Rountree, Clarke. *Judging the Supreme Court: Constructions of Motives in Bush v. Gore*. East Lansing: Michigan State University Press, 2007.

Zac Gershberg

Further proof—as if any were needed—of the resounding impact of Kenneth Burke's critical methodology sketched out in the eight-and-a-half page introduction to his 1945 work, *A Grammar of Motives*, Clark Rountree has provided us with, behold, a 400-page pentadic analysis of the *Bush v. Gore* Supreme Court decision which ended the 2000 election. The author adopts a dramatistic scope to identify and evaluate the motives that inform the High Court's majority, dissenting, and concurring opinions in the case. Additionally, he outlines and comments upon the media coverage as well as editorial and scholarly legal treatments of *Bush v. Gore*. The book is intended for *all* citizens living under a democratic form of governance, given Rountree's impassioned plea for fairness and transparency in the political process; but in particular, *Judging the Supreme Court* will prove useful to any academic scholar invested in analyzing legal discourses or comparing them to more rhetorically-inscribed communicative situations. It also serves as a superb example for younger scholars or students who are looking for ways to adapt Burke's pentad.

By asserting, in the introduction, "judicial opinions are rhetorical performances" (xv), Rountree demarcates his scholarly orientation as apart from media and legal studies of the case. Specifically, the pentad is invoked as a way to more profitably examine legal decisions. The first chapter sketches what Rountree calls the *judicial myth*: how "[t]o maintain their credibility—which is the ultimate basis of their power—judges must look and act as if they are constrained by the law" (4). While this may prove a subversive temptation to undermine all legal rulings, Rountree reminds us of the civic importance the judiciary branch of government (is supposed to) provide(s). Articulating this brief, ambivalent conception of the judicial myth and its relationship to American governance is, in fact, one of the heuristic theoretical contributions of the book and appears ripe for more study along the rhetorical-Burkean nexus.

As the title suggests, Rountree spends the majority of the text focusing on the decision and the responses to the case itself. From the voting errors and the appeals-path up the judicial chain, including a section on the Florida Supreme Court, there is a concerted effort in the

opening chapters to objectively recount—capture, that is—what happened. There is then a summary of the majority, concurring, and dissenting opinions of the High Court's actions in *Bush v. Gore*. Along the way, Rountree maintains a neutral tone and provides short as well as extended passages from the opinions themselves. He does, however, contextualize the opinions in terms of the pentad: for instance, when Chief Justice William Rehnquist states, in his concurring opinion, "We deal here not with an ordinary election, but with an election for the President of the United States," Rountree categorizes this within the scene-act ratio and infers how this remark informs the majority's justification for the Court's stay and its resulting adjudication (50). The same pentadic ratio is on display when Rountree considers Richard Posner, one of the scholarly defenders of the High Court, who disagrees with the Court's logic but vindicates the majority on the basis of scenic ramifications. The book excels in pointing out how the majority opinion and those agreeing with the decision describe the alternative(s) as fraught with peril: chaos would ensue if, God forbid, votes were (re-)counted, and "potential" harm *could* be inflicted on George W. Bush.

Rountree employs the pentad not just to understand the High Court's opinions but also evaluate its motives. A helpful example is again from treating the Chief Justice's concurring opinion:

> [I]t was critical for Rehnquist to make the case unequivocally, for he was second-guessing a state court interpreting its own state law. Terms such as 'clear,' 'plain,' 'absurd' polarized his opinion, portraying his judgment as emphatic and absolute. To maintain this level of certainty, Rehnquist refused even to address Florida's arguments to the contrary. (56)

Interestingly, Rountree notes how Rehnquist's clever rhetorical composition allowed for many of the Court's defenders to prefer this concurring opinion as opposed to the rationale of the majority proper. The framing of such an analysis as this can be of help to both legal and non-legal scholars examining future rulings, as well as help us understand how *Bush v. Gore* was argued, fought for, won, and later defended. Rountree painstakingly goes over the scholarly reconstructions of the case, but few, if any, possess this author's interest or expertise in discursively piecing together the rhetorical productions of the opinions themselves.

It is, in short, too obvious—and too easy—to charge the High Court with political motivations. The novelty of this enterprise is that Rountree acknowledges such political

machinations but penetrates the rulings with greater depth, tying all judicial decisions back to the tenuous relationship between agency, "the most powerful motive term in law" (211), and purpose, the "meting out [of] justice" (252). The difficulty for those not trained in the law is that, in typical rhetorical acts, "purpose [is meant] to drive agency, rather than the other way around," whereas "judicial discourse…is supposed [to rely on the law] to dictate the outcome" (394). While Rountree chooses not to provide an extended overview of the legal philosophy of originalism, he is apt to point out the agentic inconsistencies between federalism's deference to the states and strict constructivism with how the High Court's conservative bloc engaged in judicial activism to decide *Bush v. Gore*.

