

## (SO) WHAT IF IT'S ALL JUST RHETORIC?

FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF. By Eugene Garver.<sup>1</sup> Chicago, University of Chicago Press. 2004. 264 pp. \$22.50.

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Rhetoric gets a bad press in legal analysis.<sup>3</sup> To call a passage in an opinion “rhetoric” is to damn it as insincere or insubstantial—unworthy of serious scholarly interest. Rhetoric is often set up in opposition to logical analysis or principle. When that happens, the writer always claims to have logic or principle on her side. Rhetoric is what the other side uses. I analyze, you describe; he is a mere rhetorician.

It is wrong to dismiss rhetoric this way. Aristotle defined rhetoric as “the faculty of observing in any given case the available means of persuasion,”<sup>4</sup> and logic is one of those means. In Aristotelian rhetoric, *logos* is a powerful tool of persuasion. It is employed through enthymemes (a type of syllogistic argument) and inductive reasoning.<sup>5</sup> In Aristotelian terms, to say a passage is “rhetoric” does not imply that it is unreasoned. Aristotelian rhetoric goes beyond logic, of course. It includes *ethos* (persuasion derived from the character of the speaker), and *pathos* (per-

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3. There are exceptions, of course, including prominent discourse-based theorists such as Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003), and PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982), and scholars from disciplines less professionally antagonistic to rhetoric, such as James Boyd White, *Law As Rhetoric, Rhetoric as Law, The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985), or STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* (1999).

4. ARISTOTLE, *Rhetoric* 1. ii 1355<sup>a</sup>, in *THE RHETORIC AND POETICS OF ARISTOTLE* 24 (W. Rhys Roberts & Ingram Bywater trans., 2d ed. 1984).

5. ARISTOTLE, *supra* note 4, at 26.

suasion based on sentiment). Most dismissals of rhetoric seem to have these approaches in mind.

Why do we dismiss rhetoric? I think it is because of an aspiration and a fear. The aspiration is that many of us *want* law to be logical, not based on a speaker's character, appeals to sentiment, or society's sheep-like acceptance of whatever judges say. (Why we want this is an interesting question; more on that later.) The fear is that, in the real world, law is nothing like this. It never has been, it never will be, and society gets along just fine all the same.

With regard to constitutional law, which will be the subject of my examples here, fear is probably the wrong word to use. There is no use denying that constitutional law is more than *logos*. The real question is whether *logos* matters at all. In a recent article, Professors Nelson Lund and John McGinnis say it is a "noncontroversial positive point" that "constitutional law is whatever the Supreme Court can get away with saying it is."<sup>6</sup> It is hard to argue with their point. The Court makes constitutional law up as it goes along and, I would add, it always has. John Marshall was a Federalist. He handed down Federalist rulings, which is what John Adams expected and Thomas Jefferson resented.<sup>7</sup> It has been that way ever since. Have you heard? Liberty finds no refuge in a jurisprudence of doubt, unless it's freed from its immanent dimension, so it may evade the animus and engage in an act of ceremonial deism before condensing into the critical mass.<sup>8</sup> *Logos*? Give me a break.

It is always good to admit the obvious, but there is still something in this "noncontroversial" description that cuts against the grain. It is thin gruel for a job in which the absence of client demands leaves time for reflection. Call it a matter of taste on my part, but there is something squalid and unappealing, something base, in the idea that the justices just whisper sweet nothings in our ears to get us to comply with their commands. It would be nice to think constitutional law is on a higher plane than high school dating. It's enough to turn mainstream constitu-

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6. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH L. REV. 1555, 1586 n.113 (2004).

7. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 85–93 (2003).

8. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Allegheny v. ACLU* 492 U.S. 573 (1989); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

tional analysis into an updated version of *Oliver Twist*: Can't we have just a little bit more?

Maybe rhetoric gets a bad legal press because it reminds us of something we would rather not think about. I know it is bad form to bring this up, but could it be that we spend our lives writing either about logical principles courts are not really interested in or about nothing more substantial than which phrases are best to dress up the next politically determined result?<sup>9</sup> It would be hard to disprove this claim. Perhaps we should just admit that the practice of rhetoric is the turtle under the social construct of the law, and it's turtles all the way down.<sup>10</sup>

Perhaps it would not be a fatal admission. This brief (possibly jaded) survey of *The Way Things Are* implies that the study of rhetoric itself might improve legal argument. Might it at least give us a basis for critiquing the Court's work? *For the Sake of Argument: Practical Reasoning, Character, and the Ethics of Belief*, by Professor Eugene Garver, makes the case that it can. Professor Garver is a professor of philosophy, not law, but he uses legal examples to argue for an ethics of practical reason. The hope of this approach is that it might provide a basis for ethical critiques of what the Court actually does. If nothing else, it provides a welcome alternative to endless hand-wringing over what the Court should do, but doesn't do, because what it does do works so well for it. For that reason alone, his thesis is worth considering.

Professor Garver's book is learned, honest, and insightful. I am not aware of any work that makes such a strong case for ethical criticism of judicial reasoning.<sup>11</sup> It is the rare book that exemplifies its thesis. I doubt it will affect judicial practice. Judging in ordinary cases offers little room for the sort of ethical rhetoric Professor Garver describes, while in extraordinary cases people quite reasonably care more about the results than the case the Court has made for them, which few people read and fewer still really care about. Professor Garver's book should help

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9. That's why it's nice to teach a course in a field judges don't care about very much, so they will try to apply the law rather than dabble in high politics. I recommend Agency.

10. See David McGowan, *SCO What? Rhetoric, Law, and the Future of FOSS Development* (June 7, 2004) (Minnesota Legal Studies Research Paper No. 04-9, <http://ssrn.com/abstract=555851>).

11. That includes my attempt, David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 *GEO. J. LEGAL ETHICS* 509 (2001), and other works that emphasize qualities such as candor in judicial writing. See, e.g., David Shapiro, *In Defense of Judicial Candor*, 100 *HARV. L. REV.* 731 (2001).

us come to terms with the role of rhetoric in real-world legal analysis. That is a considerable benefit.

## I

An insight, a distinction, and a goal comprise the most interesting and (to me, at least) most original aspects of Professor Garver's analysis. The insight has to do with the nature of *ethos* in Aristotelian rhetoric. The distinction is between ascertaining the available means of persuasion and the act of persuasion itself. The goal is to aim for truth rather than accommodation.

