Inventing the Rule of Law: A Rhetorical Analysis of U.S. Supreme Court *Per Curiam* Opinions

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Abstract

The rule of law is the U.S. Supreme Court's justification for action, and because of the authority given to the Supreme Court in U.S. legal culture, the Court's speech about the rule of law shapes the lived experience of legal subjects. *Per curiam* opinions (*per curiam* meaning "by the court") obscure the identity of the author of the opinion, and are used relatively rarely, indicating that this designation reserved for exceptional cases *per curiam* opinions, and for these reasons *per curiam* opinions can serve as limit cases for studying the rule of law. This dissertation conducts rhetorical analysis of three U.S. Supreme Court *per curiam* opinions in order to explore changes in the meaning of the rule of law: *Brandenburg v. Ohio* (1969), *DeFunis v. Odegaard* (1974), and *Bush v. Gore* (2000).

The *per curiam* opinion in *Brandenburg v. Ohio* (1969) raised questions about the power of the courts to enact the law because the rhetoric of the opinion showed the law as correcting the Court's mistaken decision in *Whitney v. California* (1927). The *per curiam* label, however, attributed responsibility for the decision in *Brandenburg* to the Court, thus creating conflicting accounts of where judicial power lies.

In the Supreme Court's *DeFunis v. Odegaard* (1974) *per curiam* opinion the rule of law appeared as a bureaucracy as procedural rules were used to trump substantive issues. The *per curiam* opinion may have aimed to make the opinion more palatable, but for some audiences it appeared as cover for darker motives.

The *Bush v. Gore* (2000) *per curiam* opinion aimed to justify the Court's involvement in the Florida vote for presidential electors, but the rhetoric was missing evidence and support. The *per curiam* label obscured the facts of authorship making it impossible to hold the author(s) accountable for the opinion, and for the kind of rule of law the opinion promoted.

Comparing the rule of law in each of these opinions to the Court's foundational *Marbury v. Madison* (1803) opinion makes it possible to consider whether these opinions use the "rule of law" to create the conditions of possibility for a deliberative democracy or whether the "rule of law" is used as an crude justification for authoritarian power.

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Chapter 1 "The Rhetoric of the Rule of Law in *Per Curiam* Opinions"

"Both law and authority are made, and largely made in the process of writing the opinions by which the decisions reached by courts are given their meaning. In this sense the law can teach all of us how to live in a world in which each culture is its own ground, made out of itself, as a language or human life is made out of its own beginnings."
— James Boyd White, *Justice as Translation,* 217.

James Boyd White's description of law in the epigraph above requires that law must be a rhetorical practice as it creates meaning through language use. Rhetorical studies scholarship has long recognized the power of rhetoric to constitute communities and create systems of belief (Scott, "On Viewing Rhetoric as Epistemic"; Scott, "On Viewing Rhetoric as Epistemic"; Charland; White *Heracles' Bow*).[1] Judicial opinions are exemplary of this function of rhetoric. The opinions offer arguments in support of a court's decision that are aimed to persuade audiences of the rightness of the decision reached but also, at a deeper level, judicial opinions employ rhetoric to construct legal culture. Judicial opinions shape popular knowledge about what is "legal" and "illegal" and because they speak the authority of the Court they shape popular understandings of what make the United States a "government of laws, and not of men" (*Marbury v. Madison* 163). From this perspective, the study of judicial opinions promises to

[1] Though the picture of law presented in institutional texts like Supreme Court opinions is necessarily partial, these are texts that carry clout in U.S. society, and because of their institutional status, these texts are more likely to circulate widely. Though it would be unreasonable to expect that Supreme Court opinions would be widely read by most of U.S. society, the terms and frames through which the Supreme Court defines the law often are repeated and circulate through media accounts of the Court's actions and of the law generally (Vecera). The ways in which the Supreme Court articulates a vision of the rule of law are likely to circulate, even if the opinion in which it is articulated is not widely read, and because of its institutional nature will hold authority both in legal and popular thought.

illuminate how the rhetoric of judicial opinions constructs justifications for law's power in the United States.

Justifications for the Court's actions always involve describing relationships between the law, the Supreme Court, and legal subjects.[2] These justifications are articulated under the sign of the "rule of law."[3] As Paul Kahn explained, in the United States "the courts identity themselves, wholly and completely, with the rule of law" (Kahn 5). The rule of law is the warrant for judicial power. Yet, as White noted above, the grounds of law are rhetorically constituted through judicial opinions. Thus, the rule of law is at once the basis for judicial power and the result of the courts' work. The concept of the rule of law is at the heart of all judicial opinions for this reason. Outside of the judiciary, the rule of law is a key concept in U.S. public life because it justifies the use of law, in place of other forms of rule

The rhetoric of the rule of law has been given too little attention in studies of legal rhetoric. In the last 20 years scholars of rhetoric have explored the rhetorical appeals of legal texts in detail, especially judicial opinions.[4] Yet, more attention needs to be paid to

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[2] The rule of law is defined variously in legal studies, political science, and international relations, yet each boils down to the relationship between political institutions, which the U.S. is the Court, the law, and legal subjects. Some of these definitions include: the "putting into practice of an ideal of governance under rules that meet conditions of publicity, generality, coherence, and nonretractivity" (Kahn 3); "judicial independence" (Ginsburg); or a state wherein the government provides the necessary contexts for humans to pursue their personal goals with dignity (Tamanaha 3). Each definition envisions a relationship between the law, legal subjects, and the Court, as representative of the government.

[3] The rule of law, because of its changing meaning, is often polysemic—with different audiences reading the term through their own preferred vision. Brian Tamanaha likened the rule of law to notions of the "good" because "everyone is for it, but have constrasting convictions about what it is" (Tamanaha). The fact that Supreme Court opinions almost never mention the rule of law does not mean that we should not search for the concept in them. Instead, the absence of explicit talk about the rule of law allows the Court, in each opinion, to construct a relationship between the law, the Court, and legal subjects so as to justify judicial action without clouding their meaning with the ideologies invoked by the term.

[4] See these studies for reference in addition to footnote one: Condit and Lucaites; Hasian, Condit and Lucaites; Mootz; and Scallen.

this ideograph as the Supreme Court's authority depends upon its claim to enact the rule of law. The nature of the courts' work—adjudicating individual cases—requires flexibility in the rule of law. The rule of law is an ideograph, a signifier that masks discordant voices in the service of ideological argument (Condit and Lucaites xii-xiii). Thus, to understand all the nuance of this term would require a complete study of all Supreme Court opinions. Such a project is impossible. It is possible, however, to study opinions in which the rule of law is particularly at issue. Supreme Court *per curiam* opinions, which replace the author's name with the label "*per curiam*" meaning "by the court," are often limit cases for the rule of law.

Opinions with the *per curiam* label differ from other majority opinions from the Court in two significant ways. The *per curiam* label hides the authorship of the opinion, ironically, drawing attention to the appearance of the Supreme Court as the author of the opinion. Second, this label is reserved for exceptional circumstances or cases, as indicated by the small number of these opinions.[5] The relative rarity of the label invites the question: why was it chosen?

The *per curiam* label, in marking the case as exceptional and focusing attention on the authorship of the opinion, provides a strategic opportunity for the Court to speak on behalf of the rule of law. In cases where the law is clear or the Court need only respond to procedural issues the *per curiam* label may indicate "that a case is considered routine or non-controversial" and what the rule of law requires here is self-evident to all the justices (Wasby et al., "The Per Curiam Opinion" 36). Yet, as I will show in the

[5] *Per curiam* opinions made up approximately 15% of Supreme Court opinions from 1946-2014 according to the Supreme Court database (Spaeth et al.).

history of the Court's use of the per curiam label later in this chapter, it is not the case that the label is used only in unproblematic cases. When dealing with controversial issues the *per curiam* label may "depersonalize the decision and in that way strengthen the Court's voice on a controversial matter" (Friedland et al.). In such instances, the Court seems to be saying that issues being decided are so controversial that the rule of law requires the united front of the justices to be accepted. The contrast between "routine" and "controversial" is telling. Difficult cases are more likely to require elaborate justification for the Court's actions and are more likely to deal with the rule of law. Since the first *per curiam* opinion was issued from the Court in 1862, the use of this label has steadily shifted from easy cases dealing with clear law to controversial cases involving substantive legal issues. This change means that the rule of law has increasingly become part of *per curiam* opinions. For these reasons, *per curiam* opinions are the limit case for consideration of the rhetoric and meaning of the "rule of law."

The relatively recent shift by the U.S. Supreme Court to employ the *per curiam* label in controversial cases raises questions of what effect this rhetorical appeal has on the rule of law. If the label were employed to avoid responsibility, conceal motives, or dodge criticism, then the label could harm the Court's authority. Though the Court's use of the *per curiam* label may aim to demonstrate a united front around a common commitment to the rule of law, its use cynically to avoid difficult discussions and issues would threaten the rule of law as a viable means of justifying law's rule in place of other forms of rule because it would make the rule of law a hollow shibboleth. To invoke the

rule of law, via the *per curiam* label, in ways that emptied the rule of law of ethical and political content would put the Supreme Court's authority at risk.

Rhetorical analysis offers the necessary tools to uncover whether articulations of the rule of law in Supreme Court *per curiam* opinions create meaningful relationships between the law, the Court, and legal subjects, or, instead, cynically employ the label to justify the Court's actions absent evidence and argument. This dissertation employs rhetorical analysis to investigate three *per curiam* opinions, *Brandenburg v. Ohio* (1969), *DeFunis v. Odegaard* (1974), and *Bush v. Gore* (2000). Each of these difficult, controversial cases prompts suspicion about the Court's motives for choosing the *per curiam* label. Analyzing these cases illuminates the rhetorical strategies that maintain the rule of law as it is pushed to its limits, and the opinions in these cases illustrate the role of the *per curiam* label as a rhetorical appeal. The rhetoric of *per curiam* opinions constructs the rule of law variously: yet the rhetoric of each opinion communicates as though the Court authored it. This similarity is important as it focuses attention on the Supreme Court as an institution.

To date, studies of *per curiam* opinions in the United States have shed light on the frequency of *per curiam* opinions and the contexts that generate them. Political science and legal studies scholars, the two traditional homes for Supreme Court research, have catalogued the ways that *per curiam* opinions have been used and these studies have uncovered the authorship of many of these opinions (Schwartz, "Justice Brennan and the Brandenburg Decision-A Lawgiver in Action"; Schwartz, *Behind Bakke*; Schwartz, *Decision*). Other scholars have debated whether the use of the *per curiam* label in these

opinions are detrimental to or protective of the Court's authority and power in the United States (Robbins; Markham). These studies provide important background for analyzing the pseudonymous authorship of the opinions, as well as the vision of the rule of law articulated in these opinions. However, what has been lacking to this point is a rhetorical analysis of the strategies typical of the *per curiam* label and the implications of those strategies for the readers' experience of a rhetorically constituted "rule of law."

To do this analysis the questions that need to be asked about *per curiam* opinions are: What are the rhetorical stylistics of the *per curiam* opinions—its typical syntax, word choice, and pseudonymous *per curiam* label? What does this style communicate about the rule of law in these opinions? What do the argument forms and modes of arrangement employed in *per curiam* opinions indicate about the rule of law? About pseudonyms as rhetorical appeals? These are the kinds of questions that rhetorical analysis is uniquely positioned to answer. The second chapter of this dissertation deals with the characteristics of legal rhetoric and offers background on the rhetoric of the rule of law in order to demonstrate the method of rhetorical analysis employed to analyze *per curiam* opinions in this project.

The remainder of this chapter proceeds by; first, surveying the history of *per curiam* opinions in order to demonstrate where the rule of law has been invoked in the use of these opinions, and second, considering the rhetoricality of pseudonyms using insights from studies of anonymous and pseudonymous texts conducted in other fields. Considering the rhetorical nature of pseudonyms makes possible the analysis of the *per curiam* label as a rhetorical strategy in later chapters.

Per Curiam *Opinions*

Per curiam opinions are a small but important part of the Supreme Court's history. The application of this label is part of a broader history that shows the changes in the way authorship was understood and enacted in Supreme Court opinions. This section begins reviewing the changes in opinion writing practices at the early Court and then surveys *per curiam* opinions and their relationship to unanimity. The changes to opinion writing practices and erosion of unanimity make it possible to analyze the *per curiam* label within a broader context of authorship norms at the U.S. Supreme Court. For this reason, it is important to begin with the early Court in order to see the development of contemporary norms.

Before 1800, the Supreme Court primarily followed the English norm of issuing *seriatim* opinions, meaning that each judge offered an opinion as to how to resolve the case at hand, and it was up to the readers to divine the outcome from the overlap of those opinions (Schwartz, *A History of the Supreme Court*; Newmyer). The United States Supreme Court followed this tradition for roughly the first ten years of its work, 1790-1801. Chief Justice John Marshall changed this practice. Marshall instituted the practice of issuing one majority opinion in each case. Though before Marshall's tenure the Court only issued a slim sixty cases (Rehnquist), Marshall's choice to eliminate *seriatim* opinions in favor of majority opinions was revolutionary and has continued to today.

Rhetorically, the shift from *seriatim* to majority opinions was significant because it changed the voice of the Court. Under the tradition of *seriatim* opinions the Court's opinions were a cacophony, speaking through several justices, and sometimes discordant

as each justice might offer a different reasoning in support of or against the decision. S*eriatim* opinions may have appeared more transparent because they offered insight into the thinking of each justice on the Court and proved that each justice had done their own work in the case (Cushman 27). However, *seriatim* opinions also may have given an aura of confusion and occlusion to the law as they offered several different theories of how a case should be decided with no guidance as to how to weigh the opinions in relation to one another.

By comparison, Marshall's majority opinions spoke in one voice, the voice of the Court, thus obfuscating the differences of thought among the Justices. Marshall's opinions also claimed an authority that *seriatim* opinions could not because *seriatim* opinions reflected only the individual beliefs of each justice. During Marshall's tenure at the Court concurring and dissenting opinions were rare. The rarity of additional opinions offered increased authority to the majority opinions because they appeared to represent consensus. Marshall's change has been preserved at the Supreme Court and decisions are still primarily announced in signed opinions written by one justice on behalf of a majority of the Court.

Marshall's change was far from universally popular, and one of its greatest critics was President Thomas Jefferson. Jefferson wrote that under Marshall's leadership:

> An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiesce of lazy or timid associations, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning. (Cushman 27)

Not only was Marshall's influence a concern for Jefferson, but Jefferson also feared that the lack of transparency would lead to infidelity to the law and the Constitution (Cushman). Interestingly, the charges leveled by Jefferson against majority opinions and in favor of *seriatim* opinions are very similar to the arguments made about *per curiam* opinions today.

The authorship of opinions and the transparency of the process are concerns that invoke the rule of law as a Supreme Court practice. Jefferson's comments revealed his fear that the legal process would fail to be accountable to the people, whether because it would be difficult to impeach silent justices, or because majority opinions would allow the Court to interpret the law of the land loosely. Jefferson also feared that without accountability the Court would practice the rule of law as an oligarchical rule, rather than on behalf of the people of the United States. Critics of *per curiam* opinions today make nearly identical arguments that the *per curiam* label prevents judicial accountability and allows judges to play fast and loose with the law (Robbins). The comments of Jefferson and critics of *per curiam* opinions reveal concerns about the nature of the rule of law. However, despite these criticisms the Court continues to issue majority opinions or *per curiam* opinions in most cases.

It was only after Marshall's tenure at the Court that *per curiam* opinions were introduced. The Supreme Court first published a *per curiam* opinion in the 1862 case *Mesa v. United States* (Ray 521). From 1862 through the early twentieth century the Court's *per curiam* opinions were generally short, a few lines or less, and decided cases that were clear or easily dismissed for procedural errors (Wasby et al., "The Per Curiam

Opinion"). *Per curiam* opinions in the nineteenth century and early twentieth century served a much more clear purpose than *per curiam* opinions today. During the nineteenth and early twentieth centuries the Court had much broader mandatory appellate jurisdiction then it has today. This meant that the Court was required to review a greater number of cases on appeal (Sternberg 3). By the turn of the twentieth century, the Court's mandatory review of appellate cases led to a two to three year backlog (Sternberg 4). In light of the Court's caseload during the nineteenth century the *per curiam* opinion offered an ideal forum for quickly dealing with cases brought to the Court under the mandatory review rules.

In 1925, a new judiciary act was passed to solve the backlog problem. The act almost entirely eliminated mandatory appellate review by the Supreme Court. The shift from nearly complete mandatory review of cases to almost complete discretionary review enabled the Court to limit the number cases it heard annually. For *per curiam opinions* this shift could have been significant. If these opinions primarily signified that the Court was dealing with an obvious case, or need only affirm the lower court, then removing mandatory review would have nearly eliminated the need for *per curiam* opinions. However, *per curiam* opinions did not disappear with the change in the Court's ability to choose which cases it would hear.

Through the nineteenth and early twentieth century *per curiam* opinions tended to be fairly uniform. Unanimity was much more common in the nineteenth and early twentieth century for all of the Court's opinions, but was particularly associated with *per curiam* opinions, as none was accompanied by a dissent or other separate opinion until

1909 (*Chicago, B. & Q. Ry. Co. v. Williams*).[6] As these opinions expressed unanimity and tended to be very short, they embodied an ideal of legal rhetoric as brief, concise, self-evident and therefore invisible. These short *per curiam* opinions were interpreted as inconsequential because they reflected an easy case, unanimity among the justices, or indicate that the opinion was so straightforward it could have been written by any of the justices (Wasby et al., "Per Curiam Opinion"; Wasby et al., "Supreme Court's Use of Per Curiam Dispositions"; Gizzi and Wasby; Ray).[7]

The first dissent to accompany a *per curiam* opinion was written by Justice Holmes in *Chicago, Burlington, and Quincy Railway Co v. Williams* (1909). This dissent made it impossible to uniformly read the *per curiam* label as indicating unanimity.[8] Once *per curiam* opinions no longer signaled unanimity the meaning of the label had to change. After Holmes' dissent, the interpretation of *per curiam* opinions required more attention to the content of the opinion.

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[6] Until the 1930s the fact that *per curiam* opinions were overwhelmingly unanimous was much less remarkable because until that time unanimity was more common in all the Court's opinions. Scholars assert that the low numbers of separate opinions before the 1930s was due to a "norm of consensus," where private disagreement about the law was hidden from public view. This norm may have been based upon the belief that unanimous decisions enhanced the Court's institutional authority (Walker, Epstein, and Dixon; Haynie; Epstein, Segal, and Spaeth). The norm of consensus, if it existed, may have contributed to the number of unanimous opinions overall.

[7] These short *per curiam* opinions have been read similarly: as efficient means for deciding cases using minimal resources (Friedland et al.); or signaling that the case involved "'indisputably clear' substantive law," easy procedural issues, or "obviously moot cases" (Wasby et al., "Per Curiam Opinion" 30). Similarly, Wasby et al. argued that the *per curiam* label tells the audience that "a case is considered routine or non-controversial, at least to the majority deciding it" or that "the outcome in the case is obvious and should receive prompt compliance," (Wasby et al., "Per Curiam Opinion" 36). Ray too argued that the *per curiam* designation often signals legal triviality in part because the opinion is one "that any member of the Court could draft and that no member of the Court need sign" (Ray 519-520). These short *per curiam* opinions make up the bulk of all *per curiam* opinions across the Court's history, and few of these short *per curiam* opinions have garnered public attention.

[8] However, Holmes' dissent was still respectful of unanimity as a norm, and asserted that he felt it distasteful to dissent generally but that the issues in this case were too important to ignore (*Chicago, B. & Q. Ry. Co. v. Williams* 495-496).

The modern Court still uses *per curiam* opinions to deal with cases that it decides to hear, but finds are easily dealt with.[9] From 1946 to 2014 the Court produced, on average, about twenty-two *per curiam* opinions a year (Spaeth et al.). The rates of *per curiam* opinions annually demonstrate that the Court still finds these opinions useful even though it has near complete control in selecting the cases to be reviewed. The majority of the *per curiam* opinions produced are still relatively short and follow some of the norms of nineteenth century *per curiam* opinions, though *per curiam* opinions that appear most like those from the nineteenth century tend to evade popular notice.

In the twentieth century, the *per curiam* opinions that received popular attention and were most similar to the traditional *per curiam* opinion extended desegregation beyond schools. In *Mayor of Baltimore v. Dawson* (1955), *Holmes v. Atlanta* (1955), and *Gayle v. Bowder* (1956), the Court issued *per curiam* opinions that were very short and contained little to no argument, sometimes not even mentioning the legal issues involved. These *per curiam* opinions were also unanimous, like the *Brown v. Board of Education* opinions issued in 1954 and 1955. Rather than signaling that the legal issues were unimportant, these *per curiam* opinions allowed the Court to send the message that segregation was unconstitutional in all areas of public life, and to signal that the Court was unanimous (Ray).

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[9] For example, the Court can dismiss the case in a *per curiam* saying that the *writ of certiorari*, an order to hear the case, was improvidently granted (DIG), and the Court can do this before or after oral argument. Similarly, the Court can use a *per curiam* to orchestrate what is known as a Grant-Vacate-Remand (GVR), or a case where *certiorari* is granted, but the holding of the lower Court is vacated and remanded back to the Court, for further review. These two types of *per curiam opinions* show that there are still times and cases where the Court uses *per curiam* in ways that are similar to when the Court had mandatory jurisdiction over a large number of cases, meaning the decisions avoid substantive issues and lack separate opinions. However, because the Court is not forced to as take many cases today, they can easily let the lower Court's decision stand, effectively avoiding the need for any opinion, especially a *per curiam* noting that the case was relatively easily decided.

A second example of *per curiam* opinions that followed norm of short opinions were those announced to decide a case quickly but were later followed by more extensive opinions. For example, in *Ex Parte Quirin* (1942) the Court unanimously decided the fate of German saboteurs within three days of hearing arguments (*Ex Parte Quirin*). The *per curiam* opinion allowed the Court to quickly announce its decision without delaying to write detailed reasoning. The *per curiam* opinion was followed nearly three months later by signed opinions elaborating on the reasons for the decision. Similarly, in *New York Times v. U.S.* (1970), better known as the Pentagon Papers case, the Court issued a *per curiam* opinion that said little of substance, but decided the case. This allowed the justices to write separate concurring and dissenting opinions explaining their views without taking the time to build consensus over more than the barest minimum required for a decision. In these cases, the *per curiam* opinions dealt with issues that were neither easy nor clear, but allowed the Court to decide quickly when time was of the essence. However, these cases were unique in using the short *per curiam* opinion as a temporary stand in until more substantial opinions could be produced. These cases extended the *per curiam* label into new territory in dealing with difficult legal issues.

