

KAIROS AND AMERICAN LEGAL PRAXIS

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INTRODUCTION

*“To every thing there is a season,
 and a time to every purpose under the heaven:
 A time to be born, and a time to die;
 A time to plant, and a time to pluck up that which is planted;
 A time to kill, and a time to heal;
 A time to break down, and a time to build up;
 A time to weep, and a time to laugh;
 A time to mourn, and a time to dance;
 A time to cast away stones, and a time to gather stones together;
 A time to embrace, and a time to refrain from embracing;
 A time to get, and a time to lose;
 A time to keep, and a time to cast away;
 A time to rent, and a time to sew;
 A time to keep silence, and a time to speak;
 A time to love, and a time to hate;
 A time of war, and a time of peace.”—Ecclesiastes 3:1–8¹*

This passage from *Ecclesiastes* was popularized by the 1960s American rock group, The Byrds, in their hit song, *Turn! Turn! Turn!* written by Pete Seeger.² The Greek version of this passage in the Septuagint includes twenty-nine uses of the term Kairos, from which we get English translation as *time*.³ The sense of “proper time” or “opportune moment” and “fit” in the use of Kairos here reflects a well-settled concept that is almost as richly textured and complex as the term *logos*, evolving over hundreds of years.⁴ Notably, for my purposes here, Kairos became a central term in ancient rhetoric that, I will demonstrate, remains relevant for understanding contemporary American legal praxis.

This paper begins with a review of ancient uses of this term, particularly its role in early Greek rhetorical theory. Next, I will consider how Kairos is central

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¹ *Ecclesiastes* 3:1–8.

² See Nick Keppler, *Turn! Turn! Turn!—The Byrds’ 1965 Hit Used Lyrics That Dated Back More Than 2,000 Years*, FIN. TIMES (Oct. 29, 2018), <https://ig.ft.com/life-of-a-song/turn-turn-turn.html> [<https://perma.cc/N2AL-A8J3>].

³ *Septuagint* 3:1–8; see also *infra* Part I.

⁴ See *infra* Part I.

to an important contemporary debate in rhetorical theory concerning Lloyd F. Bitzer's conception of "the rhetorical situation."⁵ As I will show, that debate highlights an issue concerning Kairos that was never directly addressed by ancient writers—the sources of the "opportune moment" to which Kairos responds.

I will make a rather obvious, if almost unremarked point, that has implications for contemporary legal praxis: unlike Samuel Beckett's characters who are "Waiting for Godot,"⁶ rhetors do not always bide their time until "opportune moments" or "*kairotic* situations" arise. Rather, they sometimes work to create them, setting stages that they then take. This is particularly evident in contemporary litigation campaigns, such as those addressing racial segregation and abortion.⁷ Such groundwork may also be observed in the operation of legal standards and procedures, as well as some judicial decision making.⁸ This paper will argue that understanding such preparatory work by legal groups, judges, and the legal community as a whole will provide a richer appreciation of what it means to adapt to "opportune moments" in the practice of legal rhetoric. Finally, I offer a framework for analyzing such pre-*kairotic* work.

I. KAIROS IN ANCIENT GREECE

Although in late antiquity Kairos came "to mean 'due measure,' 'fitness,' 'opportunity,' etc.," its earliest usages were more literal.⁹ Homer and Euripides used Kairos to indicate a vulnerable place for mortally wounding a combatant with a weapon, such as an uncovered place on the head "where penetration was most easy . . ."¹⁰ Classicist Richard Broxton Onians argues that we should read Kairos here not as referring to a "target" but rather an "opening," such as the holes in the aligned twelve axe heads that Odysseus shoots an arrow through at the end of *The Odyssey*.¹¹ He notes, "[w]e, ourselves, speak of 'an opening' in just this sense (cf. also 'loophole')."¹²

Homer and other writers used a differently accented variation of Kairos (καῖρος rather than καιρός) to refer to the opening in threads through which a shuttle passes in weaving, one pass of which is called a "shot," strengthening Onians's analogy to an opening for an arrow.¹³ Notably, this physical opening in weaving adds a sense of timing that is associated with "opportunity" and

⁵ *Infra* Part II.

⁶ See generally SAMUEL BECKETT, *WAITING FOR GODOT* (1955).

⁷ See *infra* Part III.

⁸ See *infra* Part III.

⁹ RICHARD BROXTON ONIANS, *THE ORIGINS OF EUROPEAN THOUGHT: ABOUT THE BODY, THE MIND, THE SOUL, THE WORLD TIME, AND FATE* 343 (2d ed. 1954).

¹⁰ *Id.* at 343–44.

¹¹ *Id.* at 344–45.

¹² *Id.* at 345.

¹³ *Id.* at 345–46.

“critical time,” “for there the opening in the warp [during the weaving process] lasts only a limited time, and the ‘shot’ must be made while it is open.”¹⁴

Hesiod uses Kairos in *Work and Days* to convey a sense of due measure or proper proportion, warning about overloading a wagon and causing its axle to break.¹⁵ Phillip Sipiora notes that Hesiod may be the source of maxim, “[o]bserve due measure, and proportion [Kairos] is best in all things.”¹⁶ Although the sense of time is lost there, the notion of adaptation to circumstances connects this usage to Homer’s.

From the end of the Archaic period to the early part of the Classical period, Greek writers from Pythagoras to Pericles to Aeschylus “use[d] Kairos to signify opportunity, occasion, crisis or urgency, measure, proportionality (which carries connotations of justice), convenience, advantage, profit, fruit, fitness, propriety, and decorum.”¹⁷ Some Greeks made kairos foundational to their philosophies.¹⁸ The late John E. Smith, Clark Professor Emeritus of Philosophy at Yale, asserted that “the watchword of pre-Socratic ethics was ‘Know the opportunity’ in the context of human action, [while] the Pythagoreans regarded Kairos as ‘one of the laws of the universe.’”¹⁹ James L. Kinneavy adds that “several of the Pythagoreans made the mastery of Kairos to be the essence of philosophy,” quoting Augusto Rostagni’s (translated) claim that the Pythagoreans believed that “[t]he most important thing in every action is ‘Kairos.’”²⁰

Catherine Eskin argues that the Greek physician Hippocrates successfully departed from other healers by “mak[ing] room for individuality and case specificity . . . us[ing] the concept of Kairos[.]” such a perspective allowed him “to express the variable components of medical practice more accurately.”²¹ Hippocrates specifically invokes the role of kairos in healing in his Precepts, where he insists: “Time [chronos] is that wherein there is opportunity [kairos], and opportunity [kairos] is that wherein there is no great time [chronos]. Healing is a matter of time [chronos], but it is sometimes also a matter of opportunity [kairos].”²² Eskin argues that “[k]airos, as the term denoting a particular con-

¹⁴ *Id.* at 346.

¹⁵ HESIOD, *WORK AND DAYS* 28 (A.E. Stallings trans., Penguin Classics 2018).

¹⁶ Phillip Sipiora, *Kairos: The Rhetoric of Time and Timing in the New Testament*, in *RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS* 116 (Phillip Sipiora & James S. Baumlin eds., 2002).

¹⁷ *Id.*

¹⁸ John E. Smith, *Time and Qualitative Time*, in *RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS* 48 (Phillip Sipiora & James S. Baumlin eds., 2002).

¹⁹ *Id.*

²⁰ James L. Kinneavy, *Kairos in Classical and Modern Rhetorical Theory*, in *RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS* 59 (Phillip Sipiora & James S. Baumlin eds., 2002).

²¹ Catherine R. Eskin, *Hippocrates, Kairos, and Writing in the Sciences*, in *RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS* 98 (Phillip Sipiora & James S. Baumlin eds., 2002).

