



JUSTICE KENNEDY

THE SWING VOTER & HIS CRITICS

Douglas M. Parker

IN DECEMBER 2007, Edward Lazarus, a former Supreme Court clerk and the author of a 1998 book on the Court, *Closed Chambers*, observed:

If the commentary is to be believed, the Court’s pivotal justice, Anthony Kennedy, must be the most pompous, self-aggrandizing, and unjustifiably self-confident jurist in Supreme Court history. This verdict comes to us not merely from left- or right-wing partisans disappointed by the ideologically-diverse causes (from gay rights, to the ban on partial birth abortion) that Kennedy has championed. In addition to these usual suspects, mainstream commentators – usually circumspect in their criticisms of the Court – are currently engaged in a veritable orgy of Kennedy-bashing.¹

It might be expected that Justice Kennedy, as a “swing vote” on the Court, would receive criticism from all directions. Yet, as Lazarus pointed out, the attacks on Kennedy have been far harsher than

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¹ Edward Lazarus, “The Current Supreme Court Term, and the Pivotal Role of ‘Swing’ Justice Anthony Kennedy,” *FindLaw*, December 6, 2007.

those visited upon Justice Sandra Day O'Connor, Kennedy's predecessor as the most prominent swing vote on the Court. Although Lazarus acknowledged that he had been "an early and not infrequent Kennedy critic," he had come to think that criticism of Kennedy had gone too far, and he sought to counter "the now fashionable view that the Court's pivotal (and thus most powerful) member is best viewed as a dangerous egomaniac."²

The "mainstream commentary" cited by Lazarus included an article by Jeffrey Rosen,³ and books by Jan Crawford Greenburg⁴ and Jeffrey Toobin.⁵ Lazarus, however, did not enumerate specific criticisms or attempt to assess their merits. Given the importance of Kennedy's position on the Court, a closer look at the bill of particulars seems called for.

Although Lazarus suggested that Kennedy had been set upon from both left and right, the most strident criticism of Kennedy has originated from the political right before drifting into the mainstream. Initially, such criticism may appear puzzling because Kennedy's overall record as a Justice has remained consistently and identifiably conservative: he has shown less of a leftward shift than either Justice O'Connor or Justice David Souter.⁶ In fact, the conservative indictment of Justice Kennedy's jurisprudence – as to both style and substance – rests almost entirely on his opinions in only

² *Ibid.*

³ Jeffrey Rosen, "The Arrogance of Justice Anthony Kennedy," *The New Republic*, June 18, 2007. Mr. Rosen is a professor at George Washington University Law School and the legal affairs editor of *The New Republic*.

⁴ Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007). Ms. Greenburg is a graduate of the University of Chicago Law School and a correspondent for ABC News.

⁵ Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007). Mr. Toobin is a senior legal analyst for CNN and a staff writer for *The New Yorker*.

⁶ Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, "Ideological Drift Among Supreme Court Justices: Who, When and How Important," 104 *Northwestern University Law Review* No. 4 (Fall, 2007) 1484, 1504-09.

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four cases: *Lee v. Weisman* (holding that a non-sectarian prayer at a high school graduation ceremony violated the First Amendment); *Planned Parenthood v. Casey* (modifying *Roe v. Wade* but upholding the constitutional protection of a right to an abortion); *Lawrence v. Texas* (holding unconstitutional a law that made homosexual sodomy a crime); and *Roper v. Simmons* (holding that the Eighth Amendment barred execution for a crime committed before the defendant was eighteen years old).⁷

Those are, of course, cases that, in the eyes of Justice Antonin Scalia and others, have put the Supreme Court – and Justice Kennedy – on the wrong side of a “culture war.” Such cases represent only a small portion of Kennedy’s work on the Court, but the charged emotions they stimulated have given them prominence. Moreover, some of the resentment toward Kennedy may be attributable to the fact that, as a practicing Roman Catholic, he had been expected to provide a reliable conservative voice on social, as well as economic and political, issues. Conservatives’ disappointment with Justice Kennedy perhaps found its most vivid expression in the oft-quoted pronouncement of James C. Dobson, the influential founder of Focus on the Family, that Kennedy is “the most dangerous man in America.” But others were not far behind. Highly critical articles have appeared in conservative publications such as *The National Review*, *The Weekly Standard*, *Human Events*, and *The American Spectator*.

