

UNDERSTANDING VOICE: WRITING IN A JUDICIAL CONTEXT

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I. INTRODUCTION

When we read a judicial opinion, does it “sound” in a distinctive and recognizable way? To put it differently, does a judicial opinion have a “voice,” and if so, what are its attributes? Is voice defined by the opinion’s genre (that is, the writing), the writer, or both? What is the relationship between voice and rhetoric? Is there an independent value in using voice, as distinguished from a consideration of rhetoric, as an analytic or interpretive tool? If so, how does attention to the concept of voice add to a reader’s interpretive resources?

In this Article, I address these questions by discussing and modeling an approach for understanding judicial voice. I begin in part II by examining various conceptualizations of voice in literary writing and suggest how voice, when embraced as a central metaphor in written discourse, is a complex, multifaceted concept. I then consider how various understandings of voice have been imported into the analysis of legal writing. From there, I introduce judicial voice, and identify two complementary dimensions: One (genre-based) is tied to the recurring features of appellate opinions and other writings (advocacy briefs and bench memoranda) that stand in textual relation to these opinions; the other (authorial) is linked to an opinion author’s signature rhetorical choices and expressive style. I suggest that we should avoid thinking of judicial opinion voice as either simply genre-based or authorial but instead adopt a “both/and” formulation, which locates judicial opinion voice in both the writing and the writer.

In part III, I develop an analytic framework that includes both of these dimensions of voice. To structure this part, I begin with three textually related judicial writing contexts: the bench

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memo, the advocacy brief, and the judicial opinion. For each of these writing contexts, I address those aspects of voice that are tied to the writing itself—that is, genre-based voice. In addition to this genre-structured discussion, in this part, I consider its complement, authorial voice. I examine when it finds expression in the bench memo and advocacy brief, and then suggest ways in which to identify authorial voice in the judicial opinion. Here I argue that, in any judicial opinion, authorial voice is never singular but comprises multiple voices, including, potentially, those of other judges, judicial clerks, and advocates.

I apply the framework in part IV to illuminate an opinion's doctrinal reasoning, and illustrate with close analysis of three Supreme Court opinions. Here I show that there is good reason for writers and readers of judicial writing to develop a sensibility about judicial opinion voice. I argue that using genre-based and authorial voice as an analytic resource can aid understanding of a writing's overall cogency, or lack thereof. First, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ attending to the judicial voice helps illuminate the development of a jointly authored main opinion including the challenges of writing by "committee." Analyzing judicial voice in two other Supreme Court opinions draws attention to interpretive problems and tensions in legal doctrine, including gaps and contradictions in reasoning or tendencies in an opinion to strain doctrine to fit the facts.²

I conclude that becoming attuned to how an opinion is voiced, and resonates, is an independently important analytic tool: Because it operates aurally and allows us to make our way past surface rhetoric, the dimension of voice can aid our understanding of a judicial writing's deeper structures of meaning.

II. VOICE: OF TEXTS AND AUTHORS

In the literature of writing about writing, the idea of a writer's voice has long occupied commentators.³ In line with some

1. 505 U.S. 833 (1992).

2. See *infra* sec. IV(A)–(B).

3. For some, the pressing question is whether voice, if understood as an expression of an individual author, is an appropriate focus of inquiry at all. Theorists from New Critics to post-structuralists have disputed the importance of the author; instead, these schools of thought argue that the written text, not the author, is the source of meaning and touchstone for interpretation. Peter Elbow, *Introduction*, in *LANDMARK ESSAYS ON VOICE AND WRITING* xiii, xviii (Peter Elbow ed., 1994).

theorists' de-emphasis of the author is a social constructionist view that written discourse is the product of one's culture and social (including professional) community, which subsumes many individual voices.⁴ Further, despite the familiarity of voice in the context of spoken speech, identifying attributes of a writer's voice is a complex undertaking; depending on the theorist, it can embrace expression that is truly personal in the sense of writing that is indistinguishable from the person who is writing,⁵ or writing by a persona, in the sense of a role or disguise that a writer adopts and adapts to the purpose for which, and the audiences to whom, she writes.⁶

For example, some thoughtful commentary links written voice with a recognizable style, or signature,⁷ or with a tone that is the product of a series of linguistic gestures that result in a "carefully constructed artifact."⁸ This view is more consistent with the idea of voice as persona. However, some writers suggest that voice is not a consciously cultivated expressive style but rather an attribute that a writer locates, or recovers, from within.⁹ For some, it is the result of a process of shedding or peeling away other cultural influences, perhaps like a kind of exfoliation, that makes it possible, in poet Billy Collins's words, to "recognize the sound of my own writing."¹⁰ This permission granted to oneself to abandon a "borrowed sensibility" and put one's "own accents into the language," as the novelist Saul Bellow once put it,¹¹ suggests that the locating of one's writing voice is a process that is personally liberating. The sense that voice is bound up with one's

4. This more deterministic view posits that an individual author does less to influence the character of writing than do these external social forces. *Id.* at xviii (discussing the views of Marxist and cultural critics); Toby Fulwiler, *Looking and Listening for My Voice*, in LANDMARK ESSAYS ON VOICE AND WRITING, *supra* note 1, at 157 (discussing social constructionist position).

5. Nicholas J. Aversa & Michael Tritt, *Voice in Writing*, 20 MCGILL J. OF EDUC. 240, 240–42 (1985) (discussing Romantic and process theories of writing and authorship).

6. *Id.* at 243. This more complex view, the authors indicate, is compatible with the idea that an individual author may have more than a single persona. *Id.*

7. Peter Elbow, *What Do We Mean When We Talk About Voice in Texts?*, in VOICES ON VOICE: PERSPECTIVES, DEFINITIONS, INQUIRY 9 (Kathleen Blake Yancey ed., 1994); see also BEN YAGODA, THE SOUND ON THE PAGE: STYLE AND VOICE IN WRITING at xxxi–xxxii (2004).

8. Fulwiler, *supra* note 4, at 163.

9. For example, Donald Murray has asserted that "[v]oice is the writer revealed." Aversa & Tritt, *supra* note 5, at 241 (quoting DONALD MURRAY, WRITE TO LEARN 144 (1984)).

10. YAGODA, *supra* note 8, at 123 (quoting Billy Collins).

11. *Id.* at 116 (quoting Saul Bellow).

individuality, revealing something distinctive and self-authenticating about one's use of language and thinking, has been linked to an expressivist orientation.¹²

Scholarly inquiries about the voice of legal writing tend to begin from the perspective of professional role, although they also raise the issue of self-identifying expression. Often these inquiries proceed by disaggregating voice into more specific rhetorical dimensions. For example, commentators have drawn attention to the relationship between professional and personal voice,¹³ and differentiated within professional voice between common law-oriented and scholarly legal voice.¹⁴ Christopher Rideout's illuminating study distinguishes between discursual voice and a more distinct authorial presence,¹⁵ which he associates with a "public" as contrasted with a purely personal, or private, voice.¹⁶ Drawing on the work of linguistics scholar Roz Ivanic, Rideout associates authorial presence with the idea of a writer's self-representation or persona.¹⁷ Discursual voice, by contrast, is linked to specific legal genres, such as appellate briefs and predictive memoranda.¹⁸ Writing of this kind that is part of such established legal genres exemplifies "typified" voice, comprising the voices of those who have previously contributed to these genres.¹⁹

If legal writing voice is at minimum a professional voice, recognizable in part by the legal genre to which it is linked, then differences in writing role, context, and audience should be useful entry points for analyzing voice in a professional legal context. Moreover, if professional voice is also inflected by an author's expressive attributes, then giving attention to authors' rhetorical framing and expressive choices should enhance understanding of how legal writing is voiced. Starting from this more nuanced conception of legal writing voice, we might then ask: Are there attributes that distinguish the voice of legal writing produced in a judicial context?

12. For a helpful discussion of the expressivist understanding of voice in the context of writing pedagogy, see J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 *LEGAL WRITING* 67, 78, 82–86 (2009).

13. *Id.* at 82–86 (discussing commentary).

14. Julius G. Getman, *Voices*, 66 *TEX. L. REV.* 577, 578–81 (1988).

15. Rideout, *supra* note 12, at 94–95.

16. *Id.* at 101–05.

17. *Id.* at 94–97.

18. *See id.* at 86–88.

19. *Id.* at 87–89.

A. Genre-Based Voice in Judicial Writing

Drawing on the work of commentators and theorists of judicial writing, one entry point for responding to this query is to consider the more familiar genre-based idea that judicial voice is tied to the function of opinion writing—that is, resolving specific litigated claims and, in the process, developing doctrine. Often we associate this functional or genre-based conception of judicial opinion voice with the attributes of declaration and authoritativeness, and a “rhetoric of inevitability.”²⁰ Yet such a formulation seems incomplete because a judicial opinion encompasses more than the authoritative and justifying voice of the decision maker. An opinion also engages in persuasion; like a good advocate who addresses her arguments to the court, the judicial author must satisfy readers—and the author herself—that the opinion’s reasoning and results are analytically and jurisprudentially sound.²¹ And in doing so, an opinion may also draw on the explanatory and analytic voice of a bench memo. For this reason, in the rhetorical situation of the opinion, we can identify judicial voice not only with judicial opinions themselves but also in relation to other modes of writing (genres)²² produced in a judicial context to which the opinion is related: specifically, clerk-authored bench memos and advocate-authored briefs to the court. Thus, because an appellate judicial opinion will bear traces of the functions of bench memos and briefs that are addressed to the appellate court, genre-based judicial voice subsumes the features that we associate with the brief and the bench memo.

20. See Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 210–16 (1990).

21. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 166–67, 176, 216 (2000).

