth College v. Woodward, which Marshall delivered on the first day of the 1819 term, just weeks before the ruling in McCulloch:

(1) McCulloch:

> The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government.

Dartmouth College:

> The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a state is to be revised: an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed.

(2) McCulloch:

> No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision.

Dartmouth College:

> This court can be insensible neither to the magnitude nor delicacy of this question.

(3) McCulloch:

> On the Supreme Court of the United States has the constitution of our country devolved this important duty.

Dartmouth College:

> On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

After the introductory paragraph, Marshall presents the first major constitutional question: ". . . has Congress power to incorporate a bank?" (401). The Chief Justice devotes two-thirds of his opinion to this first question (24 of 37 pages), arranging his points in a Wilson-style investigative order intended to carry his audience with him logically and dramatically step by step. To answer the question, Marshall uses Burke's proportional strategy as he patiently works his way through an examination of all relevant constitutional language, as well as structural elements and relationships seen as implicit or "implied" in the Constitution. The argument, in sum, is developed from the abstract to the particular, masterfully interweaving along the way theoretical principles, poetic evocations, and reasoning from pragmatic consequences.[8] After arguing the background and history of the question, Marshall offers two

general premises: (1) that the authority of the Constitution comes from "the people," not the states; and (2) that the Union is a government of "limited" powers, but its "enumerated" powers are "supreme" over any conflicting state laws. If we grant Marshall these two premises, the argument is essentially over, whether we realize it or not.[9]

Marshall next identifies the problem of interpreting the letter of the Constitution in this instance: Among its enumerated powers, the text of the Constitution is silent on the incorporation of a bank. But the "framers," Marshall argues, drew only the "great outlines" and left the Court to deduce the details: "In considering this question, then, we must never forget that it is a constitution we are expounding" (407). Having asserted the Court's right to "expound" the Constitution, Marshall proceeds to develop two points: (1) a general argument on means (incidental or implied powers) vs. ends (enumerated powers), concluding that incorporation is never an end in itself; and (2) a specific examination of the language of the Constitution's "necessary and proper" clause—that Congress has the power to "make all Laws which shall be necessary and proper" for executing its constitutional powers (Art. 1, sec. 8)—concluding, like Hamilton and Webster with an argument from consequences, that strict construction of the clause would make the federal government inoperable. Thus, closely following Webster's presentation of Hamilton's 1791 argument, Marshall argues

that Congress has the right to use all appropriate means to carry out its constitutional powers:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional (421).

Almost as an afterthought, Marshall throws in the statement that a corporation, and more specifically a bank, is an ordinary choice of "necessary and proper" means, a point already "sufficiently proved" by established usage and experience (421).[10] He modestly disclaims any judicial power to rule on the degree of necessity, referring that question to Congress, and dismisses the existence of state banks as irrelevant. With twenty-four pages of his exploratory, investigative structure unfolded, Marshall finally arrives at his main claim, the judgment of the Court on the first constitutional question:

> After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land (424).

While no one following the opinion's reasoning could be surprised at the judgment, the first announcement of the

justices' unanimity on this controversial question was particularly dramatic—and frustrating for states' rights advocates. Virginian John Randolph complained about the effectiveness of Marshall's argument: "All wrong, all wrong, but no man in the United States can tell why or wherein" (qtd. in Cardozo 11).

With a short, perfunctory transition, Marshall turns his attention from the constitutionality of the Bank of the United States and its Baltimore branch to the second question: "Whether the state of Maryland may, without violating the constitution, tax that branch?" (425). Marshall spends less time on this question, devoting only thirteen pages to his answer. The organization of the text is again investigative, with the main statement of the Court's judgment coming at the end, but it is not as closely or carefully structured as the Chief Justice's treatment of the first question. Given that the opinion was read in full on March 6, 1819, Marshall may have been literally running short of time when he composed this section—whether the opinion was actually written in the three days following the close of oral arguments (most difficult to believe) or it was "mooted" at the justices' boardinghouse table over the two-week course of the case, with Marshall writing as the arguments developed.[11]

Marshall's argument in this second section follows a quirky, two-part pattern. In the first part, he argues from

what he calls "just theory" (430). He grants that states have taxing powers, but insists that they cannot be exercised where "repugnant" to the Constitution because of its "paramount character" (425). Marshall argues metaphorically that the constitutional fabric would be shredded without the "great principle" of supremacy over the states "so interwoven with its web, so blended with its texture" (426). Shifting to more explicit terms of argumentation, or meta-argument, Marshall claims that from this principle or "axiom" three "propositions are deduced as corollaries" (426):

> These are, 1st. that a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme (426).

Pausing to compliment his primary audience, Marshall remarks that these "abstract truths" have been questioned in this case, and "both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument seldom, if ever, surpassed, have been displayed" (426).

Marshall then proceeds to refute the "negative" position argued by Maryland's counsel, applying each of his corollaries to the second question in McCulloch. He handles the first corollary by simply proclaiming what has just become the law in the first section of the opinion:

> The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable (426–27).

There is a remarkable sense here of the text as instrument, of the delivery of the opinion as an institutional act which, once officially read, modifies or changes reality, even as author and audience move from one section to another within the text. The application of the second corollary—Webster's point that states might destroy the bank by exercising an absolute power of taxation—is dismissed as "too obvious to be denied" (427). And in applying the third corollary—the axiom of constitutional supremacy over conflicting state powers—Marshall presents his own short history of taxation and suggests an "intelligible standard" for determining the power of taxation: that a state's power of taxation should be limited to "the extent of sovereignty which the people of a single state possess, and can confer on its government" (429). In essence, the part (the people of the state of Maryland) cannot be allowed to control a legitimate agency sanctioned by the whole (the people of the Union).

The opinion at this point appears to come to an end. Marshall reports a resounding "no" by the justices in answer to the second question:

> We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its

> powers. The right never existed, and the question whether it has been surrendered, cannot arise (430).

But the opinion, in fact, does not conclude, not for another seven pages. With an awkward, quirky bit of cobbling, Marshall stops and appears to start his argument all over again:

> But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the constitution (430–31).

In disorganized fashion, Marshall adds points to arguments already made; refutes Maryland's claim that mutual "CONFIDENCE" between the states and the Union should govern the situation; incorporates Webster's argument from consequences or "parade of horribles" (if states may tax the bank, they can also tax the mail, the mint, etc.); gives his own interpretation of passages cited from The Federalist; and variously responds to bits and pieces of the oral arguments.

Marshall has trouble concluding this section in much the same way that James Iredell and John Jay had problems with the endings of their opinions. The endings of judicial opinions seem to be particular points of compositional strain, perhaps caused by the intermix of oral and written modes, perhaps by the conflict between writers' instrumental

and deliberative purposes. Marshall keeps saying "no" in slightly different ways, repeating the Court's judgment on the second constitutional question at least three times. In the penultimate paragraph, he announces the justices' unanimity on this question:

> We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void (436).

He concludes finally with a paragraph of repetition and some minor limitations of the ruling, offering what must have been unwelcome reassurances to Maryland and all states interested in the case.

It is important for modern readers, trying to make sense of the text after 170 years, to keep in mind the sense of a speech occasion, of Marshall publicly reading his words to the audience in the courtroom, especially to the six counsel: Webster, Wirt, and Pinkney for the Bank; and Hopkinson, Jones, and Martin for the state of Maryland. At every stage, the various points of argument made by counsel are woven into Marshall's text, either in confirmation or refutation. When Marshall stated in the courtroom that the Constitution, by its very nature, could not "partake of a prolixity of a legal code" (407), Attorney-General William Wirt must have smiled, pleased that the Chief Justice liked his point well enough to incorporate it: "But to have enumerated the power of

establishing corporations among the specific powers of Congress, would have been to change the whole plan of the constitution . . . and load it with all the complex details of a code of private jurisprudence" (357). But Walter Jones, after arguing that the Constitution could in no way have intended to throw "the American people into one aggregate mass"(363), probably took little comfort from hearing Marshall's response:

> No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments (403).

To take a more extended example, Daniel Webster reasoned (followed by Wirt and Pinkney) that the historical debate over a federal bank had already been "exhausted," going back to Alexander Hamilton in 1791, and the bank's existence should not be considered an "open question" (322–23). Jones counter–argued that it was still an open question, never having been tried before the Supreme Court: "The practice of the government, however inveterate, could never be considered as sanctioning a manifest usurpation. . . " (362).

In presenting his own history and background of the question, Marshall directly incorporated Webster's argument: "It has been truly said that this can scarcely be considered

as an open question. . ." (401). And Marshall was obviously responding to Jones's counter-argument when he stated:

> It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question . . . if not put at rest by the practice of government, ought to receive a considerable impression from that practice (401).

Neither Webster nor Jones are named, and the text once again works simultaneously in two quite different ways. The agentless passives invite outside readers, especially the majority of readers who never examine the oral arguments, to construct generalized interpretations of Marshall's "voice of the law," a voice speaking in splendid judicial isolation. But to the original audience, the insiders gathered in the courtroom on that Saturday in 1819, each statement was a specific response to points in a complex legal conversation. We might describe it as a high-stakes adult version of the literary and debating societies so loved by nineteenth-century students.

Chief Justice John Marshall, perhaps best described as "the justice as institutional dreamer," did solve the potential babble of judicial voices in seriatim opinions--avoiding the degeneration of argument into public

bickering and quarreling, into contradictory premises and unresolved claims. The nature of the conversation he created, however, is fraught with its own problems. Marshall's centripetal energy offered the Supreme Court the clarity of a single institutional voice, a monologic discourse satisfying in its unity and coherence. But the satisfaction we take in interpreting such closed, self-sufficient wholes, as M. M. Bakhtin implies, can be dangerous. Authoritarian systems always speak with single voices. In the Supreme Court justices' closed culture of argument, was the conversation regarding McCulloch v. Maryland a triumph of consensus or a failure of conformity? Try to imagine what a seriatim opinion in the case would have looked like, and how it might have affected the larger audience. Try also to imagine the modern Supreme Court led by someone of Marshall's all-absorbing presence and extraordinary rhetorical skills. Would we find ourselves returned to the Court's early nineteenth-century "golden age"? And would we be happy about it?

Notes

McCulloch v. Maryland

[1] My main sources for the background and history of McCulloch v. Maryland, John Marshall, and the Marshall Court are Baker; Baxter; Beveridge; Currie, First Hundred Years; Friedman and Israel; Gunther; Haines; Hamilton, "Opinion on the Constitutionality of the Bank"; Hammond, "The Bank Cases" and Banks and Politics in America; Johnson, "Marshall"; Jones; Morgan; Newmyer, Justice Joseph Story and The Supreme Court under Marshall and Taney; O'Brien; Shevory; Stone et al.; Warren; G. Edward White; and James B. White, When Words Lose Their Meaning.

