

# "TO SAY WHAT THE LAW IS": LEARNING THE PRACTICE OF LEGAL RHETORIC

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## I. INTRODUCTION

Few law schools substantively integrate legal research and writing into first-year coursework, despite increased attention to legal writing instruction and the rhetorical aspects of law in the 1980s and 1990s.<sup>1</sup> Seventy-nine percent of law schools now require a two-semester legal research and writing course in the first year, and seventy-five percent average the grade with student grades in other courses.<sup>2</sup> Legal research and writing teachers have worked to elevate their status from poorly-paid and overworked adjunct instructors to full-time, "legal writing professionals" in "legal research and writing programs" and are advocating tenure-track status.<sup>3</sup> A new journal is devoted to this subject, the

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\* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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1. The regular law faculties of the University of Iowa, Vanderbilt University, the University of Kansas, and the Dickinson School of Law teach writing through, and with, a substantive first-year course. Similarly, the City University of New York uses materials and teachers from substantive, core courses to teach legal writing through collaborative working groups or "houses." See Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT L. REV. 23, 26-30 (1985). Formerly adhering to the "Iowa approach," this year Duke University School of Law turned to non-tenure track personnel, who do not have substantive course responsibilities. Telephone conversation with Sr. Assoc. Dean Katharine T. Bartlett, Duke University School of Law (January 20, 1995).

2. Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 J. LEGAL WRITING INST. 123, 127-28, tbls. 3.1, 3.2, 3.3, & 10.1 (1991) (reporting results of the Legal Writing Institute's 1990 Survey of Legal Research and Writing Programs). Eighty percent of 163 schools listed in the 1989 American Association of Law Schools' Directory responded to the Survey. *Id.* at 127.

3. In 1983, the Legal Writing Institute formulated a Statement of Job Security for Legal Writing Professionals, demanding treatment equivalent to other full-time professionals in legal education. *Id.* at 123. The Institute was founded in 1984 to unite legal research and writing professionals intellectually, to share resources, and to monitor and encourage the development of effective legal

*Journal of the Legal Writing Institute.*<sup>4</sup>

Nearly concurrently, legal scholars have developed the jurisprudential implications of the observation that law is, in many respects, a language, and its method is the composition and interpretation of written texts.<sup>5</sup> Post-modern understanding of the cultural construction of legal meaning through discursive practices has challenged the conventional dichotomy between theory and practice.<sup>6</sup> Nevertheless, only thirty percent of law schools substantively integrate research and writing into the curriculum, and fewer yet completely integrate writing within a "substantive" course taught by a member of the regular faculty.<sup>7</sup>

research and writing courses across the United States and Canada. Over 200 schools were represented at its 1990 conference. *Id.* at 134 n.3. It uses the terms "legal research and writing professional" and "legal research and writing program" throughout its 1990 Survey questionnaire. *Id.* at 161-64. The term "legal research and writing professional" does not appear to distinguish those law teachers with interest and experience in teaching courses that emphasize research and writing from teachers with advanced degrees in composition theory or writing education.

4. The Legal Writing Institute published the first issue in 1991. *See generally* 1 J. Legal Writing Inst. (1991).

5. *See* RONALD DWORKIN, *LAW'S EMPIRE* 225-75 (1986); *see generally* STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980) [hereinafter FISH, *IS THERE A TEXT?*]; *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (Sanford Levinson & Steven Mailloux eds., 1988); RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* (1992); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* (1985) [hereinafter WHITE, *HERACLES' BOW*]; JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984); Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982); Sanford Levinson, *Law as Literature*, 60 *TEX. L. REV.* 373 (1982).

6. *See, e.g.*, STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989) [hereinafter FISH, *DOING WHAT COMES NATURALLY*]. This volume's subtitle is: "Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies." The phrase "[p]ractice of [t]heory" refers to the anti-formalist conviction that theory is "a practice no different from any other." *Id.* at 26. Words, meanings, and theories are not independent of use or of practice. They are products of "situated interpretive labor." *Id.* at 8.

7. I do not use "substantive" as opposed to procedural, but to indicate traditional subject areas in the first year legal curriculum, such as civil procedure, torts, contracts, property, constitutional law, and criminal law. For the purposes of this discussion, it refers to courses in which research and writing are not emphasized. Only 30% of the 127 law schools responding to the 1990 Legal Writing Institute Survey "showed substantive integration of [legal research and writing] assignments with those of other courses." Ramsfield, *supra* note 2, at 128. The Survey assumes legal research and writing is a separate course or program, either independent from other courses or linked in some way. *See id.* at tbls. 3.1, 3.2, & 3.3. It is, therefore, difficult to determine which of the 30% of law schools fully integrate legal writing through instruction in a substantive course taught by the regular faculty. However, it is safe to say that less than 30% of law schools do. The University of Seattle, for instance, utilizes J.D. and non-J.D., non-tenure track, writing teachers to work with the regular faculty in an integrative approach and presumably would come within the Survey's 30% figure.

Legal research and writing professionals advocate greater integration,<sup>8</sup> but seldom within a substantive course taught by a member of the regular faculty.<sup>9</sup> For instance, a recent article in the *Journal of the Legal Writing Institute* urges greater integration.<sup>10</sup> It recommends coordination of assignments or topic coverage between two separate courses, a research and writing course and a substantive course.<sup>11</sup> It also recommends that two professors, a writing professor and a professor who teaches a substantive course, team-teach a unit from the substantive course or teach it simultaneously in their respective courses, maintaining their respective approaches to writing and classroom speaking.<sup>12</sup> These recommendations assume legal writing is a discrete subject, requiring courses and faculty distinct from the rest of the law curriculum.<sup>13</sup>

Ironically, that assumption has underlain opposition to giving research and writing prominence in the curriculum, particularly through the use of a law school's regular faculty.<sup>14</sup> In contrast to their own emphasis on analysis of legal sources and facts, writing professionals occasionally characterize substantive courses narrowly as transmission of black-letter doctrine by lecture, and regular faculty members have traditionally had a similarly narrow idea of

8. See, e.g., Ramsfield, *supra* note 2, at 131 ("Legal Research and Writing courses ought to be actively integrated with first-year and upper-level courses.")

9. To the extent that legal writing professionals conceive their role in legal education as a distinct subject specialty, they may assume complete integration of research and writing into the general curriculum and the faculty responsible for it may deny them a role. By "regular" faculty, I mean the faculty responsible for teaching the majority of the required courses and who are entitled to full voting privileges on curricular, hiring, and promotional matters. The goal of integration is served by one teaching faculty, and Iowa, Vanderbilt, Kansas, Dickinson, (and previously Duke), schools that integrate research and writing with a first-year substantive class, rely primarily on full-time faculty on the tenure-track. However, use of regular faculty members does not necessarily negate room for specialization within a law faculty. For instance, Dickinson hired a full-time tenure-track professor with experience in legal research and writing instruction to work with other first-year faculty teaching legal research and writing with, and through, the torts course.

10. Ramsfield, *supra* note 2, at 131.

11. *Id.* at 132.

12. *Id.*

13. The false dichotomy between writing and analysis has been frequently criticized. See, e.g., Norman Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 ALB. L. REV. 292, 295 (1980). My point is not only Brand's notion, that writing includes analysis, but also that both writing and analysis teach the practice of legal rhetoric. Ramsfield sees a close connection between analysis and writing, yet appears to assume distinct classes and teachers are needed, nevertheless. Ramsfield, *supra* note 2, at 131-34.

14. Willard H. Pedrick articulated opposition to use of regular faculty to teach what he termed "basic writing skills." His narrow definition of writing may explain his opposition, as he admits law teachers can emphasize "writing in the lawyer's context at an advanced level." William H. Pedrick, *Should Permanent Faculty Teach First-Year Legal Writing? A Debate*, 32 J. LEGAL EDUC. 413, 415 (1982). In 1980, one could say that "[n]early everyone who writes about legal writing courses duly records faculty disdain for the subject matter . . . ." Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 317 (1980).

legal writing instruction. Those who are most disdainful dismissed the content of legal writing instruction as remedial writing skills or elementary analysis.<sup>15</sup>

These views do not survive even cursory reflection. There is no logical reason why analysis taught via writing needs to be more elementary than that taught in other first-year courses through lecture, discussion, or socratic methods. Rather than remedial grammar, most legal writing courses teach research, analysis, writing, and speaking, frequently referring those who have problems in mechanics to specialists.<sup>16</sup> Derogatory views of legal writing may simply rationalize the financial and political advantages to regular faculty of confining writing to courses taught by teachers who are lower paid and lack a vote, or the regular faculty's lack of interest in changing teaching methodologies.

The historical reason for neglect of research and writing in legal education appears to have been economic, rather than theoretical or pedagogical. Robert Stevens points out that the advent of the case and socratic method eliminated the quizzes and written exercises that had accompanied the lecture method and made a much higher pupil-to-teacher ratio possible.<sup>17</sup> The lowered costs made law schools both more profitable than university departments that required professors to supervise student research and writing, and therefore financially attractive to universities.<sup>18</sup> Profits promoted the integration of the "new law school industry . . . with the burgeoning universities."<sup>19</sup>

In addition to financial expectations of the larger university, financial priorities within a school shape decisions about writing in the curriculum. In an address to an American Association of Law School's 1990 Annual Meeting session on writing in the law school curriculum, Marilyn Yarborough, then Dean of University of Tennessee Law School, stressed the tension between "doing the right thing" and competition for funds. Adjuncts, short-term contract personnel, and non-tenure track faculty, as opposed to full-time, tenure-track faculty, minimize the cost of higher pupil-to-teacher ratios in courses that entail

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15. See, e.g., Pedrick, *supra* note 14, at 414-15. While directing a writing program and chairing a faculty committee on writing in recent years, I have heard regular professors sympathetic to increased emphasis on writing in the curriculum disclaim ability to teach it. I detect in this contemporary attitude narrow ideas of writing and of law, as well as a belief in a dichotomy between the two, that is reminiscent of Willard Pedrick's views.

16. Because of the assumption that legal analysis is integral to legal research, writing, and speaking, the 1990 Legal Writing Institute Survey did not ask whether analysis was taught in most research and writing courses. Ramsfield, *supra* note 2, at 128. Twenty-seven percent of the schools reported using non-J.D. writing specialists. *Id.* at 130.