²² 1 HIPPOCRATES, *Precepts*, in *HIPPOCRATES* 313 (W.H.S. Jones trans., Harv. Univ. Press 1923).

text and a time dependent upon situational determinants, was necessarily the best word available to Hippocrates to express his ideas.”²³

In its involvement with opportune moments, adaptation to particular cases, and giving due measure, Kairos was well suited to inform the practice of rhetoric as it was beginning to be theorized and taught. Mario Untersteiner’s provocative early book on the older Sophists credits Gorgias as an early practitioner of Kairos, which featured “[a]bove all . . . the capacity to improvise speeches”²⁴ Ancient sources suggest that Gorgias was highly adaptive because “he knew everything and could speak on any theme, relying on the occasion.”²⁵ Gorgias’s Kairos, Untersteiner argues, “can be defined as ‘that which is fitting in time, place and circumstance’, which means the adaptation of the speech to the manifold variety of life, to the psychology of speaker and hearer: variegated, not absolute unity of tone.”²⁶ Bruce McComiskey agrees that “it is necessary for the Gorgianic orator to know and be able to apply all of the different rhetorical techniques to any *logos* in any *kairotic* situation.”²⁷ He calls Kairos “Gorgias’s most prominent rhetorical principle”²⁸

The philosophical or pedagogical differences between writers of ancient rhetorical theory did not determine their recognition of the importance of kairos. Isocrates, in *Against the Sophists*, insisted that “oratory is good only if it has the qualities of fitness for the occasion [Kairos], propriety of style, and originality of treatment”²⁹ Even Plato, who disparaged rhetoric’s “flattery” of the audience in *Gorgias*, made kairos central to his ideal rhetoric at the end of *Phaedrus*, describing rhetoric’s ultimate goal and the means to achieve it:

Since it’s the function of speech to lead the soul, a would-be orator must know how many types of soul there are. . . . [He will discover that] [p]eople with such-and-such a nature are easy to persuade of such-and-such by speeches of such-and-such a type for reason *x*, while people with such-and-such a nature are hard to persuade for reason *y*. . . . When he can not only say what kind of person is persuaded by what kind of speech, but also spot that kind of person before him and tell himself that here, in real life and before his eyes, is the kind of person and the kind of character which was the subject of those earlier discussions, and to which such-and-such a kind of speech should be applied in such-and-such a way to persuade him of such-and-such—once he is capable of doing all this, and moreover has understood the proper moments [Kairos] for speaking and for keeping quiet, and can also recognize the appropriate and inappropriate occasions for concision, arousing pity, shocking the audience, and all the various

²³ Eskin, *supra* note 21, at 99.

²⁴ MARIO UNTERSTEINER, *THE SOPHISTS* 197 (Kathleen Freeman trans., Basil Blackwell 1954).

²⁵ *Id.*

²⁶ *Id.*

²⁷ BRUCE MCCOMISKEY, *GORGAS AND THE NEW SOPHISTIC RHETORIC* 30 (2002) (second emphasis added).

²⁸ *Id.* at 111.

²⁹ 2 ISOCRATES, *Against the Sophists*, in ISOCRATES 171 (George Norlin trans., G. P. Putnam’s Sons 1929).

modes of speech he has learnt, then and only then will his expertise have been perfected and completed.³⁰

Seizing the kairotic moment for Plato, then, covers a wide range of variables (audience, type of speech, purpose, occasion) and a wide range of rhetorical choices (style, emotional appeals, reasoned appeals), including when to withhold speech.³¹

Although Aristotle does not use the term in his definition of rhetoric, his emphasis on adapting the available means of persuasion “according to a ‘right measure’ or ‘proportion’ of topic and audience” suggests a concern for kairos in adapting to the particulars of the “given case.”³² Kinneavy and Sipiara both explain how Aristotle tied his artistic appeals—involving speaker credibility, audience emotions, and reason (i.e., ethos, pathos, and logos)—to kairos in adapting to the particulars of a situation.³³ Kinneavy shows that, despite Aristotle’s emphasis on general rules for rhetoric, he is sensitive to kairotic concerns in forensic, deliberative, and epideictic speaking, as well as in rhetorical choices involving style and arrangement.³⁴

We should not be surprised that philosophical and pedagogical opponents in ancient Greece came to make Kairos central to their rhetorical systems. Rhetoric as an art adapted to the particulars of a situation for pragmatic ends requires a consideration of and adaptation to variables involving the audience, occasion, speaker, purpose, and context.³⁵

Consider a recent example that reflects the complexity of variables involved in a rhetorical situation: the “#MeToo” movement began in 2017 in response to sexual-harassment allegations against film producer Harvey Weinstein.³⁶ It developed against a backdrop of decades of sexual harassment in the workplace that persisted despite inroads made on behalf of sexual equality in the United States over more than 150 years.³⁷ It was shaped by the election of

³⁰ PLATO, PHAEDRUS 271d–72b (Robin Waterfield trans., 2002).

³¹ McComiskey distinguishes Plato’s use of kairos in noting that “its purpose lies only in the adaptation of universal truth to various audiences.” MCCOMISKEY, *supra* note 27, at 63.

³² Sipiara, *supra* note 16, at 118.

³³ Kinneavy, *supra* note 20, at 69–73; Sipiara, *supra* note 16, at 118.

³⁴ Kinneavy, *supra* note 20, at 68–69, 72–73.

³⁵ Aristotle discusses these elements in his influential book on rhetoric, ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 47–48 (George Kennedy trans., Oxford Univ. Press 2d ed. 2007), and public speaking books today consider them central to the study of rhetorical situations. See, e.g., STEPHEN E. LUCAS, THE ART OF PUBLIC SPEAKING 18–21 (12th ed. 2015).

³⁶ Nadia Khomami, #MeToo: How a Hashtag Became a Rallying Cry Against Sexual Harassment, GUARDIAN (Oct. 20, 2017, 1:13 PM), <https://www.theguardian.com/world/2017/oct/20/women-worldwide-use-hashtag-metoo-against-sexual-harassment> [<https://perma.cc/8L7S-5TS5>].

³⁷ Lori Harrison-Kahan, *The Seeds of #MeToo Started Growing 100 Years Ago*, CNN: OPINION (Nov. 2, 2019, 1:13 AM), <https://www.cnn.com/2019/11/02/opinions/me-too-movement-history-jordan-michelson-harrison-kahan/index.html> [<https://perma.cc/T93Y-8XTZ>].

President Donald Trump, who was caught on videotape bragging about his ability as a celebrity to sexually accost women and get away with it.³⁸ It shaped the Senate Judiciary Committee hearings over the confirmation of Brett Kavanaugh to the U.S. Supreme Court where allegations of sexual assault against the nominee were made and discussed.³⁹ What someone can say about sexual harassment, or even sexual relations generally, is different today than it was before this movement.⁴⁰ The speaker on these issues must consider which opportunities have been opened and which have been foreclosed, and what adaptations must be made to fit the particulars of this context.

This contemporary example also highlights a possibility that the ancients scarcely considered regarding Kairos. Actress Alyssa Milano built upon the “MeToo” hashtag of social activist Tarana Burke to encourage women to come forward with their allegations of sexual harassment.⁴¹ Their actions shaped the context within which we now discuss these issues, creating a unique *kairotic* context that encourages some speech and discourages other speech, in terms of content, style, speaker, occasion, and so forth. Commentators have begun noting a new caution in dating and work relationships between men and women.⁴² So we should consider the extent to which rhetors not only respond to *kairotic* situations, but also help to create them. A debate over rhetorical theory in the early 1970s, which I turn to next, helps to frame a consideration of the role of rhetors in this regard.

II. KAIROS IN “THE RHETORICAL SITUATION”

In his classic 1968 essay “The Rhetorical Situation” Lloyd F. Bitzer explores “the nature of those contexts in which speakers or writers create rhetorical discourse,” in short, what makes a situation “rhetorical.”⁴³ Although he does

On the achievements of the first women’s movement, see 1 KARLYN KOHRS CAMPBELL, *MAN CANNOT SPEAK FOR HER: A CRITICAL STUDY OF EARLY FEMINIST RHETORIC* 4–6 (1989).