[2] There were some opinions "of the Court" issued before John Marshall and some seriatim opinions during his tenure (Warren 1: 654; G. Edward White 190–91). The "monolithic" quality of the Marshall Court was perhaps not quite as solid as it originally seemed and has been a subject for debate among historians (see Morgan, G. Edward White, Newmyer). But Marshall did write 547 of the Court's opinions during his thirty-four years; all of the other justices together only wrote 574 (G. Edward White 191). And he did work successfully to establish the preference for single opinions of the Court, and the justices' practice of writing seriatim was discouraged.

[3] See Beveridge (1: 57) and Baker (13) on the order of Marshall's early educational experiences.

[4] Todd apparently did not attend the Court's 1819 session, either because of "personal affairs" or "illness" (Israel 410). For the February Term, 1819, Henry Wheaton reported: "Mr. Justice Todd was absent during the whole of this term from indisposition" (4 Wheat. 32). Sadly, for the modern student of McCulloch v. Maryland, it seems to make no difference whether he was there or not.

[5] In "Marshall, the Marshall Court, and the Constitution" (Jones 168–85), Morgan argued in 1956 that "a good modern biography" of Joseph Story was needed to help get at the truth of the "inner workings of the Marshall Court"

(183). In 1985 Newmyer's fine study appeared; ironically, however, it is no more able than Morgan's biography of William Johnson to reveal what these major figures actually contributed to McCulloch.

[6] Technically, John James was also a "defendant in error" in McCulloch v. Maryland. According to Hammond, James was the "informer" who originally confronted McCulloch in the Baltimore office, with the intent of establishing that the cashier was breaking the new state law (and of collecting a portion of the penalty fees) ("Bank Cases" 30–31). Beveridge describes James as the "'Treasurer of the Western Shore'" (4: 283).

[7] Newmyer points out that Marshall might have cited his own remarks on implied powers in United States v. Fisher (1805), as well as Joseph Story's opinion in Martin v. Hunter's Lessee (1816). David P. Currie provides a full discussion of links between McCulloch and Fisher (First Hundred Years 162–65).

[8] See Bobbitt for a good discussion of "structural argument" (74–92). Strauber explores Marshall's use in McCulloch of "consequentialist" reasoning (Shevory 137–58). James Boyd White admires Marshall's "poetic mode," in which language is used as "a way of creating the object of argument in such a way as to make argument itself unnecessary" (When Words 258).

[9] Regarding Marshall's argument from the abstract to the particular in McCulloch, James Madison wrote to Virginia judge Spencer Roane:

> The occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case. I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject. The example in this instance tends to reverse the rule (qtd. in Warren 1: 517).

And regarding Marshall's rhetorical skill in working from premises to conclusions, Joseph Story relates this comment by Jefferson:

> When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I'd reply, "Sir, I don't know, I can't tell" (qtd. in Warren 1: 182).

[10] See Currie for a critique of Marshall's assumptions about the "propriety of the Bank itself" (First Hundred Years 165).

[11] Beveridge argues that Marshall could not have written an opinion so long or so excellent in such a short time: "It appears to be reasonably probable that at least the framework of the opinion in M'Culloch vs. Maryland was prepared by Marshall when in Richmond during the summer, autumn, and winter of 1818–19" (4: 290). But Baxter refutes this speculation, citing Marshall's extensive borrowing from the oral arguments, especially those of Pinkney and Webster (176–77). Note how the other justices, whatever the actual composing process may have been, do not even seem to figure in this historical puzzle.

PART TWO

FOUR MODERN CASES

In A Pragmatic Theory of Rhetoric, Walter H. Beale argues for the restoration of rhetoric as the theoretical center of the art of discourse in our culture and language. For Beale, the "openness and centrality" of rhetoric connect its principles with what have historically been key cultural and educational values--those of "diversity, pluralism, balance, civility, and the recognition of limits" (106). Within the larger framework of rhetorical discourse, Beale identifies deliberation as "the paradigmatic 'rhetorical' art," engaging writers in "matters of choice and value" as they attempt to "support opinions or theses about specific problems of policy, value, or understanding in human communities" (113-14). It is thus a theoretical compliment, perhaps not totally deserved, that Beale places Supreme Court opinions in the deliberative camp. More specifically, Beale characterizes the modern Court's majority opinions as "instrumental deliberation," essentially deliberative writing in an institutional context, official and formalized, the discourse itself serving as an instrument to carry out some action (122).

Beale's classification points to the generic tension inherent in Supreme Court opinions--the conflict between the functions of the texts as deliberative forums and governmental instruments, between the individual roles of justices and their collective institutional identity, and between the justices' multiple voices and the Court's single judicial voice in a culture of argument. The five seriatim opinions of Chisholm v. Georgia suggest some early assumptions about the importance of public deliberation among the justices and the expectation that each justice would be heard, at least on major issues before the Court. The composite Chisholm opinion is replete with diversity and pluralism, in form as well as content. Apparently no negotiation of texts took place: each justice fashioned his own piece of writing based on individual notions about purpose, audience, subject matter, and the appropriate composition of judicial opinions.

The justices' rhetorical notions varied widely in Chisholm, and the cacophony or babble of voices can be confusing to readers. The whole effect, in sum, is centrifugal. But note the core assumptions about argument and audience in the overall structure of multiple or seriatim opinions. Each justice speaks individually and publicly; indeed, the obligation to explain each vote is crucial to what it means to be a Supreme Court justice. The emphasis is on persuasion, on winning the respect of listeners and

readers. The conversation in all its variety, good and bad, strong and weak, takes place in the open. The justices' voices are directed to adult citizens who, it is hoped, will value civility, balance, and the recognition of limits, both in interpreting the texts and in assessing what they all "amount to." The synthesis is left to us.

The modern Supreme Court, following John Marshall's model in cases like McCulloch v. Maryland, places institutional emphasis on the production of a "majority" opinion, a single opinion collectively agreed to by at least five of the nine justices. The generation of "minority" or "plurality" opinions is viewed as an impractical nightmare by legal professionals. Marshall's early reshaping of the Court's dynamics of argument and audience reveals the pressure of some very different assumptions. In a hostile political world, where all audiences are potential enemies and any failure to assert or consolidate power becomes someone else's prize, the multiple voices of seriatim opinions work against the institutional effectiveness and power of the Supreme Court as guardian of the Constitution. As an example of the Court's single judicial voice, McCulloch v. Maryland is not so much "instrumental deliberation" as it is a rhetorically smart and practical "instrument" of government, all the smarter for its beautifully deliberative tone. Marshall's single text serves as a powerful engine "whose primary aim," as Beale describes instrumental

discourse, "is the governance, guidance, control, or execution of human activities" (94). James Boyd White is perhaps responding to this effect when he finds that McCulloch "seems to be less an interpretation of the Constitution than an amendment to it, the overruling of which is unimaginable. . . ." (263).

While all justices speak publicly in seriatim opinions, the norm of the Marshall-style single opinion presents justices with a very different set of rhetorical dynamics and options. The main scene of judicial conversation moves to the secrecy of the case conference, where relationships are hierarchical and the obligation to persuade takes place privately among the justices. Whatever the vote in any one case, only one justice must speak in writing the majority opinion; the others may choose to speak publicly in separate opinions, or to negotiate the majority text privately, or even to remain silent altogether. In the realm of Marshall's administrative rhetoric, the overall forces are centripetal: the ideal is for the Court to speak with a unified institutional voice. The text must be able to command its audience, winning acceptance for decisions through the prestige and power of the institution.

The values implicit in the single-text opinion are unity, order, certainty, efficiency, and authority. The stakes are considered too important among professional experts to trust the synthesis to public audiences. Thus,

the appearance in the modern Court of minority opinions, "concurring" or "dissenting," is always seen in some sense as a failure to achieve the ideal (or, worse, dissenting voices are patronized as passionate dicta). At best, separate opinions are tolerated as the unavoidable consequences of our expulsion from the institutional Garden of Eden.[1] Perhaps Marshall's real victory as administrative rhetor was in setting this single-text preference for the genre of the Supreme Court opinion.

But what if we were to drop the single-text presumption and look afresh at some significant modern opinions? What if we examined the texts, keeping in mind the full range of generic possibilities represented by Chisholm v. Georgia and McCulloch v. Maryland? The following four modern opinions make especially interesting subjects for such an exploration: (1) the 1954 landmark opinion of this century, the school segregation cases decided as Brown v. Board of Education; (2) the 1971 Pentagon Papers case, New York Times Co. v. United States; (3) the 1974 Watergate Tapes case, United States v. Nixon; and (4) the 1978 reverse discrimination case, Regents of the University of California v. Bakke.

By Marshall's ideal generic form, the single opinions of Brown v. Board of Education and United States v. Nixon should be successful texts, triumphs of consensus spun out of the Court's private culture of argument. Some justices in each case threatened to write separate opinions, but restrained

themselves in the end for the perceived good of the country and the Court. In contrast, again by Marshall's ideal generic form, the multiple opinions of New York Times Co. v. United States and Regents of the University of California v. Bakke should be textual disasters, failures of confrontation in which the justices were unable to refrain from public displays of bickering and quarreling. In Brown and Nixon, the Court's judicial voice speaks in a single unanimous text. In the New York Times and Bakke cases, the justices' voices are virtually seriatim.

Are the two single-text opinions, in fact, triumphs of consensus? And are the two multiple-text opinions failures of confrontation? Form alone will not give us answers to these questions. Analyzing the generic forms of these opinions will tell us a number of useful things about the historical development of judicial and rhetorical predilections, but it cannot fully explain matters of process, purpose, and substance. As Beale explains in discussing the principle of asymmetry in discourse, "form is not intrinsically 'locked into' meaning and can never in and of itself fully predict meaning" (17). If we were to allow that positive, successful processes of argumentation could result in seriatim as well as single opinions, then we would also need to consider the possibility that argument can fail—indeed, the Supreme Court's entire culture of argument

can disintegrate—in moments of textual unity as well as multiplicity.

With these generic parameters in mind, I return to the question asked in the introduction to this study: Are the rising numbers of modern multiple-text opinions a healthy re-emergence of argument as reasoned debate and deliberation in a mature but increasingly complex and complicated society? Or, to ask the other side of the question, are these virtually seriatim opinions symptomatic of a breakdown, of a loss of national identity and consensus in our culture and community, resulting in a rising babble of conflicting voices engaged in bickering and dispute? In the justices' recovery of their individual voices, has the Court lost the power of its judicial voice?

