

INTRODUCTION

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Justice Anthony M. Kennedy is widely acknowledged to have been the single most important justice on the United States Supreme Court during the past three decades, primarily by serving in the often-cited role as the “swing justice.” He famously disowned this moniker, insisting, “the cases swing, I don’t” (Duehren 2015). His unease is understandable. A justice who “swings” between results generated by credible judicial philosophies would be regarded as a lightweight, a person easily moved by extraneous considerations that result in decisions that are erratic and unprincipled. A sympathetic commentator explains that “Justice Kennedy is often described as a ‘rudderless and unpredictable’ individual because of the perception that his rhetorical flourishes represent his inability to adopt consistent and predictable positions on issues.”¹ Another friendly critic concludes that Justice Kennedy has only himself to blame for these negative accounts. “He has disclaimed any larger approach to constitutional interpretation, changed his votes on several high-profile issues, repudiated past votes without sufficient explanation, and attempted to court the media. Scholars fault his opinions as (at best) incompletely theorized, characterizing his approach to judicial decision-making as inconsistent, unprincipled, undefined or confused” (Colucci 2009, ix). Justice Kennedy is accused of a nonrigorous approach to judging that might be characterized as sophistic.

On the other hand, critics have long chided Justice Kennedy for his soaring prose and metaphysical musings that go far beyond the doctrinal elaboration of the relevant constitutional text. In some of his more notable opinions, Justice Kennedy invoked broad principles that seemed better suited for a class in moral philosophy. These critics do not regard Justice Kennedy as an opportunist acting without a judicial methodology. Instead, they regard him as guided

by inappropriately malleable concepts, speaking in the “mystical aphorisms of the fortune cookie,” as Justice Antonin Scalia acerbically made the point in his dissent in *Obergefell v. Hodges* (2015, 719n22). Many commentators were less caustic but equally bemused by his opinion recognizing constitutional protection of gay marriage in *Obergefell*, with one calling it a “Kennedy Special” because its “rhetoric is as gorgeous as its legal reasoning is gauzy,” having been expressed in many “sweetly teary-eyed turns of phrase” (Stern 2015).

How can one approach such a complex and multilayered rhetorical legacy? Our answer was to organize this volume, which brings together a diverse group of scholars from a variety of theoretical and doctrinal perspectives to uncover and assess Justice Kennedy’s rhetoric. From Michael Gagarin, the leading classics scholar on the legal systems of ancient Greece, to Beth Britt, a prominent rhetorical critic in an English department, to Ashutosh Bhagwat, a constitutional law scholar and former clerk for Justice Kennedy, the volume provides a rich source of insight into Justice Kennedy’s judicial rhetoric. Given the diversity and range of approaches, it should not be surprising that a simple consensus does not emerge. If the contributors agree on one thing, though, it is the importance of exploring how Justice Kennedy defended his rulings with a complex and unique voice.

Although the contributors use distinct vocabularies expressing different disciplinary interests, they all speak against the backdrop of a deep historical relationship between the study of rhetoric and the practice of law. Aristotle (2002) describes rhetoric as the ability to see in any given situation the available means to persuade a particular audience. This definition certainly captures the agonistic arguments made by lawyers at trial before a jury, but it extends to the entire scope of the work of lawyers. Lawyers constantly engage in hermeneutical discernment and rhetorical persuasion in settings as diverse as an initial meeting with a client and a strategy session with a team of lawyers to prepare for an appellate oral argument. The study of rhetoric has flourished by exploring law as an exemplary type of persuasion. Unfortunately, law has attempted to speak in a univocal voice that compels assent rather than inviting agreement through persuasion. Gerry Wetlauffer aptly notes that the rhetorical conceit of contemporary legal theory is to deny the rhetorical nature of legal practice.² Despite the shared provenance of the two disciplines, then, they hardly speak the same language. In response, we briefly provide a shared baseline to permit a diverse readership to better situate the chapters that follow.