22. Theories of genre are drawn from the fields of literature, linguistics, and rhetoric. A long dominant conception equates genre with the classification of forms of writing. Amy J. Devitt, *Generalizing About Genre: New Conceptions of an Old Concept*, 44 C. COMPOSITION & COMM. 573, 574 (1993). A more contemporary application of genre theory includes within the idea of genre “purposes, participants, and themes” and thus embraces a rhetorical and surrounding social “situation.” *Id.* at 575–76. Modern genre theory posits genre as dynamic; genre is implicated when readers respond with recognition to recurring situations in appropriate ways. *Id.* at 578–79. At the same time, writers approaching a writing task must define the context and thus construct the situation involved in the task. *Id.* Under this more nuanced conception, genre is central to writing. *Id.* at 584. Even reconceptualized as involving recurring situation or writing context rather than form, genre is distinguishable from the writer’s persona or expressive style, as developed *infra*.

B. Authorial Voice in Judicial Writing

Another entry point for analyzing judicial voice is the idea that voice is a manifestation of an opinion author's own expressive choices and style, a view of voice that is closer to that of a writer's persona²³ or public voice²⁴ than a purely unmediated expression from within. This mode of analysis emphasizes the individuality of judicial authors and offers as evidence jurists' writing that has gained a reputation as stylistically distinctive, from Oliver Wendell Holmes's epigrams²⁵ and Robert Jackson's nuance²⁶ to Antonin Scalia's affected indignation—a variation, Laura Krugman Ray suggests, on the rhetorical device of the dramatic monologue.²⁷

Yet, as commentators have noted, the notion of individual judicial style is complicated by the role that judicial clerks often take on in drafting opinions.²⁸ To be sure, judges as authors occupy various points on a spectrum from allowing clerks considerable leeway in writing initial drafts,²⁹ to more or less collaborative writing relationships,³⁰ to self-authorship.³¹

23. See Rideout, *supra* note 12, at 94–97.

24. See *id.* at 101–05.

25. See, e.g., Jeffrey O'Connell & Thomas E. O'Connell, *Book Review of: The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, 44 DEPAUL L. REV. 513, 522–32 (1995); Judith Schenck Koffler, *Forged Alliance: Law and Literature*, 89 COLUM. L. REV. 1374, 1376 n.5 (1989).

26. Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 208–11 (2002) [hereafter *Judicial Personality*].

27. *Id.* at 226–29.

28. See, e.g., Richard A. Posner, *Judges' Writing Styles (and Do They Matter)?*, 62 U. CHI. L. REV. 1421, 1429–32 (1995) (arguing the judicial clerks tend to write in a “pure” style identified by extensive quoting and citation of authority and use of formal legal terminology); Laura Krugman Ray, *Judging the Justices, A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 216–17 (2003) [hereafter *Judging the Justices*] (noting that law clerks infuse opinions with a “law review style of writing” marked by impersonality and extensive footnoting); see also John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 487 (2001).

29. Peter B. Rutledge, *Review Essay on Sorcerers' Apprentices and Courtiers of the Marble Palace*, 74 U. CHI. L. REV. 369, 396–97 (2007) (review essay on ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006) and TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006)).

30. E.g., FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 206–11 (1994) (outlining his preference for collaboration with clerks); YAGODA, *supra* note 7, at 169–70 (discussing Justice Stephen Breyer's approach to working with his clerks).

However, the practice of widespread judicial self-authorship dating particularly to the era when Franklin Roosevelt appointed distinctive judicial stylists to the Supreme Court³² does not seem easily replicable today. Under contemporary practice, some appellate courts rely not only on “elbow” or term clerks but a pool of staff attorneys who often author unpublished opinions to resolve specific cases before the court.³³

Further complicating the idea of judicial voice in this authorial sense is the recognition that judicial authors who undertake to do the principal work of writing an opinion do not write in a vacuum. Rather, an appellate judge who is designated to write an opinion must address her colleagues’ questions, comments, and critiques after drafts of the opinion are circulated.³⁴ And when colleagues’ critiques are captured in one or more separate opinions, often the author of the main opinion will respond directly to these concurring or dissenting opinions, either in the text of the opinion or in one or more footnotes. In addition to the influence that judicial colleagues bear in shaping an opinion’s text, judicial authors also may invoke other authors’ specific ideas and language, that is, from the litigants’ briefs and from their clerks’ memoranda.

In light of the many nuances that attend any consideration of judicial voice, and the ways in which the two dimensions of voice overlap, I argue that we should reorient thinking away from an “either/or” formulation in which judicial opinion voice is either typified and genre-based or reflective of authorial choice to a richer conception that embraces “both/and.” Specifically, I argue that we should locate judicial voice in both the attributes of the writing and the writer. This argument finds some support in Mikhail Bakhtin’s linguistic and literary theory, particularly his idea of heteroglossia. Although developed as a theory of novelistic discourse, the concept has a more general formulation

31. *E.g.*, Ray, *Judicial Personality*, *supra* note 26, at 226.

32. *Id.* at 195–221.

33. For a discussion of the authorship implications of non-publication see Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371, 1373–77 (1995).

34. See, for example, Linda Greenhouse’s discussion of the process of exchange and commentary that led to evolution of the draft that became the majority opinions in *Roe v. Wade* and *Doe v. Bolton*. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 80–101 (2005).

highlighting for Bakhtin the nature of language, which “like the living concrete environment in which the consciousness of the verbal artist lives is never unitary.”³⁵ Rather, “language is heteroglot from top to bottom,” in the sense that it consists of multiple “forms for conceptualizing the world in words,” forms that intersect with and may even contradict one another.³⁶

This rejection of the idea that language is unitary also has implications for the concept of voice. For Bakhtin, words are fluid and can be appropriated but, until then, they are “half someone else’s,” existing in “other people’s mouths, in other people’s contexts, serving other people’s intentions.”³⁷ His references to “form”³⁸ and his locating of language in the exchanges between people, I will suggest, support an idea of genre-based voice (form) and the distinctive interventions of an authorial voice (appropriation).

Understanding writing in terms of voice shares some ground with rhetorical analysis in that a sensibility about voice requires attention to rhetorical choices that, in turn, help to illuminate both genre-based and authorial voice. However, I argue that attending to voice involves an aural dimension beyond a surface analysis of rhetoric: it entails noting the way in which a writing includes patterns and shifts in language that produce an aural effect. This aural dimension includes the tone, rhythms, repetitions, emphases, and exaggerations that we can “hear” when a court especially presses a point or refutes it, when it seeks to disarm it or to shore it up. Cultivating an ear for how a judicial writing is voiced can help us attend to the points in an opinion in which the crucial work of analytic reasoning is occurring, or when it is breaking down. As I will attempt to demonstrate, focusing on voice involves close analysis of how a writing is pitched, and

35. MIKHAIL M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 288 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans. 1981).

36. *Id.* at 291–92.

37. *Id.* at 293–94; see also Rideout, *supra* note 12, at 87 nn.77–83 (discussing Bakhtin’s dialogism, the idea that all use of language involves borrowing and appropriation from others’ prior uses).

38. Bakhtin’s essay, *Discourse in the Novel*, seems to link “form” to a mode for “manifesting intentions” that is “used to convey meaning.” BAKHTIN, *supra* note 35, at 289, 290. In explicating “genre,” he points to a relationship between genre and form: “Certain features of language take on the specific flavor of a given genre: they knit together with specific points of view, specific approaches, forms of thinking, nuances and accents characteristic of the given genre.” *Id.* at 289.

modulated, and the ways in which it resonates. Becoming attuned to whether a writing's voice is confident or self-conscious, assured or overwrought, understated or strident, allows the audiences of judicial opinions to get at something deeper in a writing than its surface rhetoric: these variations in voice signal tensions, shifts, contradictions, and gaps in doctrinal reasoning. "Listening" for these variations offers an analytic resource to the interpretive repertoire of law students and their teachers, lawyers, judges, other close readers, and judicial authors themselves as they work through the writing and analytic process.

III. A BROADER CONCEPTION OF WRITING AND WRITER IN A JUDICIAL CONTEXT

Pursuing the question whether there is an identifiable voice for judicial writing, in this part, I develop the idea that the investigation of judicial voice requires analysis not only of writing by judicial authors but also writing intended *for* judges, what I will refer to as writing in a judicial context. Typically this expanded idea of the kinds of writing we must examine to understand judicial voice begins with a bench memo, in which the writer prepares an objective, explanatory analysis of law and legal arguments for a judge's consideration.³⁹ That analysis entails reading and digesting the briefs of the parties, which are also written *for* a judge, but for the distinct purpose of advancing a legal argument. The variations in writing voice appropriate to each of these writings—what we might tentatively refer to as the authoritative and justifying voice of the opinion, the assertive voice of the brief, and the explanatory voice of the bench memo—reflect functional features of each genre rooted in the purpose and audience of these writings. At the same time, the fact that these writings share a

39. Not all judges require bench memos. The late Judge Frank Coffin of the First Circuit Court of Appeals preferred the directness of oral exchanges with his clerks, and the time savings that that practice entailed. COFFIN, *supra* note 30, at 196–97. Some members of the bench are selective when assigning a full-blown analytic memo. For example, former Supreme Court Justice Lewis Powell calibrated memos in terms of “major research memos, full memos, and “bobtail” bench memos” on the basis of the importance of the legal issue involved. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 3–4* (2006) (quoting Letter from Lewis F. Powell, Jr. to Eugene J. Comey, Tyler A. Baker, Charles C. Ames, and David A. Martin (June 3, 1977), in *Powell Papers* Box 130b)).

judicial context and exist in relation to one another suggests linkages and intersections in the way they are voiced.

Moreover, because, as I have suggested, judicial voice implicates not only the conventions of a genre (the writing) but also the expressive choices of the author, this part will address as well the authorial dimension of voice. Specifically, I suggest that authorial voice in judicial opinions is never unitary but actually the product of engagement among writers—encompassing judges, judicial clerks, and brief writing advocates—speaking to one another. To be sure, the genre-based and authorial aspects of voice shade into one another and often will overlap. However, the discussion to follow will distinguish between them where useful to highlight what each can contribute to an understanding of voice in a judicial context.