The outrage at Kennedy’s perceived apostasy appears to have been augmented by other factors. As indicated by Lazarus, a common denominator in the negative portrayals of the Justice is an unflattering view of the Kennedy persona, and in particular the Kennedy ego. Indeed, “pompous” appears to be the epithet of choice for Kennedy critics. But despite the frequency with which that label has been applied, the grounds for it have been consistently vague or seemingly trivial. Anonymous law clerks, current or former, appear

⁷ *Lee v. Weisman*, 505 U.S. 577 (1991); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005).

to be one source for the characterization, but direct quotes or specific examples, even from undisclosed sources, are rare.⁸

The appearance of Kennedy-bashing in mainstream commentary is relatively recent. In 1996, Jeffrey Rosen wrote a profile of Justice Kennedy for *The New Yorker* that for several years was regarded as the most successful attempt to capture his personality.⁹ The article was based on lengthy interviews at Salzburg University, where Kennedy was teaching a summer course, as he has every year since 1987. Although Rosen later came to have a distinctly unsympathetic view of Kennedy, his 1996 article was a generally admiring portrait. Making only glancing (and unexplained) references to “a self-dramatizing tendency” and a “weakness for innocent pomp,” it conveyed the impression of a relatively unassuming individual prepared to discuss his approach to the law with some candor.

In 2007, the landscape would change. Jan Crawford Greenburg’s *Supreme Conflict* gave an essentially even-handed account of the various criticisms of Justice Kennedy expressed by conservatives without appearing to endorse them. Greenburg, however, did comment that Kennedy had developed an “aura of pomposity” and she took pains to describe the décor in his office. As she saw it, the office “speaks of governmental authority and power, as well as the pomp and splendor that went with it in the past.”¹⁰

In Jeffrey Toobin’s book, *The Nine*, published later that year, Toobin initially summarized Kennedy’s traits with some balance, referring to “his earnestness and his ambition, his naiveté and his

⁸ One exception appears in a 2007 online article in *Newsweek* which reported that “A few of Kennedy’s former clerks interviewed by *Newsweek* allow that he can be a little pompous. ‘He thinks he is the living embodiment or transmitter of the nation’s bedrock values,’ says one, who refused to be identified criticizing his former boss.” On the other hand, the article noted that all of the clerks interviewed had portrayed Kennedy as “gracious, decent, fair-minded and intellectually curious about many things ranging far beyond the law.” Stuart Taylor, Jr. & Evan Thomas, “The Power Broker,” www.newsweek.com/id/33225.

⁹ Jeffrey Rosen, “The Agonizer,” *The New Yorker*, November 11, 1996.

¹⁰ Greenburg, *Supreme Conflict*, 112, 160-161.

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grandiosity, his reverence for the law and his regard for his own talents.”¹¹ Nevertheless, a number of Toobin’s subsequent references to Kennedy were unflattering. Paralleling Greenburg’s treatment of Kennedy, Toobin provided an even more detailed description of his Supreme Court office (even to the placement of the Justice’s desk) and concluded solemnly that “It was an office that tried hard, maybe too hard to impress.”¹²

In his 2007 *New Republic* article, Jeffrey Rosen saw Justice Kennedy quite differently than he had in 1996. Rosen’s portrayal of Kennedy now bristled with hostility from start to finish and was crammed with innuendo and unflattering speculation. In assessing Kennedy’s personal qualities, Rosen placed considerable weight on the Justice’s activities outside the Court: he began with an account of how Kennedy, a lifelong Shakespeare buff, had presided over a mock trial of Hamlet at the Kennedy Center, and concluded with a description of Kennedy’s appearance (accompanied by First Lady Laura Bush) to moderate “a discussion about American values after September 11 at a public high school in Washington.” Rosen’s critique of Kennedy’s pedagogical style at the high school (“students struggled to get a word in edgewise [as] Kennedy kept answering his own questions and returning to his favorite themes”) contrasted sharply with his earlier appraisal of Kennedy at Salzburg (“Justice Kennedy is a very good teacher. He is passionate about his subject and respectful of even the slowest students.”). Rosen’s 2007 accounts were plainly intended to support his view that Kennedy “seems most at home when he is lecturing others about morality.”