Classical rhetoric grew out of reflections on the practice of the sophists to assist Athenians to argue their cases in trials before an untrained jury,

marking a deep connection with legal practice as it developed in Greece and Rome. The classical authors acknowledged three types of rhetoric: *forensic* (an inquiry into what happened), *deliberative* (a dialogue about what should be done), and *epideictic* (a celebration of community values). Legal rhetoric was classified as forensic in nature, but contemporary legal practice incorporates all three types of rhetoric, especially in constitutional argument. For example, a case challenging an affirmative action plan adopted by an employer will simultaneously address how and why the plan was developed, how to fashion a rule that best serves the antidiscrimination cause in this setting, and how the resolution of the case expresses and affirms our communal values of liberty and equality. Lawyers often lump these considerations together under the amorphous phrase “policy arguments,” but rhetorical critique provides a much finer-grained vocabulary for addressing legal argumentation.

The forms of persuasion are also helpful categories to explore legal rhetoric. In the classical system, persuasion was a product of *logos* (the argument itself), *ethos* (the character of the rhetor), and *pathos* (the disposition of the audience as engendered by the rhetor). These elemental forms of persuasion track well in the legal setting. The argument is central, but securing the adherence of an audience is not simply a matter of logical deduction. The *logos*, or “word,” rarely compels assent on its own. Rather, *logos* in law offers only verisimilitude (the appearance of truth). To persuade an audience, it is imperative to prepare it to hear your argument (*pathos*) and to present the argument as an extension of a trusted speaker’s character (*ethos*). Commendations and critiques of Justice Kennedy’s opinions are best analyzed in these terms. Justice Kennedy’s famous opinions often suffer from a weak *logos*, to the extent that generally accepted constitutional doctrine does not support his result, but he provides powerful arguments drawing on his *ethos* and premised on creating the proper disposition of his audience.

The reader must remain mindful of Wetlaufer’s lament that law has abandoned its rhetorical roots. This is seen in the reduction of rhetoric to mere stylistic flourish. In the case of Justice Kennedy, critics charge that he engages in “mere” rhetoric, which is seen as a frivolous and cognitively empty style. In contrast, the classical approach to rhetoric acknowledged the significance of style without capitulating to emotivism and irrationalism. The principal elements of a rhetorical argument track the divisions of the contemporary legal brief and argument: invention, arrangement, style, memorization, and delivery. It is difficult to disentangle these elements, which means that an overly stylized approach may undermine the argument at its core.

We are not suggesting that legal theory is rhetorically bankrupt. The great legal realist Karl Llewellyn sought to reinvigorate the ancient understanding of law as a rhetorical practice. In an introductory footnote to an essay on the broad social developments of law, Llewellyn expressed his hope that someday, “someone will help the second year [law] student orient himself. Nor does anyone bother to present to him the difference between logic and persuasion, nor what a man facing old courts is to do with a new vocabulary; in a word, the game, in framing an argument, of diagnosing the peculiar presuppositions of the hearers” (1934, 205). The aim of Llewellyn’s liberal education in law is properly understood as rhetorical competence. He named the required approach “Spokesmanship,” deriving it from theories first developed in ancient Greece as “rhetoric—in essence: the effective techniques of persuasion” (Llewellyn 1930, 185). He explains that this calls for more than ornamentation and that the ancient tradition illuminates a path between certainty and relativism (Mootz 2011, 143–46). In this volume, we draw on the rhetorical expertise of humanistic scholars and the legal expertise of law professors, with both seeking to understand and critique the legal analysis offered by Justice Kennedy.

We have divided the volume into five parts and a concluding assessment, but the intersections between the chapters could have resulted in any number of organizing principles. In this introduction, we briefly review the chapters that follow in an effort to provide only one of the plausible frames for reading the volume. We invite readers to draw their own comparisons and contrasts between the chapters.