Some responses to these questions are offered in the following sections, which examine the four modern opinions in chronological order. All of these difficult, highly controversial cases have been extensively chronicled, analyzed, and puzzled over by modern commentators. If we look at their texts through rhetorical eyes, applying equally the generic possibilities suggested by both Chisholm v. Georgia and McCulloch v. Maryland, we may be able to understand better the opinions themselves and the culture of argument they constitute.

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1. Brown v. Board of Education (1954): The Text as Least Tangible Denominator

The unanimous decision in Brown et al. v. Board of Education of Topeka et al., 347 U.S. 483, announced on May 17, 1954 by Chief Justice Earl Warren, is a prime candidate for the landmark case of our century. The justices spoke with a single voice in rejecting the practice of racial segregation in public schools and in definitively reversing any educational application of the Supreme Court's position of sixty years—the "separate but equal" doctrine established in the 1896 case of Plessy v. Ferguson. The high moral and legal drama of the case, however, is not matched by the rhetorical impact of the opinion's text. Many readers of Brown v. Board of Education, supporters as well as critics, professionals and nonprofessionals alike, have been puzzled by the blandness, indeed, the paucity of language and argumentation in the opinion itself.[2] Chief Justice Warren deliberately created a generalized, plain-style, low profile text intended to form as "intangible" a target as possible for hostile audiences. It is a reticent performance at a great moment in the Supreme Court's history, suggesting a profound ambivalence among the justices about the Court's community of authors and audiences, the processes of

argumentation and public deliberation in a democratic society, and the efficacy and value of language itself.

The single-text unanimity of Brown signals an emphasis on the instrumental functions of the opinion in the tradition of John Marshall's administrative rhetoric. The justices were well aware, as Richard Kluger relates, of the intense national interest and political explosiveness of the four cases which were decided together in 1954 as Brown v. Board of Education.[3] The cases had been argued and reargued for two years, beginning in 1952, with literally thousands of pages of accumulated briefs and oral arguments (see Kurland and Casper, vols. 49-49A). The Court, in no hurry to commit institutional suicide, moved slowly and carefully.

In the middle of this process Chief Justice Fred Vinson died, and California governor and former district attorney Earl Warren was appointed by President Eisenhower in the fall of 1953. Warren was present for the reargument of Brown on December 8, 1953, and he later described the "strange course" of the arguments made by plaintiffs' counsel Thurgood Marshall, who subsequently became an Associate Justice, and John W. Davis, the Pinkney-style counsel for the states:

> One might expect, as I did, that the lawyers representing black school children would appeal to the emotions of the Court based upon many years of oppression, and that the states would hold to strictly legal matters. More nearly the opposite developed. Thurgood Marshall made no emotional appeal, and argued the legal issues in a rational manner as cold as steel.

> On the other hand, states' attorney Davis, a great advocate and orator, former Democratic candidate for the presidency of the United States, displayed a great deal of emotion, and on more than one occasion broke down and took a few moments to compose himself (Memoirs 287).

Warren's appointment apparently assured that there would be no split decision, that a real majority of the justices would vote to overturn segregation, but the new Chief Justice "did not want dissents or concurrences if he could help it" (Kluger 683).

It is quite fitting that Warren, his background administrative rather than judicial, should have focused on what he saw as the Court's overwhelming institutional need to speak on this issue with a single voice. At the case conference held on December 12, 1953, Warren strategically suggested a delay of the actual vote on Brown: "We decided not to make up our minds on that first conference day, . . . but to talk it over, from week to week, dealing with different aspects of it—in groups, over lunches, in conference. It was too important to hurry it" (qtd. in Kluger 683). While not literally behind closed boardinghouse doors, Warren's strategy of private, small-group conversations (over lunch rather than dinner) sounds remarkably similar to John Marshall's gentleman's-club culture of argument. Warren himself later characterized the justices' private deliberations as occurring "in the finest collegiate tradition" (Memoirs 2).

Kluger recounts, with speculation needed to fill many gaps, how Warren eventually won unanimity of vote and voice by five months of continuous, patient, low-key interaction with the other justices. In addition to Chief Justice Warren, eight Associate Justices were involved in the Brown decision: Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Robert H. Jackson, Harold Burton, Tom C. Clark, and Sherman Minton. A formal vote of all nine was taken sometime in February or March of 1954, apparently with eight justices in favor of ruling segregation unconstitutional and only Stanley Reed of Kentucky dissenting.[4] As Warren began working on a draft of the majority opinion in April, some evidence suggests that he may have been worried about possible concurrences from Frankfurter and Jackson, as well as Reed's dissent. But in the end the Court's private culture of argument reached unanimous resolution, with various factors contributing to Warren's goal, including Jackson's heart attack, an agreement to separate the ruling (Brown I) from the decree (what would become Brown II in 1955), and an understanding that a gradual rather than immediate dismantling of segregation would be ordered (Kluger 657-99).

To what extent was the actual text of Brown, the language and argumentation, negotiated by the justices? The answer, according to Bernard Schwartz, seems to be that the justices made only "minor stylistic changes" once Warren's

draft was circulated (457). Of course, the draft came after a long series of private conversations, and we have no way of really knowing how much of the spoken language of those conversations found its way into Warren's written text. With the proliferation of interviews, publication of memoirs, and availability of papers, letters, and notebooks, we have learned more in retrospect than the original audience for Brown could have known, certainly more than we will ever be able to retrieve concerning McCulloch v. Maryland. But what we have learned about the actual composition of the text itself tends to highlight the role of Earl Pollock, one of the Chief Justice's law clerks, rather than the participation of the other justices.

The original draft of Brown, prepared sometime during the last part of April, was composed in Warren's own handwriting, in pencil, on nine pages of a yellow legal pad (Schwartz 448). The rough draft is essentially in the form that the final opinion takes, as Schwartz comments, but without some passages of supporting material, details of case citations, and footnotes. Warren asked his law clerks—Earl Pollock, William Oliver, and Richard Flynn—to each write a draft, based on the Chief Justice's rough draft, over the first weekend in May. According to Schwartz, Pollock's draft had the most influence on revisions of the text during the following week, especially the separation of the District of Columbia case from the four state cases and the addition of

the controversial references to "psychological knowledge" and "modern authority" (the famous or infamous footnote 11 was added by Richard Flynn). A fairly complete printed draft of Brown was delivered to the other justices on Saturday, May 8. Finally, a last printed draft with small changes suggested by Pollock and the justices was circulated on May 13 and unanimously agreed to by the Court at its case conference on Saturday, May 15 (Schwartz 445–60).

The text of Brown v. Board of Education, as almost all commentators have noted, is short and plain, its plainness more a result of the general than the concrete. Like John Marshall in McCulloch v. Maryland, only Chief Justice Warren speaks for the Court; unlike Marshall's long, rich rhetorical performance, Warren's actual words occupy only about six of Brown's thirteen pages. Readers of twentieth–century volumes of United States Reports no longer encounter the "hired sophisms" of counsel, only a list of their names, but the presentation of texts continues to assume an audience of legal professionals, with fixed expectations of titles, summaries, headnotes, extensive footnotes, and so forth. The textual components of Brown break down as follows:

(1) Title and Abstract	1	page	(483–484)
(2) Record of Counsel, Briefs, and Oral Arguments	2	pages	(484–486)

(3) Warren's Opinion 10 pages (486–496)
(Footnotes 4+ pages)

Brevity is a trait associated with instrumental texts, but Warren was in no sense a legal technician or essentializing strategist in the tradition of John Blair or William Cushing. In retrospect, Warren attributed the brevity of his opinion to rhetorical considerations of audience:

> 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 too much space. This enabled the public to have our entire reasoning instead of a few excerpts from a lengthier document (Memoirs 3).

While the opinion was still in draft, Warren commented to the other justices that he had composed it "on the theory" that it "should be short, readable by the lay public, non–rhetorical, unemotional and, above all, non–accusatory" (qtd. in Schwartz 448). No one, of course, would have wished it to be needlessly long and repetitive, or confusing and unreadable, or biased and inflammatory. But were these the only alternatives?

The key word "non–accusatory" turned out, unfortunately, to govern Warren's compositional choices. Two principles drive the text that was actually produced: Warren's strong conviction that the Court must speak with a single judicial

voice and the fear felt by all of the justices of public reaction in the South, of a possible threat to the authority of the Supreme Court as an institution (Rohde and Spaeth 200–01). Warren was thus bending over backwards rhetorically for two audiences, trying not to offend Justice Reed and others in the Court's private culture of argument, as well as trying not to shame Southerners directly and publicly in a text to be published "in the daily press throughout the nation."

Warren is more successful with his plain–style objectives than he is with the odd, general structure of the text. He begins with a calm, matter–of–fact recitation of the history and background of the four cases, stating in the second sentence that "a common legal question justifies their consideration together in this consolidated opinion" (486). He does not, however, formulate the question at this point. Rather, he continues to trace the history of the cases, speaking in very general language about "minors of the Negro race" and "segregation," along with setting up general lines of argument relating to the Fourteenth Amendment's "equal protection of the laws" and the "separate but equal" doctrine of Plessy v. Ferguson (487–88). On the fourth page of the opinion, Warren is still tracing the history of the cases, explaining the "inconclusive" results of the reargument concerning the 1868 adoption of the Fourteenth Amendment (489). In effect, Warren despairs of establishing either

"the letter" or "the spirit" of the Constitution in this context (489).

Warren shifts to a history of public education and of potentially relevant Supreme Court cases. He contrasts the lack of public education in the past, especially in the South, and its very different "status" in the present, concluding that "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education" (490). Warren then briefly surveys the Supreme Court's handling of early Fourteenth Amendment cases, the 1896 case of Plessy v. Ferguson, subsequent cases involving but not directly questioning the "validity" of Plessy's "separate but equal" doctrine, and "more recent" graduate school cases (490–92). All of this inquiry is in effect a negative search, extensively documented by law-clerk footnotes.

Note that Warren has yet to state the question specifically, and a first-time reader is likely to assume that all of this is essentially preliminary material, a full narratio setting up what is expected to be a much longer text. The transition finally comes on page 492:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation" (492–93).