### A. DEVELOPING *ETHOS* THROUGH ARGUMENT

Professor Garver draws three theses from Aristotle's *Rhetoric*: reasoning is the heart of persuasion, *ethos* (character) is the most powerful source of belief, and the power of *ethos* comes from the development of character through reasoning. *Ethos* here differs from reputation. A speaker's reputation may persuade some in the audience, but reputation is weaker than *ethos* developed in the course of an argument. A speaker who develops *ethos* through reasoning *shows* that she is of good character, and thus worth believing, rather than asking the audience to accept her worth on the faith of others, whose approval created her reputation (p. 7). Here is the key passage, from the Roberts translation of the *Rhetoric*:

Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him more credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided. This kind of persuasion . . . should be achieved by what the speaker says, not by what people think of his character before he begins to speak. It is not true . . . that the personal goodness revealed by the speaker contributes nothing to his power of persuasion. On the contrary, his character may almost be called the most effective means of persuasion he possesses.<sup>12</sup>

There is an interesting ambiguity in this translation. The first sentence refers to a speaker who is able to make us "think him" more credible, which is not quite the same thing as revealing to us a character that actually is credible. Maybe the speaker

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12. ARISTOTLE, *supra* note 4, at 25.

in the first sentence is just good at faking goodness. The penultimate sentence refers to goodness "revealed" by the speaker, which implies a goodness that actually exists. Professor Garver (who does his own translations), translates the first sentence to refer to a speech spoken "to make the speaker *worthy* of credence," and the penultimate sentence to refer to "the worth of an orator" (p. 7).

Consistent with his reference to a speaker who is "worthy" of being believed, Professor Garver makes a normative case for the role of *ethos* in practical reasoning. He contends that an advocate who develops *ethos* through reasoning "rationally integrates is and ought." A speaker who develops *ethos* by reasoning with an audience acts as a friend toward the audience, inviting them to enter into a relationship of friendship with him. When the invitation works, friendship created through reasoning allows the audience "to understand emotional appeals as rational." Just as friendship goes beyond justice, though the two are related, so *ethos* goes beyond reason but is not irrational (p. 7). The "crucial distinction is between an argument which claims that a conclusion follows from the nature of the good—a purely logical claim—and an argument which shows me *inferring* that same conclusion because of my *commitment* to the good—a demonstration that is simultaneously logical and ethical" (p. 106).

There is much more to this thesis than might appear at first glance, especially if you dismiss out of hand (as I think many lawyers would) any argument that seems to rest on concepts of friendship rather than competition. You may recognize the truth in the argument from your own experience. Have you ever had a famous scholar show up for a lecture and toss off a few recycled bits of previous work that seem to have been jotted on an airplane napkin in no particular order? Even if the bits form a logical sequence, you will be less inclined to accept the argument than you would be if the speaker took the time to connect with *you* in some way. Reputation might get him in the door, but *ethos* still has to be earned through the argument itself.

Recognizing this point does not clarify it. What, exactly, does it mean to say the development of *ethos* through reasoning creates relations of friendship that integrate is and ought, and why should we care about such a thesis? It may be easiest to answer the first question by first answering the second. The payoff to this argument is an ethics that integrates self-interest with the need for collective action and social interaction. Because we are social creatures in a relatively advanced social state, persuasion

is ubiquitous. Because persuasion is ubiquitous, to the degree one cares about ethics it is useful to have a way of thinking about the ethics of how it is done.

Persuasion is done most effectively when we demonstrate that we can be trusted to reason with (p. 146). We show we are trustworthy by taking responsibility for the propositions we assert rather than trying to deflect responsibility somewhere else, thus denying that we make the choices we do in fact make. In addition, we show we are worth reasoning with by taking seriously the interests and concerns of our audience. For Professor Garver, an ethical appeal is one in which I demonstrate that “I take your commitments and principles seriously, and join with you in reasoning from them” (p. 29). When we do that, we offer audience members a chance to engage us in a relationship of friendship which, in Professor Garver’s argument, means dealing with each other on these terms, rather than getting what you want by fooling them or buying them off.

We can get a more concrete understanding of this argument by thinking about how one might develop *ethos* through argument. An advocate who wishes to take advantage of the persuasive force of *ethos* has got to think about her audience. She has to understand their issues and concerns; what they value and hope for, abhor and fear. If the advocate can demonstrate that she understands the audience’s interests and concerns, she may be able show them how a person of good character (in their eyes) could see things her way. Isn’t that how you would want to be persuaded?

This account of persuasion is quite powerful. At the risk of trivializing the idea with maxims, it seems a pragmatic mixture of walking a mile in the other person’s shoes, doing as you would be done by, and doing well by doing good. Lawyers will instantly recognize elements of the argument in the appeals they craft for judges. Judges have to worry about precedent—what does a decision in your favor commit them to in the future?—so you have to worry about precedent, too. You write your brief with an eye to the opinion you want the judge to write. You argue *to* the bench or box, but you argue *from* it as well.

Professor Garver relates the means of developing *ethos* to a concept he calls “ethical surplus.” The term refers to what Professor Garver believes is the marginal persuasive effect that *ethos* adds to the logic of an argument. “Practical reason generates an ethical surplus that allows us to affirm and be committed

to more than reason would allow" (p. 75). Thus, the conclusion of an ethical argument is and should be stronger than the argument itself<sup>13</sup> (p. 75, 79). The example of "straw man" arguments provides an intuitive sense of this point. If I attack a position we both know no one holds, my argument as a whole will suffer. This fact has nothing to do with my logic, because "arguing against a straw man violates no logical rules" (p. 101). But you would be right to be more wary of my argument if I attack caricatures than if I do not.

Professor Garver uses *Brown v. Board of Education* to illustrate how ethical reasoning can create an ethical surplus (p. 6, 10). His account of *Brown* will seem counterintuitive to most lawyers—indeed, it will seem completely backwards—so it is worth close attention. Professor Garver thinks *Brown* is a paradigmatic example of ethical judicial reasoning because the Court took responsibility for its decision and the vision of equality it articulated, rather than pretending that either the decision or the vision were compelled by precedent. He sees *Brown* as "an act of commitment," by which he means the Court could have

constructed an opinion that deduced the violation of equal protection from constitutional text, history, and precedent, but for a case as monumental as *Brown* such a deduction would have been perceived as the Court hiding behind legal precedent and not taking responsibility for the decision. Finding the history inconclusive makes the Justices more responsible for their opinion. The Court presents the opinion as ethically necessary and inevitable precisely because it is not necessary and inevitable by narrow logical and legal criteria (p. 77).

Extrapolating from this point gives you the proposition that the opportunity for ethical judicial argument varies inversely with the degree to which a decision is actually compelled by law, which is indeed Professor Garver's view (p. 79–80). That idea will strike most lawyers as crazy, especially those who think judges betray the judicial office if they do anything that is not compelled by law, which is to say if they do anything for which they might take personal responsibility.