A. The Bench Memo

1. *Genre-Based Voice*

Drawing on the parties' arguments, the judicial clerk, unlike the brief writer, writes not as an advocate seeking to persuade a decision maker, but rather as an employee in a confidential professional relationship. The clerk is expected to write in a genre-based voice that explains, analyzes, and evaluates law, fact, and the parties' claims and arguments to help a judge prepare for oral argument and post-argument conferences with the judge's colleagues on the bench.⁴⁰ Occurring as it does within the context of litigation, the clerk's writing task is very much grounded in the specificities of the parties' actual arguments and theories of the case.

To do this preparatory work effectively, judicial clerks need to internalize the arguments; that is, they must be able to paraphrase rather than merely to quote them, and to distill from them the most important points. In this genre-based understanding of voice, the bench memo writer needs to step back from the brief writers' characterizations of the law and assess the doctrine as well as the arguments fashioned from it, independently, screening out the glosses of the advocate. In effect, the bench memo writer is tasked with accurately communicating the gist of

40. *See id.* at 3, 155.

the parties' arguments without lapsing into an advocacy voice, while also assessing the arguments for doctrinal accuracy. Such a nuanced writing role calls for a memo-writing voice that is focused and focusing, rooted in the function of a bench memo; it requires a voice that is confident enough to direct the judicial reader's attention, but sufficiently self-effacing to subordinate itself to the theory of argument and the judicial reader's need for a clear exposition of its substance to help prepare for oral argument.

The practice in the United States Supreme Court is for a clerk to draft bench memos for the clerk's individual Justice rather than to write a memo that is shared by the other chambers⁴¹ (the prevailing practice, by contrast, when the Court reviews certiorari petitions).⁴² That the audience for a bench memo is individualized allows the clerk to fashion it in a way that accords with the Justice's intellectual predilections and ways of working. Thus, it may encompass a range of discursive styles. But when the bench memo is drafted by a relatively junior lawyer lacking the Justice's experience and authority, as is the case in the United States Supreme Court, one might expect it to reflect a deferential relationship.

Working from Supreme Court Justice Harry Blackmun's voluminous personal papers, Linda Greenhouse's magisterial *Becoming Justice Blackmun* offers a rare glimpse into the language of Supreme Court bench memos. Detailing the intellectual process by which Justice Blackmun grappled with the issues in *Roe v. Wade*, including the Justice's productive interaction with his clerks, Greenhouse quotes from the thirty-nine-page bench memo prepared for what proved to be the first of two arguments in *Roe*. The text reveals a genre-based voice that is measured, and somewhat tentative, which seems consistent with the function of the bench memo and the nature of the relationship between writer and audience.

Discussing a Georgia statute that a district court held violated a pregnant woman's right to privacy and personal liberty, the clerk suggested some doubt about the district court's approach, which he opined was "supportable but difficult to reach because of the strong recognition it accords the woman's right as against

41. See Rutledge, *supra* note 29, at 393–94.

42. *Id.* at 385–94.

other interests.”⁴³ The memo went on to suggest that “[p]erhaps a better way of approaching it is to reason not that the woman’s right is so strong but that to permit other criteria in these statutes [other than a doctor’s view of the best course for the patient] is in the end to restrict medical judgment about what is best for each woman.”⁴⁴

In addition to the use of equivocating language (“perhaps”), the memo suggests an endorsement of one approach (grounding the case in a physician’s interests) over another, arguably weaker alternative rather than a full embrace of the seemingly preferred ground of decision. It is also steeped in the language of reasoned analysis consistent with its genre: one view is “supportable” but the preferred course is framed explicitly in terms of reasoning: a better way is to “reason not” that one right is strong but to predicate the ruling on the need to preserve a doctor’s exercise of medical judgment. When Justice Blackmun asked a clerk from a later term for an analysis of Justice Powell’s suggestion that the right to an abortion should be linked to viability of a fetus rather than the end of the first trimester of a pregnancy, the clerk responded more definitively, although still with some caution:

While the trimester is, as you admit, an arbitrary cutoff, I don’t think that it is all that arbitrary, and I would not want to prejudice a state’s interests during the ‘interim’ period between the end of the first trimester and viability at this time. I would stand by your original position.”⁴⁵

43. GREENHOUSE, *supra* note 34, at 81.

44. *Id.* at 81–82. Among other things, the Georgia statute required confirmation of a doctor’s judgment concerning the necessity of having an abortion by two independent physicians’ assessments, that the procedure be performed in an accredited hospital, and approved by a hospital committee, and that the procedure be limited to Georgia residents. *Id.* at 78; *see also* Doe v. Bolton, 410 U.S. 179, 192–200 (1973) (discussing and invalidating these provisions). As Linda Greenhouse notes, *id.* at 99, Justice Blackmun’s opinion in *Roe v. Wade* makes clear that its rationale was mainly grounded in the right of a physician to exercise medical judgment:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

Roe v. Wade, 410 U.S. 113, 165–66 (1973).

45. GREENHOUSE, *supra* note 34, at 96.

The caution here does not suggest lack of certainty so much as a disposition to decide, or to commit to, as little as is necessary “at this time” on a legal issue—the extent of a state’s interests in protecting a women’s health—that might require further delineation.

2. Authorial Voice

In addition to attending to the facts and the issues, in the Supreme Court context bench memos may also set out a rhetorical presentation of judicial reasoning commensurate with clerks’ conception of their judicial employer’s voice. Here, then, the idea of authorial voice becomes relevant. A seventy-one-page bench memo to Justice Lewis Powell in *Regents of the University of California v. Bakke*⁴⁶ concerning the legality of race-conscious admission policies in a state-supported medical school offers some evidence of how issues of authorial voice can surface. Justice Powell’s clerk sketched out the approach that Justice Powell, who would author the main opinion in the case, ultimately adopted. Tellingly, the memo began with the moderating observation that this author-surrogate sought “to map out a middle ground which will avoid the dire consequences each side predicts if it should lose.”⁴⁷ By contrast, when William Rehnquist clerked for Justice Robert Jackson and addressed the issue of segregation challenged in *Brown v. Board of Education*,⁴⁸ his assessment of the state of the law on the “separate but equal” doctrine was frank and conscious that his understanding diverged from the developing view. Rehnquist wrote, “I realize that it is an unpopular and unh[u]manitarian position, but I think *Plessy v. Ferguson*⁴⁹ was right and should be affirmed.”⁵⁰

To be sure, the content and tone of these memo excerpts of themselves offer limited, if highly specific, evidence of authorial voice. That bench memos are written in the context of a clerk-judge relationship contemplates that they will convey the

46. 438 U.S. 265 (1978).

47. WARD & WEIDEN, *supra* note 39, at 52 (quoting Letter from Robert D. Comfort to Lewis F. Powell, Jr. (Aug. 29, 1977), *Powell Papers* Box 46).

48. 347 U.S. 483 (1954).

49. 163 U.S. 537 (1896).

50. WARD & WEIDEN, *supra* note 39, at 41 (quoting DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 161 (2d ed. 1990)).

formality and hierarchy inherent in that professional context, and here consideration of authorial and genre-based voice intersect. However, the voice of a bench memo will also reflect the particularities of the working relationship and the preferences and priorities of the judge for whom they are written. The relationship may be more or less “egalitarian,” at least in the recollection of one Felix Frankfurter clerk,⁵¹ but typically the work expectations are rigorous,⁵² in keeping with the invited intellectual exchange. Justice O’Connor similarly promoted lawyerly exchanges in her chambers. She expected a detailed bench memo on every case that was orally argued.⁵³ After a clerk completed the task, the Justice would ask her other clerks⁵⁴ to draft “countermemos” if they did not concur with the first clerk’s conclusions.⁵⁵

3. *Bench Memos and Opinions*

These examples suggest the complex ways in which bench memos can operate in the broader context of judicial writing. If the voice of the bench memo is principally rooted in the specificities of the bench memo genre, the explanatory and analytic functions of that genre have a role to play in the judicial opinion as well, placing the two in functional relation to one another. The idea of authorial voice is also at issue when a memo-writing clerk approximates a judicial employer’s rhetorical approach, as in the *Bakke* memo, or when clerk authors are encouraged to lay out a position dialogically, vis-a-vis other clerks. Recognizing the role that the bench memo can play in developing the structure and reasoning of an opinion offers us a more nuanced understanding of the idea of voice in a judicial context, one that embraces functions of the bench memo as a genre and

51. *Id.* at 41 (quoting former Frankfurter clerk Alexander Bickel).

52. *See, e.g., id.* (detailing how Justice Frankfurter claimed to engage with his clerks without hierarchy, in a relation in which “no deference to position is permitted, no yessing, however much some of them in the beginning be awed”; at the same time, he professed to be a “very exacting task-master; no nonsense, intellectually speaking, is tolerated, no short-cuts,” suggesting that memos were written in a voice that was nothing if not careful and rigorously analytic) (quoting LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* 415 (1984)).

53. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 216 (2007).

54. Since 1974 each Supreme Court Justice has been afforded four clerks. *Id.* at 45.

55. *Id.* at 216.

the stylistic preferences of clerks and the judges to whom they write.⁵⁶

B. The Brief

Of course, to draft the bench memo, the judicial clerk must analyze the persuasiveness of written arguments developed in the briefs of the parties (and amici curiae). This entails a close reading and evaluation of the briefs both for the analytic rigor and logical persuasiveness of the arguments and for the more distinctive authorial features that “speak” to anticipated readers (structure, thematic development, choice of language, emphasis and extent of reasoning, choice of authority). Thus, the brief writer’s skill in projecting an effective advocacy voice—both genre-based and authorial—is a crucial component in reaching and persuading the brief’s intended audience and evaluators—the judge and also the judge’s clerk.

1. Genre-Based Voice

How do decision makers assess advocacy? In *Minding the Law*, Anthony Amsterdam and Jerome Bruner analyze the rhetorical situation in which judges evaluate efforts at persuasion. The authors emphasize conventional, genre-based features rooted in the function of advocacy that warrant a decision maker’s wariness, a caution born of a sense that arguments are “presumably self-interested” and possibly “custom-designed.”⁵⁷ They posit that underlying legal discourse is the idea of contestability, that contestability in turn triggers an impulse to discredit, which implies that efforts to persuade will seem self-interested and become suspect.⁵⁸ If an arbiter, recognizing that the function of an argument is to be persuasive, accepts this set of assumptions about legal argument, then, ironically, the work of an effective advocate may seem particularly suspect.⁵⁹

56. It is true the reader of an opinion will not have access to the bench memo and will not be in a position to assess the interplay between the memo and the opinion. However, the aim here is to bring to light that other writers contribute to the concept of judicial voice.

