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Abstract
The thesis of the article is that the Court’s enterprise is centered on preserving community through an ethics of warranted trust, and that Scalia’s rhetoric often rejects such an ethic. A modern democratic citizen, along with his whole community, instead finds himself in the situation of necessary trust in democratic institutions like the Supreme Court. The willingness of a political community ultimately to place its trust in authority is partially dependent on that authority’s commitment to, and skill at, creating a convincing argument. The practice of rhetoric recognizes the dynamics of a relation of trust: the rhetor must put his or her own character up for judgment, he or she must create a situation of warranted trust by doing the homework on the matter at hand which Aristotle labeled invention, and he or she must demonstrate respect for the personhood—sacredness, if you will—of those who constitute his audiences by paying attention to who they are and what matters to them.

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ARTICLES

NOT MERE RHETORIC: ON WASTING OR CLAIMING YOUR LEGACY, JUSTICE SCALIA

Marie A. Failinger*

DEAR Justice Scalia,

As I'm assure you are aware, you have been the subject of an unusual amount of scholarly attention since you were named to the United States Supreme Court in 1986.¹ Much of that attention has been directed at trying to articulate or rationalize your jurisprudence,² a difficult endeavor with the work of an intelligent and complex mind, particularly one like yours that fervently seeks, but refuses to be contained within, categories or absolutes. What seems to be different about the academic work on your jurisprudence, Justice Scalia, is the level of barely disguised agitation that many of your analysts display toward your opinions. Erwin Chemerinsky even goes so far as to admit that he is no fan of you or your work;³ other detractors couch their dislike in seemingly more objective terms.⁴ Even some


² See, e.g., articles cited supra note 1.


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2. See, e.g., articles cited supra note 1.


of those who are more sympathetic to what you are trying to do are not quite sure they have you right.5

This outpouring of work probably suggests less that you have offered some startling new brand of jurisprudence—and indeed, you often suggest that your arguments are obvious and commonly accepted rather than unique or innovative6—that your rhetorical style has, more than the usual Supreme Court opinion, drawn some blood from your targets. In some ways, your style, which is written in a less “objective” voice than tradition would demand, suggests that you are more visibly conscious than other justices that there is an actual audience for your opinions. But I wonder if you have indeed been an effective rhetor for your views about constitutional interpretation among the audiences to whom the Supreme Court must pay attention.

Take me as one example of these audiences. I am among those (who include members of your own bench) whose reaction to some of your opinions, especially in the area of human rights, has ranged from irritation to disbelief to downright anger. I can see why someone might think you are just a disdainful smart-aleck; your opinions often give the sense that you search for just the turn of phrase that will illustrate your own intellectual superiority and your contempt for others. It is almost as if you work at selecting language that will infuriate your opponents, cause controversy and get attention.7

This sort of reaction suggests to me that you have not always exercised the same discipline about your rhetoric that your biographers have suggested is a hallmark of your character8—a discipline that is necessary to reflect the basic principles, practices and ethics that are constitutive of the rhetorical authority of the Supreme Court. To be sure, Justice Scalia, your rhetoric is certainly more entertaining than most Justices’ opinions.9 But where such significant responsibility is reposed in a

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6. See, e.g., Zlotnik, supra note 1 at 1378 (noting your claim that only your “methodology is faithful to the Constitution”); Smith, Institutions of Government, supra note 4, at 794 (noting that you seem to recognize yourself as the sole guardian of the institutional structures of government).
7 See Robert Post, Justice For Scalia, N.Y. REV. BOOKS, June 11, 1998, at 57, cited in Zlotnik, supra note 1, at 1378 (“Charming and pugnacious, he appears to enjoy and sometimes even to court controversy”).
8. See, e.g., Gottlieb, supra note 4, at 233 (1996) (noting Kannar’s description of your vision as “based on self-discipline, stability and objectivity”); M. David Gelfand, Justice Scalia: A Passionate, Affable Conservative with a Twist, in EIGHT MEN AND A LADY: PROFILES OF THE JUSTICES OF THE SUPREME COURT 243 (J. Joseph ed., 1990) (describing you as “energetic, jovially argumentative, disciplined and conservative,” and noting your emphasis on hard work and commitment); Kannar, supra note 1, at 1323 (noting your sense that “life is hard, and that legal and other choices are harsh as often as they are clear,” and your view that “inequities are the price of ‘being strong enough to obey’ strict textual discipline”).
9 In the modern sense, that which attracts attention is memorable, though it would not live up to Aristotle’s standards:

Things that deserve to be remembered are noble, and the more they deserve this, the nobler they
human institution like the Supreme Court, it seems incumbent for a judicial rhetor to go beyond producing memorable speeches to focus on being convincing, on persuading even his most antagonistic audiences that his argument is sound and, in some cases, to move them to action.10 Sometimes your opinions suggest that you do not pay much attention to the basics of argumentation, organization and style in opinions in cases of key importance to a pluralistic democracy such as ours.

Of course, you may not see the need to convince me, a member of that "elite class" of professor/lawyers you often rail about,11 and someone who disagrees with you more often than she agrees with your judgments. But I don't fit the stereotype of a member of that "lawyer class," people you dismiss as if they are not an audience for your opinions; nor do most of the people I know who are irritated with you. True, I am a member of the bar and I do teach in a university, but otherwise my elitist credentials are a bit wanting. I'm a Midwesterner, descendant of farmers, a carpenter and a factory worker, a schoolteacher and a storeowner, a salesman and a housewife, boasting neither a rich capitalist nor a libertine intellectual in my pedigree. Like many of the lawyers and professors you address, I don't qualify as a secularized aristocrat educated at fancy Ivy League schools.12 Rather, as a parochial and public school graduate, whose paternal grandmother was as fiercely Republican as her maternal grandfather was Democratic, I'm better described as a regular church-going working stiff who lives in a blue-collar neighborhood, drives an old car, and practiced law for people who never had a bank account, much less an inheritance. With your own roots in the elite circles of the academy and the legal profession,13 you may well feel that you are in a good position to criticize that class that you would seem to come from and yet despise, but I would bet that most of

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11. See, e.g., Romer v. Evans, 517 U.S. 620, 652 (1995) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn"); Zlotnik, supra note 1, at 1378 ("Scalia has in no uncertain terms thrown down the gauntlet to those he calls the prevailing 'law-trained elite.'").

12. Well, to be fully candid, I did attend Yale Law School for nine (9) months in 1982-83, where I earned an LL.M. degree and received a wonderful graduate education, but I doubt that the experience necessarily whisked me off to the ruling classes. I think I would have noticed.

13. Your biographers note that you are the product of parents who were a teacher and a university professor, did exceptionally well as a student at prestigious institutions such as Georgetown, the University of Freiburg, and Harvard, and spent your work life at the major law firm of Jones Day, the elite law schools of the University of Virginia and University of Chicago, the Department of Justice, the President's Office, and the Administrative Conference. Pretty blue-chip academic and professional by most standards. See Gelfand, supra note 8, at 245-47; JAMES E. LEAHY, SUPREME COURT JUSTICES WHO VOTED WITH THE GOVERNMENT: NINE WHO FAVORED THE STATE OVER INDIVIDUAL RIGHTS 297-98 (1999).
your legal audience (not to mention the housewives and secretaries who have expressed dislike for you to me) would instead offer a biography much more like my own. For that matter, some of your adversaries on the Court don’t resemble the picture you paint of higher court judges either. Your intellectual nemesis, Justice Brennan, had a dad who was an Irish immigrant and local politico/labor leader (though the Justice did go to Penn and Harvard.)

Justice Marshall, another one of your targets, wasn’t even permitted to enroll at the University of Maryland law school. Even Justices Ginsburg and O’Connor, though their educational credentials are elite, have known what it is like to be rejected or demoted in the workplace simply because they were women.

So I would challenge you to think more carefully about whether you’re simply setting up a straw man instead of seriously respecting the legal audience to whom, and about whom, you write. After all, those people with whom you most often find yourself in disagreement—judges, professors, lawyers—are, among all of your constituencies, steeped in the practice of taking seriously arguments on all sides of a case. That is what infuriates “laypeople” about lawyers sometimes. If you cannot convince people whose first principle (practically) is toleration for all points of view to take your arguments seriously, it is difficult to see how you can possibly be successful in convincing your less intellectually tolerant audiences in the media or the public that you have something compelling to offer, constitutionally speaking.

As one of nine persons who has a solemn responsibility to persuade a divided public audience to come to accept as authoritative the Supreme Court’s final judgment on disputed issues that go to the very heart of strongly contested American beliefs and values, you might admit that these rhetorical failings are not only serious but (so far) fatal. As someone who is constantly harping on the use of “raw judicial power,” you also call your own integrity into question if you utilize your bully pulpit to impose your views on people whom you don’t deem worthy of convincing of those views.


16. Justice O’Connor went to Stanford, while Justice Ginsburg attended Harvard and Columbia for her law degree. See Women’s History Month—Biography, Sandra Day O’Connor at http://www.gale.com/free_resources/whm/bio/oconnor_s.htm (last visited July 8, 2002) [hereinafter Gale website]; Seymour Brody, Ruth Bader Ginsburg, Jewish Virtual Library, at http://www.us-israel.org/jsource/biography/Ginsburg.html (last visited July 8, 2002). These sources note that although Justice O’Connor came from a family with a sizeable ranch, she was no stranger to hard work rounding cattle; and that Justice Ginsburg lost her mother the day before her public high school graduation in Brooklyn.

17 See Gale website, supra note 16 (noting that Justice O’Connor was turned down from several law firms because she was a woman, so she went to work for government.); Brody, supra note 16 (noting that Justice Ginsburg was demoted three pay levels in her social security job when she informed her superiors she was pregnant); Ruth Bader Ginsburg, at http://www.infoplease.com/ipa/A0772253.html (last visited July 8, 2002) (noting that Justice Frankfurter refused to interview Ginsburg despite her first-place finish in her graduating class because she was a woman).

Of course, those who believe that your jurisprudential views are mostly dead wrong will probably wonder whether any good can come of trying to persuade you to be a more effective rhetor for your causes. They may well be as skeptical about my efforts as you are. After all, the ancients conceded—and some were particularly adamant about the fact—that evil as well as good, falsehood as well as truth, can come from brilliant rhetoric.19

At its root, I suppose, my concern for the way you write your opinions is ultimately based on the idea that rhetoric is, indeed, an inextricably ethical enterprise.20 While I try to resist the fashion of intellectuals to name one grand theory and relate all arguments to it, I will offer a notion to fasten some of these ideas to as a useful shorthand: it seems to me that the Court's enterprise is centered on preserving community through an ethics of warranted trust, and that your own work often rejects such an ethics.

I use the term "warranted trust" to evoke something of the situation in which any continuing communities of democratic people find themselves with respect to their relationship with political authority. Unlike social contract theories, the claim that we live out of a community of trust does not pretend some historical "original position," some notion that the authentic pre-political human condition is isolation and that free and autonomous individuals choose to commit themselves to others and to the authority that governs their life among others.21 A modern democratic citizen, along with his whole community, instead finds himself in the situation of necessary trust—e.g., for lack of a more compelling analogy, the position of an infant who does not choose his mother, yet trust her he does and must.

The relation of trust that produces authoritative judgments seems to me to be captured in the metaphor of rhetoric, which acknowledges these relational aspects of law-giving. Though much of the authority of a political institution by the Court is granted even before it pronounces on an issue, the willingness of a political community ultimately to place its trust in authority is partially dependent on that authority’s commitment to, and skill at, creating a convincing argument. The practice of rhetoric recognizes the dynamics of a relation of trust: the rhetor must put his or her own character up for judgment;22 he or she must create a situation of warranted trust by doing the homework on the matter at hand which Aristotle labeled invention,23 and he or she must demonstrate respect for the personhood—sacredness, if you will—of those who constitute his audiences by paying attention to who they are and what matters to them.24

19. See Patricia Bizzell & Bruce Herzberg, The Rhetorical Tradition: Readings from Classical Times to the Present 55-56 (1990); White, supra note 10, at xi.
20. See Aristotle, Rhetoric 1355a, in Apostle & Gerson, supra note 10, at 609 (noting that things that are truer or "better by nature are more persuasive"); White, supra note 10, at 34.
21. See, e.g., White, supra note 10, at 40.
23. Bizzell, supra note 19, at 3-5 (describing invention as "the search for persuasive ways to present information and formulate arguments").
24. See, e.g., id. at 3 (noting that Aristotle assumed that people always seek to serve their own self-interest). For a discussion of the idea that every human being is sacred as the foundational component of human rights, see Michael J. Perry, The Idea of Human Rights: Four Inquiries 11-
At bottom, Justice Scalia, though you blithely refer to the value of trust, as a jurist, you seem unwilling to pay the price necessary to create an ongoing community of trust. You seem to prefer the safety of being a smart-aleck, who enjoys exposing the vulnerability of others without offering your own, like the elusive Aleck Hoag himself, who was able to fleece people without exposing himself to the chance that they might fight back.24

Drawing on the work of perhaps equally elitist (?) law professors Michael Perry, Martha Minow and others who have discussed the ethics of argument in a pluralistic culture, I will do my best to convince you, as well as those reading this article, that a fair amount of your jurisprudence, most particularly in culture-dividing cases, fails to practice a rhetoric of warranted trust, by practicing an ethics of awareness, pluralism, honesty, and responsible concern for the other. Moreover, whether we approach your jurisprudence from an ethical or practical approach, it seems to me that you have failed to be a good rhetor, when we view your work through Aristotelian eyes, considering the ethos, logos, and pathos of an argument.

I view your “conversion” to a more ethical rhetorical approach as neither ill-advised nor impossible. In my view, it is precisely in those cases where the most sensitive, culturally contested issues come before the Supreme Court that the wide spectrum of opinions about American moral, political and legal life must be well-articulated and properly defended, if the Court—or any other democratic institution—is to find a way toward a more morally defensible common life in a pluralistic community. If even one representative voice in arguments over abortion, religious freedom, the death penalty, or public education is disregarded or taken less seriously, both the intrinsic and functional purposes that dialogue serves in a contested society—from providing a safety valve to a disenfranchised minority to ensuring a dialectical process of truth-seeking26—are weakened.

Those voices must include your voice representing those who resonate to your jurisprudence, but also the voices of others who do not consider themselves to be represented, or heard, in the highest courts of the land. Otherwise, we will see more of what we read in the news—people who kill abortion doctors,27 threats to atheists...
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who don’t want their kids to say the Pledge of Allegiance,
people who attend executions celebrating, “Now he’s going to burn, now he’s going to fry, now he’s going to shake, now he’s going to die.”

I also think your work is a useful study because it represents a form of argument that is, in my view, thoroughly modern, both in substance and form, despite the regular use you make of historical sources. It is perhaps the last view our jurisprudential Thelmas and Louises saw in the mirror as they drove off the cliff into the canyon of postmodernism, but it is still a rear view. Some of us are determined to make it to the other side of the canyon, and, as a consequence, we need to figure out what modernism has taught us that is usable for the future, just as we plumb Aristotle’s Rhetoric for what is useful for our time, sifting out what is merely third century B.C. Athens.

Without a doubt, there are some valuable things we can continue to take from your jurisprudence: your willingness to remind us of parts of our past we might wish to forget; to remind us of the limitation of any institution or calling, including the Supreme Court and its work of judging; to remind us of the public need for clarity and a sense of connection with the real world by the Court—these are an important part of going forward. But of necessity, it is a matter of going forward, not backward; and these potentially important contributions will be left behind if you don’t bother to convince people that they need to be part of any constitutional future. Whatever the problems with building a future without regarding the past, as you often remind us, the call to live in the past without regard to the future is even more problematic. Even a “dead” Constitution will not simply lie there: it will decompose and become food for the living.

Moreover, if I believed it was impossible to convince you to change your rhetoric, given that you have spent more than a decade using the same devices, then we would have to ask why the Supreme Court should issue opinions at all, since they would simply be exercises in “preaching to the choir” of one’s own political persuasion and getting everyone else steamed at the Court’s abuse of power. Conversely, I remain open to the possibility that you can change MY mind about how you write opinions, but I would need some very strong reasons for being convinced that yours is the way Supreme Court opinions should indeed be written.

I hope that this article will be among the chorus of reminders to all of its audiences—students and teachers of judicial opinions, those who write opinions, and possibly even those who appoint opinion-writing judges. Perhaps they will

N.Y TIMES, June 7, 2002, at B5.
30. This seems to be your favorite phrase for describing your constitutional perspective. See, e.g., Zlotnik, supra note 1, at 1378; Alice Koskela, Scalia Shows Textualists Have a Sense of Humor 43 OCT. ADVOCATE (Idaho) 31 (2000).
31. Your opinions have evidenced little change in tone throughout your Supreme Court career. See, e.g., note 206 and appendix (quoting your opinions from 1987 to 2002) and accompanying text; Linda Greenhouse, At the Bar—Name Calling in the Supreme Court: When Justices vent their spleen, is there a social cost? N.Y TIMES, July 28, 1989, at B10; Stuart Taylor, Season of Snarling Justices, AKRON BEACON J., Apr. 5, 1990, at A11.
more seriously consider how judicial rhetoric can contribute to shaping a community of trust or mistrust, and thus contribute good or ill for our political enterprise. To whom much (power) is given, much is expected.\textsuperscript{32} To read the Supreme Court’s opinions in the last fifteen years, one can see that what I criticize in your opinions, Justice Scalia, is not just about you. Whether they are simply responding in kind or you have unfortunately become a trend-setter whom other Justices think they must emulate, it is becoming more and more common for Supreme Court justices to “call each other out” in print, and not just in confidential memos and conversations with their “brethren.”\textsuperscript{33} And the public has taken regular note of their distress at this kind of open warfare.\textsuperscript{34} Even if none of what I say to you is heeded, I harbor the fond hope that your opinions will, all on their own, provoke a return to more popular rhetorical reflection on opinion-writing, one that is particularly self-conscious about the multiple audiences that the highest courts in the United States are serving, and what effect the opinions are having on them.

I. TAKING YOUR RHETORICAL RESPONSIBILITY SERIOUSLY

The Supreme Court justice writes within a tradition embedded in a specific narrative of justice that involves distinctive practices, practices which themselves involve “standards of excellence and obedience to rules as well as the achievement of good.”\textsuperscript{35} James Boyd White and Jack Sammons, among others, have written

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\item\textsuperscript{32} See Luke 12:48.
\item\textsuperscript{33} See, e.g., Greenhouse, supra note 31; Taylor, supra note 31 (though Taylor notes that judicial discord is nothing new to the bench.) See also Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev 1371, 1382 (1995) (noting ABA Journal description of the “scathing and snide repostes” among Supreme Court justices in recent times,” particularly yours); Phillip J. Cooper, Battles on the Bench: Conflict Inside the Supreme Court 178-79 (1995). Nor has your influence had a salutary effect on the Supreme Court clerks, the law professors and perhaps federal judges of the future, who have learned at your knee (and others’), or at least without your teaching them a better moral lesson, to treat the Court’s decisions either like a boy’s roughhouse or a Star War between the Forces of Good and the Forces of Evil. See, e.g., Edward Lazarus, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court 264-71, 315-17, 322, 457 (1998) (noting the “heavy chips of resentment, airs of victimhood” born by the “brash, snide, dismissive” conservative clerks who came to the Supreme Court “with a desire for revenge” and set up their own “Cabal,” “trading politically incorrect witticisms or ridiculing liberal clerks and Justices in the putdown brand of humor at which they excelled” and mocking “liberals as crusading cartoon characters (such as Batman).” Lazarus notes that these clerks compared Justice Brennan to the moneychangers Jesus drove from the Temple, and joked that Justice Blackmun could get a new job as a psychic. Id. at 265. In Lazarus’ view, the “Cabal” was an instrument for imposing ideological purity and coordinating strategy to turn moderate justices toward conservative positions. Id. at 265, 315-31.
\item\textsuperscript{34} Greenhouse notes that “the court’s credibility depends on the public’s belief that its members are engaged in principled judging rather than personal one-upsmanship,” Greenhouse, supra note 31. Taylor chides, “[f]orceful disagreement on matters of principle enhances [the Court’s] role [in bringing an element of sorely needed integrity to government”]. Taylor, supra note 31. See also Cooper, supra note 33, at 178 (noting that personal conflict poses a danger to the Court’s credibility).
\item\textsuperscript{35} Alasdair MacIntyre, After Virtue: A Study in Moral Theory 190 (1984). MacIntyre defines a practice as:

\begin{quote}
[\textit{A}ny coherent and complex form of socially established cooperative human activity through
\end{quote}
convincingly that the lawyer's—and I would include judges—practices have traditionally been, and continue to be, essentially rhetorical, even though it is, to be sure, "a particular form of rhetoric located within a particular rhetorical community with its own particular culture." The commitment to a rhetorical approach to jurisprudence, as well as the practice of law, is not just a matter of technique: it is part of a larger vision about how law functions and how it is developed in a democratic society. If law is indeed rhetorical, then a chief question before the Court—and particularly because you have so disrupted any shared consensus about this—is this: what is the conception of this rhetorical community to which its members want to make a commitment?

Given the way you write your opinions, Justice Scalia, I would be surprised if you disagreed with me, at least on a superficial level, that the task of a judicial opinion-writer is essentially rhetorical. More than the average Justice, you deliberately choose to identify and "speak to" your opponents by name in your opinions. And you seem to take great delight in identifying just the right image or metaphor that will capture the imagination of the reader. Yet, there appear to be some serious disconnects between your philosophy of judicial interpretation and your acknowledgment of the rhetorical nature of judicial opinions.

The structure of rhetorical argument identified by Aristotle not only followed a particular form, depending on its purpose and audience; but each part of the structure was intended to appeal to a particular aspect of human reaction to speech—the ethical (related to the character of the speaker), the logical (related to the reasonable bases for accepting what the speaker says) and the pathetic (relating to the emotions engendered in the audience.) Thus, the good rhetor would need

which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

Id. at 187

36. See Jack L. Sammons, The Radical Ethics of Legal Rhetoricians, 32 VAL. U. L. REV 93, 94 (1997); WHITE, supra note 10, at xi.

37. See, e.g., Republican Party v. White, 536 U.S. 765, 772, 779, 781 (2002), where you address both Justice Ginsburg and Justice Stevens who wrote opinions by name in the body of the opinion. Your explanation for this practice is fairly insulting, i.e., it is a way for the majority opinion to disavow "exaggerations and distortions of the dissent" of the holding of the case. Antonin Scalia, The Dissenting Opinion, 1994 J. OF SUP CT. HIST. 34, 38. But see Wald, supra note 33, at 1381 (noting that "[o]ne mark of an old animosity is repeated identification of the 'enemy judge' by name").

38. See, e.g., TRW Inc. v. Adelaid Andrews, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) ("The injury-discovery rule applied by the Court of Appeals is bad wine of recent vintage."); Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."); Alabama v. Shelton, 535 U.S. 654, 679 (2002) (Scalia, J., dissenting) ("Our prior opinions placed considerable weight on the practical consequences of expanding the right to appointed counsel beyond cases of actual imprisonment.

Today, the Court gives this consideration the back of its hand.").

39. See ARISTOTLE, RHETORIC 1356a, 1377, in APOSTLE, supra note 10, at 611, 617. BIZZELL, supra note 19, at 145-46.
to take into account the purpose of the particular address, its audience, the process of composing it, its argumentation, and its style.  