Kennedy’s alleged pomposity, from office décor to disquisitions on *Hamlet*, would scarcely be worth discussing but for the implication that they illumine his record on the Court. One aspect of that record that has drawn frequent fire is Kennedy’s writing style. Greenburg, for example, commented that Kennedy “appeared to have visions of grandeur and a taste for the rhetorical highlife.”¹³

¹¹ Toobin, *The Nine*, 53.

¹² *Id.* at 147.

¹³ Greenburg, *Supreme Conflict*, 110.

Toobin also claimed, as others had, that Kennedy wrote to be quoted, and he provided a colorful detail (presumably derived from an anonymous law clerk): “Seated at his keyboard typing furiously, Kennedy always labored most closely on the sections of opinions that might be quoted in the *New York Times*.”¹⁴ If the account is accurate, Kennedy’s efforts with his prose have been largely self-defeating. Although he has been quoted in the *Times* on occasion, the reviews of many commentators have been critical.

The examples of Kennedy’s writing most often held up for disapproval are found in his contributions to the Joint Opinion in *Planned Parenthood v. Casey* that he co-authored with Justices O’Connor and Souter. The opening sentence of the opinion declaimed that “Liberty finds no refuge in a jurisprudence of doubt.” Toobin criticized both the style and the thought it expressed:

In plain English, Kennedy meant that law had to be consistent and predictable, but there was in fact a noble lineage to a “jurisprudence of doubt.” Theorists like Oliver Wendell Holmes Jr. and Learned Hand thought it was critical for judges to doubt their conclusions were correct for all time.¹⁵

Professor Mark Tushnet (then of Georgetown, now of Harvard) had commented similarly in *A Court Divided*, quoting Holmes on the virtue of doubt.¹⁶ What Toobin and Tushnet failed to acknowledge, however, was the unique context in which Kennedy was writing. In the succeeding two sentences, he pointed out that the United States, as *amicus curiae*, was asking for the sixth time in a decade to have the Court overrule *Roe v. Wade*. That is a circumstance which might have tried even the patience of Holmes if he concluded, as Kennedy and his colleagues had, that *Roe* should not be overruled. Thus, it was not surprising for the Joint Opinion to say “Enough is enough” (and for Kennedy to attempt a loftier version of that sentiment).

Kennedy provided an even more attractive target for criticism

¹⁴ Toobin, *The Nine*, 52.

¹⁵ *Id.* at 56.

¹⁶ Mark Tushnet, *A Court Divided* (New York: W.W. Norton, 2005), 215.

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when he attempted to define the liberty interest in the Fourteenth Amendment that *Casey* invoked to preserve the right to an abortion: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of life.” As Toobin commented tartly, “Even many supporters of *Roe* would have trouble defining ‘the mystery of human life,’ much less asserting that it was protected by the Constitution.” Such phrases, Toobin observed, “sent Scalia into a genuine rage,” and he noted that when Kennedy repeated the language in *Lawrence v. Texas*, Scalia referred to it caustically as the “famed sweet-mystery-of-life passage.”¹⁷

The imprecision of Kennedy’s language obviously left it vulnerable to challenge. On the other hand, neither Justice William O. Douglas in *Griswold v. Connecticut* (striking down a ban on use of contraceptives) nor Justice Harry Blackmun in *Roe v. Wade* had been particularly successful in defining, and tying to the Fourteenth Amendment, the liberty (or privacy) interest on which they were relying. It seems unlikely that any rhetorical modesty on Kennedy’s part would have made the result in *Roe* or *Casey* any more acceptable to conservatives.