³⁸ Philip Bump, *How the ‘Access Hollywood’ Incident Gave Us the Trump We Recognize Today*, WASH. POST (July 10, 2019, 11:07 AM), <https://www.washingtonpost.com/politics/2019/07/10/how-access-hollywood-incident-gave-us-trump-we-recognize-today> [https://perma.cc/C6DL-23GZ].

³⁹ Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html> [https://perma.cc/X8G5-YMMF].

⁴⁰ Khomami, *supra* note 36.

⁴¹ *Id.*

⁴² See, e.g., Philip Galanes, *Dating After #MeToo*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/style/metoo-dating.html> [https://perma.cc/8UMT-HB2M]; Nicholas Kristof, *Navigating the Male-Female Work Relationship*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/opinion/me-too-male-bosses.html> [https://perma.cc/5CXZ-C2D3].

⁴³ Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 1 (1968).

not use the term Kairos, the essay is centrally concerned with that concept.⁴⁴ He suggests that a given situation “invites” discourse capable of addressing an actual or potential exigence that speech theoretically could partially or wholly remove by persuading an appropriate audience to change its beliefs or actions.⁴⁵ He describes discourse that is well adapted to the needs of the situation as “fitting,” that is, as “meet[ing] the requirements established by the situation.”⁴⁶ The situation to which the rhetor must adapt is “a . . . context of persons, events, objects, and relations”⁴⁷ Fitness is a traditional element of Kairos, and a sense of “due measure” (in meeting what the situation requires) is implied.⁴⁸ Furthermore, the sense of “right timing” and “opportunity” is reflected in Bitzer’s position that rhetors may miss their chance to address such situations because “many rhetorical situations mature and decay without giving birth to rhetorical utterance.”⁴⁹ Just because there is an “opening” does not mean an appropriate rhetor will use it.

Five years after Bitzer’s inaugural essay in *Philosophy & Rhetoric*, Richard E. Vatz responded to the essay in the same journal, rejecting Bitzer’s “realist” philosophy of meaning and his account of the rhetorical situation, asserting: “No situation can have a nature independent of the perception of its interpreter or independent of the rhetoric with which he chooses to characterize it.”⁵⁰ Instead of the situation controlling the rhetor, Vatz would position the rhetor as the selector of facts from an endless “context” and the creator of “meaning” through linguistic depiction.⁵¹ His differences with Bitzer could not be starker when he asks, “What is the relationship between rhetoric and situations?” and responds:

It will not be surprising that I take the converse position of each of Bitzer’s major statements regarding this relationship. For example: I would not say “rhetoric is situational,” but situations are rhetorical; not “. . . exigence strongly invites utterance,” but utterance strongly invites exi-

⁴⁴ Classical rhetorical scholar Edward Schiappa once suggested to me that rhetorical scholars were not really exploring kairos much by 1968, so it is not surprising that Bitzer leaves out the term. Indeed, the earliest journal article to mention kairos in EBSCO’s *Communication and Mass Media Complete* index is from 1973 and it does not appear in a major essay again for ten more years. Search for “kairos,” EBSCO COMM. & MASS MEDIA COMPLETE, <http://web.a.ebscohost.com/ehost/search/basic?vid=1&sid=8f33e3e6-42cf-4177-b2f8-5ba65ee7f3e2%40sessionmgr4007> [<https://perma.cc/7R2X-SZSZ>] (select “Advanced Search” hyperlink; then enter “kairos” in the search bar; select the box for “Also search within the full text of the articles”; select search; order results by “Date Oldest”; narrow by “Academic Journals”).

⁴⁵ Bitzer, *supra* note 43, at 6.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.* at 4–5.

⁴⁸ Sipiara, *supra* note 16, at 116.

⁴⁹ Bitzer, *supra* note 43, at 6.

⁵⁰ Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 *PHIL. & RHETORIC* 154, 154 (1973).

⁵¹ *Id.* at 160.

gence; not “the situation controls the rhetorical response . . .” but the rhetoric controls the situational response; not “. . . rhetorical discourse . . . does obtain its character-as-rhetorical from the situation which generates it,” but situations obtain their character from the rhetoric which surrounds them or creates them.⁵²

In acceding so much power to the rhetor to shape the situation, Vatz practically erases any consideration of Kairos; since “opportune moments” can simply be fashioned by speakers who create reality for their audiences, they are never “in” the situations faced by rhetors. The dispute between Bitzer and Vatz throws into relief the question of the rhetor’s role in creating situations that provide *kairotic* “openings.”

Smith, the philosopher, comes closest to Bitzer’s position in distinguishing the ancient Greek conception of Kairos from *chronos*, or time:

In *chronos* we have the fundamental conception of time as measure, the *quantity* of duration, the length of periodicity, the age of an object or artifact, and the rate of acceleration of bodies, whether on the surface of the earth or in the firmament beyond. The questions relevant to this aspect of time are: “How fast?” “How frequent?” “How old?” and the answers to these questions can be given in cardinal numbers or, as it may be, in terms of limits that approach these numbers. By contrast, the term Kairos points to a *qualitative* character of time, to the special position an event or action occupies in a series, to a season when something appropriately happens that cannot happen just at “any time,” but only at *that* time, to a time that marks an opportunity which may not recur. The question especially relevant to Kairos is “When?” “At what time?”⁵³

Contrary to Vatz’s claim that “[n]o situation can have a nature independent of the perception of its interpreter or independent of the rhetoric with which he chooses to characterize it,”⁵⁴ Smith finds objectivity in the operations of time, since the processes by which things function have tendency and directionality. For example, a “flower now in the vase as something that has become” after “the minimal time required” for that outcome.⁵⁵

Bitzer no doubt would agree with Smith that *chronos* undergirds an “ontological dimension of Kairos as manifest in various orders of happening, such as constellations of historical events, natural processes, and developments which have their own temporal frames and opportune times quite apart from human action, especially the action of this or that individual.”⁵⁶

Smith does allow for human engagement with this external unfolding in time, admitting: “It is, of course, true that there will always be a subject-situation correlation where Kairos is concerned, since someone will have to know or believe that he knows the right ‘when,’ but this insight does not create

⁵² *Id.* at 158–59.

⁵³ Smith, *supra* note 18, at 47.

⁵⁴ Vatz, *supra* note 50, at 154.

⁵⁵ Smith, *supra* note 18, at 50.

⁵⁶ *Id.* at 47–48.

that ‘when’ out of itself.”⁵⁷ Because the “when” is independent of the rhetor, like Bitzer, Smith believes that “all the *kairoi* or turning points in the historical order” present opportunities that may be “seized upon” or “missed.”⁵⁸

Eric Charles White comes closer to Vatz’s position. He asserts that “the persuasive force of a speech does not derive from its correspondence to a preexistent reality or truth. Truth is relative to the speaker and the immediate context.”⁵⁹ White’s recognition of the “immediate context” at least nods to some “reality” in the situation, which circumscribes discourse so that “knowledge comes to depend on the occasion of utterance. Or to put it another way, there is no meaning outside of a specific context of rhetorical persuasion.”⁶⁰ He asserts that discourse functions in the *kairotic* moment to offer “pragmatic closure” through “pure force of will” in practical decisions that face a “truth [that] is self-contradictory.”⁶¹

Contemporary rhetorical scholars from a variety of fields and perspectives have emphasized the power of the rhetor to shape audience understandings of situations. For example, rhetorical scholars have clearly demonstrated that there is no such thing as a neutral vocabulary for representing reality. As Richard Weaver argued, “language is sermonic,” always laden with value judgments and carrying attitudes.⁶² Kenneth Burke showed that language creates “terministic screens” that draw attention to some things and away from others, pushing us to follow the implications of our terminologies.⁶³ Chaïm Perelman and Lucie Olbrechts-Tyteca showed how strategies of discursive association and dissociation draw upon our understanding of the “structure of reality.”⁶⁴ Walter Fisher explained that humans most naturally engage the world through stories that give meaning to existence and our place in it.⁶⁵ Ernest Bormann described how groups fantasize about their social world, identifying heroes and villains, key actions, and formative settings.⁶⁶

On the other hand, rhetorical scholars have also noted how the rhetorical situations within which Vatz’s “free” rhetorical agents operate are shaped by history, culture, and technology. Karlyn Kohrs Campbell and Kathleen Hall

⁵⁷ *Id.* at 48.