Part 1 brings classical Greek conceptions of rhetoric to bear on Justice Kennedy’s opinions. Michael Gagarin demonstrates that the classical approach to interpreting legal texts established hermeneutical strategies that persist in contemporary legal practice. Against the view that legal interpretation is simply assessing facts in light of a clear and stable rule, the ancients also understood that the rule is sometimes dynamic and complex, requiring sophisticated argumentation. Gagarin then compares these different interpretive arguments as they are used in Justice Kennedy’s opinions in *Obergefell* and *Citizens United v. Federal Election Commission* (2010). Given the lack of attention to his interpretive choices in these cases, we might conclude that the ancients better understood their role in selecting interpretive approaches that generate different results. Gene Garver critiques Justice Kennedy’s appeal to the “self-evident” horror of “partial birth abortion” for drawing on the ancient notion of moral pollution. Justice Kennedy could

privatize the behavior of gays and lesbians and avoid seeing their marriage as an affront to the community, but in *Gonzales v. Carhart* (2007), he regarded the medical procedure as a deeply disturbing evil that tainted the society. Garver uses ancient concepts to clearly reveal the animating structure of Justice Kennedy's argument.

In part 2, the chapters assess Justice Kennedy through the Roman theory of stasis. Martin Camper begins by identifying the "interpretive stases" that are employed to argue about the meaning of texts and to provide relevant lines of argument. Contrary to some readings, he claims that the central interpretive challenge in *Obergefell* was to define the scope of liberty rather than to expand the definition of marriage. His analysis tracks how legal meaning is created through rhetorical argument rather than a hermeneutic of plain meaning. Susan E. Provenzano's contribution connects classical stasis theory to modern concepts of rational liberty to develop a normative baseline for assessing, rather than simply describing, the arguments made in support of a judgment. Justice Kennedy's opinion in a First Amendment case serves as the test of her evaluative theory, as she compares the more sophisticated uses of stases by Justice Kennedy to the simpler approach by Justice Scalia in dissent. This more robust use of stasis theory describes how Justice Kennedy was rhetorically successful. Finally, Sean O'Rourke contends that the current conservative majority on the Court is following Justice Kennedy more than Justice Scalia. Using the rhetorical doctrines of *controversia*, stasis, and topical argument, O'Rourke compares the opinions in *Romer v. Evans* (1996) by Justices Kennedy and Scalia to outline the rhetoric of judging well. Most significantly, and with potential connections with Provenzano's work, he observes that engaging in rhetorical exchanges by arguing both sides of a case cultivates a "habit of thought" that is normative rather than merely technical.

In part 3, the contributors look to contemporary rhetorical theorists to provide a ground for understanding Justice Kennedy's exercise of judgment. Applying Kenneth Burke's dramatic theory, Clarke Rountree investigates the degree to which Justices Kennedy and Scalia provide a reasonable and artful reconstruction of the "acts" in question in *Lawrence v. Texas* (2003). Justice Kennedy describes the acts of the Court in *Bowers v. Hardwick* (1986) as mistaken at that time and the acknowledged scope of personal freedom as underdeveloped. An affinity to Burke's theory does not guarantee a laudable result, but Rountree argues that a dramatist opinion that accounts for the past, present, and future is more likely to represent good judging. Next, Francis J. Mootz III argues that Justice Kennedy employed a form of natural law

argument that is best explained by Chaim Perelman and Lucie Olbrechts-Tyteca's notion of an appeal to the "universal audience." In the positivist era, an "ontological gap" exists between the critique of current practices and laws, on one hand, and the disavowal of natural law foundations that gird decision-making with eternal norms, on the other. Justice Kennedy did not have the vocabulary to make a rhetorical appeal to the public to regard itself as a universal audience that moves beyond positivist accounts of law, but this in fact is the nature of his argument. Mootz emphasizes that natural law argumentation will not always be persuasive. As with all things rhetorical, the rhetor cannot avoid the obligation to argue responsibly simply by invoking the universal audience. Finally, Darien Shanske uses contemporary concepts of rhetorical knowledge to describe the failure of Justice Kennedy's sovereignty jurisprudence. Eschewing reliance on dialogically secured rhetorical knowledge as a thick source of guidance, Justice Kennedy fell back on rule-based reasoning with regard to the boundaries of sovereignty. In the post-Trump era, there is renewed concern about securing the federal system of sovereignty, but Justice Kennedy collapsed his decisions into a singular respect for ultimate federal power. Shanske bemoans his failure to generate a communal achievement of creating meaningful context-sensitive distinctions.