57. AMSTERDAM & BRUNER, *supra* note 21, at 174.

58. *Id.* at 173–175.

59. *Id.* at 174. This understanding of the premises underlying persuasive argument is not necessarily in tension with the idea that good advocacy should demonstrate ethos, or

But if wariness rather than an expectation of straightforward, transparent argument is the dominant mindset of a decision maker, how can advocates disarm it? Here, Amsterdam and Bruner suggest that advocates essentially need to avoid appeals that too obviously seem as if they are designed simply to persuade; rather, advocates must preserve a degree of “deniability.”⁶⁰ The authors identify rhetorical techniques that are “staples of persuasion” because they aim to “conceal . . . contestability” and overcome the problem of argumentation that too obviously seems calculated to persuade:⁶¹ Ontological construction techniques⁶² suggest that the advocate’s position is solid and substantial; epistemological techniques⁶³ highlight the certainty of one’s position or the indeterminacy of the opposing interpretation; culturally resonant narratives can prompt an arbiter to suspend disbelief;⁶⁴ and prototypes and metaphor can imbue one’s language with desired meanings.⁶⁵

2. Authorial Voice

If these approaches are part of a genre of persuasion, it seems fair to conclude that the extent to which they are used successfully in advocacy is in part a function of what the individual writer contributes—authorial framing and rhetorical skill. To test how these authorial features might be voiced in advocacy writing, the briefs filed in the United States Supreme Court in the historic case, *National Federation of Independent Business v. Sebelius*,⁶⁶ are illuminating. The underlying litigation generated considerable attention because it addressed the constitutionality of the Patient Protection and Affordable Care Act, known in some circles as Obamacare. The Government’s brief in support of the

credibility, and integrity. See, e.g., MICHAEL R. SMITH, *ADVANCED LEGAL WRITING* 125 (2013), quoted in Gregory Johnson, *Credibility in Advocacy: Humility as the First Step*, 39 VT. B.J. 22, Fall 2013. Here, Amsterdam and Bruner seem most concerned with the interplay between an advocate’s and an arbiter’s expectations about how the other understands persuasiveness. AMSTERDAM & BRUNER, *supra* note 21, at 176.

60. *Id.* at 174–76. An arbiter, Amsterdam and Bruner go so far as to posit, is likely to be guided by the principle of caveat emptor. *Id.* at 174.

61. *Id.* at 175–77.

62. *Id.* at 177–84.

63. *Id.* at 184–86.

64. *Id.* at 186–97.

65. *Id.* at 187–92.

66. 132 S. Ct. 2566 (2012).

controversial minimum-coverage (individual mandate) provision began with a comprehensive statement of the purpose of the Act that set out the parameters of the problem: health insurance is the principal means for paying for health care services; affordable health insurance is not widely available; and many uninsured persons participate in the market for health care, resulting in shifts in the costs of care to others.⁶⁷ The brief went on to show how the Affordable Care Act (ACA) seeks to remedy the problem,⁶⁸ then delved into the many years of failed federal efforts to enact comprehensive health care reform, the efforts of states to do so, and differences in the states' reform efforts depending on whether the state laws included a minimum-coverage provision comparable to that enacted by the federal government.⁶⁹

The Supreme Court ultimately sustained the Act using the Government's alternative argument under Congress' taxing power.⁷⁰ But in its principal point of argument, the Government justified the legislation based mainly on the Commerce Clause and drew support as well from the Necessary and Proper Clause.⁷¹ Advancing this rationale, the Government offered two theories of argument to show that the minimum-coverage provision regulates how people finance health care: (1) the provision was part of a broader regulatory scheme governing how consumption of health care was financed, and (2) the provision regulates economic conduct with a substantial effect on interstate commerce.⁷²

Two sets of respondents (state and private) filed briefs in response. To illustrate the contrast with the Government's approach, this section will focus attention on the State Respondents' brief, which emphasized the following points: the text of the Commerce Clause authorizes only regulation of interstate commerce; the minimum-coverage provision was unprecedented in that it was no mere regulation of commerce but rather a mandate that uninsured people enter commerce; and the provision would coerce individuals in disregard of the structural

67. Brief of Petitioners, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, sub nom. *U.S. Dep't of Health & Human Services v. Florida*, 2012 WL 37168, at *3–8 (U.S. Jan. 6, 2012) (No. 11-398) (minimum coverage provision).

68. *Id.* at *9–12.

69. *Id.* at *12–16.

70. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594–2600.

71. Brief of Petitioners, 2012 WL 37168, at *17–20 (summary of argument).

72. *Id.* at *17–19 (summary of argument).

limits of the Constitution that reserve exercise of police power to states. The opening of the Summary of Argument captured this idea:

The individual mandate is an unprecedented law that rests on an extraordinary and unbounded assertion of federal power. Under any faithful reading of the Constitution's enumeration of limited federal powers, the mandate cannot survive constitutional scrutiny.

The Constitution grants Congress the power to *regulate* commerce, not the power to compel individuals to enter into commerce. That distinction is fundamental.⁷³

As legal writing authority Ross Guberman⁷⁴ has observed, the Government's brief effectively used choices about rhetorical framing and emphasis—aspects of authorial voice—to demonstrate through statistics and economically-based argument that a health care crisis existed. It also scored points in Guberman's assessment for including citations both to a conservative-leaning judge who voted to uphold the ACA in the lower courts and to Justice Scalia's concurrence in the judgment in *Gonzalez v. Raich*,⁷⁵ which took an expansive view of Congress' Commerce Clause authority when augmented by the Necessary and Proper Clause. Yet what the Government's brief lacked, Guberman opined, was a counter-theme to the State Respondents' "unprecedented and unbounded power" theme, which it wove into every part of its brief. The State Respondents' brief had an effective authorial voice including a "crisp" narrative and clear-cut examples to illustrate the implications of allowing the federal government to require the purchase of minimum health insurance coverage.⁷⁶

73. Brief of State Respondents, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, sub nom. *U.S. Dep't of Health & Human Services v. Florida*, 2012 WL 392550, at *10–11 (U.S. Feb. 6, 2012) (No. 11-398) (minimum coverage provision) (emphasis in original); see also *id.* at *17 ("The power to regulate ... ongoing commercial intercourse is precisely what the framers intended to confer. The power to force individuals to engage in commercial transactions against their will was the kind of police power that they reserved to state governments more directly accountable to the people (or 'applicable individuals,' as the ACA would have it).").

74. Ross Guberman heads a consulting and training firm for advanced legal writing, is a Professorial Lecturer in Law at The George Washington University Law School, and the author of *POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES* (2d ed. 2014).

75. 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring in the judgment).

76. Ross Guberman critiques the Government's health care brief,

If we apply Amsterdam and Bruner's rhetorical framework, the State Respondents' brief tapped into a culturally resonant narrative about federal government overreach and threats to cherished individual autonomy—"A power to compel individuals to enter into commerce would amount to a plenary power to compel individuals to live their day-to-day lives according to Congress' dictates."⁷⁷ It presented its theme that the legislation constituted an unprecedented and unbounded application of federal power with a level of confidence approaching epistemological certainty—"The power that the federal government asserts is as unbounded as it is unprecedented. Indeed, the federal government's effort to liken the Affordable Care Act to more familiar legislation only succeeds in highlighting the complete absence of any limiting principle for the power asserted."⁷⁸ The brief offered concrete examples showing that the Government's interpretation of the Commerce Clause power underpinning the legislation had no limiting principles—for example, under the Government's view, the Commerce Clause power could easily be applied to require the purchase of a car. The brief's use of examples offered rhetorical solidity as against the Government's more economic data-driven and less tangible explanations—"There is no principled reason why the asserted power to compel individuals to purchase insurance could not be exercised to compel individuals to purchase cars."⁷⁹ In short, the State Respondents' more artful and effective authorial choices in its Commerce Clause argument—their rhetorical framing, thematic repetition, and diction—led to a clear and resonant advocacy voice.

3. *Briefs and Opinions: Echoes of the Advocate's Voice*

Like bench memos, advocacy briefs are an integral part of the rhetorical situation in which judges write. As noted, the voice of a brief is partly rooted in genre-based attributes linked to the need to make persuasive argument seem less obviously so and less likely to be viewed with skepticism.⁸⁰ At the same time, a brief's

<http://www.scotusblog.com/2012/04/ross-guberman-critiques-the-governments-health-care-brief/>.

77. Brief of State Respondents, 2012 WL 392550, at *37.

78. *Id.* at *24.

79. *Id.* at *7.

80. See *supra* notes 57–65 and accompanying text.

effectiveness in concealing contestability and dispelling suspicion of self-interestedness is tied to an author's rhetorical skill.⁸¹ These two aspects of voice in advocacy briefs are closely intertwined. The success with which a brief overcomes these challenges to persuasiveness will increase the likelihood that it will actually persuade and perhaps influence the structure and reasoning of an opinion.

To demonstrate, I return to the discussion of *National Federation of Independent Business v. Sebelius* begun in section III(B)(2) to illustrate how judicial opinions internalize the rhetoric and framing of advocacy directed to them. In the Supreme Court's recent ruling, both Chief Justice Roberts' main opinion and the opinion of the quartet of dissenters (Justices Scalia, Kennedy, Thomas, and Alito) bear the traces of the State Respondents' rhetorical framing.

