

2017

# Narratives of Self Government in Making the Case

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## Repository Citation

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## BOOK REVIEWS

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### NARRATIVES OF SELF GOVERNMENT IN *MAKING THE CASE*

Benjamin L. Berger\*

This is a book about persuasion. In *Making the Case: The Art of the Judicial Opinion*,<sup>1</sup> Paul Kahn draws the judicial opinion into the centre of our field of vision and invites us to join him in inquiring into the role that it plays shaping our legal and political communities, and in seeking to understand how it does its work. Ultimately, he shows that persuasion is at the heart of the judicial opinion and, with that, at the heart of the rule of law.

The persuasion at stake in Kahn's book is not, however, what you might expect. Central to this insightful, creative study is the idea that the burden faced by the judge is not—or not chiefly—to persuade the parties that the court has reached the correct outcome; it is, rather, to persuade us all that the law is our own. The judicial opinion is “a form of rhetorical address performing the broadly political task of maintaining belief in

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1. PAUL W. KAHN, *MAKING THE CASE: THE ART OF THE JUDICIAL OPINION* (2016).

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self-government through law.”<sup>2</sup> It is, in other words, a persuasive act aimed at sustaining belief in a particular kind of political community. *Making the Case* explains the character of this persuasive task and the rhetorical techniques and devices available in pursuing it. Kahn offers a schematic of the location and inner workings of the judicial opinion within the imaginative architecture of our political beliefs. Seeing that picture, we are equipped to be better readers (and, in the case of judges, also better writers) of the judicial opinion.

Kahn has established himself as a preeminent guide to the shape and structure of our modern political and legal imaginations. The diversity amongst his books—ranging from in-depth studies of U.S. constitutional moments to reexaminations of classic philosophical texts, exercises in biblical interpretation, and studies of modern liberalism<sup>3</sup>—belies the tight unity of his concern. Across his work, Kahn is interested in the genealogy and architecture of the beliefs and practices that sustain our political lives, lives in which the culture of law’s rule plays a central role. Like Geertz and Weber, he is interested in the “webs of significance”<sup>4</sup> in which we are suspended and through which we make sense of our experiences.

We can find that web of meanings at work in any of our cultural artefacts—the sense that we make of our lives is not episodic or domain-specific. And so, in *Finding Ourselves at the Movies*,<sup>5</sup> Kahn examines the modern movie as a particular text in which to find and explore questions of law, love, and sacrifice, and how they work within our political imaginations. He shows in that book that the movie is successful to the extent that it participates effectively in the narratives that structure how we understand ourselves and our communities. In *Making the Case* Kahn turns his attention to a different cultural artefact, this

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2. *Id.* at xiv (footnote omitted).

3. See PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997); PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011); PAUL W. KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* (2006); PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* (2004).

4. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973).

5. PAUL W. KAHN, *FINDING OURSELVES AT THE MOVIES: PHILOSOPHY FOR A NEW GENERATION* (2013).

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one central to the world of the law: the judicial opinion. The text is different but the project is very similar.

In *Making the Case*, Kahn seeks to understand the judicial opinion as a rhetorical act that succeeds to the extent that it “persuades us to see the situation in light of one of the broad narrative accounts by which we regularly give order to our social and political life.”<sup>6</sup> As he puts it, “the rule of law is a way of seeing and maintaining our common social world”;<sup>7</sup> that burden of depiction and maintenance, Kahn argues, falls to the judicial opinion, and so we must understand better what precisely it seeks to do and how it works.