Justice Kennedy's ethos is the topic of the chapters in part 4. Ashutosh Bhagwat deftly demonstrates that in his First Amendment opinions, Justice Kennedy displayed optimism about the ability of citizens to assess the effects of speech in the public square and political settings. By extending First Amendment protections to speech that many people would regard as corrosive of democracy, especially in the infamous *Citizens United* case, he demonstrated a perhaps naive confidence in the citizenry. Bhagwat hypothesizes that Justice Kennedy was aspirational, creating a legal agora that he then called on citizens to inhabit with robust dialogue. In stark contrast, Jim Gardner characterizes Justice Kennedy as exhibiting neurotic tendencies in his efforts to defend his holdings in controversial cases. In *Vieth v. Jubelirer* (2004), an important redistricting case, Justice Kennedy could not bring himself to make a firm decision and appeared to be indecisive rather than reflective. Gardner concludes that Justice Kennedy's open struggle to resolve the question at hand served to undermine his ethos. Finally, Leslie Jacobs argues that, despite Justice Kennedy being known as the champion of liberty, his ethos was grounded more in equality at its core, with liberty rhetoric surrounding it. Even though liberty is at stake in many of these key opinions, Jacobs establishes that unequal treatment fueled the fervor of his rhetoric. The implications of this approach are seen in Justice Kennedy's

abortion jurisprudence, in which he abandons the equality core and the liberty analysis, standing alone, fails to carry the day.

In part 5, the authors interrogate Justice Kennedy's misjudgments regarding women, racial minorities, and immigrants. Given his notoriety as the justice who single-handedly integrated gays and lesbians into the legal fabric of civil society, it might strike some people as strange that Justice Kennedy's rhetoric is wanting in his treatment of various underrepresented groups. Beth Britt argues that Kennedy utilizes a disembodied rhetoric of liberty when addressing reproductive rights, adopting a formal "view from nowhere." While the Court's attention is directed to the fetus, the woman is virtually invisible in his opinions. In the same vein, Britt argues, Justice Kennedy's opinions in the gay rights cases also embrace a sterile principle of liberty that ends with a celebration of a narrow view of marriage. In a related manner, Kathryn Stanchi distinguishes the personalization of the parties in the gay rights cases to the starkly depersonalized women in the abortion opinions. In a fascinating accounting, Stanchi demonstrates that the words "dignity," "autonomy," "liberty," and "freedom" are common in Justice Kennedy's opinions on gay rights but hardly used in the abortion cases. The disparity between the empathy shown to gay litigants and the lack of empathy for women seeking an abortion is palpable. Rebecca Zietlow argues that Justice Kennedy's blind spot extended to African Americans, to the extent that he rejected racial classifications but could not see his way to understanding the continuing effects of systemic racism. Nevertheless, his opinions did hold the conservative "color-blind" jurisprudence at bay, even if he could not advance the cause of equality beyond racial classifications. Finally, Leticia Saucedo contends that Justice Kennedy's rhetoric in cases involving immigrants tended to place the liberty, autonomy, and dignity of the federal government above concern for immigrants. However, in cases in which the immigrants were seeking to assimilate to American customs and values, Justice Kennedy tended to humanize and even celebrate them as deserving of autonomy and dignity. Perhaps the stinging effect of this jurisprudence is best seen in *Trump v. Hawaii* (2018), which was announced the day before Justice Kennedy retired.

In the concluding assessment, David Frank thematizes the volume under the provocation of two themes: What does it mean to judge well? Does Justice Kennedy judge well? He begins by articulating the baseline concept of "rhetorical knowledge" that conceptualizes the efforts to persuade in situations of uncertainty. Against this backdrop, he argues that the contributors develop several noteworthy themes that cut across the organization of the volume.