17. ROBERT STEVENS, *LAW SCHOOL* 63, 268 (1983).

18. *Id.* at 63, 72-82.

19. *Id.* at 73.

significant supervision of student research and writing. Other costs tied to greater allocation of regular faculty to smaller first-year classes involving writing include fewer upper-level seminars and less time for faculty scholarship.

Research and writing continues to have marginal status in most law schools' core curriculum.<sup>20</sup> Whether the reasons are theoretical or financial, legal writing's second-class status reinforces the idea that it is not integral to what students are at school to learn.

Professor David Vernon and Dean William Hines of the University of Iowa College of Law set out a different thesis about legal writing instruction in 1977.<sup>21</sup> Iowa is one of the relatively few faculties that teach legal writing as substantive course work in the first-year curriculum, and has done so since the late 1960s.<sup>22</sup> Vernon and Hines justified the Iowa program in terms of thorough education in the law. They asserted that the real problem is *not* students' lack of writing skills, such as the ability to put words, sentences, and paragraphs together; rather, the problem is students' failure to "understand what it is that they are writing about."<sup>23</sup> It was their experience that students improved their writing as they gained an understanding of what it was that they were writing.

The rationale for the "Iowa approach" to writing in the first-year

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20. The Association of American Law Schools, as of January 1995, requires member schools to "assure that every student receives significant instruction in legal writing and research." ASS'N OF AMERICAN LAW SCHOOLS, HANDBOOK § 6-9(d) (1995) (bylaws section on Curriculum and Pedagogy). The American Bar Association Standard 302(a)(i) requires law schools to offer to all students "at least one rigorous writing experience." AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, standard 302(a)(1) (1994). Most writing and methods courses are confined to the first year. Ramsfield, *supra* note 2, at 126. Extensive writing in courses, other than those set apart for legal writing or methods instruction, is not the norm.

Writing and methods faculty have fewer scholarship obligations but far more extensive individual student feedback duties than faculty members who teach other courses. *Id.* at 128. Except for those educators in schools utilizing full-time, tenure-track faculty who teach writing, legal writing instructors receive vastly inferior compensation, between \$20,000 and \$30,000 per year. *Id.* at 130-31. Additionally, status is generally temporary, and 84% of writing and methods faculty have one-year contracts. *Id.* at 131. Furthermore, only 31% of the schools in the 1990 Legal Writing Institute Survey used tenure-track faculty to teach the subject. *Id.* at 143.

21. David H. Vernon & N. William Hines, *Guidelines for Preserving the English Language*, 4 LEARNING AND THE LAW 26 (1977).

22. Iowa's 28-year record refutes the cliché that law schools inevitably change how they teach writing frequently. Iowa recently added a clinic, staffed by writing specialists from the university, to which faculty may refer students needing help with remedial writing skills. The regular faculty continues to teach writing as part of teaching substantive law courses, but not basic writing skills. Cf. Pedrick, *supra* note 14, at 414 (criticizing the use of regular faculty to teach "basic writing skills").

23. Vernon & Hines, *supra* note 21, at 26.

curriculum is *not* that research and writing are distinct from substantive law or the subject matter of other courses. The Iowa rationale is noticeably out-of-step with more recent advocacy of improved legal writing instruction. This literature seldom talks about sound education in the law. It usually cites examples of how poorly lawyers write and non-lawyer criticism of lawyers' writing. Lawyers' bad writing, and the need to do something about it, justify specialized writing classes, teachers, and textbooks.<sup>24</sup>

Vernon and Hines are correct, because their understanding squares with post-modern insights about language, learning, and law. Their view may simply amount to recognition that one cannot entirely divorce writing from the knowledge it expresses, and therefore some doctrine and analysis must necessarily be taught with legal writing.<sup>25</sup> However, their view implies more than the logical and practical inevitability of teaching some substance along with writing skills. It is consistent with understanding law as a process in which content and skill in composition interact, and in which legal writing is more than the expression of legal ideas in words.

Understanding law as a rhetorical activity supports Vernon and Hines' position. According to this view, law is the ongoing, persuasive use of legal language to resolve problem situations. Written authorities are not law, but cultural resources for lawyers engaged in the practice of law. Law is the ongoing process of giving written authorities meaning in the context of disputes over what they mean in and for particular situations.

When a lawyer writes for a professional purpose, the lawyer says, in effect, "This is what the law is, on these facts." The lawyer claims legal meaning in a specific context: this is negligence, on these facts, in accord with these precedents, in this jurisdiction, on this date. The lawyer's persuasiveness depends on his or her understanding of the problem presented, both its factual context and the applicable written authorities. It also depends on the words, argumentative and logical forms and style that the lawyer uses to support the claim. Neither factual and conceptual aspects of the problem, nor compositional skill, is analyzed well when divorced from the other. Both function interactively to make "law."

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24. For instance, while summarizing the results of the 1990 Legal Writing Institute's Survey, Ramsfield argues that more expansive training in legal writing and research is needed, because law school graduates are ill-prepared for immediate practice or scholarship, and law firms should not have to "pick up the difference." Ramsfield, *supra* note 2, at 127.

25. That substance and analysis are linked to writing is a point frequently made by those urging greater instruction in legal writing. See, e.g., Brand, *supra* note 13, at 295-96 ("Legal Writing is no less than the principal medium for the expression of, and hence for practice in legal analysis.") (quoting Peter W. Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261, 266 (1973)).

This Article develops the idea of law as a rhetorical practice to argue for full integration of legal research and writing into substantive first-year courses. Legal composition and legal subject matter interact in ongoing rhetorical activity and are therefore best understood and best studied together. Part II explains how Justice Marshall's opinion in *Marbury v. Madison*<sup>26</sup> suggests that what the law is, inheres in the saying of what it is. Rhetorical criticism, particularly the concept of the rhetorical situation, is developed in Part III and IV to explain why this is so. I conclude in Part V with a description of how traditional teaching materials and methods already teach the practice of legal rhetoric and how integration of writing materials and methods improves teaching that is already more "practical" and "rhetorical" than legal educators often recognize.

## II. "TO SAY WHAT THE LAW IS"

In *Marbury v. Madison*, John Marshall boldly asserts that the federal courts have constitutional power to substantively review legislative action for compliance with the Constitution. He begins by stating that the petitioners had a right to the judicial commissions not delivered to them and that the law would provide a remedy. He holds that Section 13 of the Judiciary Act of 1789, which he construed to permit the Supreme Court to issue mandamus in its original jurisdiction, was unconstitutional because Congress did not have power to expand the Court's original jurisdiction. As the action was an original one for mandamus, the Court is without power to grant the requested relief.

Marshall initially reasons from two accepted constitutional premises: popular sovereignty and the written nature of the Constitution. The sovereign people established their government and its fundamental principles in a written Constitution. The authority of the legislature is that of a temporal creature, subordinate to the Constitution, which the people created in an act of "original and supreme will . . . ." <sup>27</sup> Therefore, the Constitution "controls any legislative act repugnant to it . . . ." <sup>28</sup> Marshall then jumps to his conclusion about judicial power: the courts, rather than the legislature, have the power to decide when legislation is "repugnant to the Constitution." <sup>29</sup> If they hold it is, they must refuse to enforce it.

Central to Marshall's conclusion is his premise that the Constitution is law, followed by the deduction that it is therefore peculiarly the function of the courts to "expound and interpret" it in order to resolve constitutional conflicts:

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26. 5 U.S. (1 Cranch) 137 (1803).

27. *Id.* at 176.

28. *Id.* at 177.

29. *Id.*

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.<sup>30</sup>

The federal courts' power to declare statutes unconstitutional rests on their duty "to say what the law is." Marshall derived this duty from the judicial case-deciding function: it is what those who apply rules "must of necessity" do. Thus, the law of judicial review rests on the idea that judges "say what the law is" when they decide cases.

"[T]o say what the law is" aptly describes first-year research and writing assignments: client letters, office memoranda, trial briefs, and appellate briefs. It also describes what Marshall did in the *Marbury* opinion. Studying his exposition of the law in *Marbury* should, therefore, help reveal what it means to say what the law is.

The opinion does not dwell on how a court reads the law, but instead says what the law is. Marshall intimates that it is a straightforward process of merely expressing in words what is plainly evident in the written authorities. The question of whether a statute repugnant to the Constitution can become law "is not of an intricacy proportioned to its interest."<sup>31</sup> The Judiciary Act's grant of authority to issue mandamus conflicts with the "plain import of the words" of Article III's grant of original jurisdiction.<sup>32</sup> Article III's "obvious meaning" is that the Court's power is either original or appellate.<sup>33</sup>

Judicial review of legislation's constitutionality appears to be a reiteration of the "obvious meaning" or "plain import" of constitutional and statutory provisions, comparison of one to the other to see if they conflict, and, if so, declaration that the superior one prevails.<sup>34</sup> "[T]o say what the law is" appears to be to communicate a "given" in words, to convey a certain legal meaning, objectively accessible to all.

However, Marshall derived the judicial duty to "to say what the law is"

30. *Id.* (emphasis added).

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

32. *Id.* at 175.

33. *Id.*

34. In *United States v. Butler*, 297 U.S. 1 (1936), Justice Roberts took this view: When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

*Id.* at 62.



from the activity of deciding particular cases. Therefore, by his own logic, if not his explicit language, what he did in deciding the case before him should reveal what it means "to say what the law is." However, examination of the *Marbury v. Madison* decision in its context does not support Marshall's own description of his writing. Instead, it suggests that "to say what the law is" is to participate in the rhetorical activity that is the law.

First, the opinion's structure suggests drafting in response to constitutional and partisan politics. The holding denies Federalist claims that rested on the Adams' administration's "midnight" judicial appointments, in which Marshall was a key player. However, the reasoning asserts judicial power over the actions of coordinate governmental branches, a power the seemingly victorious, Anti-Federalist Jefferson administration contested.