⁵⁸ *Id.* at 52.

⁵⁹ ERIC CHARLES WHITE, *KAIRONOMIA: ON THE WILL-TO-INVENT* 15 (1987).

⁶⁰ *Id.*

⁶¹ *Id.* at 16.

⁶² RICHARD M. WEAVER, *LANGUAGE IS SERMONIC: RICHARD M. WEAVER ON THE NATURE OF RHETORIC* 18 (Richard L. Johannesen et al. eds., Louisiana Paperback 1985 ed.) (1970).

⁶³ KENNETH BURKE, *LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD* 45–46, 49–52 (1966).

⁶⁴ CHAÏM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 261–63 (John Wilkinson & Purcell Weaver trans., 2008 ed.) (1969).

⁶⁵ Walter R. Fisher, *Narration as a Human Communication Paradigm: The Case of Public Moral Argument*, 51 *COMM. MONOGRAPHS* 1, 1–2 (1984).

⁶⁶ Ernest G. Bormann, *Fantasy and Rhetorical Vision: The Rhetorical Criticism of Social Reality*, 58 *Q.J. SPEECH* 396, 401 (1972).

Jamieson explained how expectations regarding conventional occasions frame audience assessments of what a speaker is doing.⁶⁷ Thomas Kuhn, Stephen Toulmin, and James Boyd White emphasized how particular fields of discourse develop their own paradigms, standards, and cultures of argument.⁶⁸ Michel Foucault argued that at a given point in time discursive formations underwrite implicit rules about who can talk about what and for how long in a certain situation.⁶⁹ Raymie McKerrow argued that discourse, power, and knowledge are mutually supportive, undergirding both domination and liberation.⁷⁰ Marshall McLuhan highlighted the role of technologies in extending human perception by creating virtual “nervous systems” that have profoundly reshaped our relationship to the world.⁷¹

I could easily extend these lists of those who have highlighted the agency of the individual rhetor in shaping the rhetorical situation and of those who have stressed the processes that put constraints on those rhetorical situations, but the point should be clear that rhetors are not free to engage in any discourse they choose in a particular situation, nor are they completely constrained by a situation given the considerable resources of rhetoric. I have spent much of my career examining difficult rhetorical situations faced by rhetors and documenting how they have attempted to wriggle out of their rhetorical corners—sometimes successfully, sometimes unsuccessfully. For example, on the unsuccessful side, I examined how the U.S. Supreme Court’s conservative majority defended its decision in *Bush v. Gore* to stop the recounting of “undervote” ballots in Florida and effectively award the 2000 election to their preferred presidential candidate, George W. Bush.⁷² I call this unsuccessful, despite their political victory, because even their most eloquent defenders rejected one or more of their arguments in favor of alternative (and troubling) rationales.⁷³ In short, I

⁶⁷ Karlyn Kohrs Campbell & Kathleen Hall Jamieson, *Form and Genre in Rhetorical Criticism: An Introduction*, in *FORM AND GENRE: SHAPING RHETORICAL ACTION* 17, 21 (Karlyn Kohrs Campbell & Kathleen Hall Jamieson eds., 1978).

⁶⁸ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43 (2d ed. 1970); STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* 33–36 (2003); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 6–7, 10–11 (1984).

⁶⁹ MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE: AND THE DISCOURSE ON LANGUAGE* 115–17 (A.M. Sheridan Smith trans., 1972).

⁷⁰ Raymie E. McKerrow, *Critical Rhetoric: Theory and Praxis*, 56 *COMM. MONOGRAPHS* 91, 92–93, 96–102 (1989).

⁷¹ MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 3–4 (1st MIT Press ed. 1994) (1964).

⁷² CLARKE ROUNTREE, *JUDGING THE SUPREME COURT: CONSTRUCTIONS OF MOTIVES IN BUSH V. GORE* 19–20 (2007) [hereinafter *JUDGING THE SUPREME COURT*].

⁷³ Most notably, Richard Posner, who argued that the Court’s true purpose was to avoid a constitutional crisis rather than strike down a violation of equal protection. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURT*, 168–69, 175 (2001); Richard A. Posner, *Bush v. Gore as Pragmatic Adjudication*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 211–12 (Ronald Dworkin ed., 2002).

argued that the situation for making a good legal argument to stop the recount was overly constraining, so they settled for a bad argument in support of their preferred outcome.⁷⁴

A successful example I analyzed was nineteenth-century British preacher Charles Haddon Spurgeon's sermons on the unpopular topic of election, a doctrine of predestination considered "hateful" because individuals had no opportunity for salvation if they were not elected by God before they were born.⁷⁵ This puts those who thought they were saved and those who thought they were beyond salvation on the same level, creating an "appeal" to all.⁷⁶ And Spurgeon brilliantly urged from his pulpit that if his congregants turned their lives over to God *today* they would find that God had opened their hearts *first*, prior to their decision, effectively "choosing" them in His own time.⁷⁷ Thus was an abstruse and hateful doctrine converted to an evangelical call.⁷⁸ The flexibility of human motives and of theological doctrine—particularly the Calvinist notion of *effectual calling*, the time when God awakens the elect—gave Spurgeon enough leeway to have his theological cake and eat it too.⁷⁹

But Kairos is not about situations wherein a rhetor has a mere chance to eke out a win; rather, Kairos involves the opportune moment, when conditions are *ripe* for rhetorical action, when there is an "opening." To the extent Vatz urges that situations provide little to no constraints on the clever rhetor, his position must be discounted.⁸⁰ Even the most brilliant rhetor could not make Americans care about the problem of terrorism before the 9/11 attacks as easily as after them. But, to the extent that Bitzer downplays the importance of *perceptions* of a rhetorical situation's otherwise objective elements in creating rhetorical opportunities, his position must be discounted.⁸¹ Our country's inadequate action to address global climate change is a good illustration of the gulf between perceptions and what Bitzer would undoubtedly call an exigence that demands a fitting response.⁸²

⁷⁴ JUDGING THE SUPREME COURT, *supra* note 72, at 393–94, 400–02.

⁷⁵ Clarke Rountree, *Charles Haddon Spurgeon's Calvinist Rhetoric of Election: Constituting an Elect*, 17 J. COMM. & RELIGION 33, 33–34 (1994).

⁷⁶ *Id.* at 41.

⁷⁷ *Id.* at 43–44.

⁷⁸ *Id.* at 44.

⁷⁹ *Id.* at 44–45.

⁸⁰ Vatz certainly is correct that rhetorical situations do not *cause* rhetors to speak, or to speak in certain ways. As Bitzer argued, rhetors can "miss" opportunities to speak or to speak "fittingly." Bitzer, *supra* note 43, at 10–11. Vatz highlights the necessarily symbolic character of human "reality," which is subject to all manner of rhetorical manipulation. Vatz, *supra* note 50, at 158–60. On the other hand, he does admit that "consensual symbolism" such as that surrounding the assassination of JFK, lead to predictable responses. *Id.* at 160.

⁸¹ On this inadequacy in Bitzer's position, see John H. Patton, *Causation and Creativity in Rhetorical Situations: Distinctions and Implication*, 65 Q.J. SPEECH 36, 46–50 (1979).