The concreteness of the "clock" metaphor is a welcome relief after pages of plain but generalized prose, heavy with prepositional phrases, and technical footnotes. Warren opts for what Charles A. Miller calls "ongoing history" rather than "intent history," history as process rather than history as event or command (26). "Today" becomes a key word as the Chief Justice makes the case that public education, "where the state has undertaken to provide it," has become so important and so valuable that it is now "a right which must be made available to all on equal terms" (493).

At this point, roughly three-and-a-half pages into the six pages of actual text (not including footnotes), Warren finally poses the question of his argument and immediately answers it:

> We come then to the question presented: 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? We believe that it does (493).

Teachers of writing may perhaps smile to recognize this odd construction—neither investigative nor classical, neither climactic nor anti-climactic—as the burying of the thesis in the middle of the text. Warren carries to an extreme, either implicitly or explicitly, his own assumptions about the conditions he must meet in order to produce a successful

piece of discourse in this situation. In an intriguing contrast, he relates in his Memoirs the drama of reading Brown aloud on May 17, 1954, and the "wave of emotion" that swept the courtroom when he added "unanimously" to his oral delivery of the opinion: "We unanimously believe that it does" (3). The word "unanimously" appears nowhere in the text.

Having posed the central question and given an answer, Warren supports the Court's claim with a page-long paragraph. He cites two related cases, Sweatt v. Painter and McLaurin v. Oklahoma State Regents, in which the Court had ruled that "intangible considerations" at the graduate level made segregated schools unequal. He links those cases to Brown by making an a fortiori argument (an argument from the stronger case):

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone (494).

This passage is as close as Warren comes to an emotional appeal. Even here, however, it was toned down somewhat by the deletion of "little" before "hearts and minds" (Schwartz 455).

Warren's supporting paragraph is further developed, as Schwartz explains, by two additions by law clerk Earl Pollock: (1) a long quotation from the lower court's opinion in the Kansas case (no judge's name given), which comments on the "detrimental effect" of legal segregation on "colored children"; and (2) a confusing reference to Plessy, "psychological knowledge," and "modern authority":

> "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected (494).

To the first sentence law clerk Richard Flynn added what became the much debated "footnote 11" listing authors and studies from the social sciences (Schwartz 457–58), all of which caused James Reston to declare in the New York Times that the "Court's opinion read more like an expert paper on sociology than a Supreme Court opinion" (14).

Much later, Warren dismissed the matter as "only a note, after all," Flynn described his citations as "obvious" choices with no method to the order of their listing, and Pollock explained the reasoning behind his two sentences:

> It seemed to me that the most noxious part of Plessy was the notion that, if Negroes found segregation a "badge of inferiority," that was sort of in the eye of the beholder. I was looking for a way to part company and to say that, whatever the situation in the 1890's, we

> know a lot more about law in society than we did then (qtd. in Schwartz 458).

The added passage and the subsequent controversy over the use of sociology and psychology as evidence, essentially another twist of the "Brandeis brief," have been argued and reargued by numerous commentators. Why did Warren and the other justices allow such a hot-button passage to remain in a text intended to keep everyone calm? Brown was not a hurried opinion, and certainly Warren and the justices all approved the final text, thus accepting the responsibilities of authorship, at least at some level.

If we ask what voices are included in this textual conversation—who actually gets to say what to whom—then we are confronted with a problem of what Joseph Vining calls the "authenticity" of the text. In The Authoritative and theAuthoritarian, Vining expresses concern for the late twentieth-century transformation of Supreme Court opinions from authentic texts to bureaucratic writing, from the "unified mind" of a person speaking to the mechanical outcome of a composite institutional process, as if the Court like other governmental agencies had established its own opinion-writing department (9-15). Vining argues that texts "exert their authority over us and command our respect and serious attention only to the extent that we hear a person speaking through them. Their authority rests on the sense of

mind behind them" (14). This is a perfect description of the powerful effect created by John Marshall in McCulloch v. Maryland. For Vining, modern Supreme Court opinions have lost this authority:

> Now opinions too often seem things written by no one at all. . . . they are things of patchwork which seem, on their face, to express the institutional process of their making rather than the thinking, feeling, and reasoning of the author and those persuaded with him (12).

Of course, 1954 is not the late twentieth-century, and I am focusing on only a small passage of Brown. A multitude of other Supreme Court texts would make better examples of bureaucratic writing. Looking back, however, at the tremendous attention paid to this one passage and the swirl of consternation, analysis, and debate across the country, I find Vining's thesis illuminating. How could such a disjunction occur in the rhetorical transaction between writer and reader? Reston and subsequent respondents to this passage in Brown made the natural assumption that Warren, with the approval if not the active participation of the other justices, used the evidence of "modern authority" as an integral component of the decision-making process and final judgment. In other words, readers like Reston took every line of the short text seriously, including the footnotes.

Warren executes one last transition in the text, moving to a full instrumental statement of the justices' decision:

> We conclude that in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment (495).

The reader hungers for amplification of the first two sentences, for clear thought and powerful language to inform and enrich the Court's great moment of courage. The choice of the adverb "inherently" is especially provocative. But by the third sentence, Warren has completed his transition into the rhetoric of bureaucracy, and the rest of the text focuses only on technical matters—dispositions, class actions, and decrees.

In the opinion's last paragraph, Warren concludes by explaining why no decree accompanies the Court's ruling in Brown and ordering further argument for the next term to determine "appropriate relief." The ending sounds very much like John Blair suggesting the wording for a court order at the end of his Chisholm opinion. As Warren deals with instructions in a business-like fashion, we do hear John Marshall's voice in one sentence: "We have now announced that such segregation is a denial of the equal protection of the

laws" (495). It is the same sense of the text as instrument, of the opinion as a public institutional act which, once delivered, changes reality even as the text progresses from one part to another.

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2. New York Times Co. v. United States (1971)

The Pentagon Papers Case:
The Text as Open Debate or Frenetic Parody?

The 1971 Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713, provides a revealing public snapshot of the justices' internal culture of argument. Dramatically informed by the context of the Vietnam War protest and the seriousness of First Amendment issues, the entire episode lasted only seventeen days. In contrast to the Court's slow, careful approach to Brown v. Board of Education, the quickness with which the justices moved in the New York Times case is commonly cited as the reason for their issuance of a multiple-text opinion, resulting "more by happenstance than by design" (Rohde and Spaeth 189). Serving on the Court at the time were Chief Justice Warren E. Burger and Associate Justices Hugo L. Black, William O. Douglas, William J. Brennan, Potter Stewart, Byron R. White, Thurgood Marshall, John Marshall Harlan, and Harry A. Blackmun. The justices simply did not have time to negotiate a Marshall-style majority opinion, so they delivered a short per curiam opinion, an unsigned technical opinion by the Court, and all nine members of the Court wrote separate opinions—six concurring and three dissenting.

We thus get to hear the individual voices of the justices debating around the conference table, as it were, and the composite of ten opinions is virtually seriatim in form. Instead of the collective, institutional blandness of the Court's judicial voice in Brown, the justices in New York Times engage in an active public conversation with strong feelings strongly expressed, the "open debate and discussion" so prized as a constitutional principle by Associate Justice Douglas (724). But Chief Justice Burger was not at all pleased with such open deliberations, criticizing the "frenetic haste" of the whole process and calling the result a "parody of the judicial function" (749,752). The rhetorical dynamics of the opinion were apparently embarrassing to the Court's closed culture of argument, at least to some justices, but the multiple voices are fascinating to outside readers in both serious and humorous ways. As an audience, we find ourselves adult citizens, pleased at the opportunity to synthesize and assess the deliberation of the justices, and at the same time we cannot help but be curious children, amused by an unexpected glance behind the judicial curtain.

The case originated with the publication of excerpts from classified government documents on June 13, 1971 in the Sunday edition of the New York Times.[5] Daniel Ellsberg, at one time a Pentagon official, had given the Times a copy of "top secret" studies of the Vietnam War and the thirty-plus

years of American involvement in Indochina, works that had been assembled by theDefense Department in 1967 and 1968 at the request of Robert McNamara. Included in the materials were forty-seven volumes of text and source documents, designated as "History of U.S. Decision-Making Process on Vietnam Policy," and a summary of a 1965 volume entitled "Command and Control Study of the Gulf of Tonkin Incident" (Kurland and Casper 71: 7). The Times published more on Monday, June 14, and Tuesday, June 15, by which time the government (i.e., the Nixon administration), claiming dire threats to national security, was granted a temporary restraining order and moved for a preliminary injunction in a lower federal court. By Friday, June 18, the Washington Post was also publishing excerpts from the secret documents and was similarly restrained.

The situation was explosive, given the anguished public debate over Vietnam, the suggestions of governmental deception revealed in the secret documents, and the extraordinary prior restraint placed on the free press—the New York Times and the Washington Post. Both governmental actions moved quickly through the lower courts, with "jittery" judges worried variously about the execution of prisoners of war, on the one hand, and the death of the First Amendment, on the other. By Thursday, June 24, the Supreme Court had received petitions, and on Saturday, June 26, the justices heard oral arguments in the combined cases, New York

Times Co. v. United States and United States v. Washington Post Co. Solicitor General Erwin N. Griswold argued for the United States, Alexander M. Bickel for the New York Times, and William R. Glendon for the Washington Post. As the record of the oral argument amusingly demonstrates, none of the legal participants in this drama had had time actually to study the briefs or the "top secret" documents themselves, including the counsel who were arguing on both sides and the justices who were asked to decide fundamental questions of national security and freedom of the press (Kurland and Casper 71: 213–61).[6]

Just four days later, on Wednesday, June 30, the justices delivered their 6–3 decision in favor of the newspapers, ruling that the government had not met the "heavy burden" of justifying prior restraint. The three-paragraph per curiam opinion, appearing first in the text after the conventional syllabus, is a pure piece of instrumental discourse: precedents are abruptly quoted; directions are given, with various lower court actions "affirmed," "reversed," "remanded," or "vacated"; and the Court's judgments are commanded to "issue forthwith" (714). The full fifty pages of the text of New York Times Co. v. United States divide into the following sections:

		U.S. Reports
(1) Syllabus	1 page	(713)
(2) Per Curiam opinion	3/4 page	(714)

(3) Black concurring (with Douglas)	5+ pages	(714–720)
(4) Douglas concurring (with Black)	4+ pages	(720–724)
(5) Brennan concurring	2+ pages	(724–727)
(6) Stewart concurring (with White)	3 pages	(727–730)
(7) White concurring (with Stewart)	10 pages (footnotes 4+ pages)	(730–740)
(8) Marshall concurring	7+ pages	(740–748)
(9) Burger dissenting	4+ pages	(748–752)
(10) Harlan dissenting (with Burger & Blackmun)	6+ pages	(752–759)
(11) Blackmun dissenting	4 pages	(759–763)

The dominant impression for readers is one of diversity and plurality in both style and content. We hear a multiplicity of personal voices as the justices speak to each other and the public in seriatim form. Indeed, the personal pronoun "I" appears over sixty times throughout the texts. Two interesting elements, however, make this modern generic version of a multiple–text opinion different from Chisholm v. Georgia. First, the deliberation is interactive. The justices are not engaged merely in the composition of intersecting monologues: they know everyone's vote as they write, and they have obviously read drafts of each other's opinions. Some of the justices join with each other, and some make specific references in their texts to the texts of

other "Brethren." Second, unlike the reverse seniority practiced in Chisholm (no matter what the vote), there is a logical pattern to the order of texts, with the six concurring justices speaking first, followed by the three dissenting justices.

