

THE COLOR-BLIND CONSTITUTION: CHOOSING A STORY TO LIVE BY

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“Rhetoric is the art which seeks to capture in opportune moments that which is appropriate and attempts to suggest that which is possible.”¹

INTRODUCTION

The two phrases most associated with the U.S. Supreme Court’s decisions in *Brown v. Board of Education*² have taken on

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1. John Poulakos, *Toward a Sophistic Definition of Rhetoric*, in CONTEMPORARY RHETORICAL THEORY: A READER 25, 26 (John Louis Lucaites et al. eds., 1999).

Orwellian meanings.³ Like the “Patriot Act” and “family values,” the original intention and meaning of the words have been obscured by the context and the history of their use. The *color-blind Constitution* is a rationale for rejecting attempts to integrate public schools.⁴ No one is able to proclaim without irony that an action will be taken with *all deliberate speed*.⁵

In this Article, these terms will be the vehicle for examining unanticipated consequences, particularly those associated with brief writing in the U.S. Supreme Court. The Article will make no recommendations for avoiding unanticipated consequences.⁶ Instead,

2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*) (“Separate educational facilities are inherently unequal.”); *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*) (“The[se] cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”).

3. GEORGE ORWELL, *Politics and the English Language*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 136 (Sonia Orwell & Ian Angus eds., 1968) (“In our time, political speech and writing are largely the defence of the indefensible. . . . Thus political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness. Defenceless villages are bombarded from the air, the inhabitants driven out into the countryside, the cattle machine-gunned, the huts set on fire with incendiary bullets: this is called *pacification*.”).

4. *Compare* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (plurality opinion) (finding that racial balancing cannot be a legitimate state interest), with Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 792 (1996) (concluding that “the Fourteenth Amendment was not intended to forbid all racial discrimination in all circumstances, but instead to guarantee to all citizens a limited set of absolute civil rights”).

5. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 306 (1 ed. 2004):

[T]he tragic lesson of the two decisions in *Brown v. Board of Education* is that one described an aspirational view of American democratic liberalism (*Brown I*) and the other (*Brown II*) actually defined the reality of grudging educational reform, and the power of racism as a barrier to true racial progress Whereas *Brown I* made possible the institutional equality first promised in 1776 with the Declaration of Independence . . . and again in 1865 with the ratification of the Thirteenth and Fourteenth Amendments, *Brown II* created the method and manner in which America would resist the mandate of the quality ideal.

6. See JACK GREENBERG, *BROWN V. BOARD OF EDUCATION: WITNESS TO A LANDMARK DECISION* 4-5 (2004) (“Unanticipated obstacles arose, for example, southern opposition of a fierce intensity that had never been seen before, except perhaps in the resistance to Reconstruction. . . . The law of unforeseen consequences worked its powers with vigor. If campaign is the apt word [for the NAACP litigation campaign], then it alludes to armies that in unanticipated ways advance, retreat, stall, see-saw, meander, yet continue to move towards victory.”).

my purpose is to articulate a principled approach for distinguishing among the unanticipated consequences of brief writing. My thesis is that some unanticipated consequences—for example, those associated with the Government’s friend of the court briefs filed in *Brown I* and *Brown II* and eventually with the term *all deliberate speed*⁷—are far more troublesome than others—in this case, those associated generally with the *color-blind Constitution* and specifically with the NAACP Legal Defense and Education Fund (NAACP) briefs filed on behalf of the schoolchildren in *Brown* and associated cases.⁸

While critiquing the brief writers’ rhetorical choices and argument strategies, I will try to avoid repetitive praise or criticism of the arguments made. Applying any critique to the much-studied briefs in *Brown* may be foolhardy, but perhaps the familiar, nearly mythical nature of the *Brown* opinions will throw into higher relief any lessons drawn from the critique.

I. THE TERMS

We associate the *color-blind Constitution* with *Brown I*,⁹ the case in which the Supreme Court determined that the Constitution barred states from requiring black and white children to attend different schools. Because separate schools are “inherently unequal,” segregation deprived the plaintiff children “of the equal protection of the laws guaranteed by the Fourteenth Amendment.”¹⁰ In the relatively short, unanimous opinion for the Court, Chief Justice Earl Warren revealed the ethos-based equality rationale of the decision, pointing out that the first Supreme Court case construing the Fourteenth Amendment had “interpreted it as proscribing all state-

7. One of the authors of the Government’s briefs described their preparation and consequences in detail. NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR (2004) [hereinafter ELMAN ORAL HISTORY].

8. This Article will cite to the briefs in the form in which they are available on Westlaw and Lexis whenever possible. Some briefs are not contained within those databases, so in those cases, I will cite to the nearly 2,500 pages of briefs and arguments compiled within 49 & 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, BROWN V. BOARD OF EDUCATION (1954 & 1955) (Philip B. Kurland & Gerhard Casper eds., 1975).

9. 347 U.S. 483 (1954).

10. *Id.* at 495.

imposed discriminations” on the basis of race.¹¹ “Our Constitution is color-blind,” the quote from Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*,¹² appears nowhere in *Brown I*. Yet the phrase has become embedded in our collective memory as a stand-in for the meaning of that opinion.¹³

We associate *all deliberate speed* with *Brown II*, the case in which the Supreme Court—after severing its determination that the Constitution had been violated from the relief to be granted—decided that the remedy for unconstitutional segregation was to remand the cases to the federal district courts for further action.¹⁴ This time, the memorable phrase appeared in the opinion itself: the Supreme Court ordered the district courts to assure that the public schools acted “with *all deliberate speed*” to admit students on a racially nondiscriminatory basis.¹⁵

At first glance, the two phrases have different kinds of unanticipated consequences. We can imagine ourselves as the brief writers who signed on to the argument that the government should act in a color-blind way, that it should not make distinctions on the basis of racial classifications. In our imagined roles, when we made that argument, we most likely assumed that racial classifications would be used only for the purpose of adverse discrimination (as Chief Justice Warren wrote in *Loving v. Virginia*, the statutory language alone demonstrated that there was no reason for the racial classification barring blacks and whites from marrying except for the maintenance of white supremacy¹⁶). Still imagining ourselves as the brief writers, we expected that any time legislative classifications and distinctions were made on racial grounds, they would result in disadvantage for some subordinated group; and we at least implicitly predicted that the purpose of such classifications would be to maintain a current advantage for some favored group. In other words, we failed to anticipate that federal, state, and local government entities and agencies might someday make racial

11. *Id.* at 490.

12. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

13. The phrase was repeated in the Government’s first amicus brief. Brief for the United States as Amicus Curiae at 4, *Brown I*, 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, 448), 1952 WL 82045.

14. *Brown II*, 349 U.S. 294, 301 (1955).

15. *Id.* (emphasis added).

16. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).

distinctions to equalize opportunities for all rather than to discriminate against marginalized classes. We failed to be optimistic enough about the consequences of the equality-under-the-law arguments that prevailed in *Brown I*.

As for *all deliberate speed*, what we (standing in again for the brief writers) failed to anticipate seems distinctive. Rather than failing to anticipate progress, we failed to anticipate the opposite. We failed to be pessimistic enough about the resistance of those who wished to hold on to structures and systems that perpetuated existing hierarchies. Gradualism prevailed in *Brown II* because it was “the formula that [the] Court needed” to decide “the constitutional issue in the strong, forthright, unanimous way that it did.” Unanimity was thought to be essential to assure that the decision would be accepted and followed throughout the country.¹⁷ What both the Government brief writers and the Court failed to anticipate was how far-reaching and profound the reaction would be as some communities tried to hold off the impending societal sea change.

Illustrating the first kind of unanticipated consequence, when the Supreme Court in 2007 limited the use of race in assigning students to public schools in the Seattle School District case, the five opinions cited *Brown v. Board of Education* nearly 100 times.¹⁸ In his plurality opinion, Chief Justice John Roberts quoted not only from the briefs filed in *Brown* on behalf of the schoolchildren but also from the transcript of the oral argument.¹⁹ Robert Carter, one of the lawyers for the children, had said: “We have one fundamental contention . . . [N]o state has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”²⁰ Justice Roberts cited this comment in support of his contention that *Brown* itself, not to mention the schoolchildren’s lawyers, supported the majority’s proscription against any use of race in school assignments.²¹ After the 2007 decision, Judge Carter, then a ninety-year-old senior federal judge in Manhattan, responded to the opinion by saying that Justice Roberts was “stand[ing] that argument on its

17. ELMAN ORAL HISTORY, *supra* note 7, at 206.

18. See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

19. *Id.* at 747.

20. *Id.* (quoting Transcript of Oral Argument at 7, *Brown I*, 347 U.S. 483 (1954), (No. 8)).