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13. We may also think of *ethos* as supplying a rule of decision. Aristotle said we believe good men more fully and readily than others, especially "where exact certainty is impossible and opinions are divided," which is to say in most general cases and in all the big constitutional cases. *Id.* If logic cannot determine a choice, something else must, and the development of *ethos* is a strong candidate for that something else.

Because this idea is at odds with conventional legal thinking, I want to begin by saying why I think it has to be right. Not all cases are occasions for ethical argument, a fact Professor Garver stresses (p. 79). If a foreign-born governor tried to run for president as a naturalized citizen, the Court would deny any claim he might make, and it would be hard to write an opinion that would provide room for ethical criticism. The Constitution just doesn't leave any room for argument on the question whether a foreign-born naturalized citizen can be president. It's not that the Constitution says nothing, as in *Roe*, or something that might be literally ambiguous, as in *Brown*, but that it says "no." For that reason, most of the opinion in such a case would be a statement of the obvious ("no" means "no"). It would report more than it would persuade.

Reporting requires few choices, so it is right to say that where decisions are compelled by law there is little room for ethical criticism. By parity of reasoning, where neither law nor logic compels a particular decision, judges must choose which path to follow and how to explain their choice. Those choices are proper subjects of ethical criticism, and the manner in which the decision is explained is the proper subject of rhetorical criticism. Many decisions are pretty well compelled, so this point limits substantially the number of cases to which Professor Garver's thesis applies. In cases where neither law nor logic dictates the result, however, his thesis provides a useful analytical point of view.

Nevertheless, people who do not like creative judging—which is all of us when it is our ox being gored—will and should worry about this idea.<sup>14</sup> The notion that the Court's rulings may exceed its logic if it reasons properly is and should be slightly frightening. The "ampliative" power of the "ethical surplus" generated by the rational development of *ethos* might tempt some judges to judge amuck. Mastering rhetoric might turn them into the sort of Platonic guardians conservatives have decried for years, and which liberals have started to decry as judges get more conservative.<sup>15</sup>

Professor Garver is aware of this risk. He says the "creative side of practical reasoning is potentially irresponsible. Only the

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14. I reject the term "judicial activism" as meaningless; it has been worn out by constant use on all sides of every issue.

15. See Barry Friedman, *The Birth of An Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

*ethos* of the community and the judgments of the audience keep it in check" (pp. 200–01). Such judgments keep "autonomy from becoming license" (p. 201). There is something to Professor Garver's response. He did not invent creative judging, the judges did. He is entitled to take the Court as he finds it, and it is a significant merit of his book that he offers a way to think about the ethics of creativity rather than opting for nihilism or judicial hypochondria about when the sky might fall if the Court continues to do what it has always done. Having said that, I do not think his response deals fully with the objection, because the constraint on which he relies probably does not apply to judges. I will return to this point in Part II.

First, however, I want to charge Professor Garver with partisanship in order to acquit him on most counts of the charge. Though the gap is closing,<sup>16</sup> conservatives still complain more about creative judging than liberals. A theory that links ethics to creativity will strike conservatives as liberal partisanship. In the few cases that might call for ethical reasoning, Professor Garver's notion of commitment and taking responsibility for one's reasoning does cut against conservative approaches to judging. He believes that to argue purely from precedent "denies any serious objections to one's actions" (p. 98), and he cites Judge Bork's confirmation hearings as showing that "substituting reasoning alone for character denies personal responsibility by purporting to remove agency and present oneself as part of a chain of necessary connections" (p. 105). This approach would be fine for the foreign-born citizen case, but not for *Brown*. Professor Garver refers to "original intent" judging as "mindless legalism," which does not sound very complementary (p. 184).

Not surprisingly, the aspects of *Brown* that make it ethical for Professor Garver are most troubling to conservative scholars. Professor (now Judge) Michael McConnell, who believes "the supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory," complains that "such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."<sup>17</sup> Thus, the Court's concession that the historical record regarding

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16. *Id.*

17. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952–53 (1995).

school segregation was inconclusive, which “once was seen as a weakness in the Supreme Court’s decision in *Brown* is now a mighty weapon against the proposition that the Constitution should be interpreted as it was understood by the people who framed and ratified it,”<sup>18</sup> which appears to be one reason why Professor McConnell devoted considerable effort to constructing a revisionist originalist defense of the decision. The concession that troubles Professor McConnell is the key to what Professor Garver sees as the ethical aspect of the opinion (p. 76).

Whatever the merits of Professor McConnell’s originalist defense of *Brown*,<sup>19</sup> he is right about the stakes. Professor Garver praises *Brown* as “a perfect example of what ethical reasoning looks like at its best” in part because “the *ethos* of the opinion . . . opened up a new role for courts, government, and community that went far beyond the desegregation order” (p. 10). He is right about that. *Brown* paved the way for *Loving*, and not even Professor McConnell has tried an originalist defense of *Loving*.<sup>20</sup>

This point marks a clear and important difference. The “new role” Professor Garver sees *Brown* as creating for the Court is of course exactly what worries conservatives, which is why it is important for them to craft a narrative that accommodates the result in *Brown* without endorsing judicial creativity. Professor Garver does not fault *Brown* for refusing to commit to all the implications of its premises, because “[p]ractical reason takes place in time. Deciding one practical issue creates new ones,” which we might see coming but which we cannot deliberate about “until we face them as real practical predicaments” (p. 78). That kind of open-ended claim of power, unconstrained by a pledge to adhere strictly to logic, drives conservatives nuts.<sup>21</sup>

Professor Garver may be read as offering two responses to this charge of partisanship. One is that he believes there is a dif-

18. *Id.*

19. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements On Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2365 (2002) (“Virtually no one has been persuaded by McConnell’s learned account”).

20. See *id.* (“[N]either McConnell nor Bork has defended either *Bolling* or *Loving* as consistent with original meaning, nor could they easily do so.”).