After the institutional discourse of the per curiam opinion, the fireworks begin on page 714, with the First Amendment absolutism of Hugo L. Black's concurring opinion, joined by William O. Douglas. A populist Alabama Democrat, reader of the classics, and New Deal liberal appointed by Roosevelt in 1937, Black reveled in the opportunity to stand on the free press principles challenged in this case.[7] The text of his opinion, with its straight-to-the-point, anti-climactic structure, suggests the essentializing, plain-language strategy of John Blair, but without Blair's interest in legal technicalities. Black announces in his first sentence that the government's case should have been dismissed without any hearing. The second sentence conveys his position clearly and strongly: "I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment" (714-15).

Black's text incorporates a variety of voices, including concurring justices Douglas and Brennan; "some members of the Court" who have chosen to dissent, with whom Black is obviously annoyed; Solicitor General Griswold; Chief Justice

Charles Evans Hughes; the Founding Fathers and the Framers; and, most extensively, James Madison. Arguing against any interpretation that would restrict the First Amendment, Black combines his faith in plain language with an obvious confidence in the importance of historical context, the kind of love of history demonstrated by James Iredell:

> I can imagine no greater perversion of history. Madison and the Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law. . . abridging the freedom. . . of the press. . . ." Both the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints (716–17).

The New York Times and Washington Post, in fact, had filled their roles precisely, according to Black, with "courageous reporting" intended to thwart just the sort of governmental deception that would send people "off to distant lands to die of foreign fevers and foreign shot and shell" (717). Black ends with a close look at the word "security," rejecting the government's amorphous definition of the term and insisting on the "real security" of the people's constitutional right to freedom of the press.

William O. Douglas, joined by Black, also uses an essentializing strategy in presenting his argument. Another Roosevelt appointment from 1939, Douglas was an equally

strong advocate of individual liberties and freedom of speech, a justice who combined expertise in finance and corporate law with a passionate devotion to the environment as a widely published and controversial writer, international traveler, and conservationist.[8] Douglas begins by stating his agreement with the per curiam opinion, then presents his confirming argument in two short sentences:

> It should be noted at the outset that the First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press (720).

The rest of Douglas's text refutes in a professional fashion, similar to John Blair's approach, the arguments presented by Griswold and the government. Douglas's "moreover" additions are listed in a string-like sequence, with numerous one-sentence paragraphs. He conducts a negative search of various congressional statutes; dismisses the classified documents as "all history, not future events"; cites precedents concerning the burden of proof in prior restraint situations, including the voice of Chief Justice Hughes in Near v. Minnesota; and refers readers to various writers on issues of free speech. Toward the end of his paratactic structure, Douglas explains concisely why he so values free speech: "Secrecy in government is fundamentally

anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health" (724).

William J. Brennan, an Eisenhower appointee of 1956 and strong supporter of the "passive liberties," contributes a short two-page opinion intended to affect interpretation of the Court's actions and to ward off future problems.[9] Brennan's anti-climactic structure conveys a single message:

> I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government (724-25).

Not at all tempted to write an essay, Brennan simply drives home, in general agreement with Black, the "error" of the lower courts in granting in the first place "any injunctive relief whatsoever, interim or otherwise" (725). Unlike Black, Brennan does allow for a narrow type of exception for prior restraint, citing Schenck v. United States and Near v. Minnesota. The country must be "at war," and the government must prove that publication would "inevitably, directly, and immediately" cause harm to troops or transports (726-27).

Black, Douglas, and Brennan appear to have had little trouble composing their opinions; at least the texts in their thesis-first structures convey a sense of certainty and

confidence about the issue at stake and what they feel to be the appropriate decision. Potter Stewart, on the other hand, constructs an investigative, hypotactic text reflecting a cautious process of inquiry, with the statement of his position saved for a James Wilson–style last sentence: "I join the judgments of the Court" (730). Stewart, another Eisenhower appointee from 1958, Midwestern pragmatist, and Hotchkiss–Yale Republican, unfolds his argument as a dilemma.[10] At the beginning of the opinion, joined by Byron R. White, Stewart sets up an X–yet–Y conflict between the importance of an "enlightened citizenry" and the need for "confidentiality and secrecy" in national defense and international relations.

Stewart resolves this dilemma by placing the "responsibility" for assuring appropriate security "where the power is"—i.e., the problem belongs to the executive branch (728). The justice then delivers a mini–lecture on duty, wisdom, and the value of "avoiding secrecy for its own sake" in dealing with such responsibility: "For when everything is classified, then nothing is classified. . . ." (729). Stewart delineates the functions that Congress and the courts may perform, with attention to procedures and criminal laws, and he hints that some of the documents he has seen may be dangerous. He is unable, however, to "say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people" (730). His

careful balancing and sorting act completed, Stewart renders his judgment.

Byron R. White, joined by Stewart, writes an equally cautious and qualified opinion. A 1962 Kennedy appointment, former clerk to Chief Justice Vinson, and Deputy Attorney General, Colorado football star "Whizzer" White turned out to be a surprise conservative on the Court.[11] White presents his reluctantly concurring decision in the very first sentence: "I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system" (730–31). Cautioning that there may be circumstances that would permit prior restraint, and that some of the secret documents will do damage, White goes on to reason that, nevertheless, the government has not met the "heavy burden" of proof required, especially in the "absence of express and appropriately limited congressional authorization" (731).

Unlike Black's hints of governmental deception, White's attitude toward the government's position is trusting: "It is not easy to reject the proposition urged by the United States and to deny relief on its good–faith claims in these cases that publication will work serious damage to the country" (733). White presents himself here as the careful, reluctant jurist, analyzing claims of executive "inherent powers" and reviewing congressional guidance from the Espionage Act of

1917 and the Criminal Code, all replete with detailed footnotes. He concludes his anti-climactic structure by sliding almost imperceptibly into semi-menacing obiter dicta, putting the newspapers "on full notice" and warning them that, while he cannot sanction prior restraint in this situation, he would have no trouble with upholding criminal convictions. Then, almost as if in a literal conversation and unable to revise what he has just said, he backs awkwardly out of his text by qualifying his warning: "I am not, of course, saying that either of these newspapers has yet committed a crime . . ." (740).

Thurgood Marshall's text is the sixth and last in the sequence of concurring opinions. The cool counsel in Brown v. Board of Education and liberal activist, Marshall was appointed by Johnson in 1967 as the Court's first African-American justice.[12] Like Potter Stewart, Marshall creates a climactic, investigative text that begins with a statement of the government's contention and ends with a James Iredell-style rejection of judicial activism: "It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass" (747). Sounding a little like James Wilson, Marshall begins by redefining the "ultimate issue" as "whether this Court or the Congress has the power to make law" (741). Of course, as

soon as Marshall has formulated the question in this way, we know what the final answer will be. Taking Youngstown Sheet & Tube Co. v. Sawyer and the concept of the separation of powers, Marshall explores the roles of the three branches of government, focusing particularly on what Congress has done and has declined to do and citing various cases, statutes, and studies along the way. After rejecting what he sees as judicial activism, Marshall ends with a final pragmatic sentence, suggesting appropriate orders for the lower courts in instrumental fashion.

With the next text, the dissenting opinion of Chief Justice Warren E. Burger, the judicial conversation moves from the deliberate, determined exposition of Thurgood Marshall to an extraordinary sense of alarm. Burger, a 1969 Nixon appointment and conservative Minnesota Republican, was clearly unhappy with even hearing this case in June of 1971, but for quite different reasons from those of Hugo L. Black.[13] Burger starts calmly enough, describing the justices' common ground on prior restraint and insisting that "little variation among the members of the Court" exists on this issue (748). But he also insists that the factors in this situation are not simple and shifts quickly to what he sees as a "collision" between "a free and unfettered press" and "the effective functioning of a complex modern government" (748).

By the second paragraph, Burger's growing anger is apparent in his use of repetition:

> These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts (748).

He questions why the Court is in this position in the first place, and then he launches an extended attack on the speed with which the whole affair has unfolded—the "unseemly haste," "hectic pressures," "unjudicial haste," "frenetic haste," "precipitate action," "unwarranted deadlines," "frenetic pressures," "needless pressure," and "arbitrary deadlines" (748–52). As an alternative to "all this melancholy series ofevents," Burger calls for "thoughtful, reflective deliberation" and "orderly litigation" (749, 751).

In an obvious reference to Black, Burger dismisses First Amendment absolutism and lectures the New York Times on the responsibilities of great newspapers and the "duty" to report "stolen property or secret government documents": "That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times" (751). Burger concludes by agreeing "generally" with his co-dissenters, Harlan and Blackmun, and with White's warning about criminal prosecution, but the Chief Justice expresses such a state of

distress that he cannot "reach the merits" of the case (752). He simply wants it to go back to the lower courts. His final sentence sums up his disgust: "We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function" (752).

In the second of the three dissents, John Marshall Harlan, joined by Burger and Blackmun, continues the theme of "unseemly haste," but in a somewhat more controlled manner. Appointed by Eisenhower in 1955, Harlan was the grandson of a Supreme Court justice, Wall Street lawyer, and intense hard worker who loved technical procedures and judicial restraint.[14] Harlan begins by quoting Oliver Wendell Holmes, Jr.'s famous remark about great cases ("great cases like hard cases make bad law"), and then he details an hour-by-hour chronology of the case's "frenzied train of events," labeling the Court "almost irresponsibly feverish" in this situation (752-53). Disgusted with the lack of procedure, Harlan patiently lists seven questions that the Court should have considered and, with a tone of resignation, states his judgment in the middle of the opinion: "Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court" (755).