21. *Id.*

head.”²² He pointed out that at the time of *Brown*, “[a]ll that race was used for . . . was to deny equal opportunity to black people.”²³

In contrast, the author of the Government brief who claimed credit for the concept of *all deliberate speed* seemed unfazed by its later reception. Philip Elman recognized that supporting a delay in implementation in order to gain a unanimous decision was unprincipled and indefensible. In his words, it was telling the children whose personal constitutional rights were being violated that “you’re right, . . . [b]ut we’re not going to do a damn thing for you. . . . We’ll take care of your children, perhaps. Or your grandchildren.”²⁴

Still, in a lengthy oral history, Elman called the argument he made on behalf of the United States “the one thing I’m proudest of in my whole career.”²⁵ Elman clarified:

[That’s not] because it’s a beautifully written brief; I don’t think it is. Rather, it’s because we were the first to suggest . . . that if the Court should hold that racial segregation in public schools is unconstitutional, it should give district courts a reasonable period of time to work out the details and timing of implementation of the decision. In other words, “with all deliberate speed.” The reason I’m so proud of that proposal is that it offered the Court a way out of its dilemma, a way to end racial segregation without inviting massive disobedience, a way to decide the constitutional issue unanimously without tearing the Court apart.²⁶

Articulating these consequences suggests that rather than being distinctive, the brief writers’ failures to anticipate amounted to the same shortcoming: They were simply unable to see how far later challenges might stretch their reasoning. Still, my thesis stands: There is a real, qualitative difference between these arguments that affects the nature of their unanticipated consequences. In the remainder of this Article, in an effort to provide principled support for my claim, I will suggest and follow an approach that combines narrative, metaphor, and constitutional interpretation. Together, these will provide guidelines for “judging” the arguments made.

22. Adam Liptak, *The Same Words but Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

23. *Id.*

24. ELMAN ORAL HISTORY, *supra* note 7, at 202-03.

25. *Id.* at 202.

26. *Id.*

II. DO THE STORIES *HANG TOGETHER*? DO THEY *RING TRUE*?

To serve as a counterpoint to scientific discourse and technical logic (what he called the rational paradigm),²⁷ Walter Fisher developed the concept of narrative rationality.²⁸ From this perspective, the briefs in *Brown I* and *Brown II* constitute sometimes-competing stories about how America should address foundational and inescapable questions of race, public education, and schoolchildren. What kind of stories do the briefs tell? Do their arguments fit within the grand progressive narrative of America? Are the stories instead compelled by other visions of the nation, the Constitution's history, and the nature of judicial review?

Assessments based on narrative rationality yield qualitatively different results than those founded on technical logic.²⁹ Although Fisher delineated principles and criteria, the narrative paradigm is not a formal system or model for analysis. Its function "is to offer a way of interpreting and assessing human communication that leads to critique, a determination of whether or not a given instance of

27. As Fisher noted, the principles of narrative rationality align with Aristotle's practical wisdom. In Aristotle's description, while "wisdom" combined scientific knowledge and intuitive thought, "[p]ractical wisdom . . . is concerned with things human and things about which it is possible to deliberate." ARISTOTLE, NICOMACHEAN ETHICS 144-51 (David Ross trans., Oxford Univ. Press ed. 1980) (c. 350 B.C.E.). The person who is practically wise not only makes wise decisions, but recognizes the best ways in which to act to fulfill the desired outcome. *Id.*

28. Professor Fisher discussed the narrative paradigm in a number of articles, with some understandable shifts in emphasis and phrasing over time. See Walter R. Fisher, *Toward a Logic of Good Reasons*, 64 QUARTERLY J. SPEECH 376, 378 (1978) [hereinafter *Good Reasons*]; Walter R. Fisher, *Narration as a Human Communication Paradigm: The Case of Public Moral Argument*, 51 COMM. MONOGRAPHS 1, 2 (1984) [hereinafter *Narration as Paradigm*]; Walter R. Fisher, *The Narrative Paradigm: An Elaboration*, 52 COMM. MONOGRAPHS 347, 348 (1985) [hereinafter *An Elaboration*]; Walter R. Fisher, *Technical Logic, Rhetorical Logic, and Narrative Rationality*, 1 ARGUMENTATION 3, 16-17 (1987) [hereinafter *Technical Logic, Rhetorical Logic*]; Walter R. Fisher, *Clarifying the Narrative Paradigm*, 56 COMM. MONOGRAPHS 55, 57 (1989) [hereinafter *Clarifying*]; Walter R. Fisher, *Narrative Rationality and the Logic of Scientific Discourse*, 8 ARGUMENTATION 21, 23 (1994) [hereinafter *Logic of Scientific Discourse*]. See J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 57 (2008), for a synthesis of Fisher's thought and application to *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

29. *Logic of Scientific Discourse*, *supra* note 28, at 29.

discourse provides a reliable, trustworthy, and desirable guide to thought and action in the world.”³⁰

Unlike the judgments of technical logic, narrative rationality uncovers and weighs the role of values in human reasoning and actions. According to Fisher, the uncovering and weighing of values is essential to “restore a consciousness of *whether* [something should be done] in our conceptions of knowledge.”³¹ In Fisher’s terms, we know *that* nuclear power exists, and we know *how* to use it, but the question of *whether* it should be used cannot be answered through logical rationality.³² Unless we are able to restore this sense of *whether* to our reasoning, Fisher concludes that technical knowledge will stifle “concerns of happiness, justice, and humanity.”³³

Narrative rationality applies to arguments in any form and any genre. According to Fisher, “[n]o matter how rigorously a case is argued—scientifically, philosophically, or legally—it will always be a story, an interpretation of some aspect of the world which is historically and culturally grounded and shaped by human personality.”³⁴ The best stories *hang together* and appear to us to *ring true* to the way people act and events occur in the world we live in. Because humans in Fisher’s view are predominantly storytellers (*homo narrans*) rather than mostly rational (*homo sapiens*), and because our experience is full of story telling and story understanding, everyone has the ability to judge the worth of a legal brief in terms of a story.

Accepting humans as storytellers, Fisher’s narrative paradigm presents the world as “a set of stories which must be chosen among to live the good life in a process of continual recreation.”³⁵ Though not the deliberative process of the rational paradigm, the choice among stories is not irrational. Instead, its rationality is determined by two qualities:

narrative probability (how well the story hangs together: is it internally coherent, complete, and consistent?) and

30. *An Elaboration, supra* note 28, at 351.

31. *Logic of Scientific Discourse, supra* note 28, at 30.

32. *Id.* at 25.

33. *Id.* at 30.

34. *Technical Logic, Rhetorical Logic, supra* note 28, at 17.

35. *Narration as Paradigm, supra* note 28, at 8.

narrative fidelity (whether the story rings true with other stories we know to be true: do its “good reasons” and values accord with our experiences?).³⁶

In the rational paradigm, the listener chooses after deliberation.³⁷ In the narrative paradigm, the listener chooses among stories because of “identification” in the Burkean sense.³⁸ Thus, the listener selects a story when she can identify with the speaker because they share something of substance (a sense of what constitutes a good reason and what values are relevant and substantial).

The first quality, narrative probability, is assessed by looking to the structural or formal features of the narrative—the coherence of the actions and characters within the story itself.³⁹ The story elements must hang together (structural coherence); the story must address or contain the important elements and relationships of similar stories that we have encountered before (material coherence); and the characters, both actors and author, must act in ways that warrant our belief in them (characterological coherence).⁴⁰

The second quality, narrative fidelity, is evaluated by looking to whether the substantive features of the story match up with what we think about how the world works.⁴¹ The measure of narrative fidelity is “the degree to which it accords with the logic of good reasons.”⁴² That logic, Fisher says, is measured (somewhat redundantly) by “the soundness of its reasoning and the value of its values.”⁴³

As for the soundness of its reasoning, Fisher describes good reasons as “elements that provide warrants for accepting or adhering” to the arguments made in any rhetorical communication.⁴⁴ The weighing of these reasons involves a familiar process. We check the facts, we look for missing facts and arguments, we evaluate the strength of the reasoning, and we make sure that all the important issues have been addressed.⁴⁵

As for the value of its values, we first identify the implicit and explicit values underlying the message and then determine whether

36. *An Elaboration*, *supra* note 28, at 349.

37. *Id.* at 350.

38. KENNETH BURKE, A RHETORIC OF MOTIVES 19-23 (1969).

39. *Logic of Scientific Discourse*, *supra* note 28, at 23-24.

40. *Id.* at 24.

41. *An Elaboration*, *supra* note 28, at 349-50.

42. *Id.*

43. *Id.*

44. *Good Reasons*, *supra* note 28, at 378.

45. *Id.* at 379.

they match up with the nature of the decision and the beliefs of the audience: “What would be the effects of adhering to the values . . . ? Are the values confirmed or validated in one’s experience . . . ? [A]re the values fostered by the story those that would constitute a humane basis for human conduct?”⁴⁶

To evaluate the narrative fidelity of the Government’s briefs, whether they ring true in light of their use of “good reasons” within the genre of arguments about constitutional interpretation,⁴⁷ I propose to adapt a framework suggested by Ian Bartrum.⁴⁸ Bartrum in turn relies on Philip Bobbitt’s modalities for constitutional arguments⁴⁹ and Max Black’s theory of metaphor.⁵⁰ Bartrum’s thesis is that the interaction of modalities, viewed metaphorically and thus generatively, may create new constitutional meaning and overcome long-standing interpretive deadlocks created by conflicting arguments.⁵¹

Fisher points out that narrative rationality looks to the available standards for assessing arguments. Because Bobbitt’s modalities for legitimating constitutional arguments are both well-accepted and readily available standards, they can be seen to constitute quintessentially “good reasons”⁵² in Fisher’s terms. Thus, Bobbitt’s

46. *Logic of Scientific Discourse*, *supra* note 28, at 24.

47. *Technical Logic, Rhetorical Logic*, *supra* note 28, at 17 (quoting *Good Reasons*, *supra* note 28, at 378).

48. Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt’s Theory of the Constitution*, 17 WM. & MARY BILL RTS. J. 157, 160 (2008).

49. See generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

50. See generally MAX BLACK, MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY (1962); Max Black, *More About Metaphor*, in METAPHOR AND THOUGHT (Andrew Ortony ed., 2d ed. 1993) [hereinafter *More About Metaphor*]. In addition to Max Black, this Article relies for its understanding of cognitive theory and research about metaphor primarily on the following books: GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999); STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001). I have explored similar concepts in prior articles. See generally, e.g., Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007); Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 LEGAL COMM. & RHETORIC: J. ASS’N LEGAL WRITING DIRECTORS 169 (2004).

51. Bartrum, *supra* note 48, at 160-61.

52. Professor Bartrum writes that:

modalities (or archetypes) of argument will become one way to test the soundness of the good reasons provided in the briefs. These modalities include:

1. *historical arguments* drawing on the circumstances of the period in which the relevant constitutional provision was drafted and adopted in order to “marshal[] the intent” of the framers;
2. *text-based arguments* asserting the “present sense” of the language used;
3. *structural arguments* relying on inferences derived from the structures and relationships established by the Constitution;
4. *prudential arguments* “advancing particular doctrines according to the practical wisdom of using the courts in a particular way”;
5. *doctrinal arguments* setting forth principles from precedent or from prior commentary on the precedent; and
6. *ethical arguments* drawing on “the character, or ethos, of the American polity,” arguments “whose force relies on a characterization of American institutions and the role within them of the American people.”⁵³

Ethical arguments will become especially important in the assessment of the Government’s briefs,⁵⁴ and so it may be helpful to provide several examples. Bobbitt used as an example Justice Lewis Powell’s opinion in *Moore v. City of East Cleveland*.⁵⁵ There, the Court found unconstitutional an Ohio zoning ordinance that limited occupancy of a dwelling to the members of one family.⁵⁶ Justice Powell justified the decision in favor of the challengers—a grandmother, her son, and her two grandsons (who were cousins, not brothers)—on the basis that “the Constitution protects the sanctity of the family” and “[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.”⁵⁷ This

[T]he great lesson of Bobbitt’s work is that there are rules to follow. It is not useful to build theories on argumentative modalities that are entirely outside of the existing practice—to do so is akin to speaking the wrong language, or uttering nonsense words, when trying to express an important point in conversation.

Id. at 188 (emphasis omitted).

53. BOBBITT, *supra* note 49, at 7, 94 (emphasis omitted), reprinted in Philip Bobbitt, *From Constitutional Fate: Theory of the Constitution*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 363, 363-82 (Sanford Levinson & Steven Mailloux eds., 1988).

54. See *infra* Part IV.

55. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); BOBBITT, *supra* note 49, at 96.

56. *Moore*, 431 U.S. at 495, 506.

57. *Id.* at 496, 503-04.

argument, Bobbitt suggests, not only allows the court to deal with the prior precedent in a different way but also establishes the opinion itself as a different kind of precedent for the future.

Similarly, in *Obergefell v. Hodges*,⁵⁸ the recent Supreme Court decision holding that the Constitution protects the right to marry of same-sex couples, Justice Anthony Kennedy wrote:

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.⁵⁹

Like Justice Powell's argument in *Moore*, Justice Kennedy's reasoning appears to be based on a broader underlying characterization of freedom that is implicit in the American ethos.

Bartrum's metaphorical modalities approach treats two of Bobbitt's argument archetypes as if they were the two parts of a metaphor, but not in the way we usually understand metaphors to work. For example, in the familiar metaphors *the corporation is a person* and *the First Amendment is a marketplace of ideas*, each metaphor is thought to work because the listener maps some of the attributes and characteristics of the more concrete or familiar source (the person, the marketplace) onto the more abstract or unfamiliar target (the corporation, the First Amendment). As a result of this ability to see one thing "as" another, some relationships and inferences transfer, but others do not; some features are highlighted, and others are obscured. The process of viewing the target "as" the source shifts the listener's perspective and understanding, and in this way, the metaphorical process is thought to create new meaning.

In Max Black's conception of how metaphor works (influenced by the early interaction theory of I.A. Richards), new meaning is generated in much the same way that rubbing two sticks together ignites both of them.⁶⁰ Black's theory is best explained through the

58. 135 S. Ct. 2584 (2015).

59. *Id.* at 2602-03.

60. *More About Metaphor*, *supra* note 50, at 27-28.

example of a metaphorical statement containing a word that becomes the focus (this word is used in a non-literal sense and does most of the metaphorical heavy lifting) while the rest of the sentence (used in a more concrete sense) serves as the frame.⁶¹ For example, in the sentence, “[t]he United States is an indivisible ‘Union of sovereign States,’”⁶² the word *Union* becomes the focus, and the rest of the sentence becomes the frame. The sentence is metaphorical because the United States is not literally a “Union” (the States are not literally “sovereigns” either, but that does not appear to be the metaphorical focus here). Within the frame encompassing the United States and the sovereign States, the word *Union* focuses our understanding on the attributes and characteristics that bind the States together rather than on the things that divide them. In this sentence, the word *Union* may overpower the impression of sovereignty for each of the States. So the interaction of the frame and the focus highlights a particular perspective of the United States, and it changes our understanding of “union” and “sovereign” as well.

Also important in Black’s view is the difference between weak and strong metaphors. Strong metaphors are more likely to generate insight into “how things are.”⁶³ As Black describes it, a strong metaphor has the qualities of being both emphatic and resonant. A metaphorical statement is emphatic if the author would not allow a substitution for the “salient word or expression,” the word whose appearance in the frame “invests the utterance with metaphorical force.”⁶⁴ A metaphorical statement is resonant if the interpretive response can go on to a greater extent; metaphorical statements that are relatively rich in elaboration potential are resonant.⁶⁵

Turning to the two phrases that are the objects of this analysis, each appears to be a metaphorical stand-in for a different modality or archetype of argument. The *color-blind Constitution* embodies the ethos or ethical argument while *all deliberate speed* embodies the prudential or practical argument. Based on his analysis of the Supreme Court opinions in *Brown I* and *Brown II*, Bartrum

61. *Id.* at 26-27.

62. *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., concurring in part and dissenting in part) (emphasis added) (quoting *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938)).

63. *More About Metaphor*, *supra* note 50, at 39 (pointing to charts and graphs as other familiar devices that show “how things are” without being “mere substitutes for bundles of statement of fact”).

64. *Id.* at 26.

65. *Id.* at 25-27.

concluded that the ethos-based or ethical arguments constituted the frame (built by tracing the evolution of equality principles from the Declaration of Independence on) and that the prudential or practical arguments constituted the focus (these were the arguments from the NAACP briefs based on social science and psychological research indicating that segregation negatively affected black children and the arguments from the Government's briefs on the desirability of delay).⁶⁶ Bartrum suggested that the metaphorical modality of the resulting ethical-prudential argument was the "creative push" needed to resolve the difficult conflict between the modalities.⁶⁷ The text of the Fourteenth Amendment "plainly promised 'equal protection,' but the doctrine permitted 'separate but equal' treatment; history suggested that the Fourteenth Amendment did not reach segregated schooling, but the constitutional structure hardly seemed to favor barriers to conversation and association among citizens."⁶⁸

While Bartrum depicted the interaction of arguments as creative and generative,⁶⁹ the author most associated with the government's briefs, Philip Elman, constructed a more skeptical combination of forces that overcame the deadlock on the Court. In Elman's view, the successful outcome was based on a combination of God (the death of Chief Justice Fred Vinson in 1953 and his replacement by Earl Warren) and *all deliberate speed* (the argument counseling delay).⁷⁰

66. Bartrum, *supra* note 48, at 183-85.

67. *Id.* at 184.

68. *Id.* at 179 (emphasis omitted).

69. Recognizing possible objections to the combination, Bartrum responded that:

[E]thical-prudentialism takes the basic, elemental principles of the American ethos as its principal and defining context; it looks first to those democratic, egalitarian, and libertarian values that define who we are—or who we want to be—as a nation. But the metaphor then tempers ethical idealism by focusing prudentially on the social and political realities of governing a large and diverse population.

. . . [I]t was the Court's grammatical creativity—its willingness to re-envision and realign the accepted modalities at a critical moment in the nation's history—that enabled it to overcome a two-year judicial standoff and render the most important constitutional decision of the last century.

Id. at 185-86.

70. ELMAN ORAL HISTORY, *supra* note 7, at 219.

III. THE EQUAL CITIZENSHIP BRIEFS

Much of the dispute about *Brown*'s legacy centers on what the Fourteenth Amendment means when it guarantees "equal protection of the laws."⁷¹ As a result of the adoption of the Fourteenth Amendment, does the Constitution affirmatively guarantee opportunities to achieve equal citizenship? Is it opposed to the maintenance of castes or group subordination? Does the Constitution prohibit all racial classifications no matter the purpose?⁷²

After the Civil War, the Thirteenth and Fourteenth Amendments promised an end to slavery and a guarantee of "equal protection of the laws." The NAACP briefs filed on behalf of the schoolchildren in *Brown* were constructed upon a mutually reinforcing framework of textual and doctrinal arguments as well as ethically based equality principles going back to the Declaration of Independence and re-stated in the Fourteenth Amendment and the early Supreme Court opinions interpreting it.⁷³

Section 1 of the Fourteenth Amendment reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall *abridge the privileges and immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due

71. U.S. CONST. amend. XIV, § 1.

72. Jack M. Balkin, *Brown as Icon, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* 3, 3 (2001). Justice Harlan's dissent in *Plessy* provides support for all views: in the light of the "[C]onstitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our [C]onstitution is color-blind and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

As for any claim of equal treatment of blacks and whites, Justice Harlan wrote:

Every one knows that the statute in question had its origin in [the] purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodations for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches.