This is where *Making the Case* begins: with a desire to read the judicial opinion more sensitively and to understand better how it does its work as a persuasive text. In this, Kahn sees himself as recovering the “original promise of the casebook method”<sup>8</sup>—immersing the reader in the interplay of fact and law in order to see how an opinion seeks to persuade. Kahn intends the audience of *Making the Case* to be, in part, students coming to the law for the first time, seeking to learn how to read a judicial opinion. And to be sure, talented students will gather a great deal from this book. But Kahn also notes the tradition of academic writing on law “in which an introductory work is no less a serious work on law”<sup>9</sup> and *Making the Case* is certainly that. The audience for this book is, in fact, complex. It is illuminating and important reading for lawyers, whom Kahn describes as the key audience of the judicial opinion; for law teachers interested in legal pedagogy; for judges who seek to better understand their judicial role and the “art of the judicial opinion”; and for scholars interested in political and legal theory. The book provokes ideas about legal pedagogy, could serve as something of a manual for successful opinion-writing, and makes serious and fresh interventions into fundamental questions of political philosophy. The breadth of the audience to which this text successfully appeals is one of its achievements.

Following a useful preface directed at students “with a Note to Everyone Else,” Kahn embarks on his project of

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6. KAHN, *supra* note 1, at 19.

7. *Id.* at 12.

8. *Id.* at ix.

9. *Id.* at xiii (noting Karl Llewellyn’s *THE BRAMBLE BUSH* (1930), amongst others).

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drawing out the nature, burdens, and resources of the judicial opinion. The richness of this small book rewards careful reading but precludes an exhaustive account of Kahn's argument and insights. Rather than attempting such an account, I focus in the balance of this review on what I take to be the core conceptual contribution of Kahn's account of the judicial opinion: the link between narrative, persuasion, and self-government.

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The decisive methodological move in *Making the Case* is Kahn's approach to the judicial opinion as a unique literary genre. In Chapter 1, he circumscribes his subject in a way that creates space for this distinctive and profitable framing of the opinion. He distinguishes the judicial opinion from other legal texts like statutes and regulations by observing that it seeks to persuade, not solely to command: "Only here," Kahn explains, "does law link command to explanation."<sup>10</sup> His interest is thus not in the court's judgment but rather in the judicial opinion, which is an explanatory, rhetorical exercise;<sup>11</sup> in his terms, what matters in the opinion is not principally "vote" but "voice."

Yet he also makes distance on approaches that would understand the opinion chiefly as an artefact of dispute resolution, aimed at convincing the losing party.

Central to this book is the idea that every judicial opinion—quite irrespective of the topic of law that it treats—is fundamentally public in character, in that it is not only the parties who are owed an explanation, but rather "we all are, for the opinion is a public act setting forth the meaning of law for everyone."<sup>12</sup> "An appellate court opinion explains the law to those who are to live under it."<sup>13</sup> The formulation "are to" in this sentence is key. That we will live under the law is not to be taken for granted in the judicial opinion, such that Kahn could write simply that the opinion explains the law "to those who live under it"; there is a task to complete in each judicial opinion, a

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10. *Id.* at 1.

11. As Kahn explains at one point, "you must look beyond the judgment to the opinion, for only then can you come to understand how courts construct an entire world of meaning." *Id.* at 10.

12. *Id.* at 1.

13. *Id.* at 5.

burden that must be discharged through the text if the future of living under the law (in the way that we find politically acceptable) is to remain possible. We must be persuaded by the text, and that persuasion turns on the judge's ability to appeal in the right way to the imagination of the audience, which is all of us. This framing prepares the way for approaching the judicial opinion as a literary genre, a move that gives Kahn analytic tools unavailable to the doctrinalist, who is more narrowly interested in the outcomes of legal disputes, or to the crit, whose turn away from credulity about doctrine leads to viewing the language of an opinion as mere rhetoric in service of ideology. Neither framing reflects Kahn's literary approach in which story and imagination are key and in which the judicial opinion is a creative production. Two analytic tools afforded by this approach—narrative and voice—yield the core insights of this book.<sup>14</sup>

The pivotal role of narrative in the judicial opinion is laid out in Chapter 2. For Kahn the opinion is, at core, "an effort to persuade us that a particular way of seeing the situation makes sense."<sup>15</sup> Successful opinions do so, and the judge has two sets of resources at hand to achieve this persuasive task. First, the judge must provide an account of the facts and the law. Chapters 4 and 5 of *Making the Case* offer a thoughtful taxonomy of the moves available to judges in framing the facts and relating them to the law, a discussion that I commend to law students, lawyers, and judges. The central theme in those chapters is an important but more familiar message about the interdependency of fact and law: we don't know what the salient facts are without knowing the legal issue, and it is impossible to identify the relevant law without first having made decisions about the way in which to frame the facts. But the central conceptual contributions of this book do not flow from this first set of resources, but rather from the second: the appeal to narratives.

