

1-1-1996

Rhetorical Criticism of Legal Texts: Four Rhetoricians on *Lochner v. New York*

Hastings Constitutional Law Quarterly

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly



Part of the [Constitutional Law Commons](#)

Recommended Citation

Hastings Constitutional Law Quarterly, *Rhetorical Criticism of Legal Texts: Four Rhetoricians on *Lochner v. New York**, 23 HASTINGS CONST. L.Q. 619 (1996).

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol23/iss3/1

This Forum is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

FORUM

Rhetorical Criticism of Legal Texts: Four Rhetoricians on *Lochner v. New York*

Introduction

Legal theorists have been attracted and repelled by the study of rhetoric since the times of ancient Greece, when rhetoric comprised the education of the citizen-lawyer. More recently, rhetoric's stock has risen in the legal community as legal scholars such as James Boyd White,¹ Milner S. Ball,² Stanley Fish,³ and William L. Twining⁴ have turned to rhetorical theory to explore the contours of legal language and its impact on the law. Another prominent legal theorist, Judge Richard Posner, has entered this dialogue on the use of legal rhetoric. In his book *Law and Literature: A Misunderstood Relation*,⁵ Judge Posner discussed the value of studying the rhetoric of judicial opinions,⁶ and illustrated his argument by analyzing the rhetoric of Justice Holmes in his *Lochner v. New York*⁷ dissent.⁸ Judge Posner's efforts at rhetorical criticism sparked a discussion among several scholars of law and rhetoric, which was formalized in a presentation at the Speech Communication Association/American Forensic Association Conference on Argumentation, held in Alta, Utah in August 1995.

The Essays that follow are based on the speeches given at that conference. Of these Authors, one is a law professor and the others are all noted rhetoric scholars. This group reflects the belief that interdisciplinary scholars need to make a more active effort to communicate across their department and journal borders. These Essays

1. See, e.g., JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990).

2. See, e.g., LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1985).

3. See, e.g., DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

4. See, e.g., RETHINKING EVIDENCE: EXPLORATORY ESSAYS (1990).

5. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

6. *Id.* at 269-316.

7. 198 U.S. 45 (1905).

8. Posner, *supra* note 5, at 281-89.

demonstrate various ways rhetorical criticism can be a powerful response to legal discourse. Judge Posner's analysis of Justice Holmes's *Lochner* dissent represents one approach to the study of legal language, aimed at improving the quality of judicial opinion-writing. This instructive function of rhetorical criticism can be contrasted with the rhetorical criticism used by the Authors of these Essays that aims at reconstructing and evaluating legal discourse.

Professor Eileen A. Scallen analyzes Justice Peckham's majority opinion in *Lochner* from a stylistic perspective and suggests the rhetorical problems that arise with constitutional "balancing tests." Professor William E. Wiethoff focuses on the homiletic form of the three *Lochner* opinions and compares their embedded claims to authority, legitimacy, and piety. Professor Wiethoff explores the ways in which the Justices adopt the mantle of "high priests" and invite the audience to associate legal texts with moral validity. Professor Warren Sandmann analyzes the public conceptions of "liberty" represented in the *Lochner* arguments in order to reach a deeper understanding of the quality of legal formalism. Professor James Arnt Aune uses *Lochner* to critique the critic by analyzing Judge Posner's efforts at rhetorical criticism and his theory of rhetoric. Professor Aune demonstrates that rhetorical criticism is a process of dialogue among thoughtful readers of texts in an effort to reveal the tensions within ideological systems. Thus, Professor Aune's Essay captures the spirit of this Forum: to promote intelligent argument among scholars of rhetoric and law about the ways in which legal rhetoric shapes our political and legal institutions, the legal profession, and the public's conception of law and its actors.