While the criticism of Kennedy’s prose undoubtedly has some basis, it seems considerably overstated when viewed in the light of the entire body of his jurisprudence. The majority of his opinions simply do not feature the rhetorical flourishes with which he has come to be identified. The more significant question is the extent to which Kennedy’s personality has influenced, or even dictated, the positions he has taken in cases before the Court.

In *Closed Chambers*, Lazarus reported the claim by conservatives that Justice Kennedy is susceptible to the “Greenhouse Effect.” The term, a play on the vocabulary of global warming, refers to Linda Greenhouse, the longtime Supreme Court correspondent for the *New York Times*, and suggests that some Justices on the Court might be influenced by a desire for favorable comment from Greenhouse or other members of the “liberal elite” in the media.¹⁸ In fact, how-

¹⁷ Toobin, *The Nine*, 56, 191.

¹⁸ Lazarus, *Closed Chambers*, 428; Greenburg, *Supreme Conflict*, 161.

ever, there is no evidence that any of Kennedy's opinions stemmed from a desire to please the "liberal media." Indeed, the claim is largely refuted simply by the numerous opinions and votes by Kennedy with which liberals in and outside the media have vigorously and predictably disagreed.

Toobin did not cite the Greenhouse Effect, but he posited an equally questionable theory of "influence" on Kennedy. The theory, a central thesis of *The Nine*, concerned *Bush v. Gore* and the supposed impact that the decision had on Kennedy:

Of the five Justices in the majority, Kennedy had the hardest time with the aftermath of *Bush v. Gore*. He had spent most of his adult life as a judge and he had a special reverence for the profession, "the guild of judges" he sometimes called it. There would be, it turned out, two Anthony Kennedys on the Supreme Court – the one before December 12, 2000, and the one after – and his transformation was surely one of the most unexpected legacies of this epochal case.

The Justice Kennedy of the post-*Bush v. Gore* era was shaped by one influence in particular – his exposure to foreign law and foreign judges. After 2000, in part to escape the political atmosphere in Washington, Kennedy deepened his commitment to the broader world and his journeys changed him. Given Kennedy's pivotal role, the Court and the nation would never be the same. The paradox of *Bush v. Gore* is that the justices' gift of the presidency to a conservative sent the court in its most liberal direction in years.¹⁹

Toobin's thesis has a number of components, none of which appears to survive scrutiny. To begin with, Toobin cited no source for his assertion that, of the Justices in the majority in *Bush v. Gore*, Kennedy "had the hardest time" living with the decision, and it has no support in accounts of the case by other commentators with access to the Justices and their clerks.²⁰

¹⁹ Toobin, *The Nine*, 182.

²⁰ See Greenburg, *Supreme Conflict*, 31-32; Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (New York:

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Even more tenuous is Toobin's claim that Kennedy's feelings about *Bush v. Gore* led him to increase his foreign travels and his interaction with the "broader world." This claim is not only undocumented, but is seriously undermined by an article Toobin himself had written only two years before in *The New Yorker*.²¹ In that article, Toobin gave a detailed account of Justice Kennedy's international travels and foreign connections extending over nearly two decades, but he made no suggestion that those activities had increased subsequent to *Bush v. Gore* or had been stimulated in any way by that case.

Toobin's 2005 article also made no claim that Kennedy's international experiences had propelled him, let alone the full Court, in a "more liberal direction" as a general matter. And such a claim would find little support in Kennedy's record on the Court.²² Toobin's *New Yorker* article did imply that Kennedy's teaching at Salzburg and his contacts with foreign jurists may have influenced his decisions in *Lawrence v. Texas* and *Roper v. Simmons*, but those two cases hardly constitute a direction. Moreover, even that element of Toobin's claim is dubious.