⁸² While a majority of Americans now appear to believe that our planet is warming and that warming is caused by humans, ANTHONY LEISEROWITZ ET AL., CLIMATE CHANGE IN THE AMERICAN MIND, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION 4 (2019), Presi-

Following Kenneth Burke, we may draw a useful distinction between the world of “non-symbolic motion” and that of “symbolic action” or, more generally, “social reality.”⁸³ Rhetorically, we may think of the non-symbolic world as a powerful resource for rhetorical invention to be mined for persuasive purposes: referencing buildings that were brought down by commandeered planes on 9/11, average annual world temperatures reaching new highs frequently,⁸⁴ a dead Syrian-refugee child washed up on a Mediterranean shore,⁸⁵ a recording of Donald Trump making lewd remarks about women,⁸⁶ and so forth. Our social reality shapes our understanding of the non-symbolic world and of much more—of intangibles such as ideas, values, ideologies, and doctrines. But social reality itself has an existence apart from individuals—in culture, practices, public memory, and so forth. In some ways, it is more malleable than the objects of non-symbolic motion that rhetors characterize, but it is sustained by shared beliefs, which the ancients called *doxa*.⁸⁷

While rhetors ideally will adapt to both non-symbolic and symbolic realities when they face a given rhetorical situation, it is often possible over the long run for them to help shape both realities. That is, rhetors can work to change both material conditions and social reality. In this way, they can help to create opportunities for their ascension to the rhetorical stage and their success upon it. In short, they can have a hand in creating *kairotic* moments, rhetorical situations where they can serve as the right speaker with the right message to the right audience on the right occasion. Such long-term rhetorical practices are common in litigation campaigns and may function in other legal discourses as well.⁸⁸

dent Donald Trump was elected after calling global climate change a “hoax.” See Helier Cheung, *What Does Trump Actually Believe on Climate Change?*, BBC (Jan. 23, 2020), <https://www.bbc.com/news/world-us-canada-51213003>; Justin Worland, *Donald Trump Called Climate Change a Hoax. Now He’s Awkwardly Boasting About Fighting It*, TIME (July 9, 2019), <https://time.com/5622374/donald-trump-climate-change-hoax-event> [<https://perma.cc/BA8A-4Y4T>].

⁸³ Kenneth Burke, *(Nonsymbolic) Motion/(Symbolic) Action*, 4 CRITICAL INQUIRY 809, 814 (1978).

⁸⁴ Tara Law, *Record-Breaking Temperatures Around the World Are ‘Almost Entirely’ Due to Climate Change*, TIME (Aug. 20, 2019), <https://time.com/5652972/july-2019-hottest-month> [<https://perma.cc/N5BZ-3UT8>].

⁸⁵ Helena Smith, *Shocking Images of Drowned Syrian Boy Show Tragic Plight of Refugees*, GUARDIAN (Sept. 2, 2015), <https://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees> [<https://perma.cc/T8M2-ZLTC>].

⁸⁶ Bump, *supra* note 38.

⁸⁷ See, e.g., Takis Poulakos, *Isocrates’ Use of Doxa*, 34 PHIL. & RHETORIC 61, 63–64 (2001).

⁸⁸ See *infra* Part III.

III. CREATING KAIROS IN AMERICAN LEGAL PRAXIS

Some conceptions of Kairos would seem to reject the possibility of prior planning. White emphasizes the “radical . . . occasionality” in Kairos, making such stage-setting problematic.⁸⁹ He argues “[s]ince the circumstances enabling success may change at any time, Kairos implies that there can never be more than a contingent and provisional management of the present opportunity. Success depends, in other words, on adaptation to an always mutating situation.”⁹⁰ Although situations can certainly be fluid, they are not always chaotic or unpredictable. Indeed, the early examples of weaving and medical treatment from Homer and Hippocrates, respectively, suggest situations that unfold rather predictably, certainly with the regular opening of a warp in weaving and to some extent with the progress of a known disease.⁹¹ Likewise, in public-speaking classes we teach those preparing for persuasion to analyze the audience and occasion, to consider available evidence and appeals, and to carefully adapt language and delivery to rhetorical purposes. And even if minor adjustments are required, a “contingent and provisional management”⁹² can go a long way in supporting a *kairotic* opening. This is particularly true for long-term rhetorical efforts, such as those found in campaigns involving politics, public health, advertising, corporate branding, and the like.⁹³ Notably, we find such stage-setting efforts in litigation campaigns, as I will illustrate with two cases I have previously examined.

In its efforts to fight *de jure* racial segregation in public schools, public transportation, and housing supported by *Plessy v. Ferguson*’s “separate but equal” standard, the NAACP engaged in a four-decade legal campaign led by its Legal Defense Fund (LDF) that was capped by the Court’s ruling in *Brown v. Board of Education*.⁹⁴ Mark V. Tushnet argued in his book on *Brown*:

It seems likely that the [NAACP] staff had in mind little more than the general approach of attacking segregation whenever they could: any positive outcome was seen as a victory, whether or not strategic analysis suggested that the particular result would have a domino effect or make any other contribution to the accomplishment of the long-term goal.⁹⁵

I believe we must broaden Tushnet’s conception of this legal strategy to consider the rhetorical work of creating an ideal rhetorical situation for legal

⁸⁹ WHITE, *supra* note 59, at 14.

⁹⁰ *Id.* at 13.

⁹¹ See *supra* Part I.

⁹² WHITE, *supra* note 59, at 13.

⁹³ See two illustrations of these adjustments *infra* Part III.

⁹⁴ I draw on my analysis of the case from Clarke Rountree, *Setting the Stage for Brown v. Board of Education: The NAACP’s Litigation Campaign Against the “Separate But Equal” Doctrine*, in *BROWN V. BOARD OF EDUCATION AT FIFTY: A RHETORICAL PERSPECTIVE* 49–50 (Clarke Rountree ed., 2004) [hereinafter *Setting the Stage for Brown v. Board of Education*].

⁹⁵ MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* 52 (1987).

success. Specifically, the LDF won by working over many decades to develop appropriate speakers, audiences, messages, and occasions to create the *kairotic* opportunity that finally arose in the *Brown* case.

The LDF strategy brilliantly focused on segregation in graduate education because there were almost no graduate schools for African Americans in the segregating states; hence, the LDF initially avoided endless arguments about equality between particular schools that would have eaten up its legal funds and failed to challenge constitutional law.⁹⁶ The LDF developed “speakers,” which included both lawyers and the litigants it represented.⁹⁷ It developed the first course in civil rights law at Howard University to train African American law students, whose very presence in the courts would support their appeal to be treated as equals.⁹⁸ Litigants were recruited carefully through the NAACP’s newsletter and its local offices; the LDF wanted clients who were well qualified for graduate school admission, but denied solely because of their race.⁹⁹

Because African Americans are a minority, they did not have the kind of political influence required to significantly impact the selection of judges who would hear their cases—the audiences of their ideal rhetorical situation.¹⁰⁰ Nonetheless, they sought to keep overtly racist judges off the bench in some cases.¹⁰¹ More importantly, they engaged in jurisdiction shopping, for example, bringing cases in the South’s border states, such as Maryland, rather than the Deep South.¹⁰² The greatest help came from President Franklin Roosevelt’s appointments that created a progressive bench, many newer members of which were influenced by the legal realist movement’s philosophy of using law for the social good.¹⁰³

The development of the message was the most complicated and difficult of the LDF’s stage-setting activities. Gathering information on the impact of segregation was easy enough, but most important was the creation of precedents that they could build upon.¹⁰⁴ LDF strategists recognized the dangers of moving too fast and sought incremental victories.¹⁰⁵ They were fortunate when a case they refused to support succeeded in denying railroads the option to drop expensive first-class cars for blacks because there were too few customers to

⁹⁶ This approach built upon recommendations made by Nathan Margold in his report to the NAACP. *Id.* at 25–28.

⁹⁷ *Setting the Stage for Brown v. Board of Education*, *supra* note 94, at 58–60.

⁹⁸ *Id.* at 59.

⁹⁹ *Id.* at 60.

¹⁰⁰ *Id.* at 62.

¹⁰¹ *Id.*

¹⁰² *Id.* at 61.

¹⁰³ See Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1024 (2004); *Setting the Stage for Brown v. Board of Education*, *supra* note 94, at 75–76.

¹⁰⁴ See *id.* at 64–66.

