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**Overview of the course:**

The relationship between rhetoric and the law is over two thousand years old. While individual judges and law professors maintained an interest in matters rhetorical (e.g. Justice Benjamin Cardozo's essay on "Law and Literature" devotes extensive attention to the linguistic style of judicial opinions), rhetoric's connection to legal studies and "the law" became attenuated as law emerged as a specialized area of study in the nineteenth and twentieth centuries. In the 1970s and 1980s, a number of scholars (as well as sitting judges), some more explicitly than others, began (re)exploring the centrality of language to the law and, in so doing, helped develop a scholarly movement that goes by names such as "Law and Literature" or "Law, Literature, and Rhetoric." This course's central purpose is to introduce you to some of the major ideas and issues which have energized this interdisciplinary scholarly movement.

Peter Tiersma begins his book Legal Language with the following observation: "Law—virtually by definition—comes into being through language. Thus, the legal profession focuses intensely on the words that constitute the law, whether in the form of statutes, regulations, or judicial opinions. Words are also a lawyer's most essential tools. Attorneys use language to discuss what the law means, to advise clients, to argue before a court or jury, and to question witnesses. . . . Few professions are as dependent upon language. The average lawyer's daily routine consists almost entirely of reading, speaking, and writing." As Tiersma and many other scholars observe, legal language, and therefore legal rhetoric, exists in a wide variety of forms. If we tried to devote time in this course to even a small sample of these different forms (e.g. closing arguments, cross examinations, legal memoranda, etc.), we wouldn't be able to dig into any of the topics in much depth (and if you've taken Comm 244, you should remember that I like to pursue topics in depth).

James Boyd White, in a reading will explore later in the semester, writes: "The judicial opinion is . . . the representative legal text, the document that catches and freezes for a moment the legal mind at work." White is not alone among scholars in the "Law, Literature, and Rhetoric" movement to focus on judicial opinions, and this course will follow their lead in concentrating on some of the key rhetorical dimensions of the judicial opinion.

This course will be divided into three units. In the short introductory unit, we will examine the way scholars have employed three concepts central to rhetorical studies—genre, narrative, and metaphor—to unpack the discursive dynamics of judicial opinions. Judicial opinions frequently answer the question: is this law, regulation, ordinance (etc.) constitutional. To answer this question, opinions (majority, concurrent, and dissenting) will manifest arguments regarding the Constitution’s meaning. In the course’s second unit, we will explore Philip Bobbitt’s typology of constitutional argument, a project that tries to reconstruct the essential argument strategies which judges (as well as attorneys) employ when they make claims about what the Constitution means. In the final unit, we will investigate the work of James Boyd White, widely regarded as one of the leading figures in “Law, Literature, and Rhetoric.” White’s broader intellectual project is to develop—largely through example—a way of reading that accounts for language’s “constitutive” potential (constitute should be opposed to the largely “instrumental” potential which is the focus on Comm 244), and he has been especially interested in uncovering the constitutive dimension and potential of judicial opinions. We will read a number of White’s essays in an effort to understand the basics of what he terms “judicial criticism.”

### **Required/Recommended Course Materials**

Most of the readings in units two and three will be drawn from:

Philip Bobbitt, Constitutional Fate: Theory of the Constitution (NY: Oxford University Press, 1982). A paperback edition came out in 1984 (I think) and a new paperback edition is due out this month; the bookstore was trying to get used copies.

James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism (Chicago: University of Chicago Press, 1990). Bookstore is trying to get used copies of this one as well.

There will be a number of essays (especially in unit one) made available via blackboard. The course name is Comm Studies 346 Rhetoric/Law. Access code: Bork.

See the schedule below for dates when readings are due.

Projects two and three will examine, from differing perspectives, the Supreme Court’s decision in *Hamdan v. Rumsfeld* (decision was announced on June 29, 2006). You should obtain a copy of decision (<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>), and you might consider beginning some background research on case.

In addition to the required readings, there are a few additional resources you might consider obtaining. While the course’s focus is on the rhetorical aspects of judicial opinions (and not on “the law” per se), you might find it useful to utilize various legal resources to help you better understand course readings.

1. Legal dictionary. You can get an abridged paperback of Black's dictionary on line (used) for a few bucks. The library has a copy of unabridged version in reference (KF156 .B53 1999). There are also a number of web sites that provide adequate definitions of technical legal terms (e.g. a writ of mandamus, federal diversity jurisdiction, etc.).

2. Many readings will refer to numerous Supreme Court (and in some cases lower appellate court) decisions. You can get summaries of some of these cases through on line sources or you might obtain a resource such as The Oxford Guide to United States Supreme Court Decisions (I have the 1999 first edition; I'm pretty sure a second edition has recently come out).

3. In addition to technical legal terms and court cases, readings will often refer to the terms used to describe intellectual traditions and trends within the community of legal scholars (e.g. legal realism, legal formalism or just formalism, critical legal studies, etc.). Scholarly sources such as The Blackwell Guide to the Philosophy of Law and Legal Theory can be of value (but also might present information in a way that makes things more confusing). On line sources such as Wikipedia provide adequate overviews of these concepts.