In *The Nine*, Toobin emphasized Kennedy's citation in *Lawrence* of the decision by the European Court of Human Rights in *Dudgeon v. United Kingdom* in 1981. *Dudgeon* had held that laws criminalizing sodomy were invalid under the European Convention on Human Rights, but the Supreme Court had made no reference to it in 1986 when it upheld a similar law in *Bowers v. Hardwick*. According to Toobin, the "pre-Salzburg Kennedy – even the pre-*Bush v. Gore* justice – would never have made such a reference."²³ Toobin, however, ignored the fact that in 1986 – before Kennedy had been appointed to the Court or begun teaching at Salzburg – he had cited the *Dudgeon* decision in a speech at Stanford.²⁴ Moreover, in his

HarperCollins, 2005), 309-310.

²¹ Toobin, "Swing Shift," *The New Yorker*, September 12, 2005.

²² Epstein *et. al*, *supra*, n. 6.

²³ Toobin, *The Nine*, 190.

²⁴ Anthony M. Kennedy, "Unenumerated Rights and the Dictates of Judicial Re-

2005 interview with Toobin, Kennedy had even expressed his surprise that *Dudgeon* had not been cited by the lawyers in *Bowers v. Hardwick*.²⁵

Kennedy's opinion in *Roper v. Simmons*, striking down the death penalty for defendants under eighteen at the time of their crimes, followed the methodology that Justice John Paul Stevens had employed in *Atkins v. Virginia*.²⁶ In *Atkins*, Stevens had found a national consensus against the execution of the mentally retarded by aggregating the states that did not permit the death penalty and the states that permitted the death penalty but did not permit execution of the mentally retarded. In *Roper*, Kennedy pointed out that the same numerical breakdown of state laws prevailed with respect to the execution of juveniles. He then referred to the laws of other countries as "confirmation" of his determination that imposition of the death penalty on juvenile offenders was "disproportionate."²⁷

As Toobin observed, Justice Kennedy's opinion provoked sharply negative reactions from a variety of leaders on the political right.²⁸ On the other hand, in an age of globalization, attention to foreign legal authorities by the Supreme Court is almost certain to increase rather than diminish. Whether one views that prospect favorably or unfavorably, the criticism of (or credit to) Justice Kennedy for his citation of foreign authorities seems considerably overdone. He has, after all, cited foreign law in only two cases and it is by no means clear that in either case ignoring foreign law would have produced a different result.

Perhaps the harshest and most wide-ranging assessment of Justice Kennedy's persona, on and off the bench, is found in Rosen's 2007 cover article for *The New Republic*. One respected academic who commented on the article, Professor Michael Dorf (of Columbia), pointed out that there is "a difference between fair-minded

straint," www.andrewwhyman.com/1986kennedyspeech.pdf.

²⁵ Toobin, "Swing Shift."

²⁶ 536 U.S. 304 (2002).

²⁷ 543 U.S. at 571.

²⁸ Toobin, *The Nine*, 198-199.

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criticism and personal attack” and concluded that Rosen had “crossed the line.” Indeed, Dorf was moved to observe that “The tone and content are so over the top that one wonders whether Rosen believes that Kennedy personally harmed Rosen in some way.”²⁹

As he acknowledged, Dorf is a former law clerk to Justice Kennedy and that experience might have influenced the strength of his reaction. Nevertheless, Dorf’s speculation as to Rosen’s motivation finds some support if one compares Rosen’s *New Republic* article to his 1996 profile of Kennedy in *The New Yorker*. The earlier article covered much of the same territory, but any criticism was muted and the overall tone was positive.

The title of Professor Rosen’s *New Republic* article “The Arrogance of Justice Anthony Kennedy,” succinctly conveys its message. Justice Kennedy is characterized not only as arrogant on and off the bench, pompous, and self-important, but also, more significantly, as seeking to impose his own moral vision on the Court.³⁰ This sweeping attack led Rosen from allegations of pomposity to a focus on even more ephemeral targets: Kennedy’s supposed beliefs and motivations. Here, curiously enough, Rosen did not rely on his own interviews with the Justice in 1996, but instead attempted to deconstruct an interview that Kennedy had given to the Academy of Achievement.³¹

In the Academy interview, Kennedy mentioned that he had not particularly enjoyed grade school, that he had sought an escape in reading, and that his father had been prompted to get him a job as a junior page in the State Senate when he was in the fourth grade. From that relatively modest acorn, and the fact that, even today, Kennedy retains a keen interest in literature, Rosen proceeded to

²⁹ <http://michaeldorf.org/2007/06/jeffrey-rosen-on-justice-kennedy.html>.