Id. at 557 (Harlan, J., dissenting).

73. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁷⁴

In the *Slaughter-House Cases*, its first opportunity to interpret this language, the Court narrowed the promise of a broad interpretation. Instead, the Court interpreted the Privileges and Immunities Clause as covering only those privileges and rights accruing because of national citizenship and the Equal Protection Clause as protecting only against state discrimination or denial of rights on the basis of race.⁷⁵

Nonetheless, the door to potentially more expansive interpretations of the Fourteenth Amendment stayed open. In *Strauder v. West Virginia*, the Court found unconstitutional a state's exclusion of blacks from juries on the ground that the exclusion constituted "practically a brand upon them" and erected a barrier to "equal justice."⁷⁶ Even though the words of the Fourteenth Amendment were prohibitory, prohibiting state action abridging or denying privileges, immunities, and equal protection, the *Strauder* Court said that "they [also] contain a necessary implication of a positive immunity, or right."⁷⁷ This is the "right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."⁷⁸ Similarly, in *Yick Wo v. Hopkins*, the Court found that a San Francisco ordinance that had a discriminatory impact on Chinese businesses was unconstitutional.⁷⁹ And in *Buchanan v. Warley*, the NAACP won a case challenging the constitutionality of a Louisiana law that kept blacks from living in some parts of town.⁸⁰

Despite the scope of equal protection recognized in these early cases, the Supreme Court constructed a long-lasting doctrinal barrier in its *Plessy v. Ferguson* holding that "separate but equal" facilities

74. U.S. CONST. amend. XIV, § 1 (emphasis added).

75. *Slaughter-House Cases*, 83 U.S. at 80-81.

76. 100 U.S. at 308.

77. *Id.* at 307.

78. *Id.* at 308.

79. 118 U.S. 356, 374 (1886). The ordinance banned laundries in wooden buildings, which was where most Chinese located their businesses. *Id.* at 357-59.

80. 245 U.S. 60, 82 (1917).

were consistent with the U.S. Constitution.⁸¹ Affecting not only the specific facilities at issue, “*Plessy* metastasized, infecting more than half a century of constitutional law,” including a decision allowing Mississippi to require a Chinese girl to attend black schools.⁸² Moreover, by requiring challengers to address the question of whether separate public schools were in fact equal, *Plessy*’s holding diverted attention from the question of what kind of educational opportunities should be provided to all.

Led by Charles Hamilton Houston and, after 1936, by Thurgood Marshall, the NAACP developed the litigation strategy of attacking the states’ discriminatory actions across the board, including a “step-by-step assault on segregation in education.” That campaign began in the 1930s.⁸³ By 1948, the NAACP had prevailed in *Shelley v. Kraemer*, persuading the Supreme Court to find racially restrictive property covenants to be unconstitutional.⁸⁴

Important graduate and professional school challenges followed. In *Sweatt v. Painter*, the NAACP lawyers successfully argued that the separate black law school set up when the University of Texas Law School denied admission to black students was not in fact equal.⁸⁵ Although the Supreme Court issued an injunction against the admissions policy in *Sweatt*, it did not address the continuing precedential value of *Plessy* because *Plessy*’s holding was not directly implicated.⁸⁶ In *McLaurin v. Board of Regents*, the Court required the University of Oklahoma to remove the restrictions under which it had allowed a black student to attend graduate school, holding that they too were unconstitutional.⁸⁷

By the time the cases that would be consolidated in *Brown* were filed in the Supreme Court, the NAACP had a record of successful equal protection challenges to cite,⁸⁸ and the organization’s litigation strategy for elementary schools had shifted. The new lawsuits would demand desegregation rather than

81. 163 U.S. 537, 551-52 (1954) (upholding a Louisiana law that segregated railroad cars).

82. See GREENBERG, *supra* note 6, at 4, 14 (citing *Gong Lum v. Rice*, 275 U.S. 78 (1927)). Along with *Plessy*, *Gong Lum* would pose the major doctrinal obstacle to the arguments on behalf of the schoolchildren in *Brown*.

83. GREENBERG, *supra* note 6, at 4-6.

84. 334 U.S. 1, 23 (1948).

85. 339 U.S. 629, 636 (1950).

86. *Id.* at 635-36.

87. 339 U.S. 637, 641-42 (1950).

88. Statement as to Jurisdiction at *5-12, *Brown I*, 347 U.S. 483 (1954), 1951 WL 82600 [hereinafter Statement as to Jurisdiction].

equalization.⁸⁹ The first of the eventually consolidated cases was *Briggs v. Elliott*, which was filed in November 1950 in Clarendon County, South Carolina.⁹⁰ In *Briggs*, the NAACP put on as a witness Kenneth B. Clark, an assistant professor of psychology at City College of New York who testified about the infamous “dolls” test that demonstrated the effects of societal discrimination.⁹¹ In March of 1951, *Brown v. Board of Education of Topeka* was filed.⁹² *Davis v. County School Board* was filed in Prince Edward County, Virginia, in May 1951.⁹³ And in Delaware in July 1951, *Gebhart v. Belton* was filed.⁹⁴ The fifth of the consolidated cases, *Bolling v. Sharpe*, was brought in the District of Columbia and was not filed by the NAACP.⁹⁵

By July of 1951, the NAACP began seeking Supreme Court review of the adverse rulings that had come down, first in *Briggs*, and then in *Brown*.⁹⁶ The Court scheduled arguments in *Briggs* and *Brown* for October 1952, but the arguments were postponed until December, and the Court joined *Bolling v. Sharpe*,⁹⁷ from the District of Columbia, with the other cases. In Delaware, the NAACP won.⁹⁸ In Kansas, a new school board decided it would no longer defend the

89. In earlier litigation, the plaintiffs had sometimes argued in favor of requiring the school systems to actually provide equal separate schools on the theory that the cost of actual equality would encourage the states to voluntarily desegregate.

90. See *Briggs v. Elliott*, 103 F. Supp. 920, 921 (E.D.S.C. 1952), *rev'd sub nom. Brown II*, 349 U.S. 294 (1955); *Briggs v. Elliott*, 342 U.S. 350, 351 (1952) (sending the case back to the trial court). The cases and the trials in each are described in GREENBERG, *supra* note 6, at 62-88.

91. See Bruce L. Hay, *The Damned Dolls*, 26 LAW & LITERATURE 321, 323, 333 (2014), for an unusual analysis of the use of this research.

92. See *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951), *rev'd sub nom. Brown II*, 349 U.S. 294.

93. *Davis v. Cnty. Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952), *rev'd sub nom. Brown II*, 349 U.S. 294.

94. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), *aff'd sub nom. Brown II*, 349 U.S. 294.

95. *Bolling v. Sharpe*, 344 U.S. 873 (1952), *opinion after grant of cert.*, 347 U.S. 497 (1954), *supplemented sub nom. Brown II*, 349 U.S. 294.

Because the District of Columbia was not a state, the Fourteenth Amendment arguments did not apply. See GREENBERG, *supra* note 6, at 63. In *Bolling*, 347 U.S. at 500, the Court determined that “[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”

96. GREENBERG, *supra* note 6, at 89-92.

97. *Id.*

98. *Id.*

case, but the Supreme Court requested the Kansas attorney general to appear.⁹⁹ After finally hearing oral arguments in the consolidated cases in December 1952, the Court postponed its decision and asked for reargument, which eventually occurred in 1954.¹⁰⁰

In the first NAACP brief filed in *Brown*, the Statement of Jurisdiction, the authors linked the “preservation of strong democratic institutions” to the “intelligence and enlighte[n]ment of our citizenry” and argued that when the educational development of some students is hurt by state practices, “it becomes impossible to fully muster the capabilities and energies of the country to meet whatever crises lie ahead.”¹⁰¹ According to the brief writers, the decisions in *McLaurin* and *Sweatt* had established that it was unconstitutional for the states to segregate students at the professional and graduate school level.¹⁰² The issues in *Brown I* were of even greater importance. As soon as children start going to school, they immediately begin to “integrate and formulate basic ideas and attitudes about the society in which they live.”¹⁰³ If their early ideas and attitudes

are born and fashioned within a segregated educational framework, students of both the majority and minority groups are not only limited in a full and complete interchange of ideas and responses, but are confronted and influenced by value judgments, sanctioned by their society which establishes qualitative distinctions on the basis of race.¹⁰⁴

Schools simply “cannot be separated” from the culture “in which [a] child lives.”¹⁰⁵ As the emotional core of the argument, then, “[a child] cannot attend separate schools and learn the meaning of equality.”¹⁰⁶

Starting from the foundation established in *Sweatt* and *McLaurin*, the brief built its argument that state-imposed racial segregation violates the “Fourteenth Amendment because such restrictions handicap the applicant in his pursuit of knowledge and necessarily deprive him of equal educational opportunities.”¹⁰⁷ Conceding that *Sweatt* and *McLaurin* held that the particular acts of state segregation involved did not satisfy even the *Plessy* doctrine

99. *Id.*

100. *Brown I*, 347 U.S. 483, 488 (1954).