Kahn notes that the weaving together of fact and law must yield an account that seems sensible to us, and that it will appear

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14. In this respect, *Making the Case* has an analytical affinity to critical literary works; reading this text, I was put in mind of the resonances with the work of the cultural and literary theorist Mieke Bal, in *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* (1997). *Making the Case* is a kind of narratology for the judicial opinion.

15. KAHN, *supra* note 1, at 16.

so only “if the opinion persuades us to see the situation in light of one of the broad narrative accounts by which we regularly give order to our social and political life.”<sup>16</sup> Appealing to the literary sources that so inform the book, Kahn observes that, as in a short story, in the judicial opinion “[w]e are introduced to actors confronting a problem” and “[i]n the course of the opinion, that problem must be resolved in a way that leaves us with a sense of order, a sense that the problem has been resolved fairly.”<sup>17</sup> But from where does that “sense of order” arise? Kahn explains that we feel this order when we are able to see through the facts and law of the particular case to broad narratives—larger themes—that we are accustomed to using in making sense of our personal and political experiences. To succeed, the opinion must appeal to these broad narratives; it must “present the particular case *as an instance of a more general narrative that is already familiar to readers.*”<sup>18</sup> The sanctity of privacy, the imperative of equality, the good of freedom; but also personal narratives about family, friendship, love, and care: these are the organizing narratives that we habitually use to make sense of our personal and political experiences and to which the judicial opinion must appeal if it is to persuade.<sup>19</sup> Otherwise put, the opinion must connect the case to our pasts, our imagined futures, ourselves—to our identities. Thus, Kahn explains that “[t]he opinion persuades us when we come to see the situation as making sense in light of these large, organizing ideas that have already structured our understanding of ourselves and our communities.”<sup>20</sup> In seeking to persuade us, the opinion trades in these narratives to “[offer] us representations that we recognize as familiar and, more importantly, as true.”<sup>21</sup>

Seeing them within Kahn’s frame, we understand features of the judicial craft and the character of the judicial opinion in new ways. The dissenting opinion, for example, looks very different when this need to appeal to narratives is foregrounded.

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16. *Id.* at 19.

17. *Id.* at 20.

18. *Id.* at 21 (emphasis added).

19. Kahn names some of these broader narratives, but observes that “there is no list and there are no sharp boundaries” here between the political and the personal. *Id.* at 22.

20. *Id.*

21. *Id.* at 34.

The fundamental difference between a majority opinion and a dissent is often found in the narrative offered to make sense of the case, not in a raw dispute about the facts or the available doctrine. But Kahn explains that dissenting opinions are not rejecting the majority's narrative as unappealing—such narratives are too deep and central to reject. Rather, the dissent is offering an alternative narrative, “to which we are also sympathetic,”<sup>22</sup> that purports to make better sense of the situation by better capturing who we think we are as a political community. With this, Kahn exposes the drama at the heart of the judicial opinion, the essential drama that draws our interest as lawyers, judges, and scholars, and to which—if we do our jobs ably as teachers—we connect our students: judges struggle to appeal to these core narratives and hope that their opinions will persuade. And what will ultimately persuade? The answer to that question is simultaneously an answer to the question “Who are we?” As Kahn puts it, “[r]ead as a competition to persuade the reader, there is genuine excitement in the opinions.”<sup>23</sup>

In this respect, Kahn affirms the political character of the judiciary, but he means by this something quite different than do those writing from a realist or crit perspective concerned with the individual or institutional ideologies or preferences expressed through judges' decisions. For Kahn, the attempt to persuade through the judicial opinion involves the presentation of a narrative that appeals to and seeks to order the complex and contradictory values of a community in the best, most convincing way. And “[i]f we think of politics as the domain within which we collectively give order to the multiple values circulating in our community, then the judiciary is a deeply political institution.”<sup>24</sup>

Narrative thus plays a key role in Kahn's exposition of the judicial opinion: the opinion persuades when it successfully situates the case within a fundamental narrative that reflects our understanding of ourselves as a political community. We must be persuaded to see ourselves in the opinion. But this leaves us

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22. *Id.* at 27.