I want to address some of the issues that revolve around purpose, audience, argumentation, and style with you. I will begin by discussing the purpose for a judicial opinion, which I will suggest is both more complex and more open-ended than you let on either in the way you construct your opinions or in what you say about judicial interpretation. Next, I propose an ethical field within which we might discuss what rhetoric aimed toward the good requires. I discuss your multiple audiences, what messages your opinions send them, and ask you if you really want to "go there." Finally, I'd like to point out the ethical-rhetorical problems in the form and style of argument you use and reflect back to you what they suggest.

A. The Purpose of Opinions: Beyond the Forensic

First, there is the matter of exactly what kind of rhetoric the Supreme Court engages in, that is, the Supreme Court's purpose in issuing an opinion at all. After all, many judges do not give elaborate reasons for their decisions; they simply announce a decision or judgment in the case. While the Supreme Court acts summarily in many cases, there are dozens each year in which it determines to explain publicly why it made such a decision. Yet the Court rarely articulates in any depth what purposes it attempts to serve in issuing such a decision publicly: it could, of course, simply tell the litigants privately why a decision was issued, if the Court's chief concern was to convey an appearance of fairness to the parties.

In your interpretive philosophy, you sometimes seem to imagine that a Supreme Court opinion only serves as legal or forensic rhetoric, in Aristotle's terms, i.e., as the process of judgment on litigants' past actions using a fully determined set of rules, where perhaps the only responsibility of the Court is to determine what consequence shall follow from the application of these rules. As I'm sure you know, conceptually, forensic rhetoric was confined to the very specific task of judging the legality of one person's deeds and the consequences he should suffer as a result. Aristotle suggested that the four questions a rhetor would need to answer

40. See BIZZELL, supra note 19, at 3-4 (noting that the rhetorical process, for Aristotle, requires attention to invention, arrangement, style, memory and delivery); KARLYN KOHRS CAMPBELL, THE RHETORICAL ACT 20 (1982) (noting the elements of rhetorical action include the author's purpose, audience, persona, tone, structure of the materials, supporting materials or evidence, and strategies to overcome the rhetorical problem.) In Cicero's view, a good rhetor would appeal to the ethical and the pathetic in his introduction, then follow with a statement of issues or of facts that appealed largely to reason with some attention to pathetic effect, then establish his position through rational argument, and conclude in a way that emphasized the pathetic and ethical again. Id. at 5-6.

41. See ARISTOTLE, RHETORIC 1354a, 1354b, 1358b, in APOSTLE, supra note 10, at 605-06, 613-14; PERELMAN, supra note 10, at 19.

42. See, e.g., New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 370 (1989) (quoting Justice Holmes, "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)).

43. See ARISTOTLE, RHETORIC 1358b, in APOSTLE, supra note 10, at 613-14.
for his audience were: "Did something happen? If so, was harm done? If so, was it great harm? If so, was the great harm justified?"44

While these questions make up the warp and woof of standard trial court work, the work of the United States Supreme Court and of many state courts and lower federal appellate courts goes far beyond this very narrow set of inquiries. Much as you would like to imply that the Court is no different from a state trial court, its work ranges beyond the forensic, to deliberative and epideictic tasks necessary in the creation of an ongoing constitutional community of trust.45

Even if you conceived of the Court's opinion as merely a piece of forensic rhetoric, you would have to admit that Aristotle's understanding of the forensic setting is much different than the narrow parameters you might suggest. In Athens, where trials were more significantly public than they are today, the forensic rhetor was not simply asking a lone law-trained judge to deliver a verdict upon a defendant, but entertaining both the formal legal citizen panel and the informally gathered body public that was there to watch to join him in reaching a public decision about the nature of the defendant's activity.46 That even forensic rhetoric was not a specialized form of logical or scientific speech to a specialist audience is evident by Aristotle's understanding of the audience to whom the forensic rhetor sought to appeal—an audience that could be moved by appeals to ethos (character) and pathos (emotion), as well as to logos (reason).47

Yet, your opinions often imagine audiences that can bloodlessly excise their ethical and pathetic selves from the resolution of a legal dilemma, at ease with the notion that justice is done by the clear and reasoned application of rules in a strict fashion to the problem at hand, whatever the contested background of those rules or even their meaning.

44. See BIZZELL, supra note 19, at 30. Or, as Hermagorus expanded these questions, a legal judgment consisted of arguments in the categories of conjecture (what signs are there that X committed the act?), definition (is the act criminal?), quality (are there extenuating circumstances?), and objections (is the trial being conducted according to proper procedure?). Id. at 30-31.

45. Perelman describes the three forms of rhetoric: in deliberative rhetoric:

[T]he orator advises and dissuades, and he finally recommends what seems the most useful. In the legal or forensic genre, he accuses or defends so as to decide justly upon an issue. In the epideictic [sic] genre, he praises or blames, and his speech relates to the worthy and unworthy.... [T]he epideictic genre is central to discourse because its role is to intensify adherence to values, adherence without which discourses that aim at provoking action cannot find the lever to move or to inspire their listeners.... The epideictic discourse normally belongs to the edifying genre because it seeks to create a feeling or disposition to at the appropriate moment, rather than to act immediately.... The goal is always to strengthen a consensus around certain values which one wants to see prevail and which should orient action in the future.

PERELMAN, supra note 10, at 19-20; ARISTOTLE, RHETORIC 1358b, in APOSTLE, supra note 10, at 613-14.

46. Forensic rhetoric seems to have gotten its start in fifth century B.C. litigation in Syracuse to recover property stolen by the tyrant Thrasybus. See Michael Frost, Introduction to Classical Legal Rhetoric: A Lost Heritage, 8 S. CAL. INTERD. L.J. 613, 613 (1999); BIZZELL, supra note 19, at 20-21.

47 ARISTOTLE, RHETORIC 1356a, in APOSTLE, supra note 10, at 611.
Perhaps a good example is your infamous use of *Reynolds v. United States* as precedent in the *Smith* case. The belief-action distinction, a clear rule, is logically applied to produce the result you favor in *Smith*, i.e., the rule that Black’s and Smith’s religious beliefs are protected, but their religious actions are not unless they are the subject of intentional government discrimination. You seem oblivious to the pathetic reverberations you caused by selecting a rule that was used to justify the relentless persecution of Mormons as well as other minority groups in the United States, an opinion that, for generations of religious freedom advocates and minority religions, is as odious as *Dred Scott* is for those who have fought for racial equality in the United States. Indeed, you treated the pathetic response of your audience to this opinion as—well, pathetic in the other sense of the term, the whining of those who cannot contend for their rights in the democratic process.

To be sure, the discussion about a particular Supreme Court case sometimes does revolve around an attempt to ascertain the facts, and determine whether the facts constitute a (civil or criminal) violation of law or how the legal rules are applied. Or courts only have to decide whether there are any substantive defenses or counterclams to the violation, or consider whether any procedural irregularities require the case to be decided in favor of the appellant. Yet, and I think you are ambivalent about this matter, appellate courts such as yours often do necessarily perform a deliberative function. That is, they often have the responsibility of moving their audiences to future action, e.g., to work for law reform such as new legislation, or even social reform.

Perhaps the simplest case where almost any court will speak deliberatively is that situation where a common law or statutory rule is clearly not appropriate for the particular context in which the litigants find themselves, for example, a law which has quite outlived its usefulness. We might think, for example, of the caveat emptor common law rules that pertained to products liability and landlord-tenant law, until their obsolescence began to be clear to most commentators, judges and legislators in the 1960s and 1970s. Whatever debate we might have about whether the court should use its authority to overrule such a law, at least some judges are not loathe to argue in their opinions that the legislature SHOULD change such rules, or should

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48. 98 U.S. 145 (1879).
50. *Id.* at 879, 882.
52. See Harmer-Dionne, supra note 51, at 1296-97.
53. *Id.* at 1296 (citing *Smith*, 494 U.S. at 890). Although in *Smith*, you describe religious minorities in language unusually moderate for your work, that is not always the case for other minorities. See, for example, your insinuations in *Johnson v. Transportation Agency of Santa Clara Co.*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting). Christopher Smith accuses you of whining for the majority—“minority” that is “under attack by an insensitive Supreme Court.” *Smith, Emerging Majority*, supra note 4, at 417-18.
at least seriously consider it. Even conservative judges at least occasionally express the wish that legislatures respond to some unfortunate opinion by wiping out the decision. You have not only made deliberative arguments yourself, both strident arguments mocking the legislative or administrative result in a way that seems clear that it is incumbent on Congress or the Executive to change the law, or milder suggestions that it might be time for Congress to re-visit a question. You have even expressed your willingness to use your judicial power to re-interpret a law that, on its face, would produce irrational or absurd results. Your willingness to do so suggests that what might just distinguish your views from your “liberal” colleagues’ falls in the category of “more-or-less” you have a more restrictive view than your colleagues about what “irrational” or “absurd”—a judgment that gives you the authority to overturn a statute or decision—means.

As well as its deliberative forays, on occasion the Court speaks in an epideictic fashion, attempting to mirror or strengthen national shared beliefs about some common good, often by praising or blaming noteworthy individuals for their actions. For example, in the flag-burning cases such as Texas v. Johnson, members in both the majority and dissenting opinions make epideictic judgments that seem designed to rally a public audience around a particular conception of the relationship between


56. See, e.g., Church of Scientology v. IRS, 792 F.2d 153, 159 (D.C. Cir. 1986) (noting the “ill-considered” Haskell Amendment to FOIA). See also Stuart Taylor, Scalia Proposes Major Overhaul of U.S. Courts, N.Y TIMES, Feb. 16, 1987 at 1 (describing your speech suggesting the legislative need for mechanisms to limit the cases filed in the federal courts); James B. Staab, The Tenth Amendment and Justice Scalia’s ’Split Personality, 16 J.L. & POL. 231 (2000) (noting that at a Federalist Society conference. “Justice Scalia suggested floating federal legislation that prohibits (or at least limits) state regulation in such areas as the cable, construction, or housing industries… [and] lamented the fact that there was not a single federal statute that simply said: ‘the states shall not regulate.”’).

57. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 515 (1989) (noting that the “traditional tools of statutory construction include… policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: ‘Ratio est legis anima; mutata legis ratione mutatur et lex.’”). See also Center for Auto Safety v. Peck, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (your opinion noting that in determining the validity of agency regulations, the court must determine whether agency rules were “rational, clear and complete”); David M. Zlotnik, Battered Women and Justice Scalia, 41 ARIZ. L. REV. 847 (1999) (quoting Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 861-64 (1989)) (rejecting your comment that strict textualism “in its undiluted form, at least, is medicine that seems too strong to swallow… and that in a crunch [you] may prove [to be] a ‘faint-hearted originalist.’”). Zlotnik also notes your willingness “to adulterate” originalism with stare decisis. Id. at 856 n.64.
patriotism and free speech. Justice Brennan, for the majority, suggests that we should not "punish those who feel differently, [but] persuade them that they are wrong." Yet, at the same time he asks that his audience pay respect to "the flag's deservedly cherished place in our community, [by acknowledging the] sign and source of our strength [and] the Nation's resilience ... [that] we reassert today" in the principle of free speech. Justice Stevens, in dissent, similarly calls upon his audience to take to heart "[t]he ideas of liberty and equality [that] have been an irresistible force ... ideas [that] are worth fighting for."

The question remains whether the Court SHOULD understand its rhetorical role to be deliberative as well as epideictic. You have often implied that the Court should not exercise a deliberative or epideictic role, pursuing what one commentator called your principle of democratic formalism, which suggests that the Court should leave any discussion of both the state's ends and means to the legislative body. Of course, even on the simplest level, strict adherence to that position belies the whole experience of the common law tradition, which is that general rules dictated in advance cannot possibly bring justice in every case, because they cannot anticipate the vicissitudes of human history or the varieties of human experience.

But to walk on your own turf for a moment, the "democratic formalism" that shapes your rhetorical approach to Court decisions would seem to belie the very underpinning of your own jurisprudence, the strong faith you place in separation of powers to prevent and resolve the sins of government, particularly the sin of abusing power. For you, separation of powers seems to be not only foundational for democratic government, but also essential and indeed more critical than the individual human rights over which you often break sharply with your colleagues. Yet, your description of "separation of powers" often reminds one of a nest of nuclear silos, each packing its own lethal power ready to be fired if a social need is critical enough, but each separately encased in concrete so as to prevent any contamination from the surrounding field.

In fact, "separation of powers" is only effective in creating a peaceful constitutional democracy if it is practiced through a political imagination that uses metaphors that are dialogical (conversation, argument) and relational (e.g., friends, partners, participants) rather than structural (wall, bulwark) or jurisdictional. Again, we might think of a constitutional democracy as a project of warranted trust. For separation of powers to work in the way you suggest—one branch forestalling the abuse of power by another—each branch must understand itself in relationship to

59. Id.
60. Id. at 439.
63. For an example of your absolutist views about separation of powers, see Smith, Institutions of Government, supra note 4, at 793-94 (noting your view that any deviation from the strong separation approach is a threat to liberty, because "structure is destiny").
each other and must make a leap of faith willing to respect and recognize the others' authority even in the absence of a track record that suggests such trust to be fully deserved. Yet, each branch must be similarly willing to respond with its own power to the other's hubris, if that trust is breached on a deep and irreparable level.

Trust is a vital ingredient in a separation of powers government, because no individual governor or branch of government can be assured that its co-equal partner will continue to act within its limited authority, particularly since the people and interests that make up such a government change so frequently. Occasionally, and even often, that relationship will be agonistic, to be sure, but yet not primarily a conflict of strangers or foes, each out to strengthen its own power and diminish the power of the other; but more in the nature of trust relationships among friends, of the kind James Boyd White refers to. Or if that metaphor seems too naïve or inapt to reflect the political relationships at stake, and it is, one might think of the three branches as living organisms, each linked to each other by the common purpose of keeping the body politic healthy, each with its common pedigree in the Constitution, and its mutual need for the others to employ their distinct talents and play their parts in the constitutional ecosystem. A bit like mother and child, the interdependence of actors in such a government defies attempts to define it. The initial appearance that one is dominant and the other subservient, one the invulnerable giver and the other the vulnerable recipient, is often undermined by the relational interplay among the branches.

By contrast, separation of powers practiced through the metaphors of disconnection that you often seem to employ, whether that disconnection is indifferent or agonistic, means that all of the stakes are placed on the table each and every time there is an adversarial encounter. We see the consequences of using a purely agonistic/enemy model of politics in other constitutional democracies: at the extreme, the troops are called out when one of the branches of government exceeds what the other believes is its jurisdiction, a response calculated neither to gain

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65. See, e.g., Jack Sammons, Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office, 18 U. ARK. LITTLE ROCK L. REV. 1, 12 (1995) (arguing the inappropriateness of this Aristotelian friendship metaphor for other relationships such as the lawyer-client relationship, given that friendship is non-transitory and created out of the "settled excellence of [the friends'] character"); Milner Ball & James Boyd White, A Conversation Between Milner Ball and James Boyd White, 8 YALE J.L. & HUMAN. 465, 485 (1996) (Ball noting the vast difference between Socrates' interlocution of friends and the Supreme Court's use of the rhetorical violence of the law).


confidence in the branches of government nor to ensure the citizens that their
democracy is going to be there tomorrow. By contrast, a relational model of
separation can forestall things from coming to such a pass. Again, at the risk of
pushing an inapt metaphor much too far, friends call each other on their mistakes
after they have established a history of relationship, one that shows that each can
trust the other.

Moreover, friends employ a range of techniques to support good
decisions and challenge inept or wrongful behavior, from verbal support to mild
critique to strong refusal to participate in serious wrongdoing to direct opposition
to it. They could not be as effective at successfully stopping the egregiously
wrongful behavior when it rarely occurs if they were not first willing to engage their
friends on more ambivalent actions, even if that engagement is limited to question
and mild critique.

Even if the friendship metaphor is not directly analogous to the more complex
power dynamic characterized by separation of powers, some of its lessons about
how the branches gain at least a modicum of inter-branch trust in each other, so they
can reverse course without making every conflict a constitutional crisis, are surely
useful in this setting. In such a dialogical situation, the Court’s contribution cannot
be limited to a forensic role, strictly speaking. For one thing, that would mean that
the Court’s role would be purely retrospective, since forensic rhetoric is restricted
to present judgment upon a past act. The Court could never challenge current law
or recommend a change in future behavior by the legislature or executive, based on
its own expertise and some of its own distinctive roles, such as the protection of
minorities.

Moreover, if the Court conceived of its role as merely forensic, it could never
attempt, speaking epideictically, to gather a national consensus about the importance
of constitutional principles or the occasional perfidy of other branches (or even the
Court itself) toward those principles—to criticize Korematsu or Dred Scott, for
example, as well as the legislative and executive actions which sent those cases to
the courts. Indeed, the Court could not even overrule the other branches on the basis
that past or current decisions threaten the national future. Whether its role takes the
milder form of dicta, or whether it mounts the kind of strong challenge against state
power seen in Cooper v. Aaron, or against executive power as in the Nixon tapes
case, the Court’s power ultimately emanates from its ability to get the other
branches of government to trust, at least in a tentative sense, the soundness of its
judgments.

Your view often seems to be that the Court will be trusted only when it sticks
closely to its forensic role, applying the law to particular situations without much
interpretation or engagement with the values and judgments the law embodies. You
seem to base that view upon two concerns: one, the Court’s lack of expertise on
some of these values, and two, the Court’s humanness, members’ temptation to

68. See, e.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN JR., LAWYERS, CLIENTS AND MORAL
RESPONSIBILITY 47 (1994); WHITE, supra note 64, at 109-11.
71. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 986 (1991) (Scalia, J., opinion) (arguing that
the proportionality principle becomes subject to subjective values). See also Stanford v. Kentucky,
492 U.S. 361, 378 (1989) ("The battle must be fought, then, on the field of the Eighth Amendment;
wield the enormous power they have in judicial review to impose their own individual values upon an unsuspecting populace. I am surely sympathetic to the latter concern—despite all of the cautions we might make about how lawyers’ training and judges’ temperaments might stem their instincts to use power for personal reasons, I do not believe judges are any more than human. But they are no more so (or should we say less so?) than legislators or administrators, thus the value of your constant beating of the “separation” drum when you think they have reached or exceeded the edges of their own responsibility. Moreover, as many commentators have cataloged, there are any number of constraints, both legal and embedded within their own conception of their practice, that also aid in keeping the Court honest.

On the former issue of the Court’s expertise, however, I think your views are incomplete, and thus ultimately wrong. To be sure, a Supreme Court justice is neither more virtuous nor necessarily more trained in the traditions of moral deliberation than the average schoolteacher or hot dog vendor; one has only to see how truncated its moral arguments can be in many cases that come before the Court. But the fact that the people repose legal and political power in any governor is no guarantee that the governor’s moral decisions will be perfect, or even necessarily any better than their own: as the notion of trust would indicate, the repose of power is often only a recognition that the governing buck has to stop somewhere, and that the people have agreed to give the last word to those whom they trust will largely make moral and legal choices at least as good as (if not exactly the same as) those decisions they themselves might make. If they are wrong and a Justice or two exceeds the limits of common morality, you are right that little can be done to check his or her decisions—but, on the other hand, so long as members of the Court are appointed by different administrations, the chances that there will be an adequate check on the morally “out-to-lunch” Justice even within the Court are fairly good. After all, if a Justice can gain the assent of four more members of the Court who represent different legal and political philosophies, the

and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.... The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded.”).  


73. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (on why homosexual intimacy is not protected by the Constitution); Reynolds v. United States, 98 U.S. 145 (1878) (on why polygamy is “odious”).


chances that a Court’s decision will dramatically veer from the political or legal middle are relatively slim.

That obvious point being made, I think it is incumbent on you to acknowledge that the Supreme Court is more expert than most people—and we might say even Congress or the Executive—in the areas of responsibility the Constitution grants to it. Like any other seasoned professional whom you would call on to cure your illness or build your bridges, Supreme Court justices come to the court with years of both intellectual and practical education on the meaning and value of (among other things) constitutional concepts like due process, equal protection of the law, and freedom of speech.

That does not make members of the Court “mighty Platonic guardians” but it does make them veterans of certain practical jurisprudential ruminations and conversations, whose opinions are worth paying more attention to than most. These judges have seen the consequences of the application and misapplication of these kinds of values both in their courtrooms and law offices, and in the countless cases they have studied over the years as they ascended to the bench. Of all the branches, they are most likely, and the best situated, to take “the long view” on the consequences of legislation and its impact on the constitutional ecosystem, precisely because they are not subject to immediate reprisal by opponents and constituents. Not to accord them equal respect when they make judgments, as you often fail to do—even when they make erroneous judgments, as professionals sometimes do—seems unjustified. To be sure, an erroneous judgment by a Supreme Court majority might affect thousands, even millions, but with some admittedly difficult exceptions—I think of Roe v. Wade, for those who believe fetal life is sacred, as one example—the tangible harm the Supreme Court can inflict on real people pales in comparison to the harms that Congress, the military, or even big business can cause.

A more helpful inquiry might be to ask, as you well might, what the appropriate limits of the Court’s deliberative and epideictic duties are, for this is where you really take issue with the “liberal wing” of the Court. Because this is a rhetorical task that involves considerations of audience, setting, and even a reflexive review of one’s own public persona (since character plays a significant part in the effectiveness of speech), it would seem that the exercise of practical wisdom in the particular case might be the only way to judge whether to exhort, praise or blame a particular legislative or executive decision.

As you grudgingly admit, some laws and legal structures do call for a deliberative or epideictic response. The easiest case is your so-called absurd or irrational law. But another is the type of law you have already insisted should be “called” by the Court: a law in which Congress or a legislature has passed the buck on hard decision-making by creating an unnecessarily broad or vague statute whose outlines

77. See Chemerinsky, supra note 3, at 399-400 (quoting some of your derisive language).
78. 410 U.S. 113 (1973).
must be filled in by others less competent to do so. By contrast, some broad statutes recognize that Congress itself needs the wisdom of specialists in that field to define the proper legal parameters over time, which is why your strict separationist view about legislative delegation causes more problems than it solves. Where it is appropriate to do so, the Court should cite legislative cowardice, and whether exercising the "passive virtues" or more actively rejecting the law, expect legislators to do their jobs.

Another, however, is the case where Congress or the Executive, due to ignorance or indifference or prejudice or even political cowardice, has failed to seriously consider the impact of its action upon all (especially minority) groups affected by the law. Just as your Court should consider how, for example, its interpretation of welfare regulations will affect both impoverished mothers and their children and the state fisc, so Congress and the Executive should be held to a standard that requires them to take seriously the damage as well as the benefits of legislation to such groups. At least Justice Stevens has attempted to take this responsibility seriously, in his aborted try to frame a new rational basis test in cases like City of Cleburne, where he asks whether an "impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." So too has Justice O'Connor, who through her Establishment Clause endorsement test asks what message government is sending to religious "outsiders" by the use of religious symbols.

Moreover, there are whole areas of endeavor—racial progress is perhaps one of them—where the other two branches of government have in a sense opted out of the epideictic process. They have failed to exercise epideictic leadership, and failed to call to account publicly those who are responsible for racial division and discrimination in a way that brings the community together on this issue. They have failed to draw together a national consensus on the odiousness of racial discrimination and the general will to do what is right on racial matters. It is not for lack of political power or ability to do so: elected leaders are able to create such a consensus when our nation is threatened—consider the outpouring of community that President Bush and Mayor Giuliani were able to muster using epideictic rhetoric

79. See, e.g., Whitman v. American Trucking Ass' n, 531 U.S. 457, 472 (2001) ("[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."). See also Barnes v. Gorman, 536 U.S. 181, 186 (2002) (your notation that Congress may only impose grant conditions on recipients if it does so unambiguously).