For example, taking up the Commerce Clause argument, the Chief Justice opined that "Congress has never attempted to rely on [the commerce] power to compel individuals not engaged in commerce to purchase an unwanted product."⁸² Drawing on the Respondents' theme of lack of precedent for a legislative purchasing mandate, the opinion quoted from a case referring to the "lack of historical precedent"⁸³ and made the case for careful consideration of legislation that entailed a "new conception[] of federal power."⁸⁴ Opining that both the language of the Constitution and Commerce Clause precedent "reflect[] the natural understanding that the power to regulate assumes there is already something to be regulated"⁸⁵ and that the minimum-coverage (individual mandate) provision "compels individuals to *become* active in commerce by purchasing a product,"⁸⁶ the opinion again takes up the idea of novelty and lack of precedent: "Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional activity."⁸⁷

81. See *supra* notes 66–79 and accompanying text.

82. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2586.

83. *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)).

84. 132 S. Ct. at 2568.

85. *Id.*

86. *Id.* at 2587 (emphasis in original).

87. *Id.* (emphasis in original).

Moving to the Government's argument under the Necessary and Proper Clause, the opinion reinforced both the idea that regulation presupposes the existence of something to regulate (the individual mandate "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power")⁸⁸ and that the mandate exceeds the structural limits of the Constitution on federal power ("[b]ut we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution").⁸⁹

The jointly written dissent also echoed the State Respondents' brief in emphasizing structural limits, the lack of precedent for, and the extraordinary reach of, the minimum-coverage provision: the "unprecedented"⁹⁰ individual mandate expands federal power into a "broad new field" that is "limitless"; "further."⁹¹ Further, "if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end."⁹²

In short, although neither the main opinion nor the joint dissent cited the State Respondents' brief directly in their discussion of the individual mandate, each of the opinions resonated with its rhetoric and ideas: as an unprecedented assertion of federal power, the mandate was extraordinary and thus an unconstitutional exercise of legislative authority. The frequent repetition of that idea in the brief, and appeal to Justices inclined to limit rather than expand federal power, demonstrate how an advocacy voice can find expression in the rhetorical context of the opinion: judicial opinion voice can internalize the persuasive framing of the advocate and, in the Bakhtinian sense, plausibly be "half someone else's."⁹³

88. *Id.* at 2592.

89. *Id.*

90. *Id.* at 2647 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

91. *Id.* at 2646 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

92. *Id.* at 2648 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

93. See BAKHTIN, *supra* note 35, at 293–94; Rideout, *supra* note 12, at 87 nn.77–83 (discussing Bakhtin's dialogism, the idea that all use of language involves borrowing and appropriation from others' prior uses); *supra* text accompanying note 37.

C. The Opinion

The judicial opinion is the culmination of the rhetorical efforts of the bench memo, the briefs, and the oral argument. Whether written by the judge, the judicial clerk, or in some collaborative arrangement between the two, the opinion, as a genre, not only announces an outcome but also elaborates the rationale—doctrinally based, fact-, or policy-driven—that supports it.⁹⁴ This genre-based voice of the opinion is thus at once authoritative, directing a disposition that binds the parties, and justifying, in that it sets out its reasons for ruling in the way that it has.⁹⁵ But upon deeper analysis of opinions, it would be misguided to conceive of the opinion's genre-based voice as unitary: although the dispositional and justifying functions of an opinion give it a fairly consistent and identifiable genre-based voice, as noted, the judicial opinion also incorporates functions of the bench memo and advocate's brief genres.⁹⁶ Moreover, the authorial voice of the opinion is itself a complex phenomenon to which the authors of other judicially oriented writings contribute.⁹⁷

1. *Voice in the Main Opinion*

a. Genre-based voice

John Leubsdorf's catalogue of the attributes of a judicial opinion highlight how an opinion subsumes the functions of other legal and even literary genres:

An opinion works in differing but related ways. Like a novel, it portrays a human conflict. Like a letter, it intervenes in the conflict it portrays. Like a treatise, it gives a systematic analysis meant to be applicable to many situations. Like a work of history or criticism, it compares disputes that have occurred over the years and analyzes what past authors have proposed. Like a dialogue, it embraces clashing approaches to the conflict before the court. Like a script or

94. See Wald, *supra* note 33, at 1374–77; see generally James Boyd White, *Judicial Opinion Writing—What's an Opinion for?*, 62 U. CHI. L. REV. 1363 (1995).

95. See Ferguson, *supra* note 20, at 210–16.

96. See AMSTERDAM & BRUNER, *supra* note 21, at 166–67, 176, 216.

97. See *supra* notes 35–37.

computer program, it gives instructions to those who act and decide. Like an oration, it seeks to persuade.⁹⁸

If the genre-based voice of the judicial opinion incorporates these multiple functions, the authorial voice, particularly in an opinion issued by a multimember appellate court, similarly is not singular. The very process of circulating and considering opinion drafts among judges and clerks in chambers, in addition to the influence of briefs and lower court opinions in the case, ensures that multiple voices and perspectives are likely to inflect the final product.⁹⁹ The following discussion addresses this authorial aspect of judicial opinion voice.

b. Multiplicity of Authorial Voice

Variations in rhetorical approach among judicial authors, whether they write individually or, less commonly, in collaboration, will inflect the authorial dimension of voice of a main opinion. A majority or plurality opinion by Justice Scalia resonates differently from one written by Justice Breyer or Justice Ginsburg, even when the contributions of judicial clerks to these opinions are accounted for. As Justice Breyer himself has noted, his approach to writing is quite distinct from that of Justice Scalia. Justice Breyer avers that “[i]n writing, one must understate,” because overstatement, while often effective rhetorically in conversation, would lend itself to being misunderstood in writing.¹⁰⁰ Nonetheless, he “respect[s] other writing styles that are different, yet effective,” singling out Justice Scalia’s “dramatic approach.”¹⁰¹

Still, an authoring Justice often will need to adjust an opinion’s breadth of language and statement of rationale, and possibly other attributes that mark authorial voice, in an effort to gain the support of a Court majority.¹⁰² In this sense the main opinion will

98. Leubsdorf, *supra* note 28, at 447.

99. See Jeannie Suk, *Taking the Home*, 20 LAW & LIT. 291, 293 (2008); see also Leubsdorf, *supra* note 28, at 491–94 (discussing the range of voices that may inhabit an opinion, including those of dissenters and lower court opinion authors, arguments of counsel, the parties, and witnesses).

100. YAGODA, *supra* note 7, at 170 (quoting Justice Breyer).

101. *Id.* at 171.

102. Ward, *supra* note 33, at 1377–80. It is in this sense that the named author speaks as well for the Court that John Leubsdorf refers to appellate opinions as “double-voiced.” Leubsdorf, *supra* note 28, at 488–90.

normally be responsive to, or at least cognizant of, other authorial voices on the Court. The less common jointly authored opinion must negotiate differences in individual authorial voice even more directly. In the case of multiple judicial authors, one might ask whether it is possible to harmonize authorial voice in the face of varying emphases and rhetorical choices among co-authors.

The reproductive rights case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰³ offers some insight into the nature of authorial presence in a jointly authored opinion. In *Casey*, the members of the heavily fractured Court produced five opinions. The main opinion, jointly authored by Justices O'Connor, Kennedy, and Souter, struck down a spousal notification provision in, but otherwise upheld, a Pennsylvania statute that restricted access to abortion. Equally significant, this opinion sought to reestablish the precedential vitality of *Roe v. Wade*¹⁰⁴ countering earlier post-*Roe* decisions that had “chipped . . . away” at it.¹⁰⁵

Apart from the symbolic importance of the use of the joint opinion form in this case,¹⁰⁶ the implications for authorial voice were interesting. The main opinion in *Casey* did not signal how the authors divided the actual writing work, but extrajudicial evidence indicates that all three Justices participated in drafting it.¹⁰⁷ Justice Kennedy, whose position in prior cases suggested that he had reservations with respect to aspects of *Roe*'s holding, apparently wrote the opening part affirming the continued validity of *Roe*.¹⁰⁸ When the Justices read portions of the opinion from the bench, Justice Kennedy linked himself to another part of

103. 505 U.S. 833 (1992).

104. 410 U.S. 113 (1973).

105. See Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 Berkeley J. Gender L. & Just. 232, 254 n.157 (2013) (noting that the Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), “had chipped the most away at” *Roe*).

106. See Ray, *Judging the Justices*, *supra* note 28, at 219–20. For a more recent analysis of the use of the jointly authored opinion in *Casey* as an example of “strategic collaboration” and “common ground” though not “perfect agreement,” see Laura Krugman Ray, *Circumstance and Strategy: Jointly Authored Supreme Court Opinions*, 12 NEV. L.J. 727, 767–81 (2012) [hereinafter *Circumstance and Strategy*].

107. TOOBIN, *supra* note 53, at 54. In his Notes at the conclusion of *The Nine*, Jeffrey Toobin states that his principal sources were “not-for-attribution” interviews with Justices and more than seventy-five of their law clerks. *Id.* at 342. Toobin notes that the section on *Casey* was informed by Justice Blackmun's papers in the Library of Congress. *Id.*

108. *Id.* at 54; see *Casey*, 505 U.S. at 844–46.

the opinion text addressing the philosophical conception of liberty and deep conundrums of existence: “at the heart of liberty is the right to define one’s own concept of existing, of meaning, of the universe and of the mystery of human life.”¹⁰⁹

Justice Souter was particularly concerned about addressing *stare decisis* principles and contributed that portion of the opinion (part III), a carefully elaborated discussion of the circumstances dictating adherence to precedent.¹¹⁰ Justice O’Connor took responsibility for discussing the constitutional infirmities of the spousal notification provision.¹¹¹ Part IV of the opinion, although not supported by Justices Blackmun and Stevens, who joined in the opinion’s first three parts, also laid out a rationale for adopting an “undue burden” standard, one that Justice O’Connor had long favored, in place of the three-trimester framework in *Roe*.¹¹² It was her “pragmatic rhetoric,”—her voice— O’Connor biographer Joan Biskupic has argued, that resounded in the opinion.¹¹³

2. *The Separate Voice: Concurrences and Dissents*

a. Genre-Based Voice

If main opinion writers inevitably engage with multiple authorial voices, commentators typically identify the voice of the separate opinion, whether uttered as a nuanced concurrence, or in outright dissent from the majority result and rationale, as distinctly resonant.¹¹⁴ However, this section argues that even these writings reflect a dimension of multiplicity of voice, and here, the distinctions between the genre-based and authorial voice similarly are not airtight.