The Court extended the use of *per curiam* opinions further using these opinions to announce substantive changes to the law. In *Brandenburg v. Ohio* (1969) the Court's *per curiam* opinion overturned a precedent that had stood for 42 years (Schwartz, "Justice Brennan and the Brandenburg Decision-A Lawgiver in Action"). Similarly, the *per curiam* opinion in *Toolson v. New York Yankees, Inc.* (1953) appeared only to reaffirm the relevant precedent, but in fact modified the precedent and thus changed the nature of

the law (Ray 539). *Brandenburg* and *Toolson* both dealt with substantive legal issues using the *per curiam* pseudonym.

Along with breaking the traditional connection between the *per curiam* label and easy cases, the Court's opinions in the twentieth century also destroyed any remaining association of *per curiam* opinions and unanimity. In *Furman v. Georgia* (1972) every single justice wrote a separate opinion, making a total of 10 opinions. A more recent example of a similar phenomena was the Court's opinion in *Bush v. Gore* (2000), where the total of 6 opinions, one concurring and four dissenting, which made it possible to narrow down the likely authors of the *per curiam* opinion to two justices. These cases indicate that the *per curiam* label no longer signals unanimity.

Extending the use of the *per curiam* label to cases that are controversial, or involve substantive legal issues, or are not unanimous has led to a similar increase in the ways in which *per curiam* opinions are interpreted. Some audiences read the label as inappropriate when applied to controversial cases lacking consensus. Ray argued that the *per curiam* label, traditionally meaning "by the court," is oxymoronic when accompanied by concurring and dissenting opinions, and Robbins argued that opinions that break with traditional norms of the label are actually mis-uses of the label (Ray 520; Robbins 1199). Yet, others see the *per curiam* label as boosting the Court's authority in more controversial cases with "hot-button" issues. According to Friedland et al. announcing "the decision per curiam (sic) can depersonalize the decision and in that way strengthen the Court's voice on a controversial matter" (Friedland et al. 39). These various interpretations highlight the fact that because the *per curiam* label no longer has a clear

meaning that it must be interpreted in light of the text and context of any opinion to which it is applied.

Whether the *per curiam* label offers additional authority to controversial cases, as Friedland et al. suggested, or signals a strategic avoidance of duty by the Court, likely to harm the Court's authority, as Robbins argued, the *per curiam* label often implicates the rule of law. Friedland et al. suggest that the label encourages acceptance of a controversial decision (Friedland et al.). Robbins too describes the label as an issue with the rule of law as he sees the label as violating the "the environment of transparency, individual responsibility, and well-reasoned explanation—that keep the judiciary credible and accountable," (Robbins 1213). Robbins here expressed concern that the *per curiam* label provided cover for biased authors and inadequate evidence (Robbins 1213).

Though the identity of the author of some *per curiam* opinions has been identified, it is still important to consider the way that the *per curiam* label shaped the rhetoric of the opinion.[10] *Per curiam* opinions are first published as opinions "by the Court" and for this reason still circulate, often for years or decades, as pseudonymous opinions. For this reason, even *per curiam* opinions whose authorship is now known can contribute to our understanding of pseudonyms as rhetorical devices and to our knowledge of the rhetoric of the rule of law.

[10] Many justices make their papers available to the public after leaving the Court, and these papers have revealed the identify of many *per curiam* authors. For example, Bernard Schwartz's interviews with Justices on the Court revealed that the *per curiam* opinion in *Buckley v. Valeo* (1976) was written by three authors in order to produce a detailed opinion in a timely manner (Schwartz, *Decision*). Similarly, revealed in several of the Justices' papers is that the *Brandenburg* opinion was first drafted by Justice Fortas, but after his departure from the Court Justice Brennan revised the draft and released it as a *per curiam* opinion. In both these cases, and others, the author of the *per curiam* opinion has eventually been made public.

Studying the rhetoric of the rule of law in judicial opinions requires close careful attention to the text of the opinions. Ideally a study of the rhetoric of the rule of law would examine all judicial opinion or even all *per curiam* opinions. However, the scope of this project requires selecting a few such opinions as examples so as to pay attention to the detail of the text. For this project, opinions most resemble signed majority opinions are useful because they provide adequate text and argument for analysis—this requirement rules out particularly short *per curiam* opinions such as: *Fuhrman v. Georgia* (1972) and *New York Times Co. v. United States* (1971).

Along with the length of the opinion it is also useful to consider the likelihood that the issues of the case will invoke the rule of law explicitly. As I will show in chapter two, legal scholars have singled out *Marbury v. Madison* (1803) as the paradigmatic statement of the meaning of the rule of law in the context of Supreme Court decisions. In this historic opinion, Chief Justice Marshall articulated the basis for the legitimacy of the Court or what we have come to understand as "the rule of law" in the judicial context. I have selected cases in which Marshall's rationale is tested.

A primary tenet of Marshall's rationale includes the principle of *stare decisis* because the Constitution as a written document promises continuity to the meaning of justice over time. In the first of my cases, *Brandenburg v Ohio* 1969), *stare decisis* was tested as the Court's rhetoric struggled to find a way to justify what appeared to be a departure from this principle.

In my second case, *DeFunis v Odegaard* (1974), the Court's apparent willingness to avoid addressing a case on substantive grounds seems to call into question Marshall's

description of the Court's authority as grounded upon its willingness to act as the supreme arbiter of the law.

The third case, *Bush v. Gore* (2000) dealt with the separation of powers, a tenet enshrined in *Marbury v Madison.* But the rhetoric of the Court's decision appeared to invoke a justification that was based on political expediency rather than the deductive reasoning that Marshall enshrined as essential to the rule of law.

These three cases are chosen because they are limit cases for the rule of law: they test to the limit the Court's claim to be merely a vehicle for a transcendent Rule of Law.[11]

This survey far from exhausts all of the nuance of the Court's use of *per curiam* opinions. Yet, even this brief survey illuminates how the Court's use of these opinions has changed over time and demonstrates how the interpretation of these opinions must change as well. The Supreme Court's use of *per curiam* opinions in the twentieth and twenty-first centuries indicates that the *per curiam* label no longer has stable associations with easy cases and short, uncontroversial decisions. Instead, more modern *per curiam* opinions indicate that the *per curiam* label is still useful to the Court, but now may signify any number of things about the case, the context, or the text of the opinion. Today, the meaning of the *per curiam* label must be interpreted in light of the opinion that it accompanies, as what this label says about the rule of law is often specific to the case at hand.

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[11] Unfortunately other cases had to be rejected for analysis. For example, *United States v. Nixon* (1974) is a well known separation of powers case that was unanimous but was signed by Chief Justice Burger. Similarly, *Buckley v. Valeo* (1976) was an interesting case about campaign finance reform but is much too long to allow for the study of multiple cases in this project. Finally, *Ex Parte Quirin* (1942) opinion is a useful length but negotiating the difference between civilian trials and military trials requires attention to technical arguments that make it difficult to highlight the characteristics of the rule of law.

Pseudonyms as Rhetorical Appeals

Common sense tells us that the author matters. For example, some audiences will approach a text more or less charitably depending on whether Justice Scalia or Justice Ginsburg authored the opinion, as each justice is a kind of figurehead on opposite ends of the political spectrum. As James Markham noted, the justice's name often sets the frame for interpretation of the entire opinion (Markham 925). When the name of the author is missing and is replaced by the label "*per curiam*," audiences are likely to use this information too in their interpretation of the text.

The *per curiam* label is like a pseudonym and serves many of the same functions. It is useful to consider the *per curiam* label as a pseudonym, rather than as an anonymous opinion because a truly anonymous opinion would not be recognized as a judicial opinion. Pseudonyms are distinct from strictly anonymous texts because they are openly misleading about the author's identity. The "prefix 'pseudo' entails the sense of falsity and pretension, of something that is apparent, but not real. Unlike anonymity, which leaves the reader in a void, deception is inherent to the idea of pseudonymity" (Shalev 153-154).

Audiences respond to the deceptive nature of pseudonymous texts in several ways. A felicitous judicial opinion requires institutional markers of authority to prove that the text of the opinion is actually a legal pronouncement. This means that the opinion is not really anonymous in the traditional sense because the text must carry the markers that show that it was made by a judge in the course of their duties at a particular court. The *per curiam* label serves the function of giving institutional authority to otherwise

anonymous judicial opinions. The label also signals to audiences that the *persona* of the author is different, or that the author's identity is being disguised.

Authorial *persona* is the identity of the author constructed in the text through the rhetorical appeals, including the pseudonym employed. The pseudonym gives clues about the author even without the author's name. For example, pseudonyms like "by a lady," described relevant characteristics of the author (Lanser; Mullan). Similarly, some pseudonyms were used to communicate values or political beliefs of the author's *persona*. This was particularly common in political discourse, such as debates over ratification of the U.S. Constitution. Pseudonyms like "Cato," "Brutus," and "*Candidus*" invoked virtues and values through classical terms and examples. These pseudonyms encouraged audiences to consider the author's *persona* as representing the political values or ideals of a historical figure or Greek or Latin term (Ekstrand and Jeyaram; Shalev). Each of these types of pseudonym influenced the audience's interpretation of the authorial *persona* because the pseudonym communicated characteristics about the supposed identity of the author, such as gender or political affiliation.

Like other pseudonyms, such as "by a lady" or "Cato," the *per curiam* label calls attention to the absence of the author's name and obscures the identity of the author of the opinion. The characteristics the *per curiam* label invokes are those traditionally associated with the label, such as short opinions and insubstantial legal issues. In this way the label itself may communicate about the authorship and the content.

Another function of pseudonyms that is true of the *per curiam* label is that it hides the author's identity, either to protect the author or create the appearance of propriety.

Historical studies of pseudonyms illuminate many of the motivations that prompt authors to remove their names from a text.[12] The most common motivation identified across studies of pseudonymity is that authors hide their identity in order to avoid criticism or retribution for their compositions. This is motivation can be found in all genres, such as poems (Starner and Traister), novels of political satire (Mullan), news reporting in political pamphlets and tracts (Shalev; Ekstrand and Jeyaram). For centuries pseudonyms have provided protection from identification and from criticism and retribution.

A final function of a pseudonym traditionally was to create the appearance of modesty or propriety because it was consider improper attention-seeking to publish one's compositions (Mullan 53).[13] For the U.S. Supreme Court modesty may be a concern, but propriety is more likely to be invoked by the *per curiam* label as the label foregrounds the Court's institutional power. The *per curiam* label, like pseudonyms, has also encouraged speculation as to the identity of the author. Like other pseudonyms the *per curiam* label can provide the appearance of propriety in judicial opinions. When hotly contested issues are at stake as the *per curiam* label makes it more difficult to identity bias in decision-making.

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[12] Pseudonymous texts sometimes address the issue of motivation explicitly to avoid criticism. For example, during the U.S. constitutional debate authors writing under pseudonyms argued that they would be penalized for their ideas without the protection of a pseudonym. Along with defending their choice to write under a pseudonym, authors also asserted that their texts were more trustworthy because they would be judged only by the ideas presented and not by the author's identity (Ekstrand and Jeyaram). These arguments construct the author's motivation and persona so as to garner respect from audiences for behavior that might otherwise be interpreted as cowardly.

[13] Some authors were unconcerned with modesty, however, and instead chose pseudonyms in order to encourage speculation about the author's identity. For example, Jonathan Swift took great pains ensure that the publisher had no information about the author of *Gulliver's Travels*. After publication, Swift collected accounts from friends around the country about speculation as to the identity of the author. Mullan argued that given Swift's reputation as a satirist meant that the readers of *Gulliver's Travels* were likely to enjoy the process of discovering the author's identity as "Penetrating the secret was one part of the pleasure of reading this book" (Mullan 13).

The different approaches to interpretation prompted by pseudonyms, along with the authorial characteristics and motivations that are prompted by pseudonyms, demonstrate that pseudonyms are important rhetorical strategies in shaping the meaning of a text. Pseudonyms shape the audience's interpretation of the *persona* of the author (Campbell "The Personae of Scientific Discourse") and disguise the author's identity for protection or propriety.

The following chapters in this project study individual *per curiam* opinions that bring to light the central concepts and tensions in the rule of law as a practice of the Supreme Court. The following chapters offer insight into how the meaning of the rule of law changes with the rhetorical exigencies presented by different cases. Each analysis identifies how the particular opinion envisions the rule of law and how the particular conception bears on legal subjects. Through these three case studies we get a richer idea of the relationship between rhetorical strategy and the rule of law.

Outline of the Project

Chapter two, "Judicial Rhetoric and the Rule of Law," continues the exploration of the rhetoric of judicial opinions and the rhetoric of the rule of law. This chapter surveys the characteristics of legal rhetoric in order to frame the analysis undertaken in later chapters. This chapter also examines a foundational Supreme Court opinion, *Marbury v. Madison* (1803), Marbury captures in a definitive way the meaning of the rule of law and has been influential subsequently—both substantively and rhetorically.

Chapter three, "*Brandenburg v. Ohio* (1969): The Supreme Court as Mouthpiece for the Law," explores the heart of the rule of law asking, "Does authority lie in the law

or in the Court as arbiter of the law?" The case centered on Clarence Brandenburg, a KKK member who delivered a discriminatory speech at a Klan meeting. Brandenburg's speech was also broadcast by a local television station, which led to his arrest and conviction under an Ohio statute penalizing "criminal syndicalism." The Court was left to decide whether the Ohio statute was constitutional, even though the Court had ruled on a nearly identical statute forty-two years earlier. This chapter analyzes the rhetoric of the opinion and the strategies employed to overturn the Court's precedent while still appearing to exercise the rule of law.

Chapter four, "*DeFunis v. Odegaard* (1974): The Supreme Court as Bureaucrat," explores the Court's power and the rule of law as acting with propriety. DeFunis was an applicant to the Washington University Law School who was denied admission, though 72 students with lower g.p.a. and test scores were admitted. DeFunis argued that the University's affirmative action program was discriminatory, and he challenged the policy in Court. A Washington court ordered DeFunis' admission to the law school while the case made its way through the courts. The Supreme Court's opinion dismissed the case on mootness grounds. Rhetorical analysis reveals that the procedural arguments employed in the opinion have serious rhetorical limits, as well as consequences for the nature of the rule of law in the United States.

The fifth chapter, "*Bush v. Gore* (2000): Authoritarianism and the Rule of Law," deals with the penultimate question in the rule of law as an exercise of the Supreme Court: is the rule of law based in popular sovereignty or authoritarian rule? Analyzing the rhetoric of the Supreme Court's *per curiam* opinion in *Bush v. Gore* (2000) reveals that

the Court in *Bush* used rhetorical strategies that require a view of the rule of law as an authoritarian rule, in contrast to the vision presented nearly two-hundred years earlier in *Marbury v. Madison* (1803). The opinion offered little evidence and this, along with the *per curiam* label, allowed the Court to use an appeal to the Court's historical authority. This appeal to judicial authority responded to anticipated criticism of the decision. This was particularly significant as it changed the relationship between the people and the law from that articulated in *Marbury*.

The final chapter of this project considers the insights offered by all three case studies in order to draw conclusions about the rhetoric of the rule of law. This chapter also draws conclusions about the rhetorical possibilities of pseudonymous communication.

Chapter 2 "Judicial Rhetoric and the Rule of Law"

The rhetoric of judicial opinions is in many ways distinct from other discourses in the public sphere. When a Justice writes on behalf of the Supreme Court that Justice offers an "opinion," while simultaneously pronouncing the meaning of the law, this particular speech act in the United States requires rhetorical strategies that create the appearance of fairness, impartiality, and authority. In order to understand how these judicial norms are constructed, we need to understand the rhetorical means that constitute them. This chapter will proceed in two parts: first, this chapter surveys the characteristic rhetoric that constitutes judicial norms. That characteristic rhetoric received definitive expression in *Marbury v. Madison* (1803). Thus, the second part considers the rhetoric of the rule of law using the example of the Court's opinion in *Marbury*. The opinion might be said to be establishing a foundation for judicial norms around the "rule of law."

The Rhetoric of Judicial Opinions

Legal discourse often appears technical, and because it is technical, it excludes many audiences (Wetlaufer; Ferguson). The strategies and tropes that create this impression make legal rhetoric different from many other discourses. Like the rhetoric of science, the rhetoric of law often employs rhetorical strategies to create the appearance of high standards of evidence, objectivity in processes, and uniformity of interpretation (Gross; Fahnestock, *Rhetorical Figures in Science*). These characteristics justify legal authority as it makes legal thought and action appear superior to other modalities because law looks impartial and fair. The rhetoric of law is thus a rhetoric that appears non-

rhetorical (Wetlaufer). However, the rhetoric of law also relies heavily on history and tradition: it is these traditions that shape expectations of what the law is and what it should be.

The norms and traditions of legal rhetoric are perpetuated through legal training, which privileges Supreme Court opinions as foundational texts. These opinions teach students both about the state of law, as well as about legal rhetoric. Legal training, along with the Court's avowed doctrine of *stare decisis* (the principle that precedent should guide decision making) aid in explaining why the norms of legal rhetoric matter, as well as how one case, like *Marbury v. Madison* (1803), could have significant influence over the Court today. Legal education, like classical rhetorical training exercises known as *progymnasmata*, requires attention to the history of ideas and the means by which those ideas were communicated.

The *progymnasmata* was a set of exercises that taught students about arguments, tropes, and other rhetorical strategies that became the basis for students' own compositions. A very similar style of training is employed in U.S. law schools through the case method (Stevens). This kind of training teaches law students, like rhetors, how to preserve continuity or advocate change when it suits their purposes. This process creates and maintains community norms through the shared education offered to students (Leff). Ronald Dworkin described judicial opinions as texts in which judges express their intuitive knowledge of what is acceptable and unacceptable in order to be recognized as doing "law" when writing an opinion (Dworkin). What Dworkin described were not hard

and fast rules about what constitutes law, but instead the presence of a community with shared notions of what constitutes law (Fish).

That legal rhetoric strives to appear objective and inevitable points to the values associated with law and the characteristics that make the rule of law different from political rule. This section surveys many of the strategies by which legal rhetoric creates an aura of exclusivity in order to identify likely features of *per curiam* opinions. The sheer number of possible strategies that promote this invisible rhetoric makes it useful to divide them into categories based upon the means by which the rhetorical effects are accomplished, including: (1) strategies of argument, including tropes, subject of arguments, and evidence; (2) strategies of structure, dealing with the organization of material; and (3) strategies of style, including syntax and figures. Though these divisions separate strategies that work together to create and communicate a consistent message about the power and fairness of the law, it is useful to divide them, at least initially, in order to examine the means by which legal rhetoric creates the appearance of objectivity and superiority.

a. Argument and Evidence

The norms of arguments and evidence in legal discourse are particularly apparent, even to readers who have little exposure to legal texts. Legal rhetoric often uses particular argument forms to appear objective, even across different legal subjects and issues. Similarly, the types of appeals and evidence that are acceptable in judicial opinions are quite narrow.

Gerald Wetlaufer described the rhetoric of law as utilizing the form of logical deduction to encourage the perception that the arguments were logically irrefutable (Wetlaufer). This is particularly true in judicial opinions. Justice Holmes was one of the first to assert that the deductive form was often merely a shell in which judges pour their own biases and preferences (Holmes). The deductive form is particularly amenable to judicial opinions, as it requires that a predetermined rule is identified and then applied to the case at hand. The deductive form creates the appearance that the judge merely applies the law and the judge appears to have no influence on the outcome of the case. Utilizing deductive form creates the appearance of objectivity, and because it is a form used in formal logic, it sometimes appears logically irrefutable.

Along with argument form, the substance of arguments and evidence are key strategies in creating a legal rhetoric that appears predetermined. Particularly for the U.S. Supreme Court, the doctrine of *stare decisis* provides a key rhetorical constraint on judicial opinions, even if the justices of the Court do not actually use precedent to make decisions (Epstein and Knight; George and Epstein). Patricia Wald, a judge on the United States District Court of Appeals for the District of Columbia, argued that judges use precedent to communicate the clarity, or inevitability, of the law:

> [W]hen clearly relevant precedent might appear to dictate a different result from the one decided upon, it must be definitively distinguished (or, if possible, overturned) . . . . Sometimes the precedent will be dealt with contemptuously ('illreasoned,' 'rendered without explanation,' 'its origin overtaken by later cases,'

'widely criticized,' 'generating confusion,' 'at odds with other circuits,' 'ancient,' 'rarely cited or followed').” (Wald 1400)

Wald’s description of how judges frame precedents as relevant or irrelevant demonstrates the norm of precedent as justification for judicial decisions. Appearing to follow a precedent can work like deductive form to remove the appearance of bias from the decision because it looks as though the law alone dictated the outcome of a case. Defining relevant, and irrelevant, precedents allows justices to construct "the law" as a coherent and legible tradition that predetermines their decision. Here again law appears similar to science which claims to build on the shoulders of immortalized predecessors while, as Kuhn showed, in fact there is often a sharp departure from the previous paradigm (Kuhn).

Though precedent provides a primary source of evidence for judicial opinions, it is not the only source of evidence employed in judicial opinions. In the United States judicial opinions treat the Constitution as the supreme source authority. It is the foundational text for law in the U.S. Appealing to the Constitution justifies decisions and makes the Court appear a passive instrument of the law. In this way, invoking the Constitution creates the appearance that law dictates the outcome of a case.

Judicial opinions also invoke legal traditions, famous quotations from judges speaking outside of official role, and international legal texts. Even more important than the types of evidence employed in a judicial opinion are rhetorical strategies that create the appearance of evidence when it is absent. Chaim Perelman and Lucie Olbrechts-Tyteca’s *The New Rhetoric* identified several strategies for creating the appearance of

complete arguments in the absence of strong evidence. They explained that when evidence is absent the authority of the speaker serves as the evidence for the claim.

> For [a speaker] to put forward a conclusion as more certain than he himself [or she herself] considers it to be is to engage his [or her] person and use the prestige attached to it, thus adding an extra argument to those already advanced. (Perelman and Olbrechts-Tyteca 465)

Without evidence for an argument, the audience is left to use the speaker's credibility to evaluate the arguments. This appeal is especially useful for the Supreme Court as the Justices are granted institutional authority by virtue of their position.

Similarly, Perelman and Olbrechts-Tyteca demonstrated that elaborating several claims that appear to support one conclusion and appealing to modesty in crafting arguments can make arguments appear stronger and more certain than perhaps the evidence suggests (Perelman and Olbrechts-Tyteca 466-468). These rhetorical structures are integral for constructing arguments on thin evidence. Though judges need not provide reasons for their decision as their authority is separate from their justifications, it is useful to note when evidence is presented in support of or excluded from an opinion as this affects the vision of the rule of law.