¹⁰⁵ *Id.* at 69, 74–75.

make hauling the luxury cars economical.¹⁰⁶ The Supreme Court ruled in 1914 in *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.* that constitutional rights were personal, so railroads could not deny service based on the number of persons who wanted them.¹⁰⁷ Another case stopped segregating states from providing vouchers for African Americans to attend graduate schools in other states.¹⁰⁸ The cornered states began erecting black graduate schools overnight, which led to issues of how long a student had to wait for admission (no longer than whites),¹⁰⁹ and whether these schools were equal to existing white graduate schools (they were not).¹¹⁰ Eventually the Court was pushed to consider the intangibles of graduate school equality, such as reputation, faculty stature, breadth of the curriculum, honor society opportunities, and so forth.¹¹¹ The Supreme Court famously referenced such intangibles, which included the stigma of being segregated from whites, in *Brown v. Board of Education*.¹¹²

Developing the right occasion involves some issues already noted, such as the place of litigation and the timing. But the most *kairotic* of considerations is weighing whether speakers, audiences, and messages are sufficient to mount a particular case at a particular time. The LDF took an incremental approach to challenging segregation in graduate education and, at each stage, it had to consider how far it wanted to try to move the ball.¹¹³ “Too far too fast” could create a bad precedent, but eventually the LDF had to challenge the “separate but equal” doctrine directly, which it did in *Brown v. Board of Education*.¹¹⁴

A narrow understanding of Kairos might reduce it to this very point of decision: “Is the time right?” And the unique adaptation to that “opening” may be the ultimate exercise of that *kairotic* insight. However, I would argue that the coming together of many rhetorical elements into this complex situation—which I have placed in the general and traditional categories of speaker, audience, message, and occasion—means that strategic work in developing those elements should be considered part of the work of Kairos. For, in this case, the LDF did not simply *wait* for the *Brown* situation to arise, it set the stage for

¹⁰⁶ See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 L. & HIST. REV. 97, 123–24 (2002).

¹⁰⁷ *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 161–62 (1914).

¹⁰⁸ *Pearson v. Murray*, 182 A. 590, 593–94 (Md. Ct. App. 1936).

¹⁰⁹ *Sipuel v. Bd. of Regents*, 332 U.S. 631, 633–34 (1948) (per curiam) (citation omitted).

¹¹⁰ See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (where Chief Justice Vinson compared the black law school the state of Texas erected overnight with the University of Texas Law School and noted: “It is difficult to believe that one who had a free choice between these law schools would consider the question close.”).

¹¹¹ *Id.*; see also *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 640–41 (1950).

¹¹² *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

¹¹³ Two classic sources on the incremental development of law are BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 28–31 (1921), and EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1–2 (1949).

¹¹⁴ *Brown*, 347 U.S. at 488; *Setting the Stage for Brown v. Board of Education*, *supra* note 94, at 76–77.

speakers who were prepared, for audiences who were receptive, for messages that were substantial, and, ultimately, for occasions that were ripe. That stage-setting involved material changes, such as literally having litigants, attorneys, and judges in place. It also involved symbolic changes, such as altering views of equality under the Constitution as evidenced by literal records of court decisions that asserted these changing views.

Setting the stage for an ideal *kairotic* opportunity is difficult. It requires foresight, imagination, and coordination. In the case of those seeking to overturn *Roe v. Wade*, the effort has been made more difficult by the diverse range of forces working the issue.¹¹⁵ Although *Americans United for Life* (AUL) touts itself as “the legal arm of the pro-life movement,”¹¹⁶ and it has developed a sophisticated long-term strategy to develop speakers, audiences, messages, and occasions,¹¹⁷ its work is often thwarted by zealous state officials eager to be the first state to successfully challenge *Roe*.¹¹⁸

Among the interesting efforts by AUL to create a situation conducive to overturning *Roe* are the strategies of encouraging historians to question the history of abortion practices and thus overcome the *Roe* majority’s claim that abortion restrictions are relatively recent; encouraging medical doctors to undertake studies showing that childbirth is getting safer (since the *Roe* opinion noted that an abortion was safer than childbirth, so outlawing it put women at greater risk); and even opposing euthanasia, as it might cheapen public views of the value of human life.¹¹⁹

Other stage-setting work is more obvious. The efforts to create a pro-life majority on the U.S. Supreme Court seem to have won out, thanks to Senate Majority Leader Mitch McConnell’s thwarting President Barack Obama’s attempt to replace the late Justice Antonin Scalia (who was later replaced with Justice Neil Gorsuch) and the replacement of Justice Anthony Kennedy with what appears to be a more pro-life-leaning Justice Brett Kavanaugh.¹²⁰ The

¹¹⁵ Some recent efforts by different states to restrict abortion are reviewed in K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html> [https://perma.cc/Y9G8-UK3H].

¹¹⁶ Allison McCann, *How Americans United for Life Became “The Legal Arm of the Pro-Life Movement”*, VICE (Jan. 22, 2018, 5:06 PM), https://www.vice.com/en_us/article/wjpa/99/this-is-the-legal-arm-of-the-pro-life-movement [https://perma.cc/JJB7-NGL2].

¹¹⁷ Clarke Rountree, *Address to the Speech Communication Association in San Francisco: Reversing Roe v. Wade Through the Courts: The Rhetorical Strategy of Americans United for Life* (Nov. 1989) (on file with author) [hereinafter *Reversing Roe v. Wade Through the Courts*].

¹¹⁸ Eric Levenson, *Abortion Laws in the US: Here Are the States Pushing to Restrict Access*, CNN (May 30, 2019), <https://www.cnn.com/2019/05/16/politics/states-abortion-laws/index.html> [https://perma.cc/SVU7-F927].

¹¹⁹ *Reversing Roe v. Wade Through the Courts*, *supra* note 117.

¹²⁰ Elizabeth Dias & Sydney Ember, *Abortion and Travel Ban Rulings Are Victory for G.O.P. Tactics on Gorsuch*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/travel-ban-donald-trump.html> [https://perma.cc/AMY8-AL8X]. Most notable

strategy of placing more obstacles in the way of women seeking abortions yielded the High Court's "undue burden" standard, which pro-life states have pushed to the breaking point.¹²¹ But recently many states decided to pass outright bans on abortion to the chagrin of AUL.¹²² Alabama recently passed a law that criminalizes doctors who perform abortions at any stage, threatening them with ninety-nine-year prison terms.¹²³ Any case arising from that law could be a set-back, since it is a huge legal leap from women having a constitutional right to abortion to the severe criminal punishment of those who aid them.

Another form of rhetorical stage work is much less systematic but nonetheless important in shaping American law and creating *kairotic* opportunities. It involves the work of appellate judges in pushing the law in one direction or another. It is less systematic because judges must await appeals in actual cases to effectively inject their ideas about what the law is or should be.¹²⁴ There are rare exceptions, such as the sister cases of *Roe v. Wade* and *Doe v. Bolton*, which the Court decided on the same day, but appeared consecutively in the court reporter, allowing Justice Blackmun to cite *Roe* as precedent for *Doe*.¹²⁵

More typically, judges follow their own beliefs about the law and its proper direction, supporting or limiting the expansion of the Commerce Clause powers of Congress, for example.¹²⁶ As Cardozo famously recognized, "[e]very judgment has a generative power. It begets in its own image. Every precedent . . .

is his recent dissent opposing the Court's stay of a Louisiana anti-abortion law in *June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663, 663 (2019) (Kavanaugh, J., dissenting).

¹²¹ Ariana Eunjung Cha, *At Least 20 Abortion Cases Are in the Pipeline to the Supreme Court. Any One Could Gut Roe v. Wade*, WASH. POST, (Feb. 15, 2019, 6:20 PM), <https://www.washingtonpost.com/health/2019/02/15/least-abortion-cases-are-steps-us-supreme-court-any-one-could-gut-roe-v-wade> [<https://perma.cc/Z4XG-APDQ>].