80. See, e.g., Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377 (1989) (Court needs to defer to technical experts on environmental impact statements); Fed. Power Comm'n v. Florida Power and Light Co., 404 U.S. 453, 463 (1972) ("[W]hen resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact."); Rust v. Sullivan, 500 U.S. 173, 186 (1991) (showing deference to agency expertise on abortion counseling regulations).

81. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 111, 115 (1962). See also Kannar, supra note 1, at 1356 n.272 (citing interpreters of Bickel's views).


after 9/11—though some national crises are harder than others. But these are issues that cannot be ignored, even if political leaders choose to do so for their own reasons.

I expect that you would be of the opinion that the Court's stepping into these epideictic black holes is improper, arguing either that they are the responsibility of state and federal elected leaders, or that they are failings of the private sector to which private sector institutions need to respond, and not the business of an unelected Court. I would not disagree with you that these institutions chiefly bear such responsibility. What we perhaps differ about is what the Court should do when that responsibility is abrogated by other governmental and social institutions. You may be right in assuming that if the Court picks up that responsibility (or any other), those institutions that are primarily responsible will find an excuse not to do their jobs. But on some issues, I don't see how the Court can abrogate its responsibility toward framing a national consensus in the hope that its absence in the national conversation will someday draw other political actors to do the right thing. That is particularly true concerning issues of groups who have not commanded the concern of the majority in the past, such as minorities and the poor.

If the Court's function is necessarily deliberative and epideictic at these times, it remains to be seen what ethical responsibilities are incumbent on the Court when it speaks in these ways. Though ethics may precede ontology, it may be useful for us to talk about how you view the relationship between authority and the individual before we discuss what you, as an authority, owe those persons and institutions to whom you speak. I would suggest that both your modernist instincts and your underdeveloped attempts to recover a traditional Christian understanding of authority place you at odds with a robust rhetorical ethics in this democratic society.

B. Seeing the World Through Modern Glasses

I sense in you a reluctance to embrace a rhetorical vision for the Court's opinions. To plumb that reluctance, we need to go to the heart of the reason that rhetoric so threatens your modern conception of judicial review.

As I have suggested, the naming of the democratic relation as one of trust evokes two assumptions in any well-functioning political nation: that the average citizen's political situation is given, not chosen; and that the people take daily risks in reposing their power in representative leadership. These are not unique realities for democracies, but the belief that political realities are chosen rather than given is sharper, if not more correct, in democracies, where the allure of an "otherwise," the


(at least theoretical) embrace of alternative governance structures, always beckons. In democratic situations, we accept as well as affirm the fragile givenness of the political situation in which we find ourselves, in this case, the givenness of a democratic government with certain structures, strengths and flaws. Unlike certain theories of truth or political authority, a political community located in trust does not premise the authority of its law or legal institutions on indubitable proof that the law reflects the truth of the human condition or that it has the certain capability of instantiated or achieving a knowable good. Indeed, a political community of trust accepts the ultimate inability of authority to prove a foolproof genealogy, divine or historical, even while it clings gratefully to the past it can locate. A political community of trust risks that authority might well be corrupt, occasionally or thoroughly, and accepts that such authority may one day have to be discarded when it is no longer trustworthy. Indeed, a political community of trust ensures that trust is accompanied by the preparedness to hold accountable the trusted individuals and institutions.

As a means of human deliberation about the good, rhetoric similarly displays risky optimism about human relationship and dialogue. In a certain sense, the authority of the rhetor is conferred even before he opens his mouth: he becomes authoritative in large part, though not exclusively, because his audience is willing to risk conferring on him the status of a trusted speaker. So too, the Supreme Court, of all the institutions of national government, derives its authority from a prior entrustment by the Constitution and statutes, but also because the political community is willing to place its continuing trust in the Court’s authority to make pronouncements, much as it might disagree with individual decisions. That this is a trust relationship is perhaps no better illustrated than in the breach. The emotions brought forth when the Court missteps in the view of a large segment of the polity—Dred Scott,86 Korematsu,87 or even Employment Division v. Smith88 and Roe v. Wade89—are emotions of betrayal, the deep anger and cynicism which come from the violation of one’s deepest trust.90

The rhetorical task implies a mixed view of human nature that is, still, more optimistic than it is pessimistic. As between two equally plausible images of human life (indeed, equally correct for any person who recognizes the reality of human goodness and sin, human power and shortcomings)—one of short, nasty and brutish life of human beings locked in mortal combat over material possessions and their own power, and one of creative humans as essentially connected in a common enterprise—the rhetor speaks out of the main message that members of the human community belong to one another.

For the goal of the rhetor, as many scholars believe that Aristotle conceived it, is to persuade people toward the good,91 a goal that assumes belonging rather than

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89. 410 U.S. 113 (1973).
separation. In the ancient conception, rhetoric is "a kind of legal order, a personal and public discipline fusing social authority with personal virtue." Its purpose is not to manipulate individuals' darkest fears and moods toward some predetermined end; its purpose is to speak, first to their rational faculties, and then out of the best character of the speaker and to the best emotions of the audience, toward an outcome which the audience can voluntarily agree serves the common good.

To be sure, neither traditional nor modern rhetorical theory is naive: both anticipate that men can persuade each other toward evil as well as good, using morally wrong arguments as morally sound ones. Yet, the groundwork of ancient rhetoric, what Troels Engberg-Pedersen calls "the austere conception of rhetoric," begins not with the assumption that rhetoric can be described on a morally neutral field, but with the supposition that the rhetor's deepest instincts are toward the good and that his argument aims for the good of whole human community. It is premised on a view of the communal environment in which rhetoric is practiced as inescapably, intrinsically teleological in orientation.

Indeed, the whole perspective of rhetoric is that we can be persuaded to show respect for the other by giving up our initial views when we are convinced we are wrong. In fact, the rhetorical approach assumes that we can be persuaded to action as well as a different view by the Supreme Court—not just persuaded to act conversely to the way we have been acting, but also persuaded to rise up and act where we have been complacent—if we are convinced that action is warranted. An admittedly imperfect example is the rhetoric of the desegregation decisions, which may have been at least a small factor in the decision of politicians as politically diverse as Dwight D. Eisenhower and John F. Kennedy to throw the power of the federal government—though dragging their feet all the way—behind desegregation enforcement efforts.

Your opinions, by contrast, display a deep pessimism about the possibility that rhetoric really works with respect to law-giving. That is, your opinions imply that you believe that it makes no sense to discuss moral matters in Supreme Court cases because it would be rare that people would be willing and able to change their minds about deeply contested matters. Indeed, you do not imagine that you can change your own mind: for you, many issues that come before the Court on which your

93. See Engberg-Pedersen, supra 22, at 120-21.
94. See id. at 122-24, 127 (suggesting that rhetoric is associated with the good because rhetoric is a language game one of the rules of which implies truth, and repeating the historical rhetorical assumption that the truth will shine through in rhetoric).
95. Legal historian Mary Dudziak suggests, however, that international pressure and concern about the threat to the rule of law and federal authority were the key factors in Eisenhower's final decision to intervene at Little Rock. See Mary Dudziak, The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy, 70 S. Cal. L. Rev. 1641, 1662-65 (1997). Professor Klarman attributes Eisenhower's actions, in part, to his feeling of betrayal by Governor Faubus. See Michael Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 131-32 (1994). Klarman also details Kennedy's foot-dragging on proposing or supporting civil rights legislation. Id. at 140-42.
colleagues disagree are, instead, "not at all in doubt,"96 their answers are "so obvious[97]" and those who oppose that view have "no basis" for their opinion.98 This language suggests a stultified view of human nature that acknowledges only Hobbesian wills to power as effective in making binding decisions about how people are expected to behave toward one another in our society.99

Your acceptance of a more Platonic notion of rhetoric implies that rhetoric is merely a linguistic form of Supreme Court Odor-Eaters, designed to take away the smell of very bad preconceived opinions that various members of the Court have decided to impose on an unsuspecting public. As such, your view of rhetoric is decidedly more modern than traditional. It incorporates the fact-value split,100 reclaiming a very narrow view about how truth is found,101 and seemingly accepting that privileged and certain knowledge of the truth transcends both context and history.102 However, because it assumes that language is discontinuous with truth, such a view narrows the process of legitimate inquiry by demanding that truth can only be sought through demonstrative or dialectical means, e.g., beginning with incontestable premises and then proceeding through a rigid process of observation, deduction and/or syllogism to arrive at a conclusion about what is real. Or, as Dean

98. Alabama v. Shelton, 535 U.S. 654, 677 (2002) (Scalia, J., dissenting) (indicating that the Court has no basis for its doubt "that any procedures attending the reimposition of the suspended sentence 'could satisfy the Sixth Amendment').
99. Professor Kmiec, for one, has suggested that you and Hobbes might line up on the question of the relevance of natural law to democratic lawmaking. See Douglas Kmiec, Natural-Law Originalism—Or Why Justice Scalia (Almost) Gets It Right, 20 HARV. J.L.
100. See BINDER & WEISBERG, supra note 92, at 319 (discussing Leo Strauss's attack on the fact-value distinction in modern liberalism); WAYNE C. BOOTH, MODERN DOGMA AND THE RHETORIC OF ASSENT 12-14 (1974); Daniel S. Goldberg, And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism, 39 HOU S. L. REV 463, 471-72, 491 n.184 (2002) (discussing your belief in objective meaning and certainty of the text, and his view that the inability to separate the subject from the object in this way makes verification of "truth" impossible); Cass Sunstein, Justice Scalia's Democratic Formalism, 107 YALE L.J. 529, 561 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) (noting that you implausibly suggest "that judges have only two real alternatives: Follow the original understanding as he understands it or basically do whatever they want."). For example, you are constantly distinguishing between knowledge and "moral sentiments," which are personal and not subject to objective discussion. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 983-84 (1992) (Scalia, J., dissenting) (talking about the Court's decision as "personal predilection" rather than reasoned judgment, and the values suggested by the majority as "a collection of adjectives that simply decorate a value judgment and conceal a political choice"); Atkins v. Virginia, 122 S. Ct. 2242, 2265 (2002) (Scalia, J., dissenting) (claiming that the Court's decision is not confined by the "moral sentiments" of either the founding or "the current generation of American people").
101. BINDER & WEISBERG, supra note 92, at 319-20; BOOTH, supra note 100, at 12-14.
Kronman has suggested, such an inquiry follows Hobbes and Bentham by turning the longing for truth into a quasi-mathematical inquiry that satisfies the modern urge for absolute truth.\(^{103}\) In this view, conviction and action should only accompany such rigidly derived evidence.

And conversely, the modern view is deeply suspicious of any value masquerading as truth that has not been vetted through these rigid processes. Just as Gorgias is mocked for his argument, summarized as "nothing exists; or if it does, we cannot know it; or if we can know it, we cannot communicate it,"\(^{104}\) so numerous modern philosophers like Bertrand Russell have deeply discouraged any pretense of knowing unless a proposition can be proved "indubitably true."\(^{105}\) The modern view of truth abandons rhetoric as a means for discovering the truth, because the enthymeme, the rhetorical form that corresponds with dialectic's syllogism, can never begin with an indubitable truth; it can only begin with probable truth and received wisdom.\(^{106}\)

The consequence of the modern move, however, is to suggest that anything that cannot be proved indubitably true through dialectic or sound empirical means can be believed only as a matter of opinion. For that school you seem to embrace, which we might call Chicago-economics (Chi-econ) majoritarianism, matters of opinion based on individual preference and desire become a valid basis for action because of pure power—i.e., legitimating political action where majorities are willing to put votes behind their personal preferences and desires.\(^{107}\) Chi-econ majoritarians put no moral weight on altruistic preferences: one person's materialistic desires are considered of equal value to another person's vision of a good commonweal. Or as Professor Jacob puts it, such a positivist vision of social life entails that social life "is something accepted as the best available bargain in a bad situation. It also means


\(^{104}\) BIZZELL, supra note 19, at 24.

\(^{105}\) See, e.g., Joel R. Cornell, *From Hedonism to Human Rights: Felix Cohen's Alternative to Nihilism*, 68 Temp. L. Rev 197, 203 (1995) (describing Russell's view that logical form constitutes the essence of philosophy, and the authority of philosophical criticism depended on its "indubitability."); Mooz, supra note 102, at 74-75 (1993) (noting that "the Enlightenment ethos of... practices justified by rational and detached inquiry [and the Cartesian project to locate an indubitable ground for knowledge] is so deeply embedded" in modern thought that any criticism of legal practices would be sabotaged by it.) In Mooz's view, the democratic faith in the Rule of Law cannot be justified through Cartesian thought, but Cartesian prejudices "warp[] all attempts to develop alternative justifications." It may be for this reason that you have turned back to tradition, the original nemesis of Cartesian thought, as an alternative source for law when the Constitutional mandate is unclear. *Id.*


that you regard legislation as the adjustment of interests in accordance with the shifting weight of coalition politics, in other words, who can get the votes.\textsuperscript{108}

This sort of majoritarianism abandons any possibility that lawmakers could have a serious conversation about whether a particular bill reflects the truth of the human situation or improves the human condition. First, goodness and truth cannot be sought where the empirical situation is uncertain, which is to say, in virtually any context in which legislation is desirable. Second, philosophers like Russell would suggest that any drive to make law is simply the attempt by those with hidden motives to make others do their bidding;\textsuperscript{109} thus, all political deliberation is accompanied by the suspicion that I am trying to trick or coerce you into accepting a view which puts me in a position of advantage. No political debate can occur "on the merits," i.e., on the face of the argument that has been presented, because the merits are not the true agenda, in the modern view.

Like its ancient (Platonic camp) forebears, then, this brand of Chi-econ majoritarianism suggests that rhetoric is merely a political vehicle, very rarely used for conveying previously discovered truth.\textsuperscript{110} More often, in this view, rhetoric is simply employed to convince a public to believe not what has proved to be true, but only what seems to be the preference of many. That is, as the ancients put it, rhetoric becomes a tool for manipulating people to act against their own self-interest and in the interest of the rhetor or his group, and its key link with knowledge is with human psychology, not morality.\textsuperscript{111} As Jacob also notes, "if this [is] your assessment of social life, one really will be prepared to invest a great deal of intellectual energy in the task of keeping the application of the law from becoming another political forum. Instead, one would want to conceive of it as being straightforward, relatively simple and apolitical in the sense of not providing yet another forum for the same struggle of wills and votes ...."\textsuperscript{112}

I suspect you yourself belong to this school; any number of your opinions reflect these sorts of Chi-econ majoritarian assumptions. If a Congressional decision is, indeed, merely a matter of the personal preferences of a majority—as you claim not


\textsuperscript{109} See BOOTH, supra note 100, at 55-62.

\textsuperscript{110} See Francis J. Mootz III, \textit{Is the Rule of Law Possible in a Postmodern World?} 68 WASH. L. REV. 249, 250 n.2 (1993) (noting your "thoroughly modernist perspective" in \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175 (1989)). Following Margaret Radin, Mootz identifies modernism with the following tenets: "(1) law consists of rules; (2) rules are prior to particular cases, more general than particular cases, and applied to particular cases; (3) law is instrumental (the rules are applied to achieve ends); (4) there is a radical separation between government and citizens (there are rule-givers and applicers, versus rule-takers and compliers); (5) the person is a rational chooser ordering her affairs instrumentally." Id. (quoting Margaret J. Radin, \textit{Reconsidering the Rule of Law}, 69 B.U. L. REV. 781, 792 (1989)).

\textsuperscript{111} Or, as Gerald Wetlauffer notes, "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. Thus, the rhetoric of foundationalism is the essence of philosophy and the antithesis of rhetoric." Gerald B. Wetlauffer, \textit{Rhetoric and Its Denial in Legal Discourse}, 76 VA. L. REV 1545, 1555 (1990).

\textsuperscript{112} Jacob, supra note 108, at 1632.
only when you are reviewing economic legislation but also laws that impact religious freedom or due process—then it would indeed be incoherent for the Court to review them using anything more than the standard of absurdity (e.g., it must have been a mistake that everyone can recognize). For in the modernist view, the Court would have no basis for asserting that a piece of legislation is morally or even legally wrong, except in a few clear categories that everyone could agree the Constitution prohibits. Conversely, if any decision—whether the Court's or the Congress—failed to reflect a predetermined, logically derived Truth, then no amount of discussion (practical or not) would be relevant. And, as Professor Jacob predicts, you too work very hard to isolate law from such political horse-trading by making it clear, straight-forward and not mixed up in politics. As he anticipates, you “[m]ake judges ... agents with an agent’s fiduciary obligation to carry out the self-evident intention of their principals” that you would find in the text of the Constitution and laws. For example, in the abortion cases, you express your disdain for constitutional interpretation that draws the Court into political disputes.

C. A Theological Alternative to Modernism: Taking a Little Detour

Recently you have argued what begins to be a more defensible justification of the authority of the state than the modernist approach I have just sketched. Admittedly, its widespread acceptance may well be problematic since it relies on a theological premise, but at least you and I, as fellow Christians, should be able to see where it might lead. In your article in First Things on the death penalty, you argue that the authority of the state does not derive from the individual preferences of citizens, added up in a Benthamian calculus, but on God's conferral of authority upon the state to act for the good of its citizens. Your argument seems to avoid the ignorant secularist caricature that a divine authority claim entails either a daily divine conversation in which God gives orders to the secular power about what specific laws to enforce, or a divine carte blanche to specific anointed persons (or in our case, the democratic process) to do exactly what they feel like doing.

However, your theological argument about the power of the state to coerce non-consenting citizens needs a bit of work. The metaphor of the kingship or sovereignty of God is multi-faceted, but surely one facet must respect the historical
experience of those people such as the House of Israel: the choice of kingship is ultimately a choice that evidences trust, for whom people must obey, they must also trust. The Lutheran version of that argument (which is the one I know best) reflects the ethos of trust, or as my colleague, theologian Patrick Keifert, often will say, a recognition of God's ongoing activity in creating a trustworthy world. The divine action is a study in reciprocal trust: God entrusts the world to the co-creating acts of human beings, that is, God works with us to construct and flesh out the "orders of creation" or "governances of creation," the living frameworks or structures within which humans can flourish. Luther recognized three such frameworks: the state for public order and development of the commonweal; the church to provide spiritual nourishment consonant with God's work of salvation; and the family or economy to provide the emotional, physical, and social needs of daily existence. Reciprocally, human beings place themselves, though not always and not fully as a result of sin, into the hands of one another and, most often through human mediation rather than direct encounter, into the hands of a God who cannot be located, who is always absconding. The act of trust toward God is the act of falling into ever-moving arms.

Thus, Luther recognized that the legitimacy of the state and its coercive authority do not derive exclusively from its form, but rather from its source. Kings and democracies can both and equally be mediators of God's relationship in the world, co-creators and preservers of humankind; both political forms can also be fully corrupt. That explains, in part, why Luther counseled obedience to authority even when a citizen believes that the authority (including the judge) is mistaken, because political authority is a good gift from God. Yet, at the same time, Luther honestly recognized the realities of the trust relationship, i.e., it will be marred by sin and human limitation, however good it might be.

You seem to part with Luther on governance in some respects that are significant for this discussion of your rhetoric. Your account of the divine genesis of state authority does not account for the complex frailty of the co-trustee relationship of God's work with human governors, which puts human government always in the situation of accounting to a terrible God who will unexpectedly and swiftly mete His


120. See, e.g., Carl E. Braaten, God in Public Life: Rehabilitating the "Orders of Creation," "FIRST THINGS, Dec. 1990, at 32, 35.


123. See Martin Luther, Temporal Authority: To What Extent it Should be Obeyed, in LUTHER: SELECTED POLITICAL WRITINGS 51 (J.M. Porter ed., 1974).

124. Id. at 66; Martin Luther, Whether Soldiers, Too, Can Be Saved, in LUTHER: SELECTED POLITICAL WRITINGS, supra note 123, at 117; Martin Luther, Against the Robbing and Murdering Hordes of Peasants, in LUTHER: SELECTED POLITICAL WRITINGS, supra, at 85-86.
wreath upon its failings. In this way, your account remains authoritarian, for it does not take seriously the idea of a conversation with either God or others about the good. Luther, at least, would never have granted absolute authority to the state in any of its forms, recognizing that the fact of the corruption of the human will means that inevitably (though not because predetermined), the state will become corrupt and come under the judgment of God. Thus, though civil disobedience should be an exceedingly rare event, it is a necessary precondition of state ordained by God because of the possibility of its corruption. (Indeed, how could you be a separation of powers fanatic without recognizing this?) That is to say, inherent in the goodness of a trust relationship is an aspect of accountability: trust must be the first moment, but it must be warranted.

Moreover, Luther was no apologist for the political status quo as a naturally occurring and static good; he recognized a God who works mysteriously through history and persons for the good of humankind, activity that resists conferring authority upon the political status quo as much as it supports doing so. This critical element, that God remains active in history, creating anew in each moment though without our being able to identify God’s handiwork until God has disappeared, requires the recognition that the forms and processes of the “order” of governance—the state, the family, the church—will change over time because God and human beings are always makers, always creating new things.

Thus, the assent we give to the authority of government is always an assent that looks forward to the next moment in its development. You seem to grasp the part that the act of creation in the political realm is an act which is dependent upon and arises up out of the past, out of tradition, so that we can never claim to be making a “fully new” moment of justice—whether it is on the legal questions of birth and death, or on search and seizure or equal protection. You do not seem to grasp that, as God moves through history, God’s co-activity with humankind’s will change political institutions—not always for the better, for humankind bears the major creative responsibility for them—but they will change. And that means that God will participate in changing the courts and the law—and dare I say, your “dead” Constitution as well.

More to my rhetorical point, Luther rejected the “rule of law” position you regularly take, which assumes that justice will better be done by strict application

125. See Luther, Temporal Authority, supra note 123, at 68-69.
126. James Boyd White identifies this tradition, over against a tradition of law as rhetoric, as stemming from the older Jewish and Christian traditions. See White, supra note 10, at 29, but some scholars have suggested that a pure “divine command” understanding of the relationship between God and Israel is much too narrow. See generally Walter Brueggemann, Theology of the Old Testament 117-44, 413-527 (1997) (describing the Old Testament as Israel’s witness to the character of God as a partner with humans).
127. See Temporal Authority, supra note 123, at 62, 66.
128. Id. at 66.
129. See, e.g., Braaten, supra note 120, at 35, 37. Indeed, Professor Kamp has argued that this is also the Catholic position, noting that “[i]n focusing on the practices of an ideal earlier age and denying the possibility of evolving traditions, at least one made by the courts, Justice Scalia’s approach is more Protestant than Roman Catholic. Catholic traditionalism is evolving, … [a]nd [a]t the Spirit’s bidding a tradition may start at any point in history.” Allen R. Kamp, The Counter-Revolutionary Nature of Justice Scalia’s “Traditionalism,” 27 Pac. L.J. 99, 110 (1995).
of rules specifically enunciated by the legislature than in the application of practical wisdom to existing circumstances. You propose to create a trustworthy world through human legal edifices that can be counted on, that are stable and clear and absent contradiction. But a theological approach that recognizes the elusive presence of the Divine Hand in history in relation to the individual seems inconsistent with that approach, because your approach fully trusts persons living in a particular moment of time to construct timeless solutions. At the considerable risk of confusing the sacred and the mundane (or as we Lutherans might put it, the left and the right-hand kingdoms of God), it would seem that a *deus absconditus* theology would be more consistent with the rhetorical than the dialectical. That is because it makes room for the recognition that God does display God’s character, if you will, in many faces, and God does speak to people out of their particular history and circumstances, recognizing their sacredness. God speaks, just as co-creating human beings speak, out of their own (changing) characters to particular circumstances of particular persons. Thus, perhaps seeing some analogy Luther pays much more careful attention to the character of the judge than to the laws the judge enforces, and to the ways the judge communicates with those he judges. He concerns himself more with the judge’s attempt to reach a just outcome rather than question whether his decision measures up to some abstract preconceived standard of justice.