101. Statement as to Jurisdiction, *supra* note 88, at *5.

102. *See id.*

103. *Id.* at *6.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at *9-10.

(because the separate educational facilities that had been established by the states were not actually equal), the NAACP's brief on the merits in *Brown I* went on to claim that a new doctrine was now clearly established. As a result, the plaintiffs asked the Court to finally hold that segregation in itself is always unconstitutional.¹⁰⁸

The NAACP briefs in *Brown I* were thus constructed upon a doctrinal frame of the advocates' own construction;¹⁰⁹ the brief writers had in rhetorical terms created their own *kairos*, or most

108. Brief for Appellants at *5-6, *Brown I*, 347 U.S. 483 (1954), 1952 WL 47265:

The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone. The State of Kansas has no power thereunder to use race as a factor in affording educational opportunities to its citizens.

Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. Even assuming that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population. Such injury and inequality are established as facts on this appeal by the uncontested findings of the District Court.

The District Court reasoned that it could not rectify the inequality that it had found because of this Court's decisions in *Plessy v. Ferguson*, 163 U.S. 537 and *Gong Lum v. Rice*, 275 U.S. 78. This Court has already decided that the *Plessy* case is not in point. Reliance upon *Gong Lum v. Rice* is mistaken since the basic assumption of that case is the existence of equality while no such assumption can be made here in the face of the established facts. Moreover, more recent decisions of this Court, most notably *Sweatt v. Painter*, 339 U. S. 629 and *McLaurin v. Board of Regents*, 339 U.S. 637, clearly show that such hurtful consequences of segregated schools as appear here constitute a denial of equal educational opportunities in violation of the Fourteenth Amendment. Therefore, the court below erred in denying the relief prayed by appellants.

109. See *id.* at *7-8 (citations omitted):

Since 1940, in an unbroken line of decisions, this Court has clearly enunciated the doctrine that the state may not validly impose distinctions and restrictions among its citizens based upon race or color alone in each field of governmental activity where question has been raised. On the other hand, when the state has sought to protect its citizenry against racial discrimination and prejudice, its action has been consistently upheld . . .

It follows, therefore, that under this doctrine, the State of Kansas which by statutory sanctions seeks to subject appellants, in their pursuit of elementary education, to distinctions based upon race or color alone, is here attempting to exceed the constitutional limits to its authority.

opportune moment.¹¹⁰ Drawing on the terminology of metaphorical modalities, the doctrinal frame was reinforced and filled out by textual, ethical, and prudential arguments. Rather than the expected collision of the ethos-based argument with the *Plessy* holding, the argument modalities put to work in the NAACP brief were mutually supporting. And they were mutually supporting because the NAACP's past victories had weakened the conflicting doctrine.

When it came to *Brown II*, the NAACP brief maintained a consistent theme and balance. As for the argument for a gradual remedy, the brief asserted that “[m]uch of the opposition to forthwith desegregation does not truly rest on any theory that it is better to accomplish it gradually. In considerable part, if indeed not in the main, such opposition stems from a desire that desegregation not be undertaken at all.”¹¹¹ Returning again to the story of *Brown I*, the brief emphasized the overarching importance of the right at issue: “Appellants here seek effective protection for adjudicated constitutional rights which are personal and present.”¹¹² Given a personal and present right deserving to be protected, the Court might impose a delay only if it had before it “a showing of clear legal precedent therefor and some public necessity of a gravity never as yet demonstrated.”¹¹³

IV. THE GOVERNMENT’S BRIEFS

During the course of *Brown I* and *Brown II*, the United States filed three briefs and a memo as a friend of the court.¹¹⁴ Years later,

110. See Linda L. Berger, *Creating Kairos at the Supreme Court: The Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS (forthcoming 2015), for an explanation of *kairos* as rhetorical concept.

111. Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument at *31, *Brown I*, 347 U.S. 483, 1954 WL 72725.

112. *Id.*

113. *Id.*

114. Brief for the United States as Amicus Curiae, *Brown I*, 347 U.S. 483 (Nos. 8, 101, 191, 413, 448), 1952 WL 82045 [hereinafter Brief for the United States]; Supplemental Brief for the United States on Reargument, *Brown I*, 347 U.S. 483 (Nos. 1, 2, 4, 8, 10), 1953 WL 78291 [hereinafter Supplemental Brief for the United States]; Brief for the United States on the Further Argument of the Questions of Relief, *Brown II*, 349 U.S. 294 (1955) (Nos. 1, 2, 3, 4, & 5), reprinted in 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 739 (1975) [hereinafter Brief for the United States on Questions of Relief]; Supplemental Memorandum for the United States on the Further Argument of the Questions of Relief, *Brown II*, 349 U.S. 294 (Nos. 1-5), reprinted in 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF

Philip Elman, the former Frankfurter clerk and one of the authors of the Government briefs, recounted at length how the briefs were constructed, including his role in their construction and reception.¹¹⁵ This Part relies not only on the briefs but also on the accounts of Elman and others.¹¹⁶

A. *Brown I*

In an amicus brief written by Elman and filed on behalf of the United States in *Shelley v. Kraemer*, the Government set forth the foundations of the ethos-based equality argument that the Solicitor General's Office would continue to advance in *Brown I*:

This Nation was founded upon the declaration that all men are endowed by their Creator with certain inalienable rights, and that among these rights are Life, Liberty and the pursuit of Happiness. To that declaration was added the Fifth Amendment of the Bill of Rights, providing that no person shall be deprived of life; liberty or property without due process of law; and the Fourteenth Amendment, providing that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. And Congress, exercising its power to enforce the provisions of the Fourteenth Amendment, has provided that all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property.¹¹⁷

Like the brief it filed in *Shelley*,¹¹⁸ the Government's brief in *Brown I* emphasized the principle of equal rights under law. This ethical foundation was bolstered by significant prudential arguments (the United States is concerned about our ability to conduct foreign affairs when we are being justly criticized for segregationist policies,¹¹⁹ and we are equally worried about the "vexing problems"

THE UNITED STATES: CONSTITUTIONAL LAW 773 (1975) [hereinafter Supplemental Memorandum for the United States on Questions of Relief].

115. ELMAN ORAL HISTORY, *supra* note 7, at 199-205.

116. In addition to ELMAN ORAL HISTORY, *supra* note 7, this includes GREENBERG, *supra* note 6, and RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

117. Brief for the United States as Amicus Curiae at *3-4, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 72), 1947 WL 44159.

118. *Id.*

119. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-63 (1988).

that will arise if the Court finds segregation to be in violation of the Constitution).¹²⁰

The straightforward Table of Contents in the Government brief filed in 1952 in *Brown I* made these points:

First, the United States has a substantial interest in the case because of its stake in equality principles generally and especially in how America looks to foreign countries. The brief argued that the Federal Government had recognized a “special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution,” and that there was in fact “general acceptance of an affirmative government obligation to insure respect for fundamental human rights.”¹²¹ The constitutional right involved in *Brown I* was the basic right to equal treatment before the law. Moreover, “[t]he proposition that all men are created equal is not mere rhetoric. It implies a rule of law”¹²²

Next, and practically speaking, the Court might not find it necessary to reach the question of whether the *Plessy* principle of separate but equal schools violated the Constitution because all the cases before it involved unequal school facilities.¹²³ If, however, the Court did reach that question, it should overrule *Plessy*. As the United States had stated in prior briefs, the brief contended again that “racial segregation imposed or supported by law is per se unconstitutional.”¹²⁴ The broad principle at issue, according to this brief, “is that the Fourteenth Amendment forbids the classification of students on the basis of race or color so as to deny one group educational advantages and opportunities afforded to another.”¹²⁵ The brief went on to cite a number of cases holding that the Fourteenth Amendment was “primarily designed to assure to [blacks] the right

120. Brief for the United States, *supra* note 114, at *28.

121. *Id.* at *2.

122. *Id.* at *3, *4 n.2 (relying on Justice Harlan’s dissent in *Plessy*).

123. *Id.* at *10. The brief characterized all the lower court holdings as having found inequalities because the Kansas court—while concluding that the other factors were equal—had also found that the segregation had a detrimental effect upon black children. *Id.* at 12. This, the brief said, is a finding of “separate and hence unequal.” *Id.* at 13.

124. *Id.* at *17 (emphasis omitted) (citing government briefs in *Henderson v. United States*, 339 U.S. 816 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950)).