Concurrences can serve a variety of functions, from emphasizing a point made in the majority opinion, to limiting the

109. JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 272 (2006); *see also Casey*, 505 U.S. at 851.

110. BISKUPIC, *supra* note 109, at 272; TOOBIN, *supra* note 53, at 54; *see also Casey*, 505 U.S. at 854–69.

111. TOOBIN, *supra* note 53, at 54; *see also Casey*, 505 U.S. at 888–98.

112. *See Casey*, 505 U.S. at 869–79.

113. BISKUPIC, *supra* note 109, at 272.

114. Marie-Claire Belleau & Rebecca Johnson, *I Beg to Differ: Interdisciplinary Questions About Law, Language and Dissent*, in *LAW, MYSTERY & THE HUMANITIES: COLLECTED ESSAYS* 141–45, 148, 151–54 (Logan Atkinson & Diana Majury eds., 2008).

opinion's reach, to expanding its scope by pointing to other possible applications, and to positing an alternative legal rationale for the majority opinion—in effect, a concurrence in the judgment only.¹¹⁵ Although a characteristic of the concurrence is that it presents an “internal commentary” on the Court's ruling that weakens the authority of the main opinion,¹¹⁶ its voice in a genre-based sense will vary to some extent according to its function.¹¹⁷

A more pointed separate writing is that of the dissent. Justice Brennan, over time an estimable dissenter on the Court, addressed the function of dissents, arguing that “[d]issents contribute to the integrity of the [judicial] process, not only by directing attention to perceived difficulties with the majority's opinion but . . . also by contributing to the marketplace of competing ideas.”¹¹⁸ In the sense that a dissent can “sow seeds for future harvest,” the dissent is forward-looking and keeps open the possibility that the Court in a future opinion will adopt that dissent's line of reasoning.¹¹⁹ As Marie-Claire Belleau and Rebecca Johnson emphasize in their elaboration on the rhetorical impact of dissents, Justice Brennan's seed-sowing dissents, as he puts it, “soar with passion and ring with rhetoric.”¹²⁰ The function of dissents of this sort, Belleau and Johnson argue, is to engage “noetic space,” a term they borrow from Amsterdam and Bruner in *Minding the Law* that integrates the rational and the emotional. It is the space of the imagination that can envision an alternative way of interpreting or applying the law.¹²¹

115. Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 780–81 (1990) [hereinafter *Justices Write Separately*].

116. *Id.* at 783.

117. *See id.* at 781. For example, Ray highlights two main varieties of concurrence: the “limiting concurrence” that confines the main holding, and the “expansive concurrence” that pulls the holding toward other situations. *Id.* And as with dissents, see Belleau & Johnson, *supra* note 114, at 149, and majority opinions, see *supra* note 102 and accompanying text, the concurrence will adjust its breadth of language and statement of rationale depending on the constituencies that influence it.

118. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986). For an analysis of Justice Brennan's dissents, see Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988) [hereinafter *Justice Brennan*].

119. Brennan, *Justice Brennan*, *supra* note 120, at 431.

120. Belleau & Johnson, *supra* note 118, at 151 (quoting Brennan, *supra* note 118, at 431).

121. *Id.* at 178–179. Belleau & Johnson, *supra* note 114, at 151–52 (discussing

b. Authorial Voice

Even if the dissent as a genre, or sub-genre, given its function to differ pointedly, offers a more distinct genre-based voice than a concurrence, both forms of separate opinion may still implicate multiple authorial voices. First, as in main opinions, other Justices often join in a separate opinion; thus, the same issues of negotiation exist about language and rationale that main opinion writers face. Moreover, the concurring or dissenting voice is never uttered in a vacuum but rather is heard in dialogue with the main opinion to which it responds.¹²² These disparate authors' voices are linked precisely because they contest or challenge one another.

The pointed dialogue between Justice Scalia and Justice Brennan in dissent in *Michael H. v. Gerald D.*,¹²³ illustrates the way in which a dissenting voice resounds in a main opinion, there a plurality joined in fully by only one other Justice. At issue in the case was the effort of an unmarried biological father to assert a liberty-based parental relationship with his daughter, who was conceived and born while her mother was married to and living with another man. The plurality concluded that under these circumstances Michael H., the biological father, had neither a procedural nor a substantive due process interest in pursuing a relationship with his daughter.¹²⁴ To justify this conclusion, the plurality applied an interpretive approach that sought to identify a specific tradition in case law allowing the assertion of a parental interest against the claims of the husband of the child's mother, that is, when the presumption of legitimacy would otherwise prevail.¹²⁵

An unusually long footnote by Justice Scalia and sections of Justice Brennan's responsive dissent operate contrapuntally to underline crucial differences in interpretive methodology. Specifically, Justice Brennan's dissent took issue with Justice Scalia's search for a tradition in the law recognizing the due process

ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING: AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES (2000)).

122. Belleau & Johnson, *supra* note 114, at 181.

123. 491 U.S. 110 (1989).

124. *Id.* at 119–21, 122–24.

125. *Id.* at 126–27 n.6.

rights of, in his words, an "adulterous natural father" to pursue a relationship with his child over the opposition of the child's mother who was married to another man at the time of the child's conception and who, with her husband, wished to raise the child. Justice Brennan opined,

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice . . . the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of these terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.¹²⁶

In specific refutation of this critique, in footnote six¹²⁷ Justice Scalia defended his interpretive method at length:

The need, if arbitrary decision making is to be avoided, to adopt the most specific tradition as the point of reference—or at least to announce, as Justice Brennan declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted—is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion . . . which disapproves this footnote, both appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.¹²⁸

126. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

127. Justices O'Connor and Kennedy concurred in all but this footnote six in the plurality opinion.

128. *Michael H.*, 491 U.S. at 127 n.6.

Here, the Justices directly and dialogically engaged one another's views of how to determine the relevant category for assessing the existence of a tradition to define a liberty-based parental interest.¹²⁹ Whereas Justice Scalia favored "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified,"¹³⁰ Justice Brennan preferred to "ask whether the specific parent-child relationship under consideration is close enough to the interests that [the Court] already . . . protected to be deemed an aspect of 'liberty' as well."¹³¹ The ensemble of writings that make up the opinion in the case is inflected by that dialogue and direct contestation,¹³² as well as by the larger conversation among the other Justices in the four separate opinions.

To invoke Bakhtin, the existence of dissents such as Justice Brennan's in *Michael H.* makes more likely that the main opinion's authorial voice will engage with another's rhetoric and ideas, even when to do so addresses, exposes, and possibly even reinforces "other . . . intentions."¹³³

IV. APPLICATION: VOICE AS INDEX OF DEEPER STRUCTURES OF MEANING

Building on the framework for analyzing judicial opinion voice developed in part III, this part uses variations in voice as an entry point for a deeper analysis of judicial reasoning in three cases. In these discussions, I point both to (1) shifts in authorial voice, that is, variations in authors' expressive approaches, as suggested in *Casey*, and (2) departures from genre-based voice, for example, where, as in *Michael H. v. Gerald D.*, the plurality departs from an opinion's dispositional and justifying functions in favor of argumentation, as openings to consider more closely these opinions' analytic coherence. Nonetheless, it bears emphasis that variations in genre-based and authorial opinion voice are often

129. AMSTERDAM & BRUNER, *supra* note 21, at 78.

130. *Id.*

131. *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting). For a discussion of how these variant conceptions of tradition informed this dialogue, see AMSTERDAM & BRUNER, *supra* note 21, at 102–05.

132. John Leubsdorf has suggestively written of the "adversary character" of the "resulting multiplicities" of writings in a divided opinion. Leubsdorf, *supra* note 28, at 491.

133. See BAKHTIN, *supra* n. 35, at 293–94; see also Rideout, *supra* note 12, at 87 nn. 77–83 (discussing Bakhtin's dialogism); *supra* note 12.

connected, and difficult to disentangle, as suggested in discussing the per curiam opinion in *Bush v. Gore*.

A. *Casey*

Here, the Article returns to *Casey* to trace the complex shifts in reasoning that, I argue, are signaled by shifts in expression and rhetorical framing. As noted, the deeply divided *Casey* opinion comprised a main opinion and four separate writings concurring in part in the opinion or in the judgment and dissenting in part. The result was a patchwork quilt of judicial writing requiring a chart to keep track of the rationales stated in each opinion and to confirm which portions of the main opinion garnered five votes to constitute the ruling of the Court. But quite apart from the complexity resulting from the variations in views in the ensemble of opinions, the main opinion itself is noteworthy, and rhetorically complex, for having multiple Justices as signing judicial authors.

The complexity of the main opinion in *Casey* (parts one, two, and three), with its shifts in rhetoric and reasoning, seems as much bound up in the multiplicity of authors and their concerns and perspectives as in its subject matter. Part One begins with a ringing sentence that encapsulates the aim of the opinion to shore up the jurisprudential standing of *Roe*, which recognized a women's liberty-based right under the Fourteenth Amendment Due Process Clause to terminate a pregnancy in its early stages: "Liberty has no refuge in a jurisprudence of doubt."¹³⁴ Following that pronouncement is a short discussion of post-*Roe* history indicating the degree to which the import of its holding had been placed in doubt, then a statement "with clarity" of the three parts of *Roe*'s "essential holding," which the opinion reaffirmed: women's right to choose to have an abortion before fetal viability; the state's power to limit abortions after viability; the state's interest from the beginning of pregnancy in protecting the health of a pregnant woman and the life of the fetus.¹³⁵

Part two of *Casey* reviews the liberty jurisprudence of which *Roe* is a part and, despite its previous effort at clarity, the Court here highlights the complexity of this body of law: "The

134. 531 U.S. at 844.