Whether we proceed from this sketchily described theological base, or follow a more sophist understanding, a rhetorical approach to justice denies that demonstration or dialectic are ultimately the only means for discovering and implementing what is true or good. Unlike the Plato-ish attempt to free the philosopher “from the conventional and all worldly encumbrances in the pursuit and eventual attainment of absolute truth,” such a concept of rhetoric understands the pursuit of the good to emanate from the “imperfect”—but nonetheless sound—practice of *phronesis*, a reflexive sort of conventionality that takes seriously the experience and thought of previous generations as well as the needs and distinctive character of the present community and the challenges of the future. The rejection of the idea that there is a privileged, unchanging knowledge or discourse prior to history and context gives space for a relational and ever-moving search for the truth: we come to know what is true and what is good partially by way of discourse. Discourse becomes not just a means for conveying truth, but an indispensable aid in finding it. And at least the liberal methodology of rhetoric is decidedly more

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130. Keifert, *supra* note 121, at 60 (quoting Terence Fretheim on the different “intensifications” of God’s presence as stranger).

131. See *Temporal Authority*, supra note 123, at 64-65, 67-69.

132. See *Bizzell*, supra note 19, at 28.

133. See, e.g., Wetlaufer, *supra* note 111, at 1548 (noting that rhetoric teaches “a range of unified sets of discursive conventions; that these rhetorics differ one from another; and that, at any given time and place, particular rhetorics will be embraced by particular disciplines” and that “through our particular rhetorical conventions and commitments, we constitute our selves, our communities, and, perhaps, our world. Thus, the rhetorical conventions to which we commit ourselves are both contingent and important. Those commitments bear not just upon how we say the things we say but also upon what we say, on what we are able to see, on what we are able to think, on what we are able to know and believe, and on who we are able to be.”).
pluralistic as well; in addition to considering context, it considers the constellation of values and worldviews, and how an argument appeals not only to logos, rational instinct, but pathos and ethos, humans' emotional and moral senses. Today, we might label that a postmodern or feminist or holistic or dialogical understanding of the human encounter with truth and the good, but its roots are deep in the practice of rhetoric.

Some critics, particularly critics of the law and literature movement, are inclined to ignore rhetoric as a side moment, fundamentally flawed, in the development of legal theory. However accurate their arguments may be about the use of rhetoric as an ultimate ideology, a more rhetorical approach to the practice we call law seems at least a critical bridge on the way from modern and postmodern legal theory, which we see in our rear view mirrors, to a new moment, though it may be only a bridge. As Bernard Jacob has suggested, the linguistic turn in the humanities, including legal philosophy, has shown:

[T]he ... act of constituting experience through the synthesis of concepts and empirical intuition no longer leads, as Kant hoped, to a new foundationalism, even if only a subjective one; instead, it leads to the uncertainties inherent in the open structure of human discourse and communication ... [and it does not answer the question, how is it possible for us to have meaningful discussions in the absence of some master or foundational certainty?]

Law can embrace the insights of postmodernism but cannot ultimately construct a practice from it; law demands a momentary end to the endless conversation, a modicum of determinacy and finality.

Or in legal philosopher Theodor Viehweg's terms, to have law, we must embrace "dogmatic legal reasoning" and "zetetic" reasoning, and we must embrace them both equally, something we might call Viehweg's paradox. We must use dogmatic reasoning because law has the goal of judgment and action; thus, there must be a point when certain opinions are fixed, when distinct judgments are exempt from

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134. See Binder & Weisberg, supra note 92, at 330-33.
136. See id. at 1048-54. "[A]rguing that law and literature does not deserve an important place in the law school curriculum, Posner says that 'the field lacks the theoretical coherence, convergent thrust, parallelism to legal doctrine, and practical application to lucrative fields of practice that have given the law and economics movement so important a place in the curricular of leading law schools.'" David R. Papke, Problems with an Uninvited Guest: Richard A. Posner and the Law and Literature Movement, 69 B.U. L. Rev 1067, 1083 n.70 (1989) (quoting Richard Posner, Law and Literature, A Misunderstood Relation 361 (1988)).
137. See Jacob, supra note 108, at 1669 (citing Donald M. McCloskey, The Rhetoric of Economics (1985) regarding the tyranny of method and noting that rhetoric is anti-methodology).
138. Id. at 1629
139. Id. at 1670 (citing Theodor Viehweg, Some Considerations Concerning Legal Reasoning, in Law, Reason and Justice: Essays in Legal Philosophy 257, 262, 263 (Graham Hughes ed., 1969)).
questioning, so that emerging determinations are unassailable and authoritative.\textsuperscript{140} But we must also, at the very same time, employ zetetic reasoning, which recognizes "a limited defense of authority and precedent" while it "brings to the fore" and investigates new problems critically and open-endedly.\textsuperscript{141}

Or, more simply, Viehweg might argue, lawyers at a post-postmodern moment must realistically use a rhetorical "topics" approach to law: they must be anti-methodological but employ a nest of determinate rules and easy cases; they must approach new problems using the dynamic of invention, by proceeding to "question[] only some issues; and in doing so .. rely on other facts and rules that we can take as given."\textsuperscript{142} The mistake of many of those identified with modern and post-modern jurisprudence has been to try to resolve this paradox by collapsing it: some modern jurisprudes have attempted to eliminate the openness of legal reasoning by resort to rational and empirical certainty\textsuperscript{143}; postmodernists suggest that every rule and fact was inescapably, and needed to be, indeterminate and contested.\textsuperscript{144}

To approach this problem another way, Richard Sherwin has called for a dialectical approach to the relationship between critical theory and rhetoric, arguing that both theory and rhetoric have their own limitations.\textsuperscript{145} Yet, Sherwin insists that rhetoric is "a form of discourse that can stem the dangers of prolonged abstraction and systemic conceptualization while also allowing the critical theoretical tradition to thrive in its own right."\textsuperscript{146}

Rhetoric, as practiced by the ancients, may not be the ultimate way we confront Viehweg's paradox, which postmodernism does not resolve despite its contributions to a more just society. Viehweg's paradox, which may apply uniquely to law because it must be authoritative in a different way than other disciplines, may well be irresolvable precisely because law represents a profoundly moral enterprise, and morality enters only deeply contested and complicated fields that are part of the human hunger for truth and the good. Indeed, in Jacob's view, rhetorical theory does not assume that "the antimethod, the indeterminacy, of either speech or law may or need be radically remedied. The conversations, and the controversies in which they find their life, can be expected to continue, hopefully without sinking into 'the complacent acceptance of common sense.'"\textsuperscript{147} Because the very nature of the rhetorical imagination resists totalization, it may allow us to claim our future through a carefully considered past; in that sense, it may be timeless without claiming any ultimacy.

In the rest of this article, I want to be more concrete about how the rhetorical view applies to your own work, Justice Scalia. But first, I want to sketch in brief form

\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 1669
\textsuperscript{143} See id. at 1627
\textsuperscript{144} See id. at 1628 n.26, 1669.
\textsuperscript{146} Id. at 550.
\textsuperscript{147} Jacob, supra note 108, at 1673 (quoting DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT 35 (1992)).
how an ethics of rhetoric might embrace at least a few of the insights postmodern legal thought has provided us, so that I can later show how I think your assumptions and forms of argument regularly disrupt such possibilities.

II. FOCUSING ON AN ETHICS OF PERSUASION

A key to understanding how the Court might frame its opinions in an ethical form of rhetoric must be uncovering how it "reads" its audiences. To a great extent, in my view that means that the Supreme Court must not only recognize, but in some sense create and nest its rhetorical audiences within each other, because the only "natural" constituency for its work—one that is really familiar to the Court—is the community of lawyers and judges. This requires the Court to consider the "standards of ethical engagement" entailed by a rhetorical approach founded upon trust; and then ask, who are the audiences "served" by its opinions and what form of argument is most useful for them?

A. Judges as Psychologists or Ethicists?

But assuming there's an ethics involved in judicial rhetoric may be a little presumptuous, notwithstanding what I have said. Maybe rhetoric is, after all, all a matter of (social) scientific investigation, with any moral concerns relegated to the substance or outcome of arguments, not the argument form itself. Indeed, Aristotle suggested that the successful practice of rhetoric entails a significant amount of (particularly psychological) homework: a rhetor must investigate his audience, its cultural predilections and emotions as well as the rhetor's own inner resources in order to determine the best argument, the best order, indeed, the best style for the particular occasion.148 Of course, with the complex and multiple audiences for the Court's opinion, you might naturally suggest that investigating your audiences in this way is a hopeless task, one that the Court might just as well forego. In part, to the extent that traditional rhetoric demands that the rhetor become knowledgeable about the psychology of human response to speech, you might argue that no judge can be fully competent to make a proper assessment of any individual's or group's likely response to the Court's opinions; modern psychological theory is just too complex and conflicting to yield reliable predictions.

That, of course, did not stop Aristotle, who catalogues in the Rhetoric any number of motivations that influence the average person.150 Indeed, his catalogue of human passions and motivations still resonates well in some ways. Yet, anyone who takes postmodern thought the least bit seriously must respect the critique that what


149. That may be especially true in light of your mockery of Justice Kennedy for introducing what you label the concept of "ersatz ... psycho-coercion." Lee v. Weisman, 505 U.S. 577, 641-42 (1992) (Scalia, J., dissenting).

150. See Rorty, supra note 148, at 11 (noting that Aristotle's views of people's dispositions are "layered in a veritable archaeological site.")
Aristotle gives us there is a folk-catalogue that may not hold up under the weight of what we now know about the human mind.\textsuperscript{151}

Rhetorical theory does not, however, call for rhetors to be psychological experts, to understand the medical or psychological workings of the mind sufficiently well to predict with certainty what any one person will think or do upon reading a Supreme Court opinion, considering chemical, biological, environmental and other influences. It asks rhetors to make practical judgments about what is likely to influence groups of people, on the whole, given some general assessments about human nature in particular contexts,\textsuperscript{152} none of which may apply to any specific individual. It asks rhetors to do so out of the fund of experience they have gained as influenced parties in a rhetorical world, and as observing parties in those parts of the world that are not directly rhetorical.

Just as adults have learned how to locomote through trial and error, coaching, imitation, past generations’ knowledge conveyed to them through speech and writing, their own ingenuity and abilities to analogize and adapt, and the like, so rhetoric calls forth an intellectual and emotional library that any good rhetor possesses, both internal to the practice within which the rhetor functions and from world external to that practice. In a sense, then, the Court is really imagining its audiences rather than being able to locate them in any objective sense, for any attempt to describe what audiences the Court serves will be disrupted by human experience: doubtless, the Court will not immediately imagine, as its members write opinions, the Muslim scientist in Tunisia, or the Malaysian labor leader or the third grade student in Lead, South Dakota, who are “tuning into” the Court’s rhetoric through the Internet,\textsuperscript{153} and yet all of these are among the Court’s audiences.

Perhaps a more doable project than becoming a Ph.D. in psychology would be for you, and members of your Court, to focus on the goals you have in mind in writing your opinion. Campbell argued that rhetoric informs four key aspects of the human intellect: understanding, imagination, passion, and will.\textsuperscript{154} To serve understanding means to use arguments framed with perspicuity, so that audiences can be informed (by dispelling their ignorance) and/or brought to a new state of conviction about reality (by vanquishing the errors in their thinking).\textsuperscript{155} To serve human imagination, the rhetor must employ vehicles that will delight and please, that will permit people to admire the form of the rhetoric and understand the excellence of its aesthetic qualities.\textsuperscript{156} To serve human passion, the rhetor must move his or her audience.\textsuperscript{157} And finally, to change the will, particularly toward action, the rhetor must not only persuade or convince his audience that his judgments are sound, but interest their passions, bringing them to a “vehement” conviction about the subject of the

\textsuperscript{151} See id. at 10.
\textsuperscript{152} See id. at 11.
\textsuperscript{153} See infra note 203 (providing examples).
\textsuperscript{154} BIZZELL, supra note 19, at 746 (summarizing the views of George Campbell in his work, THE PHILOSOPHY OF RHETORIC (1776)).
\textsuperscript{155} See id. at 750.
\textsuperscript{156} See id. at 750-51.
\textsuperscript{157} See id. at 751.
rhetorical argument.\textsuperscript{158} Cicero said it more simply: the legal rhetor’s job is to teach, please, and move.\textsuperscript{159}

Informing the understanding, delighting the imagination, moving the passions, changing the will - ethical activities, except possibly for the aesthetic touch that pleases the imagination. All of these aims focus on what a person, educated to know what is likely to be the truth, should do. Given the responsibilities that accompany the office of a rhetor with such wide flung audiences and such institutional authority as your own, we may now sneakily proceed to ask, what would an ethics of rhetoric require of a Supreme Court justice, and how do those requirements apply to the writing of opinions? Focusing on an ethics of rhetoric permits us to attend more consciously to what ancient rhetoricians have suggested is inherent in the ethical enterprise: rhetoric is dependent upon the inherent ethical character of the speaker; on his or her use of rhetorical strategies, which have both conscious and unconscious ethical dimensions for good or ill; and on the rhetor’s movement, again both conscious and unconscious, toward a morally good telos.

B. Sketching an Ethics of Warranted Trust

Borrowing from Martha Minow and Michael Perry, I would suggest four key moments in an ethics of rhetoric within a community of warranted trust, characteristics that may be used to judge how a rhetor attends to issues of character, strategy and purpose. First, rhetors must exercise awareness of their audience and their own preconceptions, for warranted trust is based on the willingness of communicative partners to reveal themselves. Second, a community of trust requires a moral commitment to the value of pluralism; such a community is by definition pluralistic and trust shuts down in the face of exclusion. Third, there must be a rhetorical commitment to honesty; and fourth, responsible concern for the other, including the exercise of moral virtues such as courage and love.

In Making All the Difference, Minow begins to describe the foundation of an ethics of awareness by identifying the unstated assumptions with which most people, including legal rhetors, evaluate the Other to whom they will speak or over whom they will exercise power, personal or institutional, judgmental or coercive.\textsuperscript{160} Each of these assumptions carries within it a moral imperative related to a rhetorical requirement of ethical awareness, which includes reflexive critique, the “self-critical” part of Michael Perry’s call for self-critical rationality.\textsuperscript{161} While it might be strange to think about “choosing” awareness, the ethics of awareness assumes that the issue we confront is partly a problem of the will, assuming that individuals can make some choices about how they attend to difference and whether they will attend to their own differences as well.

\textsuperscript{158} Id. at 752.
\textsuperscript{159} See id. at 33 (citing Cicero).
\textsuperscript{160} See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 50 (1990).
First, an ethics of awareness demands that rhetors understand and keep in mind that difference is virtually always a form of comparison rather than an objective fact that exists in the internal world. People of some races are “different” from people of other races because evaluators “select[] out some traits and make[] them matter … indeed, [they treat] people as subject to categorization rather than as manifesting multitudes of characteristics.” Indeed, race is an excellent example of the intersubjectivity of difference, since individuals who are differentiated on the basis of race will have virtually identical biological DNA in all other respects. Stated in a different way, the other differences that divide individuals—height, weight, gender, education, language, family status—will be much more significant indicators of their “difference” than race. In fact, the confluence of categorized factors which make one person the same as and/or different from another will be so complex that it would seem virtually meaningless to select out one of these factors as a meaningful basis on which to distinguish one person from another, much less one group from another.

An ethical rhetor will thus ask, is this difference I intend to point out a meaningful basis for comparison or not? What is the moral weight of the difference I intend to make in my speech between, say, myself or “my crowd” and the object of my rhetoric? What do I mean to accomplish by separating myself from him or her? Will the language I use reflect that I am offering this comparison for possible acceptance (or rejection) to my audience, rather than assuming it to be an uncontested “fact” which is not subject to discussion?

Second, following Minow, an ethics of awareness requires the rhetor to acknowledge his tendency to start from an unstated point of reference, which is most often the rhetor’s own situation. When it is not, that point of reference is often that of people “who have had greater access to the power used in naming and assessing others. Women are different in relation to the unstated male norm. Blacks, Mormons, Jews and Arabs are different in relation to the unstated white Christian norm. Handicapped persons are different in relation to the unstated norm of able bodiedness . . . .” Minow argues that this reference point is treated as “natural,” “normal” or even “normative”: the rhetor or observer thinks of himself as not having a situated perspective, while he believes that others’ perspectives are clouded by their situation. To use race as an example, again, a white person might think a person of color improperly sees racism in a police encounter or an employment choice where there is none; that is, the white person assumes that his view of the situation is “neutral,” not infected by race or his own racial status, where the view of a person of color is influenced by his minority status.

James Boyd White similarly argues that self-critical awareness is vital to “help us see more clearly (what is otherwise nearly invisible) the force and meaning of the habits of mind and language in which we have been brought up, as lawyers and as people, and to which we shall in all likelihood remain unconscious unless led to

162. See MINOW, supra note 160, at 50-51.
163. Id. at 51.
164. Id.
165. Id. at 52.
perceive or imagine other worlds”166 Justice Shirley Abrahamson calls this virtue candor, comprising both self-awareness and the disclosure I will label honesty 167 An ethical commitment to awareness, particularly self-awareness, is critically needed in a community of trust, because it ensures the participants that their fellows account for the partialness of their perspectives. Rhetoric becomes less a struggle to maintain one worldview over another and more a search for the missing pieces of reality. And it has practical benefits as well: predictability and guidance for future cases are the fruit of candid decisions.168

An ethical rhetor will thus ask, what are the reference points I use for making an argument? Are these reference points I share with my audience, or am I attempting to impose my reference points upon them as if they were “neutral” and “normal” and unchallengeable by my audience? Here, the confluence of the ethics and the efficacy of rhetoric is apparent: if the rhetor begins from an unstated point of reference which his or her audience does NOT share, his or her rhetoric will fall on deaf ears. One can think of any number of examples where rhetoric is disrupted from the start because of a poor rhetor’s assumptions about a neutral reference point from which distinctions can be made: “We have all experienced frustration when our husbands (wives) don’t listen to us ....” “Because a fetus is a human life, it naturally follows that ....” “Women’s bodies belong to no one but them, so that .... “All of us know the complexities involved in managing our stock portfolios ....”

Michael Perry makes a similar move in his description of an ethics of interreligious public dialogue in Love and Power,169 though he extends the point Minow is making beyond reference points to the arguments themselves and their relationship to transcendent truth. He calls for an ethical attitude of “fallibilism,” an embrace of “the ideal of self-critical rationality.”170 Thus, a principal consideration for him in whether justifications can be backed up by coercion “is the fact that human judgment is fallible. There is always the possibility that the moral judgment in the service of which a coercive strategy has been proposed is mistaken.”171

Fallibilism goes beyond the awareness that one is constructing categories of difference and comparing one person to another instead of “locating” an “objective” difference. It goes beyond using the rhetor’s own reference point as the normative one. Perry’s argument requires the self-awareness that both one’s reference point and one’s methodology for deriving a moral conclusion might be so infected by human limitation and (you and I might just as well say) sin that one should be especially reluctant to impose such a judgment by force. Indeed, Perry might well argue that even if one could establish that one’s initial reference point is based

167. Abrahamson, supra note 75, at 989.
168. See id. at 990.
169. Perry, supra note 161, at 99-111. For a continuation of these issues, see Michael J. Perry, Religion in Politics: Constitutional and Moral Perspectives (1997).
170. Perry, supra note 161, at 100.
171. Id. at 132.
(empirically or morally) on solid evidence, the process of moral reasoning itself can still be flawed due to human limitation or evil.

James Boyd White expands the ethics of awareness in the rhetorical practice that is law. In his view, legal rhetoric requires a constant sense of the resources and limits of one's language and culture; a conscious attention to the silence against which all language action takes place, to what cannot be said; an awareness of one's own need for an education, particularly for an education from the past that has created our linguistic and intellectual inheritance; a recognition that it is our responsibility to preserve and improve this inheritance, leaving it fit for use by others; an acknowledgement that the authority of this inheritance is at once real and tentative; and an awareness that others, who are also users of language, composers of texts, and members of communities, are entitled to basic respect as autonomous and equal persons. 172

In one sense, these calls for an ethics of awareness resound with what you are claiming when you fuss about the Supreme Court trying to impose its members' wills upon an unsuspecting public. 173 Indeed, it would not be difficult to criticize every single Supreme Court justice for the failings Minow and Perry are identifying: the failure to name one's identification of difference as a subjective comparison, the failure to recognize that the Justice's point of reference is being treated as normative, and the failure to engage in self-criticism to determine whether one's reference points or thinking processes are flawed because of human limitation or evil.

Yet, your critics have tried to remind you that you err in focusing so myopically on the Court's failings in this regard and that you don't take seriously how commensurate failings in equally flawed human beings in other branches of government might also influence their use of power for and against the Other. 174 You acknowledge these failings, 175 but you do not take as seriously as you claim the notion that separation of powers contains a corrective for them. You seem to prefer that judges simply throw up their hands when they recognize such failings. Indeed, to return to our discussion of the divine authority of the state, 176 you seem to be exceedingly unwilling to grant that judicial power, except as primarily defined as mechanical application of law to facts, is also a place where the Divine works out, with persons, moments of justice. Your recent comments on the Eighth Amendment

172. White, supra note 10, at xii.
176. Scalia, supra note 118, at 18-19.
illustrate this: instead of taking at all seriously the possibility that the Creator is working with and through the courts (as well as legislative and executive processes) to move human beings to a new view about the justice of killing for killing, you simply cast off the “evolving standards of decency” standard as if it were the personal fetish of overbearing pantywaist liberals. That you don’t take the continuous co-creation of God moving in the history of justice very seriously is made crystal-clear by your denunciation of the evolution of Catholic social teaching on this matter. If the Church itself must be bound to its traditional theology and the precise language of its past “legal documents” for its pronouncements to be authentic and legitimate, then what room could there possibly be for the Spirit of God to move in the human community?

Moreover, you fail in many ways to exercise Perry’s self-critical awareness upon its most accurate target: yourself. An ethics of awareness would recognize, particularly in those who are truly skilled rhetors, that no one is more likely to have the knowledge and skills to perform a complete and honest critique on himself than himself. However, such an ethics might also fruitfully realize what Luther might suggest is the irony that the person in the best position to criticize himself may be least likely to do so, for the human will inevitably puts up a truly breathtaking effort to blind itself to its own failures, or justify what we do as moral when it is not. (Which is one reason we need dissenting justices, as long as they are dissenting in an effective way.)

A second requirement of a rhetorical ethics is what Perry calls pluralism. Minow implicitly identifies how such an ethics challenges complacency about perspective: she notes that human beings tend to “assume that the perspectives of those being judged are either irrelevant or are already taken into account through the perspective of the judge” and that “existing social and economic arrangements are natural and neutral.” Perry extends this critique, which aims at avoiding the inclination to make others and their perspectives “invisible” by discounting them as identical with one’s own perspectives, or assuming that the groundwork for the judge’s perspective is “natural” and therefore right. Perry argues that the ethical duty of pluralism goes beyond the recognition and, if you will, the acceptance of the moral equality of situation and perspective of both judge and judged that is implied in Minow’s work.