Similarly, creating the appearance of self-evidence is a powerful rhetorical strategy, as if the arguments were obvious and unquestionable. Enthymematic reasoning can create the appearance of self-evidence. For Aristotle, the enthymeme was a syllogism where one of the premises or the conclusion was left unstated for the audience to fill in for themselves (Aristotle 1:21-22). Whether communicated through syllogism, or visual

appeal, the enthymemes ask the audience to complete the argument in their own minds (Finnegan; Bitzer). When the audience participates in the construction of the argument it can feel as though the conclusions were self-evident. Supreme Court opinions often use a kind of shortened syllogism to announce the rule that will be applied to the case and the Court's conclusion based upon the application of the rule (Goutal 44).

The audience must complete enthymemes. Leaving a puzzle for the audience to "solve" implies that the puzzle is easily worked out and the answer is obvious. It also offers a kind of reward to the audience for solving the puzzle, and thus encourages positive feelings toward the rhetor. This can be a particularly powerful argument form because for an audience the act of drawing out the implied meaning involves them in the process of making the argument. Drawing an inference can give audiences a sense of involvement in the argument, and can lend an aura of self-evidence to the argument because of the process through which audiences come to experience the argument.

H.P. Grice's theory of implicature explained how audiences could understand ambiguous communication by making reasonable assumptions to fill in the missing information (Grice 65-67). In this way implicature is like an enthymematic argument in that the audience supplies the missing information or assumptions in order to interpret the message. However, sometimes ambiguous communication cannot be puzzled out, whether because the context does not provide appropriate clues to determine meaning, or because too little information or evidence is provided.

Rhetors can employ ambiguous communication to mislead by relying on common assumptions made by audiences; this is called false implicature (Walzer). The Court, as an authoritative speaker, is particularly able to manipulate audiences by fostering the inference that evidence exists to support its arguments when it does not. False implicature can be a very useful strategy for the Supreme Court in creating the appearance that the decision produced was necessary and justified. However, this is a strategy we should be particularly wary of as it requires misleading the audience and violates the communicative purpose of the judicial opinion, to provide reasoned argument in support of the Court's decision (Aldisert).

In judicial rhetoric, strategies of argument and evidence create the appearance that judicial opinions follow formal logic, follow precedent, and have strong evidence. When these strategies are successful, judicial decisions appear incontestable. Judicial opinions also employ appeals to structure, which enhance the appearance of orderliness and objectivity communicated through the other strategies.

b. Structure

The same organizational pattern characterizes most majority and other precedent setting opinions of the Court. Instructional and advisory manuals on writing judicial opinions offer important insight into the structure of judicial opinions and the rhetorical purpose of that structure. Though these texts are prescriptive rather than descriptive, they offer a glimpse into the norms of the profession that have been internalized by many legal thinkers and authors. There are several texts offering advice to opinions writers, for this project the most useful is Ruggero Aldisert's thorough discussion in *Opinion Writing*, as

it provides adequate scope and depth as to the parts of the judicial opinion in relatively concise manner. Joyce J. George's extended discussion in *Judicial Opinion Writing Handbook*, and the concise *Judicial Writing Manual: A Pocket Guide for Judges* published by the Federal Judicial Center, are also useful, particularly to note deviations in advice from Aldisert's book.

Aldisert's *Opinion Writing*, now in its third edition, posited that judicial opinions are structured like classical rhetoric from the exordium to the peroration (Aldisert 77-79) and should have five primary sections: 1) an orientation paragraph(s) explaining the nature and history of the case, 2) a summary of the legal issues, 3) a description of the material facts of the case,[14] 4) an analysis of the issues, meaning the arguments justifying the decision,[15] and 5) a conclusion that disposes of the case and offers instructions to parties and lower courts (Aldisert 78-79; *Judicial Writing Manual: A Pocket Guide for Judges* 13; George 211). Each section presents material specifically designed to persuade audiences that "sound logic supports the court's decision" (Aldisert 142).

The orientation paragraph(s) of the opinion should offer background information on the topic, such as a brief summary of the case that alerts the reader as to the type of law involved (Aldisert 78-79). This paragraph allows the judge to frame the remainder of the opinion and to prime certain issues for the audience. If written strategically the orientation paragraph should allow the opinion writer to draw attention to the issues that

[14] George called for a discussion of recognized errors here, though arguably any errors could also be "issues." Then George also calls for an explicit discussion of the standard of review. Both of these are included into issues by Aldisert.

[15] George did not include this as a separate section.

aid their argument and divert attention from issues that might detract from agreement with the opinion.

Aldisert's *Opinion Writing* suggested brevity and clarity in the orientation paragraphs because "Users of judicial opinions —lawyers, judges, researchers and law students — tend to be very busy. As a result, they have highly selective reading habits. They need and expect to know what a given case is about, and the opening of an opinion should tell them immediately" (Aldisert 103). To accomplish the goal of conveying key information quickly, Aldisert recommended a journalistic style focused on merely reporting about the case (Aldisert 106). Rhetorically, taking on a "reporting style" suggests that authors use rhetorical strategies to create the appearance of neutrality and objectivity. The opening sections may set the tone that the opinion is merely a "report" of the requirements of the law, but these sections serve important rhetorical functions in crafting the description of the case in such a way that the arguments used in the later parts of the opinion appear justified in response. Though the argument may not be explicit, this creative framing is no less central to the rhetoric of the opinion.

By the end of the orientation paragraphs "no reasoning has appeared. The reasoning scheme … will not start until after the end of that lengthy factual information" (Goutal 52-53). After the orientation, the opinion often describes the legal issues in the case, including what law or rule will govern the case. The selection of which legal issues will be addressed is also a rhetorical one. Sometimes each parties' brief identified different legal issues and selecting one or the other shapes the outcome of the case. For example in *Bowers v. Hardwick* (1986) the majority opinion identified the primary legal

issue as constitutional protection for sodomy, while the dissenting opinion argued that the legal issue was a right to privacy for consenting adults (*Bowers v. Hardwick*). Presenting the legal issues in a case allows the judge to frame some issues as central and others as peripheral, which will shape the decision reached in the opinion (Aldisert 115-118).

Often the issues section will also preview the Court's conclusion stating the Court's decision and what rule was used to reach that decision. Goutal described this as a "collapsible syllogism," as it omits the explanation of how the rule when applied to the case determines the result (Goutal 53). Reasoning is provided later in the opinion, yet this preview of the Court's conclusion can make the conclusion appear self-evident. It also, however, has the potential to create the appearance that the Court provides justifications after making its decisions, rather than using deduction to come to a conclusion.

Aldisert encouraged opinion writers to describe the facts of the case as the third section of the opinion. Aldisert advised authors to use facts of the case selectively, only including in their opinion those facts that influenced their decision or are otherwise material to the case (Aldisert 132). Rhetorically this kind of selection should work to frame the case to suit the outcome of the opinion. The description of central legal issues and material facts is also important for setting up the evidence offered later in the opinion as the doctrine of *stare decisis* requires the outcome of the case by determined by the outcome of sufficiently similar previous cases. Early in the Court's history Justice Johnson found that laying out the facts could shape the result of the case, as he described Justice Marshall as being particularly adept at leading the Court to a particular result through his description of the facts of the case (Cushman 26-27). Identifying certain

issues and facts as important frames the outcome as either required by precedent or as breaking with precedent.

The fourth section of a judicial opinion analyzes the issues of the case and is the most explicitly persuasive. This section offers argument and evidence in support of the Court's conclusion in order to demonstrate to audiences that the case was justifiably and correctly adjudicated (Aldisert 157, 142). This section of the opinion is central to creating and maintaining judicial legitimacy: "In the common law tradition the court's ability to develop case law finds legitimacy only because the decision is accompanied by a publicly recorded statement of reasons" (Aldisert 12). We can assume that reasoning would be the most important because it is most likely to encourage acceptance of the opinion and the section most useful for demonstrating that the Court's decision was justified.

The final section of the opinion suggested by the opinion writing manuals concludes the opinion and disposes of the case. Much of the advice offered about this section encourages clarity so that lower courts and other legal actors can carry out the court's decision quickly and efficiently (George 220-224). The advice on concluding is generally brief but forceful as "Disposition of a case—and the mandate to the lower court or agency, when that is a part of the disposition—is the most important part of the concluding paragraph" (*Judicial Writing Manual: A Pocket Guide for Judges* 19). The conclusion and disposition often fulfill the key function of judicial opinions in giving guidance to lower courts on how to act (Schauer, "Refining the Lawmaking Function of the Supreme Court").

The five sections of a judicial opinion suggested by these manuals provide prescriptive advice for opinion writers on how to organize a judicial opinion. The formula presented by these manuals offers an idealized view of the judicial opinion that expresses the internalized norms of the legal community. The advice offered in these manuals does not necessarily represent consensus about the best writing styles, arguments, or even structures to be employed in judicial opinions (Posner; Wald, "A Reply to Judge Posner"), yet the opinion writing manuals' emphasis on the goals of the opinion, the style for opinion writing, and the distinct sections are revealing guides for rhetorical analysis. These manuals offer both a vocabulary for describing judicial opinions and provide a kind of framework for comparison that helps highlight divergence in rhetorical strategy from the formula.

The formula of a judicial opinion as conceptualized by the opinion writing manuals fits with many of the rhetorical strategies identified by other studies of judicial rhetoric (Wald, "A Reply to Judge Posner"; Wetlaufer; Mootz III). The dissection of an opinion into defined sections creates the appearance of linear and orderly argument. The advice about selection of material also is a means for creating a rhetoric of judicial opinions that appears inevitable. The advice offered in these manuals illustrates the rhetorical nature of the structure of the opinion, whether intended persuasively or not.

c. Style

Gerald Wetlaufer argued that the primary feature of legal rhetoric was that it denied that it was rhetorical at all (Wetlaufer). Wetlaufer described legal rhetoric as creating the appearance of objectivity, deduction, and clarity. To achieve this appearance

legal rhetoric is unlikely to use many traditional "figures" as they appear too ornamented and thus too manufactured for the genre. Instead, legal discourse employs a middle style conveying "an unmarked, neutral stance, fitted for straight narration and exposition" (Fahnestock, *Rhetorical Style* 79). Even in the absence of overt figures, judicial opinions utilize stylistic features like word choice, syntax, and tropes to create a rhetoric that appears impartial.

The use of technical jargon gives the impression of objectivity and expertise (Lanham 106). This effect is heightened when grammatical strategies obscure the author and the author's relationship to the reader by removing personal pronouns, such as "I" and "you." Removing personal pronouns allows the author to appear as an impersonal automaton and addresses the audience as "unspecified overhearers rather than addressees" (Fahnestock, *Rhetorical Style* 286). Without these pronouns the writer and readers appear absent and the texts read like mechanical productions. Richard Lanham explained that it is particularly difficult for audiences to engage with texts that appear authorless, especially when accompanied by "jargon, gobledegook, bureaucratese" because the text does not create a relationship between the author and audience (Lanham 106). This kind of text can claim a super-human authority because it appears to be authored by the "law" rather than a particular justice. These stylistic strategies often work along with syntactic strategies to create a rhetoric that appears objective and technical.

Syntactic strategies, such as active or passive verbs, can be employed to create the appearance of legal objectivity, though the Court's opinions are often very declarative. The use of active verb structures might make it possible to show the law acting

definitively, while actions undertaken by litigants are shown as passive and muddled. For example, the Supreme Court's *Bowers v. Hardwick* (1989) opinion stated that "we think it evident that none of the rights announced in [previous] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case" (*Bowers v. Hardwick* 191). In this sentence the opinion utilized active verbs "think," "bears," "engage," in explaining the Court's interpretation of the previous cases. By comparison, the opinion's construction of the arguments of the litigants used passive structures to show the arguments as comparatively muddled:

> No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. (*Bowers v. Hardwick* 191)

The passive verb structures, such as "has been demonstrated" and "is unsupportable," were potentially more difficult to decipher, just as the opinion claimed the arguments were indecipherable. The substance of the argument was thus reflected in the sentence structure. Though these kinds of rhetorical strategies may not operate at a conscious level for audiences, they shape the meaning conveyed.

In addition to syntax, stylistic elements like tone and figures can create the appearance of objectivity. Robert Ferguson argued that the syntactic and stylistic features of judicial opinions contribute to a rhetoric of inevitability (Ferguson). This rhetoric is

important as it addresses a rhetorical barrier faced by the Supreme Court. The U.S. Supreme Court faces what political scientists refer to as the counter-majoritarian problem, meaning that as justices are "[u]nelected and largely unaccountable, [they] must always respond to the fundamental inconsistency of imposing a separate authority on the democratic process" (Ferguson 207). Rhetoric can accommodate this perception by illustrating that the Court's decisions are incontrovertible so as to mitigate concerns about the nature of the Court's power. Ferguson described monologic voice as a rhetorical strategy that emphasizes the collective assent of the justices to the Court's decision and writing as though there were no other possible outcome. This strategy subsumes any difference of opinion between justices in order to assure the audience that Justices of the Court possesses "a level of virtue above and beyond ordinary human behavior" (Ferguson 206). In this way Ferguson pointed to strategies of word choice as a possible means of making the Court's decisions appear definitive.

Along with word choice, Ferguson described rhetorical tropes that would make judicial opinions appear inevitable. The first, he described as an interrogative mode of writing, characterized by a kind of *rogatio*, where the rhetor asks a question and answers it in the course of the text (Fahnestock, *Rhetorical Style* 299). The question, to which the opinion serves as answer, makes the opinion appear authoritative as it offers the "correct" answer to the question. This trope arranges the text to focus on the Court's question and distract from other questions that could be asked about any case.

Second, Ferguson also described the declarative tone used in judicial opinions in which "[h]yperbole, certitude, assertion, simplification, and abstraction are the essential

tools of the declarative tone as it reaches down from above in a way that can be accepted from below" (Ferguson 213). Hyperbole and assertions can portray the Court's decisions as obvious or self-evident so as to make the decision appear irreproachable. Ferguson argued that together monologic voice, interrogative mode, and declarative tone make judicial decisions appear necessary.

These stylistic strategies create the appearance of objectivity and certainty. Obfuscating the individual author of the opinion, using technical jargon, strategic use of syntax, and strategic use of tropes communicates objectivity and inevitability. These strategies are complemented by rhetorical strategies of argument form and norms of evidence that perform a similar rhetorical function.

d. Summary

The rhetoric of judicial opinions illustrates that law is a rhetorical culture, meaning legal discourse employs the full complement of rhetorical strategies and tools in order to persuade, negotiate relationships, and express and resist claims of power (Hasian Jr, Condit, and Lucaites). The functions performed by strategies of style, argument and evidence, and structure work together to express certain characteristics of the law, such as that law is impartial, determinative, and superior to other forms of inquiry. This rhetoric is important as it serves to legitimate judicial power although judges are human and fallible because the rhetoric obscures the bias of judges behind the screen of law. The characteristics of legal rhetoric are born out of a conception of the rule of law in U.S. culture to create the appearance that the law is non-political. The rhetoric is thus governed by ideas about the rule of law even as it is used to construct the meaning of the

rule of law. In order to find how this rhetoric constructs the rule of law, as it enacts it, we must attend to the relations that the rhetoric implies. Supreme Court opinions always envision a relationship between the Court, the law, and legal subjects. It is useful to consider a foundational case of this rhetoric, such as *Marbury v. Madison* (1803), which provides a unique and enduring vision of the rule of law in order to see how the tropes and appeals communicate these relationships.

The Rule of Law in Supreme Court Opinions

In 1803 the Supreme Court announced its decision in what was to become the foundational opinion for Constitutional law in the United States (Kahn). The opinion claimed the power of judicial review for the Supreme Court alone and articulated a vision of the rule of law that relied upon the Court as constitutional arbiter. The *Marbury* opinion has been incredibly influential in U.S. legal culture, as is evidenced by the volumes written about the opinion and its impact (Garraty; Schwartz, *A History of the Supreme Court*; Clinton; Nelson; Tushnet). For these reasons, *Marbury v. Madison* offers an ideal text for exploring visions of the rule of law and for providing a point of comparison. However, before examining the characteristics of the rule of law as articulated in the opinion it is necessary to consider the context and history of the case.

a. The *Marbury v. Madison* (1803) Opinion and History of the Case

The *Marbury* case grew out of the 1800 election, during which the Federalist Party, headed by outgoing President John Adams, was soundly defeated by its political rival, Jefferson's Democratic-Republican Party. The outgoing President, and the Federalist-led Congress, spent the remainder of their terms in late 1800 and early 1801

filling the federal judiciary and other posts in Washington D.C. with loyal Federalists. Also during this time President Adams had the opportunity to appoint a new Chief Justice to the Supreme Court, and Adams appointed his Secretary of State John Marshall. Marshall chose to serve out his term as Secretary of State before joining the Court. The night before the inauguration of President-Elect Jefferson it was Secretary of State Marshall's job to see that all of the Federalist appointees to new positions received their commissions. However, the short time span for all of the appointments meant a few were not delivered.

The next day, March 4, 1801, Marshall presided as Chief Justice at Jefferson's inauguration then returned to the executive department as acting Secretary of State until Jefferson could appoint someone new. On March 5, Jefferson made his own appointments to fill the posts left open by Marshall's failure to deliver the commissions. Marshall wrote to his brother that "to withhold the commission of the Justices is an act of which I entertaind (sic) no suspicion. I should however have sent out the commissions which had been signd & seald (sic) but for the extreme hurry of the time" (Marshall 90). Marshall's surprise at the Jefferson's replacement of Adam's signaled his dissatisfaction with the situation.

On December 17, 1801, the Supreme Court, headed by Marshall, heard a motion from William Marbury, one of Adams appointees to whom Marshall failed to deliver a commission, for a *writ of mandamus*. The *writ,* if granted, would order the new Secretary of State to deliver Marbury's commission, giving Marbury the job. The opinion argued that Marbury had every right to the commission, but that the section of the Judiciary Act

of 1789 that made it possible for Marbury to argue his case before the Supreme Court immediately, instead of coming to the Court on appeal, was unconstitutional. The opinion declared that only the Constitution could give the Court original jurisdiction, not Congress (*Marbury v. Madison*).[16]

The opinion reached a conclusion by answering three questions, each posed in the introduction: 1) did Marbury have a right to the commission, 2) if he had a right did the law afford him a remedy, and 3) was the Court able to offer that remedy? The opinion argued that Marbury had a right that was violated when the Jefferson administration denied him the commission because Adams had legally completed the commission. In the second section, the opinion argued that Marbury deserved the *writ* and that there was no legal reason that the Jefferson administration could deny it to him. The third section of the opinion concluded that although Marbury deserved the *writ*, it was outside of the power of the Court to order such a *writ* in this case. Thus, the first two sections of the opinion argued at length in Marbury's favor, creating a surprise for readers when the third section denied the Court's ability to grant Marbury's *writ*. The rhetoric of the opinion relied upon the appearance of deductive reasoning, appeals to authoritative sources and constitutional interpretation to declare part of the Judiciary Act of 1789 unconstitutional.

In the *Marbury* opinion five elements were key to the vision of the rule of law,

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[16] *Marbury*'s value for U.S. law has been remarked upon by many legal scholars; however most trace its import to its claiming the power of judicial review for the Supreme Court (Nelson; Tushnet; Schwartz, *A History of the Supreme Court*; Garraty; Clinton). Kahn, on the other hand, argued that judicial review is only a small part of the rule of law. Instead, for Kahn, the real power of *Marbury* is not the claim of the political power of judicial review, but instead its power is "in the distinction of law *from* political action ... The measure of its success lies not in some future exercise of judicial review but the appearance it creates of the American political order as the rule of law" (Kahn 17).

including: (1) separation of the realms of law and politics; (2) detailed use of deductive reasoning, and openness to the conclusion dictated by law; (3) the absolute supremacy of the Constitution because it is a written document; (4) the Supreme Court is the sole arbiter of the law; and (5) the idea that the Constitution is an expression of consent in the Court's rule by law. This section explores each of these aspects of the opinion's rhetoric in order to analyze the vision of the rule of law articulated in the opinion.

b.1. Separation of Law and Politics

The first key element of the rule of law in the *Marbury* opinion was separation of the realms of law and politics. One way in which law and politics were distinguished in the opinion was through the inclusion and exclusion of information about the history of the case. The *Marbury* opinion included very little information about the circumstances that led to Marbury's suit, yet it included detailed argument and evidence about the legal issues involved. Paul Kahn argued that the absence of information about the election of 1800 and Marshall's failure to deliver the commissions denied the relevance of these political aspects of the case, and the exclusion implied that the Court was concerned only with legal issues (Kahn 17). The opinion employed a framing strategy similar to that described by the opinion writing manuals for including and excluding information in order to shape the narrative of the opinion. Law was delineated from politics in the opinion by the different focus of each practice.

The rhetoric of the opinion also distinguished law and politics using arguments that the Court could not hear "political" questions, only legal ones (*Marbury v. Madison* 170). This assertion defined the scope of the Court's power and sphere of action. This

distinction implied a substantive difference between the nature of law and the nature of politics because the descriptions of law in the opinion can also be read as describing what politics is not. The opinion's rhetoric utilized the appearance of logical deduction, as well as showing that the Court required a high standard of proof to demonstrate the nature of law. By comparison, politics was implied to be unreasoned, biased, and driven by public opinion. Rather than declaring that law was impartial and rational, the *Marbury* opinion demonstrated those qualities through the rhetoric of the opinion. This kind of embodiment is particularly powerful as it draws "the reader into the appearance of law it creates" (Kahn 17).

b. 2. Deductive Form and Consideration of Opposing Views

In *Marbury*, the rhetorical strategies that displayed the orderliness and logic of the law, as distinct from the realm of politics were key to the rule of law. The rhetoric of the opinion appeared to display the decision-making process of the Court. One aspect of this process was the detailed use of deduction. As noted earlier, deduction as a form allows the Court to write as if the law determined the outcome of the case, creating a rhetoric of impartiality.

The first two sections of the opinion analyzed the legal issues in great detail, and this detail created the appearance that the opinion exhausted all possibilities before drawing a conclusion. In order to determine whether Marbury had a right to the commission, the opinion analyzed the nature of the appointment process and the duties of all actors in the process. The opinion determined that a person can be said to have been finally, or legally, appointed when "when the last act, required from the person

possessing the power [to appoint], has been performed. This last act is the signature of the commission" (*Marbury v. Madison* 157-158). The opinion thus concluded that "It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state" (*Marbury v. Madison* 161-162). The detailed argument and use of deduction displayed the decision-making process whereby the Court seemed to apply the law. This was important in showing the Court's decision as unbiased and determined by law.

Another aspect of rhetoric of the opinion that created the appearance of unbiased, objective reasoning was attention to possible counter-arguments. Though the Court searched "anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine (*Marbury v. Madison* 158). Marbury's commission had been signed and sealed, therefore Jefferson's refusal to honor Marbury's appointment and instead fill the vacancies with appointments of his own was "an act deemed by the court not warranted by law, but violative of a vested legal right" (*Marbury v. Madison* 162). This analysis of the appointment process was detailed, thorough, and considered possible counter arguments regarding when the appointment was legally made. The detail and thoroughness of the section made it appear as though the answer was found in the reasoning process and that the opinion was not merely offering arguments to justify the decision after the fact.