125. *Id.* at *18.

to be treated under the law exactly like white persons.”¹²⁶ As a contraction of that right, the decision in *Plessy* was “irreconcilable with the body of decisions which preceded and followed” it.¹²⁷ Whatever the merits of the *Plessy* decision at the time it was made, the brief said that “it should now be discarded as a negation of rights secured by the Constitution.”¹²⁸ Constitutional provisions “are not mathematical formulas . . . they are organic living institutions.”¹²⁹ In sum, *Plessy* was “an unwarranted departure . . . from the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law.”¹³⁰

And finally, the brief suggested that if the Court overruled *Plessy*, it should remand the cases to the district courts so that relief could be structured in a way that would be “most likely to achieve orderly and expeditious transition.”¹³¹ Here, citing antitrust and nuisance cases, the Government argued that a court of equity can “fashion a remedy to meet the needs of the particular situation before it.”¹³² The brief suggested the Court take into account the need for “orderly and reasonable solution of the vexing problems which may arise.”¹³³ And, in a footnote not repeated later, the Government lawyers wrote that the brief’s discussion of a reasonable and orderly transition “assumes that the separate schools for [black] children are in other respects ‘equal’” and noted that it “would be manifestly unfair and unjust, and contrary to the Court’s decisions, to withhold immediate relief where the separate schools are also physically unequal and inferior.”¹³⁴

Although mentioning that the Court might not need to overrule *Plessy*, the brief pointed out that the Government had argued in prior cases that “racial segregation imposed or supported by law is per se unconstitutional.”¹³⁵ The brief renewed, but did not “repeat[] in detail the grounds” for arguing that *Plessy*’s separate but equal rule was

126. *Id.* at *19-22 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Virginia v. Rives*, 100 U.S. 313 (1880); the *Slaughter-House Cases* themselves; and *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

127. *Id.* at *23.

128. *Id.* at *25.

129. *Id.*

130. *Id.* at *25-26.

131. *Id.* at *27.

132. *Id.*

133. *Id.* at *28.

134. *Id.* at *28 n.17.

135. *Id.* at *17.

“wrong as a matter of constitutional law, history, and policy.”¹³⁶ Still, that *Plessy* should be overruled was at the heart of the argument.

B. *Brown I* on Reargument

On reargument, the Government’s 200-page brief addressed (as the Court had asked) the history of the Fourteenth Amendment.¹³⁷ In the first 130 pages, the brief covered contemporary understandings of the Fourteenth Amendment starting with the Reconstruction Amendments and the status of blacks at the end of the Civil War, and then it proceeded through the legislative history of the Thirteenth and Fourteenth Amendments, the ratification of the Fourteenth Amendment by the states, and federal and state legislation on school segregation.¹³⁸

Based on its version of this history, the Government brief concluded that the Court had the power to construe the Fourteenth Amendment as prohibiting racial segregation in public schools. Moreover, if the Court held that such segregation was unconstitutional, the Court had the power to direct the resulting relief to “best serve the interests of justice in the circumstances.”¹³⁹ Thus, if the Court held that school segregation was unconstitutional, the Court should remand to the lower courts with directions to carry out the decision “as speedily as the particular circumstances permit.”¹⁴⁰

C. *Brown II*

The Government’s brief in *Brown II* was filed in response to the Court’s invitation to participate in the further arguments of the parties on questions of relief.¹⁴¹ Again, the Table of Contents sketches the broad contours of the argument in a way that allows a judgment of the brief’s structural coherence.¹⁴²

First, the Court has the equitable power to “direct such relief as will be most effective and just.”¹⁴³ It is true that “[t]he vindication of

136. *Id.*

137. Supplemental Brief for the United States, *supra* note 114, at *1 n.2.

138. *Id.* at *3-131.

139. *Id.* at *152.

140. *Id.* at *168.

141. Brief for the United States on Questions of Relief, *supra* note 114, at I.

142. *Id.*

143. *Id.*

the constitutional rights involved should be as prompt as feasible.”¹⁴⁴ Yet, “[t]he public interest requires an intelligent, orderly, and effective solution of the problems” of compliance “in particular areas.”¹⁴⁵ And it is important to remember that “[t]he nature and extent of the problems that . . . desegregation . . . may entail will vary from area to area.”¹⁴⁶ Thus, both formulating and carrying out “programs for transition . . . should be undertaken by the responsible school authorities under the supervision of the courts of first instance.”¹⁴⁷ And finally, “[t]he cases should be remanded . . . with directions to carry out this Court’s decision as rapidly as the particular circumstances permit.”¹⁴⁸

The essence of this brief’s argument can be found in the Government’s answers to the questions posted by the Court:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice? *No.*

(b) or may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? *Yes.*¹⁴⁹

Neither the Court in its eventual opinion nor the Government in its brief in *Brown II* felt it necessary to cite authority to support the Court’s power to fashion relief.¹⁵⁰ The Government merely concluded that the Court could draw on a “breadth and flexibility of judicial remedies.”¹⁵¹ Moreover, the brief emphasized that “all will agree” that the “shaping of appropriate relief in the present cases . . . involves considerations of a most sensitive and difficult nature.”¹⁵²

The brief recognized that because of their ages, the “personal and present” rights of the schoolchildren involved in the consolidated cases might be lost if the remedy was delayed.¹⁵³ “Hence any delay in

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 2.

150. Some authority had been cited in its earlier brief. See Brief for the United States, *supra* note 114, at *28-29.

151. *Id.* at *3.

152. *Id.* at *3-4.

153. *Id.* at *5.

granting relief is pro tanto an irretrievable loss of the right.”¹⁵⁴ But the brief suggested that in fashioning relief, the Court “always” faces a similar question, the question of how best to remove “the condition of illegality” in a way that respects not only the interests of the aggrieved parties, but also the public interest.¹⁵⁵ And when “the scales are not so clearly tipped” in the direction of entering a decree enjoining the unlawful conduct, the shaping of the remedy “involves difficulties.”¹⁵⁶

On the one hand, the Government acknowledged, “[W]e are dealing here with basic constitutional rights, and not merely those of a few children but of millions.”¹⁵⁷ So unless there are “compelling reasons to the contrary,” “there should be no unnecessary delay.”¹⁵⁸ Still, on the other hand, the Government presented an opposing “public interest” as seen from an “objective examination of the problems of relief.”¹⁵⁹ The public interest (in opposition to ordering immediate relief) was implicated because *Brown I* “requires the termination of segregation in school systems in more than one-third of the States and the District of Columbia,” and “the systems of public education . . . should not be adversely affected.”¹⁶⁰

Finally, in a section Elman later attributed to President Dwight Eisenhower,¹⁶¹ the brief expressed even-handed empathy, encouraging the Court to be concerned not only for the schoolchildren attending segregated schools but also for those undergoing “alterations” in the transition to desegregation.¹⁶² As the brief put it: “[R]acial segregation in public schools is not a separate and distinct phenomenon. It is part of a larger social pattern of racial relationships.”¹⁶³ The Court should take into consideration the feelings of all those affected by the decision because the Court’s decision in *Brown I* had

outlawed a social institution which has existed for a long time in many areas throughout the country—an institution, it may be noted, which during its existence not only has had the sanction of decisions of this court

154. *Id.* (emphasis omitted).

155. *Id.* at *4.

156. *Id.* at *4-5.

157. *Id.* at *5.

158. *Id.* at *6.

159. *Id.*

160. *Id.* at *6-7.

161. ELMAN ORAL HISTORY, *supra* note 7, at 221-22.

162. Brief for the United States on Questions of Relief, *supra* note 114, at 8.

163. *Id.* at 7.

but has been fervently supported by great numbers of people as justifiable on legal and moral grounds.¹⁶⁴

The brief pointed to the Court's earlier recognition of the psychological and emotional impact on schoolchildren of attending separate schools. Similar psychological and emotional forces would affect the school districts and community members now faced with the change to desegregation. "In similar fashion, psychological and emotional factors are involved—and must be met with understanding and good will—in the alterations that must now take place in order to bring about compliance with the Court's decision."¹⁶⁵ Thus, this paragraph concluded, the Court, "in determining the most effective means for ending school segregation in particular areas," should take into account "[t]he practical difficulties which may be met in effecting transition to nonsegregated public school systems."¹⁶⁶

In the next section, the Government brief elaborated on the kinds of problems that might affect the transition, listing a series of benign and mundane causes. First, the administration and delivery of educational services is greatly decentralized across the United States, including more than 70,000 school districts, with numerous agencies sharing authority. Next, because of the discretion given local school authorities, no two districts will face the same problems. These problems will include allocating students among schools, adjusting the use of school facilities, reassignment of teachers, and accommodation of transportation needs. Similarly, the economic costs and solutions will fall upon many different layers of government. Only at the end did the Government acknowledge the concern of widespread community resistance. Finally, "school authorities may have to cope with a certain amount of popular hostility towards the elimination of segregation in public schools."¹⁶⁷ This hostility will come about because "the dual system has existed for generations and is accepted by many as a 'way of life.'"¹⁶⁸ And even though "general community hostility cannot serve as justification for avoiding or postponing compliance," the Court should nevertheless consider it as "relevant in determining the most effective method for ending segregation in the particular locality."¹⁶⁹

164. *Id.*

165. *Id.* at 8.

166. *Id.* at 7-8.

167. *Id.* at 17-18.

168. *Id.* at 18.

169. *Id.* at 19-20.

