

# On the Rhetorical Criticism of Judge Posner

By JAMES ARNT AUNE\*

Perhaps the best commentary on the rhetoric of United States Supreme Court Justice Rufus Peckham in *Lochner v. New York*<sup>1</sup> was made by Oliver Wendell Holmes in a letter to Felix Frankfurter in 1922. In that letter Justice Holmes wrote that “emotional predilections somewhat governed [Justice Peckham] on social themes.”<sup>2</sup> Certainly the most interesting recent commentary on *Lochner* is the rhetorical analysis of Justice Holmes’s dissent in Richard Posner’s *Law and Literature*.<sup>3</sup> Posner, the Chief Judge of the Seventh Circuit and a leader of the “Law and Economics” movement, at first sounds a bit like Justice Peckham himself. He writes:

Would the dissent in *Lochner* have received a high grade in a law school examination in 1905? I think not. It is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched, does not exploit the factual record, and is highly unfair to poor old Herbert Spencer.<sup>4</sup>

Posner further criticizes Justice Holmes for not dealing with the Due Process Clause, the real heart of the constitutional argument, and concludes:

It is not, in short, a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years. To judge it by ‘scientific’ standards is to miss the point. It is a rhetorical masterpiece, and evidently rhetoric counts in law; otherwise the dissent in *Lochner* would be forgotten.<sup>5</sup>

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1. 198 U.S. 45 (1905).

2. Letter from Oliver Wendell Holmes to Felix Frankfurter (March 28, 1922), *quoted in* LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 417 (1991).

3. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) [hereinafter *LAW AND LITERATURE*].

4. *Id.* at 285.

5. *Id.* at 285-86.

Most of the time when we analyze the relationships among political, legal, and rhetorical theory, we are left with a few odd marginal hints, such as Kant's brief dismissal of rhetoric in the third critique<sup>6</sup> or Marx's confession to his father about cooling his fevered brain by translating parts of Aristotle's *Rhetoric*.<sup>7</sup> It is rare for the student of legal argument to find an explicit statement of an influential jurist's method of rhetorical criticism as well as a provocative reflection on the nature of rhetoric itself, as Posner goes on to do in his recent *Overcoming Law*.<sup>8</sup>

The purpose of this Essay is to examine Posner's rhetorical criticism of the Justice Holmes dissent, compare that criticism with Posner's recent extension of his reflections on rhetoric in *Overcoming Law*, and perhaps reinforce the claims of Edward Panetta and Marouf Hasian in their recent analysis of Posner's "anti-rhetoric."<sup>9</sup> Posner's discussion of rhetoric reveals how, as Morton Horwitz has noted, "every complex legal system presents a structure of classification and categorization that reveals many of its dominant concerns and points of tension and contradiction."<sup>10</sup> This Essay is part of a larger intellectual project. Besides contributing to what might one day be called a "Law and Rhetoric" movement, the goal of this Essay is to use implicit and explicit discussions of rhetoric in political, social, and legal theory to explore the larger movement of arguments across particular social formations, and to identify the peculiar usefulness of rhetorical theorizing in exposing the strains and contradictions in ideological systems.<sup>11</sup> Posner's impoverished view of rhetoric seems to go hand in hand with his reification of the role of the market in law and politics.

Although Posner's self-conscious reflections on rhetoric come after his reading of the Justice Holmes dissent, I begin with the later work for purposes of clarity. Posner's theory of rhetoric follows the same conceptual path as his introduction of economics into legal analysis. First, he narrows the scope of the rhetorical enterprise to cost-benefit analysis. He describes the persuader's choice of the available means of persuasion in this way:

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6. IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 184-85 (J.H. Bernard, trans. 1951).

7. Letter from Karl Marx to his father (November 10-11, 1837), in KARL MARX & FRIEDRICH ENGELS, *COLLECTED WORKS*, Vol. I at 18-19 (1975).