In Perry’s view, the ethical duty of pluralism also entails a recognition of, and delight in, the positive good of a morally pluralistic context, not just the equality of diverse perspectives and situations that characterizes the rhetorical situation. Perry identifies several of the positive aspects of pluralism: (a) it can “often be a more fertile source of deepening moral insight than a monastic context;” (b) it can “fuel our efforts to imagine better ways ... of life;” and (c) it can provide “over-

177 Id. at 17.
178 Id. at 20.
179 See Braaten, supra note 120, at 34.
180 See PERRY, supra note 161, at 100.
181 MINOW, supra note 160, at 52.
182 Id. at 52.
183 See PERRY, supra note 161, at 100.
184 Id.
againstness,” i.e., it can trigger the very instinct to distinguish ourselves, which may help us find ourselves or at least “knowledge of [our] wants, needs, motives, of what kind of life [we] would find acceptable and satisfying ... [our] own human possibilities and [the ability to] see [our] form[s] of life against a background of envisaged alternatives.”

A commitment to pluralism can be critical to a community of trust. Such a commitment not only unseats the instinct for rhetors to divide up the world into “us” and them,” because it encourages the rhetor to view “them” as a critical part of “us.” It also extends a moral hand of welcome to another who may legitimately distrust the ability of a profoundly other person to imagine his own situation and concerns. The bridge for communication is not, then, the false assumption that “we are all alike” which comes undone as rhetor and audience come to know each other, but rather the willingness to learn how different we are without fracturing human relationship.

In another piece, on passion in judging, Professor Minow and Professor Elizabeth Spelman call for something beyond what Perry describes as a commitment to pluralism. They suggest that the judge should “try to take the perspective of all parties before the court prior to reaching a decision” and “remain open to the newness of each case” so that he/she can try to “develop reasons that would persuade that party or explain the result in terms that party would concede are fair.”

Perry, in parallel, suggests the importance of the virtue of “empathy with one’s interlocutors so that one can better understand the affective as well as the cognitive dimensions of their position.”

This is a claim I’m sure you would scoff at, and with at least some reason. Like self-criticism, attempting to live in the skin of another person and imagine things from his or her perspective is a difficult enterprise for anyone, including a judge. As a first challenge, there is the problem of limited information: no matter how much someone can tell us about his or her life, it is only a glimpse of what goes on; and this is particularly true of someone who has not the gift of story-telling, which is true of so many litigants, hence their need for lawyers. Also, the temptation Minow has already identified—to presume that our own perspective is identical with or includes the perspective of others—is exceedingly strong, making this goal elusive.

Moreover, as others have suggested, the goal of achieving justice through full consideration of perspectives is limited by the fact that we use a “party” system to decide on justice; many people affected by a court case, even in such a relatively private matter as family law, are not present before the court as parties. In a paternity action, for example, as you tried to point out in Michael H., taking the perspective of the parties to the lawsuit—the putative father, the mother, the child, and the state—leaves out a whole constellation of persons whose lives are deeply affected by the decision, including the mother’s husband and the putative father’s

185. Id. (quoting RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY 53-54 (1981)).
187. PERRY, supra note 161, at 99.
significant other, the child's grandparents and extended family members, other
children of the putative father and the mother, and so forth.

However, the key word in Minow's formulation is the word "attempt." That is,
she seeks a good faith exercise of imagination by the judge, putting aside his or her
own vantage point and trying on the case from the vantage point of as many others
as he can imagine. Again, this is just a common sense exhortation to a judicial
rhetor, for a rhetor's failure to attempt to discern how his multiple audiences may
conceive of the situation will mean that his words will not have persuasive effect.
For the judge, inattention to the other's perspective means that his or her decree will
have an effect on some losing litigants which is virtually indistinguishable from a
bully beating them up, because the judge's rhetoric will not permit them to
comprehend what is being done to them. Indeed, the failure of a judicial rhetor to
explain things in ways that have some resonance with the litigants' perspective may
virtually guarantee their non-compliance: it may multiply the number of abusers
who violate orders for protection, fathers who don't pay support, tortfeasors who
make themselves judgment-proof, and so forth.

In the Supreme Court, though Minow's charge is much harder to carry out given
the many perspectives affected by an opinion, the failure of justices to consider the
perspective of all of the parties can be devastating. Of course, some cases stand as
a warning about how difficult such a task is, and how potentially damaging if the
Court misreads: for example, debates go on about whether the Supreme Court's
attempt in Brown and succeeding cases to take into consideration both the plaintiffs'
harms and the perspectives of their opponents was good (because it allowed
integration to proceed relatively peacefully, if slowly) or bad (because it retarded or
halted the social/political progress of African Americans by expecting too little from
American racists). 189

Yet, other cases warn what can happen if the Supreme Court does too little
perspective-taking: it is difficult to understand violence against abortion clinics as
anything but a consequence of the Court's failure, as a rhetorical institution, to fully
acknowledge that it had taken the perspective of the pro-life community seriously.
Of course, some might argue that such violence might have been inevitable in such
a volatile issue. However, there has been virtually no similar political violence
accompanying the Supreme Court's controversial stands on similar life-and-death
issues, such as the right to die cases and capital punishment. And of course, we do
not know what other kinds of social violence—loss of hope, shoring up abusive
power relationships, etc.—might be occasioned by the Supreme Court's failure to
take all perspectives into consideration.

I'm sure that your reply would be: well, that's not my job, but the legislature's.
I have to start out with the presumption that those responsible for law-making did
take each person's perspective into consideration, and focus on my task of applying

189. See, e.g., brief discussion in John Wisdom Minor, One of a Kind, 71 TEX. L. REV. 913, 918-
19 (1993) (describing judges' ambivalence about the Brown decision); Richard Delgado, Rodrigo's
Seventh Chronicle: Race, Democracy, and the State, 41 UCLA L. REV 721, 743 (1994) (noting
"[d]ecisions like Brown produce a lot of hurrah-ing and singing and dancing in the streets, as you have
pointed out. Then, they are quietly stolen back by narrow construction, foot-dragging, and
administrative delay").
the judgment the legislature made to this particular case without trying to re-imagine what they thought of those perspectives.\footnote{See, e.g., Lewis v. Casey, 518 U.S. 343, 388 (1996) (noting that it is not the Court's role to resolve intractable prison problems).} That, of course, has the ring of common sense: in many complex sorts of legislation, it is only through a legislative or rule-making process that permits all kinds of “testimony” that the vast number of perspectives on a problem can be considered. And the legislative process is not constrained in accepting perspectives by the rules of evidence or other legal doctrines that would rule some perspectives “irrelevant.”

But legislative history of various statutes and rulings discloses countless cases where obvious perspectives were missing, or the lawmaker’s view of some perspectives was so distorted that a reviewing court could not simply turn a blind eye, and say that justice is largely done by the application of a clear rule. One shudders to think what would have happened if the Supreme Court had not challenged legislative and executive views about whether the perspectives of blacks toward segregation should be considered, or if it had not even challenged lawmakers’ views about what these perspectives WERE. Thus, to treat the constraint because of limited competence as an absolute rule rather than a rule of thumb is to ensure that vast and most critical areas of legal reform will never occur.

Third, both Perry and Minow essentially call for the virtue of honesty in rhetoric, which is critical in a community of trust for the reasons previously noted. In addition to the self-criticism and correction through the perspective-taking that honesty requires, the virtue of honesty also requires a probing and critical stance toward interpretation of the situation in which the judicial rhetor finds him or herself, and the willingness to give a fair recitation of “what is the case,” including (for judges) “what the cases really say.” Minow offers that the judge “should not disguise how he or she actually reached the decision, and should explain the decision not only through post hoc justifications but also with reference to the intuitions and reasons for selecting one principled justification over other possible ones.”\footnote{See Minow & Spelman, supra note 186, at 50-51.}

Essentially, this is simply a call not to distort the dynamic of rhetoric itself: a rhetor who fabricates or distorts evidence or reasons cannot ultimately be aiming toward the true and the good, the telos of rhetoric, even if he might excite some momentary passion in his hearers. But it is also a call for the judge to develop habits of rhetoric that are likely to give the appearance of integrity as well as ensuring its fact: the audience for the judge’s opinion is more likely to credit its worthiness if the judge explains not only to himself or herself the true facts and reasons for his/her decision, but to his or her audience as well. While integrity is properly bound up with constancy, a judge is more likely over time to display constancy if he or she is honest about the reasons for his/her decision instead of trying to fabricate a post hoc rationalization. Of course, the problem of constancy in judicial decision-making takes on a more complicated caste in a multi-member court such as the Supreme Court, where opinions may be influenced by the need to horse trade opinion language to make a majority.\footnote{See, e.g., Scalia, supra note 37, at 41-42.} This reality may call for a re-thinking of criticism.
of the proliferation of Supreme Court opinions, a staple of the common law until Justice Marshall's time, although multiple opinions have other flaws that might outweigh their virtues.

In addition, the virtue of honesty is dialogical; as Perry notes, quoting David Tracy on the importance of honesty and sincerity in interreligious discussions: "[C]onversation is a game with some hard rules: say only what you mean; say it as accurately as you can; listen to and respect what the other says, however different or other; be willing to correct or defend your opinion if challenged by the conversation partner ...." Thus, honesty is not only about telling what you see and understand as directly as you can the first time; it is about trying to get it right ultimately, so that the courage to be wrong is implicit in this virtue. What the courage to be wrong entails, of course, is the courage to be vulnerable to the other, to open oneself to the risk that a confession of error will be seized upon by an opponent to gain advantage over the rhetor. But that's the risk of rhetoric.

In a similar vein, Perry also suggests that an important aspect of dialogical virtue, linked with honesty, is taking the conversation partner at his word, instead of trying to probe for hidden motives for his argument, something we might call mutual sincerity bound up in the virtue of respect for the other. This claim is in some tension with Minow's claim that the judge should try to consider things from the perspective of the other, since Minow's duty requires the judicial rhetor to probe beyond the surface of what a litigant says to understand more. However, as Perry describes it, the idea of taking what the Other says seriously is not meant to limit the rhetor's search for information about his audience, but to avoid an abrupt end to search for true understanding that occurs when one presumes dishonesty in the Other and thus refuses to credit the Other's response as authentic without evidence. Because much suspicion of hidden motives stems from disbelief that the Other could have a different vantage point or logically reach a conclusion other than one's own, this virtue to some extent undergirds the virtues entailed in ethical self-awareness.

As Perry's point acknowledges, the virtue of honesty is shored up by what Judge Noonan has identified as fortitude, which is not stubbornness in retaining one's position but, when one believes one is right, "resolve, determination, firmness," patience which refuses to end the inquiry too early. Or, as Justice Brandeis described it, courage or fortitude requires the "willingness to risk positions, ... the willingness to risk criticisms, ... the willingness to risk misunderstandings that so often come when people do the heroic thing." James Boyd White has suggested
that the law requires attention to what others say, because any other alternative is bound to end in violence.200

This understanding of the importance of honesty and respect flows into perhaps the most key rhetorical virtue, the virtue of responsible concern for the other. This virtue is critical to the continued success of a community based on trust, because it is a moral commitment that transcends the particular interests that people in such a community may or may not have in common, and their momentary feelings toward each other, which may be quite bitter in a period of conflict over most cherished beliefs. Perry argues, "[c]ommunity, not agreement, is the fundamental test or measure of the success of ecumenical political dialogue. [T]he hoped-for yield is political community ... constituted by the sharing and the cultivation, in dialogue, of certain basic, albeit indeterminate, political-moral norms, and embodied, at its best, in a polity that is committed to certain dialogic virtues and aspires to mediate its conflicts, as much as possible, discursively rather than manipulatively, coercively, violently.201"

We might argue that community is not only the test of dialogue (or rhetoric): it is its sine qua non. Without responsible concern for the other, rhetoric can easily be diverted, in the hands of its masters, from its aim of finding and instantiating the good to serving as a tool to further the self-interests of the rhetor. Indeed, without the virtue of responsible concern for the other, it is hard to know why rhetoric should have any moral priority over physical violence, unless the clever somehow have some moral precedence over the brutish.

At this point, Justice Scalia, I can almost see you rolling your eyes. Sounds too much like a speech that we all should love each other, and that belongs back in religion, not in the law and certainly not in the courts, which deal with hard facts and hard law. Of course, I knew you might say that, because that's the modernist fact-value clap-trap, dividing rationality from morality and passion, the garbage that has gotten us into this culture war you complain about. If we head your way, there is no possible opportunity for the court's opinions, or any arguments within the realm of politics and law, to make any headway toward the just community. There is only sound and fury, people spewing their rhetorical venom at each other and at the brokenness of human institutions, or searching for addictions of flesh or mind in order to avoid that brokenness.

Now to the thing itself: your rhetoric, what it seems to say to your multiple audiences—other justices, lawyers, and the public at large—and how your rhetorical style contributes to what my kids might call a "negative message" not only about the Court itself, but also about the possibilities for community that the Court is engaged in creating.

III. TAKING YOU ON: SOME EXAMPLES

So far, you might not be convinced that I'm talking about you and your work. So let's just take a look at a few samples—though the harvest is plenty—of the ways

200. See, e.g., White, supra note 166, at 2044-45.
201. PERRY, supra note 161, at 124.
in which you "diss" some of your audiences and use the techniques that play on each of Aristotle's keys for moving an audience, on ethos, logos, and pathos.

A. Reading Your Audiences

For a Supreme Court justice, identifying and "reading" the audience is a much more complex task than the opinions themselves let on, even at the level of choice of argument. Aristotle suggested, for example, that even the form of argument depended on the audience: dialectical arguments were most effectively used in controversies with particular individuals, while the rhetorical form is best used in arguments to crowds lacking specialized knowledge or the ability to follow a lengthy chain of argument. Yet, the Supreme Court speaks both to lawyers and teachers and judges who have the specialized knowledge and ability to engage the Court dialogically, and to many who are not well aware of basic Court doctrine, much less the nuances of specific fields of law or the style of argumentation that lawyers employ among each other. Some of the Court's audiences are largely hidden from sight, though from the popular media and the Internet we are learning more about how these communities read the Court's opinion. Each of these audiences hears with unique "ears," with a set of preconceptions that mark its way, and each such audience must be a matter of concern for the Court.

The rhetorical tradition insists that the rhetor must appeal to the whole person, using reason (logos) through statement or argument, emotion (pathos), and the speaker's authority (ethos). This requires you to have a detailed understanding not only of what will gain its multiple audiences' agreement on a rational level, but what will command their emotional assent as well. Particularly where pathos is concerned, you seem to have a "tin ear" for your audiences.

1 The Other Members of the Court

The most immediate audience for an opinion, but probably not the most important, is the Court itself. This audience is in some ways the most difficult and the easiest, but it is not your only audience, as you sometimes appear to forget. Like an audience of family or friends, the Court has already trod over most of the rhetorical ground with you. Your judicial brothers and sisters are probably prepared, by and large, to engage you in the ways I have just described, because they know your character as a speaker and as a member of their community. Indeed,

202. PERELMAN. supra note 10, at 4-5.
204. See Rortv. supra note 148. at 8.
your Court audience is probably already quite predisposed either to grant you your flaws or tune you out, precisely because, over time, it has come to decide that your character is (or isn't) trustworthy based on past encounters with you.\textsuperscript{205}

Second, the Court as an audience has already heard not only the arguments and evidence you have offered in the opinion, but also many others that you have proposed to gain support for your opinion. To the extent you mean to inform, this audience will already be familiar with the ground you tread. To the extent you mean to convince them through logos, you probably have already scored a failure, or the other Justices would be joining your opinion. To the extent you mean to appeal to emotion, this moment has probably already passed, since you have had more than one opportunity orally and in print to move your Court audience to enthusiastically embrace the views you offer, without success.

Despite this fact, in your opinions, you very often address or refer to this audience, or its members; and most often, not in a very supportive way\textsuperscript{206} It is hard to know what you seek to gain by this regular address. Perhaps you mean really to reach another audience, making the Court's battles more transparent to the outside world, something I'll take up in a moment. Otherwise, addressing this audience would seem to be fairly useless at the point when your opinion is ready to be published in the Supreme Court Reports. Your objective can only be to leave a lasting imprint that may, somewhere down the line, move your colleagues to change their minds; or possibly to shame them into deciding future cases differently.

Indeed, maybe shame is your game: you address your colleagues in the harshest possible terms.\textsuperscript{207} To the extent they are your audience, one shakes one's head about what you could hope to accomplish with these insults. In fact, it is rumored that your insults have backfired, causing at least some members of the Court ideologically predisposed to join you to go a different way on a regular basis.\textsuperscript{208} Good for those of us who think you are pursuing some wrong-headed arguments, or more precisely, that you are wrong-headed in pursuing them to their ultimate conclusions. Bad for you, if you indeed believe what you say and want others to join you in believing it.

\textsuperscript{205} See, e.g., COOPER, supra note 33, at 113 (describing how Powell found you irritating and uncivil, and noting that your wit and charm was wasted on Powell).

\textsuperscript{206} See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 987 (1992) (Scalia, J., dissenting) ("Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation."); Utah v. Evans, 536 U.S. 452, 513 (2002) (Scalia, J., dissenting) ("What a wild principle of interpretation the Court today embraces .... That is, I think, the inevitable consequence of trying to combine the incompatible.").

\textsuperscript{207} See, e.g., Holland v. Illinois, 493 U.S. 474, 484-85 (1990) (Scalia, J., dissenting, referring to Justice Marshall's opinion in Batson v. Kentucky, 476 U.S. 79, 107 (1986)) ("Misplaced optimism [on whether the Court would invalidate peremptory challenges based on group discrimination beyond race] is cost free to those who in any event 'would ... eliminate[peremptory challenges entirely in criminal cases, but we see no justification for indulging it.']").

\textsuperscript{208} See, e.g., Karen Chopra, Putting the Judicial Squeeze on the Civil Rights Act of 1871, 1993 DET. C. L. REV. 1315, 1350 n.221 (1993) (noting that your refusal to compromise and scornful tone have turned away "natural allies").
2. Your Lawyer Audience

It is not fully clear what an effective appeal to logos, ethos and pathos might demand of you for your second audience, the law-trained community that interprets, advises, and uses your opinions on a regular basis, in academia, in practice, and on the lower court bench.

With the possible exception of academics, who are not taken seriously by many people anyway (did YOU read this far in my article?), this audience has been largely trained to do what you want them to do—look to cases for the “hard” legal rules which then can be mechanically applied to the facts, and exercise rationality in the very limited sense in which modernists use that term. This audience will probably be more skeptical about ethos or pathos, indeed, about any rhetorical flourishes you may be making in an effort to win people over to your side. In fact, this audience is often taught that, while arguments aimed at phronesis are possible resorts, they are never preferable to concentration on facts and rules—“go with the law when it is on your side, and when it is not, argue policy” So it is hard to know what you seek to gain from them by the rhetorical baggage, which I’ll later describe, that you seem to need to carry around in your opinions.

Indeed, if anything, you violate the same ethical precepts that you do with your colleagues. First, there’s no evidence in your opinions, at least, that you practice an ethics of self-awareness as to lawyers—that you take their perspectives seriously, that you imagine what difficulties they may be facing as they try to do their jobs as scholars and practitioners, critiquing, understanding, predicting, advocating. Indeed, the evidence is to the contrary: you regularly discount as irrelevant any opposing perspectives that colleagues or lawyers present to you, or else assume that they must be included in your own.

As to the legal audience you serve, there is also little evidence that you practice the virtue of honesty as broadly described. To be sure, you think you are being virtuous when you are being direct; but being direct (or insulting) is not the same thing as being honest, which is about the process of finding the truth and making yourself vulnerable to the other. Even if it could be called candor, however, your directness does not extend to admitting that you are part of the very bar that you criticize. It is a rare and wonderful moment when you confess that you are part of this machinery rather than an outsider critiquing it. For example, I was impressed when you recently admitted that you were a responsible part of the machinery that puts murderers to death in this country, and that no one else is to blame, if blame is indeed appropriate. That is a refreshing position in a system that involves denial at every stage, though your apparent willingness to limit your responsibility to these

209. Do you take the work of my colleagues in constitutional law seriously? See Alice Koskela, Scalia Shows Textualists Have a Sense of Humor 43 OCT. ADVOCATE (Idaho) 31, 32 (2000) (“It's idiotic, but we have every law school in the country talking about due process as if it made sense.”).

210. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992) (noting that the concurrence's correct observation was “entirely irrelevant” to the case).


212. Scalia, supra note 118, at 18.
direct kinds of judicial involvements\textsuperscript{213} is troubling. More often, you effectively insult the bar, suggesting that they are an elite who are out of touch with real people (whom you claim to side with)—e.g., real Christians, real working people, real family people. It would, of course, be nice if you would insult them more often for things they might really be guilty of—e.g., whitewashing injustice, living a life of ease while others suffer, and so forth. But to pretend that you are somehow removed from this community instead of acknowledging your part in it seems at the very best disingenuous.

Moreover, you rarely admit in your opinions that you identify yourself as part of a specific community, one that some knee-jerks (quick to equate religion with conservatism) might call Christian anti-legal-establishment conservativists.\textsuperscript{214} Again, external evidence gives you away: it is clear from the way you use the language of inclusion—"we" and "us" versus "they" and "them"—that there is a particular community to which you believe yourself responsible, and that such a community is set over against others.\textsuperscript{215} There is, of course, nothing wrong with commitments to particular social constituencies: to pretend that judges come from some ivory tower for philosophers somewhere is equally as pernicious as expecting them to serve only the interests of the group from which they came. Indeed, some of your best friends—or at least your acquaintances—might possibly be some of mine. But your unwillingness to acknowledge these loyalties when you write such acerbic opinions is a bit hypocritical: you cannot consistently mock judges and litigants for proceeding from a particular values standpoint, and then hold yourself out as objectively disinterested in affairs that exceed your professional jurisdiction.\textsuperscript{216}

Finally, you seem not to express any awareness or interest in the value of pluralism.\textsuperscript{217} Within the lawyer/judge community, that lack of sensitivity—much

\textsuperscript{213}. \textit{Id.}

\textsuperscript{214}. Chemerinsky, \textit{supra} note 3, at 385 (noting how you deny your own value choices).


\textsuperscript{216}. \textit{See, e.g.,} Lee v. Weisman, \textit{505 U.S. 577, 637-38} (1992) (Scalia, J., dissenting) ("It is fanciful enough to say that ... [a student standing silent could believe that a group prayer signified her own participation/approval in it.] It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise." "We indeed live in a vulgar age. But surely 'our social conventions ... have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence"); \textit{Romer} 517 U.S. at 640 (Scalia, J., dissenting) ("The Court's entire novel theory rests upon the proposition that there is something special—something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.").

\textsuperscript{217}. \textit{See, e.g.,} Scalia, \textit{supra} note 118, at 18; \textit{Romer} 517 U.S. at 651 (Scalia, J., dissenting).