Harlan presents his reasoning in "telescoped form," talking in terms of lower court actions, proper procedures, and limits on the Supreme Court's powers in regard to the executive branch (755). He quotes Chief Justice John

Marshall on the power of the President, George Washington on the need for secrecy in foreign affairs, and Justice Robert H. Jackson on restrictions of the judicial role. Not surprisingly, Harlan emphasizes his disapproval of the lower courts' lack of "deference" to the "conclusions of the Executive" (758). And he ends with a call for the Secretaries of State and Defense to testify on national security and gives directions (what he would do, if he were in the majority) for the lower courts: "Pending further hearings in each case conducted under the appropriate ground rules, I would continue the restraints on publication" (758–59).

The third dissent and final text in New York Times Co. v. United States, the opinion of Harry A. Blackmun, combines the tone of Burger's alarm over "unseemly haste" with Harlan's patient concern with proper procedures. Nixon's third nominee for the Supreme Court in 1970 (after the rejections of Haynesworth and Carswell), the recently appointed Blackmun, a Minnesota conservative and close friend of Burger, brought to the Court in 1971 a dislike for judicial activism, absolutism, and societal permissiveness.[15] The justice who would be the author of Roe v. Wade was not an ideologue, however, and his dissenting opinion in the New York Times case hints that, if proper and orderly procedures had been followed, he might have decided the issue otherwise. He constructs an anti–climactic text, matter–of–factly

joining in the conversation with the other justices: "I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion" (759).

Also using Holmes's "great cases" quotation, Blackmun deplores the "strain" and "sensationalism" of the entire situation, criticizes the New York Times for what he sees as hypocrisy, and laments the lack of "careful deliberation" in the various courts (759, 761). Sounding rather like Chief Justice John Marshall declaring that "it is a constitution we are expounding," Blackmun calls for a proportional strategy of constitutional interpretation:

> The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court (761).[16]

Feeling that the cases, the issues, and the courts "deserve better," Blackmun details what he thinks is needed to consider the matter properly and ends with a strong warning to the press. Convinced that some of the secret documents could do harm, he figuratively shakes his finger at the two newspapers, reminding them of their "ultimate

responsibilities to the United States of America" and the "sad consequences" which they may bring about (763).

Chief Justice Burger, despite his dissenting position, delivered the opinion of the Court on June 30, 1971. Afterwards, he insisted that the justices had been "actually unanimous," that the dissents had been over procedure, not substance.[17] Are the multiple voices heard in New York Times Co. v. United States positive instances of healthy debate or negative signs of institutional disintegration? We certainly get Vining's strong "sense of mind" behind each text, of people speaking with a variety of human reactions ranging from celebration to outrage. And the Court did survive, at least for that year. Perhaps the answer depends, at least in part, on how comfortable we are with thinking of justices as people, and of valuing their Supreme Court opinions as rhetorically significant texts.

3. United States v. Nixon (1974)
The Watergate Tapes Case:
The Text as Judicial Privilege

In New York Times Co. v. United States, the explosive 1971 Pentagon Papers case, Chief Justice Warren E. Burger added a revealing footnote to his dissenting opinion. The footnote draws an analogy between what Burger saw as the President's "inherent power" to classify sensitive materials and the Supreme Court's unspoken right to "establish and enforce the utmost security measures for the secrecy of our deliberations and records" (752). Three years later, in the even more explosive context of the 1974 Watergate Tapes case, United States v. Nixon, Chief Justice Burger returned to the same theme, this time in the main text, comparing the "expectation of a President to the confidentiality of his conversations and correspondence" with the "claim of confidentiality of judicial deliberations" (708). The multiple-text opinion in the New York Times case opens to public view, in one instance at least, the Court's closed culture of argument. But the unanimous single-text opinion delivered by Burger in United States v. Nixon ironically preserves the "confidentiality of judicial deliberations," pretending to offer readers a Marshall-style text as the united institutional voice of the Court. In fact, the

opinion is an odd, fragmented, multiple-authored text filled with unreconciled voices.

The Watergate scandal began in the summer of 1972, as David M. O'Brien explains, with an attempted break-in at the Democratic party headquarters, located in the Watergate apartment complex in Washington, D. C.[18] The burglars, planning to install secret listening devices, were working for Republican President Richard M. Nixon's personal campaign organization, the Committee to Re-elect the President (CREEP). Through a deliberate cover-up, Nixon and his aides were able to "appear" as surprised and shocked as everyone else at this illegal activity, and Nixon went on to win a second presidential term that November. The cover-up unraveled, however, during 1973 and early 1974 through the efforts of many different actors involved in this simultaneously petty and grand political drama, until the summer of 1974 when the Supreme Court ruled on the White House's claim of executive privilege, the House of Representatives prepared articles of impeachment, and President Nixon was forced to resign. As John Brigham comments, the "events of Watergate evolved from mystery theater to morality play with the Supreme Court slipping from neutral observer to the side of the angels as the identity of the angels became clear" (49).

The actors involved in the plot's unraveling included the following: John Sirica, a federal district court judge

who tried the burglars and pressed determinedly for public disclosure; Sam Ervin, a North Carolina senator who chaired the Select Committee on Presidential Activities; John Dean, a presidential counsel who "kissed and told" a lot, if not all, to Ervin's committee; Alexander Butterfield, an administration employee who revealed that Nixon had ironically "bugged" his own office; Archibald Cox, a special prosecutor who, upon refusing to accept Nixon's compromise offer on releasing taped conversations, was fired by Robert Bork in the "Saturday Night Massacre," along with Elliot Richardson and William Ruckelshaus; and Leon Jaworski, Cox's replacement, who pursued the release of Nixon's "Watergate" tapes all the way to the Supreme Court.

The Court became a key factor in the Watergate scandal on May 31, 1974, when the justices agreed to hear United States v. Nixon, an appeal by special prosecutor Jaworski, who had been frustrated in his attempt to subpoena from the administration various documents and tapes of conversations recorded in the White House. Two months before, a federal grand jury had indicted administration aides and had secretly named Nixon as an unindicted co-conspirator.[19] A September trial had been scheduled, and Jaworski was particularly interested in obtaining Nixon's tape-recorded conversations. Simultaneously, the House Judiciary Committee also wanted the tapes for its hearings on impeachment. Eight justices were involved in hearing the case: Chief Justice Burger and

Associate Justices William O. Douglas, William J. Brennan, Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, and Lewis F. Powell, Jr. The ninth justice, William H. Rehnquist, disqualified himself, apparently because of his former position in Nixon's Justice Department. The justices scheduled oral argument for July 8, 1974, with Jaworski representing the United States and James St. Clair serving as Nixon's counsel.

As the transcript of the oral argument shows, Nixon's counsel, claiming executive privilege and citing the separation of powers, was careful not to be pinned down on the basic issue of the Court's authority to decide whether Nixon had to hand over the tapes (Kurland and Casper 79: 837–915). Other hints of possible defiance, if the Court were to rule against Nixon, carried implications of a truly dangerous constitutional crisis, with the justices at center stage, now fearing a threat to their authority and the viability of their own institution (Rohde and Spaeth 201–03). Sixteen days later, on July 24, 1974, Burger delivered the Court's unanimous 8–0 ruling, insisting in the tradition of John Marshall that it was the Court's responsibility to "say what the law is," and that the President was not protected by his claim of absolute, unreviewable executive privilege. O'Brien describes concisely the effect of the Court's unanimous opinion:

> The announcement was dramatic and devastating for the President. Later that day, the House Judiciary Committee began televized debates on the exact wording of its articles of impeachment. Two weeks later, on August 8, 1974, Nixon resigned (222).

During those sixteen days between oral argument and announcement, what happened in the Court's closed, private culture of argument? At the time, of course, the "confidentiality of judicial deliberations" so important to Burger was preserved, supporting a kind of judicial privilege for the justices even as they were limiting the President's claim of executive privilege. In retrospect, however, we do know a fair amount about the dynamics of argumentation that resulted in the odd text of United States v. Nixon. Like other famous cases that have passed into the category of "history," such as Brown v. Board of Education, the Nixon case has been illuminated over the years by the proliferation of interviews, reminiscences, papers, and so forth.[20]

O'Brien draws on the papers of William J. Brennan to trace the private deliberations of the justices and the final text that was negotiated. The unanimous vote was apparently not a problem, but the generation of the opinion was. In the best tradition of John Marshall's administrative rhetoric, Burger had assigned the opinion to himself as Chief Justice, only to find that the other justices had problems with the degree of "deference" shown to Nixon in early drafts

(219–21). The justices (and their law clerks) worked intensively on various sections of the text, engaging in a series of textual and personal exchanges—drafts, counter–drafts, composite counter–drafts, memoranda with suggested revisions, proposals for alternative sections orsubsections, small–group conversations of the justices in various combinations, and strategy sessions with justices' law clerks.

Through this process of negotiation, a single text was finally assembled, according to O'Brien, with different justices in effect writing different sections:

> Blackmun's work became incorporated in the statement of facts. The first section, on matters of jurisdiction, reflected Douglas's work. The second, on justiciability, was a compromised version of drafts by Burger and Brennan. The third, dealing with subpoenaing the President, drew on White's early work. Powell, Stewart, and Brennan had a hand in drafting various parts of the final section, on judicial review of claims to executive privilege (221).

This is apparently what happened, although we will never know for certain how accurate the account is (Thurgood Marshall is oddly missing from the composition process altogether). The text of the opinion is marked off in sections matching the purported division of labor:

		U.S. Reports
(1) Syllabus	3+ pages	(683–686)
(2) Burger's Opinion	31 pages	(686–716)
Statement of Facts	(4 pages)	
I. Jurisdiction	(2 pages)	
II. Justiciability	(5 pages)	
III. Rule 17 (c)	(5+ pages)	
IV. The Claim of Privilege	(13+ pages)	
Untitled subsections A through E		

But when we examine the opinion as recorded in United States Reports, UNITED STATES v. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., 418 U.S. 683, we find only that Chief Justice Burger, joined by all the participating justices, "delivered the opinion of the Court" (686).