### **Course objectives:**

In addition to introducing you to key themes in the "Law, Literature, and Rhetoric" movement, upon completing the course you should be able to:

1. identify basic generic features of the judicial opinion and various sub-genres of the judicial opinion (e.g. dissenting opinions);
2. recognize the way narratives and metaphors function to warrant an opinion's specific determination as well as enhance the opinion's persuasiveness;
3. distinguish various modes of constitutional argument, articulate their strengths and limitations, and identify their presence in different judicial opinions; and
4. demonstrate an understanding of the central features of White's project of "judicial criticism."

### **Course Policies**

1. Students must comply with University policies regarding academic honesty. It is your responsibility to review Logger on-line so that you avoid violating University academic honesty policies, especially those relating to plagiarism.
2. *Turn off* your cell phones before class.
3. Please visit appropriate restrooms *before* class begins.

4. Please do not sit in class with sweatshirt hoods over your head. It is rude.

**Course requirements:**

Three (3) medium length papers (app. 6-8pp), one due at the end of each of the three course units. Details on each paper will be provided in class. The average of the three papers will determine 2/3 of your final grade.

Either (a) a final project (in the range of 15pp) or (b) a take home final exam. Final projects should employ the framework of unit one, two, or three (or *perhaps* a combination of the frameworks) to produce an original piece of critical analysis focusing on a judicial opinion. The take home exam will *not* ask you to simply regurgitate your course discussion notes or reading notes. The exam will pose novel questions and you will be asked to draw from course readings, discussions, *as well as additional research* in your answers. Your final project/exam grade will determine 1/3 of your final grade.

**Tentative class schedule** (subject to minor revisions):

Date	Reading
8/29 (Tu)	Introduction to course.
8/31 (Th)	Sanford Levinson, “The Rhetoric of the Judicial Opinion”; Reva B. Siegel, “In the Eyes of the Law: Reflections on the Authority of Legal Discourse” [a response to Levinson’s essay] both in <u>Law’s Stories: Narrative and Rhetoric in the Law</u> (1996) ( <b>on blackboard</b> )
9/5 (Tu)	Robert A. Ferguson, “The Judicial Opinion as Literary Genre” <u>Yale Journal of Law and the Humanities</u> 2 (1990): 201-219. ( <b>on blackboard</b> )
9/7 (Th)	L.H. LaRue, “Telling Stories” from <u>Constitutional Law as Fiction: Narrative in the Rhetoric of Authority</u> (1995) ( <b>on blackboard</b> )
9/12 (Tu)	Haig Bosmajian, <u>Metaphor and Reason in Judicial Opinions</u> (1992); on the first day of class you will be assigned a chapter in Bosmajian and for this class period you will prepare a report on that chapter (including a short handout for classmates); Bosmajian on reserve at library.
9/14 (Th)	Dry run for project one.
9/19 (Tu)	<b>Project one due</b>
9/21 (Th)	Bobbitt, <u>Constitutional Fate</u> , Chs. 1-2
9/26 (Tu)	Theoretical Approach to Historical/Intentionalist Argument. <b>Read:</b> Steven Knapp and Walter Benn Michaels, “Intention, Identity, and

- the Constitution: A Response to David Hoy” in Legal Hermeneutics, ed. G. Leyh (1992) **(on blackboard)**
- 9/28 (Th) Historical Approach to Historical/Intentionalist Argument. **Read:** H. Jefferson Powell, “The Original Understanding of Original Intent” Harvard Law Review, 98 (1985) **(on blackboard)**
- 10/3 (Tu) Bobbitt, Constitutional Fate, Chs. 3-4  
10/5 (Th) No class.
- 10/10 (Tu) Bobbitt, Constitutional Fate, Chs. 5-6  
10/12 (Th) Bobbitt, Constitutional Fate, Chs. 7-8, 10-12
- 10/17 (Tu) Fall break/no class.  
10/19 (Th) Bobbitt, “*Missouri v. Holland*” in Constitutional Interpretation (1991) **(on blackboard)**
- 10/24 (Tu) Dry run for project two.  
10/26 (Th) **Project two due.**
- 10/31 (Tu) White, Justice as Translation “Introduction”; White, “A Way of Reading” in When Words Lose Their Meaning (1984) **(on blackboard)**
- 11/2 (Th) White, Justice as Translation, Ch. 4
- 11/7 (Tu) White, Justice as Translation, Ch. 5  
11/9 (Th) White, Justice as Translation, Chs. 6-7
- 11/14 (Tu) White, Justice as Translation, Ch. 8  
11/16 (Th) No class.
- 11/21 (Tu) White, Justice as Translation, Ch. 10  
11/23 (Th) Thanksgiving/no class.
- 11/28(Tu) White, “*Planned Parenthood v. Casey*: Legal Judgment as an Ethical and Cultural Art” in Acts of Hope: Creating Authority in Literature, Law, and Politics (1994) **(on blackboard)**
- 11/30 (Th) Dry run for project three.
- 12/5 (Tu) **Project three due.**

We will meet during our scheduled exam period (Tu 12/12 at noon) to discuss final projects and take home exams.