Second, the opinion relies on an improbable reading of authorities. Marshall indicates that conflict compelled his decision that the Judiciary Act exceeds the limits of Article III.<sup>35</sup> However, the conflict is not inherent; rather it arises from Marshall's cramped readings of both authorities. His reading of Article III is not the only possible or probable construction. He might have read the grant of original jurisdiction to give power over "at least" the specified cases and not to exclude issuance of extraordinary writs. He could have read the Judiciary Act to authorize *mandamus in aid of* the Court's appellate jurisdiction, and arguably should have, thus avoiding the constitutional issue.<sup>36</sup>

Third, the opinion's reasoning notoriously begs the real question.<sup>37</sup> After establishing that an act repugnant to the Constitution is void, Marshall asks if such an act can bind the courts. His negative answer rests on two truisms: (1) judges have the duty to say what the law is in order to decide cases in which laws conflict; and (2) a superior, constitutional law, by virtue of the Supremacy Clause, controls an inferior one.

Therefore, he concludes that courts must uphold the Constitution, and the legislative action cannot bind them. The truisms mask the critical question of which branch, the judicial or the legislative, should decide if a statute conflicts with the Constitution. Legislative sovereignty was not, however, "an absurdity

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35. "The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised." *Marbury*, 5 U.S. (1 Cranch) at 176.

36. William W. Van Alstyne demonstrates the superiority of either of these textual readings to Marshall's own in William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 1-47. For additional historical analysis of *Marbury v. Madison*, see James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

37. Van Alstyne, *supra* note 36, at 21-23.

too gross to be insisted on," but the prevailing assumption.<sup>38</sup>

Marshall's question-begging reveals that he crafted the opinion to persuade. His response to political realities and competing views of national judicial power is evident in the opinion's structure. He chose one among alternative readings of constitutional and statutory language that were more or equally probable. In these respects, *Marbury* refutes the idea that "to say what the law is" is a formal process of expressing in words the "given," objectively "real" meaning of authoritative texts.<sup>39</sup>

*Marbury* was, and is, effective legal writing. It established that "the judicial power of the United States" includes the power of judicial review of legislation for its substantive constitutionality. It not only established the doctrine, but also the terms of the ongoing argument about the meaning of judicial power. As highly persuasive precedent, it still participates in the debate. To say what the law of judicial review is, subsequent legal writers must interpret *Marbury*, as Marshall had to interpret Article III's language.

However, the opinion's effectiveness does not rest on the finality of its meaning. As Marshall demonstrated, Article III and the Judiciary Act of 1789 was subject to more than one reading, and later writers have subjected *Marbury* to more than one interpretation. Lawyers and judges who read the opinion as they prepare to "say what the law is" for their cases, find it ambiguous. *Marbury* holds at least that federal courts have the power to incidentally review legislative action that affects the extent of their constitutional powers. The Court reviewed a statute concerning its own jurisdiction and struck it because it expanded judicial power past constitutional limits. Therefore, the opinion supports defensive and reluctant use of the review power, incidental to judicial decisionmaking. However, its insistence on the need for the judiciary to give meaning to constitutional limits on legislative power implies a greater power.<sup>40</sup> The Court has cited *Marbury* to support the argument that the federal judiciary,

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38. The few examples of English judicial recognition of a superior source of law that could render Acts of Parliament void, and of state courts claiming the power of constitutional review, had raised the issue of judicial review, but its legitimacy was definitely controversial. See WILLIAM M. WIECEK, *LIBERTY UNDER LAW* 5-13 (1988). England did not recognize judicial power to control actions of Parliament by holding them unconstitutional in the American sense. *Id.* at 10. While eight or nine state courts had claimed judicial power to hold legislation unconstitutional, only North Carolina had done so by 1790. *Id.* at 14.

39. See Levinson, *supra* note 5, at 389 (questioning whether legal educators really wish to argue that innovative judges of our legal tradition, such as Marshall, "got the essence right in their interpretation of the Constitution," and pointing out that it is irrelevant, given Marshall's shaping of new constitutional meaning for the written Constitution).

40. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

as one supreme among the branches of the federal government, has a special power to interpret the Constitution.<sup>41</sup>

Marshall, both as reader and as writer of "what the law is," shaped the meaning of Article III's grant of federal judicial power. His writing became part of the law of judicial review, so much so that it frames the ongoing arguments on the nature and extent of federal judicial power. Similarly, as other lawyers and judges read *Marbury v. Madison* and say or write "what the law is" in other contexts, they participate in shaping its meaning.

Most who are well-read in United States constitutional law would agree that, in "saying what the law is," Marshall contributed to the making of the law of federal judicial review. *Marbury v. Madison* teaches that judges make law interstitially. It teaches that general terms, such as "the judicial power," are vague and open to more than one potential meaning in a given situation, and that the Constitution, a charter for governing in future and unforeseeable circumstances, may fail to address certain topics at all. It is a "hard case" that illustrates these truths.<sup>42</sup> It also suggests something else, however, something about the nature of law.

Marshall's reading and writing of "what the law is" in *Marbury* is more active than descriptive. He does not discover and state the meaning of Article III as much as he participates in creating it.<sup>43</sup> The opinion responds to a particular historical and political setting, chooses among probable readings of applicable legal authorities, and argues for one with persuasive, if disingenuous, strategies. It decisively shapes, but does not finally determine, the law of federal judicial review. Rather than merely expressing that law, Marshall's opinion shapes it. "What the law is," according to *Marbury*, is in the saying, expounding, and interpreting of what it is.

*Marbury* teaches that "what the law is" is political response, interpretive

41. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

42. Frederick Schauer argues that focusing on hard cases distorts appreciation for the power of linguistically articulated legal rules to speak clearly enough to generate an answer to easy cases, an answer that is consistent with the language and the purpose of the rule, and the social, political and moral situation. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). Because the constitutional language and binding precedents did not address the legitimacy of judicial review, Schauer would probably include *Marbury v. Madison* in the category of prototypical hard cases, those generated by a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule or by the absence of an applicable rule. *Id.* at 415.

43. This is one of the main insights of those who apply the theory of interpreting written texts to law. As Sanford Levinson summarizes it, "[m]eaning is created rather than discovered." Levinson, *supra* note 5, at 383.

choice, and persuasive argument. It is temporary and local response, choice, and argument, which has elastic significance in an ongoing debate over the meaning of a community's authoritative language. Law is not what Marshall's words would indicate—something "there" to be communicated. It exists *in* the ongoing activity of expounding and interpreting the meaning of legal language.<sup>44</sup> The law is continually being made and remade from among competing claims for the meaning of its authoritative language. "[To] say what the law is" is to persuasively argue for the meaning of authoritative language in and for a specific context.

A legal writer who effectively applies legal authorities to new situations, as did Marshall, participates in the ongoing process that maintains and sometimes alters the meaning of authoritative legal language.<sup>45</sup> Few will alter the

44. My emphasis is on the active, ongoing creation and re-creation of legal meaning through discourse. The underlying observation that law is in many respects a language and involves interpretation of written texts is not novel, of course. Recently, it has been cast in light of insights drawn from philosophy of language, literary criticism and rhetoric by scholars in the "law and language" movement. Its implications go beyond recognition of literary sources of law or literary methods as an analog to legal methods. It is the basis of a theoretical claim about legal meaning. *See, e.g.*, WEISBERG, *supra* note 5, at 3-22 (arguing for a literary jurisprudence and a poetic method for law); *cf.* RICHARD A. POSNER, *LAW AND LITERATURE* chs. 2 & 5 (1988) (arguing legal and literary theories of interpretation have little in common). Legal texts, like literary ones, are artifacts and compositions. The meaning of both is dependent at least in part on the reader's interpretation and cultural context, and on form as well as substance. Interpretation of the meaning of written texts is a more sophisticated art than previously supposed, and "plain textual meaning" or intentionalism does not plumb its depths.

45. An aspect of viewing law as literature that is in tension with the traditional understanding of the authority of legal texts is that multiple readings or interpretations of textual meaning are not only theoretically plausible, but respectable. WEISBERG, *supra* note 5, at xiii. Acceptance of ultimately indeterminate meaning contrasts with a positivistic notion of law, in which rules or principles have a correct meaning, not dependent on context. Its "de-constructionist" implications may deny any determinate meaning in law's textual sources, beyond what is socially constructed. *See, e.g.*, FISH, *IS THERE A TEXT?*, *supra* note 5, at 136 (stating that objective, external meaning is illusory, although interpretive communities have shared conventions).

However, recognition that law is culturally constructed has constructive as well as "deconstructive" aspects, and the discipline of rhetoric stresses these. Rhetorical criticism focuses on how meaning is constructed within the language and culture of a specific community. It offers a way to be critically self-aware of law as a largely indeterminate, linguistic activity of constructing legal meaning, while utilizing that insight to stress discipline, criticism, and innovative potential within the cultural construct. *See* WHITE, *HERACLES' BOW*, *supra* note 5, at 28-48; *THE RECOVERY OF RHETORIC: PERSUASIVE DISCOURSE AND DISCIPLINARITY IN THE HUMAN SCIENCES* 1-21 (James M.M. Good & Richard H. Roberts eds., 1993) [hereinafter *RECOVERY OF RHETORIC*]; Steven Mailloux, *Rhetorical Hermeneutics*, 11 *CRITICAL INQUIRY* (1985), *reprinted in* *INTERPRETING LAW AND LITERATURE*, *supra* note 5, at 345; Philip Bobbitt, selections from *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982), *reprinted in* *INTERPRETING LAW AND LITERATURE*, *supra* note 5, at 363. Rhetoric speaks not so much to the deconstructionist issue—the relation of the interpreter-reader to the meaning(s) of written texts—but to justifying an interpretation or claim of meaning in a particular cultural setting. *Introduction to* *INTERPRETING LAW AND LITERATURE*,

framework of the conversation as dramatically as Marshall, who set the terms of the debate about the meaning of federal judicial power. Nevertheless, because law is performed in the saying of what it is for a specific context, every legal writer "makes" law in a sense. A memorandum predicts what written authorities will mean in a context and urges action in reliance on it; a brief urges authoritative action on its reading of the law in context; an opinion authoritatively decides and argues in support of its conclusion. The lawyer or law student who says or writes what the law on a particular set of facts is, participates in the ongoing activity that is law, however modestly.