If we really want to understand who is saying what to whom, then we find ourselves on the horns of a dilemma. On the one hand, if we accept at face value the designation of Burger as author, then we naturally say "Burger argues," or "Burger intends," or "Burger constructs his text in one way or another." But Burger was apparently not the author in any meaningful sense. If we assume, on the other hand, that the text was patched together by multiple authors, unidentified in any specific passage, then we are forced into expressions such as "the text argues," or "the institution intends," or "the Court constructs its text in one way or another." But

people argue, have intentions, and construct texts—not texts themselves (that is an absurdity), not institutions, not even the Supreme Court of the United States.[21] Thus, United States v. Nixon is, in one sense, a Marshall-style single-text opinion, an example of the Court's judicial voice serving an instrumental purpose. But it is very different from the strong deliberative voice of McCulloch v. Maryland, different from Brown v. Board of Education as well. If we attempt to read the text by projecting a "fictional" institutional author, by assuming that the text possesses the usual traits that make texts readable, give them cohesion, and so forth, then we will find ourselves puzzled by the imagined writer's ineptitude and shifting tones, styles, and voices.

There is a mechanical orderliness to the text, typical of unsynthesized collaborative efforts of this sort. The imagined author (the collective text?) raises a series of questions in each section, analyzing each in investigative fashion and providing an answer at the conclusion of each respective section. After a highly technical, business-like rendition of the case's history, an almost deadpan narrative in its tone, the "threshold" question of jurisdiction is presented first: Is this case properly before this court? There is talk of "appealable" orders, "timely" filings, and "finality" requirements, replete with case and code citations, all leading to an affirmative answer at the end.

But note the following sentence as an example of the authorship problem:

> To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between the two branches of the Government (691–92).

Is this Burger speaking with deference towards the President, or is this Douglas speaking with a satirical grin?

The second section concerns issues of justiciability and intra–branch disputes. Two related questions are posed: (1) Does the Special Prosecutor have standing to bring this action? (2) Is a justiciable controversy presented for decision? With an eight–line string citation, reminiscent of the Court's late nineteenth–century style of opinion writing (Pratt), the collective text works its way through to "yes" on both questions, with rejection of "mere" assertions, "surface" inquiries, and "theoretical" possibilities. There is much talk of consistency, of being "bound" by the "force of law," along with another voice characterizing the President as "steadfast" in his "assertion of privilege against disclosure of the material" (697).

The third section, entitled "Rule 17 (c)," deals with legal technicalities concerning the subpoena <u>duces tecum</u>, an order to produce specified materials, in this case in the

context of a federal criminal proceeding. The question is posed—whether the requirements of Rule 17 (c) have been satisfied—and the special prosecutor's actions are examined in terms of "burdens" to be carried and "hurdles" to be cleared. There is more talk of "deference" to the President interjected:

> In a case such as this, however, where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17 (c) have been correctly applied (702).

The answer given, finally, is a careful "yes."

The fourth section, entitled "The Claim of Privilege," is the longest (13—plus pages) and obviously most significant part of the 31—page opinion. Two questions are presented: (1) Does the separation of powers doctrine preclude "judicial review of a President's claim of privilege"? (2) If not "absolute" executive privilege, can the President claim privilege over the subpoena duces tecum? The answer to both questions is "no," but the prose is muddy, the organization confusing, and the explanations for the justices' judgments are apparently disappointing, even for readers trained in the law. Here is Philip Bobbitt's assessment of United States v. Nixon:

> In contrast to other weak doctrinal opinions, the Tapes Case has been charitably treated by commentators. Yet I venture to say that it is the worst set of doctrinal arguments—the least convincing, the most easily refuted, brief but repetitious, bombastic but unmoving—one is likely to encounter in the recent volumes of the United States Reports (212).

Reading his own judicial analysis into the opinion, Bobbitt goes on to argue that the Court's decision was nevertheless successful in serving an "expressive function," conveying "a national goal captured by the cliches 'a government of laws, not men' and 'equal justice under law'" (217).

Ironically, John Marshall is quoted several times in this opinion (in fact, one passage is quoted twice, the second time introduced as if the first). While not every justice can write like John Marshall, the Supreme Court's Shakespeare, the text of United States v. Nixon represents an extraordinarily poor performance, however the responsibilities of authorship are explained. Several of the justices participating in the case have reputations as good, competent writers. But the collective text in this situation, patched together out of the justices' private culture of argument, is a failure. At a dramatic moment in the life of the Court, we cannot help but look for the clear thought and deliberative character of a Marshall or a John Jay. Instead, we get a mechanical, muddied text, written by all and none.

4. Regents of the University of California v. Bakke (1978)

The Text as Living Thought or Lawyers' Document?

If the single judicial voice in Brown v. Board of Education was a reticent performance at a significant moment in the Supreme Court's history, then the justices' multiple voices in Regents of the University of California v. Bakke, the 1978 reverse discrimination case, represent quite the opposite.[22] For 156 pages, the justices write profusely in various combinations, "concurring in part and dissenting in part," as they publicly explain their brokered decision. There was no majority opinion for this famous case in which Allan Bakke, a white male, challenged the minority "quota system" for admission to the Medical School of the University of California at Davis. After months of private deliberations and exchanges of draft opinions, the justices issued a plurality opinion—i.e., a series of separate opinions, no one of which had the support of a majority of the justices.

The multiplicity of the justices' voices cannot be attributed to the "frenetic haste" of time pressures, as in New York Times Co. v. United States. The justices literally had as much time as they wanted to work through to a determination of the Bakke case. But they apparently did not respond to the centripetal pull of the Court as an

institution in the tradition of John Marshall's administrative rhetoric, perhaps because there was no direct sense of threat to the authority of the Court, as had existed in Brown and United States v. Nixon. Quite the contrary, the justices in Bakke speak diversely and in great detail, fulfilling their individual roles in a variety of different ways. Unlike Earl Warren and the other justices in Brown, the justices in Bakke obviously felt no ambiguity about the Court's community of authors and audiences, the processes of argumentation and public deliberation, or the value of language itself. In this pluralistic, centrifugal performance of opinion writing, the problem for general readers arises with the justices' identification of the Court's community of authors and audiences, and thus in the nature of appropriate language and argumentation chosen to persuade this community. The justices' diverse opinions and deliberations are made public, but the "public" audience to whom they speak appears to be another closed culture of argument, that of legal professionals and scholars.

In the 1970s reverse discrimination was an issue waiting for an appropriate case. As Bernard Schwarz relates in Behind Bakke: Affirmative Action and the Supreme Court, Allan Bakke was a white male who twice applied and was twice denied admission, in 1973 and 1974, to the Medical School at the University of California at Davis. The Medical School had one hundred openings each year, with sixteen spots reserved

for minority applicants. Bakke sued, pointing to minority applicants who had been admitted with lower grade-point averages and MCAT (Medical College Admission Test) scores than he had. Bakke claimed that he had been discriminated against on the basis of race in violation of (1) the equal protection guaranteed to all citizens by the Fourteenth Amendment, (2) a similar protection in California's state constitution, and (3) Title VI of the 1964 Civil Rights Act. In the state courts Bakke's challenge was eventually successful, although the issue was apparently decided on complex grounds that avoided dealing directly with constitutional questions. After much debate the University's regents voted to appeal, and the case was accepted in February of 1977 for review by the United States Supreme Court.

By October 12, 1977, when the justices heard the oral argument, an extraordinary amount of national interest in the Bakke case had developed. Well over 1,500 pages of briefs and related materials had been generated by a vast array of organizations and groups interested in the case in one way or another (see Kurland and Casper, vols. 99, 100). According to Schwartz, the justices were also intensely focused on the case, "immersing" themselves in discussions and preparing memoranda in advance: "Justice Brennan, in particular, wrote some of his 1976 term opinions with Bakke in mind" (42-43). In the oral argument, Archibald Cox represented the

University, Wade H. McCree, Jr., United States Solicitor General argued as amicus curiae (friend of the court), and Reynold H. Colvin represented Bakke. Chief Justice Warren E. Burger heard the case, along with Associate Justices William J. Brennan, Potter Stewart, Byron R. White,Thurgood Marshall, Harry A. Blackmun, Lewis F. Powell, Jr., William H. Rehnquist, and John Paul Stevens.

Schwartz details a fascinating series of "behind-the-scenes" interactions among the justices as they attempted to negotiate their opinions in the months following the oral argument. As in the Brown and Nixon cases, this information about the justices' private culture of argument was not available to the general public on June 28, 1978, when the Bakke opinion was delivered. In retrospect, we know that the justices engaged in a "deluge" of memoranda throughout the prolonged decision-making process, arguing a multiplicity of legal issues and doctrines in highly technical legal language (Schwartz 99). Burger and Rehnquist were at one end of the judicial spectrum, ready to support Bakke from the start; at the other end, Brennan and Marshall were determined to uphold the University's admissions program. This left five "undetermined" justices in the middle: White, Blackmun, Stevens, Stewart, and Powell. The justices slowly sorted themselves into various voting blocks, but continued to argue over the legal grounds of their respective decisions, their quarrels spilling over into

negotiations on the writing of other opinions.[23] At the end of April, 1978, they were still amazingly unsure themselves of what the outcome of the case was going to be.

The "logjam" in deciding the Bakke case, as Schwartz describes it, was broken in May with Blackmun's vote—joining Brennan, Marshall, and White—to uphold the University's admissions program using their readings of Title VI and the Fourteenth Amendment as justification. These four votes reversing the state court's decision were exactly balanced by the four votes of Burger, Rehnquist, Stewart, and Stevens, who wanted Bakke admitted, also using Title VI to affirm the state court's decision. "Justice Powell," Schwartz reports, "was for affirmance on the ground that the Davis program violated equal protection, but for reversal of the California holding that race could never be considered as a factor in admissions programs" (136). Powell was subsequently assigned to write the Court's "judgment" (not the "opinion of the Court"), and the other justices busily negotiated their own statements.

As recorded in United States Reports, REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE, 438 U.S. 265, this curious opinion captures in print the strategic processes of the justices' deliberations. The long text of the opinion breaks down into the following components:

			U.S. Reports
(1)	Syllabus	4 pages	(265–268)
(2)	Powell Opinion	55 pages	(269–324)
	Judgment of Court (3 paragraphs)		
	Sections I–VI (with various A–D subsections)		
	Appendix (Harvard College Admissions Program)		
(3)	Opinion of Brennan, White, Marshall, & Blackmun (concurring/dissenting in part)	55 pages	(324–379)
(4)	White Opinion	8 pages	(379–387)
(5)	Marshall Opinion	15 pages	(387–402)
(6)	Blackmun Opinion	6 pages	(402–408)
(7)	Stevens Opinion joined by Burger, Stewart, & Rehnquist (concurring/dissenting in part)	13 pages	(408–421)

For all this generation of words—Erasmus's copia, if not his golden stream—the meaning of these texts and the significance of the case remain arcane. The newspaper headlines ranged from various versions of "Bakke won," to "the University won," to "everybody won," to "nobody won" (Schwartz 151–52). The personal result for Bakke was that he was admitted to the Medical School. College affirmative-action admissions programs found in the decision an approval of the "goal" of diversity based on multiple

factors, including race, so long as specific numbers or "quotas" were not set.