Similarly, the opinion also displayed caution in drawing only tentative conclusions at the end of each section, such as concluding that Marbury had been

appointed to the position, but did not surmise from that fact alone that the Court should grant the *writ of mandamus*. Instead, the opinion ended with a kind of "twist" for audiences. Per Fjelstad's analysis of the *Marbury* opinion explained that the first twenty pages of the twenty-six page opinion implied that Marbury would prevail. When the Court did not find in Marbury's favor, it was a surprise to the audience (Fjelstad 26-27). The opinion turned from supporting Marbury's right to the commission only to conclude that "if this court is not authorized to issue a writ of mandamus to [the Secretary of State], it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign" (*Marbury v. Madison* 173). The "surprise" that it was unconstitutional for the Court to issue the *writ* in this case created the appearance that Marshall was forced to follow the law against his personal and political beliefs.

In this way the law appeared to overcome the biases of judges in order to compel the correct result. This appearance promised objectivity, encouraged audiences' faith in the Court, and faith in the rule of law as different from the rule of men. Like the stylistic choices that make other laws appear to emanate from an automaton rather than from a human, the *Marbury* opinion's surprise showed the decision was unbiased.

Both the detailed reasoning of the opinion and appearance that conclusions were only reached after significant consideration portrayed the Court's practice as unbiased and rational. The twist in the *Marbury* opinion similarly portrayed law as impartial and as powerful in appearing to overcome any judicial bias. These aspects envisioned the rule of law as fair and unbiased because the Court appeared to follow the dictates of the law.

b. 3. Enduring Quality of Written Constitution makes Constitution Supreme

A third aspect of the rule of law articulated in the *Marbury* opinion was faith in the enduring quality of the law. The third section of the opinion put forth the argument that the Constitution has boundaries and limits that must be preserved *because* they are written. This claim about the enduring quality of the law was part of a larger argument that the Congress could not give original jurisdiction to the Court because the Constitution did not grant that power to the Congress and did explicitly define the original jurisdiction of the Court. Through these arguments the *Marbury* opinion upheld the Constitution as the supreme law of the land, which by comparison implied that the Court was the passive instrument of the law.

The opinion explained "[t]he constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it" (*Marbury v. Madison* 177). According to the opinion, the people made their Constitution a written one in order to form the fundamental law of the land meaning that any law that contradicted it must be void. The Constitution, in this argument, was supreme because it was preserved in writing and because it was an expression of the will of the people.

The opinion implied that written nature of the Constitution preserves the law and the limits to government power because the text of the Constitution protects the law across time.[17] A written constitution meant that the rule of law required reading and interpreting the Constitution. And *Marbury* opinion offered a theory of Constitutional

[17] This argument may have been particularly appealing to those in the first generation after the Revolution as it promised limits to the powers of government (Parker).

interpretation that limited interpretation so that the meaning could not change: "It cannot be presumed that any clause in the constitution (sic) is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it" (*Marbury v. Madison* 174). Here the opinion argued that the goal of constitutional interpretation should be to put the language into effect, and that the only interpretations that are *legal* are those that are *required* by the language of the document. Here the *Marbury* opinion reinforced the idea that law is clear and determinative. This vision promised that the law would endure, as it could not be changed by an act of Congress alone. The enduring quality of law was especially important in *Marbury* because it also promised that the law would always carry out the will of the people.

b. 4. The Supreme Court as Supreme Legal Authority

The meaning of the rule of law in the *Marbury* opinion depended upon the description of the relationship between the branches of U.S. government in the opinion. Through these arguments the opinion envisioned the Court as the Constitutional arbiter that could rule by law. To show the Court as the only branch of the government with the power to review the constitutionality of laws, the opinion first set out arguments that catered to the executive branch. The opinion argued that the Executive branch had a protected sphere, and if it acted within that sphere the judicial branch could not interfere:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion (sic). Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

(*Marbury v. Madison* 170)

In this passage, the Court appeared cautious and modest in recognizing the limits of its power. Here the opinion also stated that as the executive had a protected sphere of action that was outside the reach of the Court. By extension the judicial branch also had a protected sphere of action.

According to the opinion, these spheres of action originated in the written Constitution. The judicial sphere, according to the opinion, included the power to arbitrate legal disputes:

> [I]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. (*Marbury v. Madison* 177)

And the act of choosing which law or rule should apply was "the very essence of judicial duty" (*Marbury v. Madison* 177). In these passages the *Marbury* opinion described the protected sphere of action of the judiciary as arbitrating the application of the law. The opinion implied that this power is one that is given *only* to the Courts and must be respected by the other branches. Envisioning the judiciary as the sole arbiter of the law and as the only branch with the power of judicial review made the rule of law an exercise of the courts alone. In this way the opinion defined the rule of law as a rule by courts in the sense that only a court could determine when the law had been properly applied. Any other determination of the application of law would be a guess that was to be confirmed or denied in court.

From the claim that the courts alone could determine and apply the law, the *Marbury* opinion implied that the Supreme Court was the real seat of power in the government. This was because the aim of the Constitution was to create a "government of laws, and not of men" (*Marbury v. Madison* 163). As only the courts could determine the law, the Supreme Court was the ultimate ruler by law. This vision of the rule of law, though it appeared quite authoritative in giving nearly all legal power to the courts, was grounded in the popular will. In these ways the *Marbury* opinion maintained the vision of the Court as passive instrument of the law while granting the law authority because of its source in the popular will.

b. 5. The Will of the People authorized the Court's Rule by Law

In the course of defining the powers of the Court in comparison to the other branches, the *Marbury* opinion took great pains to show that the Constitution was an expression of the people. The opinion explained:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. (*Marbury v. Madison* 175-176)

In this passage, the opinion argued that the extraordinary act of collectively establishing a written Constitution endowed the Constitution with particular authority and supremacy

because the will of the people was the absolute authority. Though it was not explicitly stated, the opinion implied that the Court was always acting on behalf of the will of the people. If the people gave their consent to the Constitution, and the Constitution said that the courts alone must be the ones to interpret and apply law, then any time the Court acted it expressed the will the people. This argument allowed the *Marbury* opinion to deny that the vision of the rule of law it offered enacted an authoritarian system.

Similarly, this system allowed the Court to police the other branches of government on behalf of the people. As the "original and supreme will" set out the powers given to each branch of the government (*Marbury v. Madison* 176), and the Court has the power to interpret the Constitution and apply the it as the law of the land, the Court must also be able to hold the other branches accountable for following allocations and restrictions on powers given by the Constitution because the Court alone applies the law. The Court thus appeared as first among equals with the power to review the Constitutionality of the other two branches.

c. Summary

The view of the rule of law articulated in the *Marbury* opinion may not seem particularly controversial today, such as: deductive form, using the Constitution as the supreme authority for evidence, strategic framing, among others. The opinion has been so influential in the U.S. that it is now accepted as 'the way our system works," that is, as part of the ideology around law. The *Marbury* opinion offers several themes that recur throughout the *per curiam* opinions, even if the variations do not quite have the same purpose as the original.

The *Marbury* articulated the rule of law as (1) distinct from politics, (2) pseudo-scientific in method, (3) requiring careful reading of the Constitution as a fundamental law, (4) exercised by the Supreme Court, and (5) a practice undertaken to exert the will of the people. This vision, because of the foundational nature of this text, is particularly important for considering later cases as it allows us to trace the use of the key values and arguments that underpin the *Marbury* vision of the rule of law through later texts.

Conclusion

The rhetoric of *Marbury v. Madison* (1803) illustrated many of the norms of judicial discourse that continue today. The rhetoric of judicial opinions, like *Marbury*, are integral to crafting visions of the rule of law and demonstrating the characteristics of that rule. The rhetoric of judicial opinions embodies the exercise of the rule of law in order to lead the audience to assent to the decision. In this way the rhetoric of judicial opinions is integral to how the Court communicates the meaning the rule of law. For this reason, it is imperative that any studies of "the rule of law" as a socially constructed concept attend to the rhetorical strategies and discourses that define the meaning of this concept. The next three chapters of this project analyze the rhetoric of *per curiam* opinions as they construct the rule of law in order to consider what these visions imply about the law, the Court, and the legal subjects. Studying the relationships between these three parts of U.S. legal culture in *per curiam* opinions promises to illuminate the rhetorical functions of pseudonyms and the rhetoric of the rule of law.

Chapter 3 "*Brandenburg v. Ohio* (1969): Conflict Between the Law and the Supreme Court"

This chapter considers the relationship between rhetoric and the rule of law through an analysis of the Court's *per curiam* opinion in *Brandenburg v. Ohio* (1969). This opinion raises issues that are central to the rule of law as a practice of the Supreme Court, such as: the Court's responsibility to follow precedent, the clarity of law, and the fallibility of Supreme Court justices.

Brandenburg dealt with a video recording of a Ku Klux Klan member's speech advocating violence and public disturbance. The recording included discriminatory and offensive speech directed at several minority groups, and parts of the recording were broadcast on local and national television (*Brandenburg v. Ohio* 445). The speaker in the video, Clarence Brandenburg, was arrested, tried, and convicted under the Ohio Criminal Syndicalism statute. The Supreme Court's *per curiam* opinion overturned Brandenburg's conviction and asserted that advocating violence could only be punished when speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio* 447-448).

The Court's legal holding in *Brandenburg* revised free speech law by overturning the reigning precedent, *Whitney v. California* (1927), and instituting a new test for determining what speech deserves First Amendment protection. For these reasons, the opinion brings to light the nature of the Court's power and the fallibility of Supreme Court justices. For the rule of law, these issues prompt questions about what is an

appropriate justification for the Court's action. This case thus encourages considerations of the scope and bounds of the rule of law as a Supreme Court practice. In order to study these issues this chapter explores how the context of the *Brandenburg* opinion illuminates the exigencies that shaped the opinion, including the history of why the opinion was labeled *per curiam*. Next, this chapter analyzes the opinion to reveal that the Court deflected responsibility for the decision to overturn *Whitney* as precedent and was portrayed as a mouthpiece of the law. The *per curiam* label contradicted the rhetoric of the opinion foregrounding the Court's role as author of the decision. The rhetoric and the *per curiam* label were in tension and this tension upheld the mythology of the rule of law, potentially at the cost of faith in the Court.

Background on *Brandenburg*

As documented in the text of the opinion, Clarence Brandenburg, a KKK leader, invited a local news team to a KKK rally in Ohio. The rally was recorded by the news team and broadcast on television. Brandenburg expressed denigrating sentiments about African Americans, Jews, and the U.S. government. Brandenburg was arrested by local authorities for violating the Ohio Criminal Syndicalism statute, which penalized "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism (*Brandenburg v. Ohio* 444-445). Brandenburg was fined and sentenced to 10 years imprisonment. The Ohio intermediate appellate court affirmed Brandenburg's conviction without an opinion, and

the Supreme Court of Ohio dismissed Brandenburg's case for want of a constitutional issue (*Brandenburg v. Ohio* 445).

Brandenburg's case was not the first involving a criminal syndicalism statute to reach the Court. Criminal syndicalism statutes were adopted by a majority of states between 1917 and 1920 as part of the first "red scare" in the United States (Dowell 13-5). During these same years the U.S. Supreme Court heard several First Amendment cases dealing with opposition to the First World War and cases dealing with communist advocacy. Though initially the Court upheld laws prohibiting communist and anti-war sentiment in cases like *Schenck v. United States* (1919), the U.S. Supreme Court eventually granted modest protections for anti-war demonstrators and communists. In *DeJonge v. Oregon* (1937) the Court found that it was not a crime to hold, or to share, communist beliefs. However, the slightly warmer reaction of the Court to communist thought in *DeJonge* was short lived, and in the 1950's the Supreme Court returned to upholding the prosecution of communists in cases like *Dennis v. United States* (1951).

In 1927, the Court heard *Whitney v. California*, another case about expressions of communist beliefs. Anita Whitney was found guilty of violating the California Criminal Syndicalism statute for her role in establishing a radical communist party that advocated the overthrow of the U.S. government. The *Whitney* decision upheld criminal syndicalism statutes as constitutional, and no case since *Whitney* had asked the Court explicitly to review these statutes until *Brandenburg* in 1969.

Internal issues at the Court in 1968 and 1969, also shaped the opinion. In 1968, President Johnson nominated Associate Justice Abe Fortas to become Chief Justice.

Fortas' nomination hearings in the Senate were a failure. Throughout the hearings Fortas' was portrayed as having inappropriate interactions with President Johnson and questions were raised about the legality of some of Fortas' financial dealings (Kalman 335-385). In 1969, Justice Fortas resigned from the Court.

On April 11, 1969, amidst the controversy, Fortas circulated a signed draft of the opinion in *Brandenburg v. Ohio* (Fortas). Perhaps Justice Fortas would have released the Brandenburg opinion as a signed opinion that April, but in an April 15 memo, Justice Harlan suggested to Justice Fortas that the announcement of the opinion should be delayed until the Court was ready also to announce decisions in *Younger v. Harris* (1971) and *Samuels v. Mackell* (1971) (Harlan). In Justice Brennan's files there is a memo, addressed to Fortas alone, suggesting changes in Fortas's language including the phrase "in terms of mere advocacy as distinguished from incitement to imminent lawless action" (Brennan, "Memo, Brennan to Fortas, N.D."). Brennan's memo previewed language that he eventually added to the opinion after Fortas' departure. This memo may indicate that Brennan volunteered to finish the opinion in *Brandenburg* in order to include his preferred language.[18]

After Fortas' resignation, Justice Brennan took over the opinion and circulated a draft *per curiam* opinion on May 20, 1969 (Brennan, "Draft Opinion, Brandenburg v. Ohio, May 20, 1969"). The *per curiam* label seems to have been chosen to reflect the

[18] The memo matches handwritten comments on the April 11, draft in Brennan's files that noted, "pure speech has nothing to do with clear and present danger" and "mere advocacy as distinguished from incitement to imminent lawless action" (Fortas and Brennan). These notes, and the memo, almost exactly matched the language that was eventually included in the *per curiam* opinion.

joint authorship of the opinion and also to deal with the fact that the primary author was no longer a justice on the Court. The new *Brandenburg* opinion was announced on Monday June 9, 1969.[19]

Bernard Schwartz documented the change in authorship and attributed the *per curiam* label to the fact that the opinion had two authors (Schwartz, "Justice Brennan and the Brandenburg Decision-A Lawgiver in Action"). Schwartz also meticulously documented the changes made by Justice Brennan to Justice Fortas's draft and concluded:

> [The] redraft changed only a small portion of what Justice Fortas had written, but the changes completely altered the nature of the *Brandenburg* opinion, converting it from one that confirmed the clear and present danger test to one that virtually did away with the test as the governing standard in First Amendment cases. (Schwartz 28)

The change in legal doctrine is important for understanding the rule of law in the *Brandenburg* opinion. Overturning *Whitney* and the clear and present danger test precedent raised issues, such as the role of deference to precedent in Court decisions. These changes also demonstrate the import of the authorship of the opinion for shaping the law as different authors write the law differently.

***Brandenburg v. Ohio* (1969)**

[19] Apparently the Court decided not to wait any longer to announce their decision in the case, regardless of the *Younger* and *Samuels* opinions. Both cases were reargued in April and November of 1970 and Justice Black authored the opinions.

The *Brandenburg* opinion was relatively short, filling a mere five pages of the *U.S. Reports*. The opinion followed the standard organizational pattern: first, introducing the case, second, the facts, and third, dealing with the legal issues of the case. In the introduction, the opinion announced that the lower court was reversed and Brandenburg's conviction overturned. One of the longest parts of the opinion was the facts section. The facts section included detailed descriptions of Brandenburg's speech. This section implied that Brandenburg's speech was not harmful and thus deserved protection. Following the facts section was the heart of the opinion analyzing the legal issues. This section put forward two assertions: first, that the 1927 *Whitney* opinion had been essentially overturned by the Court's 1951 opinion in *Dennis v. U.S.*, and second, that the Constitution would only allow for prosecution of speech that produced, or was likely to produce, imminent lawless action. This section raised the issues of proper deference to precedent and the fallibility of the Court and its justices.

a. Orientation Paragraph

The opening of the *Brandenburg* opinion included background information about Brandenburg's actions, arrest, and punishment. The information presented by the opening paragraph of the *Brandenburg* opinion was covered as background material at the beginning of this chapter. For this analysis, the facts and legal issues sections were more important to the rhetoric of the opinion.

b. The Facts of the Case

In this section, the Court's rhetoric performed three key functions: 1) defining harm in such a way as to warrant protection for Brandenburg's speech, 2) separating the

Court's legal judgment from any moral evaluation of the derogatory speech, and 3), authorizing discriminatory speech and threatening the possibility of equality under the law. This last point was probably not intended but was brought about by the opinion's quoting Brandenburg's speech directly.

The facts section focused primarily on Brandenburg's speech. The *per curiam* opinion described Brandenburg's speech in detail, offering several quotations from the recording of his speech at a Ku Klux Klan rally (*Brandenburg v. Ohio* 446-447).[20] The descriptions and quotations were key to the Court's substantive arguments in justifying protecting Brandenburg's speech.

Quoting Brandenburg's speech served, first, as evidence in support of the Court's decision. Repeating Brandenburg's speech provided the audience with the opportunity to see for themselves what kind of speech the case involved. In order to demonstrate that this speech was not harmful, the opinion framed quotations of Brandenburg's speech with descriptions of the audience and context that made the speech appear harmless. For

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[20] The opinion explained that "Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews" (Brandenburg 446). These scattered phrases were reprinted in the first note to the opinion, and so would require readers to look for Brandenburg's statements that were most derogatory, and the passages that were most threatening to African-Americans. The opinion quoted a large section of Brandenburg's speech, including these passages:

> This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent (sic) organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance (sic) taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you. (Brandenburg 446)

Finally, the opinion explained that in a second film "The reference to the possibility of 'revengeance' (sic) was omitted, and one sentence was added: 'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.'" (Brandenburg 446).

example, the opinion noted that "no one was present other than the participants and the newsmen who made the film" (*Brandenburg v. Ohio* 446) and explained that "[t]hough some of the figures in the films carried weapons, the speaker did not" (*Brandenburg v. Ohio* 447). The first passage implied that if no one was present, except the Klan members and television crew, then no persons were present who could have been harmed by the speech. Read in this way the Court's qualifications about the audience of the rally ignored the circulation of the video recording on local and national television. The second description of the rally, noting that the speaker was not carrying a firearm, encouraged the assumption that Brandenburg was not likely to act violently, nor harm anyone because he was not carrying a weapon to do so. These two passages both implied that a lack of visible harm and/or violence meant that the speech was literally harmless.

In effect, this rhetoric denied that speech alone could harm the audience even when it is discriminatory. This argument ignores the obvious, that speech does harm. This simplistic view of speech may be socially harmful but it is effective for upholding the rule of law because it makes the decision appear justified in protecting Brandenburg's speech because it was unable to harm. The effects of this rhetoric are mixed and contradictory. As there was no visible harm or violence in the video recording the opinion eventually concluded that Brandenburg's speech deserved First Amendment protection.

The second rhetorical function served by quoting from Brandenburg's speech was that it separated the legal judgment made by the Court from any moral judgment of the speech. Repeating Brandenburg's discriminatory language, without any evaluation of the

moral or ethical character of that speech, implied that the language was either unproblematic, or more likely, that the Court was not the appropriate venue for discussing the ethical and moral offensiveness of the language. Treating Brandenburg's speech in this way could also have created the appearance that the Court was acting impartially in evaluating the speech without bias. Repeating Brandenburg's speech without commentary on the value of the speech simultaneously encouraged the assumption that the speech was harmless and excluded moral concerns from the Court's purview. In separating moral concerns from the law, the opinion reified the separation of law from politics. This function was important for separating law from politics as it reified the *Marbury v. Madison* vision of the rule of law as different from political rule. The rule of law justified the exclusion of moral concerns and to reinforce the rule of law at the same time.

The bald repetition of Brandenburg's speech had the rhetorical effect of demonstrating judicial impartiality but established the position that the content of the speech was irrelevant to the legal judgement —which is what the opinion eventually concluded, without having to make an argument to that effect. The framing of Brandenburg's speech limited what was visible as harm and this required protecting Brandenburg's speech. This definition of harm made the conclusion appear impartial and inevitable, thus consistent with the rule of law as unbiased and predestined. The facts section set up the Court's discussion of the issues in focusing on speech and the kind of protection it warrants.

c. Discussion of Legal Issues

After discussing Brandenburg's speech and conviction, the *per curiam* opinion analyzed precedents involving criminal syndicalism statutes. The *per curiam* opinion's discussion of precedents was particularly important because it most explicitly dealt with the rule of law.

In two previous cases, *Fiske v. Kansas* (1927), and *Whitney v. California* (1927), the Court upheld nearly identical criminal syndicalism statutes to the one that a lower court convicted Brandenburg of violating.[21] Overturning *Whitney* created a rhetorical problem for the Court because of the norm of *stare decisis*. There has been robust debate about whether the Supreme Court actually follows a norm of *stare decisis*, meaning deferring to precedent to decide cases (Segal and Spaeth; Songer and Lindquist). Regardless, the Court tends to write opinions *as though* precedent governs the outcome of cases (Wald). That judicial opinions appear to be bound by precedent links the rule of law to *stare decisis*, as it promises that like cases are treated alike. For this reason, it is important to examine the arguments and other rhetorical strategies employed in the *Brandenburg* opinion to understand how the Court attempted to deal with admitting that *Whitney* was wrong and without calling attention to the failure to follow precedent (Schauer, "Precedent").

[21]The criminal syndicalism statute in California at issue in *Whitney* reads as follows: "Section 1. The term `criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." And "Sec. 2. Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . ." and "Is guilty of a felony and punishable by imprisonment" (*Whitney v. California* 359-360).

Overturning precedent particularly threatens the rule of law as a practice of the Supreme Court. Reaching different conclusions in cases that appear the same leads to the conclusion that the Court is partial and inconsistent. Faith in the fairness of the Court's decisions is encouraged by the practice of *stare decisis*, using precedent to guide the outcome of a case because following "the law" should remove personal bias from judicial decision making and guarantee predictability in judicial decision-making. Overturning a precedent admits judicial fallibility because the first case was decided wrongly and calls attention to the subjective nature of judge-made law. These both have the potential to undermine the rule of law and therefore the legitimacy of the Court.

Pointing out the fallibility of the Court simultaneously draws attention to the humanity and biases of judges. To divert attention away from the role of bias in judicial decision-making majority opinions cultivate the appearance of objectivity and finality. Strategies like passive voice, absence of pronouns, and deductive reasoning patterns all create the appearance of objectivity and remove the subjective voice of the author (Fahnestock, *Rhetorical Style*; Wetlaufer; Ferguson; Wald, "Rhetoric of Results and the Results of Rhetoric"). The *Brandenburg* opinion too employed these strategies, but unlike in other majority opinions the *Brandenburg* opinion needed to compensate for failing to follow the norm of *stare decisis*. To do this, the *per curiam* alternated between active and passive attribution of agency to limit the Court's responsibility for overturning *Whitney*.