*Marbury* supports Vernon and Hines' rationale for integration of research and writing with substantive law instruction. They say students have to understand the problem presented before they can improve their writing. Students' writing problems are seldom caused by lack of basic writing skills, but rather by failure "to understand what it is that they are writing about."<sup>46</sup> Their statement suggests that the understanding of legal subject matter and effective composition are related, so closely related that the latter is not taught effectively without the former.

*Marbury* confirms Vernon and Hines' insight. It indicates that "what law is," is performed in the saying, expounding, and interpreting of written authorities in a specific situation calling for resolution. The "saying," and the compositional and argumentative choices it involves, participates in creating the meaning of the legal language that is its subject matter. A legally authoritative text, such as Article III, gains, maintains, and changes its meaning in persuasive argumentation about its meaning in and for particular contexts. *Marbury* teaches that the substance of the law, the meaning of its authoritative written texts, is composed in a continual process of reading and writing. It is not independent of the ongoing process.

Marshall's reading and writing illustrates how content and composition are integrally related. Therefore, when students learn legal writing they are learning the "law."

### III. LAW AS THE PRACTICE OF RHETORIC

Thinking of law as a branch of rhetoric is one way to approach it as the ongoing activity of "say[ing] what the law is." By rhetoric, I mean the art of persuasively claiming and justifying meaning for language in a specific cultural setting with the aim of effecting change in the situation to the extent language

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*supra* note 5, at 343.

46. Vernon & Hines, *supra* note 21, at 26.

can do so.<sup>47</sup> It is a linguistic activity performed in a specific historical, social, and political context. Language, oral and written, is a resource for rhetoric, and often the meaning of language in a situation is its subject.

Both Aristotle and contemporary rhetorical theorists think of rhetoric functionally and holistically, as a language activity that has power to change perspectives and influence action.<sup>48</sup> Rhetoric is the constant interaction among the three interdependent elements of speaker, audience, and situation.<sup>49</sup> The audience is the weightiest,<sup>50</sup> but rhetorical criticism does not understand the elements separately, apart from their interactive functioning in persuasive argumentation.

Lloyd Bitzer emphasizes the constitutive functioning of these elements in an essay that defines the "rhetorical situation" and describes its interaction with rhetorical speech.<sup>51</sup> The relation between situation and response helps explain

47. This definition draws on Aristotle's definition of rhetoric as "the faculty of observing in any given case the available means of persuasion." ARISTOTLE, RHETORIC I, *quoted in* BRIAN VICKERS, IN DEFENCE OF RHETORIC 19 (1988). James Boyd White defines rhetorical activity broadly to include intellectual and social activity that constitutes a culture. It is not merely the art of persuasion, but the "central art by which culture and community are established, maintained, and transformed." WHITE, HERACLES' BOW, *supra* note 5, at 28.

A minimal definition of rhetoric is the art or science of persuasion. Contemporary rhetorical criticism assumes a discipline initially formed, with categories and distinctions, from the Sophists, Aristotle, Cicero, Socrates and Quintilian, and later applied in the Renaissance. The "New Rhetoric" of Chaim Perelman reclaimed these categories and distinctions. Chaim Perelman, *The New Rhetoric: A Theory of Practical Reasoning*, in THE GREAT IDEAS TODAY: 1970, at 272 (1970); CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (J. Wilkinson & P. Weaver trans., 1969). Rhetorical methods are taught in university departments of rhetoric, although primarily as a means of improving persuasive skills in self-presentation and argumentation. Rhetoric has received renewed interest in literary criticism and theory. It has also been pursued in the human sciences in programs at the University of Iowa and Temple University. See RECOVERY OF RHETORIC, *supra* note 45, at 1-8.

48. See Brian Vickers, *The Recovery of Rhetoric: Petrarch, Erasmus, Perelman*, in RECOVERY OF RHETORIC, *supra* note 45, at 41-42. Vickers demonstrates that Perelman and Aristotle share a functional and holistic view of rhetoric, as opposed to rhetoric as ornamentation.

49. Aristotle gave a classical statement of the independent triad, the three elements of speech making: "speaker, subject, and person addressed—it is the last one, the hearer, that determines the speech's end and object." ARISTOTLE, RHETORIC I, *quoted in* VICKERS, *supra* note 47, at 20. Perelman and Olbrechts-Tyteca describe rhetoric as a constant interaction among all its elements: speaker, audience, and situation. THE NEW RHETORIC, *supra* note 47, at 17-45. Lloyd Bitzer, *The Rhetorical Situation*, PHIL. & RHETORIC 1 (1968), *reprinted in* CONTEMPORARY THEORIES OF RHETORIC 381, 384 (Richard L. Johannesen ed., 1971), uses situation and response similarly, to emphasize the constant interaction of rhetorical elements in modifying a preexisting state of affairs.

50. Vickers, *supra* note 48, at 41.

51. Bitzer, *supra* note 49. Bitzer wrote before the ascent of "post-modern" thinking in literary criticism, and before the human sciences adopted the term "situation." His language describes situations as more fixed and objectively knowable than do contemporary writers. Stanley Fish says a situation "is not an entity, but a bundle of tacit or unspoken assumptions that is simultaneously

how legal texts, such as *Marbury v. Madison*, are composed for an audience in a specific context, change meaning when read as a resource to describe the law in a different context, yet retain enough stability of meaning to be authoritative in our legal culture. It also explains how using legal texts to compose written responses to legal situations is an inherent part of their meaning and therefore of substantive law.

#### A. *The Rhetorical Situation*

Rhetoric functions ultimately to produce action or change. It must perform some task. It responds to complex and structured situations—rhetorical situations.

Supreme Court opinions, as well as legislation on violence against women or a lawyer's opinion letter to a bank client advising on the adequacy of collateral to secure a commercial loan, respond to complex, structured rhetorical situations. A rhetorical situation is

a complex of persons, events, objects, and relations presenting an actual or potential exigence, which can be removed or positively modified if discourse, introduced into the situation, can constrain human decision or action.<sup>52</sup>

Bitzer describes the rhetorical situation in terms of three elements: exigency, audience, and constraints. An exigency is something waiting to be done, awaiting resolution, modification, or removal. It is something capable of modification by discourse. The exigency specifies the audience to be addressed and the change to be effected. Injurious acts capable of repetition specify a change: restraint by injunction. They also specify an audience: the person the court enjoins, or from the perspective of the attorney seeking relief, the court from whom an injunction is sought.

The second element is the audience. The rhetorical audience is those who are capable of being influenced by discourse and of serving as mediators of the change that the discourse functions to produce. In legal rhetoric, the audience or interpretive community is the practitioners, including judges, professors, and juries, as well as the bar, who have the responsibility to determine the meaning

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organizing the world and changing in response to its own organizing work." FISH, *DOING WHAT COMES NATURALLY*, *supra* note 6, at 352. Bitzer's description provides a helpful starting point for understanding the "rhetorical situation."

52. Bitzer, *supra* note 49, at 6.

of a law.<sup>53</sup> Specific examples may include the senior partner who can file a lawsuit after reading a memorandum, the legislative committee that can recommend a bill following hearings, the judge who can grant relief or hear the appeal, and the administrator who has discretion to act to the fullest extent of his or her statutorily granted powers.

Effective legal discourse entails understanding the jurisdiction of an official, an agency, a court, or a legislature to effect change. A legal writer may need to understand the parties over whom a court has jurisdiction, for example, and the difference between equity and law. These factors determine whether the audience addressed is really the rhetorical audience, in the sense of being capable of changing the exigent circumstances.

Finally, every rhetorical situation contains a set of constraints. These are persons, events, relations, and objects that have the power to constrain decision and action that might modify the exigence. Beliefs, attitudes, documents, facts, traditions, images, interests, and motives are among constraining influences. Constraints shape effective rhetoric because they mean certain arguments and behavior are more likely to persuade a particular audience than are others. Because it is the audience who implements the desired change, effective rhetoric attends to constraints.

There are two main classes of constraints, which correspond to Aristotle's classes of proofs or forms of argumentation.<sup>54</sup> The first are those originated and managed by the rhetor and his or her method: the technical or artistic proofs. These include the example and the enthymeme,<sup>55</sup> argumentative strategies, and rhetorical figures.<sup>56</sup> The other class of constraints is the inartistic or nontechnical proofs. These are constraints in the situation that are external to the rhetor, which do not need to be invented or crafted. They may include laws, statutory and case decisions, and documents such as contracts, witness statements, and oaths.

Use of constraints in legal argumentation is obvious. They include documents, legal authorities, and factual impediments to, or predicates of, one legal response or another. Values and norms, both those commonly held by the

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53. See FISH, IS THERE A TEXT?, *supra* note 5, at 13-17. Fish describes interpretive communities that are communities of practitioners who have responsibility to determine the meaning of a text. *Id.*

54. Bitzer, *supra* note 49, at 8.

55. The example and the enthymeme correspond to logical proofs by induction and the syllogism. An enthymeme is a syllogism in which one of the premises is explicit, understood by the audience. VICKERS, *supra* note 47, ch. 6.

56. Among the more familiar rhetorical figures are climax, hyperbole, and metaphor. See generally VICKERS, *supra* note 47, ch. 6.



audience and the rhetor, are constraints. Prior precedent, especially a case "on all fours," constrains a judicial response. For Justice Marshall, Article III and the Judiciary Act of 1789 were constraining written authorities. Constraints are not universal, but local. They vary by situation. For instance, precedent is less constraining if the situation involves the Justices of the United States Supreme Court writing a constitutional opinion.

The advocate's skill in methods of persuasive argument, or lack thereof, are technical constraints. Marshall's question-begging strategy in *Marbury* is an example. Thus, constraints include not only those a perceptive speaker finds in the situation, but those the speaker brings to the situation: the speaker's personal character and values, logical proofs, style, and skill. It is easy to see how a speaker addressing an audience should attend to the factual context, traditions, documents, and attitudes that are part of the audience's personal and cultural setting—part of the situation inviting his or her speech. It is more difficult to see how the speaker's own style, arguments, and character are part of the situation. Because the speaker is responsible for them, they seem external to the situation.