23. *Id.* at 33.

24. *Id.* at 38 (footnote omitted).



with a crucial question: Why is it essential that an opinion so persuades us?

This is where Kahn turns to the question of voice and, in exploring it, offers the most piercing and creative theoretical insights of the book. If Chapter 2 is about the importance of what a judicial opinion says, Chapter 3 is about the importance of who we hear saying it. This is the issue of voice in the opinion. The central conundrum around which this chapter is built is this: Why would we accept the authority of the courts to do the work described in Chapter 2? This is the question of the legitimacy of judicial decisionmaking. The reader would be forgiven for being skeptical that something new and fresh could be offered here. But Kahn strides past the abundant literature that seeks to address this question with variations on appeals to trust or truth and, instead, looks for the ground of judicial legitimacy and authority in the narrative voice of the opinion.

The arc of Kahn's argument is set by his observation that a central tenet of our political imaginations is that "[w]e want our laws not only to be just but to be our own."<sup>25</sup> Our commitment to the rule of law is accompanied by this commitment to self-government: that the laws do not happen to us, but rather that they belong to us in some strong sense, and that we are responsible for them. Yet we don't vote on all of our laws, including the fundamental law of our constitution, and so we are met with the question: How do we sustain this sense that the laws are our own?

Kahn explains that "[t]he sense that the law is our own rests on a set of beliefs about authorship."<sup>26</sup> This is the question of voice: Who do we hear when we read a text? The author of a text is not the same as the drafter or writer. The writer is the cause of the text, whereas it is the author that we hold accountable or responsible for it. "Authorship," in this sense, is "a social practice of accountability."<sup>27</sup> The authority of the text,

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25. *Id.* at 49.

26. *Id.* at 50.

27. *Id.* Kahn uses familiar examples to illustrate this point about the distinction between the writer and the author, and the way in which it turns on this "social practice of accountability":

[I]t is not acceptable for a professor to blame his research assistant when problems emerge with a published text that the assistant drafted. Similarly, a judge cannot blame her law clerk for what an opinion says. The clerk may have

in turn, depends on who is accountable for it. With this, Kahn moves from authorship through to authority. And, given our political commitment to self-government, we must understand ourselves to be the author of a legal text if it is to have authority and legitimacy. In a resonant statement from which the rest of this book conceptually ripples out, Kahn explains that “[a]n important part of the work of a legal text in a democracy, then, is to persuade us that we are its authors. *Self-government begins here, rather than with the vote.*”<sup>28</sup> Nestled as it is within such a rich text, the significance of that statement could be missed. Kahn is arguing that the vote is not the ground of democracy but, rather, one expression of a more fundamental commitment in the architecture of democratic political imagination: that we are the authors of—and therefore accountable for—the laws by which we live.

This is true, Kahn explains, of a constitution: “[O]ur political relationship to the Constitution is not constituted in the first instance by its justice or efficiency. Rather, that relationship arises out of beliefs about authorship.”<sup>29</sup> The point at which we cease to see the Constitution as our own is the point at which it ceases to have true authority and legitimacy, even if it retains its force. This is also true of legislation: “[w]e must see through the regulation to the statute and through the statute to its author, who is us.”<sup>30</sup> And his inquiry into voice reveals that this is also true of the judicial opinion. Kahn concedes that placing self-authorship at the ground of authority and legitimacy is not a new idea in political and legal theory. What is new here is asking “how the judicial opinion contributes to our social practices of reading the legal order as a product of our own authorship.”<sup>31</sup>

The judicial opinion is, thus, successful when we are able to see ourselves as its authors—when we receive it as an expression of the will of the self-governing people. This is why it is so important that we see our way of understanding ourselves

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drafted the opinion, but he is not the author. He is not the author even if he wrote every word of the opinion. No one wants to know what the clerk thought when he drafted this text.