¹²² Susan Roberts, *Surprised by All These Abortion Bans? Meet Americans United for Life—The Most Significant Antiabortion Group You've Never Heard Of*, WASH. POST (May 31, 2019, 4:45 AM), <https://www.washingtonpost.com/politics/2019/05/31/surprised-by-all-the-se-abortion-bans-meet-americans-united-life-most-significant-pro-life-group-youve-never-heard> [<https://perma.cc/X7SG-Y45G>] ("Clark Forsythe, AUL's senior counsel, recently wrote in the National Review that the Alabama law was perhaps the 'least likely to attract Supreme Court review' of all those likely to go up on appeal, although the provision that bans abortion once there's a 'fetal heartbeat' does not fit AUL's approach.").

¹²³ Matt Stieb, *Democrats and Activists Respond to Passage of Alabama Abortion Bill, Most Restrictive in the Nation*, INTELLIGENCER (May 15, 2019), <http://nymag.com/intelligencer/2019/05/democrats-respond-to-passage-of-alabama-abortion-bill.html> [<https://perma.cc/X2VL-R4RU>].

¹²⁴ Obviously, judges can give speeches, give interviews, or write essays and books expressing their opinions. But they are most effective when their opinions appear in citable cases. See Anne E. Mullins, *Jedi Or Judge: How the Human Mind Redefines Judicial Opinions*, 16 WYO. L. REV. 325, 328–29 (2016).

¹²⁵ *Doe v. Bolton*, 410 U.S. 179, 181 (1973).

¹²⁶ See, e.g., Lino A. Graglia, Lopez, Morrison, and Raich: *Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761, 764–65 (2008) ("The earliest indication of an interest by the more conservative members of the Court, led by then-Justice Rehnquist, in finding a limit on the commerce power came in 1976 in *National League of Cities v. Usery*.").

has a ‘directive force for future cases of the same or similar nature.’”¹²⁷ Even dissents often function to lay the groundwork for overturning the positions they reject.¹²⁸

Of course, judges do not always live long enough to mount the stages they set; instead, their creation of *kairotic* opportunities, as in litigation campaigns, may be taken up by others. Nor do judges always foresee the ways in which their arguments might be used—the ironic invocation of Justice John Marshall Harlan’s “color-blind” Constitution metaphor by those opposed to affirmative action comes to mind.¹²⁹ But having an official voice in pronouncing the law does offer an opportunity to build upon one’s line of argument over time.

Finally, we may look at legal norms in American law as helping to shape situations where the right speakers deliver the right messages to the right audiences at the right times. That is, American law (and other legal systems) have evolved to ensure that conditions are ripe for effective rhetorical exchanges. The educational system for law and procedures for licensure ensure that those appearing in court have at least a modicum of knowledge to speak.¹³⁰ The election of judges does not necessarily support good audiences, but judicial appointments that are reviewed by bodies such as the U.S. Senate Judiciary Committee ideally weed out weak judges.¹³¹ Elaborate procedures for indictments, lawsuits, trials, appeals, and the like ensure that litigants and their messages are appropriately before the court and ready for hearing.¹³² Considerations such as standing,¹³³ jurisdiction,¹³⁴ ripeness,¹³⁵ and so forth make cases that are heard more likely to yield *kairotic* opportunities by helping to ensure that appropriate speakers address appropriate audiences at appropriate times on

¹²⁷ CARDOZO, *supra* note 113, at 21–22.

¹²⁸ See, e.g., Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 817 (2000).

¹²⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). On the appropriation of the color-blind metaphor by those opposing affirmative action, see Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 9–10 (2013).

¹³⁰ See Joseph Robert Giannini, *Legal Challenges to Attorney Admission Rules in Federal District Courts Seek to Avoid Multiple State Bar Exams*, FED. LAW. 27 (Sept. 2016) (“The purpose of a bar exam is to measure entry-level competence to provide public protection. Experienced attorneys have already proven they have entry-level competence and are not a threat to the public.”).

¹³¹ Lauren M. Cohen, *Missing in Action: Interest Groups and Federal Judicial Appointments*, 82 JUDICATURE 119, 123 (1998).

¹³² See Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 519 n.262 (1998); Richard E. Hall & Steven J. Hippler, *Getting Back to the Basics—How to Be Prepared for Trial*, 40 ADVOCATE 9, 9 (1997).

¹³³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558, 560–61 (1992).

¹³⁴ *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019).

¹³⁵ *Texas v. United States*, 523 U.S. 296, 300–01 (1998).

appropriate topics. The weight given to *stare decisis* provides some check on law's inconsistency and promotes opportune appeals to precedent.¹³⁶

Of course, there are exceptions to the tendency of these practices to create situations for the effective use of Kairos. To take a random example, the rejection of DNA evidence in paternity cases in some states suggests that the law was slow to catch up with the science;¹³⁷ an "opportune" moment to provide greater certainty than the presumptions afforded by ancient common law can be squelched by traditions, as well as supported by them. Generally, then, legal practices tend to ensure that general conditions exist for creating *kairotic* opportunities in legal rhetoric.

IV. A FRAMEWORK FOR *KAIROTIC* STAGE-SETTING

I would like to propose a framework for describing and analyzing stage-setting work that seeks to create *kairotic* opportunities. If we identify the elements that make rhetorical opportunities *kairotic*, then we can imagine those elements as coming to be and consider the extent to which they are amenable to strategic development. I believe we can simplify our understanding of stage-setting *kairotic* work if we draw upon the basic elements rhetorical theorists have traditionally identified as central to rhetorical situations: speaker, audience, message, and occasion.¹³⁸ Each of these are obviously subject to strategic development, such as recruiting clients ("speakers") for a litigation campaign, though their interrelations require that we consider how each is related to the whole rhetorical situation.

Speakers can be developed in nonsymbolic (or material) and symbolic ways, as the LDF example illustrates. They can be discovered and strategically selected or educated and trained, as the clients and lawyers were, respectively, by the LDF.¹³⁹ They can develop personal reputations that bolster their standing as intelligent, trustworthy, and caring (in general or for certain audiences). For example, President Bill Clinton avoided a draft deferment during the Vietnam War because as he admitted, he wanted to "maintain [his] political viability within the system" and realized that such a deferment might hurt his political

¹³⁶ See *Hohn v. United States*, 524 U.S. 236, 251 (1998); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev. L.J. 787, 792 (2012).

¹³⁷ Margaret A. Jacobs, *Ancient Paternity Rule Gets Nod from Courts Over DNA Tests*, WALL ST. J. (June 2, 1999, 12:01 AM), <https://www.wsj.com/articles/SB928284163327670754> [https://perma.cc/9AZM-JGEN].

¹³⁸ These categories can be traced back at least to Aristotle's *Rhetoric* (where his genres stand in for "occasion"). ARISTOTLE, *supra* note 35, at 47, 47 n.75. One might distinguish "context" more generally, though I am here folding it into a larger consideration of "occasion," which includes genre and immediate situational factors but also the larger symbolic context, which I have sometimes called the "context of ideas."

¹³⁹ See *supra* Part III.

career.¹⁴⁰ Speakers can brand themselves through their association with particular causes and groups, by achieving notable successes, by fostering alliances, by evincing unique styles, and so forth. Or, as in the case of Donald Trump, they can identify with groups against others, such as those opposing President Obama or immigration across the southern border.¹⁴¹

Audiences can be found and developed. For example, the Internet has allowed members of fringe groups to find one another, coalescing individuals into audiences for White Nationalists, as well as more benign groups.¹⁴² Speakers can seek out such groups or attract a sufficient number of people through their discourse to create their own audiences. For example, the #MeToo movement's message brought many victims of sexual harassment together.¹⁴³ Longer-term relationships between audiences, speakers, and messages can prepare audiences to accept or even clamor for those speakers and messages.