8. RICHARD A. POSNER, *OVERCOMING LAW* 498-530 (1995).

9. Edward M. Panetta & Marouf Hasian, Jr., *Anti-Rhetoric as Rhetoric: The Law and Economics Movement*, 42 *COMM. Q.* 1, 57-74 (1994).

10. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 10 (1992). For a good discussion of Justice Holmes, see *id.* at 109-43. See also *OVERCOMING LAW*, supra note 8, at 271-86.

11. See generally JAMES ARNT AUNE, *RHETORIC AND MARXISM* (1994).

The persuader whose goal is fixed will choose that mixture of rhetorical devices—including true information, lies, signals, and emotional appeals—that, at least cost to himself will maximize the likelihood of achieving that goal. . . . The cost of persuading the audience depends on the distance between X and Y, where Y is the audience's prior belief concerning the subject matter of the speech.<sup>12</sup>

The difficulty of persuasion also depends on the tenacity with which the audience's preexisting beliefs are held.<sup>13</sup>

Second, actual communication between speaker and audience is, by a rhetorical sleight of hand, defined primarily in terms of information. A speaker influences the beliefs of audiences in two ways: by supplying information, which includes false as well as true information, deductions, and inductions, and by "using signals of one sort or another to enhance the credibility of the speaker's arguments—such signals as speaking with great self-assurance or furnishing particulars about oneself that make one seem a credible person."<sup>14</sup> Posner notes that this strategy usually comes first, in order to "place the audience in a receptive mood," and states that, "[t]he creation of this receptive mood was called in classical rhetoric the 'ethical appeal.'"<sup>15</sup>

Posner's characterization of ethos as simply the creation of a receptive mood is simply wrong. Aristotle's *Rhetoric* defines ethos as a mode of proof provided "in the character of the speaker," or, as Thomas Farrell puts it, "the character of the speaker as it is manifested in the speech."<sup>16</sup> Posner apparently confuses ethos with pathos: ignoring the significance of ethos means leaving out the historical and cultural dimension of rhetoric. Posner cannot account for the role of the orator as an embodiment of cultural ideals (although his reverence for Justice Holmes suggests an implicit understanding of this dimension of ethos).<sup>17</sup> Nor can Posner account for the way in which exceptionally eloquent rhetorical texts such as Lincoln's "Second Inaugural" enter into the public consciousness of a nation.

Third, Posner defines audience response, as well as the "utility" of rhetoric, in terms of information costs. He accuses Donald McCloskey and other advocates of rhetorical methods in economics of ignor-

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12. OVERCOMING LAW, *supra* note 8, at 500-01 (citations omitted).

13. OVERCOMING LAW, *supra* note 8, at 500-01.

14. OVERCOMING LAW, *supra* note 8, at 500.

15. OVERCOMING LAW, *supra* note 8, at 500.

16. ARISTOTLE, ON RHETORIC 39, § 1356(a) (George A. Kennedy, trans. 1991); THOMAS B. FARRELL, NORMS OF RHETORICAL CULTURE 41 (1993).

17. See RONALD BEINER, POLITICAL JUDGMENT 101 (1983).

ing "the significance of the costs of information to the rhetorician's audience":<sup>18</sup>

The average scientific paper is less 'rhetorical,' in a perfectly intelligible sense of that word, than the average political address or the average closing argument to a jury. The reason is that the cost of information is much lower to a scientific audience for a scientific paper than, for example, to the lay audience of a politician's speech on macroeconomics or foreign policy. The higher an audience's cost of absorbing information, the more a speaker will rely on forms of persuasion that avoid taxing the audience's absorptive capacity and thus minimize the cost.<sup>19</sup>

Posner, who ostensibly is an admirer of Protagoras, here reinscribes an essentially Platonic view of rhetoric in which clear lines are drawn between rhetoric and science. Not only does such line-drawing ignore the enduring role of rhetorical masterpieces in sustaining a nation's public consciousness, it also obscures insight into the rhetorical tools used by scientists to address audiences with low information costs. McCloskey's comparative historical analysis of changes in the "implied author" of economic articles from the historian/philosopher of 1929 to the mathematician of 1989 is but one example of the uses of rhetorical analysis of economic "science."<sup>20</sup>