21. As I write, exactly the same thing is happening with regard to whether *Lawrence v. Texas* implies anything about same-sex marriage. The Court says “we’ll see,” 539 U.S. at 578. Liberals do not mind that, Post, *supra* note 3, at 104–05, and the Court’s refusal to commit to following its premises where they lead drives conservatives crazy. See, e.g., Lund & McGinnis, *supra* note 6. (Though in this case a failure to commit probably makes them less crazy than a promise would).

ference between constitutional argument and personal preference, such that a judge who reasons ethically is in fact engaging in constitutional interpretation, rather than just winging it. "Taking responsibility" for an argument "does not mean being willful or arbitrary. The Justices engage in Constitutional interpretation. But they do not pretend that the Constitution is simply speaking through them" (p. 80). Instead, "the *ethos* internal to the practices of constitutional argument is a spirit committed to reading the Constitution as a constitution, not as the businessman reads a contract. If I read the Constitution ethically, then I am committed to recognizing the other forms of argument as well. That commitment is a powerful new form of political friendship" (pp. 172-73).<sup>22</sup>

A second response is that Professor Garver is concerned with the means of persuasion, not the target. On his account it is entirely possible for a conservative judge to argue ethically for strict adherence to original meaning, precedent, or whatever else the judge wants to adhere to. Professor Garver would insist only that there must *be* such an argument, in which the judge takes responsibility for his choices and acknowledges that they are choices rather than asserting that his position is so self-evidently true that no one else's views are worth mentioning. Thus—and now we can make liberals uncomfortable—by Professor Garver's lights it would be perfectly possible to write an ethical opinion in *Brown* that upheld segregation. In the ethics of rhetoric, the choice that matters is the means of persuasion, not the end for which persuasion is employed.

Nevertheless, as a purely practical matter it is easier to accept personal responsibility for decisions if you believe your job is to make decisions for which you might be personally responsible. If you do not, then you have an uphill climb in Professor Garver's system of ethics. Presumably you could reason ethically about why you think you should not make such decisions, but that sort of meta-argument is likely to get drowned out in arguments over the issue at hand. The Bork confirmation hearings, in which Judge Bork's reasons for originalist judging were drowned

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22. This line of argument implicitly takes the position that "interpretation" encompasses more than a search for the intended meaning of the author of a text. I think it would be better to restrict the term "interpretation" to that search, see Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1981), and evaluate on the basis of whether the results are good or bad (and by what measure) any decision based on something other than a search for the author's meaning.

out by popular disagreement with his results, exemplify this point.

#### B. DECIDING HOW TO PERSUADE

I said earlier that Professor Garver's argument is based on an insight, a distinction, and a goal. The distinction is between ascertaining the available means of persuasion and actually persuading someone (pp. 51, 123). When you have ascertained the means of persuasion available in a particular case, you still have to choose among them. Because the choice affects your relations with others, Professor Garver views it as a proper subject for ethical analysis.

Professor Garver is right to treat this choice as an ethical matter. His analysis improves our understanding of how persuasion affects the way we see each other and deal with each other. It is obvious that we are social creatures who specialize in different things, so it is obvious that we will need to persuade others to get what we want. It is not obvious why we should care about how we persuade them, or even that we should persuade them rather than manipulate them. Utilitarianism may rule out fraud, but that leaves a lot of room for discretion. What of flattery? What of pathos? John Edwards made millions literally channeling the voices of dead infants in medical malpractice trials.<sup>23</sup> If it's good enough for a vice-presidential nominee, why isn't it good enough for the rest of us?

Professor Garver confronts this question in a fascinating chapter entitled "Confronting the Sophist." Professor Garver claims Aristotelian rhetoric, with its emphasis on reason and the development of *ethos* through reasoned argument, is ethically superior to sophistic rhetoric, which aims only to persuade and is indifferent to how persuasion is accomplished in a particular case. Why should we prefer Aristotelian to sophistic rhetoric? Because rhetoric "is tested not only by success in persuasion, but by the kind of relations between speaker and audience each [kind of rhetoric] engenders" (p. 56). Aristotelian rhetoric "can have ethical relations between speaker and hearer." It "creates and sustains community, while sophistic cannot" (p. 55). Take away Aristotle's limitations that reason must predominate in argument, and that *ethos* should be developed through reason, and

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23. Adam Liptak & Michael Moss, *In Trial Work, Edwards Left A Trademark*, N.Y. TIMES, Jan. 31, 2004, at A1.

"I must be the audience's master or its slave. I can have commercial relations, or military relations, but not ethical ones" (p. 55). Looking at the question from the audience's point of view, I can want to be persuaded, but I cannot want to be manipulated (p. 63), so "the sophist who wants to persuade me through images and irrational appeals has to pretend to convince me that he is persuading me through argument . . . such rhetoric is inherently deceptive . . ." (p. 58).

In a moment I am going to play the vulgar skeptic and ask what is so great about community, but first I want to stress that Professor Garver is right to say that the choice of the means of persuasion is an ethical choice. Reasoning with you from commitments and principles that you yourself hold shows more respect for you than simply steering you my way by finding your blind or weak spots. Developing my ethos through argument requires me to open myself up to you by showing that I am committed to at least trying to see how you see things. I may or may not persuade you to join me in working through an issue—that is up to you—but that does not matter. If I reason ethically I treat you as a friend and therefore at least have a chance to deal with you in friendship. If I opt for sophistry, I have no chance at all. Comparative advantage is the only kind.

I think all that is quite true. But opening myself up to you—investigating your interests and concerns and working candidly on your turf—takes time and effort. It is harder than simply telling you what I think you want to hear. If I am good enough at knowing what you want to hear, and at hiding the fact that I don't care about your interests and concerns, only your agreement, I will do as well as if I argue ethically, so why should I bother? Sure I can help engender friendly, community-building relations, but I do not reap the marginal benefit of the community's welfare, so why should I incur any cost to enhance it? Ethics need not produce marginal benefits, so this point does not undermine Professor Garver's thesis as a purely ethical matter. Practical reason is practical, however, so an ethics of practical reason has to be concerned with practicality, too. Unless I value community enough to bear costs out of proportion to my own marginal benefits, self-interest poses a practical problem for realizing the benefits the thesis wants to make possible.

So now I want to subject Professor Garver's thesis to the vulgar skeptic: What is so great about community? What if I don't really want to be in a community with you? What if would rather beat you into submission than talk to you, which I will do

only because I am worse off going to jail than manipulating you through sophistry? I might reason with you, if that is what works most effectively, but I don't really care one way or the other.

I know, I know, this kind of question leads to infinite regress. We can always ask what is so great about the end we pursue, but we have to pursue some end or life is pointless, so why not just lose the sophomoric skepticism and get on with it? But the premise of this line of Professor Garver's argument is that a heterogeneous society has to reconcile sharply differing views. Deliberating is nice—it is what professors are supposed to do best—but lots of things are nice, and in a world of scarcity choices must be made. So why do ethics require the marginal investment in the development of *ethos* through reason when there is no guaranteed payoff in terms of community (that is up to the audience, which may not care about all your effort) and a working (if un-friendly) accommodation could be had at lower cost?