135. *Id.* at 846.

inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise the same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.”¹³⁶ As the opinion attempts to convey that decision making in this area can be challenging, even the opinion’s syntax is confounding. (What boundaries are being referred to? Reasoned judgment? The adjudication of substantive due process claims?) This section goes on to address the moral profundities of abortion, and the opinion’s voice takes on a character that reflects a more philosophical cast of mind:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.¹³⁷

But the opinion no sooner takes this philosophic turn that it hastens to assure the reader that its focus is rooted in practical concerns: abortion is no mere “philosophic exercise. Abortion is a unique act . . . fraught with consequences for others.”¹³⁸ This segment of the opinion suggests some familiarity or at least empathy with the physical and emotional strains of pregnancy but does so in a more detached voice that projects a generic woman (“the woman”) and keeps the particular at a distance: “The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”¹³⁹

Part three of the opinion shifts to the doctrine of stare decisis, and here, in the most jurisprudential portion of the opinion, it

136. *Id.* at 849.

137. *Id.* at 851.

138. *Id.* at 852.

139. *Id.*

develops an extended analysis of that doctrine and its applications. It takes on an explanatory voice as it elaborates standards (whether the decision has proved unworkable, whether it has induced reliance such that overruling would cause social harm, whether it is doctrinally anachronistic, and whether its underlying factual premises have changed)¹⁴⁰ by which to assess whether a precedent merits overruling. It applies those standards to *Roe* and concludes that the rule in *Roe* still justifies adherence.¹⁴¹ Then it illustrates how the overturning of two other lines of cases (*Lochner v. New York*¹⁴² and *Plessy v. Ferguson*¹⁴³) linked to national controversies that the cases themselves became part of, was consistent with these standards.¹⁴⁴

Although the opinion remains largely faithful to the conventions of its genre, the joint drafting complicates its authorial voice; the opinion shifts complexly from speaking with clarity to voicing the complexity of liberty jurisprudence, from addressing the moral implications of the decision to abort to focusing on the practical and material, then back again to the philosophical, before turning to the jurisprudential. This last section of the main opinion that commands a majority concludes with a discussion of the nature and source of the Supreme Court's legitimacy. Here, the opinion refers to voice more directly:

The Court must take care to speak and act in a way that allows people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.¹⁴⁵

In the analysis of legitimacy, the joint opinion suggests that judicial voice is concerned with the content of the opinion as much as with its expression: even as it struggles to achieve clarity and precision, the Court must speak in a way that assures its audiences that its reasoning is based on legal principle. It is perhaps in this concern, this effort to reframe voice to mean the

140. *Id.* at 854–55.

141. *Id.* at 855–61.

142. 198 U.S. 45 (1905).

143. 163 U.S. 537 (1896).

144. *Roe*, 531 U.S. at 861–64.

145. *Id.* at 865–66.

Court's speaking as an institution in a principled way, that the joint opinion partly overcomes the unevenness in register occasioned by differences in individual authorial voice, aspiration, and emphasis.

B. *Michael H. v. Gerald D.*

This section looks again at the plurality in *Michael H. v. Gerald D.* and connects the instability of that opinion's due process rationale with a heightened emphasis conveyed in its repeated resort to italicized statements. The highly fractured Court that decided *Michael H.* was, as noted, deeply divided about the proper approach to identifying whether a tradition existed for recognizing a liberty interest in an unmarried biological father's pursuit of a paternal relationship with a married woman's child when a state law created a presumption that the mother's husband was the child's legitimate parent.¹⁴⁶ Justice Brennan's dissent highlighted most trenchantly a sharp difference in approach with that of Justice Scalia's plurality opinion. Notably, in the insistence and assertiveness of the plurality's vocal inflections, an advocacy voice seemed to drown out the opinion voice. Here, the departure from genre-based voice raised questions about the assumptions that underlay the opinion's reasoning.

Part three of the opinion determined that, in the face of a state presumption of legitimacy, Michael H. had neither a procedural right to establish at a hearing his paternity of a child who was conceived and born while her mother was married and living with her husband, nor a substantive due process right to pursue a relationship with the child. Near the beginning of part three, the plurality addressed the state courts' denial of Michael H.'s efforts to demonstrate paternity. The plurality's description of the basis for Michael H.'s application assumed that allowing Michael H. to establish paternity would have a particular consequence:

We address first the claims of Michael. At the outset, it is necessary to clarify what he sought and what he was denied. California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared *the* father of

146. See *supra* notes 123–133 and accompanying text.

Victoria. The immediate benefit he evidently sought to obtain from that status was visitation rights. But if Michael were successful in being declared the father, other rights would follow—most importantly, the right to be considered as the parent who should have custody.¹⁴⁷

Here, the plurality's use of italics for emphasis voiced the anxiety fueling the assumption that, if successful in establishing paternity, Michael, an adulterous father, would seek custody of Victoria and that a judicial declaration of paternity would accord him exclusive parental rights vis-à-vis Gerald, the marital father. In this view, the procedure of declaring Michael's paternity was inextricably linked to, and would result in, the marital father's loss of substantive paternal rights.

Later, after concluding that no specific tradition existed in the law granting a biological father paternal rights over a child born while her mother was married to another man, the plurality confusingly seemed to disaggregate the very proceedings that it had previously linked together. It asserted that even if the law permitted one circumstanced as Michael to seek to overcome the state's presumption of legitimacy, it would be of no legal value because the real claim in issue is not a declaration of paternity but "substantive" parental rights. To make this point the opinion emphasized the distinctness of the two claims:

Moreover, even if it were clear that one in Michael's position generally possesses, and has generally always possessed, standing to challenge the marital child's legitimacy, that would still not establish Michael's case. As noted earlier, what is at issue here is not entitlement to a state pronouncement that Victoria was begotten by Michael. It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration.¹⁴⁸

On first reading, the plurality's shifting locutions appeared to contradict its earlier assertion that seeking a declaration of paternity is highly consequential. Instead, the plurality simply

147. *Michael H.*, 491 U.S. at 118 (citations omitted; emphasis in original). For a discussion of the plurality's rhetorical techniques in this passage, see AMSTERDAM & BRUNER, *supra* note 21, at 96–97.

148. *Id.* at 126.

exaggerated the distinctness between the two proceedings to set up what it considered to be the inevitable point of challenging the presumption of legitimacy:

What Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives* What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. Even if the law in all States had always been that the entire world could challenge the marital presumption and obtain a declaration as to who was the natural father, that would not advance Michael's claim.¹⁴⁹

Again, the plurality italicized what in its view was the only reason to seek a declaration of paternity: to pursue parental rights. In fact, the plurality had actually come full circle, taking an oblique turn to trumpet its concerns that a marital father risks losing all parental rights were a biological father to succeed in establishing paternity:

Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a "freedom not to conform"¹⁵⁰ (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom"—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established.¹⁵¹

The plurality's continued italicizing of its argument—the visual sign of stridence in its decisional voice—underscored the underlying instability of its interpretive approach. To sustain its rationale, the plurality would need to demonstrate that the paternal interests of Gerald and Michael could only be understood

149. *Id.* at 126–27 (quoted in part in AMSTERDAM & BRUNER, *supra* note 21, at 97) (emphasis in original).

150. Here the plurality refers to Justice Brennan's dissent. *Id.* at 141.

151. *Id.* at 130 (quoted in AMSTERDAM & BRUNER, *supra* note 21, at 100) (emphasis in original).

as the California statute apparently considered them, in the nature of a zero sum game, and could not otherwise be accommodated in the law. Moreover, the plurality emphasized the weightiness of the outcome by placing a weight on the scale: characterizing Michael's act as adulterous, whereas Gerald was concerned with "preserv[ing] the integrity of the traditional family unit," assumed that the two men were not morally equivalent, and thus that an outcome awarding Michael paternal rights would be against "nature," in the sense that the state's presumption in favor of the marital father's rights was part of the natural order of things.

However, nothing in the case supported the conclusion that Michael sought to displace Gerald as the head of household, or that the recognition of Michael's paternity would lead to his actually seeking custodial rights or guarantee any success in his seeking visitation with Victoria. As Justice Brennan's dissent pointed out, the reasoning at the core of the plurality opinion was flawed:

The plurality's confusion about the proper analysis of claims involving procedural due process also becomes obvious when one examines the plurality's shift in emphasis from the putative father's standing to his ability to obtain parental prerogatives. In announcing that what matters is not the father's ability to claim paternity, but his ability to obtain "substantive parental rights", the plurality turns procedural due process upside down. Michael's challenge in this Court does not depend on his ability ultimately to obtain visitation rights; it would be strange indeed if, before one could be granted a hearing, one were required to prove that one would prevail on the merits. The point of procedural due process is to give the litigant a fair chance at prevailing, not to ensure a particular substantive outcome.¹⁵²

What the plurality had strained to yoke together, the clarity and directness of Justice Brennan's dissenting voice exposed as separable. The plurality's reading of the facts, and assertions about the consequences of granting Michael a paternity hearing, amounted to argumentation rather than analysis. In a pointed footnote, the plurality responds to Justice Brennan's analysis, observing that Michael's petition "does not depend upon his

152. *Id.* at 147 (Brennan, J., dissenting) (citations omitted).

ability ultimately to *obtain* [substantive parental] rights, but it surely depends upon his *asserting a claim* to those rights, which is precisely what Justice BRENNAN denies.”¹⁵³ But like a trumpet’s blare, this rejoinder sounded with the hyper-confidence of false bravado. Justice Brennan did not deny that Michael would assert some right to pursue a parental relationship, but sought to highlight that recognition of a procedural right necessarily preceded any effort to pursue a substantive right. In thus explaining the “point of procedural due process,” the credible voice of Justice Brennan’s dissent is matter-of-fact, cogent, and comparatively muted, in contrast to the sense of urgency that we hear in the plurality opinion.

The plurality elided the distinction between procedural and substantive due process while assuming an either-or categorization of potential paternal interests. Drawing on insistent repetitions and assertions, the plurality diverged from the genre-based functions of an opinion. Instead, its characterizations and categorizations assumed functions that more closely approximated advocacy. The plurality’s departure from genre-based voice, that is, the way in which the plurality sounds, and functions, like an argument, helps draw our aural attention to its resort to unwarranted assumptions and instances of strained reasoning.