Fourth, Posner rigidly separates rhetoric from ethics. After a rather breathless analysis of Plato's *Gorgias* and Aristotle's rhetoric, he concludes that one simply should "try to place a normative evaluation on legal . . . advocacy in gross."<sup>21</sup> He also notes in a parenthesis that "[t]he efforts of the defenders of rhetoric to do so may be one reason for the low esteem in which the discipline is held. Poor rhetoricians they, they overargue their case."<sup>22</sup> "When rhetoric is moralized, rhetorical analysis of judicial opinions turns into the old lawyers' game of congratulating the judges who agree with you; and it becomes impossible to remark the rhetorical prowess of a Hitler."<sup>23</sup> In these passages, the voice of Justice Holmes begins to come out very clearly. Just as Justice Holmes had rigorously attempted to separate law and morality in *The Common Law*, Posner wishes to do the same with rhetoric and morality.<sup>24</sup>

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18. OVERCOMING LAW, *supra* note 8, at 502.

19. OVERCOMING LAW, *supra* note 8, at 503.

20. See generally DONALD McCLOSKEY, KNOWLEDGE AND PERSUASION IN ECONOMICS (1994). See especially chapters 9-13.

21. OVERCOMING LAW, *supra* note 8, at 516.

22. OVERCOMING LAW, *supra* note 8, at 516.

23. OVERCOMING LAW, *supra* note 8, at 528.

24. OLIVER W. HOLMES, JR., THE COMMON LAW 38 (1881).

It is simply wrong to characterize rhetoricians as playing the old lawyers' game: Posner has constructed a straw version of "morality" as a simplistic answer to questions of right and wrong. Aristotle understood, as did generations of rhetoricians, philosophers, and lawyers after him, that politics, law, and ethics are inextricably linked by the human capacity for reasoning. Posner is right that there is a lot of bad rhetorical criticism that simply attacks the rhetor for not adhering to the critic's prejudices, but surely he knows that it is possible to examine the ethical reasoning of a rhetor respectfully without agreeing with it. Posner's objection applies equally to his own rhetoric in *Overcoming Law*, which is full of dismissive epithets ("rhetoric prigs") cloaked in the guise of scientific judgments.

Fifth, Posner rigidly separates rhetoric and science. The rhetorician discovers nothing: "the rhetorician doesn't stick his neck out. No Socrates, he is respectful of public opinion, or less politely the prejudices of his audience. That is one reason why the literature of rhetoric is duller than that of science or philosophy."<sup>25</sup> Much of rhetoric, in contrast to science, depends on the ability to parry an opponent's rhetorical thrusts. Also, "science tends to falsify false propositions, and thus to promote truth, whereas rhetoric has no such tendency."<sup>26</sup>

A final criticism of Posner lies in his selective writing of the history of rhetorical theory. Posner's is a history of rhetoric from which Isocrates, Cicero, and Quintilian, among others, are absent. He constructs a history of rhetoric in which the "extremes" of Plato and Aristotle are seen as unrealistic, leaving the sophistic rhetoric of Protagoras as winner by default. Legal rhetoric in the West, much like law itself, is largely a creature of the Roman rhetoricians, who combined a sophistic attention to effectiveness with a philosophical view of ethics and politics.

There are other criticisms of Posner's rhetoric, including the reduction of argument to communication of information; the elimination of cultural tradition as a factor in ethical appeal; the ignoring of the role of the audience (as well as the presence of multiple audiences) in negotiating rhetorical meaning; the simplistic and "literary" focus on the single speech text, and the unrealistic depiction of an essentially unidirectional flow of information from speaker to audience.

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25. *OVERCOMING LAW*, *supra* note 8, at 528.

26. *OVERCOMING LAW*, *supra* note 8, at 529.