The difficulty arises because, to examine its elements, we view the situation artificially, isolated from, or prior to, the creation and presentation of discourse. Rhetoric, however, is a constant interaction between situation and response. The rhetor responds to the situation, but is also a part of the situation. The speaker shares the situation with the audience, and is located in it as he or she speaks. The speaker's style, character, and argumentative resources are dependent upon it. When a speaker presents discourse, he or she "enters" the situation in another sense. Both the speaker and the speech act as new constraints, and are additional constitutive elements of a reconstituted situation.

In the first sense, the speaker draws on the situation in composing his or her discourse, using those forms of argumentation and appeals to emotion that the speaker perceives as available in the situation. It inevitably shapes the discourse, in ways of which the speaker may not be aware. If the speaker successfully responds to the situation and presents effective discourse, the speaker is part of it in another sense. The speaker provides additional persuasive resources. The speaker's character, style, and logical proofs become part of a situation now altered. They are new constraints for the next rhetorical occasion. The two characteristics of rhetorical situations discussed below make this interdependent relation clearer.

### *B. A Fitting Response*

Exigency, audience, and constraints not only constitute the rhetorical situation, but also shape the legal discourse that will be a fitting rhetorical

response. A rhetorical situation invites a response. It does not invite just any response, but a fitting response. Its elements prescribe responses that fit.<sup>57</sup>

Some responses miss the mark. They do not fit the situation. An example is the exam answer that has the required elements, but receives a near-failing grade. The answer may identify an issue, discuss authorities, analyze the facts in light of the authorities, and conclude, but it does not resolve and discuss the legal issue raised by the problem situation. It may discuss the affirmative grant of constitutional power over commerce to Congress where the exigency, audience, and constraints call for analysis of the negative implications for state powers over commerce. Despite the formal elements and the author's intent, it was not an appropriate response to the legal problem. The response did not fit the rhetorical situation.

Some responses fit, and their significance is in the fit. *Marbury* resolved the charged rhetorical situation that Marshall faced. It served his vision of a strong national government, while preserving values of constitutional order and stability. Marshall strengthened the national judiciary, while avoiding direct confrontation with the Executive. He asserted power over Congress self-effacingly, denying the Court jurisdiction that Congress had probably intended to grant. His opinion inverted the argument against judicial power based upon the commonly held belief in popular sovereignty, tying "[w]e the people" to judicial enforcement of the written Constitution against the more democratically accountable branches. This creative rhetorical response was clearly not tightly prescribed by the situation, but it "fit."

As we saw earlier, *Marbury's* effectiveness lessens when one examines its response to the constraints of authoritative textual language and judicial ethics. Marshall's reading of Article III and the Judiciary Act is not compelling. He begs the question of who decides when legislation is repugnant to the Constitution, and refusal would have been the most ethically appropriate response in light of the political context. Yet, *Marbury* has undeniable persuasive force, even to those in the interpretive community who acknowledge the legitimacy of such criticism. The decision's power may derive from its character as a response to the exigency, the audience, and the multiple constraints of facts, textual language, history, and constitutional values that comprised the particular rhetorical situation.<sup>58</sup>

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57. Bitzer, *supra* note 49, at 389.

58. William Van Alstyne observed that taken together, Marshall's arguments may have greater force than when analyzed separately. Van Alstyne, *supra* note 36, at 29.

C. *The Response Changes the Situation*

A response may change the rhetorical situation.<sup>59</sup> When a rhetor speaks or writes in response to a situation, the rhetor "enters" it. The speaker and the speech are then additional elements that make up the rhetorical situation. The next speaker will modify his or her behavior and composition to respond effectively to the now-altered constraints. Speaker and speech, or author and writing, are not separable from their context. They are formed by it, because the situation shapes the response. They also form the situation, because the response changes the situation.

Rhetoric that fits a situation's elements in at least some respects intervenes in the situation, changing its constituent elements. Some situations never elicit a response. One intuitively knows when the moment for effective speech has gone. Some situations persist. Effective responses to them do not speak only in the present. They continue to participate in situations they alter, inviting new discourse. Because of the ongoing pattern of situation, response and reconstituted situation, they continue to shape rhetorical responses.

This explains how a body of rhetorical literature grows. The authoritative status within their traditions of rhetorical responses such as the United States Constitution, Shakespeare's tragedies, or the Bible, is due to their effective, fitting response to aspects of a situation that persist in some sense.<sup>60</sup> They so "fit" the situation as to reconstitute it. They participate in shaping the subsequent discourse the reconstituted situation invites. Such rhetorical responses do not merely add themselves to the new situation as an additional element. They are not simply another historically interesting text. They function decisively to change the situation to which they responded. Because they affect the parameters of the situation, they set the terms of the invitation for new responses.

Continued citation of *Marbury* in Supreme Court opinions and commentaries on judicial review demonstrates that it not only altered its situation, but continues to operate as a constraint within it. *Marbury* is a resource, a highly persuasive resource, in a rhetorical situation that persists. It invites responses that address its meaning. The decision thus shapes the continuing conversation on the nature and extent of judicial power. It continues to participate in the rhetorical activity that is law.

Situations may recur, generating comparable responses, so that a rhetorical

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59. Bitzer, *supra* note 49, at 389.

60. *Id.* at 392.

form is created. The form then becomes part of the situation faced by future rhetors. A form of discourse is established and comes to have a power of its own. The tradition then functions as a constraint upon any new response in the form. Bitzer gives the example of the situation that invites the inaugural address of a President.<sup>61</sup> Its recurrence creates a form of discourse. Another example is situations that invite judicial examination of legislation for its constitutionality. The form prescribes case and controversy requirements that constrain judicial responses to such a situation, excluding collusive suits, those that are moot or not ripe, or those lacking a real and substantial controversy. The history of judicial review of economic legislation for compliance with equal protection and due process guarantees constrains judicial responses to similar situations today through the form of minimal rationality review. More explicit constitutional provisions, or those with distinct histories, different concerns, or which address different facts, have established the form of stricter judicial scrutiny.

Argumentative forms like "plain meaning arguments," strict scrutiny review, and even phrases like "to say what the law is," thus become elements of rhetorical situations. They are constraints on new responses to those situations. They shape arguments concerning the meaning of authoritative legal texts in those situations. Because the audience or interpretive community is familiar with them and values them, an effective rhetor will perceive that these argumentative forms are persuasive resources in the situation, and will "fit" a response to them. The effectiveness of the response depends upon using the language and forms that have persuasive force for the audience. The audience is likely to agree with innovation that has continuity with their rhetorical tradition.

Use of words, forms of argument, and style is therefore not separate from the object of persuasive speech. Rhetorically, form and content, language and meaning, are not separable. The reasons that words, forms, and style are potentially persuasive resources for speaking in and to the situation are the same reasons that a response utilizing them will be effective. The response will so persuade as to make a real, "substantive" change in the situation.

#### *D. Law as a Rhetorical Activity*

The written language of constitutions, statutes, judicial opinions such as *Marbury v. Madison*, regulations, contracts, and other written texts figure prominently in legal situations. Their words, phrases, structure, and argumentative forms are powerful resources for the lawyer/rhetor to use in addressing situations that are new in some aspects, yet recurring or persistent

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61. *Id.* at 390.

in other aspects. Because they are an element in the situation that shapes the legal response and are changed by an effective response, they have a force of their own. Legal language is not merely a vehicle to convey legal meaning. It acts and reacts. It constrains what is said: situation invites response. It also is changed by what is said: response changes situation. Lawyers employ legal words, phrases, syllogisms, and rhetorical forms to change situations because they have persuasive force.

Lawyers use legal language to change a rhetorical situation. However, legal language is not separate from the situation. It is an element of the situation, a constraint, and is, therefore, subject to change when used as a resource to respond to recurring or persisting situations. Effective, authoritative legal writing is a condition of, and a resource for, later legal writing that responds to a situation in which the earlier authority is a constituent part. For instance, *Marbury* is a condition of, and a resource for, effective legal writing on the nature and extent of federal judicial power. If the later writing is effective in changing its situation, it may alter the meaning of the writing that is part of that situation. Later Supreme Court opinions citing *Marbury* as support for a special, broad power of judicial review altered its significance.<sup>62</sup>

The common law method by which precedents form doctrine is similar to the interdependence of situation and response in creating a rhetorical tradition. Traditionally, legal theory tended to conceive this doctrinal growth as evolutionary discovery of preexistent, determinate, and universally true principles. In contrast, rhetorical understanding is consistent with more critical theories of textual meaning, because it assumes the persuasively crafted, indeterminate, and localized nature of legal knowledge.<sup>63</sup> It need not, however, equate all meaning with the reader's situation.<sup>64</sup> For purposes of the present discussion, it is sufficient that both understanding law as a rhetorical discipline and traditional legal theory take account of central common law terms acquiring meaning in the ongoing activity of deciding cases.

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62. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

63. Stanley Fish, for example, says interpretation is "not the art of construing but the art of constructing." FISH, IS THERE A TEXT?, *supra* note 5, at 327. He argues that the apparent objectivity of textual meaning is "an illusion." *Id.* at 43. Rhetorical analysis assumes an understanding of knowledge consistent with this view. "Rhetoric recognizes that no statement is assured 'uncontroverted, universal agreement'; and that all discourse confronts 'the necessity for interpretation,' for models of understanding, notions which are 'malleable' rather than 'univocal'." Vickers, *supra* note 48, at 41.

64. For example, James Boyd White, a leading proponent of viewing law as "constitutive rhetoric," rejects the idea that textual meaning is solely or simply a creation of a community of readers. See, e.g., WHITE, HERACLES' BOW, *supra* note 5, at 82.

Rhetorically understood, law is an ongoing, interactive process of responding to situations framed by authoritative texts. Lawyers use authoritative language to respond to disputes over its meaning in particular situations. As lawyers use legal language to resolve a dispute, they participate in maintaining or remaking its meaning for the situation they address. They are constrained by textual language as part of the tradition in which they operate. Nevertheless, lawyers may alter the significance of authoritative language, thereby altering a constraint for future responses.

“[T]o say what the law is” is to participate in this language activity, to use authoritative language to respond to situations in which its meaning is in dispute. The saying and the writing of the law are thus inseparable from its substance and meaning.