First, the *per curiam* opinion employed sentence structures that portrayed the Court as responsible for deciding *Whitney v. California*: "In 1927, this Court sustained

the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400-11402, the text of which is quite similar to that of the laws of Ohio" (*Brandenburg v. Ohio* 447). This sentence attributed the action of deciding *Whitney* to the Court as an institution through use of active verbs. Though the opinion attributed responsibility for the *Whitney* decision to the Court, the opinion utilized personification and other strategies to attribute responsibility for overturning *Whitney* to agents other than the Court.

After claiming the Court's responsibility for the *Whitney* decision, the opinion explained that *Whitney* had been invalidated as a precedent prior to the *Brandenburg* case. This argument aimed to show that the *Brandenburg* opinion did not overturn *Whitney*, and thus did not fail to follow *stare decisis*. However, the rhetoric of the opinion did not attribute responsibility for overturning *Whitney* to the Court itself. The *per curiam* opinion described cases after the *Whitney* decision as responsible for invalidating the *Whitney* and in doing so the opinion evaded claiming responsibility for overturning *Whitney*. For example, the opinion stated that:

> *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States,* 341 U.S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. (*Brandenburg v. Ohio* 447-448)

This description attributed agency to the *Dennis* opinion, along with any other decisions that discredited *Whitney*, without any acknowledgement of the fact that *the Supreme Court decided Dennis*. The Court, surprisingly, thus took credit for *Whitney,* but not for the decisions that supposedly overturned *Whitney*. In this way the *Brandenburg* opinion constructed the Court's work as merely reminding audiences of an action that had already been taken. The phrasing was so consistent in attributing agency to the cases themselves, that the Court's responsibility was obfuscated.

The phrasing of the opinion that attributed agency to *Dennis* in overturning *Whitney* gave agency to previous opinions as instantiations of the law. This rhetoric created the appearance of the Court as exercising little power or responsibility. This may hinder faith in the Court because the law is responsible for making decisions. However, this rhetoric preserved the rule of law as a mythology as it showed the law as having the power to self-correct and the law as the source of the decision.

The grammar of the *per curiam* opinion similarly denied responsibility for striking the Ohio Criminal Syndicalism law. The *per curiam* said "Measured by this test," of whether the speech produced was likely to produce violence, "Ohio's Criminal Syndicalism Act cannot be sustained" because the statute "by its own words … purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action" (*Brandenburg v. Ohio* 448, 449). This passage asserted that the Ohio law "admitted" its unconstitutionality. Thus, rather than taking responsibility for striking the Ohio statute, the opinion's phrasing portrayed the statute as confessing its own unconstitutionality and thus invalidating itself.

The attributions of responsibility may have helped the audience see overturning *Whitney* as a legitimate exercise of the rule of law. This is because the Court did not appear responsible for overturning *Whitney*. Instead, the Court seemed to be merely restating what had already been done. Similarly, the opinion denied that the Court overturned the Ohio law, as the law condemned itself.

However, attributing agency for these decisions outside the Court may not have been persuasive, as many readers would likely see the Court as responsible for the *Dennis* and other decisions and thus responsible for overturning *Whitney* indirectly. Similarly, portraying the Ohio law as self-evidently unconstitutional required that the audience believe that the Court's test for whether speech was punishable was articulated before the *Brandenburg* opinion for the logic of the argument to be accepted. In fact, *Brandenburg* was the first time that the Court explicitly offered this standard for First Amendment protection (Schwartz, "Justice Brennan and the Brandenburg Decision-A Lawgiver in Action"). The Court exerted agency in creating a new standard yet the rhetoric obscured that power.

As the attribution of agency to powers outside the Court was on the verge of farcical, the opinion could have bolstered these arguments by appealing to the exceptional nature of the case at hand. Claiming that overturning precedent was exceptional may have alleviated concerns that overturning precedent is a normal part of the Court's practice. Qualifications could have also alleviated concerns that *stare decisis* was no longer a norm of the Court; because qualifying the case at issue as exception could disassociate this case from others (Schauer 11). Though several options were

available to the Court to show that *stare decisis* was not abandoned because the case was exceptional, none was employed in the *Brandenburg* opinion. Here the choice of omission over inclusion may have hindered the persuasiveness of the opinion.

The lack of attention and justification for the *exceptionality* of overturning a precedent may be just as problematic as the act of admitting that *Whitney* was wrongly decided. Abandoning the appearance of deference to *stare decisis* would undermine one of the primary sources of the Court's authority—the faith justices are following the law and not their own whims. In this sense, the rhetoric of the *Brandenburg* opinion failed because it did not justify the decision to overturn *Whitney*, nor did it articulate this act as one that was atypical. Similarly, the fact that *Whitney* was wrongly decided and required fixing, drew attention to the fact that law in the U.S. is made by humans and thus is fallible. Pointing to human mistakes unravels much of the rhetorical work of the opinion to create the appearance of objectivity. Showing that the mistake was exceptional would aid in demonstrating to audiences that the law is above human fallibility most of the time.

The issues section of the *per curiam* opinion closed saying "The contrary teaching of *Whitney* v. *California, supra,* cannot be supported, and that decision is therefore overruled" (*Brandenburg v. Ohio* 449).

The issues section of the opinion went through several steps to overturn *Whitney* and declare the Ohio Criminal Syndicalism statute unconstitutional. First, the *per curiam* opinion attributed responsibility to the Court for deciding *Whitney*. Second, the *per curiam* opinion employed personification in showing *Dennis v. United States* as subverting the *Whitney* decision. Finally, the *per curiam* opinion claimed that *Whitney*

was overruled, but did so in a way that seemed to merely repeat what was already the case. In attributing agency to judicial decisions, rather than to the Court making the *Brandenburg* decision, the *per curiam* opinion denied responsibility for violating *stare decisis* and showed that the law itself required that *Whitney* be overturned.

This rhetoric inconsistently assigned responsibility for the decisions and constructed the law as the ultimate power—law declared *Whitney* incorrect, and the Ohio Syndicalism law stated its own unconstitutionality. By comparison, the Court looked weak in merely repeating decisions already made by law. Especially problematic for the Court was how judicial fallibility was displayed in overturning a nearly identical law with no more explanation than a change in the Court's membership. The lack of explanation for what had changed between *Whitney* in 1927 and *Brandenburg* portrayed the rule of law was merely the Court acting on the justices' biases. In failing to show that violations of *stare decisis* are exceptional, the *Brandenburg* opinion missed an opportunity to strengthen its case and to preserve the appearance of the rule of law as objective and eternal.

The Rule of Law in *Brandenburg*

The rhetoric of the *Brandenburg* opinion constructed a vision of the rule of law where the law was ostensibly the powerful agent making the decisions and the Court was merely the mouthpiece of the law. This vision was communicated through several aspects of the rhetoric of the opinion, but not the *per curiam* label.

First, the *Brandenburg* opinion offered arguments that showed the power of law as an agent in governing. When the opinion showed the law as acting apart from the

Court, such as the *Dennis* decision appearing to discredit *Whitney* and the Ohio Criminal syndicalism law professing its unconstitutionality, the law seemed to have the power to govern. Also, in constructing Brandenburg's speech as harmless, the opinion offered no explanation of why violent speech deserved protection at all (Gilles 525). The opinion in this way implied that the law required no justification—instead the law was accountable to none.

By comparison, the Court was portrayed as the mouthpiece for the law as it seemed to merely restate the law. The opinion attributed responsibility for the *Whitney* decision to the Court; thus the one decision the Court made was incorrectly decided. Also, the opinion failed to explain overturning *Whitney* as a unique occurrence and in doing so called attention to the fallibility of the Court as an actor. If the law were the oracle containing the power to make decisions, then the Court would be the medium through which law was communicated. Legal subjects in this vision were not the basis of the Court's power, but instead were recipients of the law.

Through these two rhetorical constructions the rule of law consisted of the law holding the power and authority, which was communicated by the Court. In this way, the mythology of the power of the rule of law was preserved, as law functioned objectively to come to the seemingly correct conclusion, including righting the wrong decision made by the Supreme Court in *Whitney*. The mythology of the Court as neutral arbiter of the rule of law may have been eroded as the Court was corrected by law, and had little agency to decide or declare the law. However, this image of the rule of law was framed by the *per curiam* label and this label complicated the vision of the rule of law.

The *per curiam* label, unlike the rhetoric of the remainder of the opinion, attributed the rhetoric to the Court as an institution. Like a pseudonym, the *per curiam* label replaced the name of the author with a "name" that signaled characteristics of the author. The *per curiam* label invokes characteristics associated with *per curiam* opinions historically like the pseudonyms employed in the eighteenth century in the United States that communicated political ideologies, pseudonyms such as *Brutus*, *Cato*, *Caesar*, *Americanus*, and *Candidus* (Shalev; Ekstrand and Jeyaram). The *per curiam* label communicates that the opinion is "by the Court," and invokes the history of these opinions as easy, short, and uncontroversial. In this way, the *per curiam* label replaces the name of the author with the authority of the Court as an institution.

Even with rhetoric that displaced responsibility by portraying the Court as the mouthpiece of the law, the *per curiam* label re-attributed responsibility back on the Court. The *per curiam* label was in tension with the rhetoric of the opinion about the responsibility of the Court, and this tension encourages questions about where the power of the judiciary lies.

The tension between the two conflicting attributions of responsibility, ironically, preserved the vision of the rule of law as a Supreme Court practice. The *per curiam* label made possible two different readings of responsibility as the opinion attributed agency to the law while the *per curiam* label claimed the Court as author. The label made possible kind of strategic ambiguity where the two rhetorical strategies existed in conflict in the opinion. This tension was thus productive as the *per curiam* label conflicted with the rhetoric of the opinion because it replaced the Court's authority and power in the opinion.

The *per curiam* label contributed positively to the vision of the rule of law in the opinion because it worked to allow both the Court and the law to be responsible for the decision to correct the past wrong. The rhetoric of the opinion preserved the vision of law as an impartial power that would overcome the bias of judges, while the *per curiam* label allowed the opinion to claim the Court as author with the power to pronounce the law. The conflicting rhetorical strategies upheld the rule of law despite the tricky rhetorical situation presented by the case.

Conclusion

The *Brandenburg* opinion offered a view of the rule of law that aimed to sustain the myth of the law as impartial, definitive, and correct in the face of a mistake by the Court. The rhetoric of the opinions sustained faith in both the rule of law and the Supreme Court through the rhetoric of the opinion, including the *per curiam* label. The strategic ambiguity caused by the conflicting rhetorical attributions of responsibility offered the possibility to avoid harm to the rule of law and the Court because it could speak two conflicting messages at once, each of which preserved the power of the law.

The rhetoric of the *Brandenburg* opinion, and the vision of the rule of law it offered, point to two conclusions. First, as signatures are a powerful tool to note the presence of a human at a particular time and place, the absence of signature in judicial opinions invokes the authority of the Court as an institution. Second, the *per curiam* label will amplify the consequences of the rhetoric of a judicial opinion as it focuses attention on the Court and removes the possibility of scapegoating individual authors. The *per*

curiam label creates the appearance that the Court communicates as the law, rather than through human agents, and in doing so it focuses attention on law's power.

Rhetorical criticism has analyzed the rhetorical power that signatures engender as markers of individual identity (Zaeske). In Supreme Court opinions the absence of the author's signature and use of the *per curiam* label, places the Court's authority in place of the reputation of the author. Unlike anonymous texts in other contexts, *per curiam* opinions invoke the institutional authority of the Court because the context in which they are produced. In this way the absence of the signature serves as a metonym for the Court as an institution.

The second conclusion suggested by the *Brandenburg* opinion is that the replacement of the author's signature with the *per curiam* label amplifies the consequences of the rhetoric of the opinion. Both critics and proponents of *per curiam* opinions have identified how the *per curiam* label works to amplify the consequences of the rhetoric of the opinion. Ira Robbins argued that the absence of the author's signature would make it possible for justices to change the law without being held accountable because the author's name makes it possible to hold justices accountable (Robbins 1211). *Brandenburg* is a prime example for Robbins of a case where the *per curiam* opinion changed the nature of the law absent strong justification and made it possible for the author(s) to avoid criticism for the change. Even proponents of increasing the number of *per curiam* opinions note this essential quality of the label. James Markham argued that increased use of *per curiam* opinions would prevent the "cult of personality" that develops around justices known for their style or for their appeals to audiences other than

the litigants of the case (Markham 924, 925). Markham envisioned the transfer of responsibility from individual justices to the Court as one that would lend an aura of authority to judicial opinions because it would create the appearance of consensus and rely upon institutional authority. Both authors envision the *per curiam* label as amplifying the effects of the opinion, and the *Brandenburg* opinion illustrates why this is so.

Chapter 4 "*DeFunis v. Odegaard* (1974): The Supreme Court as Bureaucrat"

This chapter examines the meaning under the rule of law by analyzing the Supreme Court's *per curiam* opinion in *DeFunis v. Odegaard* (1974). DeFunis applied to the University of Washington Law School in 1970 and 1971 and was denied admission both times. DeFunis sued the University of Washington arguing that the school's affirmative action program led to his denial of admission. DeFunis asserted that the admissions process was unconstitutional in treating applicants unequally by preferring minority applicants. The Court's opinion did not deal with affirmative action or race as constitutional issues because, the Court argued, the case was already moot. The Supreme Court dismissed the case, and the opinion asserted that if the admissions policy remained in tact that a new case could come to the Supreme Court with "relative speed" (*DeFunis v. Odegaard* 629).

The opinion, which dismissed the case without addressing the substantive issues brought by the parties, offered a vision of the Court as a kind of bureaucrat who could apply the law, but not need to justify the law. In this way, the *DeFunis* opinion offered a vision of the rule of law that raised the issue of propriety in judicial motives. In order to analyze the rhetoric of the rule of law in *DeFunis* this chapter is proceeds by: first considering the context of the opinion, including the history of the case and media coverage of the issues; second, this chapter analyzes the opinion's rhetoric and draws from it a vision of the rule of law that privileged procedural concerns over substantive ones. The *per curiam* label, along with deference to procedure, removed the appearance

of bias from the opinion at a literal level. This vision tarnished the myth of the rule of law because the decision made the law and the Court appear immune to the struggles of the litigants.

Background on the *DeFunis* case and Media Coverage

Marco DeFunis was denied admission to the University of Washington Law School's entering classes of 1970 and 1971, and though he was admitted to five other law schools, DeFunis chose to challenge his rejection from the University of Washington Law School. At issue was the University admissions procedure that gave preferential treatment to minority applicants and may have been the cause of DeFunis' denial of admission. In 1971, the law school admitted 74 other students who had lower Predicted First Year Averages than DeFunis, a measure combining LSAT scores and grade point average (GPA). Of the 74 students admitted with lower scores 36 were minority students according to the University's definition, 22 others were returning veterans, and the remaining 16 were admitted for other factors that made their applications exceptional to the University (Morris 15).

The University Washington Law School essentially employed two admissions processes. The first process used for white students granted or denied admission summarily based upon the Predicted First Year Average score. The second procedure for minority students involved more detailed case by case review. At trial, DeFunis argued that he would have been admitted if not for the University's separate admissions process for minority students. DeFunis asserted that the separate admissions process was unconstitutional, and he asked for a court order requiring his admission to the law school.

The process by which DeFunis' lawsuit reached the Supreme Court is particularly significant for understanding the Supreme Court's opinion because it was the duration of the litigation process that determined the Court's decision in the case. At the trial level DeFunis succeeded. A Washington trial court found that the University of Washington's admission policy was unconstitutional because it utilized race as a factor in admissions, and for this reason the court ordered that DeFunis be admitted to the entering class of the law school in 1971. The Washington State Supreme Court reversed the trial court's decision, found that the University's procedures were constitutional, and ordered that the University need not continue to admit DeFunis. The Washington Supreme Court issued its decision in 1973 while Marco DeFunis was in his second year of law school. DeFunis then petitioned the Supreme Court to hear his case. Justice Douglas issued a stay of the Washington Supreme Court's order until the U.S. Supreme Court decided whether to hear the case. The stay was issued in 1973 while DeFunis was in his third year of law school. Justice Douglas' stay remained in effect throughout the U.S. Supreme Court's proceedings, which concluded on April 23, 1974, about one month before DeFunis was set to graduate from the law school.

Like most Supreme Court cases, media coverage of *DeFunis v. Odegaard* was relatively limited, yet it is particularly important to study the media coverage of this case because the Court's opinion gave almost no information about the issues involved in the case. In fact, the *per curiam* opinion only mentioned race once and only vaguely indicated that affirmative action was involved. In contrast, *The New York Times* coverage of the case before the Court's decision offered detailed descriptions of the facts of

DeFunis' case and the path the case took to the Court (Totenberg; Malbin; A. Lewis). Newspaper reports also repeatedly used the terms "reverse discrimination" and admissions or racial "quotas" to describe the University of Washington Law School admissions process (Weaver; Shanker).

The news coverage indicates that audiences would have expected the Court's opinion to deal with race and affirmative action. Alan Sindler's study of the *DeFunis* case argued that these expectations increased attention to the case: "Well before the Court agreed to hear *DeFunis*, the case had already aroused considerable interest because it promised to deal for the first time with the controversial question of the legality of race-preference policies in the absence of demonstrated overt racial discrimination" (Sindler 202). This anticipation only grew after the Court accepted the case to the Court's docket, which led to an unusually large number of friend of the Court briefs on the case: "over 60 organizations allied themselves with one another of 30 *amici* briefs, which was an unusually large number to be submitted" (Sindler 202). Media coverage of the *DeFunis* case offers a useful perspective on the case and the exigencies faced by the Court, but it is only part of the story. Archival information also offers information about the milieu at the Court throughout the *DeFunis* case.

Records from the files of Justices Powell, Brennan, and White show that throughout the decision making process the Justices were far from unanimous in their opinions about the case. Justice Powell's notes on the first vote on whether or not to accept the case show that at least four justices wanted to deny *certiorari* and dismiss the case, the others voted to hold the case for later, remand the case, grant *certiorari*, or to

ask the parties to address the issue of whether the case was moot or was still a live controversy. The justices decided to ask the parties to prepare briefs about whether or not the case was moot (Powell, "Certiorari Vote Sheet"). Powell's notes also recorded that "Appellant is in Law School because Douglas granted stay. Court hopes to avoid race issue, thinking there is some chance the University will work this out (??). Potter and Byron think state can do this" (Powell, "Certiorari Vote Sheet", punctuation in original). This note can be read as foreshadowing the Court's decision in the case.

After receiving briefs on the mootness of the case, the justices again voted on whether or not to take the *DeFunis* case. On November 9, 1973, Powell recorded six votes to deny *certiorari* and dismiss the case, leaving only three of the required four votes to hear the case. The justices agreed that the case would be relisted for a later vote so that Douglas could "write" (Powell, "Certiorari Vote Sheet"). Douglas drafted a dissent from the denial of *certiorari* and dismissal of the case and he circulated a draft of the dissent on November 13. Perhaps Douglas' arguments, or merely his threat to publish a dissent on the denial of *certiorari*, swayed Justice White. At the November 16, conference Powell recorded that Justice White changed his vote making four votes to hear the case.

The Court heard oral arguments in the case on February 26, 1974. Powell's notes from the March 1, 1974, conference show that no consensus had developed since November. At the end of the conference on March 1, Justices Brennan, White, and Marshall wanted to affirm the Washington Supreme Court's decision that the University's procedure was constitutional and that DeFunis' admission need not be honored, though the University had promised to honor DeFunis' admission and allow

him to graduate (Powell, "Notes March 1, 1974"). Justices Stewart, Blackmun, and Rehnquist voted to dismiss the case because it was moot. The Chief Justice, Douglas, and Powell chose not to vote.

With the Court divided into even thirds, the fate of the case rested on the undecided, though from the arguments made at the conference Douglas appeared to be leaning towards affirming in order to give Universities room for judgment in admissions decisions. Similarly, the Chief Justice appeared to support voting to dismiss the case. Thus, it was really Powell's vote that would tip the balance. Powell's notes about his own views are particularly interesting. Powell wrote that he felt the case was probably moot, but "As to merits inclined to affirm" the Washington Supreme Court's decision. Powell's notes also reveal that he considered recusing himself from the case because of his membership on the Washington and Lee board of directors, which the other justices encouraged him not to do (Powell, "Notes March 1, 1974").

It became particularly important that Powell chose not to recuse himself from the case because it was his vote that determined the Court's majority. On March 11, 1974 Powell wrote a letter addressed to the Chief Justice, which was also circulated to the entire conference, explaining his vote to find that the case was moot. The letter began with the history of the Court's votes in the case noting that Powell consistently voted not to hear the case and that he was not alone in doing so. He then argued that he felt compelled to decide the merits of the affirmative action issues in the case because the Court had heard oral arguments (Powell Memo to Conference Mar 11, 1974, Powell Papers). Powell's letter eventually explained that though it was *possible* that the case was

not moot, for example, if the University were to go back on its promise to let DeFunis graduate, that he found "it difficult to accept this as a real possibility" (Powell, "Memo, Powell to Conference, March 11, 1974"). Powell decided to stick with his previous votes and find that the case was moot (Powell, "Memo, Powell to Conference, March 11, 1974").

On March 14, 1974, the Chief Justice circulated a memo to the conference explaining that Justice Stewart "agreed to draft a per curiam opinion dismissing the appeal" in *DeFunis* because the case was moot (Burger, underlining in original). Bernard Schwartz's interviews with Court personnel indicate that Stewart may have volunteered because he was the most vocal proponent of finding the case moot (Schwartz 33-34). On April 23, 1973, the Court's *per curiam* opinion was announced and was accompanied by two dissenting opinions. Justice Douglas' dissent took issue with University admission processes generally and argued that better measures of aptitude were needed. Justice Brennan's dissent responded directly to the *per curiam* opinion arguing that that case was not moot and that the Court had an obligation to decide the case.

Unlike *Brandenburg*, there is no clear explanation for why Justice Stewart chose the *per curiam* label for this opinion. The strongest suggestion for choosing not to decide the issues and label the opinion *per curiam* comes from Powell's note that the Court wanted to avoid the race issues of the case. Powell wrote that the Court as a whole wanted to avoid the race issues, yet at least four justices eventually voted to hear the case. However, without additional evidence there is little to support any theory of why the *per curiam* label was chosen.

The media coverage and Court archives offer a more complex picture of the exigency faced by the Court. The media coverage indicates that audiences would have been familiar with the issues of the case and would have expected an opinion dealing with affirmative action. The archival material shows that the Justices did not reach consensus on this case, nor did they agree about the desirability and constitutionality of affirmative action. This background is important for understanding the factors that may have encouraged the choice to write pseudonymously.

