

## RHETORICAL PROCESSES AND LEGAL JUDGMENTS

Over the last several decades, legal scholars have plumbed law's rhetorical life. Scholars have done so under various rubrics, with law and literature being among the most fruitful venues for the exploration of law's rhetoric and the way rhetoric shapes law. Today, new approaches are shaping this exploration. Among the most important of these approaches is the turn toward history and toward what might be called an "embedded" analysis of rhetoric in law. Historical and embedded approaches locate analysis of rhetoric in particular contexts, seeking to draw our attention to how the rhetorical dimensions of legal life work in those contexts. *Rhetorical Processes and Legal Judgments* seeks to advance that mode of analysis and also to contribute to the understanding of the rhetorical structure of judicial arguments and opinions.

Austin Sarat is William Nelson Cromwell Professor of Jurisprudence and Political Science and Associate Dean of the Faculty at Amherst College, and Justice Hugo L. Black Senior Faculty Scholar at the University of Alabama School of Law. He is the author or editor of numerous books, including the recent *A World without Privacy* (2014), *Civility, Legality, and the Limits of Justice* (2014), and *Re-imagining To Kill a Mockingbird: Family, Community, and the Possibility of Equal Justice under Law* (2013). His book, *When Government Breaks the Law: Prosecuting the Bush Administration*, was named one of the best books of 2010 by *The Huffington Post*.

# Rhetorical Processes and Legal Judgments

HOW LANGUAGE AND ARGUMENTS SHAPE STRUGGLES  
FOR RIGHTS AND POWER

Edited by  
AUSTIN SARAT  
Amherst College



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
978-1-107-15550-3 — Rhetorical Processes and Legal Judgments  
Edited by Austin Sarat  
Frontmatter  
[More Information](#)

**CAMBRIDGE**  
UNIVERSITY PRESS

32 Avenue of the Americas, New York NY 10013

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107155503](http://www.cambridge.org/9781107155503)

© Austin Sarat 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

*A catalogue record for this publication is available from the British Library.*

*Library of Congress Cataloging-in-Publication Data*

Sarat, Austin, editor.

Rhetorical processes and legal judgments : how language and arguments shape struggles for rights and power / edited by Austin Sarat.

New York : Cambridge University Press, 2016.

LCCN 2016016314 | ISBN 9781107155503 (hardback)

LCSH: Law – Language. | Law – Language – History. | BISAC: LAW / General.

LCC K213 .R488 2016 | DDC 340/.14–dc23

LC record available at <https://lcn.loc.gov/2016016314>

ISBN 978-1-107-15550-3 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press  
978-1-107-15550-3 — Rhetorical Processes and Legal Judgments  
Edited by Austin Sarat  
Frontmatter  
[More Information](#)

---

*To Ben, with love*

## Contents

<i>List of figures</i>	<i>page</i> viii
<i>List of contributors</i>	ix
<i>Acknowledgments</i>	xi
<b>The relevance of rhetoric: an introduction</b>	1
Austin Sarat	
<b>1 From “equality before the law” to “separate but equal”: legal rhetoric, legal history, and <i>Roberts v. Boston</i> (1849)</b>	12
Eric Slauter	
<b>2 “The civilizing hand of law”: defending the legal process in the civil rights era</b>	31
Christopher W. Schmidt	
<b>3 The evolving rhetoric of the gay rights and same-sex marriage debate</b>	54
Teresa Godwin Phelps	
<b>4 The rhetoric of precedent</b>	83
Bernadette Meyler	
<b>5 Alternative conceptions of legal rhetoric: open hand, closed fist</b>	100
Linda L. Berger	
<b>Afterword: Use your words: rhetoric as absence of law, rhetoric as essence of law</b>	127
Adam N. Steinman	
<i>Index</i>	141

## Figures

4.1 Passenger cases (1849).	<i>page</i> 98
4.2 Passenger cases majority.	98
4.3 Passenger cases dissents.	98

## Contributors

**Linda L. Berger** is the Family Foundation Professor of Law at UNLV

**Bernadette Meyler** is the Carl and Sheila Spaeth Professor of Law at Stanford Law School

**Teresa Godwin Phelps** is Director of Legal Rhetoric and Professor of Law at American University's Washington College of Law

**Austin Sarat** is Associate Dean of the Faculty and William Nelson Cromwell Professor of Jurisprudence & Political Science at Amherst College and Justice Hugo L. Black Visiting Senior Scholar at the School of Law at the University of Alabama

**Christopher W. Schmidt** is Associate Professor and Director, Institute on the Supreme Court of the United States at Chicago-Kent College of Law and Faculty Fellow at the American Bar Foundation

**Eric Slauter** is Associate Professor of English at the University of Chicago

**Adam N. Steinman** is Professor of Law at the School of Law at the University of Alabama

## Acknowledgments

This volume is the product of a symposium held at the University of Alabama, School of Law, on September 18, 2015. I want to thank the colleagues, students, and staff who helped make it such a successful event. I am grateful for the financial support of the University of Alabama Law School Foundation and for the able research assistance of Keshav Pant.