#### IV. LEGAL WRITING AS EDUCATION IN THE PRACTICE OF LEGAL RHETORIC

Vernon and Hines assert that understanding the problem presented is fundamental to good legal writing. They are saying that legal discourse does not exist and therefore cannot be taught or evaluated well, apart from the rhetorical situation to which it responds. The situation or the problem presented invites a fitting response. One must, therefore, teach the rhetorical situation and its elements in order to teach how to compose a response that “fits.”

The interactive, constitutive relation of rhetorical situation and response means the inverse of Vernon and Hines’ statement is also true. Not only is understanding the problem presented fundamental to good legal writing, but understanding legal writing is fundamental to good problem analysis. This is because written authorities make up part of a legal problem situation. The facts and the applicable law make an issue. Understanding how to select which legal authorities are applicable to a fact situation, and why a dispute about their meaning on the facts arises, is essential to understanding the problem presented. It is as essential as understanding the facts. However, the applicable authorities are the products of writing activity. To select them requires an understanding of how and why they were composed.

The written authorities do not only constitute part of the problem; they are also the resources for its resolution. Critical reading of possibly applicable written authorities is, therefore, a necessary preliminary step in legal writing. It is necessary both to understand the problem and to evaluate the sources of law available to resolve it. Critical reading of a judicial opinion or a statute involves appreciation of it as a composition responding to the elements of a legal rhetorical situation. For instance, the opinion that does not acknowledge a prior persuasive precedent as a constraint is weaker than one that is consistent with precedent or gives reasons for departing from it. The opinion that ignores facts

relevant in the light of prior cases is weaker than one with reasoning that takes all relevant facts into account, or one that explains why an apparently material fact is not decisive on the instant facts. Thus, knowledge of what constitutes persuasive legal writing is fundamental to analysis of the legal problem presented.

Rhetorical criticism restates the above conclusions in terms of situation and response. Vernon and Hines' position is that understanding the rhetorical situation is fundamental to effective response. The inverse is also true: understanding a fitting legal response is integral to understanding what constitutes the rhetorical situation. This is because responses change and thereby reconstitute situations. A fitting response may enter and change the rhetorical situation it addresses, becoming a new element in it or modifying its elements. Understanding the altered situation requires understanding what constraints the response changed, as well as why, how, and to what extent the constraints were altered.

A student or a lawyer needs to be able to discern the facts and other situational elements to which a legally authoritative writing responded. Only then can the lawyer critically evaluate it as a resource in the situation presented for analysis and give it the weight it deserves in his or her composition.

A student memorandum or exam answer arguing against broad power of judicial review should recognize that *Marbury* is a significant textual restraint that may frame the issue. An excellent student also stresses the elements of the situation that confine *Marbury* as a fitting response. Marshall did not address the Judiciary Act's constitutionality as the central issue presented for judicial determination, but as one incidental to the decision on the merits. He exercised the power of substantive constitutional review defensively, to defend the judicial power against congressional expansion. The student would demonstrate that *Marbury* thus does not necessarily mean the Judiciary is supreme among the branches in constitutional interpretation.

Students arguing for the exercise of broad judicial constitutional review power should also recognize *Marbury* as a prominent constraint. They would stress the elements of the situation that persist and give the *Marbury* response broader significance. They should stress that Marshall's reasoning was premised on a judicial duty "to say what the law is." *Marbury* means the Constitution is law, and that judges have a duty to interpret it. Later opinions, not involving defensive or incidental use of judicial review, have cited *Marbury* as authority

for broad judicial review power.<sup>65</sup> They have done with *Marbury* what *Marbury* did with Article III. They used *Marbury* as a resource to construct a doctrine of judicial power that gives the *Marbury* text significance surpassing its original factual constraints, as would the student writing in favor of judicial review.

Understanding the elements of the situation to which *Marbury* was a response allows the student to perceive and argue the extent to which it changed the rhetorical situation for later writers and the weight it deserves in the student's present writing assignment. Understanding *Marbury* as a composition whose "fit" to a rhetorical situation can be critically assessed is fundamental to writing that argues persuasively about its meaning in later situations. *Marbury* is now a written authoritative textual constraint, a constituent element of situations concerning the exercise of the judicial power of constitutional review. To write effectively in and for a present situation, students need to learn its elements. They need to understand that present textual constraints like *Marbury* are prior responses either to analogous situations that recur, or to aspects of situations that persist. They need to learn not only the words, holdings, and statutory language of these earlier legal responses, but how and why they changed the elements of the rhetorical situation. In terms closer to Vernon and Hines', students need to understand effective legal writing to analyze substantive legal issues well.

Because legal writing is situated, students understand it by locating themselves in a particular legal situation and writing in and to that situation—by practicing legal writing. Students need to compose legal responses to situations and have their writing frame situations for other readers. Practice in writing is thus integral to understanding legal texts and the law.

Traditional case and socratic teaching methods can foster understanding of legal writing. Students learn critical reading through classroom discussion and dissection of constitutions, statutes, cases, and regulations. They learn these authorities are responses to situations, and learn how to use them as resources to respond to new situations, through orally responding to varied situations posed by hypotheticals and problems. Both the student orally responding in class and the student writer make a claim concerning the meaning of legal authorities on particular facts.

However, composing a written response to a legal rhetorical situation affords a different learning experience than oral classroom responses. The

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65. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).



writer commits to a claim in a more definite and enduring sense. A written argument can be more precisely phrased and is not as easily revoked or modified. The writer generally takes more time to respond, which allows greater investigation of facts and possibly applicable written authorities. Therefore, the writer is more likely to appreciate how the situation affects and defines his or her legal response. Such appreciation of the situation gives greater context and direction to the reading of legal authorities than does reading for classroom discussion. Generally, the writer can respond to more complicated rhetorical situations than can a speaker. The writer can sort out and identify aspects of the situation that have persuasive force, deserving greater emphasis and defining the scope of *stare decisis* and policy arguments.

Finally, writing leaves a "trace" of the student's claim for meaning in the situation that the oral response does not. Writing is read, responded to, and can be referred back to. The student may experience someone who, although not present with the student as the student speaks and writes, reads the student's statement of what the law is. When the student believes a peer or a teacher misunderstands his or her meaning, the student may experience the separation between subjective authorial intent and the meaning of a writing for readers. The student may sense participation in a process in which his or her written legal language is a resource for others in ongoing argumentation. The student should thereby gain an understanding of the authorities studied in the regular classroom as resources lawyers use—elements of legal situations rather than "law" itself.

Vernon and Hines correctly state that students need to understand the problem presented to write well. They also need to write to understand legal problems. To rephrase in rhetorical terms, legal discourse cannot be taught well apart from the rhetorical situation to which it responds. The rhetorical situation cannot be taught well apart from its interactive relation to discourse. As the two inverse propositions demonstrate, "substantive" law and legal composition are integral to each other. Both can be, and often are, taught as the practice of legal rhetoric.

#### V. TEACHING LAW AS THE PRACTICE OF RHETORIC

Ideally, traditional law school classes have taught what constitutes a legal rhetorical situation and what is a fitting response to the situation. Case method and socratic questioning teach the elements of a legal rhetorical situation and how to critically read a judicial opinion, statute, regulation, or constitution as a response. Legal education teaches one to examine authoritative written authorities and alternate responses to assess how they "fit" the situation and how a lawyer can use them to compose new responses.

When legal education emphasizes development of the law, it also teaches the interactive process in which a situation shapes a response and a fitting response changes the situation. Legal education teaches how a written legal response may alter the rhetorical situation for the next instance of legal writing, not only by resolving disputes, but by altering prior understanding of authoritative writings.

Teachers of constitutional law teach as much when they teach *Marbury*. Casebooks routinely stress Marshall's historical and political situation, and comments point out that his readings of Article III and the Judiciary Act were not the most probable ones, and that his Supremacy Clause analysis begged the real question.<sup>66</sup> The change in the meaning of Article III's textual constraint wrought by the *Marbury* opinion is evident in the subsequent opinions studied throughout an introductory constitutional law course. Casebooks also emphasize the ambiguous significance of the opinion for the incidental or the special nature of judicial review.<sup>67</sup> Thus, a traditional substantive course almost necessarily teaches that legal writers may change the meaning of the authoritative texts with which they fashion compositions to respond to new and varied situations.

Teaching law as the practice of legal rhetoric bridges the theory versus practice dichotomy. Attention to the situation—the particular problem or exigency, audience, and constraints—locates both teacher and student in a “practical” context. Attention to how the situation is altered by a legal writing points to the development of doctrine and theory.<sup>68</sup> One may concede the

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66. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 29-35 (2d ed. 1991).

67. *Id.* at 35-44.

68. Implications of the 1992 “MacCrate” Report for teaching law complement teaching implications that flow from viewing law as the practice of legal rhetoric, but stop short of the emphasis on writing as participating in the ongoing interaction between situation and response that constitutes law. See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Am. Bar Ass’n, July 1992). It could, but should not, reinforce the false assumption that legal writing is about effective communication of law in words. It should challenge regular faculty to accept responsibility for the “practical.”

MacCrate’s fundamental lawyering skills correspond to skill in understanding the elements of the rhetorical situation in which the lawyer is located and to which he or she seeks to respond fittingly. *Id.* ch. 5, § B. The first, problem solving, corresponds to appreciation of the exigency. The fifth, communication, includes consideration of rhetorical purpose and audience. *Id.* at 5.2(c). The second through fourth skills—analysis and reasoning, research, and factual investigation—fit within understanding and responding fittingly to the constraints of a legal rhetorical situation.

The report does not present a simple, linear description of applying law to fact, and recognizes interaction between “analysis skill” and “communication.” For instance, evaluating legal theory is listed as a skill and is specifically phrased in terms of persuasiveness. *Id.* at 2.4. Communication is tied to the skill of legal reasoning. For instance, it includes selecting the most powerful arguments in the particular setting and refers to reasoning skills. *Id.* at 2.3-2.4 & 5.2(b)(ii)(C) (elaborating and evaluating legal theory).

*Marbury* example, yet limit it. *Marbury* is a landmark decision interpreting constitutional language, hardly typical of instructional content in most law school courses. Yet, even mastery of the rules on filing to perfect security interests under Article Nine of the Uniform Commercial Code involves use of the written text as a resource to say what the law is on a set of facts. Compositional freedom is of course more constrained by the situation, particularly by the nature of the authoritative document, than in the *Marbury* example.