³⁰ Rosen himself is not entirely without self-regard: his biography on the law school website quotes the *Los Angeles Times* as calling him “the nation’s most widely read and influential legal commentator.”

³¹ The interview may be found at www.achievement.org.

erect a blossoming tree of pop psychology. After attempting to catalog Kennedy as a grade school misfit, Rosen continued by describing him as someone who is “uncomfortable with real conflicts among real people [and] took refuge from an early age in the morality tales he found in fiction.” As a result, according to Rosen, “Kennedy’s world seems powerfully shaped by the ideas he has absorbed from novels and plays.”

Rosen’s curious speculation that Kennedy is uncomfortable with the problems of real people was unsupported by any evidence, and conspicuously ignored Kennedy’s successful and diversified law practice in Sacramento. In that practice, Kennedy handled not only civil and criminal litigation, but also corporate, estate planning, tax, and a variety of other matters. It was a practice, one suspects, that gave Kennedy rather more experience in dealing with real problems of real people than might be claimed by Professor Rosen from his career in journalism and academia.

Similarly, Rosen provided little support for his claim that Kennedy has been unduly influenced by literature. It does not seem remarkable for a Supreme Court Justice to be well read and even to have some thoughts (such as Kennedy had expressed in the Academy interview) as to what might be taken from works ranging from *Hamlet* to Orwell’s *Nineteen Eighty-four*. In Rosen’s eyes, however, Kennedy’s literary tastes become almost sinister. Seizing on a Kennedy comment on *Nineteen Eighty-Four*, that governments “want to plan what you think, and this must never happen,” Rosen spun off into his own soliloquy:

As a justice, Kennedy would seek to ensure that it never does happen – striking down what he viewed as dystopian laws that prevent Americans from enjoying the abstractions about liberty he cherished from his excursions into fiction.

Rosen did not identify just what “dystopian laws” would be struck down, but it is clear from the balance of the article that he had in mind the abortion and sodomy laws at issue in *Casey* and *Lawrence*. But a connection between Kennedy’s reaction to *Nineteen Eighty-Four* and his opinions in those cases seems a considerable stretch.

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Rosen also recounted a story about Kennedy that has probably been cited by Kennedy's critics as often as any passage in his opinions:

Even today, Kennedy's world seems powerfully shaped by the ideas he has absorbed from novels and plays. Many of his most embarrassing moments have come from his habit of comparing himself to archetypes from literature. Before handing down his decision in *Planned Parenthood v. Casey*, he told a reporter whom he had invited into his chambers, "Sometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line." He then excused himself saying that he needed to "brood."

(In passing, one may note the sly references to "many" of Kennedy's "most embarrassing moments" and his "habit" of comparing himself to literary figures, implying the existence of a large catalog of such moments. Yet anyone who has read the Rosen article is likely to believe that if the writer had been aware of other examples, he would have shared them.)

Moving to the substance of this well-traveled anecdote, it might quickly be agreed – as Kennedy undoubtedly would today – that making offhand comments to a reporter, just before the announcement of a major decision, is not a particularly good idea. Yet Kennedy's comment was one that, if offered by another Justice, might well have been regarded as an insignificant, or even charming, moment of self-deprecation. In any case, there is not the slightest basis for thinking that either Caesar or Captain Queeg had any influence on Kennedy's decision in *Casey*.

Rosen then turned to Kennedy's long-standing reputation for agonizing over cases before the Court. Consistent with that reputation, Rosen's 1996 article in *The New Yorker* was entitled "The Agonizer." In it, Rosen rejected the "conservative caricature" of Kennedy as yielding to "elite liberal opinion," and added approvingly: "In fact, his struggles to make up his mind show, in some respects, precisely the qualities one would hope to find in a Supreme Court Justice."