However, just as Posner is a skillful persuader in spite of his impoverished view of rhetoric (or, to put it another way, he is skillful in adapting to audiences who find, among other things, *equations* a helpful mode of proof), perhaps Posner's own practice of rhetorical criticism is better. A common defense of economic methods in law lies in their practical usefulness in resolving conflicts, a defense that fits nicely with Posner's own eloquent defense of pragmatism. In *Law and Literature*, Posner tells us that the rhetorical analysis of judicial opinions may help us better understand the process by which such decisions are written, and perhaps even to improve judicial opinion-writing.<sup>27</sup> In a fascinating chapter, Posner moves from analyzing Yeats' "Second Coming," to Mark Antony's speech in *Julius Caesar*, and then finally, to Justice Holmes' *Lochner* dissent.

I include the full text of Justice Holmes' dissent in part because of its brevity and also because it will make it easier to locate certain roads not taken in Posner's analysis. It reads as follows:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. It if were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law.<sup>28</sup> United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court.<sup>29</sup> Two years ago we upheld the prohibi-

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27. LAW AND LITERATURE, *supra* note 3, at 269.

28. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

29. *Northern Securities Co. v. United States*, 193 U.S. 197 (1905).

tion of sales of stock on margins or for future delivery in the constitution of California.<sup>30</sup> The decision sustaining an eight hour law for miners is still recent.<sup>31</sup> Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment [sic] of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.<sup>32</sup>

Posner's reading of Justice Holmes' dissent is rather straightforward, and certainly consistent with his later theoretical reflections on rhetorical practice. Posner simply identifies strategies and omissions of points of law.

First, Posner identifies the ethical appeal of Justice Holmes that is established by a "serious and deferential tone" in the first sentence, a rapid change of subject, and a bold statement about the role of economic theory in the majority opinion. Posner writes that the force of this appeal "lies in the assurance with which it is made. It puts the reader on the defensive; dare he question a statement made with a conviction so confident and serene?"<sup>33</sup>

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30. *Otis v. Parker*, 187 U.S. 606 (1905).

31. *Holden v. Hardy*, 169 U.S. 366 (1905).

32. 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

33. LAW AND LITERATURE, *supra* note 3, at 283-84.

Second, this ethical appeal works because of the high information costs of the audience: "Holmes' method is more effective because in areas where our own knowledge is shaky we tend to take people at their own apparent self-evaluation and thus to give more credence to the confident than to the defensive."<sup>34</sup>

Third, Posner argues that Justice Holmes is being disingenuous by adopting a "simple man" ethical appeal, since he was known to have been quite conversant with laissez faire economic theory, and had even adopted it himself.<sup>35</sup>

Fourth, the choice of "Mr. Herbert Spencer's Social Statics" as a metonymy for laissez faire is very concrete and effective.<sup>36</sup>

Finally, Posner notes that when Justice Holmes "finally" introduces evidence (which in a one-page decision seems vaguely overstated), he employs it badly. Posner chooses the one bad precedent, the vaccination case, to discuss in the text, arguing that vaccination conveyed an external benefit to those who may catch the disease, while the New York hours law did not. He does, magnanimously, note below that Justice Holmes' other examples do work.<sup>37</sup>

Posner continues with the passage cited earlier,<sup>38</sup> noting that Justice Holmes' dissent is not a good judicial opinion because of its lack of logical order, its lack of clear opposition to the majority, its sparse research, and its failure to use the factual record effectively in making the argument. In calling it a great judicial opinion, he points to its longevity, as well as to its "enchanted rhetoric" with all its "tricks," which have blinded us to the fact that the Supreme Court majority, by striking down laws such as the New York law, probably "made the United States marginally more prosperous than it would otherwise have been."<sup>39</sup> Posner also directs our attention to recent legal scholarship which has attempted to rehabilitate the majority decision, including an argument that the extension of First Amendment freedoms to commercial speech is in line with *Lochner*.<sup>40</sup>

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34. LAW AND LITERATURE, *supra* note 3, at 283-84.