\textsuperscript{218}. \textit{See, e.g.,} Ann Elizabeth Mayer, \textit{Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?} \textit{23 HASTINGS CONST. L.Q. 727}, 764 (1996) (noting your "dissimissive attitude toward international law and international opinion"); Atkins v. Virginia, \textit{122 S. Ct. 2242, 2264-65} (2002) (Scalia, J., dissenting) ("[E]qually irrelevant [on the issue of the constitutionality of the death penalty] are the practices of the 'world community, whose notions of justice are (thankfully) not always those of our people'"; "But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called
less interest—is particularly troubling in a global setting. South African, Canadian, and Namibian judges, among others, look to your opinions for guidance about how they should interpret parallel provisions of their constitutional law. I have not even raised the legal audience you most clearly affect: the state supreme court judges throughout the United States. You are certainly not alone in this respect, but I have not noticed that you particularly acknowledge any judges who will be influenced by your opinions other than those federal judges required to follow the Court’s decisions. For you, insofar as you see the job of the Court as a technical discipline, this is perhaps not troubling, as these courts should not be looking to you for advice anyway. However, they do, and for you to ignore the fact that your opinions—both majority and dissenting—will have an influence on how these courts understand American values, American law, and the American judicial system is fairly short-sighted.

3. Public Audiences

As I have suggested, perhaps the most important of your audiences, and the most interesting in terms of rhetorical analysis of your work, is your public audience, those people who are not part of the “inner circle” of either the Court or the legal establishment. For them, as James Boyd White suggests, judicial opinions constitute a “manifestation of [judicial] character and an establishment of a community—that can be judged ethically and politically”.

One of the factors that the Court must keep in mind as it speaks to its public audiences is the plurality contained in the notion of a public community watching the Court as its own political-ethical institution. To the extent that rhetoric is designed to inform and convince—to educate people on the true and good, and to urge them to revise their thinking accordingly—it is clear that the rhetor must have some understanding of what preconceptions his audience will hold on the matters that come before the Court. In the Court’s most controversial cases, such preconceptions will be as wide-ranging as one could possibly imagine, and as well-informed or ill-informed. For example, in any case involving life-and-death issues, the Court’s audiences will include those who have extensive training in moral


220. See, e.g., White, supra note 166, at 2047
deliberation on these issues as well as those who have had none, audiences who have a complex and nuanced understanding of the differences between various biological signs of life, and others who have barely a clue. Indeed, the Court’s audience will include those who have no opinions about the Court’s decision on these cases, and those whose opinions are so strongly held that they are willing to be civilly disobedient and perhaps violent in order to advocate for them.

Speaking to a complex plurality, such as this multitude of audiences, is a tricky rhetorical business, requiring careful consideration of how the rhetor convinces through the three chief forms of persuasion: ethos, logos, and pathos.

B. Establishing an Ethos: The Problems with Sarcasm

In Aristotle’s view, a key part of establishing credibility with an audience was to establish the character (ethos) of the speaker: “Since the purpose of rhetoric is to influence decisions, the speaker must not only see to it that his argument is demonstrative and persuasive, but also that he is a man of good character.” Aristotle argued that three things engender trust in the orator’s own character: the orator’s prudence or good sense, his virtue or good moral character, and his goodwill. Conversely, people are likely to form a false opinion when the rhetor fails to use common sense to make his argument, when the rhetor lies even though he knows the truth, or when the rhetor does not have a good opinion of his audience and therefore does not recommend the best course of action.

In ancient Greece, the character of the speaker might have been partially pre-established from the audience’s familiarity with the speaker’s past work. In the case of the Supreme Court’s public audience, however, with the exception of some “Court-watchers” such as the news media, each Court opinion bears the weight of establishing the character and thus authority of the speaker(s), because the reader is unlikely to know either the biography or the trail of past rulings by that particular member of the Court. Thus, it is exceedingly important that Court members writing opinions be cognizant of both how they present their own character, and of how the character of the Court as a whole is presented.

Of course, you might want to argue that in the modern age, character is not a crucial aspect of rhetoric, that the success or failure of rhetoric depends largely on logos, on the arguments made. In a sense, because of the modern turn toward a theory of truth that is abstract and universal, separating ideas from their context and authors, and because modern rhetors rely heavily on the written form which does not nearly acknowledge the author’s character except indirectly that is probably

222. ARISTOTLE, RHETORIC 1377b, in APOSTLE, supra note 10, at 617
223. Id. at 1378a, in APOSTLE, supra note 10, at 618.
224. Id.
partially true. (Narrative jurisprudence and the law and literature movements pose a clear challenge to that rending apart of character and content.)

On the other hand, the modern suspicion of rhetoric as the exercise of power by the crafty to serve their self- (or class) interests has also heightened the converse dynamic: even at a very public level, Americans harbor deep suspicion about whether what their public leaders say can be trusted precisely because they realize the possible manipulability of language, the open-endedness of words, and the breakdown of the public demand for integrity. For example, it is a virtual maxim among published commentary on politicians’ promises that the public can’t expect them to be kept, and any reading of campaign commitments discloses the ways in which promises are made abstractly and categorically, using language that will resonate with certain audiences but not make the speaker subject to any form of accountability.

And, one can point to any number of cases—on the political spectrum from Gary Hart and Bill Clinton to Pat Robertson—which illustrate that, despite this fact, Americans resort to the character of a politician speaker to determine whether his rhetoric can be trusted or not. President Clinton’s credibility as a rhetor was deeply wounded by the Lewinsky affair, while President Reagan, who was never pinned with any of the shenanigans of his friends, continued to have rhetorical credibility well beyond his term in office.

Yet, despite evidence that character does still matter in the legal and political realms in which the Supreme Court participates, you seem to delight in using language which casts doubt on the character of the Court as an institution. (Indeed, these moves also undermine your own rhetorical credibility.) In reviewing what you do, we might pause to consider Aristotle’s three species of belittling: contempt, in which someone shows that he believes someone or something is of no worth; spite, that is, preventing someone from getting something he wishes just to stymie him; and insult, causing harm or pain by doing things that shame someone else, simply for the pleasure of it.

225. See, e.g., Moderates are In; Partisans are Out, BOSTON GLOBE, Nov. 28, 2000, at A14 (castigating Bush and Gore for promises they could not keep, as “the worst sort of demagoguery”); Sandra Sobieraj, On Bush's Agenda in Calif. Compassion and Conservatives, PHILADELPHIA INQUIRER, May 1, 2002, at A17 (DNC chairman McAuliffe noting President Bush’s having walked away from his 2000 campaign promises).

226. See, e.g., Jerry Roberts, Hart Confesses to ‘Sin at Iowa Demo Debate, SAN FRANCISCO CHRON., Jan. 16, 1988 (noting that Hart addressed “doubts about his character and judgment” raised as a result of his affair with Donna Rice); Elizabeth Leland, Speculation on Swaggart’s Fate Grows, HOUSTON CHRON., Feb. 21, 1988, at 7 (noting ramifications of Swaggart’s sex scandal on Robertson’s political campaign); Leon Hadar, Dole may get personal, BUSINESS TIMES (Singapore), Oct. 15, 1996 (noting candidate Bob Dole’s intent to “lash out at Mr. Clinton on the ‘character’ and ‘trust’ issues”).

227. See, e.g., Restoring the Presidency, NEW ORLEANS TIMES-PICAYUNE, Feb. 13, 1999, at 6B (suggesting that the Lewinsky scandal “darkened the shadow of dishonesty that has followed” Clinton throughout his public life).

228. See, e.g., Jonathan Kirsch, Book Review: The Awkward Age of Political Oratory, LOS ANGELES TIMES, July 6, 1988, at 1 (describing Reagan’s success as “the Great Communicator” due to his reassuring rhetoric); Reagan's Reign: We Survived, but We'll Pay for It, NEWSDAY, Jan. 19, 1989, at 72 (noting Reagan's rhetorical successes while he was “lackadaisical in managing the government”).

229. ARISTOTLE, RHETORIC 1378b, in APOSTLE, supra note 10, at 619.
You often express contempt for members of the Court and insult them, wielding sarcasm and name-calling as your vehicles. Oftentimes, you express your contempt simply because the Court is deciding an issue. In the abortion cases, you are exceptionally vitriolic:

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong the Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical ....

But not unusually so:

The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. "[I]n the end," it is the feelings and intuition of a majority of the Justices that count—"the perceptions of decency, or of penology, or of mercy, entertained ... by a majority of the small and unrepresentative segment of our society that sits on this Court."232

In fact, I suspect that one reason you address your colleagues by name so often is to drive home your point that the Court is merely a collection of individuals whose authority does not carry beyond the specific argument they are attempting to make—that the reader should give no more weight to their opinion than that of the man on the street, and that they are entitled to no particular respect due to their office.

You also address members of the Court in a way that suggests that the reader is well to be cynical of their motives or reasons for making the arguments they do. You accuse the Court of "contriving to avoid" overruling Roe v. Wade and "fabricating" a revision of that case.234 It is not unusual for you to suggest that

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230. See Chemerinsky, supra note 3, at 399-400.
231. See, e.g., Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989). See also Planned Parenthood v. Casey, 505 U.S. 833, 983 (1992) (Scalia, J., dissenting) ("The emptiness of the 'reasoned judgment' that produced Roe is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in these and other cases, the best the Court can do to explain how it is that the word 'liberty' must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.").
232. Atkins v. Virginia, 122 S. Ct. 2242, 2265 (2002) (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 815-17 (1988). See also TRW Inc. v. Adelaide Andrews, 534 U.S. 19, 38 (2001) (Scalia, J., concurring) ("These cries, however, are properly directed not to us but to Congress, whose job it is to decide how 'humane' legislation should be—or (to put the point less tendentiously) to strike the balance between remediation of all injuries and a policy of repose."); Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("Bivens is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.").
233. Webster 492 U.S. at 532.
234. Casey, 505 U.S. at 984-85.
other justices' or lawyers' arguments or statements are "patently false," or impugn their honesty more sarcastically:

This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.

Sometimes your gibes seem to be merely Aristotelian insults—intended to inflict shame without any particular goal in mind. For example, you delight in suggesting that other Justices' opinions are not just indefensible, but deliberately obfuscatory or (not deliberately) incomprehensible to the reader.

Or you might suggest that your colleagues are a little dim-witted. Or that no rational person could possibly conclude what they have concluded. In Kansas v. Crane, for example, you use Cicero's favorite technique to suggest that Justice Breyer must have been out of touch with legal reasoning, if not reality, in holding that states must determine that sexual offenders of any kind show "serious difficulty in controlling behavior" before they can be civilly committed, possibly for life. You say variously:

235. See, e.g., Johnson v. Transp. Agency, Santa Clara County, CA, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting). See also id. at 668 ("Given this meaning of the phrase, it is patently false to say that the requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance ... that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination.").

236. Id. at 671. See also United States v. Virginia, 518 U.S. 515, 574 (1996) (Scalia, J. dissenting) ("The wonderful thing about these statements is that they are not actually false .... But the statements are misleading, insofar as they suggest that we have not already categorically held strict scrutiny to be inapplicable to sex-based classifications."); Atkins, 122 S. Ct. at 2262 (Scalia, J., dissenting) ("What the Court calls evidence of "consensus" in the present case (a fudged 47%) more closely resembles evidence that we found inadequate to establish consensus in earlier cases."); Casey, 505 U.S. at 993 (Scalia, J., dissenting) ("The Court's reliance upon stare decisis can best be described as contrived."); Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting) ("The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled 'gay-bashing' is so false as to be comical.").

237. See, e.g., U.S. Airways v. Barnette, 122 S. Ct. 1516, 1528 (2002) (Scalia, J., dissenting) ("Indulging its penchant for eschewing clear rules that might avoid litigation ... the Court answers 'maybe.'").

238. See, e.g., appendix for comments on your inability to understand the Court's argument.

239. See, e.g., U.S. Airways, 122 S. Ct. at 1531 (Scalia, J., dissenting) ("Sadly, this analysis is lost on the Court, which mistakenly and inexplicably concludes ... that my position here is the same as that attributed to U.S. Airways").

240. See, e.g., Kansas v. Crane, 534 U.S. 407 417-23 (2002) (Scalia, J., dissenting), quoted in Chemerinsky, supra note 3, at 399. See also Lee v. Weissman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting); ("The Court's argument [that students at graduation are coerced into praying] is, not to put too fine a point on it, incoherent."). Romer 517 U.S. at 640 (Scalia, J., dissenting) ("The Court's entire novel theory rests upon the proposition that there is something special—something that cannot be justified by normal 'rational basis' analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.").

241. Cicero's oratorical style was particularly "characterized by amplification—naming the same thing two or three different ways in succession, adding elaborating or qualifying clauses," in order to evoke much stronger emotions. BIZZEL, supra note 19, at 196.
"That is simply not a permissible reading of [a] passage" of Hendricks, the previous sex offender civil commitment case decided by the Court.\textsuperscript{242}

"[T]he passage ... cannot possibly be read as today's majority would read it."\textsuperscript{243}

I also doubt the desirability, and indeed even the coherence, of the new constitutional test [this case] substitutes [for Hendricks].\textsuperscript{244}

This formulation of the new requirement certainly displays an elegant subtlety of mind. Unfortunately, it gives trial courts, in future cases ... not a clue as to how they are supposed to charge the jury!\textsuperscript{245}

Again, what can possibly be the purpose of this tactic before your wider public audience is unclear. Perhaps you mean to shame justices into reconsidering their positions in the next cases that they write, or into creating what you believe to be a more comprehensible legal scheme, though you profess despair at that prospect in some cases.\textsuperscript{246} Yet, just as any situation in which a speaker shames someone in a public situation, there are other ramifications for everyone. I suggest you might consider them in weighing the pros and cons of shaming as a technique: the rhetor's credibility as someone genuinely committed to respect for others is called into question, and the target may respond with self-protective anger,\textsuperscript{247} which is almost guaranteed not to move an honest conversation forward toward the truth, much less get you your needed vote on the next case.

Moreover, the watching public may probably become sidetracked from the issue at stake, thinking that the real issue is where to put their loyalty, unsure whether to ally themselves protectively with the target of the shame or whether to stay as far away as possible, lest the stigma conferred upon the target be transferred to them. Your use of this kind of rhetoric, both in your opinions and "off the field,"\textsuperscript{248} is particularly ironic when you yourself express distress about the "great damage" caused to the image of the Court when it does not act in a "statesmanlike" manner,

\textsuperscript{242} Crane, 534 U.S. at 419 (Scalia, J., dissenting).
\textsuperscript{243} Id. at 420.
\textsuperscript{244} Id. at 422.
\textsuperscript{245} Id. at 423. \textit{See also} other examples of your view that the Court is oblivious to reality. Devlin v. Scardelletti, 536 U.S. 1, 19 n.3 (2002) (Scalia, J. dissenting) ("While this difference between procedures of federal and state courts seemingly escapes the Court's attention, it was well enough recognized [in the citation the Court relies on]."). \textit{Weisman}, 505 U.S. at 633 (Scalia, J., dissenting) ("[S]ince the Court is so oblivious to our history as to suggest that the Constitution restricts [religion] to the private sphere" ....").
\textsuperscript{246} \textit{See}, \textit{e.g.}, Antonin Scalia, \textit{The Disease as a Cure}, in \textit{RACIAL PREFERENCE & RACIAL JUSTICE} 209, 211 (1991) (where you noted, "I find [the area of affirmative action] an embarrassment to teach. Here, as in some other fields of constitutional law, it is increasingly difficult to pretend to one's student's that the decisions of the Supreme Court are tied together by threads of logic and analysis—as opposed to ... threads of social preference and predisposition. Frankly, I do not have it in me to play the game of distinguishing and reconciling the cases in this utterly confused field.").
\textsuperscript{248} \textit{See}, \textit{e.g.}, Scalia, \textit{supra} note 246, at 211.
making it the “object of the sort of organized public pressure that political institutions in a democracy ought to receive.” \(^{249}\) Especially after you complain that the opinion of another Justice who has modified a due process ruling “cheapens the currency of our judgments.” \(^{250}\) Thus, your rhetorical style is virtually guaranteed to stir up Kulturkampf \(^{251}\) where there was none, or heighten what conflict over the issues there was into a cultural grudge-match, rather than focusing public attention on resolution or accommodation of the issues.

Aristotle would have advised you to write differently. He argued that it is important to treat authority well, and probably most importantly the authority from which you derive your own. \(^{252}\) The rhetoric of contempt is especially problematical for an institution that derives virtually all of its enforcement power from what is popularly called “moral authority,” that is, the ability to make its audiences believe that, in the end, it is making decisions on the basis of just and proper reasons, so there is no strong basis for them to disregard its rulings. Were the Court not to have such moral authority, it would seemingly either have to pack its bags and give up, or acquire some instrument of coercive power—some Supreme Court Army—that could reinforce its demands with physical as well as legal force. For if the Court’s chief public audience—the voters—do not grant it “moral authority,” it is hard to see why any official elected by that audience should be likely to grant it any either. Most of us would, I think, agree that giving the Court its own bomber squadron would not be a positive move in the right direction, for separation of powers reasons that are well-known to all American schoolchildren.

Of course, protecting the authority of the Court when it speaks does not entail that the Court should be treated as a fragile piece of ceramic or a sacred totem, immune from criticism, or that rhetors must adopt a style of engagement that follows Boston Brahmin (or Minnesota Norwegian) rules of politeness and civility. The power of the Court rests as much on its willingness to engage in robust gloves-off honest debate as it does on justice done by the Court. I expect that one of the reasons your opinions attract at least some people is that they perceive you to be someone who exposes the pretense of rules of etiquette, as well as the pretense that the Court must be unimpeachable to survive or that its opinions are indeed perfect examples of rationality, justice and truth.

But it is important to remember what rhetorical uses sarcasm serves. As a form of biting humor, sarcasm finds its best home in situations where those without power attempt to expose the pretentiousness or hypocrisy of the more powerful. Sarcasm

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249. Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1988). You complain, “We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.” \(\text{Id.}\) at 535.


252. ARISTOTLE, \(\text{supra}\) note 9, at Bk. II, Ch. 22. 1396a (“We must not, therefore, start from any and every accepted opinion, but only from those we have defined—those accepted by our judges or by those whose authority they recognize: and there must, moreover, be no doubt in the minds of most, if not all, of our judges that the opinions put forward really are of this sort.”).
is a way of leveling the playing field, by cracking the apparent invulnerability of the more powerful person and exposing his or her actions to a truth that the audience has implicitly agreed to beforehand.

Thus, being sarcastic about President Clinton's moral condemnations of sexual predators in the workplace or President Bush's preaching about corporate responsibility might work. Conversely, sarcasm is not nearly as effective as a truth-demanding technique when the important factual and value assumptions in a particular case are viewed as contested by the audience, and when the target of the sarcasm is or appears to be acting in good faith. For example, using sarcasm to criticize someone's sister for keeping their mother on life-support would not be particularly effective. Similarly, name-calling best works when the name seems apt to the audience, when the comment accurately alludes to the worst failings of the individual singled out for ridicule, but not when it seems aimed at a vulnerable and understandable soft spot in an admittedly frail human being. Calling a Justice "stupid" because he oversimplifies complex matters might work rhetorically, but equating a mentally disabled person and a "stupid" or "ugly" one is not a way to make friends and influence (at least good) people.

Thus, your use of sarcasm or name-calling might be appropriate when members of the Court are, in fact, being pretentious or hypocritical. To the extent you are responding to character traits that are displayed in your daily interactions with them, and not in the final product they produce, however, your attempt to air their flaws in print will likely backfire. As your mother might remind you, there is a time and place for everything, and it's not always a wise thing to "air your dirty laundry in public." In part, that is because people can't be convinced (or talked out of their view) of someone's pretentiousness or duplicity when they don't have access to the events that make that charge plausible, and your public audience largely has access only to what all of you put in print.

Your use of sarcasm and name-calling as a means of responding to colleagues who disagree with you deeply on matters such as the scope of judicial review and constitutional hermeneutics displays how thoroughly modern you are in some ways. For you give the impression that matters are either absolute or else they must be (terribly) relative. For example, you constantly suggest that it is impossible that another Justice could sincerely and plausibly hold a different position from your own on the power and duty of the Supreme Court to adjudicate deeply contested moral matters. That is because you seem, at least, to hold the modern view that


254. See, e.g., Ken Fireman, Bush: It's Old News/His past ventures scrutinized as he decries corporate deceit, NEWSDAY, July 9, 2002, at A05 (quoting a liberal group as saying about Bush's regulation of corporate scandals, "Remember the saying about foxes guarding the henhouse .... Well, guess what's happening in Washington").

255. See, e.g., Atkins v. Virginia, 122 S. Ct. 2242, 2267 (2002) (Scalia, J., dissenting) ("The Court throws one last factor into its grab bag of reasons why execution of the retarded is 'excessive' in all cases: Mentally retarded offenders 'face a special risk of wrongful execution' because they are less able 'to make a persuasive showing of mitigation,' 'to give meaningful assistance to their counsel, .... 'Special risk' is pretty flabby language (even flabbier than 'less likely')—and I suppose a similar 'special risk' could be said to exist for just plain stupid people, marmariculate people, even ugly people.").

256. For example, on abortion, see Planned Parenthood v. Casey, 505 U.S. 833, 984, 989-90...
there can be only one “true” and indubitable method of constitutional interpretation (either that, or it is all chaos and power).

Following this view, anyone who is arguing a different view from yours must either be unconsciously power-hungry (i.e., pretentious) or consciously trying to usurp power (s)he claims not to have (i.e., hypocritical).

This cynicism you display about the hidden motivations of Justices who honestly register a disagreement with you about these matters constitutes a deep violation of two of the tenets of rhetorical ethics. First, it is a thorough rejection of the tenet of pluralism, which expects not only that rhetors recognize that their vantage points and value assumptions are not shared by all, but that they come to embrace the value of others’ vantage points for viewing a problem. Even if you disagreed deeply with Justice Brennan’s philosophy of how “living” the Constitution was, it would say much about how small a person you are if you could not recognize how deeply it was rooted in your own faith tradition, and how thoughtful and well-meant his jurisprudence was.

Second, such cynicism is a deep rejection of the value of reciprocal honesty, requiring that you accord your rhetorical enemy’s argument as much respect on its face as you would expect your enemy to accord you. Both your supporters and some of your critics have attempted to defend you against accusations that your opinions are simply a smokescreen for you to impose your own (so-called conservative) opinions on the rest of us. Yet, every time you use sarcasm against one of your colleagues on the Court, you implicitly accuse them of attempting to hide a political agenda in a similar smokescreen of apparently objective jurisprudence, rather than attempting faithfully to find an understanding of “rule of law” that will work in a changing society.

In a sense, you are to some extent cutting off your nose to spite your face. As I noted, Aristotle argued that the successful rhetor must be thought of as a person of common sense, a person of virtue, and a person of good will. Yet, your willingness to use sarcasm when it is not appropriate is ultimately inconsistent with the hope that your audience will view you as a person of good will. As I will suggest next, your willingness to fudge the evidence that you use in your argument also undercuts your ability to establish yourself as a person of virtue. And, your willingness to exaggerate or oversimplify what are complex matters casts doubt upon whether you are a person of common sense. Ultimately, your tactics have backfired, at least with

(1992) (Scalia, J., dissenting) (“It is not reasoned judgment that supports the Court’s decision; only personal predilection” and “It is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily [on abortion].”). For your views on affirmative action, see, e.g., Holland v. Illinois, 493 U.S. 474, 486 (1990) (Scalia, J., dissenting) (comment on Justice Marshall, quoted in infra note 313).


some of the scholars who accept and work with some of the ethical tenets I have suggested. But this is your "inner audience," a group that can see this kind of mistake being made over and over again.