***DeFunis v. Odegaard* (1974)**

The *DeFunis per curiam* opinion was relatively brief, taking up a mere eight pages in the Supreme Court reporter. The rhetoric of the opinion excluded any discussion of affirmative action or race from the opinion. The opinion employed a deductive style to appear logical, rational, and determinative. The *DeFunis per curiam* opinion can be conceptually divided into four section: the orientation section, summary of issues and facts, analysis of the issues, and disposition.

The opening of the *DeFunis per curiam* opinion introduced the nature of the case and the legal question presented: Did the Washington University Law School's admissions policy violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution? The opinion then reviewed the history of the case giving special attention to how the case came to the Supreme Court. This section also tracked DeFunis' progress through law school since the Washington trial court ordered his admission in 1971. From this context the opinion declared that the case was likely moot, but investigated four rules relating to mootness in order to explain which of the rules were

relevant to the case at hand. This section appeared to anticipate several arguments put forward in Justice Brennan's dissenting opinion, though without naming or citing Brennan's opinion. The opinion eventually concluded that the *DeFunis* case was moot and a briefly disposed of the case by remanding it to the Washington Supreme Court. It is useful to study each section of the opinion in detail to highlight the unique rhetorical strategies employed and to discover how the sections worked together to construct a vision of the rule of law.

a. Orientation Paragraph

The *DeFunis* opinion began with the origins of the case and the legal remedy sought by DeFunis in the Washington state courts saying:

> In 1971 the petitioner Marco DeFunis, Jr., … applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*DeFunis v. Odegaard* 314, internal citations omitted)

This paragraph provided the only background information about the admissions process and DeFunis' grievance with this process in the opinion. The opinion gave very little

information as to the reason for DeFunis' denial of admission. Particularly important rhetorically was the omission of DeFunis' race and of any discussion of affirmative action. Readers unfamiliar with the facts of the case might have guessed that DeFunis was discriminated against as a minority applicant because so little information was given in the opinion. The Court's opinion required that audiences already be familiar with the facts of the case to know that DeFunis was a white applicant arguing that that the University's admissions policy of giving preferential treatment to minority applicants was unconstitutional.

The omission of information about DeFunis' race and of affirmative action is rhetorically significant because exclusion, particularly of a relevant issue, event, or audience denies the relevance, import, and desirability of the excluded (Wander 209). The exclusion of affirmative action totally and near total exclusion of race from the *per curiam* opinion denied the relevance of these topics to case at hand. The exclusion of affirmation action from the opinion as a part of the refusal to decide on the substantive issues of the case was particularly important for the meaning of the rule of law articulated in the *per curiam* opinion. In this way the Court acted as though it were unconcerned with the substantive issues and deaf to the concerns of the litigants.

b. Summary of the Issues/Description of Material Facts

This section of the opinion described the history of the case and key issues in the litigation process to frame the case so as to support the conclusion that the case was moot. The opinion focused on procedural issues, like the timing of the litigation and

whether or not the case was filed as a class-action suit, to set up the case as one that was likely moot.

The second paragraph of the opinion immediately noted that DeFunis brought his suit only on behalf of himself and not "as the representative of any class" (*DeFunis v. Odegaard* 314). For readers unfamiliar with the rules regarding mootness this statement may appear inconsequential. However, this aspect of DeFunis' lawsuit provided an important justification for the Court's dismissal of the case. In order to seek adjudication in the court system any potential litigant must demonstrate standing. To do so requires that the potential litigant show: 1) that they have been harmed, 2) that the other party to the action was the cause of that harm, and 3) that there is a remedy that a Court can offer to assuage the harm. This is particularly important in the *DeFunis* case because if any of these aspects of the case were lost — if the harm disappeared, or if the courts were unable to remedy the harm — then the case would become "moot," meaning that further proceedings could not be pursued.

The opinion implied that because DeFunis brought the case only on behalf of himself and not as a member of a similarly situated class of persons that the case was moot. If DeFunis was no longer threatened with denial of admission then there would be no remedy for the Supreme Court to offer. However, if DeFunis had brought suit on behalf of himself and on behalf of a class of similarly situated persons, then the DeFunis' graduation would not eliminate the harm suffered by the class of similarly situated persons. In calling attention to the nature of DeFunis' lawsuit the opinion previewed the

mootness decision by implying DeFunis' choice to bring suit only on behalf of himself would make it more difficult for the Court to decide the case.

The second issue in this section was the timing of the case. The opinion explained that the first remedy sought by DeFunis was "a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September 1971" (*DeFunis v. Odegaard* 314-315). The Washington trial court granted this request. DeFunis began taking courses at the law school in the fall of 1971. The opinion then noted that the Washington Supreme Court heard the case on appeal and found that the Law School's admission policy was constitutional so that DeFunis did not need to continue to be allowed to enroll. At the time of the this decision "DeFunis was in his second year at the Law School" (*DeFunis v. Odegaard* 315). DeFunis then petitioned the U.S. Supreme Court to hear his case.

Justice Douglas issued a stay of the Washington Supreme Court's order preserving DeFunis' admission to the law school while the Court decided whether or not to take the case (*DeFunis v. Odegaard* 315). The opinion then explained that "[The Court] granted the petition for certiorari on November 19, 1973 …. The case was in due course orally argued on February 26, 1974" (*DeFunis v. Odegaard* 315, internal citations omitted). By the time of oral arguments DeFunis was preparing to register for his final quarter of law, and was just a few months away from graduation in May, as long as his admission continued. The detailed information about the timing of the case as it coincided with DeFunis' progress through law school focused audience attention on the possibility that DeFunis would graduate before the Court was able to decide the case.

Along with the detailed explanation of timing, the opinion noted that the Court itself had been unsure about the Court's ability to hear the case since DeFunis' petition for *certiorari.* Even though the Court "requested the parties to brief the question of mootness before we acted on the petition" and both parties argued that the case was not moot, yet the Court waffled (*DeFunis v. Odegaard* 315). During oral arguments Justice Marshall asked DeFunis' attorney to notify the Court of whether or not DeFunis had been allowed to register for his final set of law school courses to aid in determining whether or not the case could be decided. After oral arguments DeFunis' attorney sent a letter indicating that DeFunis had registered for his final quarter of courses. With confirmation that DeFunis was registered for his final term, and the University's promise that the Law School "will not in any way seek to abrogate [DeFunis'] registration," it appeared as though DeFunis would be allowed to graduate regardless of the Court's decision (*DeFunis v. Odegaard* 316). If the Court's actions could have had no effect on the case, then the case would have been moot. Though the opinion questioned whether or not the case was moot, the discussion of the case to this point left no question that the Court would find the case moot.

Taken together the opinion's attention to details relating to the nature of the lawsuit and the timing of the case focused the audiences' attention on issues that could render the case moot. These issues set the stage for the Court's eventual conclusion that the case was moot. The focus on procedures was rhetorically significant because this focus also functioned as an appeal to formal rules. In paying close attention to the details

of the case, such as the lack of class-action filing and the timing, the opinion set out the formal rules of standing as key to any decision.

c. Analysis of the Issues

This section of the opinion evaluated rules related to mootness to determine whether the case was actually moot. If the case were found to be moot, it would prevent the Court from deciding on the affirmative action issues in the case. This section identified four rules about mootness that if applicable to this case would allow the Court to deal with the affirmative action issues. The opinion dismissed each of these rules as inapplicable to the case. Most of this section served to anticipate the arguments put forth in Justice Brennan's dissenting opinion. In responding, even implicitly, to the dissenting opinion the *per curiam* opinion acknowledged the validity of Brennan's arguments as worthy of response. The opinion thus may have surrendered control of the content of the opinion to other rhetors as the *per curiam* responded to arguments rather than putting forth assertions and evidence of its own. Despite this, the Court did not note the source of these arguments, and if read alone they appear as pre-emptive responses.

The first rule the *per curiam* opinion put forward regarding mootness, was that the Court could follow the mootness rules of the State of Washington which allowed for otherwise moot cases to be heard when doing so serves "the great public interest in the continuing issues raised by" an appeal (*DeFunis v. Odegaard* 316).[22] From this the opinion concluded that the U.S. Supreme Court's ability to act was determined by the federal law and the Washington state law could not be applied. After arguing that the

[22] This argument was not raised in Brennan's dissenting opinion.

federal standards for mootness must be used in this case the Court determined that the case must be found moot by federal rules (*DeFunis v. Odegaard* 316-317).

The second possibility regarding mootness identified by the *per curiam* opinion was that if the University were to renege on its promise to allow DeFunis to graduate, then DeFunis would still need court action in order to allow him to graduate.[23] The *per curiam* opinion explained that the Court's policy was to honor such promises:

> The respondents, through their counsel, the Attorney General of the State, have professionally represented that in no event will the status of DeFunis now be affected by any view this Court might express on the merits of this controversy. And it has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision. (*DeFunis v. Odegaard* 317-318)

The *per curiam* opinion opted to trust the University not upon the University's reputation or trustworthiness, but upon a policy of accepting what appellants said at face value. In this way the procedure of taking "representations" as true trumped any concern about the substance of the promise or quality of the promisor.

The third possible rule relating to mootness had to do with a rule allowing courts to hear cases where the case appeared moot because the "allegedly illegal activity ceased" making it difficult to show harm (*DeFunis v. Odegaard* 348-349). The opinion explained "[t]here is a line of decisions in this Court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to

[23] See Brennan's dissent at 348 for this argument (*DeFunis v. Odegaard* 348).

hear and determine the case, *i.e.,* does not make the case moot'" and the opinion offered citations to five cases to support this statement (*DeFunis v. Odegaard* 318). The *per curiam* opinion then argued that any application to *DeFunis* was hypothetical because

> [M]ootness in the present case depends not at all upon a "voluntary cessation" of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled. (*DeFunis v. Odegaard* 318)

The *per curiam* opinion thus dismissed this possibility without actually dealing with the substance of the rule. The opinion claimed a kind of precedence in arguing that because the case was mooted by DeFunis' graduation, this exception could not be applied. This argument was an assertion without evidence, as the opinion did not explain how any sort of sequence to show why one rule should be applied before another.

The fourth rule relating to mootness considered in the *per curiam* opinion would have allowed the Court to hear *DeFunis* case if the affirmative action issues were likely to be repeated, and likely to evade judicial review again. If the *DeFunis* case "presents a question that is 'capable of repetition, yet evading review,'" the Court could decide the affirmative action issues in the case even though the case would otherwise be considered moot (*DeFunis v. Odegaard* 319).[24] The *per curiam* opinion ruled out this exception stating that DeFunis would never again face law school admissions and so this case will

[24] Justice Brennan's dissent argued that it was wasteful to wait for "repetitious" litigation to decide these issues when the *DeFunis* case was ready for decision, but did not use this rule in the argument (*DeFunis v. Odegaard*).

not be repeated. In focusing only on DeFunis' experience and not upon the University of Washington admissions policy the *per curiam* opinion offered a procedural reason, lack of available remedy, why the case was found moot. The *per curiam* opinion further implied that another lawsuit, perhaps a class action suit, was possible:

> [J]ust because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged … there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. (*DeFunis v. Odegaard* 319, internal citations omitted)

In this passage, the *per curiam* opinion encouraged the audience to see that another case could bring the same issues to the Court. Thus, even though this case was moot, the *per curiam* opinion did not explicitly dismiss the subject or legal issues as unimportant or uninteresting.

The *per curiam* opinion's discussion of these four possibilities in dealing with the mootness issues repeatedly used procedures to dismiss the case and ignored issues related to the substance of the case and of the arguments. The focus on procedures, along with the organization of the section, is particularly important for considering what the opinion says about the rule of law.

Throughout the *per curiam* opinion's analysis of the mootness issue the Court relied upon procedure to justify its decision to find the case moot. First, the opinion

dismissed state rules in favor of federal regulations. Second, the opinion followed the Court's procedure of trusting the "representations" of the litigants. Third, the opinion dismissed the possibility of deciding the case using the "voluntary cessation of allegedly illegal activity" rule because the Court had already found the case moot on other grounds, thus putting in place a procedure governed by sequence. Fourth, the *per curiam* opinion dismissed the possibility that the issues would evade future review because procedures could allow another case to come before the Court that met the relevant criteria.

This section of the *per curiam* opinion demonstrated that the Court followed policy and regulation to determine the outcome of the case. This kind of literal rule following could be appealing to audiences in several ways. First, following the letter of law could act as a guarantee of fairness because the rules are known in advance and thus make outcomes predictable. Rule-following could also be appealing because it appears totally impartial as the rules determine outcomes and not bias. Perhaps even more appealing could be the way in which rule following could appear to embody procedural justice.

Yet, responses to this case demonstrate that many audiences found the opinion unsatisfying. This may be because procedural justice, meaning an attempt at justice where the process is the only guarantor of justice, is designed to solve the abstract or general case. In practice, the case at hand rarely embodies the generalized expectation. For this reason, substantive justice, or decision-making that is aimed at producing the most just outcome in each particular case, is sometimes required to "fix" the outcome produced by attempts at procedural justice. In *DeFunis*, the emphasis on procedure, at

times at the expense of substance, may have been unsatisfying because the resolution of the substantive issues of the case were highly anticipated (Sindler). The opinion's appeal to procedural fairness constructed the rule of law as privileging procedure over substance, and this may have challenged audience notions of the rule of law ideal. This contributed to the vision of the rule of law, but before going deeper into that vision it is also important to consider the organization of this section of the opinion as part of the rhetoric.

The second aspect of this section of the *per curiam* opinion that was rhetorically significant was organization of this section of the opinion. As noted above, the *per curiam* opinion dealt with four possibilities that would allow the Supreme Court to decide the affirmative action issues in this case. The opinion dismissed each. The organization of this section of the opinion was significant because it employed an apagogic argument style introducing each possibility for deciding the case on the merits and rejecting each after applying the rule to the facts of the DeFunis case. The structure of these arguments was not always linear, nor were the conclusions always determined by the application of the rule to the case, so that the arguments were not formally deductive, yet this section utilized clearly delimited arguments during which formal and informal rules were applied to the facts of the *DeFunis* case in a way that *appeared* definitive. In this way, the Court's rhetoric employed an argument structure that should have enhanced the authority of the arguments because the pseudo-deductive structure should make the Court's conclusions appear impartial and logically required. This strategy would appeal to audiences because it portrays law as a scientific endeavor, one with high standards of

proof, and as a practice guided by reason.

The third consideration in light of this section of the opinion is about purpose. It is worth considering what rhetorical purpose may have been served by focusing on procedure. One explanation for this organization is to see it as an invitation to pursue future litigation. In showing the many ways that the *DeFunis* case was moot and by dismissing possible exceptions to the mootness of the case, the Court was able to implicitly suggest what characteristics a case would have for the Court to decide on the substantive issues. For example, in drawing the conclusion that the case was moot the opinion noted that "DeFunis did not cast his suit as a class action" and for that reason the Court could not offer the remedy requested. To read this as an invitation to future litigation, audiences would look to the opinion's concern with the fact that this case was not a class action, along with the opinion's claim that other similar cases could be pursued, as a promise that the Court would hear and decide similar cases that were filed as class action suits. Thus, the repeated dismissal of rules or exceptions that would have made it possible for the Court to decide the affirmative action issues in the *DeFunis* case could be read as pointing to ways that future litigants could ensure that their case would not present the same procedural issues as *DeFunis*.

From this perspective the opinion's explication of the various rules and exceptions that would allow the Court to hear the case, if they applied, can be read as guides for future litigants as to how to ensure that their case will be heard by the Court. This reading explains the structure of the analysis section of the opinion not as deference to critics, but as a positive instruction as to how to read the law. Similarly, this perspective allows the

opinion's discussion of procedures both to justify the outcome in *DeFunis* and to provide guidance to future litigants as to value of procedures and the characteristics of cases likely to merit a substantive decision from the Court.

Reading the *DeFunis* opinion as an invitation to future litigation demonstrates how the opinion can be read in a way that affirms the rule of law, even if only as a practice of strict rule-following. Also, viewing the *DeFunis* opinion through this lens helps show the opinion as a helpful guide to lawyers and litigants that fulfills the Court's duty to clarify the law through offering instructions as to how to carry out its decisions (Schauer, "Refining the Lawmaking Function of the Supreme Court"). Yet, this reading is not the one taken up by many readers of the opinion, and for this reason it is important to explore how the rhetoric of the opinion brings up deep rooted issues about the rule of law ideal.

The Rule of Law in *DeFunis v. Odegaard*

The rhetoric of the opinion valued procedural concerns over potential arguments about substantive justice. The emphasis on rules and procedures regarding mootness, along with suggestions that other cases could be heard, may have functioned as an invitation for future litigation for some audiences. This opinion constructed the rule of law as a literal enactment of the Court following the minutiae of rules regarding various aspects of the law. The Court in this vision functioned like a bureaucrat enforcing rules without explanation, deaf to the substantive issues.

The first aspect of the opinion that contributed to this vision of the rule of law presented in the opinion was the omission of affirmative action completely, and the near

complete omission of race from the opinion. Excluding these issues from the opinion would have violated the general rule that rhetors generally "[m]ake [their] conversational contribution such as is required at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which [they] are engaged" (Grice 67). Rather that explaining the irrelevance of these issues the opinion denigrated through exclusion (Wander 209). The Court functioned as a bureaucrat in enforcing rules they did not make—tied up in red tape—indifferent to the problems of the litigants.

A second important characteristic of the rule of law in the opinion was the way in which rules appeared to dictate the outcome of the case. Like the *Brandenburg* opinion, the *DeFunis per curiam* opinion denied the Court's responsibility for the decision in this case. The *DeFunis* opinion did this by demonstrating that several rules prevented the Court from dealing with the substantive issues in the case and required that the Court dismiss the case. Though the opinion did not imply that some other force or agent was responsible for the decision, as the *Brandenburg* opinion had, the opinion implied that the rules had to be followed and could not be manipulated or ignored. The opinion did not offer any explanation of why these rules would have trumped the possible benefits of deciding on the substantive issues, such as the certainty for schools and administrators across the country as to what policies were constitutional. In deferring to the mootness rules the *DeFunis* opinion made it appear as if the rules decided the outcome of the case, leaving the Court little agency or responsibility for the outcome. In this vision the Court appeared to act as an impartial arbiter, rather than as an interpreter of the law. This allowed the Court to ignore the real issues of the case replacing them with red tape.

This vision of the rule of law as a practice of following the letter of the law may be compelling as it shows the Court as a neutral and impartial arbiter. Concerns that the Justices of the Supreme Court are unelected are easily dismissed if the Court's role is only to follow the rules, as there would be no room for bias to change how the rules are followed. In this way the Court's relationship to the law was like that of a Kafka-esque bureaucrat in that the Court can recite and apply the rules but offer no explanation of why the rules exist. In this way the Court never appears biased, but also may never appear to have satisfactory answers.

Also the potential invitation to future litigation was presented in the opinion. The opinion noted that in the future similar issues could likely reach the Court more quickly. Also, the attention to the detail of the mootness rules could be read as a set of guidelines or criteria to guarantee that the Court would hear the substantive issues. In this way too the Court acted like a bureaucrat advising litigants, or potential litigants, on what to do in order to navigate the bureaucracy. This vision of the Court conflicts with the vision presented in *Marbury*. The *Marbury* opinion claimed, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule" (*Marbury v. Madison* 177). The *DeFunis* opinion, by contrast, appeared to portray the Court as checking the necessary boxes to *follow* the law, rather than as expounding and interpreting the law.

Omission of affirmative action and race issues, preference for procedural rules over substantive concerns, reliance upon mootness to make it appear as those rules alone dictated the outcome of the *DeFunis* case, and the potential invitation to future litigation

together created a vision of the rule of law that was bureaucratic. Like one of Kafka's petty functionaries, the Court ignored substantive concerns in order to literally rule by the law. This vision of the rule of law upholds the Court's power to arbitrate legal issues as it affirms the Court's neutrality and objectivity, yet it results in decisions that may appear arbitrary or unsatisfying as the Court provided no justifications for why the mootness rules trumped other concerns. This vision of the rule of law may also be frustrating for many audiences, as the opinion may have implicitly communicated that substantive concerns are less important than procedural rules. This message harmed the rule of law as the court and the law appeared indifferent to justice, presenting a disincentive to litigants looking to the legal system for remedy (Bybee 62-63). Similarly, this vision of the rule of law broke with the *Marbury* vision of law made by the people for the people because justice was lost in red tape.

The final aspect of the vision of the rule of law in this opinion that should be considered is the relationship of the *per curiam* label to the rhetoric of the opinion and vision of the rule of law presented in the opinion. In light of the *per curiam* label this vision of the rule of law may appear more like a persona taken on in order to hide motives that would not have been considered appropriate to some audiences. In this way the *per curiam* label attempted to preserve the Court's position as ruler by law in masking the contentious debate and covering the justice's reluctance of dealing with race and affirmative action

Looking to traditions of pseudonymous publication in the English-speaking world demonstrates how pseudonyms have aided authors in hiding their motives in order to

appear appropriate. John Mullan's *Anonymity* noted that from the sixteenth through the nineteenth century there was a long tradition of employing pseudonyms to protect "modesty" (Mullan 46). Pseudonyms can mask authorial motives in order to appear more appropriate or acceptable. In *DeFunis*, the *per curiam* label hid the justice's motives and effaced the dissensus about what action was appropriate in the case. The *per curiam* label may have worked to limit the damage to the Court in this case because it made the opinion more "appropriate" in masking dissensus and hiding less acceptable motives for finding the case moot.

Though the opinion's elaborate explanation of the mootness rules and how they shaped the Court's decision, in conjunction with the *per curiam* label, appeared to some readers as a kind of cover or mask for the Court's true motives, even before Justice Powell's notes that indicated that the justices hoped to ignore the "race issue" were available publicly (Powell, "Certiorari Vote Sheet").[25] The *per curiam* label gave credence to the bureaucratic rhetoric because it removed the appearance of individual bias from the opinion at a literal level, even if some read such bias between the lines. This indicates that the rhetoric and the *per curiam* label together may have created the appearance of appropriateness and an aura of unanimity in order to hide other motives, just as earlier English authors utilized pseudonymity to protect their "modesty." This case illustrates how pseudonyms can allow a rhetor to speak appropriately in difficult rhetorical situations.

[25] Justice Brennan's dissenting opinion cannot of course be included in this group as he was party to discussion of race at the judicial conference. However, Baldwin's commentary was published in 1974, Spencer's in 1973, and Fischer's in 1975, all before Powell's retirement from the Supreme Court in 1987.