Two middle chapters deal with how the media reacted to the case, combing both reporting and editorial coverage across daily newspapers and weekly or monthly magazines. "Despite journalistic goals to be objective and fair," writes Rountree, "there is no ultimately neutral vocabulary for describing motives" (100). As such, reporters are seen as "much more subtle" than editorialists in constructing their analysis of the case. One freshly thought out point Rountree makes is that the media, even those who vehemently disagree with *Bush v. Gore*, did a poor job contextualizing the Florida Supreme Court Case, *Gore v. Harris*. As such, the Florida Supreme Court was left open to charges of a similar political bias as the Supreme Court, albeit for the Democrats. This overlooks, as Rountree argues in his own analysis found in the final chapter, "Judging the Supreme Court and Its Judges," that the Florida Court ruled against Gore in some of his motions concerning the recount.

This book may also appeal readers for the rhetorical kernels of wisdom found at the beginning and end of each chapter. Rountree's voice largely disappears during the course of his review of the opinions, media coverage, and literature reviews of legal scholars—excepting when he applies the pentad—but he bookends the chapters with the advice worthy of a consummate rhetorican, at times a theorist and at others a practitioner. Take, for instance, the concluding paragraph to the chapter on editorialists:

> The rhetorical lesson of these editorials is clear: If you are defending someone faced with evidence that he, she, or they have engaged in an inappropriate act, move attention away from that particular act and toward (1) other acts that might have created a situation in which those you are defending were reluctantly forced to act or (2) other acts of the accused suggesting that they do not have the motives

> attributed to them in the particular case. On the other hand, if you are attacking them, focus attention on the act itself and away from the acts of others that may have contributed to a situation requiring a response from the accused. (169)

Rountree distills from all of his analyses a Burkean frame with which to make suggestions and offer judgment. We find, then, a pentadic approach that is not merely limited to the legal rulings of *Bush v. Gore* but extends to media and scholarship as well.

Whereas throughout most of the book Rountree speaks through Burkean terms and detached neutrality, his conclusion is a refutative broadside leveled at the decision and those who would justify it. "The conservative justices […] should have kept their federal noses out of this state business in the first place" he writes, adding that they "sacrificed legitimacy for the decision" and "yielded justice for no one" (386, 396, 401). By limiting *Bush v. Gore* as the one and only Supreme Court decision *without* precedent, the High Court is accused of "simultaneously ignor[ing] its responsibilities to the past, the present, and the future—to following the law, to doing justice, and to laying down clear precedents" (392). In short, the book's conclusion permits Rountree permits to unleash pent-up anger (not entirely unjustified given the hypocrisy and weak arguments he fleshes out), even imagining a world in which Al Gore, not George W. Bush, governed as president. He does, however, suggest a couple of alternatives to how the case played out: first, as mentioned above, a defense of the Florida's Supreme Court is offered, though Rountree does not mention whether the state court could have argued differently—maybe with a federal poison pill, of sorts, or a decision with greater clarity for the recounting procedures. Second, the High Court's majority opinion is pigeon-holded to either refuse the stay or render a 7-2 decision joined by Justices Breyer and Souter, both of whom acknowledged equal rights protection violations. Had the Supreme Court followed this path in its per curiam, it would have allowed the recount to continue, only under more uniform methods of recounting the vote. As Rountree asserts earlier in the book, "The irreparable harm in recounting could be realized only if Bush lost his lead in the election" (31). For the most part, though, Rountree's conclusion focuses on rejecting the uncertainty that the scene-act defense of *Bush v. Gore* relies upon. The High Court suggests that the state court "held that the [safe harbor] deadline was sacrosanct under Florida law," which, for Rountree, scholars, and the state court's decision alike, is patently untrue (388). "December 18, the day the Electoral College met,

should have been the earliest deadline insisted on by the High Court," concludes Rountree, to ensure a more faithful record of counting votes (389).

Judging the Supreme Court is a particularly sound piece of Burkean scholarship which also serves as a civic appraisal of the American judiciary branch. While the book's breadth comprises everything one can imaginatively conceive of regarding *Bush v. Gore*, some readers may be left wanting for more of a Burkean/rhetorical analysis of justice or the law itself. I raise this criticism if only because Rountree, whose purpose in this book is admittedly limited, positions himself as adept to do so and almost teases the reader with his theoretical insights. Stanley Fish is renown for rhetorical engaging legal philosophies and discourses, and, in *Doing What Comes Naturally*, takes Rountree's antagonist Richard Posner to task for his ideas on language. Supreme Court Justices, meanwhile, often write popular books and deliver public lectures on their judicial philosophies. Not to be so Perelman-esque, but they are decidedly not philosophical systems of thought, merely rhetorical methods with which to analyze discursive arguments and construct rulings. Rountree demonstrates the degree to which originalism and the Court's conservative bloc sold their legitimacy to the Republican Party, yet ex-President Bush advanced the nominations and confirmations of Justices Roberts and Alito with little fierce resistance. Relying on divorcing agentic action from legal rulings and a belief in the purity or transparency of language, strict-constructivism continues to be peddled unabated today. If ever originalism should be exposed and pitched to the ash-heap of history, I imagine it will be at the hands of a Burkean or rhetorician capable of rejecting its tenets. Here's hoping that Rountree or some other enterprising scholar constructs a decisive second act to this impressive foray into judicial rhetoric.

Contact:
Zac Gershberg, Ph.D
Visiting Assistant Professor of Rhetoric
The University of Montana
301 Liberal Arts
Missoula, MT 59801
406-243-2551
z.gershberg@umontana.edu