First, the contributors each demonstrate that classical and contemporary rhetorical theories and analytical practices can inform our understanding of contemporary legal discourse. Second, the concept of rhetorical knowledge, as developed in the rhetorical tradition, provides an appropriate baseline for assessing Justice Kennedy's opinions. Finally, the analysis is recursive insofar as the examination of Justice Kennedy's rhetoric provides more detailed explanation of what it means to judge well, effecting a nonvicious hermeneutical circle of understanding.

What does the impressive erudition in this volume accomplish? First, it reveals that the "superficial rhetoric" of some of Justice Kennedy's most prominent cases is a matter of stylistic flourish of some interest but that there are deep rhetorical lessons to be learned from his body of judicial opinions. Justice Kennedy's rhetoric is inextricably yoked to his articulation of legal doctrine. There is much more at work than elegiac phrases describing marriage or the exercise of free speech that order his thinking and expression. This volume makes substantial headway in uncovering these rhetorical themes. We invite you to enjoy the interdisciplinary investigations that follow.

We close with the suggestion that a unifying feature of Justice Kennedy's rhetoric may be its epideictic appeal to the citizenry to fulfill the promise of the American experiment of constitutional democracy. His former clerk Ashutosh Bhagwat makes this claim directly in his chapter, and it is echoed by another former clerk in Leah Litman's tribute to Justice Kennedy upon his retirement. As Litman summarizes,

Instead of the pointed zingers that his colleagues directed at him (some of which should probably have never made their way into the U.S. Reports), the justice chose to write about the inherent goodness of America—not necessarily who America is, but who America should be, at least from the justice's perspective. [Several cases during Litman's term as a clerk contain] similar undercurrents of the justice's faith in the American constitutional project, and a desire to (re?)make America in that idealized image. . . . The justice's opinion in *Arizona v. United States* also adopted an instructive, almost admonishing, tone, this time about the importance of civility and rationality in politics. (2018)

Our sophisticated understanding of Justice Kennedy's judicial rhetoric should not obscure that a very human person penned those words with a

genuinely optimistic commitment to decency. As Gene Garver has emphasized in his pathbreaking book on Aristotle's *Rhetoric*, rhetoric primarily is an art of character.

Rhetorical argument differs from argument in general in that rhetorical argument is essentially ethical, and that rhetorical topics are the means of making argument ethical. . . . I would call the *Rhetoric*, in contrast to a hermeneutics of suspicion, a hermeneutics of trust. But even a hermeneutics of trust is not a hermeneutics of gullibility. . . . To rule on the basis of the law alone is a character flaw. Aristotle condemns the man who stands on his rights in demanding an ethically excessive sort of precision concerning justice in the distribution of goods. Similarly here. To argue on the basis of reason alone is a character flaw, a failure of ethos, and therefore a failure to persuade. Excessive precision is in both cases unethical because it takes something which should be within the range of praxis and judgment and makes it into a subject for more precise, scientific determination. (1994, 100–101, 161, 183)

This would seem to be an apt description of Justice Kennedy's struggle to judge well by embracing an ethic of openness without being gullible. Pure in heart is not sufficient, of course, even if it provides a strong foundation for fostering rhetorical knowledge. But it is equally certain that no human, however dignified and respectful that person might be, could ever *fully* meet the ethical demands of judging well. By exploring Justice Kennedy's struggles in the rhetorical discernment and articulation of the law, though, we may hope to gain insight into how to judge better.

Notes

1. Knowles 2019, 12, quoting Michael McConnell in Reuben 1992, 36. See also Bartl 2014, 1–2.

2. Wetlaufer's incisive prose deserves an extended quotation:

The irony is the fact that, on the one hand, law is the very profession of rhetoric. We are the sons and daughters of Gorgias himself. But if law is, at its core, the practice of rhetoric, the *particular* rhetoric that law embraces is the rhetoric of foundations and logical deductions. And that particular rhetoric is one that relies, above all else, upon the denial that it is rhetoric that is being done. . . . If, as I suggest, law *is* rhetoric but the particular rhetoric embraced by the law operates through the systematic *denial* that it is rhetoric, then it should come as no surprise that difficulties sometimes confront us. (1990, 154–55)

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