Because local needs and conditions varied so widely, the Government brief argued that local school authorities should be responsible for creating, initiating, and supervising programs of desegregation.¹⁷⁰ Perhaps anticipating the reaction of some school districts, the brief pointed out that delay would nonetheless not be justifiable where the defendants could not show that immediate completion of the desegregation program is impracticable.¹⁷¹

Unlike the Government's earlier interpretations of the Fourteenth Amendment as providing affirmative guarantees of equality, the brief in *Brown II* was restricted to the prohibitory claim. In other words, the Constitution prohibits the maintenance of segregated school system by requiring that school districts end racial classifications: "The decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools."¹⁷² And, in marked contrast with the language of its earlier briefs insisting that the principle of equal rights under the law should prevail, this Government brief expressed its hope that Americans will act in the spirit of "patience without compromise of principle."¹⁷³

V. JUDGING THE BRIEFS

Not only does the past inform the present case, but the decision in the present case changes the past.¹⁷⁴

In Fisher's view, when we choose among stories, we rely on our inherent sense of their probability (how well do they hang together?) and fidelity (do they ring true?).¹⁷⁵ Probability is an internal assessment of whether the story is coherent and complete and whether the characters behave in consistent ways. Fidelity is an assessment of how reliable and faithful the story is to our vision of how the world works. Fidelity to a world most of us would like to live in can be seen in the near-iconic status of *Brown I*: "*Brown* fits nicely into a widely held and often repeated story about America and its Constitution. This story has such deep resonance in American culture that we may justly regard it as the country's national

170. *Id.* at 22.

171. *Id.* at 24-25.

172. *Id.* at 26.

173. *Id.* at 30 (quoting "the words of the President").

174. LINDA ROSS MEYER, *THE JUSTICE OF MERCY* 30 (2010).

175. *Narration as Paradigm*, *supra* note 28, at 7-8, 16.

narrative . . . the Great Progressive Narrative.”¹⁷⁶ In this story, despite setbacks, the Constitution reflects America’s deepest ideals, America has been striving to meet these ideals since its founding, and they are “gradually [being] realized through historical struggle and acts of great political courage.”¹⁷⁷

A. The Judgment of the Court

Concluding in *Brown I* that segregation itself deprives children of equal educational opportunities¹⁷⁸ because “[s]eparate educational facilities are inherently unequal,” the Supreme Court overturned *Plessy* and ruled that the states had denied the plaintiffs the equal protection of the law.¹⁷⁹ Chief Justice Warren’s short opinion for the unanimous Court explained the decision almost entirely in terms of the ethos-based equality rationale. He frankly acknowledged that the history of the Fourteenth Amendment—which had been the subject of extensive reargument and re-briefing—was at best inconclusive. Because of the relatively undeveloped status of public education at the time of the adoption of the Fourteen Amendment, it was even more difficult to discern the intended effect of the Fourteenth Amendment on public education.¹⁸⁰

As for doctrinal arguments, Chief Justice Warren minimized the influence of the existing precedent. Of the six prior cases the Supreme Court had decided involving the separate but equal doctrine in public education, two had not involved the validity of the doctrine itself, while the more recent cases at the graduate or professional school level could be said to have found that because inequality existed, it was unnecessary to re-examine *Plessy*.¹⁸¹ In contrast, several of the cases consolidated in *Brown* were based on lower court findings that the segregated schools were equal. The Court was therefore required to address “the effect of segregation itself on public education . . . in the light of its full development and its present place in American life.”¹⁸² Here, Chief Justice Warren turned to the policy argument advanced by the NAACP and backed by psychological research. Quoting the Kansas court’s finding that

176. Balkin, *supra* note 72, at 5.

177. *Id.*

178. *Brown I*, 347 U.S. 483, 493 (1954).

179. *Id.* at 494-95.

180. *Id.* at 489-90, 492-93.

181. *Id.* at 490-92.

182. *Id.* at 492-93.

segregation has a detrimental effect upon black children, Chief Justice Warren concluded that segregated schools could not provide equal educational opportunities.¹⁸³

In *Brown II*, the Supreme Court accepted the Government's argument favoring gradualism in pursuit of a remedy.¹⁸⁴ For the schoolchildren's advocates, this was a profound disappointment: "The NAACP lawyers who litigated both *Brown* cases certainly understood the potentially devastating effect of 'all deliberate speed.'"¹⁸⁵ In their brief filed in 1954, they had argued that the resisting school districts had an affirmative burden to "state explicitly what they propose and to establish that the requested postponement has judicially cognizable advantages greater than those inherent in the prompt vindication of appellants' adjudicated constitutional rights."¹⁸⁶ The NAACP lawyers had found "*no case* where this Court has found a violation of a present constitutional right but has postponed relief on the representation by governmental officials that local mores and customs justify delay which might produce a more orderly transition."¹⁸⁷ How harmful if the Court were to decide for the first time in *Brown* "that constitutional rights may be postponed because of anticipation of difficulties arising out of local feelings."¹⁸⁸ This would be a particularly inappropriate result because these challenges to elementary school segregation had been brought especially "to vindicate rights which, as a matter of common knowledge and legal experience, need, above all others, protection against local attitudes and patterns of behavior."¹⁸⁹ For reasons that have been discussed in many sources and will not be repeated here, the Court accepted the Government's argument, and Chief Justice

183. *Id.* at 494-95.

184. *See generally Brown II*, 349 U.S. 294, 301 (1955). As noted earlier, the concept of all deliberate speed, but not the phrase itself, was found throughout the Government's briefs. The first brief filed by the Government in *Brown*, in December 1952, suggested that if the Court should hold "separate but equal" public schools to be unconstitutional, "it should remand the case to the district court with directions to devise and execute such program for relief as appears most likely to achieve orderly and expeditious transition to a non-segregated system." Brief for the United States, *supra* note 114, at *27. Assistant Attorney General J. Lee Rankin used the phrase during the 1953 oral argument. ELMAN ORAL HISTORY, *supra* note 7, at 205.

185. Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 584 (2006).

186. Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument at *10-11, *Brown I*, 347 U.S. 483 (Nos. 1, 2, 3, & 5), 1954 WL 72725.

187. *Id.* at *14 (emphasis added).

188. *Id.*

189. *Id.*

Warren then incorporated *all deliberate speed* in his 1954 opinion for the Court.¹⁹⁰

B. The Judgment of Narrative Rationality

Like all stories, legal briefs and opinions make claims to knowledge, truth, and reality. Fisher's principles of narrative probability and fidelity provide a perspective for judging the stories contained in the Government's briefs. This judgment of narrative rationality is based on examining the themes and values of the message, the character of the messenger, and the resulting reliability, trustworthiness, and desirability of the message.¹⁹¹

The first quality of narrative probability, whether the story hangs together, is assessed in terms of its argumentative or structural coherence; its material coherence (a story that is internally consistent may fail this test if it omits important facts or ignores issues and counterarguments); and the coherence of its characters. As Fisher explains this last element, "Whether or not a story is believable depends on the reliability of characters, both as narrators and as actors."¹⁹² To determine character, we interpret a person's decisions and actions as reflecting the person's values. If the values underlying the character's decisions and actions tend to "contradict one another, change significantly, or alter in 'strange' ways, the result is a questioning of character."¹⁹³ To achieve the narrative quality of coherence, "characters [must] behave characteristically."¹⁹⁴

Taken one by one, as they were filed, each of the Government's briefs (in *Brown I*, *Brown I* on reargument, and *Brown II*) almost certainly meets the test of argumentative or structural coherence. Written by experienced and expert brief

190. In Philip Elman's words:

[M]any people think that "with all deliberate speed" was a disaster. [But] [i]t broke the log jam. It was the formula that Court needed in order to bring all the justices together to decide the constitutional issue on the merits correctly. Without "all deliberate speed" in the remedy, the Court could never have decided the constitutional issue in the strong, forthright, unanimous way that it did; and it was essential for the Court to do so if its decision was to be accepted and followed throughout the country.

ELMAN ORAL HISTORY, *supra* note 7, at 206.

191. *An Elaboration*, *supra* note 28, at 357-64 (applying the paradigm to the dialogue between Socrates and Callicles in Plato's *Gorgias*).

192. *Technical Logic, Rhetorical Logic*, *supra* note 28, at 16.

193. *Id.*

194. *Id.*

writers, each brief is logically arranged and follows a familiar argument structure. As for material coherence, each brief contains essential law and facts as well as backup arguments and rebuttals to counterarguments. There are no gaps or surprises, and the expected elements and answers are easily located. Thus, the Government brief in *Brown I* begins by advancing the structural or prudential argument that there was an alternative route, that is, the Court need not decide in this case to overrule precedent. But the brief goes on to support in depth its essential argument: that equality principles are well established in the American ethos and that those principles compel the conclusion that *Plessy* should be overruled. As requested, the brief on reargument in *Brown I* contains the necessary and expected elements; having been asked to address the history of the Fourteenth Amendment, the brief focuses on that history before returning to its themes that *Plessy* should be overruled and introducing a stronger argument that caution should be taken with the remedy. Finally, in *Brown II*, again filed in response to the specific request of the Court, the Government's brief is internally consistent, and it omits none of the expected arguments. From the advocate's point of view, each brief is structurally and materially coherent—each brief hangs together.

Once the Government's briefs are viewed together, some issues arise as to their coherence. The almost-exclusive emphasis in the *Brown II* brief on the need to move slowly and gradually is jarring when viewed within the context of the strongly stated equality arguments in the first Government brief. Even in the third brief, the Government briefly and emphatically restates the earlier point that "[t]he right of children not to be segregated because of race or color is not a technical legal right of little significance or value. It is a fundamental human right, supported by considerations of morality as well as law."¹⁹⁵

Other incongruities and inconsistencies in the structure and content of the Government briefs, viewed together, include the disconnect between the argument, running consistently through all the Government's briefs, that segregated schools violate a personal and present right of children and the concept, expressed at length in the third brief, that there is an offsetting public interest to be taken into account. Similarly, the early vision of Americans as ethical and courageous people who have embraced broad equality principles is in conflict with the final brief's recognition of implacable hostility in

195. Brief for the United States on Questions of Relief, *supra* note 114, at 6.

the communities that will be told to integrate. That inconsistency is underlined by the brief's claim that the Court should weigh equally the emotional and psychological factors affecting both the children and those resisting desegregation.