By 2007, however, those positive qualities had disappeared from

Rosen's perception. Rosen now concluded that Kennedy "seems to agonize not because he is genuinely ambivalent or humble but because he thinks agonizing is something a great judge should do, to show that he takes seriously the awesome magnitude of his task." Warming to his subject, Rosen then made the remarkable assertion that Kennedy really doesn't agonize at all, but engages in "the *Blink* theory of jurisprudence." Kennedy, he wrote:

... makes a spot judgment about how the world should be, then expresses it as an ideal against which the world must be measured.

The purported basis of Rosen's latter assessment was a truncated quote from Kennedy's Academy interview. In fact, the full quote made the point that snap judgments could *not* be trusted, but had to be examined and reexamined:

But after you make a judgment you must then formulate the reason for your judgment into a verbal phrase, into a verbal formula. And then you have to see if that makes sense, if it's logical, if it's fair, if it accords with the law, if it accords with the Constitution, if it accords with your own sense of ethics and morality. And if at any point along this process you think you're wrong you have to go back and do it all over again.³²

The net effect of Rosen's editing was to distort Kennedy's view of judging by approximately 180 degrees.

Rosen's most fundamental argument was that Kennedy's opinions attempt to impose his own moral vision, "constructing morality plays in which he occupies the central role." By contrast, Rosen's 1996 *New Yorker* article had credited Kennedy with keeping his own moral views out of his opinions. Rosen had cited the passionate personal objections to abortion that Kennedy expressed to his class in Salzburg and Kennedy's insistence that when it came time to decide *Casey* "he couldn't impose his personal views on the nation." Indeed, Rosen argued that "those who applaud [Kennedy's] very abstract

³² Academy Interview.

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vision of the state's obligation to be neutral about morality in the abortion and gay-rights cases can hardly object when [he] applies a similarly abstract vision of neutrality in cases that question affirmative-action programs or require wholesale redistricting of congressional maps." Rosen, of course, was entitled to change his mind between 1996 and 2007, but on balance his earlier appraisal seems closer to the mark.

Toward the end of his *New Republic* article, Rosen briefly acknowledged the "core of a case" for Kennedy: "that he is a moderate, decent, fair-minded person rather than a judicial ideologue – no small achievement in a polarized age." But he immediately returned to the attack by comparing Kennedy unfavorably with Justice O'Connor. The latter's opinions, he said, were narrowly drawn and "[b]ecause she offered few principles to support her rulings, it was difficult to extend them to future cases." Kennedy, by contrast said Rosen, "prefers opinions that are broad and deep" and "attempts to identify a sweeping principle of justice."

Ironically, Rosen had written an article in 2001 in the *New York Times Magazine* in which he had criticized the narrowness of O'Connor's opinions and, on that very ground, compared *her* unfavorably to *Kennedy*.³³

In the 2001 article, Rosen had accused O'Connor of "judicial imperialism," but in a 2005 interview, he reassigned that deficiency to Justice Kennedy. Describing himself as a "liberal advocate of judicial restraint," Rosen said that he "sympathize[d] with the criticism of Justice Kennedy in some of those areas involving abortion, gay rights and the application of international law to the culture wars." It was Justice Kennedy, Rosen now claimed, who had "embraced a rhetoric of judicial supremacy."³⁴

Whatever the shift in Rosen's perceptions, judicial restraint (or its absence) is obviously a fair ground for debate. So, indeed, are Justice Kennedy's various opinions. That debate, however, is not

³³ Jeffrey Rosen, "Majority of One," *New York Times Magazine*, June 3, 2001.

³⁴ Jason DeParle, "In Battle to Pick Next Justice, Right Says Avoid a Kennedy," *The New York Times*, June 27, 2005.

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enriched by excursions into pop psychology, fanciful speculation as to external “influences,” or ad hominem attacks. Justice Scalia is well-known for his view that statutes should be interpreted and applied without attempting to divine legislators’ subjective intent. Perhaps that would be a refreshing approach to considering the opinions of Justice Kennedy. It is likely that it would result in a more balanced and constructive appraisal of his contributions to the Court.