35. LAW AND LITERATURE, *supra* note 3, at 283-84.

36. LAW AND LITERATURE, *supra* note 3, at 284.

37. LAW AND LITERATURE, *supra* note 3, at 284-85.

38. See *supra* note 3 and accompanying text.

39. LAW AND LITERATURE, *supra* note 3, at 286.

40. LAW AND LITERATURE, *supra* note 3, at 286 n.21. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 108-09, 128, 280-81 (1985).



Finally, Posner uses Justice Holmes' decision in *Buck v. Bell*<sup>41</sup>—the notorious Virginia sterilization case that concluded with the famous line, “Three generations of imbeciles is enough”—to illustrate his thesis that “[s]cholarly analysis of the ‘rhetoric’ of judicial decisions would be more fruitful, and certainly clearer, if scholars stopped trying to equate good rhetoric with goodness.”<sup>42</sup>

Now, what is wrong with Posner's reading of *Lochner*? An examination of Justice Peckham's opinion, as well as Justice Harlan's dissent, reveals that much of Justice Holmes' strategy can be understood only in response to his colleagues as well as its direction to a larger audience.

First, Posner directs our attention to the simultaneously arrogant yet “plain man” ethos of Justice Holmes' introduction. Holmes' strategy to me reads more like an echo of Justice Peckham's own opening move, when he writes, “this is not a question of substituting the judgment of the court for that of the legislature,”<sup>43</sup> and yet goes on to say, “we do not believe in the soundness of the views which uphold this law.”<sup>44</sup> Sir Frederick Pollock commented on Justice Peckham's tone here as not giving credit “to the state legislature for knowing its own business,” and as treating it “like an inferior court which has to give proof of its competence.”<sup>45</sup>

Second, Justice Holmes' “lack of evidence” for his argument that the majority is using a particular economic theory makes more sense when read against Justice Peckham's imputation of ulterior motives to the New York legislature, where he argues that this is not a public health but rather a labor law.<sup>46</sup> Justice Holmes' seemingly ill-mannered tone towards his fellow justices must be compared to Justice Peckham's treatment of the New York legislature. It is also important to recall, as Justice Holmes must have known, that Justice Peckham had in his forty-page opinion in *Budd v. New York*,<sup>47</sup> attacked a statute setting rates for grain elevators as “vicious in its nature, communistic in its tendency.” In this attack, Justice Peckham had cited not Spencer, but Stanley Jevons's *The State in Relation to Labor*.<sup>48</sup>

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41. 247 U.S. 200 (1927).

42. LAW AND LITERATURE, *supra* note 3, at 289.

43. 198 U.S. 45, 56 (1905).

44. *Id.* at 61.

45. 3 LAW Q. REV. 211 (1905).

46. 198 U.S. at 57.

47. 143 U.S. 517 (1892).

48. 117 N.Y. 1, 47 (1889).

Third, Posner's own structuring of his argument is deeply rhetorical, in his own limited sense. He heightens the weakest part of Justice Holmes' legal reasoning, the supposed weakness of the vaccination analogy, and deals with the strongest part only in a footnote.

Fourth, Posner misidentifies the "simple man" ethical appeal and the rapid, overly authoritative style of the opinion as being appropriate for audiences whose "own knowledge is shaky."<sup>49</sup> The audience for this opinion was not a potted plant. Note that in my earlier discussion of Posner's rhetorical theory he defined the speaker to audience transaction in terms of information costs. Yet there were multiple audiences addressed by Justice Holmes' dissent, some present, some future, some anticipated, some unanticipated. One audience was the majority, the other the rest of the minority. Posner never discusses Justice Harlan's dissent, which was much more lawyerly and perhaps freed Justice Holmes to make his own arguments. Justice Harlan's dissent was also the original majority opinion, until one of the justices changed his vote. Thus, the timing of Justice Holmes' dissent is of some interest both to the rhetorician and the legal historian.<sup>50</sup> Another audience consisted of younger legal scholars for whom the *Lochner* decision was the opening move in the development of Legal Realism. Surely Justice Holmes knew, however limited his own optimism for social reform, that his words would have some effect on the larger progressive legal and political community. Interestingly, the labor movement itself—an audience for whom the information cost even of reading Justice Holmes' dissent was high, at least by Posner's standards—used the *Lochner* decision as a justification for intensifying strike action to gain the eight-hour day.<sup>51</sup>