The seriatim conversation in the text of Bakke has little in common with Chisholm v. Georgia or even New York Times Co. v. United States. A passage in Powell's opinion encapsulates the problems of listening in on the justices' deliberations. Powell, a technical procedurist and pragmatic holder of the "lawyer's" seat on the Court[24], claims that the "language of [section] 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (284).

The idea behind this piece of instrumental discourse is certainly noble in its intention, but is the language "majestic in its sweep"? Powell immediately follows with this statement of his own intentions:

> The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. Train v. Colorado Public

Interest Research Group, 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Assns., 310 U.S. 534, 543–544 (1940) (284).

The contrast is extraordinary between Oliver Wendell Holmes, Jr.'s beautifully expressed notion of language as "the skin of a living thought" and Powell's surrounding technical discourse, a document that speaks only to lawyers as it dissects "levels of scrutiny" in extended detail. Powell does indeed pursue "precise" meanings in his 55–page opinion—elaborately,relentlessly, endlessly—with massive footnotes, multiple case and code citations, and numerous quotations of legal scholars.[25] Ironically, the justice even quotes Archibald Cox on the Court's role in "expounding the Constitution" (299).

A good portion of Bakke is written in this fashion, in what Robert F. Nagel calls the "formulaic style," an approach to writing that encourages justices to engage in "tireless, detailed debate" and to compose judicial opinions as if they were law review articles (121). Quoting Michael Oakeshott, Nagel describes this style as "an impressive display of the rationalist's preference for knowledge that is 'susceptible of formulation in rules, principles, directions, maxims . . ." and that "emphasizes carefully framed doctrine expressed in elaborately layered sets of 'tests,' 'prongs,' 'requirements,' 'standards,' or 'hurdles'" (121). As an

example, Nagel analyzes a section of Brennan's opinion in Bakke, criticizing the text for its formulaic "compartmentalization" and simplification of complex moral issues (151–52). Despairing of the justices' understanding of "conversation as a political art" and their relationship to "general culture," Nagel asks some important questions about the Court's community of authors and audiences:

> The less immediate, but more basic question, then, is why Justices and scholars have not been more dissatisfied with the awkward and degraded way of talking that has developed naturally along with the Court's instrumentalist role. Why are those who want the Court to intervene with wisdom and effectiveness in the culture not dismayed by a communicative style that isolates the Court from the governed and from their ordinary experiences and understandings? (154)

But not all of Bakke is composed in Nagel's formulaic style. Two of the separate opinions, one by Marshall and one by Blackmun, use plain-style language to reach a larger audience. While it is always difficult to assess the amount of law-clerk drafting, both of these opinions appear to speak personally and directly. Marshall, having joined Brennan's long opinion, did not need to write separately, but he obviously felt compelled to talk about what he saw as the sacrifice of "genuine equality" for some legal notion of "abstract equality" (398). Marshall begins at the beginning, recounting the history of slavery and its effects on

African-Americans, and ends by focusing on the irony of the Court's decision:

> While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible" (400).

While other justices present detailed analyses of "levels of scrutiny," Marshall speaks powerfully to core moral issues.

Blackmun, having also joined Brennan's opinion, did not need to write separately, but he apparently felt equally compelled to add some personal comments "on the edges of the central question" (406). In a sort of plain-style staccato, Blackmun strings together a small sequence of observations that speak to the intersections of law, society, and morality. Here, for example, is Blackmun commenting on Powell's Harvard model (an admissions program with "goals" but not "quotas"):

> I am not convinced, as MR. JUSTICE POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work (406).

And on the dilemma of reverse discrimination:

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy (407).

Blackmun ends by posing the "ultimate question" of Bakke: "Among the qualified, how does one choose?" (407) He answers curiously, intriguingly, almost like a poet, by quoting three passages: two from John Marshall on "expounding" the Constitution in McCulloch v. Maryland; and one from Woodrow Wilson, declaring that the Constitution is "not a mere lawyers' document" but a "vehicle of life, and its spirit is always the spirit of the age" (408). Bakke was a difficult case for Blackmun, a decision that could not be reached merely through legal technicalities and academic proficiencies. He concludes with a cryptic, provocative explanation of his three quotations or "precepts":

> These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a Constitution. The same principles that governed McCulloch's case in 1819 govern Bakke's case in 1978. There can be no other answer (408).

In "The Logic and Rhetoric of Constitutional Law," a classic essay written early in the twentieth century, Thomas Reed Powell argues for the importance of judges' individual voices. He insists that "the fact that judges disagree, and freely express the reasons for their disagreement, should add to our confidence in their labors rather than detract from it" (92). For Powell, confidence does not reside in the Court's judicial voice, in a collective institutional voice pretending to be human:

> We have nine judges instead of one, twelve jurors instead of one, because we know that human judgment is fallible and because we wish by increase of numbers to decrease the margin of error. Though when our passions are strong we sometimes forget that out of a multitude of counsel cometh wisdom, our enterprise of democracy is an expression of our abiding faith that the erring thoughts of individuals are best controlled by the full play of competing opinions (92–93).

Of course, the justices of the Supreme Court cannot function in a "goldfish bowl." No one can. People in institutions will always develop an informal private culture for exchanging ideas, debating choices, and working towards solutions. Perhaps what is dangerous, and potentially destructive for the Court, is to be found in the formal elaboration and official sanctioning of an internal, secret, private culture of argument—a rhetorical culture that Warren E. Burger felt was a constitutionally protected judicial

privilege. The Constitution is silent on how justices should interact, or even if they should do so at all. It is also silent on the writing of judicial opinions, in whatever generic form. We need to remember that we have made up all of this as we have gone along.

Notes

Four Modern Cases

[1] Corso provides a good survey of traditional attitudes concerning minority opinions (184–226). For a fresh, interesting approach to concurring opinions, see Ray, "The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court."

[2] For commentators with a rhetorical focus, see Dunbar and Cooper, "A Situational Perspective for the Study of Legal Argument: A Case Study of Brown v. Board of Education"; Hunsaker, "The Rhetoric of Brown v. Board of Education: Paradigm for Contemporary Social Protest"; and Prentice, "Supreme Court Rhetoric."

[3] The Brown case from Kansas was "consolidated" with three similar cases: Briggs v. Elliott from South Carolina; Davis v. County School Board from Virginia; and Gebhart v. Belton from Delaware. A fifth case, Bolling v. Sharpe from the District of Columbia, was decided separately.

[4] Kluger reports that Reed "apparently" dissented (694). But Warren makes a special point at the beginning of his Memoirs of denying that any dissenting votes were ever formally cast (2).

[5] Background and sources for New York Times Co. v. United States include the following: Cox; Currie, Second Century; Friedman and Israel, vol. 5; Kelly et al.; Kurland and Casper, vol. 71; O'Brien; Stone et al.

[6] The entire oral argument for the case lasted for two hours and thirteen minutes. Unlike the grand oratorical performances of Daniel Webster or William Pinkney, the modern version of oral argument before the Supreme Court challenges counsel to think quickly and speak concisely in intense exercises of dialectical give-and-take. In what surely echoes Marshall's administrative rhetoric, the transcripts of these oral arguments identify counsel by name but not

necessarily the justices. When a speaks, he or she is usually identified as "THE COURT."

[7] See Frank, "Hugo L. Black," and Dunne, "Hugo L. Black." See Frank, in particular, for a discussion of Black's membership in the Ku Klux Klan.

[8] See Campbell; Countryman; Frank, "William O. Douglas"; and Rodgers.

[9] See Friedman, "William J. Brennan," and Lewin, "William J. Brennan."

[10] See Israel, "Potter Stewart," and Friedman, "Potter Stewart."

[11] See Israel, "Byron R. White," and Friedman, "Byron R. White."

[12] See MacKenzie, "Thurgood Marshall," and Clark, "Thurgood Marshall."

[13] See MacKenzie, "Warren E. Burger," and Norman, "Warren E. Burger."

[14] See Dorsen, "John Marshall Harlan."

[15] See Pollet, "Harry A. Blackmun."

[16] Bobbitt calls this approach to constitutional interpretation "structural argument," drawing on the work of Charles Black. See also an interesting discussion by Tribe and Dorf on "dis-integrative" and "hyper-integrative" ways of reading the Constitution.

[17] New York Times, 6 July 1971: 16.

[18] Background and sources for United States v. Nixon include the following: Bobbitt; Brigham; Cox; Currie, Second Century; Friedman and Israel, vol. 5; Kelly et al.; Kurland and Casper, vol. 79; O'Brien; Stone et al.

[19] Seven Nixon associates were indicted: John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W.

Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan.

[20] The amusing account of the Nixon deliberations in Woodward and Bernstein's The Brethren certainly adds weight to Burger's concern about losing judicial confidentiality, especially as Burger himself is made to look like an incompetent fool. While The Brethren is unquestionably interesting and fun to read, I have tried to avoid using information from this popular book without substantiation from other sources and documented accounts. The very popularity of such a tell-all work, filled with law clerks' gossip, suggests some of the problems with closed cultures of argument in democratic societies and what Brigham calls "the cult of the court."

[21] We do in fact write phrases such as "the essay presents," "the article deals with," "the editorial takes a stand on." But these are largely figurative conventions of language. Try saying "the book deliberates. . . ." See Ong for an interesting discussion of oral vs. written modes and books as "objects" or "containers" of knowledge.

[22] Background and sources for Regents of the University of California v. Bakke include the following: Bobbitt; Currie, Second Century; Friedman and Israel, vol. 5; Kelly et al.; Kurland and Casper, vols. 99, 100; Nagel; O'Brien; Schwartz, Behind Bakke; Stone et al.

[23] According to Schwartz, Blackmun, who was the last justice to make up his mind about Bakke, quarreled with Brennan over Baldwin v. Montana Fish & Game Commission, a case dear to Blackmun's heart, that Brennan was dragging his feet on. At an April case conference, Blackmun "attacked" Brennan, insisting that he "would not vote in Bakke until Brennan voted in Baldwin" (127).

[24] See Neuborne, "Lewis F. Powell, Jr."

[25] Despite Powell's interest in precise meanings, he dismisses the differences between racial "goal" and "quota" as a "semantic distinction" that is "beside the point" and insists on the more general term "classification" (289). See Block on some other terms defined by Powell in his opinion.

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