Even on the most unsettled and most ethically charged questions—perhaps especially on such questions—it is not at all clear to me that we are better off with deliberation than with accommodation. Everyone knows that foundational arguments can be offensive and disruptive. Suppose you believe the Bible is literally true, and homosexuals are sinners. If I can persuade you that the Bible is not literally true, and that homosexuals are just ordinary people like you and me, you will have to re-arrange much more than a single opinion. You will have reason to wonder whether there is a God, which may change every aspect of your life. You will wonder whether you are as virtuous as you thought you were when you thought you were better than gays, and you will come face to face with your own fallibility. It would be a serious mistake to underestimate the degree to which many white Southerners saw *Brown* as a boot in the face rather than as an act of friendship. It was.

In one of his more recent books (it is never safe to say most recent), Judge Posner provides an interesting report on this question. He says that, in his experience, judges talk least about the most sensitive cases because those are the ones most likely to breed anger among persons who have to live and get along with each other.<sup>24</sup> They do not deliberate, though their shared educational and professional backgrounds would seem to make them ideal candidates for deliberation. I am not surprised. Judges get paid to decide cases, their dockets are always full, and if the pay-

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24. POSNER, *supra* note 7, at 129, 139.

off from ethical reasoning is not high enough, it is better just to decide and move on.

### C. TRUTH OR CONSEQUENCES?

My cost-benefit argument in the last section is good as far as it goes, but it understates the strength of Professor Garver's case because it leaves out an important consideration. In contrasting deliberation and accommodation, I implicitly treated everyone's interests, commitments, and aspirations as fixed. In economic terms, I portrayed a static model of persuasion. The world is not like that. People change their minds. They may even decide to pursue an end they once condemned. Many people once thought—hell, they *knew*—that Blacks were inferior to whites. Many people thought women were not suited for work and should stay home and raise children, and that gays and lesbians were damnable deviants on the fast track to Hell. Not any more.

Where do preferences and commitments come from? Why do people hold the ones they hold? How do preferences and commitments change? These are the most important questions we can ask about practical reasoning.<sup>25</sup> They raise the third point I mentioned above, which is the aim of persuasion. Professor Garver believes ethical reasoning can aim at truth rather than just the accommodation of interests. He sees liberalism as aiming at agreement among free persons rather than at truth, which is too divisive a subject for a liberal state to pursue (pp. 14, 21). "The success of liberal democracy depends on lowering one's ambitions from seeking truth to settling for agreement" (p. 14). In contrast, "ethical argument creates essentially civic relations between people. Reason becomes thickened from consistency to integrity" (p. 30). Why? Because, "rhetorically, we don't trust people who agree with us, or who look like us, but trust in people whom we think are engaged with us in a common project" (p. 33).

This idea will sound as peculiar to the legal ear as the notion that courts reason ethically in inverse proportion to the support they derive from conventional legal sources. Like that notion, however, this one carries an important insight. Professor Garver believes that "aiming at agreement may avoid civil war, but the prejudices of the powerful get to constitute common knowl-

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25. They are pretty important for utilitarianism, too, for in many cases these questions bear on what will count as utility and disutility.

edge.” Thus, “outsiders naturally feel the loss of truth more heavily than the powerful. The powerful have no reason not to be satisfied with agreement” (p. 26).

Professor Garver offers South Africa’s Truth and Reconciliation Commission as an example of what he means. The Commission made public (through *epideictic* rhetoric) accounts of the crimes of apartheid which Blacks knew to be true but which whites had denied. Because whites had had the power, their denials were the “authorized version” of the truth of apartheid. Professor Garver believes that by aiming for truth rather than trying to accommodate different interests, the TRC “replaced the false official opinions that held together the old South Africa with new truths it found by being more inclusive about what counts as rational” (p. 27).

The notion of “inclusive rationality” is enough to worry many people, including me.<sup>26</sup> Professor Garver is not endorsing total relativism, however. His point is that by adding to the store of public knowledge about apartheid the stories of Blacks who previously could not get a hearing, the TRC provided a means for integrating their stories into mainstream political discussion in a way that allowed whites to understand rationally the pathos of the stories. Rational integration of pathos helped develop a community ethos that reinforced that rationality. The knowledge of individual persons became the knowledge of all, and so reinforced the knowledge of individuals and changed the way they dealt with each other (p. 39–41). I do not know enough about South Africa to know whether, as Professor Garver says, through the TRC “South Africa persuaded itself that it was a democratic nation, and so became one” (p. 42), but one can see how that could be true.

Aiming at truth rather than agreement can help us reason about ends rather than just means. Reasoning about ends can change the terms on which accommodations are reached, which is one way of understanding Professor Garver’s claim that ethical reasoning integrates is and ought. Professor Garver makes an important contribution by connecting the reasoned development of *ethos* to the ability of persons with different beliefs to reason together about ends.

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26. It reminds me of a put-down one of my law school professors directed at another student (for a change), and which I still cherish: “So you’re saying this is not the result of mere reason, but a deeply held personal belief?”

I am skeptical of the practical aspects of this claim, however. For one thing, I am not sure that even ethical argument can get very far without some common ground between speaker and audience. The easiest way to argue ethically in Professor Garver's sense of the term is to find a commitment or principle you have in common with your audience. Professor Garver does not impose such a restriction on ethical argument, however. He requires only that you reason with a person about their commitments, not that you hold them, too. In fact, he argues that "rhetorically, we don't trust people who agree with us, or who look like us, but trust in people whom we think are engaged with us in a common project. . . . The more we trust in reasoning, the less we need to worry about shared ends, shared values, and pre-supposed truths" (p. 33).

I don't think this is how things really are, at least in legal argument. How do we know the speaker is engaged in a common project with us other than by concluding that we have at least some things in common? We at least have to have a shared interesting reasoning together about an issue. I will come back to this point in Part II. For now I note only that litigation is almost never a common project from the litigants' point of view; to the extent litigants represent the views of segments of society, as in cases like *Brown*, *Roe*, or *Lawrence*, litigation is not a common project for society, either.

It is one thing for me to take your commitments seriously, but a very different thing to take seriously only the fact that you have such commitments. I cannot take seriously a commitment to the literal truth of the Bible. I take very seriously the fact that some people are committed to Biblical literalism. If I am honest, the best I can do is accept that commitment, as Professor Garver's title has it, for the sake of argument. Even that is risky, though, because what I am willing to accept for the sake of argument reveals something about my character, and accepting something for the sake of argument implies that it is worth considering (p. 100).