C. *Bush v. Gore*

This section addresses the discordance of the per curiam opinion of *Bush v. Gore*,¹⁵⁴ an opinion putatively written as an expression of institutional voice, to demonstrate the ruptures in reasoning at its core. If a jointly authored opinion as in *Casey* presents challenges to rhetorical coherence and consistency in authorial voice, one might think that the per curiam opinion, which ostensibly represents the institutional voice, would conquer the shifts and variations in voice that are seemingly attributable to multiple authors. Yet the implications for authorial voice are once again complex if the Court’s resort to the mechanism of the per curiam actually reflects the absence of consensus in judicial

153. *Id.* at 126 n.5 (emphasis in original).

154. 531 U.S. 98 (2000) (per curiam).

rationale,¹⁵⁵ as it did in *Bush v. Gore*.¹⁵⁶ There, the Court held that the divergent ballot counting standards applied in various Florida counties during the 2000 Presidential election presented an equal protection issue. Another example of a divided Court, *Bush v. Gore* actually consisted of six opinions: in addition to the per curiam, the ruling included a concurrence by Chief Justice Rehnquist joined by Justices Scalia and Thomas, and dissents authored by Justices Stevens, Souter, Ginsburg, and Breyer.¹⁵⁷ Quite apart from the differences among these separate opinions, the discordance within the main per curiam opinion is itself striking. Tracing the opinion's fluctuations in genre-based and authorial voice helps to illuminate its self-contradictory turns.

First, the Court claimed a novel equal protection basis for reversing the Florida Supreme Court, rooted in the "manner" by which the right to vote is exercised:

The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." (citations omitted.) This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary. . . . The want of those rules here has led to unequal evaluation of ballots in various respects. . . . As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from

155. Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 524–30 (2000) [hereinafter *The Road to Bush v. Gore*]. This section draws on Ray's analysis of *Bush v. Gore* as a per curiam opinion to illustrate how the opinion's strained reasoning finds expression in the opinion's voice and especially in its departure from genre-based voice. In considering the plurality's use of the per curiam opinion form in *Bush v. Gore*, Ray suggests a number of motivating factors, including the exigencies surrounding the issuance of the opinion, an effort to create an "aura of consensus," and the Court's concern to limit the case to its unique context. *Id.* at 571–74.

156. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

157. This configuration of separate opinion authors identified the per curiam's authors as Justices Kennedy and O'Connor.

county to county but indeed within a single county from one recount team to another.¹⁵⁸

Then the Court announced in a voice that combined overconfidence and a certain disingenuousness that seven members of the Court concurred with its unprecedented constitutional analysis: “Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy [citing to Justice Souter’s and Justice Breyer’s dissents]. The only disagreement is as to the remedy.”¹⁵⁹

But, as commentator Laura Krugman Ray persuasively points out, for all the per curiam’s attempts to highlight that seven Justices identified an equal protection issue, only a bare majority of five agreed with the result of the per curiam’s equal protection rationale.¹⁶⁰ Justices Souter and Breyer in dissent, while recognizing an equal protection issue, rejected the main opinion’s remedy to reverse the Florida Supreme Court’s order of a recount and in effect award the election to then Governor Bush. Rather, these dissenting Justices would have remanded the case to allow the recounting procedure to continue.¹⁶¹ And because even Chief Justice Rehnquist’s concurring opinion added its own highly specific ground—that the Florida Supreme Court’s reading of Florida law violated the requirements of federal law for designating how Presidential electors will be selected¹⁶²—it seems clear that the concurring members of the Court actually found the equal protection rationale for the main opinion to be too narrow to stand on its own.¹⁶³

Moreover, the per curiam opinion itself seemed to acknowledge the doctrinal anomaly it had introduced by almost immediately reversing course; after announcing the equal protection rationale for overturning the Florida Supreme Court, it disclaimed an intent to continue that line of equal protection analysis by limiting the holding to the particular circumstances. Here the Court wrote in a voice that exuded confidence in its legal

158. 531 U.S. at 105–06 (per curiam).

159. *Id.* at 111 (per curiam).

160. RAY, *The Road to Bush v. Gore*, *supra* note 155, at 572–73.

161. *Id.*

162. *Id.* at 572 (discussing *Bush*, 531 U.S. at 121–22 (Rehnquist, J., concurring)).

163. *Id.*

analysis and then, without abandoning the confident tone, seemed to sidestep the import of announcing a new application of the equal protection doctrine by offering a self-limited holding:

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.¹⁶⁴

The absence, for example, of a transitional expression such as “however” to acknowledge for the reader this anomaly (“our consideration is limited . . .”) hurried the reader along and seemed an effort to deflect attention from, rather than engage with, the implications of its holding.

The Court did not refer to the particularities of these ballot counting procedures as the reason for limiting the scope of its ruling but rather to the “complexities” of the equal protection issue in the election context. Yet reliance on the complexities of equal protection law as applied to the election context to limit the ruling seems perplexing, given the Court’s history of involvement in precisely that issue, a history that the per curiam documented to set up its equal protection rationale.¹⁶⁵ The shift mid-paragraph in authorial framing and emphasis from confident assertion of the equal protection ground of decision to “self-effacing” limitation¹⁶⁶ in abandoning that ground as a basis for further doctrinal development, alerts us to an unresolved rupture in the Court’s underlying reasoning.¹⁶⁷ And in its show of reticence to continue the line of equal protection analysis beyond the “present circumstances,” the per curiam seemed to depart from the

164. *Bush*, 531 U.S. at 109 (per curiam) (quoted in part in RAY, *The Road to Bush v. Gore*, *supra* note 155, at 574).

165. *Id.* at 104–05, 107 (per curiam) (discussing equal protection precedent in voting context).

166. *Cf.* RAY, *The Road to Bush v. Gore*, *supra* note 155, at 521 (referring to the per curiam more generally as “the most self-effacing judicial form”).

167. Ray suggests that the use of the per curiam form is convenient for portraying the opinion as one of “modest intentions,” one that eschews an aim of opening up new constitutional ground for further development. *Id.* at 575.

authoritative and justifying voice that we associate with the functions, and hence the genre, of the judicial opinion.

The internal contradictions continued in the per curiam's insistence that the Court acted with awareness of the limits on its role when in fact it adopted a remedy that impaired voters' efforts to exercise the franchise. Here, the Court wrote with a voice that sounded a concern for proving its bona fides:

None are more conscious of the 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.¹⁶⁸

Given that, in actuality, the Court followed a path not of restraint, but rather of considerable overreach into a state's administration of its election procedures, its protestations of unwilling involvement in the case rang hollowly:

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.¹⁶⁹

As dissenting Justice Breyer observed in a measured judicial voice grounded in enduring institutional concerns, the Court, while espousing the rhetoric of restraint, failed to "adequately attend[] to that 'necessary check upon our own exercise of power,' 'our own sense of self-restraint.'"¹⁷⁰

The per curiam's fastidiousness in expressing its due respect for the separation of powers offers another revealing glimpse of how voice and reasoning are mutually implicated. Here, the authorial anxiety betrayed in the opinion's repeated assurances that the Court had not overstepped its role suggested the opposite: its strained vocalizations signaled the strains in the per curiam's reasoning and the lack of internal consistency and coherence that a more solidly grounded opinion would have

168. *Bush*, 531 U.S. at 111 (quoted in part in RAY, *The Road to Bush v. Gore*, *supra* note 155, at 574).

169. *Id.*

170. *Id.* at 158 (Breyer, J, dissenting) (quoting THE LEAST DANGEROUS BRANCH 185 (1962)).

provided. At the same time, the sense of judicial unease does not square with an opinion's genre-based voice of authoritative justification.

Using voice in this way as an aid to interpreting *Casey*, *Michael H.*, and *Bush v. Gore* bears some resemblance to a variation of voice that Peter Elbow refers to as "resonant voice," which he has described as "often correlat[ing] with places where a text has a hole or crack or disjuncture."¹⁷¹ Elbow considers that resonant voice has the "self's resources behind or underneath it"¹⁷² and thus suggests that it can be more revealing of the author, if less than a self-portrait.¹⁷³ Complicating Elbow's conception is the particular way in which judicial opinion voice subsumes genres and multiple authorial contributions. Thus, it would be challenging to identify the "self" whose resources are revealed. Yet Elbow's formulation gets at something important about attentiveness to voice: shifts in modulation of judicial opinion voice can illuminate ruptures in reasoning and coherence that are critical to discern—that can be *heard*—in the work of judicial interpretation.

V. CONCLUSION

This Article offers a framework for understanding judicial opinion voice as an interpretive resource to enable deep readings of judicial opinions. It first addresses the complexity of voice as a concept and, drawing on the work of literary theory and its application to legal writing, it posits that judicial opinion voice has two aspects. Genre-based voice is rooted in the function, context, and audience of judicially oriented writing and the other, authorial voice, is linked to the identity and distinctive rhetorical choices of judicial authors. Neither of these aspects is unitary. Genre-based judicial opinion voice subsumes within it functions of bench memos and advocacy briefs reflecting the ways in which these writings exist in relation to opinions. Similarly, authorial judicial voice is never singular but typically reflects multiple authorial contributions and perspectives.

171. Elbow, *supra* note 7, at 13.

172. *Id.* at 14.

173. *Id.*

Although these aspects of judicial opinion voice are conceptually related and at times overlapping, the Article has treated them as analytically distinct to convey the nuanced and multi-faceted way in which voice operates. Having developed this more complex formulation of voice, this Article has suggested that attention to judicial voice in its multiplicity can serve as an entry point for a deeper analysis of judicial rhetoric, one which helps to explain the trajectory of a court's reasoning and doctrinal perspective. Using voice as interpretive method can lead us to intervals in judicial writing where crucial, if often unacknowledged, analytic shifts or glosses may occur and illuminates tensions and discordance in jurisprudential approach. Applying the framework developed here for analyzing judicial opinion voice offers another resource for the difficult work of interpretation, and the search for evidence of principled decision making, or its absence, that all close readers of opinions strive to achieve.