*Id.* (footnote omitted).

28. *Id.* at 58 (emphasis added).

29. *Id.* at 55.

30. *Id.* at 56 (footnote omitted).

31. *Id.* at 62.

and our political community in the narratives of the judicial opinion. This is, for Kahn, the ultimate persuasive burden of the judicial opinion: to convince us that we hear our own voice, not the voice of the court or the judge. The authority and legitimacy of the judicial opinion rest on the judge's success in establishing this voice. The opinion should in consequence be read as "a sort of draft that gains legitimacy when we imagine its author as the people themselves acting as the popular sovereign."<sup>32</sup> The successful discharge of this persuasive task—not trust or truth—must be the ground of legitimacy for the judicial opinion if we are to maintain fidelity to the core imaginative commitment that we are engaged in a project of self-government. Kahn summarizes his central claim:

The opinion, accordingly, is persuasive just to the degree that it does not appear at all. As soon as we see the opinion as the authored act of the Justices, we will ask with what authority they rule in our democratic policy. There is no answer to that question, for they have no such authority.<sup>33</sup>

Understanding this, listening for that voice, we are truly reading the opinion: "[i]f you are counting votes, then you are not reading."<sup>34</sup> The judge's burden, then, is to persuade us to hear the opinion as an expression of the reach and character of democratic will, reading through the opinion to the people themselves. "There is no other measure of legitimacy."<sup>35</sup>

With this, Kahn explains, "[w]e are at the imaginative foundation of the whole fabric that is the American idea of the rule of law. The opinion of the Court is nothing less than the opinion of the people."<sup>36</sup> Drawing from Weber, Kahn explains that judges thus exercise a "charismatic" function, maintaining the link between the legal order and the "transcendent authority of the people,"<sup>37</sup> the link between the profane and the sacred. To the extent that the judicial opinion is successful in establishing that relationship of immanence, "we solve the puzzle of how

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32. *Id.* at 51.

33. *Id.* at 69.

34. *Id.* at 71.

35. *Id.* at 72.

36. *Id.*

37. *Id.* at 84.

popular sovereignty and the rule of law can be one and the same.”<sup>38</sup>

How precisely does this happen? Kahn uses *Marbury v. Madison*<sup>39</sup> to explore the answer to this question, and he offers principles that would have to guide the interpretation of a statute to meet this persuasive demand.<sup>40</sup> But ultimately he concedes that “[i]f all of this seems mysterious, it is because it is. It is a matter of faith and belief, of rituals that maintain that faith, and of rhetoric that gives it expression.”<sup>41</sup>

The student, lawyer, or judge who reads this book must not view this ultimate turn to mystery and faith as a failure of precision or as somehow opaque. It is, rather, the true expression of an approach to law that understands it as a world of beliefs and practices that create and shape political communities, and of a book that seeks to understand the judicial opinion as a text that helps to sustain that imaginative world.

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In the preface to *Making the Case*, Kahn describes “a successful reading as getting the opinion to sing. There is music in the law,” he explains, “and its audience is the well-trained lawyer. Unless you have a trained ear, you will not hear the melody.”<sup>42</sup> Kahn sets out to train our ears, to help us listen to the music of the opinion; in this, he succeeds marvelously, and in exciting and revealing ways. The recurring melody—perhaps the leitmotif—common to all opinions is the pursuit of that essential persuasive objective through the use of narrative and voice: the core burden of convincing us to see and hear *through* the judicial opinion to ourselves. We need to hear this melody if we are to hold together the rule of law with our commitment to self-government. I have therefore focused this review on Kahn’s

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38. *Id.* at 85.