These facts create two problems. First, there are some interests and commitments I will not honestly accept, even for the sake of argument. If you believe the Bible is literally true, that homosexuals are sinners bound for Hell, that tolerance of them condemns us in the eyes of God (which is why God allowed the attacks of September 11 to succeed),<sup>27</sup> and that homosexuals

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27. I'm not making it up. See Gavin Esler, *Christian Evangelists With A Touch of*

therefore should be locked up in an asylum,<sup>28</sup> I will either not deal with you, try to get the force of law on my side (as in *Lawrence v. Texas*),<sup>29</sup> or manipulate you with sophistic rhetoric. We are too far apart for friendship on this question, and it would be a waste of time to try.<sup>30</sup>

Second, even if I accept for the sake of argument Biblical literalism and the sinfulness of homosexuality, if you know where I stand why should you trust me? You know I deny that which you affirm, and you would be right to infer that whatever I say about the Bible is going to point you in my direction. I will know that before agreeing to argue on your turf; why would I agree otherwise? In theory, of course, I could agree because I am willing to open myself to the literal truth of the Bible, but that would entail re-wiring years of education. Do I really have to be prepared to toss Hume out the window just to talk to you? Not likely. If I am that open-minded, I have to wonder whether I have a brain or a sieve. (I would expect you to say the same about the Bible.) Professor Garver faults Aristotle for considering how speakers should persuade but not how audiences should listen (p. 6), but the question of why you should trust me in such circumstances remains unanswered.

These points limit the advantage ethical reasoning can claim over *logos*. Professor Garver distinguishes ethical reasoning from logical appeals based on authorities the audience accepts. I can catch you in a logical contradiction among Bible verses, for example, or between your actual practice and Biblical teaching, and urge you to take a consistent position. (I will, of course, urge you to reconcile the consistency my way.) You might plausibly see that sort of argument as insincere and accusatory, which is very different from developing my *ethos* by reasoning together with you. But if I reason only about beliefs that you hold but I do not, what else am I supposed to do but catch you in contradictions or make you retreat in the face of counter-examples?

As a practical matter, if I want to reason *with* you instead of *at* you, it seems I can do is one of five things. I can argue logi-

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*the Taleban*, THE SCOTSMAN, Nov. 30, 2001, at 18.

28. As one judge (!) in Mississippi believes. See Mississippi Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004).

29. 539 U.S. 558 (2003).

30. From the fundamentalist point of view, reasoning with me would require agnosticism about God, rejection of the Bible as authority for public policy, and a pretty strong version of the harm principle and the invisible hand, stretched to its farthest reach. I wouldn't blame them in the least if they thought it was not worth their time.

cally with you about your premises, hoping you believe enough in the concept of consistency for me to shame you into abandoning whatever is keeping you from agreeing with me. (And if I can't trust you enough to want to avoid obvious contradictions in your own beliefs, why should I trust you to join me on a common analysis of those beliefs?) I can try to show you that your beliefs harm others, and hope you have some vision of a common humanity I can appeal to. I can try to move sideways around our point of disagreement, or move up to a level of abstraction that blurs it, re-casting the issue in the hope of finding common ground between us, from which I might be able to persuade you.<sup>31</sup> (Banning pornography is not about prudishness, you see, it's about equality.) I can also manipulate you with verbal trickery. These methods are relatively easy and effective.

Finally, I can lay my soul bare and do my best to entertain honestly and without manipulative intent the premises you hold dear. I agree with Professor Garver that this approach generates a sense of common purpose the others do not. I do not think it happens very often (he does not say it does). I would like to think it is so obviously worth the effort that it deserves to be called more ethical than the other approaches but, at least to the extent that the ethics of practical reason take into account such practical things as the different social costs of different strategies, I am not so sure.

## II

In this section, I want to argue that the institutional facts of litigation limit (though they do not eliminate entirely) what ethical criticism can teach us about judicial reasoning. There are a lot of possible objections—opinions are often written by committee and often reflect compromise more than the candid feelings of individual justices, for example—but I want to focus on three facts: Very few people read opinions; reasoning in litigation is mandatory, not optional; and litigation produces results as well as arguments.

Professor Garver notes that, when Earl Warren became Chief Justice, Hugo Black advised him to read Aristotle's *Rhetoric* (p. 67). That fact is interesting, and it does fit nicely with the more familiar observation that Warren wanted to write a short

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31. Which is what the tiresome debate over the level at which rights should be formulated is really all about. See Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

opinion in *Brown*, one that would be easy for non-lawyers to read and which would not damn the South (p. 72). Professor Garver says the opinions needed to be readable by ordinary people “because it is they who decide whether the opinion is legitimate, and this particular opinion had to be legitimate in order to be successful” (p. 72). This point is consistent with the idea that the speaker’s *ethos* both is her own and is derived “via argument, from the audience” (p. 83), and with the idea that the *ethos* of the community and the judgments of the audience guard against excessive judicial creativity (pp. 200–01).

But what if people do not read the opinion? I cannot prove it, but I don’t think the opinion in *Brown* was read by many lawyers in 1954, and by no more than a trivial number of lay people.<sup>32</sup> Probably most law students after 1954 have read edited versions of *Brown*, but I bet hardly any have read all of it. Warren’s rhetoric did not stop the Southern Manifesto or massive resistance to integration. It took soldiers with rifles, the public mauling of freedom riders, and pictures of redneck sheriffs setting dogs and water canons on conservatively dressed protestors to fulfill the promise of *Brown*.

From one angle, it does not matter that most people did not and have not read Warren’s opinion. Ethical reasoning is no less ethical if it fails to persuade. It is the choice of the means of persuasion that matters, and Warren was right about the best way to write the opinion in *Brown*, regardless whether anyone read it. But what about the part of *ethos* derived from the audience through the argument? How can *ethos* be created by an argument that was and is “largely unread”?<sup>33</sup> How can audience judgments about judicial reasoning reign in irresponsible judges when the audience sees only the result? I do not find answers to these questions in Professor Garver’s book.

My second and third facts are that litigation entails involuntary reasoning and that it produces results, not just reasons. I will take these points together. Suppose that, in addition to not really trusting you when you agree to my premises only for the sake of argument, I really don’t want to be talking to you at all. I wish you would just leave me alone. At a minimum, this fact would complicate the ideas of friendship and community, yet litigation is like that. In almost all cases, neither party wants to be in court.

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32. See Randall Kennedy, *Schoolings in Equality*, NEW REPUBLIC, July 5 & 12, 2004, at 32.

33. *Id.*

Plaintiffs would rather not have to put up with whatever brought them to court, and defendants almost never want to be sued. How is friendship supposed to flourish in such an environment? This point is not a fatal flaw, because the Court is always speaking to a much broader audience than the parties to particular cases, but it sets the right tone for thinking about opinions.