It is difficult to know what your more public audiences will make of this kind of ridicule of the Court and its members. Some of them may well believe you, because they are predisposed to see you as having a political agenda that they share. More dangerously, though, your tactics may well deepen the cynicism of those who share with you the modern assumption that all disagreements are the product of hidden motives and desires, and that the Court's opinions are no more than that, another stage where the great drama of corrupt power politics is being played out. Because in such dramas the same people always win, those for whom your cynicism is infectious, who are already morally susceptible to such persuasion, are sure to believe that there is no such thing as (even close to) impartial justice in the courts.

Perhaps your sarcasm about the Court's jurisprudence is simply aimed at its failure to come up with a clear, certain, and final rule that will resolve an interpretation of a constitutional or statutory provision once and for all. However, as Viehweg's paradox points out, the Court as an institution cannot regularly be the object of ridicule just because it cannot resolve an immense legal dilemma with the certainty and finality that modern reasoning would call for. The moral argument embedded in all constitutional and many statutory interpretive contests resists the sort of modern "proof" you would attempt to place on it, and so does not expose a pretense by members of the Court but merely our human limitations as moral thinkers.

Unfortunately, you also employ the tactic of sarcasm against the people who inhabit the cases in the Supreme Court reports. For example, in the Michael H. case, you might well be right that the litigants are not the most upstanding people in the world. However, your attempt to characterize and create resentment for international models and despicably promiscuous rich businessmen violates the tenet of responsible concern for the other, not to mention being disrespectful of the tenet of pluralism. In fact, you have very little to go on which might explain how the child, Victoria, came into being and why she might possibly benefit from having two men claim her as father—you have no idea, for example, whether her mother got involved with a neighbor because she was being abused by her husband, whether he was also fooling around, whether Victoria was conceived in a moment the parties regretted but took responsibility for, or whether she was conceived as part of a careless ongoing fling between two self-involved people. Indeed, your whole attitude of contempt for the litigants seems gratuitous in light of the fact that you claim that the Supreme Court has no business making moral judgments about what constitutes a family.

260. See, e.g., Chemerinsky, supra note 3, at 399-400; Kannar, supra note 1, at 1357 (seeming to mock your certainty by equating you with "those confident of their own salvation").
262. Id. at 113.
263. See, e.g., Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").
But we don’t need to look at a “hard” case like *Michael H.* which does suggest that something is rotten in the State of California. In *Lee v. Weisman*, for example, you virtually mock the high school student who feels uncomfortable because her classmates are praying to a God she does not recognize. While this may not directly attack the credibility of the Court as a rhetor, it is hard to imagine how it could be consistent with the rhetorical virtue of respect and honesty for those about whom you speak.

C. Logos as Representation and Characterization: Problems with Assuming, Exaggerating and Fudging

The lynchpin to all effective rhetoric, the argument (logos), is designed to get an audience to adhere to an idea and increase their disposition to accept the argument, and in most cases to act upon it. As Aristotle suggested, part of this task is invention, the creation of the rationale of the argument; and part of this task is arrangement, determining the kind of argument that will be effective given the nature of the discourse and subject matter, and the character of the audience. I’d like to suggest that you use three kinds of tactics that undermine your logos or argument, and violate the ethics of rhetoric. The first tactic is your use of arguments starting from assumptions that you treat as uncontestable, but which are not. The second is your inappropriate use of hyperbolic techniques to get your message across. The third is your willingness to play a little fast and loose with the evidence you use, most noticeably in your use of precedent.

1. Assumptions

Perelman notes that, in the process of constructing an effective argument using enthymemes, the successful rhetor must begin with a generally accepted thesis to reason to a controversial one. She must also create a tight bond between her premises and conclusion. For example, cause and effect arguments are not as convincing if a cause can bring about different consequences, not just the one the rhetor claims. Moreover, it is possible to make certain arguments ineffective by misunderstanding how they work or misapplying them. Cause and effect arguments, for example, can be made ridiculous, e.g., by transforming means to ends or ends

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264. *See* *Lee v. Weisman,* 505 U.S. 577, 645 (1992) (Scalia, J., dissenting) ("[Graduation prayers will be able to be given] so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers.").
265. *See* BIZZELL, supra note 19, at 4-6.
266. PERELMAN, supra note 10, at 21-22.
267. *Id.*
268. *Id.* at 21, 84 (noting the difficulty of judging causal arguments).
Most importantly here, arguments based on the structure of reality work only if their pre-existing elements are not questioned by the audience.

Your rhetoric often violates these basic assumptions of rhetoric. You regularly begin an argument with a thesis that you suggest that everyone accepts, even though that claim is deeply contested. For example, in *Romer v. Evans*, where you wish to argue for the constitutionality of Proposition 2, banning non-discrimination regulations protecting gay and lesbian people, you begin the analysis by stating what you imply is an indubitable proposition, that "seemingly tolerant Coloradans" are attempting to "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." Were this meant as irony, it might have worked; but your opinion goes on to suggest that you expect your audience to accept this argument without question. As I am sure you are aware, none of the assumptions in this starting premise is uncontested—indeed, the history of this litigation was all about whether Coloradans who voted for Proposition 2 were tolerant or intolerant, whether they were attempting to preserve traditions or to roll back the clock on sexual mores, whether their gay and lesbian targets were indeed politically powerful, and whether it was the goal of the legislation to revise sexual mores. It would be difficult for you to convince someone who was initially a fence-sitter on these matters when you use rhetorical language that suggests that you (and everyone else should) take them for granted.

2. **Exaggeration**

Aristotle remarked, "[h]yperboles are for young men to use; they show vehemence of character; and this is why angry people use them more than other people." The recurrent use of hyperbole that marks your rhetoric also suggests

269. PERELMAN, supra note 10, at 86-87 (stating it would be unconvincing to say that war was an effective means for the goal of enabling brave people to show their courage). The same problem will occur if the rhetor creates disproportion between values in means and ends unless he is aiming at humor, or ignores the context of the speech in selecting a causal argument. Thus, Swift's satire recommending that Irish children be roasted to ensure they became no burden to their parents or the state became not so funny after the horrors of World War II. *Id.*


272. *See, e.g.,* Utah v. Evans, 536 U.S. 452, 513 (2002) (Scalia, J., dissenting) ("The Court no doubt realizes that it is not even conceivable that appellants could have standing if redress of their injuries hinged on action by Congress; accordingly, it is driven to assert that the law does not mean what it says .... This is an astonishing exercise of raw judicial power."); Atkins v. Virginia, 122 S. Ct. 2242, 2259 (2002) (Scalia, J., dissenting) (case holding that execution of mentally retarded violates the Eighth Amendment) ("Today’s decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate.").

273. ARISTOTLE, RHETORIC, supra note 9, at 1413a.

274. *See, e.g.,* Evans, 536 U.S. at 513 (Scalia, J., dissenting) ("I would not subscribe to application of this deformed new canon of construction even if there were something about ‘clerical error’ that made it uniquely insusceptible of correction by the means set forth in the statute. But there is not ...
an angry immaturity that becomes an ineffective way of posing your claims. Proportionality would seem to be a key value in legal opinion rhetoric, because the paradigm against which an audience will judge the judge and his or her arguments is one of moderation, fairness and open-mindedness. Judges who are considered to have radical political agendas are likely to be discounted, even if the particular opinion under consideration is well-argued. Similarly, judges who express an immediate and continuing opinion of dislike or disgust for one of the litigants or her attorney are not likely to be taken seriously as impartial.

In addition, the requirement of proportionality would seem to be key in implementing the rhetorical values of honesty and plurality. Where a rhetor uses disproportion related to the physical world, one may doubt whether he means to convince the audience to come to see the same truth that he has come to believe. And where the rhetor uses disproportion related to human beings, one may wonder whether he is willing to accord them and their ideas the same respect as his own. Of course, disproportionate statements can engender a humorous approach to the subject matter, but in the particular case of legal rhetoric, it is doubtful whether many of the cases that make it up to the Supreme Court are appropriate targets of the sort of humor that disproportional language engenders. In most cases, the stakes are significant, and the parties' positions well-discussed, so that outrageous facts and ludicrous arguments have been screened out of the process.

Yet, Justice Scalia, you use rhetorical exaggeration or hyperbole on a regular basis, for no apparent reason except to express contempt for opposing positions, litigants or colleagues—you employ techniques such as slippery slope arguments, far-fetched hypotheticals, and all-or-nothing extremism, to make your points.

1. The slippery slope

One way in which you attempt to engage your reader's paranoia is to employ slippery slope arguments: if the Court (or the state) accepts X, then terrible consequences Y and Z will follow. Diane Meulemans notes that the slippery slope entails the "tendency of a principle to expand itself to the limits of its logic." The general theme of an argument based on the slippery slope is contrast ... between a tolerable solution to the current problem and an intolerable result in light of a
currently hypothetical but potentially real future state.\textsuperscript{278} The validity of slippery slope arguments depends on whether they can be limited to prevent this "slide" to the terrible consequences (if so, they don't work). You seem to delight in anticipating this slide, rather than exploring the possible limitations of your targeted principle when they conflict with the horror story you wish to paint.

Such arguments, when they cannot be validated, have a potentially more pernicious result than simply failing: if they are accepted, they may cause the audience to avoid looking for more moderate alternatives that may preserve some of the value of the proposed solutions without the baggage of their problems. The public may come to see the legal rule, and its application, as an all-or-nothing proposition. Of course, since your solutions tend to be all (i.e., rules that admit of no exceptions or discretion) or nothing (excluding the court's jurisdiction from an area altogether), maybe this is your clever use of rhetoric so your audience will accept only your proposed solutions to the dilemma. But it does little to develop legal responses that embrace the possibility that litigants in a Supreme Court are presenting legitimate conflicting claims, one of which need not be summarily rejected in order to enforce the legitimate concerns of the other.

\textit{ii. Far-fetched hypotheticals}

Along with slippery-slope politics, you seem to delight in constructing hypotheticals that pose some far-fetched scenario that will come out of a Court decision you do not like. For example, you suggest that you cannot imagine how it would be possible for Congress to constrain its delegation power once it sets up one independent commission:

If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of “expert” bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, “no-win” political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research.\textsuperscript{279}


\textsuperscript{279} Mistretta v. United States, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting). \textit{See also Morrison v. Olson}, 487 U.S. 654, 726-27 (1988) (Scalia, J., dissenting) ("If the removal of a prosecutor, the virtual embodiment of the power to 'take care that the laws be faithfully executed,' can be restricted, what officer's removal cannot? This is an open invitation for Congress to experiment. What about a special Assistant Secretary of State, with responsibility for one very narrow area of foreign policy, who would not only have to be confirmed by the Senate but could also be removed only pursuant to certain carefully designed restrictions? ... Or a special Assistant Secretary of Defense for Procurement? The possibilities are endless .... As far as I can discern from the Court's opinion, it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of \textit{Humphrey's Executor} as cover. The Court essentially says to the President: 'Trust us. We will make sure that you are able to accomplish your constitutional role. I think the Constitution gives the President—and the people—more protection than that.'").
Nor can you imagine how local governmental units, like school systems, can operate once the Court orders them to refrain from unconstitutional behavior.\textsuperscript{280}

As much as they might delight the fantasy reader in your audience, the problem with these arguments, as with slippery-slope arguments, is that the reader who trusts you might actually accept that such a scenario is possible. He might tend to act in a frightened way that avoids the possible scenario, or conversely, discount your ability to view the realistic consequences of your actions. The first possibility is problematical because people do act politically based on Supreme Court decisions—one has only to note everything from bombings to protests and billboards (Impeach Justice Douglas!) that are the consequence of Supreme Court decisions.\textsuperscript{281} If politics proceeds from and is shaped by fear, the chances that it will be good politics is virtually nil. The other possibility—that the reader will discount your ability to make realistic assessments of the situation—is, of course, only a problem if you really want people to take you seriously.

\textit{iii. All-or-nothing rhetoric}

It is clear from reading your opinions that you treasure the absolute. Words such as "always" and "never"\textsuperscript{282} and "all" or "none" are favorites of yours.\textsuperscript{283} (Your) answers to controversial questions are "obvious,"\textsuperscript{284} "beyond question"\textsuperscript{285} and "not at all in doubt."\textsuperscript{286} And, of course, contrary opinions could not possibly be

\textsuperscript{280} See, e.g., Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (invalidating graduation prayers) ("As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense.").

\textsuperscript{281} See, e.g., Editorial, Don't Overreact to Flagburners, COLO. SPRINGS GAZETTE TELEGRAPH, July 16, 1989, at D4 (noting confrontations of flag protesters and letters and phone calls after the Supreme Court's decision protecting flagburning).

\textsuperscript{282} See, e.g., Devlin v. Scardelletti, 536 U.S. 1, 19 n.3 (2002) (Scalia, J. dissenting) ("I should think that the significant datum on this point is not that such appeals have been 'often allowed by other courts, but that they have never been allowed by this Court."); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998). ("We have always regarded [the requirement of severe and pervasive sexual harassment] as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'").

\textsuperscript{283} See, e.g., Nevada v. Hicks, 533 U.S. 353, 373 (2001) (opinion of O'Connor, J.) ("Without so much as a citation (none is available) the concurrence declares the qualified immunity inquiry to be part of the jurisdictional inquiry, thus bringing it within the ken of the federal court at the outset of the case."); Kyllo v. United States, 533 U.S. 27, 39 (2001) ("The dissent offers no practical guidance for the application of this standard, and for reasons already discussed, we believe there can be none.").

\textsuperscript{284} See, e.g., Romer v. Evans, 517 U.S. 620, 640 (1996) (Scalia, J., dissenting) ("I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes.").

\textsuperscript{285} See, e.g., United States v. Virginia, 518 U.S. 515, 576 (1996) (Scalia, J., dissenting) ("It is beyond question that Virginia has an important state interest in providing effective college education for its citizens.").

\textsuperscript{286} See, e.g., Lee, 505 U.S. at 646 (Scalia, J., dissenting) ("As the age-old practices of our people show, the answer to that question is not at all in doubt.").
true\textsuperscript{287}—“not remotely” possible\textsuperscript{288}—and must surely be without substance.\textsuperscript{289} No way, no-how\textsuperscript{290} Indeed, any other approach than yours is “utterly incompatible” with past traditions.\textsuperscript{291} The use of such absolute language suggests either a mind which does not think in complex ways\textsuperscript{292} (which I would doubt), or a rhetor who wants to insinuate into his reader’s mind that every choice is a categorical one—that any legal regime has ultimate consequences rather than just interim ones. The problem with all-or-nothing arguments, like the demand for clear rules for which no exceptions are permitted, is that each problem is set up as a conflict between good and evil, light and darkness. These kinds of arguments not only ensure that conflict will continue, for to take the side of good necessarily means that one must continue to view the opponent or his cause as evil. They also suggest that any rules that limit, or any solutions that compromise, the clear division of good and evil that the language sets up are inauthentic solutions to a problem.

3 Fudging the Material

One of the most important tasks for a judicial rhetor is to make a trustworthy representation of the case to his or her audience. Like many other rhetors in professional disciplines, modern judicial rhetors speak to public audiences who are naïve about much of the legal material which is used in the rhetor’s argument. Unfamiliar with the subject matter, they may think about it in general and absolutist terms, not realizing the nuances that have developed as the law has met and responded to the various stories of injustice that have been brought to the courts. They may also be naïve in the sense that, aware of their own ignorance of the

\textsuperscript{287} See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 982 (1992) (Scalia, J., dissenting) (“Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying ‘reasoned judgment, I do not see how that could possibly have produced the answer the Court arrived at in [Roe v. Wade.]”).

\textsuperscript{288} See, e.g., Booth v. Maryland, 482 U.S. 496, 520-21 (1987) (Scalia, J., dissenting) (rejecting the Court’s holding that requiring consideration of victim impact statements in the penalty phase of a death penalty case was a violation of the Eighth Amendment) (“If [the death] penalty is constitutional ... it seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard.”).

\textsuperscript{289} See, e.g., Holland v. Illinois, 493 U.S. 474, 486 (1990) (“In short, there is no substance to the contention that what we hold today ‘ignor[es] precedent after precedent.’”).

\textsuperscript{290} See, e.g., Romer 517 U.S. at 644 (Scalia, J., dissenting) (“The foregoing suffices to establish what the Court’s failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here.”); Booth, 482 U.S. at 520 (Scalia, J., dissenting) (“In sum, the principle upon which the Court’s opinion rests—that the imposition of capital punishment is to be determined solely on the basis of moral guilt—does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court.”).

\textsuperscript{291} See, e.g., Morrison v. Olson, 487 U.S. 654, 709 (1988) (“The utter incompatibility of the Court’s approach with our constitutional traditions can be made more clear, perhaps, by applying it to the powers of the other two branches.”). Or, a well-established commercial speech test seems to you “to have nothing more than policy intuition to support it.” See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) (referring to Central Hudson Gas and Elec. Co. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1982)).

\textsuperscript{292} See appendix at 498-499 for some of your numerous claims that the Court’s decision is beyond your ability to grasp.
subject matter, they may tend to place more trust in the authority of the speaker to resolve any doubts about what to believe than in cases where they are more familiar with the subject matter. Thus, just as lay people might trust a plumber's or a doctor's explanation for what is wrong with the sink/heart and what must be done because they recognize that the doctor or plumber knows her field, so they may trust the judge to correctly describe what has occurred in the case and how the law applies.

In the case of judicial opinions, this means that the rhetorical virtue of honesty—an honest representation of the facts and an honest representation of the law—is extremely important. I have used the word "honest" rather than "correct" because, contrary to the language you often employ suggesting otherwise, it is very rare that on the kinds of contested issues that come before the Court, one description of the facts or one view of the law can be indubitably proven to be the clearly correct one. Rhetors not only wisely but properly describe a version of the facts that is consonant with the point they are going to make—if they did not believe that version, presumably they would not be making the argument. And if they exclude a fact that is irrelevant to their point, we have dissenters to fill in the blanks.

Similarly, a majority opinion on the law may or may not be correct in an ultimate sense. What we can say about it is that it represents the best view of the law that can be agreed upon by a majority at the time a decision is made, for the practical purpose of bringing finality to a particular case. It purports to be better than any alternative that presents itself before the Court, given the constraints on the Court's ability to decide. It does not purport to be the last legal word on a particular subject, or even to represent the best of all possible solutions to a particular legal problem that anyone can think up.

Thus, what an ethics of judicial rhetoric demands from a judge is to avoid clear distortions of the facts or law in the service of a particular rhetorical outcome. Or to the extent that he realizes that he is taking a novel position in the description of either, that he acknowledge the alternative view and try to meet it.

Unfortunately, your opinions tend, on a regular basis, to violate this precept. Perhaps the most infamous example, one that caused considerable public consternation as well as academic criticism, is your statement in Employment Division v. Smith that the Supreme Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Such a statement was not only gratuitous but clearly erroneous. In fact, as Justice O'Connor points out, any number of successful free exercise cases involved individuals who were requesting an exemption from a neutral, generally applicable law, including the ones she cites—Wisconsin v. Yoder and Cantwell v. Connecticut. It is impossible to
imagine how a reader of the "plain text" of those decisions could conclude otherwise, suggesting a deliberate distortion of the legal precedent in this area in service of your own conclusion, especially since a less absolute but correct statement would have clearly made your point. For example, you could have honestly and more accurately said that in most cases where the Supreme Court has confronted a request for excuse from compliance with a neutral, generally applicable law, the Supreme Court has not permitted an exemption.298

Unfortunately, that was not the only deliberate misreading in Smith. As one example, you suggest later in the opinion that the idea of applying the "compelling state interest" test to religious freedom cases in 1990 would be an innovation and aberration, even though it dated back to 1963,299 and that its use would be "a constitutional anomaly"300 when it has been a commonplace of Free Exercise law for most of that period.

But your misuse of legal precedent in Smith is no anomaly, if you don't mind me using the term. You have more than a few times elected to read legal precedent in absolutist and stark terms that bear little resemblance to the holdings of cases or their application in particular situations. In Troxel v. Granville,301 for example, you suggested that the unenumerated right of parents to raise their children rested largely on the slender reed of repudiated substantive due process holdings such as Pierce v. Society of Sisters292 and Meyer v. Nebraska,303 when the Court's jurisprudence is rich with confirmation of the validity of these cases and the rights they stand for.304
As I have suggested, your tendency in opinions to "fudge" the material that you work with, and to exaggerate to the point of simplification, is problematical for the authority of your own opinions. However, that is not the only pernicious effect of mischaracterizing the authorities or the facts of a particular case. Such mischaracterizations, if detected by the non-lawyer reader, tend to call into question the legitimacy of all opinion-writing. To borrow an analogy from another field, just as laypeople often react to their discovery that a pastor or priest has engaged in unthinkable sins by turning away from the church altogether, so the likely reaction of a layperson, who finds he has been "tricked" by one justice who has distorted the law, is to distrust the entire system of judicial review.

You might well think that's a good thing, given some of your insults to your colleagues on the bench, though sometimes you speak as if judicial review should be a ritual of high priests unsullied by the muddy problems of policy and morals, and the public should be able to hold the judiciary in some kind of Olympian awe. But it is unclear what good is to be gained from convincing the general public that the real (not your imagined) judiciary cannot be trusted to give an honest account of the cases and law when they issue opinions.

Of course, distrust of judicial institutions might persuade the public to take public policy into their own hands more often, demanding that their representatives legislate more clearly and specifically, as you often demand that they do, so there can be little room for interpretation of the applicability of law. However, even if it were possible to legislate almost all judicial discretion out of the system—the nightmare of the amount of law that would have to be passed in order to accomplish this boggles the mind—legal institutions assume as a uncontested matter that the singularity and multiplicity in human conflict will continue to far outstrip the ability of legislators to imagine it. So judges will never be out of a job. Why it makes sense to undercut the credibility of their institution, then, is not clear.

Of more considerable concern is the possibility that your audiences will not take themselves seriously as audiences, e.g., they will not be moved to morally good action. With this, I turn to the "pathetic" element of judicial rhetoric, to suggest that you reach for the worst fears and emotions in human beings to rouse them to untoward action.

D. Pathos and the Just Society

Rhetoric has perhaps gotten its worst name because of "pathetic" strategies that misuse the power of the rhetor to create emotion that moves his or her audience to decision and then action. 305 Whether it be Marc Anthony's call for the crowd to go after Caesar's killers, or a modern TV preacher's admonition to his flock to root out (name your favorite social aberration), 306 the power of rhetoric to stir its hearers to
response has always been received with considerable suspicion in legal circles. Better to work on convincing an audience's "reason" to accept the justice of a court's rulings based their view of how well the law has been applied to the facts than to stir emotion up. Yet, this view flies in the face of what we know to be the lawyer's art in the courtroom, which includes aiming directly to the emotions of jurors so that they decide out of those emotions.

What might account for this apparent schizophrenia in modern legal circles about the value of awakening emotion in the hearer? One reason might be found in what we expect the audience to do about a legal decision. Of the wide variety of emotions that rhetoric can engender, some emotions are likely to persuade or stimulate action, and some are most likely to dissuade people from action. In the case of a trial, these uses are clear: juries may be dissuaded from holding a criminal or a tortfeasor responsible if their lawyers can persuade the juror to feel compassion or esteem for them, for example. But what emotional reaction we expect from an audience for an appellate opinion is not so clear, mostly because that audience is thought to be largely lawyerly.

However, to the extent that important Supreme Court opinions reach lay audiences—both those who have particular investments in the court's decisions, such as in antitrust cases where business people may have a particular interest, and those who have more general interests, as when the Court decides a race or abortion case—the pathos engendered by Court rhetoric cannot be discounted. The real question is, what kind of pathetic reaction does the Court wish to engender?