From Fisher's perspective, even more important to the judgment based on narrative probability is the conclusion that the Government's briefs—taken as a whole—fail the test of portraying reliable characters. The state and federal government actors depicted in the stories told by the Government's briefs—as well as the authors of those briefs—do not act characteristically. Sometimes they are courageous and vigilant; at other times they are cautious and fearful. In other words, these characters cannot be relied upon.¹⁹⁶ Outside the briefs themselves, the test of character faces another challenge, that of the reliability of the narrator. According to Elman, he had ongoing private conversations with Justice Frankfurter (for whom he had clerked) during the time he was working on the civil rights cases. Elman contended that this was proper because he did not consider himself a lawyer for a litigant: "I considered it a cause that transcended ordinary notions about propriety in litigation."¹⁹⁷ Elman's status as an unreliable narrator seems further demonstrated by the Government's assertion that rather than an argument, it was providing an objective viewpoint or was engaged in an objective non-adversary discussion.

To assess the second quality, narrative fidelity, the briefs are "viewed as composed of good reasons, elements that give warrants for believing or acting in accord with the message fostered by that text."¹⁹⁸ Good reasons in the Fisher sense may be expressed in many different forms, ranging from syllogistic arguments to metaphors and analogies as well as everyday stories and long-enduring myths. Chris Rideout describes the important role that audience plays in determining what is a good reason: "[W]hether a story constitutes good reasons for belief or action is a matter of how willing an audience is to adhere to the story."¹⁹⁹

Looking at the Government's briefs from this perspective of narrative fidelity, we look for good reasons both in the form of specific categories of argument accepted within the field and in the form of identifiable values and beliefs held by the assumed audience

196. *Logic of Scientific Discourse*, *supra* note 28, at 23-24.

197. ELMAN ORAL HISTORY, *supra* note at 7, 223.

198. *An Elaboration*, *supra* note 28, at 358.

199. Rideout, *supra* note 28, at 72.

(here, the Supreme Court given the job of interpreting the constitutional guarantees).²⁰⁰ Translating the reasons that constitute the Government's stories into the language of Bobbitt's archetypes, the Government's brief in *Brown I* is constructed on a strong ethical framework (buttressed by doctrinal and policy support asserted more particularly in the NAACP brief), while the historical argument contained in *Brown I* on reargument carries little weight. In *Brown II*, both reasons and values are overwhelmingly devoted to supporting the Court's inclination for delay. Hardly any doctrinal framework supports the brief's claim that the Court may structure relief as the brief suggested.

Instead of balanced or reinforcing argument modalities, the Government's brief in *Brown II* is constructed almost exclusively upon prudential arguments, stated in the conventional forms of policy arguments. These are based on social, political, cultural, and economic circumstances. They weigh the costs and benefits; they look at the consequences of the decision; they suggest judgments about whether certain actions will achieve their object. Some appear to be a blend of structural-prudential argument, for example, the argument that the Court is not as well suited to make particular decisions as the local school districts are.

Looking only at *Brown I*, the good reasons in the Government's brief match up with those in the Court's opinion: The basis of both is the ethical framework stated consistently by the Government as early as the *Shelley* amicus brief. Judging the same category of good reasons as expressed in the Government's brief in *Brown II*, however, the countervailing weight of the NAACP brief's ethical arguments is simply too much for the Government's prudential arguments to bear.

As for narrative fidelity's weighing of values, Fisher suggests that "the values of technical precision are not as important as the values of overall coherence, truthfulness, wisdom and humane action."²⁰¹ The stories told in the Government's briefs start out as fully informed by shared values of equality under the law and the Government's affirmative and courageous role as a protector of the rights of citizens. They move on to the values of prudence, practicality, caution, and moderation as well as need for local control and modest governance. Even though these latter values may not be entirely coherent, consistent, or true to the values we aspire to, many

200. *Id.* at 62.

201. *Technical Logic, Rhetorical Logic*, *supra* note 28, at 17.

aspects of the Government's stories are true to the way we actually live our lives. So it cannot be said that their briefs are wholly lacking in the quality of narrative fidelity.

In the end, the Government's briefs in *Brown I* and *Brown II* tried to have it all: an end to the reported deadlock among the Supreme Court justices, an uplifting outcome with minimum upheaval. Yet, as Fisher points out in his analysis of the argument between Socrates and Callicles, when we try to live according to conflicting myths, the best we can achieve is a kind of schizophrenia.²⁰²

CONCLUSION

"This is not a story to pass on."²⁰³

Brown I established the framework for the arguments we continue to make about equality and race, both within and outside the courts. Like the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, we still draw upon the stories we find in *Brown I* and the stories we tell about *Brown I*.

Beyond the frame of advocacy, *Brown I* established a "deep connection between the Constitution, the Rule of Law, and equal citizenship [that] has become an article of faith in the American civic religion."²⁰⁴ Despite enduring disagreement about what the opinion means, *Brown I* has shaped common understanding and civil rights policy for more than fifty years. Its status is such that "[n]o federal judicial nominee and no mainstream national politician today would dare suggest that *Brown* was wrongly decided."²⁰⁵

As one NAACP lawyer recalled its effect on America's social and cultural development, "*Brown* cracked open [a] frozen sea. It changed minds and rules, challenged hierarchical assumptions, stimulated a social movement that became political, enlisted parts of the country and the world."²⁰⁶ Although massive resistance followed *Brown II*, the U.S. government was eventually able to suppress physical resistance, and federal legislation was enacted to carry out the vision of equality under the law.

202. *An Elaboration*, *supra* note 28, at 363.

203. TONI MORRISON, *BELOVED* 275 (1987).

204. Balkin, *supra* note 72, at 24.

205. *Id.* at 4.

206. GREENBERG, *supra* note 6, at xvi.

In political and judicial circles, *Brown* became “a symbol of what courts devoted to justice could achieve if they had the necessary will and courage.” *Brown* represented a radically changed view of the role of the judiciary, one in which the Court would be seen as the central source of authority for interpreting the Constitution and, in the process, for elevating public values above private interests.²⁰⁷

The decisions rendered in *Brown I* and other civil rights cases marked the beginning of a period in which the Court increasingly found ethical grounds for expanding the reach of constitutional rights. The decisions in *Brown* and *Bolling* opened the door to more such claims:

Not only were the briefs strongly [in favor of the model of the living Constitution], but the Court’s opinions were exclusively so. That the Court’s greatest and most legitimate constitutional decisions were rendered with no originalist support—and wide belief that original intent supported *Plessy*—called forth a generation of relatively open constitutional dynamism.²⁰⁸

For a time at least, the result would be to expand protections against state discrimination on the basis of racial classifications and also to encourage lawyers to seek greater recognition of the rights of women and LGBT Americans.

How might narrative and metaphor enrich our understanding of the work done by persuasive lawyers in civil rights advocacy? Fisher’s narrative paradigm offers guidelines that will help in the “determination of whether or not a given instance of discourse provides a reliable, trustworthy, and desirable guide to thought and action in the world.”²⁰⁹ In Fisher’s view, briefs can be judged in the same way that we choose among stories, and we choose among stories based on whether they “‘ring true’ to life as we would like to live it.”²¹⁰ As we choose among stories, we assess reasons, values, and characters: Who are the heroes and who are the villains? With what “morals of the story” do we wish to be identified?²¹¹

Analogous guidelines can be found in Black’s metaphor theory. According to Black, strong metaphors, that is ones that are emphatic

207. Balkin, *supra* note 72, at 16.

208. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2360 (2002).

209. *An Elaboration*, *supra* note 28, at 351.

210. *Id.* at 362.

211. *Id.*

and resonant,²¹² create meaning. Once she has heard a strong metaphor, the listener perceives connections. Once those connections are seen, they are actually present. As a result, emphatic and resonant metaphors generate insight and understanding.²¹³

The *color-blind Constitution* and *all deliberate speed* have become metaphorical stand-ins for complex and evolving concepts. The color-blind Constitution began as an emphatic and resonant metaphor capable of creating meaning. From the start, *all deliberate speed* was a purposefully weak metaphor, chosen for its ability to cloud and obscure. As Justice Hugo Black pointed out fifteen years after *Brown*, “‘*all deliberate speed*’ has turned out to be only a soft euphemism for delay.”²¹⁴

Is there a real, qualitative difference between the Government’s briefs and those filed on behalf of the schoolchildren in *Brown I* and *Brown II*? The narrative and metaphor theories applied here provide only guidelines for further conversation, not final judgments. So the answer may depend on whether we join Fisher in viewing the world as “a set of stories [and images] which must be chosen among to live the good life in a process of continual recreation.”²¹⁵

212. *More About Metaphor*, *supra* note 50, at 25-27

213. *Id.* at 40-41.

214. *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 1218, 1219 (1969) (emphasis added).

215. *Narration as Paradigm*, *supra* note 28, at 8.