Support for particular messages can be developed over time in terms of assumptions, evidence, arguments, precedents, language, and so forth. The scholarly work of climate scientists, for example, feeds directly into arguments about the nature and seriousness of climate change.¹⁴⁴ National endorsement of the Paris Climate Agreement sets a precedent for action (as does the U.S. withdrawal from it), even if such precedents lack the formal authority of legal prec-

¹⁴⁰ David S. Broder & Thomas B. Edsall, *Clinton Releases '69 Letter on His Draft Deferment*, WASH. POST (Feb. 13, 1992), <https://www.washingtonpost.com/archive/politics/1992/02/13/clinton-releases-69-letter-on-his-draft-deferment/54942e4e-19c0-4cfd-92f0-6f63c3041c1c> [https://perma.cc/92S6-DAZ5].

¹⁴¹ Numerous commentators have documented Trump's divisive rhetoric. See Ellen Gorsevski et al., *The United States' Immigration Rhetoric Amid the Syrian Refugee Crisis: Presidents, Precedents and Portents*, in NATIONAL RHETORICS IN THE SYRIAN IMMIGRATION CRISIS: VICTIMS, FRAUDS, AND FLOODS 270–71, 281–86 (Clarke Rountree & Jouni Tilli eds., 2019).

¹⁴² Jessica Johnson, *The Self-Radicalization of White Men: "Fake News" and the Affective Networking of Paranoia*, 11 COMM. CULTURE & CRITIQUE 100, 105–06 (2018).

¹⁴³ Eva Wiseman, *It's a Year Since the Weinstein Scandal Broke, but the Battle Is Just Beginning*, GUARDIAN (Oct. 7, 2018), <https://www.theguardian.com/lifeandstyle/2018/oct/07/me-too-is-one-year-old-but-the-battle-is-just-beginning-sexual-harassment> [https://perma.cc/VXE2-VJTE].

¹⁴⁴ See, e.g., John W. Nielsen-Gammon, *An Inconvenient Truth: The Scientific Argument*, 70 GEOJOURNAL 21, 21–22, 25 (2007) (discussing the popular documentary *An Inconvenient Truth* (Paramount, 2006), which featured former Vice President Al Gore and draws extensively on climate change research); see also Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming Than Cap and Trade*, 28 STAN. ENVTL. L.J. 3, 9 (2009) ("For more than forty years, scientists have expressed concern about growing carbon concentrations in the atmosphere and resulting global climate change. Public concern has lagged behind the scientific evidence, and our political leaders have been even slower to recognize the magnitude of the climate change crisis. In the past several years, however, with the release of *An Inconvenient Truth* and mounting evidence of global warming, the political debate about the existence of global climate change has largely ended—only to be replaced by the more difficult question of what to do about climate change.").

edents.¹⁴⁵ The strategic replacement of “global warming” with “global climate change” in the parlance of those discussing the problem carries implications for rhetorical effectiveness.¹⁴⁶

Occasions may be found or developed. Anniversaries, holidays, ceremonial events, ongoing speech situations (from college classes to staff meetings to city council meetings), and ad hoc convergences of circumstances can create opportunities for rhetorical action, as well as for squelching them. Political candidates can create occasions out of an announcement that they are running for office or joining a political debate scheduled by others. Anti-abortion activists typically demonstrate in front of the U.S. Supreme Court building on the anniversary of *Roe v. Wade*, or they may bring a case to court and convene a press conference to announce their intentions.¹⁴⁷ An alleged victim of sexual harassment by Harvey Weinstein can go public with accusations after other accusers have created an environment in which such claims will be seen as more credible (in fitting a pattern offered by others).¹⁴⁸

These brief, selective illustrations of how rhetors can set *kairotic* stages by adapting speakers, audiences, messages, and occasions are meant to highlight the variety of stage-setting opportunities as well as indicate the complexity of situations they would make ripe for effective rhetorical action. Those who would set such stages obviously face an uncertain future. How could the NAACP know, for example, that President Franklin Roosevelt would serve so long and appoint such progressive judges;¹⁴⁹ they certainly could not have predicted that President Dwight Eisenhower would appoint Governor Earl Warren as Chief Justice,¹⁵⁰ or that the new Chief Justice would be so supportive of desegregation?¹⁵¹ But the “radical occasionality” that White warned about should

¹⁴⁵ President Trump’s recent withdrawal from the Paris Climate Agreement spurred consideration of its consequences. See, e.g., Brady Dennis, *Trump Makes It Official: U.S. Will Withdraw from the Paris Climate Accord*, WASH. POST (Nov. 4, 2019, 4:17 PM), <https://www.washingtonpost.com/climate-environment/2019/11/04/trump-makes-it-official-u-s-will-withdraw-paris-climate-accord> [<https://perma.cc/76UC-Q3JK>].

¹⁴⁶ Jonathon P. Schuldt & Sungjong Roh, *Media Frames and Cognitive Accessibility: What Do “Global Warming” and “Climate Change” Evoke in Partisan Minds?*, 8 ENVTL. COMM. 529, 542 (2014).

¹⁴⁷ Adam Aton, *As GOP Weighs Priorities, Activists Flock to Washington for Anti-Abortion March*, ST. LOUIS DISPATCH (Jan. 27, 2017), https://www.stltoday.com/news/local/govt-and-politics/as-gop-weighs-priorities-activists-flock-to-washington-for-anti/article_64647926-5613-5c4a-b459-9148db594dc2.html [<https://perma.cc/2ALD-VUAAU>].

¹⁴⁸ Deborah Tuerkheimer, *What if Only One Woman Had Accused Harvey Weinstein?*, GUARDIAN (Oct. 22, 2017, 6:00 AM), <https://www.theguardian.com/commentisfree/2017/oct/22/harvey-weinstein-bill-cosby-allegations> [<https://perma.cc/2NGR-GGPL>].

¹⁴⁹ See Chemerinsky, *supra* note 103, at 1024.

¹⁵⁰ See Albert Lawrence, *Herbert Brownell, Jr.: The “Hidden Hand” in the Selection of Earl Warren and the Government’s Role in Brown v. Board of Education*, 37 J. SUP. CT. HIST. 75, 75–76, 85 (2012).

¹⁵¹ See Otis H. King, *Chief Justice Earl Warren*, 12 N.C. CENT. L.J. 238, 238, 242 (1981) (discussing Chief Justice Warren’s record prior to his time on the Supreme Court).

not deter us from accounting for those things that a rhetor can work to develop in a future rhetorical situation, as I have suggested. Generally, I would urge us to think beyond Aristotle's influential focus in the *Rhetoric* on the "given case" of persuasion, which takes the situation as limited to present circumstances.

CONCLUSION

In Kairos the ancients conceived of opportunities presented for action in warfare, weaving, wagon-loading, and, later, in rhetoric. Greek rhetorical theory was often built around the notion that the particularity of situations required adaptive responses if speakers were to succeed. What these early rhetorical theorists did not scrutinize was how complex constellations of factors in particular situations arose and, notably, whether rhetors could help to create them. The Bitzer-Vatz debate highlights the constraints of rhetorical situations as well as the possibilities of shaping them. I have argued that over time individuals and organizations can and have worked to create *kairotic* moments. This is most obvious in litigation campaigns, but rhetorical situations are also constructed by judges and even by legal practices.

Perhaps there are exceptions to my generalization that ancient scholars did not reflect seriously on how *kairotic* situations arose, and I welcome research that considers that question more thoroughly. Obviously, those teaching rhetorical pedagogy were concerned about preparing speakers to be the "right" speakers—trained, effective, and sensitive to opportune moments. To this extent, they were setting the stage for Kairos. But, as I have argued, I have found little to suggest a campaign-like concern for Kairos and the possibility of crafting situations.

If The Byrds and Solomon agree, "there is a season, and a time to every purpose under the heaven,"¹⁵² I would add that, as President Bill Clinton said in his first inaugural address, in some cases, "by the words we speak and the faces we show the world, we force the spring."¹⁵³

¹⁵² *Ecclesiastes* 3:1; Keppler, *supra* note 2.

¹⁵³ Inaugural Address, 1 PUB. PAPERS 1 (Jan. 20, 1993).