We also know that *Lochner* became a symbol for Teddy Roosevelt in his "New Nationalism" speech in 1912, and for the New Deal reformers, later Supreme Court opinion-writers, as well as conservative opponents of "judicial activism." Those later audiences, like Posner, are part of a larger tradition of argument and audience that is not easily captured by the simple calculation of information costs. It is here that both true conservatives and radicals can join in criticizing the essentially ahistorical character of Posner's jurisprudence.

The most persuasive recent reading of the majority decision in *Lochner* is by Howard Gillman and shows us that Justice Holmes' ac-

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49. See *supra* note 34 and accompanying text.

50. See Baker, *supra* note 2, at 416.

51. DAVID R. ROEDIGER & PHILIP S. FONER, OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY 157-58 (1989).

count of Justice Peckham's reasoning may not have done justice to its consistency with the long American tradition of avoiding factionalism. Gillman explains that the *Lochner* era Court upheld much more social welfare legislation than it is usually credited with doing, and that it did so on the basis of a distinction between state actions that advanced the interests of the public as a whole and actions that served factions or special interests.<sup>52</sup> Using the rhetorically sensitive methods of Isaac Kramnick, Frederick Pollock, and Joyce Appleby, Gillman demonstrates how the Justices were constrained by something more than mere rationalization of policy preferences. And Gillman also, by taking a longer view, is able to show how a rhetorical idiom such as Justice Peckham's collapses when confronted with massive social change in audience experience. Since the frontier freehold was no longer available as an escape valve for urban labor, labor and capital no longer existed under conditions even roughly approximating republican equality.

It also seems impossible to understand the stylistic texture of Justice Holmes' dissent without placing it within a larger tradition of crafting public argument. When I first read Justice Holmes again after many years I was struck by the similarity of his prose style to that of Emerson's: they share the common characteristics of a lack of linear progression, a preference for the sentence rather than the paragraph as the unit of thought, and the simultaneous affectation of simplicity and cosmopolitan irony. Therefore, I was not surprised when I read about the Emerson-Holmes relationship in Baker's biography of Justice Holmes, in which she traced echoes of particular Emerson lines in Justice Holmes' work.<sup>53</sup>

I have suggested an alternative reading of Justice Holmes' strategy in his *Lochner* dissent, and that Posner's view of rhetoric is of a piece with his larger "anti-rhetoric." This anti-rhetoric seeks to displace the normative and political dimension of legal decisionmaking into a "pragmatic vocabulary that remind[s] us of the limits of resources (and rights)."<sup>54</sup> Posner diminishes the historical and ethical force of the rhetorical tradition by limiting the range of audience response to arguments. There remains one point I am as yet unable to answer, and that is Posner's invocation of what Richard Lanham calls the "Q Question," after "its most famous nonanswerer," namely the

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52. See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

53. Baker, *supra* note 2, at 85.

54. Panetta & Hasian, *supra* note 9, at 71.

connection between rhetoric and goodness.<sup>55</sup> Can we reconcile Justice Holmes, the hero of *Lochner* and the free speech cases, with the decision in *Buck v. Bell*? The answer will probably require more than weighing utility-functions. It will probably require recovering the links among rhetoric, law, ethics, and politics that pragmatism has attempted to suppress.

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55. RICHARD A. LANHAM, *THE ELECTRONIC WORD: DEMOCRACY, TECHNOLOGY, AND THE ARTS* 155 (1993).