The awkwardness of reasoning through litigation is compounded by the fact that courts issue orders. It is fine to say that in *Brown* the Court placed before the nation a vision of equality the nation could consider, and which ultimately became a fundamental part of the American *ethos*. But the Court did not say “let us consider what the world would be like if we treated black children as equal human beings.” It said: “treat black children as equal human beings.” At least in the near term, the Court does not reason with the nation about ends, it orders that some end be pursued (in *Brown*) or recognized as law (in most other cases). Most people cared more about the result in *Brown* than the reasoning. Reasoning might make things worse—if Warren had written about Southerners as H.L. Mencken did, Southerners would have been even angrier—but no amount of reasoning could hide the fact that the Court was condemning not just school segregation, but an entire way of life. Such condemnation is always more or less present in constitutional cases that try to alter culture.

This point is related to my earlier point that there are some premises I will not accept, even for the sake of argument. Professor Garver acknowledges that “sometimes the only way to be friends with someone [who holds] radically different beliefs . . . is to bracket the truth-claims of their beliefs and values . . .” (p. 186). I think that is right, but this point creates problems for Professor Garver’s claim that judicial reasoning can create relations of friendship. In every contested constitutional case, including *Brown*, some segment of society will be so at odds with the Court that it will not be able to accept the Court’s premises, even for the sake of argument (which is not how judicial opinions are supposed to be accepted anyway). The Court cannot bracket truth-claims, however, because its decisions establish (or at least try to establish) a new truth.

It is a great flaw of academics (though not of Professor Garver’s book) that we tend to discount preferences we do not share. (I suppose most people do that, but we at least claim to be better than most people at reasoning about such things.) Discounting makes us feel better about arguing that the Court

should condemn those preferences and banish them from the law, but it is not very honest. Sad though it is, it is a mistake to underestimate the degree to which human beings base their sense of self on their relative position to others, and by extension the degree to which members of one group feel harmed by rulings in favor of the other.<sup>34</sup>

Professor John Donahue makes the point from a utilitarian point of view. He recounts telling a student that race relations in the South seemed to have progressed a lot; the student replies that he guesses that is right: his father no longer throws up when he sees a black man drink from a white drinking fountain.<sup>35</sup> An honest utilitarian must count that reaction as disutility. Many conservative Christians see themselves as virtuous not just in the eyes of God but *as opposed to* (for example) sinful homosexuals, whose conduct is an “abomination.”

When the Court decides a case on such fundamental issues, it cannot help but put a boot in the face of the losing side. To say separate is not equal is to say the system of white domination is wrong and to call into question the relative status of many whites. To say gay men and lesbians are human beings entitled to the equal respect of the law is to say condemnation of them is wrong. If you believe the word of God condemns gays, it is to say that God’s word is wrong,<sup>36</sup> or at least does not deserve to be law. That is pretty heady stuff. None of this means that such decisions are wrong, of course. (They roughly track the harm principle, so people like me like them.) It does mean that large numbers of people will see the results in such cases as acts of aggression, not friendship.

What you think of such things in the near term depends on whether the boot is on your foot or in your face. If I am on the losing side, why on Earth should I consider any opinion an act of

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34. See, e.g., William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1377–78 (1995) (“[A]ntigay prejudice provides hedonic satisfaction to homophobes. For many people, homophobic feelings alleviate significant psychological problems, including sexual frustrations and feelings of personal inadequacy.”), citing ELIZABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICE* (1996).

35. John J. Donahue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1591 (1994) (reviewing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992)).

36. Logically, the Court could write an opinion saying you were wrong about God’s word. It would destroy its *ethos* as a secular institution if it tried that, however, and the opinion would be a disaster no matter how logical it might be, which is why we often see the Court channel J.S. Mill but we never see it debate the meaning of scripture.

friendship? I cannot reply to you in any meaningful way. As noted above, Professor Garver acknowledges that sometimes it is friendlier to ignore fundamental differences than to fight about them. Litigation eliminates that option. I suppose Professor Garver could still respond that, even if the Court rules against your side, things could be worse. The Court could rule against you and reason insincerely, meaning it could both reject your position and show contempt for you in its reasoning. That would be worse, I suppose, but depending on how strongly you felt about the result, it might not be much worse. Either way, why should I be satisfied with you giving me the boot and taking responsibility for it? What kind of joint project is that?

All discourse-based theories of adjudication have to wrestle with this problem, however.<sup>37</sup> And this objection does not undercut the force of Professor Garver's claim that *ethos* is critical to persuasion and the relations among persons different persuasive strategies create. An advocate who relies on arguments he does not actually accept as true, for example, is engaged in a different sort of dialogue than one who asserts only propositions he believes to be true. The difference does not come from the logic of an argument, because the rules of logic do not require that the logician believe the propositions tested.<sup>38</sup> The difference is in the relations an advocate creates with an audience by virtue of his rhetorical choices. An advocate who asks you to believe an argument he does not believe himself is not your friend, though he may be a very effective advocate just the same.

Professor Garver's argument suffers somewhat in the litigation environment, but I do not think it fails completely. That some portion of the public will perceive any decision as a kick in the face does not mean everyone will see it that way. Large portions of the public may be willing to listen to the Court, and through ethical reasoning it may persuade them that it speaks for them as well as to them (p. 72). That any decision will feel like a kick to someone is not a warrant for sophistry. Neither is the fact that the Court commands more than it converses. Professor Garver is right to say that the choice of the means of persuasion

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37. For a generalizable criticism of such arguments, see Lund & McGinnis, *supra* note 6, at 1587-90.

38. One can analogize this difference to the difference between logically valid arguments, whose propositions need not be true, and logically sound arguments, whose logic is valid and whose propositions are true. An advocate who asserts only sound arguments relates to an audience in a different way than an advocate who is willing to assert valid but unsound arguments.

is a choice of how to deal with each other, and therefore an ethical choice. To the extent his thesis applies to litigation, it provides a valuable perspective on an otherwise familiar problem.

### III

I want to conclude by returning to the aspiration and the fear I mentioned at the beginning. I believe we should give up on part of the aspiration, and worry less about the fear. I'll take the second point first.

The last section did not answer a question. What restrains judicial creativity if people do not read or do not care about judicial reasoning? Judicial self-interest. The Court does not want to lose its power, so it will not issue decisions that put that power at too much risk.<sup>39</sup> If the Court is constrained, albeit in a very general way, why should we worry that its decisions are just rhetoric—even sophistic rhetoric?

Professors Lund & McGinnis claim creative decisions harm the Court as an institution, which is the most common answer. I think the evidence refutes that claim to the extent it can be tested at all. People have more and more consistent faith in the Court than in other federal institutions, for example.<sup>40</sup> And many of the Court's most obviously creative decisions are now considered beyond question. *Brown*, *Griswold*, *Eisenstadt*, and *Loving*, are as much a part of current American *ethos* as the document in which they cannot be found.<sup>41</sup>

39. E.g., Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 (2003) ("the wealth of existing evidence suggests that most of the time judicial decisions fall within the range of acceptability that one might expect of the agents of popular government" (footnote omitted)); *Id.* at 2607 ("[I]n the main the results of Supreme Court decisionmaking comport with the preferences of a majority or at least a strong plurality, something that many political scientists now take as a given."); Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1120 (1997).