Responses to the opinion demonstrate that those who interpreted the Court's opinion as avoiding race and affirmative action found this motive inappropriate. Two commentaries on the *DeFunis* case argued that in deciding the case on mootness grounds, and not reaching the affirmative action issues, the opinion was difficult to justify and it appeared as though the Court had "deserted the national populace" in leaving the legal limbo in place (Baldwin 360; Spencer 806). Even more explicitly Justice Brennan's dissenting opinion argued that the Court's majority used "mootness" to screen the Court from the difficulties of the affirmative action issue saying there was "no justification for the Court's straining to rid itself of this dispute" (*DeFunis v. Odegaard* 349). Similarly, Fischer argued that the votes of the justices revealed dissensus about the issues, and rather than deal with the difficult issues, the justices in the majority chose the "path of least resistance" in using mootness rules to dismiss the case (Fischer 491).[26] Both Brennan and Fischer read the mootness decision along with the *per curiam* label as hiding the real motives of the Court, reluctance to deal with the difficult affirmative action issues.

These responses demonstrate that the rhetoric of the opinion, despite the *per curiam* label, harmed faith in the Court and in the rule of law. The *per curiam* label, despite the potential to lend a sense of propriety, contributed to the bureaucratic *persona* of the Court in the opinion. The rhetoric of the opinion consistently portrayed the Court and the law as indifferent to substantive concerns, and thus to justice. Unlike the *Marbury*

[26] Laura Krugman Ray's study of the history of *per curiam* opinions utilizes *DeFunis v. Odegaard* as an example of a case where the Court used "procedure as a screen" to distance itself from difficult issues (Ray 548).

vision of the Court as protecting individual rights, the *DeFunis* opinion showed the Court as obstructing the litigants search for justice.

Conclusion

The *DeFunis v. Odegaard per curiam* opinion offered a vision of the rule of law where the Court appeared either as a bureaucrat applying the rules without reflection, or as utilizing the persona of a kind of bureaucrat in order to hide other, less acceptable, motives. The rhetoric of the opinion hindered faith in the rule of law because the law and the Court appeared deaf to concerns that it should adjudicate, and in this way immune to justice. The *per curiam* label attempted to make the Court's response to the case more appropriate. However, for some audiences this strategy failed to remove the appearance that the Court was avoiding the substantive issues of the case.

This case demonstrates that the rhetoric of the rule of law may often be shaped by instrumental concerns and goals as the Court aims to deal with a case. The analysis in this chapter also illustrates that pseudonyms can protect the character and authority of institutions like the Supreme Court, and as such, pseudonyms can do more than just avoid criticism as they preserve institutional legitimacy.

Chapter 5 "*Bush v. Gore* (2000): Authoritarianism and the Rule of Law"

This chapter analyzes what may be the most controversial *per curiam* opinion decided by the Supreme Court to date, *Bush v. Gore* (2000). *Bush v. Gore* effectively determined the outcome of the 2000 presidential election by ending the Florida vote recounts. The opinion argued that the Florida recount lacked the necessary precautions and rules needed to ensure that the recount was fair.

The nature of the case, as well as the rhetoric of the opinion, prompts questions about the Court's relationship to the other branches of the U.S. government. For this reason, the opinion makes it possible to consider changes in visions of the rule of law in politically charged cases and also is a notable example of the use of the *per curiam* label in a controversial case. This chapter begins describing the background of the Court's opinion with a particular emphasis on how the context may have created a situation that encouraged the Court to write pseudonymously. This chapter then undertakes a rhetorical analysis of the *Bush v. Gore per curiam* opinion in order to draw out how the opinion crafted a vision of the rule of law that was characterized by the rule of the U.S. Supreme Court over the people and over other the other branches of government. The *per curiam* label reinforced the image of the Court as ruler by law as it shielded the authors from criticism, making it impossible to hold the authors accountable for their opinion.

The 2000 Election and Encouraging Pseudonymity

The history of the 2000 Florida election alone is long and complex. For this reason, this section focuses on the aspects of the election that would have presented an exigency in need of response and would have encouraged pseudonymity in the Court's opinion.

Examining the context leading up to the Court's *Bush v. Gore per curiam* opinion points to five factors that encouraged pseudonymity. These include: 1) the need for a speedy decision, 2) concerns that the Supreme Court should have deferred to the Florida Supreme Court, which contributed to the controversial appearance of the case, 3) the intense media focus on the election controversy and the Court's role in its resolution, and 5) the Court's use of the *per curiam* label in prior contentious and controversial cases. The Court's motivation may never be known, certainly not for many more years, but it is useful to consider these factors in relation to the text of the opinion in order to consider how the rhetoric of the opinion responded to the situation at hand.

The 2000 presidential election took place on November 7, and the Florida vote was contentious from the beginning. The 1,784 votes between the leader, Governor Bush, and Vice President Gore triggered automatic recount measures (*Bush v. Gore* 101).[27] The machine recounts further diminished the margin of Bush's win, leading Gore to request manual recounts in several counties. These recounts continued until November 26, when the Florida Secretary of State certified the vote (*Bush v. Gore*). The certification made it possible for Gore to pursue additional legal avenues in search of recounts.

[27] On November 8, the state of Florida was called for Governor Bush because he had received 2,909,135 votes, over Vice-President Gore's 2,907,351 votes (*Bush v. Gore*).

On November 27, 2000, Vice-President Gore filed a contest to the election arguing that there were either enough illegal votes counted or legal votes not counted to put the election in question. Effectively, Gore's contest requested additional recounts. The Florida Supreme Court agreed that there were potentially enough legal votes uncounted to warrant ordering a manual recount across the state of all of the "undervotes," ballots read by machines as not showing a vote, and announced the order for a manual recount on December 8, 2000. This order extended the recounts to all counties and required manual reviewing of all ballots that were not readable by the tabulation machines but upon which human interpretation could find the intent of the voter. The Florida Supreme Court's decision was important as it defined a legal vote as a ballot containing a "clear indication of the intent of the voter" and required human interpretation of "undervotes" (*Gore v. Harris*). This decision was the basis for the U.S. Supreme Court's *Bush v. Gore* decision.

On December 9, 2000, George W. Bush filed a petition with the U.S. Supreme Court to prevent the Florida manual recounts from taking place. That day the Supreme Court granted Bush's petition and issued a stay preventing the recounts from continuing. The Court simultaneously agreed to hear arguments about the recount and scheduled oral arguments for December 11, 2000 (*Bush v. Gore*). The stay was accompanied by a dissenting opinion signed by Justices Stevens, Souter, Breyer, and Ginsburg, as well as an opinion in support of the stay authored by Justice Scalia (McGreevy 94). The date of the stay and oral arguments in *Bush v. Gore* are particularly important for understanding one of the reasons why the Court may have written pseudonymously. December 12, 2000

was the date set by the U.S. Congress as a deadline to select electors with the guarantee that the electors would be considered "conclusive." Though there were many examples of states' failing to meet this deadline without issue, this appears to have served for the Court's majority as a deadline that had to be met and thus required a quick decision.

The short time between oral arguments on December 11, and the announcement of the Court's opinion on December 12, may have encouraged pseudonymity. This quick turnaround likely rushed the decision-making and writing processes of the Court, including the usual measures taken to ensure quality control. Even with the aid of clerks, it would not be surprising if the Justice(s) who authored the *Bush* opinion chose pseudonymity to avoid associating their name[s] with an opinion produced hastily, yet this hardly seems a complete answer when viewed in light of the Court's history. In at least two other cases, *New York Times v. United States* (1971) and *Ex Parte Quirin* (1942), the Court utilized perfunctory *per curiam* opinions to announce a decision immediately and then later followed the *per curiam* opinions with signed opinions that dealt with the substance of the case. Unlike the *per curiam* opinions in other cases requiring haste, the *Bush v. Gore per curiam* opinion offered explanations and arguments in support of the Court's decision.

A second aspect of the legal battle that may have encouraged pseudonymity were the comments made in Justice Stevens dissent from the stay of the Florida Supreme Court's order for a recount. The dissenting opinion took issue with the Court's decision to hear the case arguing that the stay violated the Supreme Court's tradition of respecting a state court's decisions on issues of state law ("Supreme Court's Decision to Halt the

Florida Recount"). If, as the dissent charged, the Court was violating its own practice by hearing *Bush v. Gore*, then the Supreme Court would appear to be willing to break its own rules to achieve the desired *political* result.

The media also played an important role in documenting the legal battles over the election, and this attention could have prompted pseudonymity in the Court's opinion. In a November 27, 2000, article Linda Greenhouse, Supreme Court correspondent for the *New York Time*s, wrote that "By seizing a central role for itself in sorting out the legitimacy of Florida's presidential vote count, the Supreme Court put on the line its own legitimacy as an institution able to rise above partisan rancor and serve as a fair and neutral arbiter" (Greenhouse, "The Supreme Court; Justices Ready to Walk a Very Fine Legal Line"). Similarly, on December 10, she wrote that the legal issues in the case "will inevitably be overshadowed in the eyes of history by the political import of what occurred" (Greenhouse, "Bush Had Sought Stay - Hearing Is Tomorrow" 45). These arguments may have encouraged the Justice(s) who authored the opinion to employ a pseudonym to avoid criticism for authoring a "political" decision, or authoring an opinion that tarnished the Court's image.

Along with criticism from the media, the volume of media coverage presented a particularly pressing exigency to the Supreme Court in December 2000. The impact of the media coverage of the 2000 presidential election was illustrated by Herbert Kritzer's study of popular knowledge of the Supreme Court. Kritzer found that found that news coverage increased public knowledge about the Court, at least temporarily. Before December 12, 2000, most people surveyed correctly answered 3.04 out of 6 questions

about the justices and the powers of the Court (Kritzer 37). After December 12, 2000, the survey showed increased knowledge about the Court for each of the questions individually and the average number of questions correct jumped to 3.48 (Kritzer 37). Kritzer attributed the increased knowledge to the media focus on the Court's role in the election controversy.

Similarly, Kathleen Hall Jamieson and Paul Waldman's study of Sunday morning political talk demonstrated that, from the vote on November 7 until the November 26 certification of the Florida vote, some media outlets resisted the presumption that Bush had won the election. This was in part because Gore had won the national popular vote and because the Florida electoral votes appeared contentious (Jamieson and Waldman). Jamieson and Waldman's study illustrates how the controversy was kept alive in the media through November and December 2000.

The breadth of coverage of the Florida election may have encouraged pseudonymity because the media focus on the case increased the level of scrutiny which any author(s) would likely face if their authorship were known. The focus of this attention upon one or more Justices may have been daunting, especially in light of the many threatening letters Chief Justice Warren and Justice Blackmun received for their respective authorship of the *Brown v. Board of Education* (1955) and *Roe v. Wade* (1973) opinions. Yet, this particular explanation may not be compelling for all readers of the opinion, as some justices appear to seek publicity.[28]

[28] Nygaard argued that pseudonymous opinions would be preferable but are unlikely because every judge "secretly hopes to someday be accorded the recognition of having held the correct position in the face of opposition; or to have been the author of a famous, oft-quoted opinion; or perhaps even to have been the

The final explanation for the Court's decision to write pseudonymously came from the Court's own history with particularly contentious cases. In the history of *per curiam* opinions there are several notable cases in which the Court used pseudonymity as a marker of consensus, for example, the segregation cases following *Brown v. Board* (1954) such as *Mayor v. Dawson* (1954) and *Gayle v. Browder* (1956). In these cases the Court used *per curiam* opinions to unanimously uphold *Brown* and to extend the *Brown* holding to new areas of public life. The Court has also invoked unanimity by having all nine justices sign their names to the case (*Cooper v. Aaron*). The *per curiam* label in *Bush* may have been chosen because of its association with consensus and unanimity. It is important to pay attention to arguments that may indicate this motivation, even though the *Bush v. Gore* opinion garnered a bare majority and was accompanied by five separate opinions.

***Bush v. Gore* (2000)**

The *Bush* opinion began with the litigation history of the case and quickly announced the Court's decision that the Florida recounts had to be stopped because they violated the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution. After stating the Court's conclusion, the *per curiam* opinion included two sections labeled Part II A and Part II B. Part A described concerns about balloting procedures and particularly the vote counting machines employed in Florida. Part A did not put advance any substantive arguments about the case. Part B offered detailed arguments about the legal issues in the Florida recount and explanations for the Court's

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Benjamin R. Cardozo or the John Marshall Harlan of a famous dissent vindicated by a later, and obviously more enlightened, court. … I am afraid this is too much for most of us to resist" (Nygaard 42).

conclusion that the recount violated the Equal Protection and Due Process clauses. The opinion in Part B put forth four primary arguments: (1) the right to vote for presidential electors is fundamental, (2) predetermined rules for interpreting ballots were required for constitutional recounts, (3) the lack of rules in the Florida recount violated the Constitution, (4) the Supreme Court needed to resolve the constitutional issues in this case. These arguments shaped the vision of the rule of law in the opinion along with the *per curiam* label.

a. Orientation Section

The Supreme Court's opinion in *Bush v. Gore* (2000) was announced on December 12, 2000, just one day after hearing oral arguments in the case. The opening section of the opinion followed the norms of Supreme Court majority opinions in describing the history of the case in lower appellate courts and the Court's previous review of the case. This section announced the Court's decision through an enthymeme saying:

> The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U. S. C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. (*Bush v. Gore* 103)

The Court then concluded that the Florida recount violated the Equal Protection and Due Process clauses of the Constitution. Within this section the opinion introduced two sets of terms that framed the issues of the case and the Court's decision. In setting up two

opposing terms, the Court rhetorically created a sense that the ballots could have been easily categorized and ordered. The Court's rhetoric constituted a perspective that created the impression of clarity in a situation that the Florida Supreme Court found chaotic and messy.

The first set of terms, "undervotes" and "overvotes," originated in Florida election law. The Florida Supreme Court described "undervotes" as ballots on which machine tabulators did not detect a vote for president, and for this reason the Florida Supreme Court treated "undervotes" as potential votes for President (*Gore v. Harris*). The U.S. Supreme Court used the term "overvote" to denote ballots rejected by the machine tabulators for containing votes for more than one candidate for an office.[29] The terminology of under- and over- votes conveyed a sense that ballots occupied one of three categories: those offering too many markings, too few markings, or just right. The impression of categorization of ballots was important because debate over how to read markings on ballots was the focus of the controversy.

The second significant set of terms introduced near the beginning of the *per curiam* opinion were the qualifiers "legal" and "illegal" to describe different votes. Both the U.S. and Florida Supreme Courts relied upon the Florida election law stating that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" constituted grounds for a challenge to the state's awarding of electoral votes (*Bush v. Gore* 101). Legal votes, as determined by the Florida Supreme Court, were any ballots containing a "clear indication of the intent of

[29] The term "overvote" did not appear in the Florida Court's recount decision, *Gore v. Harris*.

the voter" (*Bush v. Gore* 102; Gore v. Harris). Illegal votes were not defined in the U.S. Supreme Court's opinion, but it may be that overvotes (ballots containing a vote for more than one candidate for an office) constituted "illegal" votes, though other ballots may have fallen into this category as well (Balkin, "Bush v. Gore" 112).

In setting up two sets of opposing terms to describe the ballots, the Court's opinion conveyed a sense that the ballots in Florida easily *could* have been categorized. The Court's perspective offered clarity and simplicity to an otherwise complex and opaque situation in promising that the ballots could be ordered and sorted into categories. Though the *per curiam* opinion did not explicitly put forward these arguments, the use of dichotomies implied the possibility of clarity. At a minimum these categories would make the realities of the recount process appear muddled by comparison.

b. Facts

The *Bush v. Gore* opinion recounted the "facts" of the case in detail, but all of the facts included in the opinion related to the litigation history of the case. For this reason, it is more useful to focus upon the substantive arguments in the opinion, which were presented in Part B of the opinion.

c. The Legal Issues

This section had four main arguments each of which attempted to justify the Court's involvement in the case. The first argument put forward was that the right to vote is fundamental and deserves substantial protections. Through this argument the rhetoric of the opinion set up the Court as a hero intervening on behalf of the people to stop the unconstitutional Florida recount.

First, the opinion stated that although no constitutional provision gave the right to vote for president to the people, the U.S. Congress had since given that right to the people, and thus it must be protected (*Bush v. Gore* 104). This argument began with a view of citizens as incidental, yet once given the power to vote for president, citizens were transformed into "voters" with new rights and protection. The change in value of the "the people" in the Court's rhetoric placed emphasis on the right to vote as a privilege that must be protected. The Court explained that the "fundamental nature [of the right to vote] lies in the equal weight accorded to each vote and the equal dignity owed to each voter" (*Bush v. Gore* 104). These arguments justified the Court's involvement in the case on two different levels.

The Court's involvement was justified in defending voting as a "fundamental" exercise of citizenship. "Fundamental" for audiences familiar with the Court's rules will be recognized as a term used to describe rights that require near absolute protection, and possible violations of the right must meet the highest standards of scrutiny (Shaman). Second, in describing the right to vote as threatened, the Court could champion the voters whose rights were threatened. This romantic image of the Court justified the Court's actions on grounds which require the infirmity of the people and the superiority of the Court (W. Lewis). This relationship was important for framing the Court's action.

The second argument put forward in the *Bush per curiam* opinion was that predetermined rules were needed to interpret the marks on ballots as votes. The need for rules allowed the Court again to intervene in order to "fix" the situation. Though it was

arguable whether or not the recount actually lacked rules,[30] this rhetorical construction of a need allowed the Court to fulfill the need. However, this argument lacked the evidence necessary to be complete and instead relied upon the Court's authority as evidence.

The *per curiam* opinion explained that the Florida Supreme Court "ordered that the intent of the voter be discerned" from ballots with hanging or indented chads that were not fully separated. The opinion asserted that though Florida's goal was unobjectionable, the carrying out of manual recounts could not be fair without a predetermined, universal standard by which to judge whether partially detached chads were indications of the "intent of the voter." The *per curiam* opinion found that the recount, as ordered, did "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote because a standard for judging the ballots was not specified (*Bush v. Gore* 105-106). The opinion assumed that specific rules about the meaning of chads or other marks would remove ambiguity from interpretation.

The U.S. Supreme Court argued that interpreting ballots required universal rules because markings on ballots did not "speak" for themselves. Unlike in other cases where

[30] This perspective on interpreting ballots differed significantly from the Florida Supreme Court, a point the Supreme Court opinion notably did not emphasize. The Florida Supreme Court argued that the best possible resolution for any voting controversy would be to ensure that every citizen's vote be counted (*Gore v. Harris* 1253). The Florida Court's opinion suggested that no potential vote should be rejected until review showed that it did not show the clear intent of the voter: "the intent of the voter is of paramount concern and should always be given effect *if* the intent can be determined" (*Gore v. Harris* 1256). For the Florida Court that meant that: "a vote should be counted as a legal vote if it properly indicates the voter's intent with reasonable certainty," and that it was legitimate to treat "every marking found where a vote should be should be treated as an intended vote in the absence of clear evidence to the clear contrary" (*Gore v. Harris* 1256). These passages suggest that the Florida Supreme Court eschewed predetermined rules because such rules would only limit the ability of County Canvassing boards to interpret the clear intent of the voter. The U.S. Supreme Court, however, worked to show that rules were necessary to guarantee equal treatment of votes.

people testify to their intent, "marks or holes or scratches on an inanimate object," the Court argued, could not speak to intent (*Bush v. Gore* 106). However, "specific rules designed to ensure uniform treatment" of ballots, would guarantee that intent was interpreted uniformly across counties (*Bush v. Gore* 106). This argument assumed two things. First, that the marks on ballots were equivocal on their own and, second, that rules would prevent divergent interpretations. The second assumption deserves further attention because it implies that rules exist and can be impartially applied is a way of shifting rhetorically authority to impersonal procedures over human judgments.

The second assumption of the Court's argument was that rules would have prevented differing interpretations of ballots. The Court's *per curiam* opinion argued that "want of those rules," which would guide interpretation, created an "unequal evaluation of ballots," as to which marks, scratches, and holes demonstrated intent (*Bush v. Gore* 106), yet voting is a form of communication because it is a marker of one's desire for a particular candidate to serve in elected office. Polysemy and ambiguity are always possible in communication. Rules cannot preclude ambiguity. The opinion's rhetoric claimed that rules were needed implied that adequate laws could have eradicated the ambiguity in vote counting. Thus the *per curiam* opinion offered a vision of the rule of law where the Court could appear to resolve the recount controversy by calling for rules.

However, this argument had a rhetorical problem in that it was not adequately supported with argument and evidence. The lack of evidence for the Court's conclusion functioned as an implicit appeal to the Court's authority as an institution. As Perelman and Olbrechts-Tyteca explained:

> For [a speaker] to put forward a conclusion as more certain than he himself [or she herself] considers it to be is to engage his [or her] person and use the prestige attached to it, thus adding an extra argument to those already advanced. (Perelman and Olbrechts-Tyteca 465)

The Court's authority acted as a substitute for evidence and reasoning. In this way the claim that predetermined rules were necessary relied upon the authority of the Court in place of evidence and argument.

The third argument put forth in support of the Court's decision was that Florida's failure to institute predetermined rules in the recount violated the Equal Protection and Due Process clauses. This claim too lacked the necessary evidence to be fully supported and instead relied upon the Court's authority. This argument was also important as a rhetorical strategy for justifying the Court's involvement as the opinion eventually offered four examples of seemingly unconstitutional actions that required the Court's remedy.

To support the claim that the Florida recount was "standardless," the opinion elaborated several problems in the Florida recount in order to show that the situation *required* the Court's involvement (*Bush v. Gore*). These claims repeatedly invoked the Supreme Court's credibility and authority as support for the assertions put forward in the opinion. This section offered several appeals to show that the recount was unconstitutional, and in this way the various examples functioned collectively to create the appearance of convergence (several arguments leading to the same conclusion) a

textbook illustration of the rhetorical technique that Perelman and Olbrechts-Tyteca identified (471-475).

In order to support the assertion that a universal, predetermined standard was needed to ensure fairness, the opinion compared the results of the manual recounts in two counties. The manual recounts in Broward and Palm Beach counties appeared to produce strong evidence that differing standards resulted in unequal treatment. The Court explained, "each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties" (*Bush v. Gore* 107).

The opinion implied that disproportionate vote totals were the result of different standards. However, other explanations were possible and were not explicitly ruled out by the Court. From all the variables involved, such as the number of election judges, accuracy of machine tabulators, and voter error, it would be difficult to prove that one factor alone, like the rule employed for interpreting ballots, created the disparity. In this way the Court's rhetoric violated the audience's trust in the Court fidelity to the communicative purpose of the exchange because it violated the expectation that rhetors "not say that for which you lack adequate evidence" (Grice). The symmetry between the different standards and apparent lack of a competing explanation fostered the appearance that evidence did exist and that the differing rules were the only explanation for the differing vote totals. Though casual conversation often lacks adequate explanation, as Walton has argued, the genre of the judicial opinion is not one that promises presumption

or plausibility as the standard for truth (Walton). Instead, judicial opinions aim for deduction and certainty. Without explanation for why the rules were the cause of the discrepancy, the audience was left with only their perception of the Court's credibility to judge the argument.