39. 5 U.S. (1 Cranch) 137 (1803).

40. The question of how the interpretation and development of common law rules enables them to acquire legitimacy is one that Kahn does not treat in this text. This is of course an interesting question: Can true common law rules—those independent of statutory or constitutional footing—satisfy the conditions of democratic legitimacy that Kahn so convincingly sets out?

41. KAHN, *supra* note 1, at 86.

42. *Id.* at xiii.

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exploration of narrative and voice in Chapters 2 and 3, but there is much more in this book that rewards the engaged reader.

In Chapters 4 and 5 Kahn brings us closer to the key instruments at play in the judicial opinion—doctrine and fact—and offers an insightful account of the moves available to the judge as she works with each in service of the ultimate persuasive task. In these chapters, the student, lawyer, or judge is given a detailed picture of how doctrine and the presentation of fact can work within the opinion, and how fact and law are constantly interwoven. In Chapter 4 Kahn maps the “horizontal and vertical” axes along which judges can move as they relate to prior decisions, the horizontal representing the engagement with past judicial decisionmaking and the vertical marking the move outside the jurisprudence to rely on non-judicial interpretive aids and authorities. “These two dimensions,” Kahn explains, “provide the basic argumentative tools for the doctrinal positions of a judicial opinion.”<sup>43</sup> Kahn explores “the life of doctrine” in the judicial opinion, showing that, moving along these two interpretive dimensions, judges have three strategies available in relation to past doctrine: to incrementally develop the doctrine (“erudition”), to make a new doctrinal beginning (“natality”); or to tear down an existing line of doctrine, often in an asserted return to authoritative text (“destruction/fundamentalism”).<sup>44</sup> Using prominent examples, Kahn’s exposition of these doctrinal moves offers a fresh and helpful perspective from which to understand the argumentative structure of the opinion.

In his discussion of the use and role of facts, Kahn’s emphasis is on the reciprocal relationship between facts and law, and on the “decisive importance of establishing context.”<sup>45</sup> Facts are not merely presented—a decision always sits behind the narrative of the facts, a decision about the legal and normative horizon against which we are asked to view these facts. Although he does not describe his analysis as such, an evidence lawyer will recognize this discussion as, in essence, an exposition of the fundamental role of relevance in all parts of the judicial opinion. What Kahn describes as context could well

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43. *Id.* at 97.

44. *Id.* at 108–33 (discussing all three).

45. *Id.* at 140 (introducing his analysis of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

serve as a definition of legal relevance: “We need to know something about where we are going legally if we are to make decisions about where to begin factually.”<sup>46</sup> But just as fact depends on law, the successful presentation of the facts—a narration of the facts that “convince us that this is the way the world is”<sup>47</sup>—can create a sense of the inexorable reasonableness of a legal conclusion. Insisting throughout on this irrepressible interrelationship between fact and law, Kahn engages with cases like *Roe v. Wade*<sup>48</sup> and *Gonzales v. Carhart*<sup>49</sup> to explore questions like the role of analogy and empathy in factual reasoning and the difference between legal and scientific fact. The latter discussion brings us back to the principal melody of the book. Kahn explains that legal facts will always seem deficient from a scientific perspective, but that this is not a failing of the law. Rather, it reflects the truth that “[o]ur law is not a science but a practice of self-government through persuasion.”<sup>50</sup>

*Making the Case* is thick with both theoretical insights and practical lessons about reading and understanding the judicial opinion that flow from those theoretical starting points. In this, it presents itself as a general inquiry into “the art of the judicial opinion.” And yet Kahn draws examples exclusively from the jurisprudence of the United States Supreme Court and leans heavily on framings of popular sovereignty (“We the People,” for example) that ring in a distinctively American constitutional and political register. This is far from a criticism of Kahn’s approach. Quite the contrary: throughout his work, Kahn has urged that the culture of law’s rule is importantly particular, not universal. Legal imaginations are tied to specific political genealogies and Kahn—despite his keen interest in how the beliefs and rituals of the culture of law’s rule shift and change across political communities—is careful to work within the culture and history that he knows best. Nevertheless, the particularity of this book raises a question: How tied to the United States are its insights and lessons? This is a question that

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46. *Id.*

47. *Id.* at 155.