40. John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2000).

41. I list *Brown* as creative because the justices who decided it thought history was not on their side, a fact Professor McConnell's case does not alter. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 302–08 (2004). Professors Lund and McGinnis ask rhetorically, "if the Supreme Court doesn't take the Constitution seriously, why should anyone else?" It is an odd question, because in the real world people do take the Constitution seriously notwithstanding what Professors Lund and McGinnis see as the Court's brazen lawlessness. A pragmatic answer is that argument has to end sometime, so that life can go on and people can do other things. From that perspective the Court's finality is a virtue regardless of the content of a wide range of possible decisions. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). Judicial creativity does not erode support for the law

*Roe* has caused a lot of noise, it is true, and it altered national politics to a degree, but roughly half the country has supported it since the day it was decided, and there is no evidence it has harmed the Court's overall standing.<sup>42</sup> Professors Lund and McGinnis are right to point out that 50% support would not secure a constitutional amendment, but that just reminds us (if we needed reminding) that the boot was as present in *Roe* as in any other case. Popular divisions over *Roe* did not keep the Court's from deciding the 2000 election in favor of the candidate with the fewest popular votes,<sup>43</sup> proclaiming a new era of state sovereignty, giving habeas rights to prisoners in Guantanamo Bay,<sup>44</sup> radically re-making criminal sentencing practices,<sup>45</sup> or striking down the anti-sodomy law at issue in *Lawrence v. Texas*.<sup>46</sup>

There is no reason to expect creativity to get the Court into serious trouble in the future. Professor Post describes a "serenely confident" Court,<sup>47</sup> and why not? The practice of judicial review grows stronger with exercise. As the country accepts creative decisions, they become more accustomed to such decisions, making creativity less costly in the future, and therefore more likely. In purely political terms, liberals and conservatives both have some stake in creative judging. Each side wins sometimes. If you are a conservative you got *Bush v. Gore* and the proclamation that states are sovereign;<sup>48</sup> you have to live with

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because accepting judicial finality works better for people than perpetual hand-wringing about democratic theory.

42. On public opinion regarding abortion, see Michael Vitiello, *How Imperial is the Supreme Court? An Analysis of Supreme Court Abortion Doctrine and Popular Will*, 34 U.S.F. L. REV. 49, 85 (1999), which concludes that 25 years of polling data show significant agreement between the Court's rulings and public opinion. For the datum that roughly half the population supports *Roe*, see *id.* at 86. Brian Bix reminds me that popular divisions over *Roe* might have made the Court more timid than it would have been had *Roe* gone the other way. The Court might have been more willing to recognize a right to kill oneself, for example. Cf. *Washington v. Glucksberg*, 521 U.S. 702 (1997). This point is true though, as with all counterfactuals it is hard to prove. I believe the Court has been creative enough, and successfully so, to disprove the notion that it suffers from its creativity.

43. *Bush v. Gore*, 531 U.S. 98 (2000). It is worth noting that the public liked the opinion, see Yoo, *supra* note 40, at 778 n.21 (surveying surveys of public opinion on *Bush v. Gore*), though many scholars have argued that it was unprincipled. E.g., Laurence Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571 (2002).

44. *Rasul v. Bush*, 542 U.S. 466 (2004).

45. *Blakely v. Washington*, 542 U.S. 296 (2004). Justice Scalia's majority opinion denied the full implications of *Blakely* for the Sentencing Guidelines, *id.* at 308, as Justice Kennedy refused to commit to the implications of *Lawrence*, 539 U.S. at 578.

46. 539 U.S. 558 (2003).

47. Post, *supra* note 3, at 5.

48. *Alden v. Maine*, 527 U.S. 706 (1999).

*Lawrence*, *Grutter*,<sup>49</sup> and Internet pornography.<sup>50</sup> If you are liberal, the reverse is true. The country's passivity over creative judging suggests most people think that's not too bad.<sup>51</sup> Within the general parameters of popular opinion, it is true that the Court tends to impose elite values on the country, but it is also true that this fact worries elites more than it worries the country.<sup>52</sup>

These points bring us to the aspiration. Why do we want law to be logical? Without harping too much on Holmes or the realists, I sometimes wonder if we want law to be logical because the goodness of a law is a function of the strictness of its logic or because logic is what we happen to be good at. If the law were strictly logical, then legal logicians (us) might influence its development more, but that would not guarantee that *logos*-only law would benefit anyone else. Judicial practice suggests there must and should be more to law than logic.

If we accept the “noncontroversial positive point” that the Constitution means what the Court can get away with saying it means, and if that fact implies that constitutional law will always outrun logic, then it follows that we cannot teach students about real-world constitutional law without teaching more than logic. Like it or not, to teach real-world constitutional law is to teach the evolution of constitutional *ethos*, which is to say it is to teach rhetoric. Maybe we condemn the word “rhetoric” to divert attention from how well it applies to what we do.

None of this means we should give up on logic.<sup>53</sup> Legal academics are (or at least should be) partisans of logic. Constructing logical legal arguments, and logical critiques of unsound arguments, should be our stock-in-trade. If we have a comparative advantage over practicing lawyers—or the rhetoric, literature, or theater departments, for that matter—logical legal argument is it. That logic is *our* job does not mean it is the *only* job, however. It means instead that we can write about and teach only part of the way law works in the real world. There is nothing wrong with that. It is risky to ask for more. To the extent we have a com-

49. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

50. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

51. *Cf. Mondak & Smithey*, *supra* note 39, at 1139 (noting that opposition generated by rulings a person dislikes may fade with time and subsequent favorable rulings).

52. Friedman, *supra* note 15, at 158 (“[A]cademic fixation with the countermajoritarian problem differs significantly from popular criticism of the courts that appears as circumstances.”).

53. As Professor Garver puts it, “ethical argument is never illogical. It depends on logic, and then goes beyond what it is logically authorized to conclude.” (p. 86)

parative advantage we have limited influence over the direction of the law; to the extent we seek such influence, we are likely to lose our comparative advantage.

The problem, of course, is that teaching students about ethical reasoning is not the same thing as teaching ethical reasoning itself. How do we teach students to go beyond *logos* without abandoning or mocking it? Like judgment, I think ethical reasoning can be learned, but I doubt it can be taught. All we can hope for is that it can be shown, which is what Professor Garver has done in this book.