However, the learning task is similar. It is to thoroughly master the exigencies, audiences, and constraints of Article Nine situations so as to respond to a particular rhetorical situation effectively. Usage, policy considerations underlying the entire Uniform Commercial Code, and prior common law understandings can influence the rhetorical response and alter the meaning of a Code provision in a particular situation.<sup>69</sup> Because different states enact various versions of the Code, where the legal activity takes place may decide what the law on particular facts is. Rhetorical purpose can be decisive. For instance, if the activity is legislative revision of the Code rather than advice to a client on how to comply, constraints differ. Part of learning Article Nine of the Uniform Commercial Code is learning to understand it as a response to a persisting situation of debtor—creditor relations and to appreciate it as a resource for responses to recurring situations that vary. A practitioner needs to predict with certainty how the filing rule will be applied, and may also need to respond to a situation calling for an argument on how it should be applied or revised.

The materials and methods of "regular," substantive law classes and writing classes can and often do teach the practice of legal rhetoric. Five principles for teaching legal rhetoric apply to both: (1) Teach and vary the elements of a

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Listing communication as a separate skill could reinforce the conventional understanding of legal writing as the vehicle by which lawyers communicate something independent of legal language—doctrine, principles or analysis. This misconception is exacerbated by refusal to differentiate oral and written forms of communication, except for skills of drafting executory instruments, litigation pleadings and other legal responses that have become rhetorical forms. *Id.* ch.5, cmt. The power of writing to not only change a situation, but participate in the altered rhetorical situation, thereby altering doctrine or theory, is not recognized.

However, the Report appropriately disclaims any intent to have the listed skills and values serve as a standard for a legal curriculum. *Id.* at 131. Thus, the description of communication as a separate skill should be viewed as describing only a part of the ongoing process that is legal writing. The role of legal writing in the ongoing, interactive relation of situation and response that constitutes law is the larger topic of the entire legal curriculum. The MacCrate report thus should challenge regular faculty to abandon the theory versus practice distinction and the marginal status of legal writing, rather than reinforce the idea that legal writing is distinctive instruction in communication skill.

69. U.C.C. § 1-102 (providing for liberal construction and application to promote underlying policies) & § 1-103 (providing for supplementation of Code provisions by general principles of law and equity).

rhetorical situation; (2) Rely primarily on materials, methods, and teachers that are part of legal situations; (3) Teach gradually and sequentially; (4) Teach the process of reading and of composing; and (5) Elicit student participation.

None of the five principles are newly minted. They are noteworthy here because they illustrate that subject matter, materials, and teaching methods of both substantive and writing classrooms teach the practice of legal rhetoric.<sup>70</sup> They counter the assumption that legal research and writing is a subject distinct from that of other courses, and the accompanying tendency to marginalize it in the curriculum and on the faculty.

#### A. *Teach and Vary the Elements of a Legal Rhetorical Situation*

Students need to learn both the elements of legal rhetorical situations and how they constrain effective responses. It follows that primary teaching materials should be those that figure prominently in rhetorical situations. Use of judicial opinions as a primary teaching device in foundational courses therefore makes sense. The case method has been remarkably durable, despite much criticism, and praised as the single most significant achievement of American legal education.<sup>71</sup> This is so, in part, because an opinion is an example of a rhetorical response. It often reveals the exigent circumstances, the audience it addressed, and the constraints under which it was composed—facts, language of relevant legal texts, precedents, and values. An opinion offers a window for the student to vicariously enter into the rhetorical situation that the judge-writer sought to resolve.

A standard question in introductory study of *Marbury v. Madison* is, "How does the opinion respond to the political dilemma Justice Marshall faced?"

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70. Another use of "rhetorical situation" to explain legal method and urge reintegration of rhetoric in the law school curriculum is found in Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108 (1993). Levine and Saunders urge the teaching of law as rhetoric in doctrinal, clinical and writing courses, as do I. They emphasize rhetorical teaching as distinct from traditional law teaching, however. I do not view the regular classroom as solely doctrinal teaching, and see rhetoric as a way of understanding the ideal use of case and socratic methods, although it underscores certain practices over others. Teresa Phelps is a writing specialist who recognizes that viewing law as rhetoric implies that substance is not distinct from writing, although she does not stress integration of writing and other instruction. See Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089 (1986).

71. STEVENS, *supra* note 17, at 51-64. Stevens acknowledges and shares criticism of the case method if used to confine legal materials, and in its original assumption of a unitary, principled system of objective doctrines that provide consistent responses. *Id.* at 54-55. Nevertheless, he argues its original practical emphasis has been borne out in its ability to engage students imaginatively in the activity of solving problems and to instill a sense of legal process. *Id.* at 54-63, 269-71. The case method's practical aspects can be appreciated anew among those who see theory as practice. See FISH, *DOING WHAT COMES NATURALLY*, *supra* note 6.

Students are often asked a similar question in other classes: "Why didn't the court make the opposite ruling?" These are ways of asking the student to stand in the judge's shoes or face the rhetorical situation the judge or rhetor faced. By examining the elements that the opinion ignores and the weight it gives those elements to which it responds, students can critically assess how the opinion "fits" its situation.<sup>72</sup>

Socratic questioning can teach the practice of legal rhetoric. By posing a hypothetical, a teacher alters the rhetorical situation the judicial author faced. A teacher can enlarge or alter the possibilities and invite students to formulate responses to alternate situations. Hypotheticals often yield new appreciation of the significance of a fact or of reasoning that, on initial reading, seemed straightforward and unexceptional. The student can evaluate the judicial response or opinion in terms of consequences evident in the hypothetical future situations. In the language of legal rhetoric, the student can assess the extent to which intervention of legal discourse in the situation is likely to alter it for future responses.

Hypotheticals that ask the student to assume the role of advocate or judge, by applying an opinion in a different set of facts, invite the student to communicate to the same or another judge in a new situation, or to use the opinion as a resource to address a new situation. In the terminology of rhetoric, hypotheticals help a student recognize that constraints shaping his or her responses to similar situations include authoritative texts like the opinion being studied. A judge deciding an analogous case will recognize the prior opinion as an authoritative constraint on possible judicial responses. The persuasive advocate perceives that possibilities for argument are framed by the opinion. The advocate must argue how it did or did not alter the rhetorical situation for the advocate's case and for other cases.

By allowing a student to vicariously enter the situation facing a judge-writer or advocate-writer, the case method and socratic questioning allow the student to practice legal rhetoric imaginatively. The student can also gain a sense of professional identity, internally appropriating the rhetorical tradition as a resource to address other situations. Students may learn to use generalizable elements of most legal situations, such as the need for individual justice and for

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72. That the situation constrains a response sounds uncomfortably like Langdell's science, a jurisprudence in which only one correct legal response to a set of facts exists and needs only to be discovered. Both propositions are foreign to rhetorical criticism. Although a situation does not necessarily prescribe a response, it invites one that fits. Most heirs of the legal realist movement analyze opinions by isolating and examining text, precedents, values, and facts ignored or emphasized by the judicial author. Such analysis is analysis of the elements of the situation and which, if any, a legal response fits.

workable principles, as a ground upon which to criticize opinions.

Rhetoric confirms a commonplace insight, namely that teaching cases and statutes in the "substantive" classroom teaches far more than doctrine. It teaches how to critically read a legal text as a response to a legal situation, invited by the situation, and altering it. This is an essential skill for a scholar, advocate, advisor, or administrator who must use it to address another rhetorical situation.

Yet, traditional case method and socratic questioning are indirect ways to teach this skill and may be best adapted to the analytically outstanding student.<sup>73</sup> Classroom socratic dialogue usually involves only a few students. Many must try to vicariously share the speaking student's experience. Some passively fail to do so, without being aware that they are missing the very activity they are there to participate in. Few teachers use cases to teach other skills needed in modern practice, such as negotiation, counseling, advocacy, and knowledge of statutory and regulatory processes and applications.

By providing direct involvement in composing responses to rhetorical situations, writing assignments alleviate some of these deficiencies. The writing student must not only critically and imaginatively read, but use what the student reads to address the situation posed in a writing problem. Students who may avoid sharing another student's experience in the regular classroom *cannot* avoid analysis of written authorities when writing. The writing assignment can focus on specific skills, such as statute drafting or advocacy of a position.

Writing students must make decisions that are similar to those made in the cases taught and the hypotheticals posed in substantive classes. They must select and emphasize relevant facts, find and select relevant authorities, wrestle with their import and weight, and construct a persuasive response to the situation presented by the assignment. They may learn that they are more persuasive if they defend their response in light of its consequences for the law. In terms of rhetorical criticism, students indicate how or to what extent their response may change the situation for the next response or change aspects of the situation that persist.

A teacher can readily vary elements of legal situations in a writing course. Short assignments on particular elements or constraints teach what defines a legal situation calling for discourse in response: the exigency, the response-holding, and constraints of precedent. To help students discern elements of a situation, one can vary them. Formulating a response to a factual situation

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73. STEVENS, *supra* note 17, at 161.

similar to that in previous assignments, but with a few differences, helps the student appreciate the idea that legal rhetorical situations constrain responses. It may require them to assess which elements of the situation most decisively shape the response.

The teacher can add or change constraints, audiences, or exigencies. A statute added to a former problem, which asked for synthesis of the rule from a series of cases, changes the situational constraints. One can assign the problem in a different jurisdiction, varying applicable precedents. The exigency can be readily changed. For example, a problem could propose that the client not only wants money damages, but reform of the defendant's practices. The audience can be easily varied as well: write to a client, partner, judge, or a legal scholar in China. A teacher can require use of previous written assignments or the same materials used in a prior exercise, so the effect of the variance in exigent facts or audience is clear. For example, one may assign rewriting a memorandum to the senior partner, but now for the client or for the judge in a pretrial motion proceeding. This allows the student an opportunity to revise the prior work and to do so for a different audience and exigency. A procedural issue or an ethical dimension increases complexity.