At the risk of sounding corny, it seems to me that one of the questions judicial rhetors need to ask is whether they wish to create an emotional response that would tend to bind their audience to a public community, or not. Even with Supreme Court rhetoric, a public audience can be persuaded to contribute to the commonweal if the right tone can be struck.

Justice Scalia, in some of your opinions, you use some of the worst forms of rhetoric—ad hominem and ad populum attacks, which try to invoke irrational prejudices and fears, either against individuals, or on issues. Such attacks "attempt to divert the audience from the issue at hand by exciting [negative] emotions and anesthetizing rational faculties." In your opinions, these arguments seem aimed at detaching the public from a stake in the issues involved, either by creating a sense of futility and/or cynicism about participants in the litigation or the court itself; or by stirring resentment or anger in your audience, playing off their worst fears and instincts.

You seem to delight in evoking anger against people and institutions that make up some of the most contested court opinions, using the tactic of demonizing the opposition. You positively revel in playing to the public's worse fears about politics. Whether it is a gay power structure or minority power structure or a

307 See, e.g., Cooper, supra note 305, at 242-43 (noting that Aristotle gives treatment to 15 emotions, including feeling angry, friendly, hatred, afraid, disgraced, indignant, and kindly).

308 See, e.g., BIZZELL & HERZBERG, supra note 19, at 775-77, 783-85 (George Campbell's description of how passions are evoked and others calmed).


310 Id.
feminist political movement, you waste no opportunity to heighten public suspicion that somewhere, political power is being exercised behind closed doors and against the will of the people, in some kind of conspiracy of special interests. 311

One of your messages is that lawyer elites look with contempt on popular constituencies and are out to deprive them of their democratic rights. An example is your opinion in Romer v. Evans, 312 where you harp on what sounds like the stealth politics of the Denver gay community to get its moral agenda on the legislative plate, while the good people of Colorado merely mean to exercise their democratic veto rights in the best of faith. Whether that description bears any resemblance to reality, it is a very effective way to continue the paranoia attendant upon an "us" and "them" reality that sexual politics has fostered in this society.

Second, you may create resentment against some of the litigants who appear before you. For example, your affirmative action opinions imply that those who seek the Court's protection are asking unjustly for handouts that only their ancestors (if anyone) rightly deserved: see, for example, your comment in Adarand that "there can be no such thing as either a creditor or a debtor race." 313 Many of your statements attest to your willingness to play on your audience's worst fears that the Courts are aiding people in seeking unjust solutions. 314

311. See, e.g., Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality ... is evil."). See also United States v. Virginia, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting) ("But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a 'more perfect Union, ... (a criterion only slightly more restrictive than a 'more perfect world'), can impose its own favored social and economic dispositions nationwide."); Atkins v. Virginia, 122 S. Ct. 2242, 2265 (2002) (Scalia, J., dissenting) ("Beyond the empty talk of a 'national consensus, the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined neither by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) nor even by the current moral sentiments of the American people."); Virginia, 518 U.S. at 569, 574 (Scalia, J., dissenting) ("The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.") ("Our task is to clarify the law—not to muddy the waters, and not to exact overcompliance by intimidation.").

312. See, e.g., Romer 517 U.S. at 645-46 (Scalia, J., dissenting) ("The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities ... have high disposable income ... and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality ... ").

313. See Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). See also Holland v. Illinois, 493 U.S. 474, 486 (1990) ("Justice Marshall's dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly. It is not remotely true [that the opinion sets aside the goal of eliminating racial discrimination].").

314. See, e.g., Virginia, 518 U.S. at 567 (Scalia, J., dissenting) ("That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in
Of course, the consequence of rhetorically creating a belief that the public is being cheated of its rights is to foster a desire to "exact an apparent revenge because of what appears to be an unjustified belittling of what is due to a man."\textsuperscript{315} For example, in the case of \textit{Romer}, your opinion can do nothing but encourage those who agree with Proposition 2 to go full bore into finding ways around the Court's opinion. Such is hardly the detached judicial observer politics you often call for.

Conversely, of course, a judicial opinion might appeal to the better instincts of its audiences, encouraging them to believe justice is being done, to have hope for the future, or to participate in the political process with a positive view toward their opponents. To look for such an opinion, we might explore your colleagues' responses in some of the cases I have already cited. For example, in \textit{Michael H.}, where you spend most of your time disparaging the litigants, Justice Brennan considers how he might find a moment for community on one of the most contested issues in American society today, the relationship of parenthood and family. His argument, against your own, does not need to belittle or mock any particular ideas or people, including those who share your more restrictive view of the family. Instead, he seeks common ground: "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies." This kind of argument asks for a result not on the basis of disdain, but on the basis that we can find common ground in the idea of toleration.

\textbf{IV CONCLUSION}

I have now gone on at too much length about what's troubling with the rhetoric of your judicial opinions—the ways in which it departs from a rhetorical ethics of warranted trust so necessary in a constitutional democracy, by undercutting the values of awareness, pluralism, honesty and responsible concern for the other. I have tried to give you examples of how your attempts to influence your audience are not only probably ineffective, but if effective, pernicious. By sarcastically undercutting the character of the Supreme Court through creating suspicion about the good faith and rationality of disagreeing members, you have damaged the Court's authority as well as your own. By taking an extreme approach to the logos of your arguments, using hyperbolic language and fudging your material, you similarly undercut your audience's ability to trust both you and your opponents on the Court. By speaking to the worst of people's emotions, you help to guarantee that the culture wars will go on—that we will not have a respectful conversation about deeply contested matters that might possibly result in some compromise, if not at least less warfare.

\textsuperscript{315} \textit{ARISTOTLE, RHETORIC} 1375a, \textit{in APOSTLE, supra} note 10, at 618.
You might argue that I have used selected examples to make my point. In fact, it is true that a fair amount of your jurisprudence does not reflect this kind of ill-considered or ill-intentioned rhetoric, even when it concerns life and death issues. (Conversely, you also use these extreme rhetorical devices on procedural and other issues that would seem hardly worth fighting about.) But that the better part of many of your views does not reflect such a character should not be a cause for your celebration—it should be a cause for worry that someone who reads constitutional law regularly should think your views much more demeaning and extreme than they indeed are as a whole, because the underside of your opinions is so much more memorable than the good, true and noble in them. And of course, on those claims I have made, I am sorry to say that there are other examples to back me up. (See appendix.)

I truly do hope that you will hear what I have said, and change your ways. If you won’t do it for me or your brethren and sisters on the Court, or the legal community, or the public—do it for your grandchildren and great-grandchildren. It is their future—not the Framer’s precious past—which is most at stake. It is they who must find a way to reason with people who think in much different ways than you and your children will have taught them to think. It is they who will have to find a way to co-exist with those who live much different traditions than theirs, not only neighbors and countrymen, but human beings all over the great wide world that is the responsibility placed upon them by the Creator. And it is they who will have only historians’ memories of you as a justice. Whether the texts they read must report that you remained a mean and cantankerous smart-aleck to the bitter end, or became a graceful, passionate advocate for your views, is entirely in your hands.
Appendix

More "Memorable" Scalia
(Citations are omitted from quotations)

Comments suggesting that the Court dissembles or makes completely illegitimate arguments

The Court's pretense that today's opinion is nothing more than application of our prior case law does not withstand analysis. It is, to be sure, impossible to demonstrate that any of our cases contradicts the rule of decision that the Court prescribes, because the Court prescribes none.  

It is not remotely true that our opinion today "lightly... set[s] aside" the constitutional goal of "eliminating racial discrimination in our system of criminal justice."  

The Court identifies two "dominant facts" that it says dictate its ruling... Neither of them is in any relevant sense true.  

It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades.  

There are two problems with this declaration [by the concurrence that the qualified immunity inquiry is part of the jurisdiction question.] The first is that it is not true.  

With this explanation of how the Court has succeeded in making its analysis seem orthodox—and indeed, if intimations are to be believed, even overly generous to VMI—I now proceed to describe how the analysis should have been conducted.  

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes.  

Another exaggeration is the concurrence's contention that we "give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials." 

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The Court seeks to evade the force of this expression of purpose by stubbornly misinterpreting it, and then finding that the provisions of the Act do not advance that misinterpreted purpose, thereby showing it to be a sham.9

COMMENTS SUGGESTING THAT THE COURT'S VIEWS ARE UNSUPPORTABLE, OR THAT ITS OPINIONS ARE FOOLISH OR IRRATIONAL

As for the Court's fairy-tale category of "patriotic citizens," who would rather be silenced than licensed in a manner that the Constitution (but for their "patriotic" objection) would permit: If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed.10

Had the Court devoted to this central question [of legislative purpose] a small fraction of the research into legislative history that produced its quotations of religiously motivated statements by individual legislators, it would have discerned quite readily what "academic freedom" meant: students' freedom from indoctrination.11

But even accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the failure to enact legislation.12

I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered.13

[T]he Court today holds, essentially on the basis of "its visceral knowledge regarding what must have motivated the legislators,..."14

Any line of decisions rooted so firmly in naivete must be wrong.15

Justice Jackson's eloquence notwithstanding, the rule of Skidmore deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.16

It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial

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court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2. 17

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this litigation, or both.18

The Court adopts, in effect, the argument of the United States that since the exclusion of women from VMI in 1839 was based on the "assumptions" of the time "that men alone were fit for military and leadership roles," and since "[b]efore this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy," "[t]hat failure itself renders the VMI policy invalid." This is an unheard-of doctrine.19

Finally, the Court unreasonably suggests that there is some pretext in Virginia's reliance upon decentralized decisionmaking to achieve diversity.20

Is it likely—or indeed even plausible—that Congress meant, when such an agency chooses rulemaking, to accord the administrators of that agency, and their successors, the flexibility of interpreting the ambiguous statute now one way, and later another; but, when such an agency chooses case-by-case administration, to eliminate all future agency discretion by having that same ambiguity resolved authoritatively (and forever) by the courts? Surely that makes no sense.21

We must comment upon the final paragraphs of Part II of the concurrence's opinion—which bring on stage, in classic fashion, a deus ex machina to extract, from the seemingly insoluble difficulties that the prior writing has created, a happy ending. The concurrence manages to have its cake and eat it too ... by simply announcing "that in order to protect government officials, immunity defenses should be considered in reviewing tribal court jurisdiction." What wonderful magic.22

Is it likely—or indeed even plausible—that Congress meant, when such an agency chooses rulemaking, to accord the administrators of that agency, and their successors, the flexibility of interpreting the ambiguous statute now one way, and later another; but, when such an agency chooses case-by-case administration, to eliminate all future agency discretion by having that same ambiguity resolved authoritatively (and forever) by the courts? Surely that makes no sense.23

I find it impossible to understand how one can derive from the lonesome word "willfully" the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity (i.e., the legal nonexistence) of a textual prohibition does not.\(^{24}\)

It is impossible to understand what this has to do with implied causes of action—which is why we declared in *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 73, 112 S.Ct. 1028, that § 6 did not "in any way alte[r] the existing rights of action and the corresponding remedies permissible under ... Title VI."\(^{25}\)

It is impossible to understand how this use of the qualifier "interstate or foreign" in § 201(a), which limits the class of common carriers with the duty of providing communication service, reaches forward into the last sentence of § 201(b) to limit the class of provisions that the Commission has authority to implement.\(^{26}\)

(It is, moreover, impossible to believe that the many other cases decided shortly after *Pennoyer* represented some sort of instant mutation—or, for that matter, that *Pennoyer* itself was not drawing upon clear contemporary understanding.)\(^{27}\)

The obvious difficulty with the Attorney General’s interpretation is that it is impossible to understand how the qualifier in § 1252(g), "[e]xcept as provided in this section" (emphasis added), can possibly mean "except as provided in § 1105a."\(^{28}\)

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any “psychological barrier” to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans new house.\(^{29}\)

I do not know what the judges of our district courts and courts of appeals are to make of today’s opinion. I have no idea what the trial judge is to do if [he finds the attorney’s contingent fee is above the lodestar amount.]\(^{30}\)

I am amazed by the Court’s conclusion that it “makes little sense” to limit today’s decision to the question presented (the constitutionality of imposing a suspended

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sentence on uncounseled misdemeanants) and to avoid a question not presented (the constitutionality of the “procedures that will precede its activation”).

An obstacle is “substantial,” we are told, if it is “calculated[,] [not] to inform the woman’s free choice, [but to] hinder it.” This latter statement cannot possibly mean what it says.

COMMENTS SUGGESTING THAT THE COURT IS ILLEGITIMATELY USING ITS POWER

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speak[s] before all others for their constitutional ideals”—with the somewhat more modest role envisioned for these lawyers by the Founders.

What is remarkable about the joint opinion’s fact-intensive analysis is that it does not result in any measurable clarification of the “undue burden” standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a “substantial obstacle” or an “undue burden.”

Today’s opinion shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

Even while bemoaning the sorry, bygone days of “fixed notions” concerning women’s education … the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built “tests.” This is not the interpretation of a Constitution, but the creation of one.

The only principle the Court “adheres” to, it seems to me, is the principle that the Court must be seen as standing by Roe. That is not a principle of law (which is what I thought the Court was talking about), but a principle of Realpolitik—and a wrong one at that.

We have abandoned that power to invent "implications" in the statutory field.\textsuperscript{38} It may surprise the layman, but it will surely not surprise the lawyers here, to learn that originalism is not, and had perhaps never been, the sole method of constitutional exegesis. It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean. That is, I suppose, the sort of behavior Chief Justice Hughes was referring to when he said the Constitution is what the judges say it is. But in the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing .... It is only in relatively recent years, however, that nonoriginalist exegesis has, so to speak, come out of the closet, and put itself forward overtly as an intellectually legitimate device. To be sure, in support of its venerability as a legitimate interpretive theory there is often trotted out John Marshall's statement in \textit{McCulloch v. Maryland} that "we must never forget it is a constitution we are expounding"—as though the implication of that statement was that our interpretation must change from age to age. But that is a canard.\textsuperscript{39}

Today's imposition upon the States finds justification neither in the text of the Constitution, nor in the settled practices of our people, nor in the prior jurisprudence of this Court.\textsuperscript{40}

When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justification" from \textit{Hogan}. The Court's nine invocations of that phrase and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in \textit{J.E.B. v. Alabama ex rel. T B.}, supra, and \textit{Hogan}, supra ... would be unobjectionable if the Court acknowledged that \textit{whether} a "justification" is "exceedingly persuasive" must be assessed by asking "[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of \textit{Hogan} and our other precedents.\textsuperscript{41}

But when [the idea] is in the mind of a Court that believes the Constitution has an evolving meaning ... that the Ninth Amendment's reference to "other" rights is not a disclaimer, but a charter for action, \textit{ibid.}, and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition—then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of \textit{Roe}, to protest our

saying that the Constitution requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change—to show how little they intimidate us.\(^{42}\)

But in my view the function of this Court is to \textit{preserve} our society's values regarding (among other things) equal protection, not to \textit{revise} them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees.\(^{43}\)

The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply \textit{announces}, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so.\(^{44}\)

\textbf{COMMENTS USING SARCASM AGAINST COURT OR LITIGANTS}

Liberty finds no refuge in a jurisprudence of doubt.\(^{45}\)

One might have feared to encounter this august and sonorous phrase in an opinion defending the real \textit{Roe v. Wade}, rather than the revised version fabricated today by the authors of the joint opinion. The shortcomings of \textit{Roe} did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion—which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear.\(^{46}\)

The Court conveniently ignores a third "social purpose" of the death penalty—"incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future ...." But never mind; its discussion of even the other two does not bear analysis.\(^{47}\)

The Court's thrashing about for evidence of "consensus" includes reliance upon the \textit{margins} by which state legislatures have enacted bans on execution of the retarded. Presumably, in applying our Eighth Amendment "evolving-standards-of-decency" jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed \textit{by how much}.\(^{48}\)

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Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no shadow of change or hint of alteration (*** *) with the more democratic views of a more humble man ....

I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays ... has come to 'requir[e] scrutiny more commonly associated with interior decorators than with the judiciary.' But interior decorating is rock-hard science compared to psychology practiced by amateurs.

Although the Court does not say how one goes about selecting the result-determinative 'context' for its oh-so-sophisticated new inquiry, I gather from its repeated invocation of this phrase that the relevant context in the present case is the "goals of class action litigation."51

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game.52

And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, "peer-pressure" psycho-coercion is present.... [W]hatever the merit of [the school prayer] cases, they do not support, much less compel, the Court's psycho-journey.53

To characterize the "subtle coercive pressures," ... allegedly present here as the "practical" equivalent of the legal sanctions in Barnette is ... well, let me just say it is not a "delicate and fact-sensitive" analysis.54

What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard.55

In addition to complying with the commands of the statute, abandoning Weber would have the desirable side effect of eliminating the requirement of willing suspension of disbelief that is currently a credential for reading our opinions in the affirmative-action field.56

I see no warrant for the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciplines of Blackstone rather than of Freud.57

I must admit, however, that today's next step—recognition of an independent agency in the Judicial Branch—makes Morrison seem, by comparison, rigorously logical.58

The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life."59

While today's opinion gets this case out of our 'in' box, it does nothing whatever to subject these fees to anything approximating a uniform rule of law.60

These [equal protection tests] tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.61

It seems to me that stare decisis ought to be applied even to the doctrine of stare decisis, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.62

Similarly hollow is the Court's assurance that we would strike this [affirmative action] plan down if it "failed to take distinctions in qualifications into account," because that "would dictate mere blind hiring by the numbers ...." The requirement that the employer "take distinctions in qualifications into account" thus turns out to be an assurance, not that candidates' comparative merits will always be considered, but only that none of the successful candidates selected over the others solely on the basis of their race or sex will be utterly unqualified. That may be of great comfort to those concerned with American productivity; and it is undoubtedly effective in reducing the effect of affirmative-action discrimination upon those in the upper strata of society, who (unlike road maintenance workers, for example) compete for employment in professional and semiprofessional fields where, for many reasons, including most notably the effects of past discrimination, the numbers of "M.Q." applicants from the favored groups are substantially less. But I fail to see how it has any relevance to whether selecting among final candidates solely on the basis of race or sex is permissible under Title VII, which prohibits discrimination on the basis of race or sex.63

[I]nstead, the State's interest in unborn human life is stealthily downgraded to a merely "substantial" or "profound" interest .... (That had to be done, of course, since designating the interest as "compelling" throughout pregnancy would have been, shall we say a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of Roe.)

Thus, despite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of Roe for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful.

It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of "constancy," ... of "remain[ing] steadfast," ibid., of adhering to "principle."

Closed-minded they [our forbears] were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.

I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress.

I suppose the Court is entitled to call a "central holding" whatever it wants to call a "central holding"—which is, come to think of it, perhaps one of the difficulties with this modified version of stare decisis.

They call themselves believers in the 'living Constitution. Now isn't that great packaging? Where does that leave me?

Thus, when the Court says it "doubt[s]" that any procedures attending the reimposition of the suspended sentence "could satisfy the Sixth Amendment," it must be using doubt as a euphemism for certitude.

The dissent again works its statistical magic by refusing to count among the States that authorize capital punishment of 16- and 17-year-old offenders those 19 States that set no minimum age in their death penalty statute, and specifically permit 16-

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and 17-year-olds to be sentenced as adults. We think that describing this position is adequate response. 72

The Court pays lip service to these precedents as it miraculously extracts a “national consensus” forbidding execution of the mentally retarded ... from the fact that 18 States—less than half (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded. 73

The Court attempts to bolster its embarrassingly feeble evidence of “consensus” with the following: “It is not so much the number of these States that is significant, but the consistency of the direction of change.” But in what other direction could we possibly see change? Given that 14 years ago all the death penalty statutes included the mentally retarded, any change (except precipitate undoing of what had just been done) was bound to be in the one direction the Court finds significant enough to overcome the lack of real consensus. 74

How remarkable to criticize the District Court on the ground that its findings rest on the evidence (i.e., the testimony of Virginia’s witnesses)! That is what findings are supposed to do. 75

Ultimately, in fact, the Court does not deny the evidence supporting these findings. It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous—in favor of the Justices own view of the world, which the Court proceeds to support with (1) references to observations of someone who is not a witness, nor even an educational expert, nor even a judge who reviewed the record or participated in the judgment below, but rather a judge who merely dissented from the Court of Appeals’ decision not to rehear this litigation en banc ... (2) citations of non evidentiary materials such as amicus curiae briefs filed in this Court ... and (3) various historical anecdotes designed to demonstrate that Virginia’s support for VMI as currently constituted reminds the Justices of the “bad old days.” ... It is not too much to say that this approach to the litigation has rendered the trial a sham. But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion. 76

The Court has miraculously divined how the Alabama justices would resolve a constitutional question. 77

This analysis, which is fully in accord with (indeed, follows inescapably from) the text of the constitutional provision, lays to rest such horribles, raised in the course of oral argument, as the prospect that assaults upon homosexuals could not be prosecuted.78

EXAMPLES OF HYPERBOLE

Thus, today's opinion works a revolution in past practice, subjecting to criminal penalties taxpayers who do not comply with Treasury Regulations that are in their view contrary to the Internal Revenue Code, Treasury Rulings that are in their view contrary to the regulations, and even IRS auditor pronouncements that are in their view contrary to Treasury Rulings.79

It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether [the President requires and has sufficient control over the independent counsel to perform his duties. The utter incompatibility of the Court's approach with our constitutional traditions can be made more clear, perhaps, by applying it to the powers of the other two branches.80

Today's opinion makes an avulsive change in judicial review of federal administrative action.81

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead.82

The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none.83

This [holding that a non-named class member should be considered a party to the judgment because he will be bound by it] will come as news to law students everywhere.84

[In its holding] the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies themselves..\(^{85}\)

The Court’s description of the place of *Roe* in the social history of the United States is unrecognizable.\(^{86}\)

The Court today, announcing that Amendment 2 “defies .. conventional [constitutional] inquiry,”... and “confounds [the] normal process of judicial review,”... employs a constitutional theory heretofore unknown to frustrate Colorado’s reasonable effort to preserve traditional American moral values.\(^{87}\)

But to portray *Roe* as the statesmanlike “settlement” of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court’s new majority decrees.\(^{88}\)

Starving oneself to death is no different from putting a gun to one’s temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide’s conscious decision to “put[ti] an end to his own existence.”\(^{89}\)

**EXAMPLES OF EXTREME OR ABSOLUTE LANGUAGE**

I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency. As recently as 1996, we rejected an attempt to do precisely that.... There is, in short, no way to avoid the ossification of federal law that today’s opinion sets in motion. What a court says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking.\(^{90}\)

There is no authority whatever for the proposition that absolute—and qualified—immunity defenses pertain to the court’s jurisdiction—much less to the tribe’s regulatory jurisdiction, which is what is at issue here.\(^{91}\)

The principles central to today’s opinion have no antecedent in our jurisprudence.\(^{92}\)

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The Court has no basis, moreover, for its "doubt." 93

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. 94

We are asked to decide whether "imposition of a suspended or conditional sentence in a misdemeanor case invoke[s] a defendant's Sixth Amendment right to counsel." ... Since imposition of a suspended sentence does not deprive a defendant of his personal liberty, the answer to that question is plainly no. 95

[The] point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory .... It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about "life and death" than they do) that they will decide upon a line less reasonable. 96