48. 410 U.S. 113 (1973).

49. 550 U.S. 124 (2007).

50. *Id.* at 169.

comes naturally to a Canadian academic, particularly one who has been conscious of his use of “we” and “our” throughout this review.

In my view, *Making the Case* has more reach than might be suggested on the face of the text. The reason is simple: the persuasive burden at the heart of the judicial opinion is and must be common across legal orders, to the extent that they understand themselves to be engaged in a project of self-government. Much will shift from culture to culture. The broad narratives that resonate, the values that an opinion must order, the communities that must hear themselves in the opinion—all will vary. That which persuades is particular. Indeed, a fascinating way into comparative constitutionalism is to ask the question “what persuades here?”<sup>51</sup> But the burden to persuade in the specific way that Kahn exposes as the heart of the judicial opinion, as well as the need to do certain kinds of work with fact and law, is, in my view, a feature of modern law in a constitutional democracy. Having read *Making the Case*, I have difficulty imagining how it could be otherwise. Judges, lawyers, academics, and students outside the United States will better understand not only the judicial opinion, but their own constitutional cultures, after a careful encounter with this book.

Early in this review I reflected on the complexity of the audience for *Making the Case*, a complexity that flows from the fact that this book is at once a guide to reading the judicial opinion and a philosophical intervention on the subject of self-government and the rule of law. Packed with insight in both dimensions, the book will challenge and reward the law student, the lawyer, the judge, and the scholar curious about the unique place of the judicial opinion in the practical and imaginative architecture of our legal and political worlds.

But the book ends with an address to another audience: a *cri de cœur* to the humanist scholar of law . . . and we should listen. Kahn notes the force of social-scientific inquiry—and, in particular, of economics—in the study of law and, with it, the

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51. I make a similar claim in Benjamin L. Berger, *Children of Two Logics: A Way into Canadian Constitutional Culture*, 11 INT’L J. CONST. L. 319 (2013), in which I argue that “the study of comparative constitutional cultures should be keenly interested in those points in the constitutional life of a country at which the claims of the particular persist in spite of the logic of the universal.” *Id.* at 337–38.

scholarly focus on efficiency, on the effect of laws on social behavior, and on prescriptions about what the law should be. He urges the humanist to take up the mantle of her discipline and to pursue the very different lessons and insights that it can yield. “For the humanist,” Kahn explains, “the problem of understanding law is not that of deciding what the law should be but of explaining how we actually live with the law we have even as we argue with each other about what the law means.”<sup>52</sup> Although the social scientist can no doubt offer useful information about law, there are some matters—and the persuasive task at the heart of the judicial opinion is one—for which we need the tools of the humanities. If we wish to understand the meaning of our legal and political practices and experiences, we need the tools of literary and philosophical inquiry. The humanist, whose task is fundamentally interpretive and phenomenological,<sup>53</sup> “approaches the legal imagination as the source of a way of understanding oneself and one’s world that is fundamentally built around a collective subject’s history.”<sup>54</sup> And with this, *Making the Case* ends by pointing to the uniting feature of Kahn’s scholarship. As one of our guiding voices in the humanistic study of the culture of law’s rule, his objective here the same as it is in all of his work: to help us to understand ourselves better.



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52. KAHN, *supra* note 1, at 175 (footnote omitted).

53. Kahn explains that the humanist “approaches law as an imagined world and asks how events, persons, and institutions appear in that world.” *Id.* at 177. In sympathetic tones, I explore the nature of a phenomenological approach to legal scholarship in the specific field of law and religion in *LAW’S RELIGION: RELIGIOUS DIFFERENCE AND THE CLAIMS OF CONSTITUTIONALISM* (2015).

54. KAHN, *supra* note 1, at 174.