The argument that the Broward and Palm Beach recounts provided examples of unequal treatment also functioned as part of a larger rhetorical appeal to convergence. Using the appearance of convergence was a powerful rhetorical strategy in the opinion because it appeared to elaborate the several problems that could only be remedied by the Court's intervention. This comparison of the Broward and Palm Beach recounts was the first of four claims that appeared to lead to the same conclusion. These arguments, in the order that they appeared in the opinion were: first that the Broward and Palm Beach counts were evidence of unequal treatment because they lacked uniform standards. Second, the Court argued that not all ballots were treated equally because "overvotes" were not included in the Florida Supreme Court's order for a recount. Third, that the Florida certified vote, announced on November 26 before the recounts, included totals from partially completed recounts and this inclusion was a form of unequal treatment; ostensibly because the recount had not been completed meant that not all ballots were given equal attention during the recount. Fourth, the Florida Supreme Court recount order did not specify who could partake in recounts leading to "ad hoc" committees of election judges, including persons with no previous training, which affected the fairness of the recount.

The four claims each lacked adequate support requiring audiences to rely on the Court's authority as evidence. However, the lack of evidence was obscured by the rhetorical power of convergence. The enumeration of four different examples of how the Florida voting procedures did not meet the equal protection requirements appeared to offer several separate arguments that independently led to the same conclusion. As Perelman and Olbrechts-Tyteca explained, "if several distinct arguments lead to a single conclusion, be it general or partial, final or provisional the value attributed to the conclusion and to each separate argument will be augmented, for the likelihood that several entirely erroneous arguments would reach the same result is very small'" (Perelman and Olbrechts-Tyteca 471). Convergence is a powerful rhetorical tool, even though the enumeration of claims could not provide complete evidence.

Creating the appearance of convergence was a key rhetorical strategy of the opinion for encouraging acceptance of the Court's role in the Florida voting controversy and cultivating the audiences' assent to the arguments presented in the opinion. Along with arguments that relied upon the Court's credibility as evidence, these four arguments led to the Court's conclusion that the recount was unconstitutional. The appearance of convergence also encouraged audiences to see the Court's involvement in the Florida election controversy as justified because there were so many seemingly unconstitutional practices that the Court needed to halt.

The fourth and final argument put forward in the *Bush v. Gore per curiam* opinion's justification section explicitly defended the Supreme Court's involvement in

the Florida recount. These arguments functioned as a kind of paralepsis, or comments that drew attention to the issue while presuming to dismiss the issue. The opinion stated:

> None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront. (*Bush v. Gore* 111)

This paragraph asserted that the Justices of the Court recognized that the opinion might appear to violate the separation of powers in the Constitution, but asserted that the Court was aware of the limits to its powers and the boundaries between law and politics. Second, the paragraph asserted that the Court had no choice but to decide the case once the parties asked for the Court's aid in resolving the conflict. Jeanne Fahnestock explained that paralepsis is often a political tool used to call attention to a sensitive issue while claiming not to discuss the issue, such as "In order to make this a clean debate I will not bring up my opponent's scandalous affairs" (Fahnestock, *Rhetorical Style* 119-120).

Though the opinion's description of the necessity of the Court's involvement was not a pure example of paralepsis, the arguments had several similarities to the rhetorical trope. This passage brought up the issue that the Court may have violated the constitutional separation of powers in the act of dismissing that argument. The opinion

did not respond to that argument, but instead deflected attention by suggesting that the audience needed to trust in the judgment of the Court to uphold those boundaries.

Second, this passage also focused blame for the opinion on the litigants while stating the Court's responsibility in stating that it was the Court's "unsought responsibility" to resolve the case (*Bush v. Gore* 111). Focusing attention on the litigants offered a scapegoat even though the passage explicitly took responsibility for the decision. Unlike the strategic paralepsis of the politician that calls attention to the failure of their opponent, the pseudo-paralepsis in the Court's opinion only drew negative attention to the Court. Though the paralepsis aimed to dismiss concerns that the Court acted inappropriately, it actually called attention to the possibility that the Court's actions violated the Constitution, as well as drawing attention to the possibility that the Justices may have gone out of their way to involve the Court in this case.

The *Bush v. Gore per curiam* opinion's analysis of the issues put forth four arguments that supported the Court's decision that the Florida recounts were unconstitutional and needed to be stopped; at the same time, these arguments implicitly justified the Court's involvement in the case. The rhetorical strategies employed in these arguments constructed vision of the rule of law. The claims in the *Bush* opinion repeatedly lacked substantive evidence, which invoked the Court's authority as a kind of justification or support. In this way the *Bush per curiam* opinion relied upon the Court's institutional authority in place of evidence. This is potentially problematic as it may have violated the communicative purpose of a judicial opinion, which is to provide reasoned argument and justification for the Court's decision (Aldisert 157). The claims in the *Bush*

per curiam opinion created the appearance of convergence, yet because none of these claims was adequately supported, this convergence was questionable. Finally, the use of pseudo-paralepsis to dismiss concerns about the Court's involvement in this case called into question the Court's actions and appeared to work against the rhetorical purpose of the opinion. Invoking the Court's authority in place of evidence, along with violating the communicative purpose of the opinion and calling attention to concerns about the propriety of the Court's actions painted a picture of the rule of law as rule by the Court that relied either upon the faith of the audience, or the authoritarian power of the Court.

The Rule of Law in *Bush v. Gore*

The *Bush v. Gore* opinion offered a vision of the rule of law that was distinct from previous visions, particularly in how this opinion portrayed the relationship between the Court and legal subjects. The *Bush v. Gore* opinion characterized the rule of law as: ordering the world through dichotomous terms, requiring the Court's heroic intervention on behalf of voters, requiring little evidence other than the Court's authority and the faith the audience, and relying upon trust in the Justices of the Court. Together these characteristics of the rule of law as envisioned in the *Bush v. Gore* opinion portray the rule of law as a rule by the Court. It is important to draw out this view of the Court in order to consider how this perspective envisions the relationship between the Court and legal subjects.

First, the *Bush v. Gore* opinion used dichotomous terms ("under" and "over" vote, as well as "legal" and "illegal" vote) in order to frame the issues in the Florida recount. The dichotomous terms implied that the political controversy could be resolved through

legal categorization. The law thus appeared to have the power to order political life, and in this way risked the separation of law from politics presented in other visions of the rule of law, such as that in *Marbury v. Madison* (1803).

Second, the opinion described the right to vote as fundamental, which justified the Supreme Court's intervention as hero to protect the people. The Court's heroic role in protecting the right of the people was in some ways similar to the contention in *Marbury* that the Court's responsibility was to protect individual rights (*Marbury v. Madison* 163); however, unlike in *Marbury* the Court in *Bush* framed its actions as protecting the people generally, not the rights of the litigants. In this way the *Bush* opinion expanded the vision of the Court as hero from that presented in *Marbury.* The *Bush* opinion thus no longer portrayed the Court as a passive instrument of the law.

Third, reliance upon the Court's authority as evidence fostered the inference that the claims presented in the opinion were self-evident and required no other explanation. This, however, violated the communicative purpose of the opinion in failing to provide the audience with the evidence necessary to evaluate the Court's claims as democratic subjects, although the Court justified its actions as taken on behalf of the people. Yet, the opinion denied those same legal subjects the evidence necessary to act as democratic subjects capable of participating in political processes. The opinion thus appeared to be superficially concerned with the people, but without providing the evidence necessary for the audience to evaluate the Court's arguments, the opinion denied the people any political power to decide for themselves. In this way the rule of law showed the Court as accountable to none.

Fourth, the use of paralepsis deflected concerns about the power of the Court to intervene in a presidential election and implicitly asserted that the Court was a kind of first among equals among the branches of government, able to resolve issues within the political spheres of government. Through the paralepsis the opinion implied that the Court had the power to order or resolve issues in the political branches when a suit brings the issues to the legal branch as the Court's "unsought responsibility" (*Bush v. Gore* 111). In this way the Court appeared to rule by law over the other aspects of political and social life, as in the *Marbury* opinion. Yet, in *Marbury* the Court's power over other branches was solely about reviewing the constitutionality of acts; in *Bush* the Court invested itself with the power to govern other branches through the exercise of law.

The paralepsis created a rhetoric that aimed to cover the nature of the Court's power. The basis for the Court's claim to this power was rooted in a rhetoric of restraint as it asked for the audience to believe that "[n]one are more conscious of the vital limits on judicial authority than are the Members of this Court" (*Bush v. Gore* 111), yet the Court's action was in fact unrestrained because it transgressed the separation of powers. The rule of law in the *Bush* opinion showed the Court as ruling over other branches of government because there were no barriers to keep the Court from hearing any political issue.

The vision of the rule of law in *Bush* portrayed the Court as a kind of authoritarian power, as the Court could order political controversies, protect the people from political issues and resolve issues in the political sphere. Unlike the vision of the rule of law presented in *Marbury* that claimed a mandate from the people as the basis for the Court's

power and action, the *Bush* opinion offered no clear description of the basis for the Court's power and instead portrayed the Court as a institution with power over the people and the political branches rather than acting on behalf of the people (*Marbury v. Madison*). The difference between these visions is substantial. In *Marbury* the rhetoric of the opinion treated its audience as democratic subjects capable of sophisticated participation in the political process. However, in *Bush*, the people were portrayed only as subjects in need of the Court's protection.

The image of the Court as a kind authoritarian ruler by law presented in the *Bush* opinion was fostered by the pseudonymity of the opinion as well. As noted in previous chapters the *per curiam* label replaces the reputation and ethos of the author with the historical and institutional authority of the Supreme Court. In the *Bush* opinion both the *per curiam* label and the use of the Court's authority as a form of evidence foregrounded the institutional authority of the Court for audiences. For the rule of law, this may mean that the opinion appeared to claim rule by the Court over law and politics with a kind of superior institutional ethos. However, the sheer number of separate opinions, both concurring and dissenting, would likely temper any sense of unanimity of feeling that the opinion could represent.

In light of the dissensus in the case, the *per curiam* label was unlikely to invoke the traditional characteristics of *per curiam* opinions, such as unanimity and undisputed legal issues. Instead, in the *Bush* opinion the *per curiam* labels appears to have functioned as a screen or mask protecting the authors from criticism. Protection from criticism is the most commonly noted use of pseudonyms (Mullan; Starner and Traister; Ekstrand and

Jeyaram). Authors have defended their pseudonymity by making arguments that pseudonymity requires that authors employ reasoned arguments rather than "relying solely on their reputations or political affiliations to influence public opinion" (Ekstrand and Jeyaram 45). However, pseudonymity is still often interpreted as cowardliness or evasion. Pseudonymous writing especially "entails the sense of falsity and pretension, of something that is apparent, but not real" because the pseudonym signals that the author hides their identity (Shalev 153-154). For the *Bush* opinion the perception that the *per curiam* label hid the author from public criticism could have contributed to the vision of the rule of law as an authoritarian rule by the Court.

Appeals to judicial authority throughout the *Bush* opinion and the opinion's insistence that audiences trust the Court's understanding of judicial authority denied the audience the necessary material to evaluate the arguments for themselves. In the same way, the *per curiam* label denied audiences the necessary information to criticize the authors, making it impossible for audiences to express their discontent with the decision through criticism of the author of the opinion. Also, without the name of the author the Executive and Legislative branches were missing the necessary information needed to pursue any measures to hold the author(s) accountable for the opinion. The Court thus again appeared as an authoritarian power as it was unaffected by discontent with the opinion.

The rhetoric of the *Bush v. Gore* opinion, along with the *per curiam* label, eroded the *Marbury* vision of the rule of law as compatible with the kind of democratic governance where citizens have the tools to participate in the political process. This

rhetoric envisioned the Court as a kind of authoritarian ruler who ruled through law. This vision replaced the sovereign people in the *Marbury* vision of the rule of law with the law as sovereign. This rhetoric contributes to the counter-majoritarian perception of law and has the potential to undermine the myth of the Court as an impartial arbiter of legal issues.

Conclusion

The *Bush v. Gore per curiam* opinion stopped manual recounts in the 2000 Florida presidential election and in the process communicated a vision of the Court and its relationship to legal subjects that portrayed the rule of law as rule by the Court. In this vision the Court was unaccountable to the people or to the other branches of government. As the rhetoric of the opinion expanded the realm of the Court's power, all barriers were removed from the Court's ability to decide political issues. The rhetoric of the opinion relied upon the institutional status and authority of the Court, dichotomous terminology, and constructions of the Florida controversy as a crisis in need of intervention, in order to justify the Court's decision to stop the Florida manual recounts.

The rhetoric of the opinion makes it appear as though the *per curiam* label was chosen to allow the author(s) of the opinion to hide from criticism and retribution. Though in other cases the *per curiam* label obscured the rhetoric that justified the Court's power, in *Bush* the *per curiam* label contributed to the vision of the Court as all powerful because it denied the information required to criticize the author of the opinion. The *per curiam* label thus contributed to the vision of the Court as authoritarian in withholding the information required to hold the author accountable for the opinion.

Chapter 6 "Conclusion"

"We need to explore not only the shape of our belief in the rule of law but the strategies used to maintain the beliefs against competing appearance of political meaning."
— Paul Kahn, *The Reign of Law* (5).

The *per curiam* opinions studied in this dissertation reveal how legal rhetoric aims to show the law as impartial, determinative of judicial decisions, and authoritative. The rhetorical strategies and tropes that characterize legal discourse describe the law as discrete and different from politics. Differentiating law from politics makes it possible to show that the rule of law as superior to political rule.

Law's authority is constructed in the language of judicial opinions. The rhetoric of the rule of law is thus circular in employing the "rule of law" as a justification for its exercise of power while simultaneously defining what that concept means. Rhetoric scholars should attend to the meaning of the rule of law described in judicial opinions because these opinions are given special authority via their institutional authorship. The language of the rule of law in judicial opinions shapes the lived experience of legal subjects. The ability of law to do this has been noted time and again by legal scholars (Silbey and Ewick; Balkin "The Proliferation of Legal Truth"; White *Heracles' Bow*).

Viewing law as a constitutive rhetoric offers a significant contribution to rhetoric and legal studies. Rhetorical analysis has the tools to reveal the implicit assumptions of legal rhetoric and to show when the rhetoric of *per curiam* opinions challenges or reifies faith in the law and in the Court. Each case study in this dissertation provided the opportunity to analyze the rhetoric of the rule of law in opinions that prompted questions about the Court's motivation for employing the *per curiam* label. These cases were limit

cases for the rule of law because they were cases involving difficult legal issues *and* because of the appearance of the Court as the author of the opinion.

The *per curiam* label functions as a pseudonym functions in shaping the rhetoric of the opinion. Like the classical names taken on by authors during debates over the U.S. Constitution, the *per curiam* label constructs judicial authority and communicates about the *persona* of the author; the label invokes associations with clear law, short opinions, and unanimous decisions. Also, the *per curiam* label anthropomorphizes the Court as an institution giving it agency separate from the justices themselves, though we know that the justices write these opinions, not the institution. This label contributes to the rhetoric of the opinion in constructing the rule of law and is often key in showing the rule of law as either an empty justification for judicial power or a meaningful relationship between the law, the courts, and legal subjects.

The characteristics of the rule of law as defined in judicial opinions are important. There is a substantive difference between opinions that employ the rule of law as a hollow shibboleth to justify its actions and opinions that articulate the rule of law as the ordering of society with the consent of the people. Should the rule of law become merely a justification for authoritarian power, it would lose its ability to legitimate the Court's work as part of a democratic system of government because it would deny legal subjects the tools necessary for sophisticated participation in the political process.

The rhetoric of the *Brandenburg v. Ohio* (1969), studied in chapter three, offered a vision of the rule of law that was conflicted. The opinion's rhetoric attributed agency and power to the law, while the *per curiam* label attributed authority to the Supreme

Court as an institution. This tension made possible multiple interpretations of which agent lay behind the decision. *Brandenburg* demonstrated that the rhetoric of the rule of law can be sustained, even when the law must be "corrected," by using strategic ambiguity to simultaneously describe the power of the law to reach the correct outcome, and attribute to the Court the power to author correct law. This opinion also demonstrated that the *per curiam* label amplifies the consequences of the rhetoric because it attributes authorship to the institution of the Court. In this way, whether the effects of the rhetoric of the opinion encourage or prohibit faith in the rule of law, the *per curiam* label raises the stakes because it attributes these effects to the Court as an institution.

In chapter four, the analysis demonstrated how the *DeFunis v. Odegaard* (1974) *per curiam* opinion employed rhetorical strategies and arguments to show the Court as concerned primarily with procedures. The Court appeared as a bureaucrat enforcing the dictates of the law. The rhetoric of the opinion was technical, in privileging the detailed application of rules, and made it appear as though the rules regarding mootness determined the outcome in the case. For some audiences, this rhetoric appeared to cynically invoke the rule of law (in this case meaning literal rule following) in order to obscure other motives for dismissing the case. The *DeFunis* opinion thus showed the Court's exercise of the rule of law as deaf to the struggles faced by many with determining the legality of affirmative action. The rhetoric eroded faith in the rule of law and in the Court. This opinion demonstrated that the *per curiam* label as a pseudonym can serve instrumental goals of the Court in hiding the Court's motives, or avoiding difficult legal questions.

The Supreme Court's *per curiam* opinion in *Bush v. Gore* (2000), studied in chapter five, envisioned the rule of law as authoritarian rule by the Court. The rhetoric of the opinion showed the law as able to resolve any political conflict. The boundary between law and politics imagined in the *Marbury v. Madison* opinion was eviscerated in *Bush*. In showing the Court's rule as near absolute and denying audiences the necessary evidence to evaluate the merits of the Court's decision, the opinion treated legal subjects as in need of saving by the heroic Supreme Court. Just as the opinion denied audiences the necessary information to evaluate the arguments presented in the opinion, the *per curiam* label hid the facts of authorship from the audience to make it impossible for other branches of government or legal subjects to attempt to hold the author(s) accountable. The huge public response to the opinion is unsurprising given the historical import of the decision in determining the outcome of a presidential election. Considering the rhetoric of the opinion, and this public response, it is likely that this opinion contributed to a lack of faith in the rule of law and in the Court because it left no room for political agency on the part of legal subjects.

Each of these three visions of the rule of law treated legal subjects differently. *Brandenburg* saw law as a kind of almighty power beyond human control, and in this way denied the agency of legal subjects to shape the law. The *DeFunis* opinion showed the law as beyond explanation and deaf to the concerns of legal subjects. Finally, the *Bush* opinion attributed to law the power to order public life implying that legal subjects were literally subject to the law which could only be accessed by the Supreme Court. None of the *per curiam* opinions carried on the vision of legal subjects as the source of

the law's power, nor the implication that the power of the people could compel changes in the law of the land. These cases indicate that over time the democratic vision of the rule of law presented in *Marbury* has largely disappeared from Supreme Court opinions.

The erosion of the more democratic vision of the rule of law might be a result of the changing status of the Supreme Court in U.S. public life. Studies of the *Marbury* opinion repeatedly noted the low station of the Court in the U.S. public imagination (Kahn; Schwartz, *A History of the Supreme Court*), yet the Court today is granted much more authority and power in the public imagination. If this is the cause of the change in rhetoric, it may indicate that the *Marbury* opinion was so successful because it pandered to its audience. Regardless of the source of the change, the change in rhetoric is significant as it divests legal subjects of their power to control their own political fate.

The embodiment of the rule of law in the *Marbury v. Madison* (1803) opinion is one worth saving. Though Chief Justice Marshall's opinion may always be associated the political battle for power between the Federalists and the Democratic-Republicans, still the rhetoric of the opinion constructed the rule of law in a way that promoted faith in the law as an impartial, logical, and just arena for resolving disputes. Many of the rhetorical strategies employed by Marshall to create this vision of the rule of law have continued to today; however, Marshall's vision of the rule of law as grounded in the exceptional exercise of the popular will has been eroded. Any notion of a kind of deliberative democracy (where citizens and subjects can voice their concerns in such a way as to practice self-rule) requires that counter-majoritarian institutions, like the Court, offer

reasoned explanations for their decisions in order to educate audiences about the law and its bases, rather than merely "induce belief" (Aldisert 166).

Final Thoughts

The question left after surveying the findings of this extended study is: What should we do with this information? Several answers seem useful. First, for rhetorical studies it is important that we see pseudonyms and other marks of authorship as rhetorical appeals and study them as such. In texts where the name of the author is clear, rhetorical studies has a history of studying the life of the author and audience's awareness of that life as part of the rhetoric of the text (Brigance), but it is important to explicitly include the author's name as one of the components that contributes to the *persona* of the author in the text. In texts without clear authorship, or where the authornym does not match the legal identity of a real person, this too needs to be considered an important aspect of the way in which audiences interact with the text, and this dissertation has offered some resources for thinking about how and why these marks are rhetorical appeals.

Second, *per curiam* opinions illustrate that authorship matters particularly in legal discourse. Legal rhetoric creates the appearance of exclusivity, and as a realm of U.S. rhetorical culture, the legal culture of the U.S. is one that privileges institutional discourse significantly. For these reasons the *per curiam* label is important as a mark of authorship that gives institutional authority and reifies separation between legal subjects and legal institutions. That *per curiam* opinions may contribute to this separation is worthy of note and encourages attention to these seemingly unimportant opinions.

Third, *per curiam* opinions shape the meaning of the rule of law in the United States as they contribute to discourse about the rule of law from a privileged source. For rhetorical studies this indicates that increased attention to the rhetoric of the rule of law is merited because this discourse has important effects on the agency of legal subjects. In order to do this, we need to understand changes in rhetoric of the rule of law over time.

Fourth, and finally, this study contributes to our knowledge of legal rhetoric in ways that encourage rhetorical studies and other popular audiences to be more critical consumers of legal rhetoric. Though legal rhetoric appears technical and exclusive, these case studies demonstrate that the appearance of objectivity and legal determination of law are rhetorically constructed just like other kinds of discourse. It is my hope that demonstrating the rhetoric strategies and appeals employed in these three opinions will help create legal literacy so others feel empowered to read and critique judicial opinions and other types of legal rhetoric without feeling like they need a *juris doctor* to do so. We all have a relationship to the law, whether we feel exposed before the law, engaged in a game with the law, or against the tyranny of the law (Silbey and Ewick); these perspectives and relationships shape the lived experience of residing in the U.S. and my hope is that legal subjects will feel empowered to challenge rhetoric that disempowers them. This may mean rejecting the power of law to accurately describe the world, or making law more inclusive of other rhetorical appeals so that it can speak in new ways. Chief Justice Marshall's vision of the law as an exceptional agreement of the people should be preserved. To do that people need to be able to see themselves in law and law must be able to effect change to make this possible.

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