Writing teachers can also utilize a type of socratic questioning. The teacher may not direct a correct written solution to the problem but ask questions of the student that expose the elements of the situation—in the assigned fact problem or in the case, statute, or regulation the student is using—that a student may not appreciate or respond to appropriately.<sup>74</sup>

In the regular classroom, an exam that requires a written essay response to a complex factual situation is generally *the* writing assignment. It invites the student to use the assigned legal texts to address a new situation and to justify the student's response in terms of the situation: the given facts, authorities, principles, and values studied in class. However, time constraints on the students' writing and on the teachers' ability to give timely or complete assessment limit its effectiveness. A writing assignment usually requires a more thorough and considered response than an exam answer. Assessment of a writing assignment generally consists of written and oral personal critique, as well as an opportunity to revise. It therefore can teach how to compose a fitting response to a situation more directly and thoroughly than can regular classroom instruction.

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74. This technique is thoroughly explained and persuasively justified by Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to 'Think Like Lawyers': Integrating Socratic Method with the Writing Process*, 64 *TEMP. L.Q.* 885 (1991).

### *B. Rely Primarily on Culture-Specific Teachers*

The teacher as well as the teaching materials and methods should be from the culture whose language is being taught: the law. Just as one would not hire an English specialist to teach French, an English composition specialist should not teach legal writing. The reason once again is the rhetorical situation. Legal discourse does not exist apart from the situation it addresses and cannot be effectively taught and evaluated apart from a thorough understanding of the legal rhetorical situation. The form, techniques, and language of legal written responses to legal problems are inseparable from the law, its content, and meaning.

In Vernon and Hines' language, problems in student understanding of what they are writing about are as great a problem as writing skills are, and the two are not entirely separable. A teacher must thoroughly understand what the student is writing about, and the rhetorical situation to which the student is responding, in order to teach legal writing and to grade a law school exam in a substantive course.

This does not mean that writing specialists without a law degree or other nonlawyer specialists, such as scholars in subjects such as economics or literature, should not teach on law faculties. Nor does it mean that a law professor cannot specialize in legal writing, as in clinical education, torts, or jurisprudence. It does mean that those entrusted with teaching the core courses that introduce students to the practice of legal rhetoric should be familiar with, and skilled in, the language activities that constitute law. Financial pressures may dictate otherwise, but the nature of the students there to learn does not.

### *C. Teach Gradually and Sequentially*

Writing assignments should not be designed initially to test knowledge, but to foster learning by participation in a language activity. Assignments should build gradually and sequentially, in length and complexity, so the student can participate and speak a few words, while not yet speaking fluently. This applies at all levels, from learning the "dialect" of anti trust law within the language of the law to learning the basics of common law analysis in Torts I.

Common practice dictates beginning any substantive course with key cases and key concepts, examining cases or other authorities more deeply and slowly in the early weeks than later. In terms of legal rhetoric, each course's subject matter presents a legal rhetorical situation with certain persisting aspects. The elements of the situation need to be introduced gradually. Some aspects of the situation will be common to nearly all of the problems studied in the course: for instance, the issue of the nature and extent of judicial power in constitutional



law. These aspects can be thoroughly examined in the early weeks. A teacher can take the basic understanding for granted later on, returning to it while emphasizing other elements in varied constitutional situations.

Introduction to aspects common to nearly all legal situations is particularly pertinent in first-year instruction. Short, sequential assignments that build in complexity let the student gradually learn the key elements in legal situations that constrain responses. Writing teachers frequently assign a memorandum's factual summary or issue statement as separate, short, initial projects. Providing "canned" materials, to delay full library or computer research initially, focuses attention on one or a few elements in analogous situations. For example, a problem could ask the student to determine how a "search" is defined in these five Fourth Amendment cases.<sup>75</sup>

To avoid disguising the complexity of legal situations or the interaction between situation and response, one can have partial, short assignments progress to longer written responses, such as the final memorandum, brief, or exam answer. Classroom discussion can also direct student attention to policy implications of selecting which facts to emphasize and which authorities to discuss.

#### *D. Teach the Process of Reading and Composing*

Education in legal rhetoric should reveal the law as an active process that gives the lawyer/writer rhetorical resources, while engaging him or her in their continual remaking. Writing teachers, in and out of legal education, agree that writing is best taught as a process. The process is not merely word choice, or sentence, paragraph, and argument construction, but composing, deliberating, and problem solving.<sup>76</sup> Law as rhetorical practice is also a constant activity. It is the process of using written authorities to persuasively compose responses to situations in which the meaning of language is in dispute, and thereby reconstituting the meaning of legal language.

In the regular classroom, dissents provide contrasting, alternate, compositions; they teach by their very existence how a legal response is less

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75. The partial or artificial nature of these assignments poses a "chicken and egg" problem. Until the authorities are mastered, one does not know the scope of constraining facts or the precise legal issue the immediate exigency poses. Yet, one must know the facts to determine which textual authorities are analogous and, therefore, constrain a legal response. A given fact statement in a problem and provision of "canned" authorities imply that factual and authoritative textual constraints on appropriate responses are set and finite and that relevancy is immediately apparent. Yet, the artificial focus of these assignments focuses the student on one element of a situation at a time, and brevity allows a professor to give feedback.

76. See generally Phelps, *supra* note 70, at 1093-98.

“given,” than it is constructed. Cases that overrule others, especially when the dissent becomes the majority response, exemplify the tentative and negotiated nature of the process of constructing a response that fits.

Having students prepare statements of the holding of the assigned case, in the hypothetical context of counsel to differing parties, can reveal both the varying ways the opinion responded to different factual circumstances and the ways in which different audiences could read it and employ it as a resource in future argumentation. For instance, one can ask students to explain the *Marbury* holding in the narrow sense and in its broader implications: as counsel to William Marbury, as counsel to President Jefferson, and as legal advisor to the Anti-Federalist majority in Congress. They may discover defeat for William Marbury was less than a clear victory for the Anti-Federalists, because the Federalists could read *Marbury* to support their argument that the Anti-Federalist repeal of the Judiciary Act of 1801 was unconstitutional.

Revision, evaluation, and deliberation can be structured into a writing assignment. It is standard for writing teachers to hold conferences, give written criticism of drafts, and require revision.<sup>77</sup> One can use classroom editing of a student peer's five minute classroom writing exercise, or have a small group or a class use several statements of the holding to formulate one. Students can be encouraged to respond orally in class, prior to writing, to see if their response changes when they write. They can formulate an answer before and after research, to see what difference constraints of precedent and history have on their earlier response. They learn that effective legal writing results from a compositional process dependent on perception and choice. Like Marshall, they respond to historical, personal, and political interests, make interpretive choices, and craft persuasive arguments.

Because persuasive written responses change the law's rhetorical situations, writers not only respond to a situation, but also intervene and participate in it. They resolve exigent situations, like William Marbury's. They may also confirm and maintain or modify an interpretation of an authoritative text, like Article III. New instances of legal writing will respond to the changed factual and interpretive context. Both aspects of participating in a situation, effecting change in exigent circumstances and in the cultural resources of the law, make legal writing “law.” Therefore, students need to learn not only that legal writing responds to a situation, but how it may become a constraint for future situations. They need to learn the process of composition and the process of reading and being read.

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77. Ramsfield, *supra* note 2, at 128-29.

When teachers who are members of the legal interpretive community read and respond to student writing they offer students the experience of law as an ongoing, interactive process of reading and writing. Students experience their writing leaving the student's subjective control, and becoming a resource for another—a reader of their statement of "what the law is" in a particular situation. In a conference, a student's attention is focused on the writing's existence as a textual resource for another reader, the teacher.

Teachers can also structure writing assignments to allow students to see the impact of their writing on situations, as a resource and constraint for later writers. Revision of prior assignments can do this effectively. For example, students can first summarize a deposition for a partner, then write an office memorandum using their prior summary of the facts. The next assignment may posit that their memoranda resulted in a decision to file suit. They then may rewrite the memorandum persuasively, to support a pretrial motion, or as a letter giving notice of intent to sue. An appellate brief writing assignment can posit a ruling on the pretrial motion. Writing to defend or challenge the ruling, a ruling that their pretrial briefs helped shape, dramatizes how a legal writing can alter a situation for the next writing.

#### *E. Elicit Student Participation*

Emphasis on the legal writer's ability to alter legal language accentuates issues of professional responsibility. It stresses the lawyer as an agent, not only in representing a client or serving society, but in the development of the law. Although a student can be urged to take a position orally in class, the commitment that goes with a *written* argument helps one take responsibility for one's legal claims. Teachers should require a conclusion—a "yes" or "no" answer in a memorandum. At a simpler stage, they can ask students to select the case most analogous to a given fact pattern and defend their reasoning in a written paragraph. The earlier example, of assignments that require revision of prior work, enables students to see how their entry into a situation may change it for a later response. For instance, using a deposition summary as the basis for a memorandum's fact statement helps one learn how intellectual honesty and responsibility in one response affect others.

## VI. CONCLUSION

Legal writing is not something other than law. It is not something distinct from what is taught in other law classes. It makes little sense to describe certain courses as courses in principles, analysis, or substantive law and others as courses in communication, expression, or legal writing. The first may describe a class that focuses on critically reading legal texts as responses to rhetorical

situations and orally examining their usefulness as resources to respond to new and varied situations. The second may emphasize personally committing to a particular written response and leaving a "trace" that continues to participate in the situation. These distinctions do not, however, describe a course in law as opposed to one in writing. Both courses can and do teach the practice of legal rhetoric.

The cost of lower teacher-to-student ratios for writing instruction, rather than theoretical distinctions between law and writing, may still be the primary reason for the marginal status of writing in the law curriculum and writing teachers on law faculties. However, financial choices reflect assumptions about what is central to sound education in the law. The assumed dichotomy between legal writing and law gives the false impression that sound education in law and the present status of writing in legal education are compatible. It obscures a choice against "doing the right thing" educationally, in favor of greater university profits, higher regular faculty salaries, and increased faculty scholarship. Discussion of the place of writing in the curriculum and of writing teachers on the faculty should be premised on the common and complementary character of traditional and writing instruction.

"Learning to think like a lawyer" is frequently given as the goal of the first-year curriculum. Observation of legal practice, landmark case authorities like *Marbury*, and post-modern understandings of law teach that thinking like a lawyer is inseparable from speaking, acting, and writing like a lawyer. The goal of the first-year curriculum may be better described as learning to "say what the law is." It is best served by full integration of writing into the courses of the core curriculum.