

and insights about how the constitutional system actually works in practice.

Moreover, when the vertical dimension of constitutional law is taken into account, the complexities facing constitutional theory become much greater still. In short, notwithstanding the important contributions of Ackerman, Mount and others, much work still needs to be done.

METAPHOR AND REASON IN JUDICIAL OPINIONS.

By Haig Bosmajian.¹ Carbondale, IL: Southern Illinois University Press. 1992. Pp. xiv, 240. Cloth, \$22.50.

*Eileen A. Scallen*²

One of my colleagues, a tax professor, heard that I was reviewing Haig Bosmajian's book and bet that I would not find a metaphor in the regulations to the United States Tax Code. It took less than ten minutes of paging through the tax regulations to hit a couple—"safe harbor," "golden parachute"—then I stopped, lest I be accused of overkill.³ My colleague's challenge illustrates and extends one of Bosmajian's central points: "[a]t all judicial levels,

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3. My correspondence with the judge of our bet—the good professor's spouse, a distinguished student of literature—follows. The names have been changed to protect the innocent. And me.

To: Ms. Susan Spouse
 From: Professor Eileen A. Scallen
 Re: Metaphors in the Tax Code & Regs

As you will recall, I bet your distinguished husband that I could find a metaphor in the regulations to the United States Tax Code. He was, to put it politely, skeptical. You kindly agreed to judge my efforts, which I set forth herein.

A metaphor, as you know, is "[a] figure of speech in which two unlike objects are compared by identification or by the substitution of one for the other." Karl Beckson and Arthur Ganz, *Literary Terms: A Dictionary* 156 (Noonday Press, 3rd ed. 1989).

My assignment was not difficult. I will not tax you with the boring details, but I discovered that metaphors are pervasive in both the tax regs and the tax code. Just a few examples should suffice. I.R.C. section 280G sets forth the rule for "Golden Parachute Payments." Both the code and the regs refer to "safe harbors," see, e.g., Treas. Reg. § 1.62-2(g)(2).

Of course, there are also the less transparent figures of speech. For example, property is described as being "in the hands of" someone (over 600 times in the regs alone, according to Lexis). If the drafters wanted to eschew metaphorical language, why didn't they say "in the possession of," or "in the control of" someone?

Oh well, I'm glad they didn't. I believe I have won our bet. Hope to see you again soon Susan.

metaphors, metonymies, personifications, and other tropes appearing in court opinions have attained permanence, have become institutionalized and relied upon as principles, standards, doctrines, and premises in arriving at judicial judgments." As my colleague discovered, legislators and administrative agencies are no more immune to using figures of speech than are judges.

My bet with my colleague, and this book, reflect a very old, but timeless, debate about the role of language, or more broadly, rhetoric, in the creation of truth. Bosmajian quotes philosophers who vilified the use of figurative language in discourse about truth and reality. John Locke presents the typical view:

If we would speak of things as they are, we must allow that all the art of rhetoric, besides order and clearness, all the artificial and figurative application of words eloquence hath invented, are for nothing else but to insinuate wrong ideas, move the passions, and thereby mislead the judgment, and so indeed are perfect cheat; and therefore however laudable or allowable oratory may render them in harangues and popular addresses, they are certainly, in all discourses that pretend to inform or instruct, wholly to be avoided and, where truth and knowledge are concerned, cannot but be thought a great fault either of the language or person who makes use of them.⁴

Yet the book notes that scholars and practitioners of the law have always had a natural interest in figurative language, realizing, as Richard Posner points out, "that in the areas of law that matter—the areas of disagreement—to divorce style and content is not an attainable goal."⁵ Bosmajian believes that instead of attempting to "purify" our language—eliminating style and figures of speech—our efforts should be directed at understanding how legal language functions. This is Bosmajian's goal.

Bosmajian is quick to point out both the benefit and burden of figurative language, quoting one of the most accomplished authors of judicial prose, Benjamin Cardozo: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."⁶ Metaphors and other figures of speech have a wonderful power to make the abstract concepts and doctrines of the law become concrete, and thus real, to those who must understand and apply them. However, when we are unconscious or

4. John Locke, *An Essay Concerning Human Understanding* 327, quoted in Bosmajian at 37-38.

5. Richard A. Posner, *Law and Literature: A Misunderstood Relation* 298 (1988), quoted in Bosmajian at 13.

6. *Berky v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926) (Cardozo, J.), quoted in Bosmajian at 12.

forgetful of the suggestive power of language, we risk becoming limited by the images that we have selected in the past or, more ominously, by the images that others have selected for us. This is why Bosmajian's topic is so important. Critics of the use of legal language can make us see, for the first time, or in a new way, what we have overlooked about the dominant images in our language. Criticism of legal rhetoric is not an easy task. Although Bosmajian's recent work is a solid and scholarly contribution, it reflects many of the problems that face any critic of language in law.

Haig Bosmajian is a professor of speech communication at the University of Washington, Seattle. His particular scholarly interest is the First Amendment, and he uses that body of constitutional law to explore the use of certain figures of speech in judicial decisions. He readily acknowledges, however, that figures of speech regularly appear outside of the constitutional context, and challenges "others to make what they will of 'yellow dog contracts,' 'wraparound mortgage,' 'ripe for adjudication,' 'at first blush,' 'floating capital,' 'heir of the blood,' 'negative pregnant' and 'dead freight.'" Moreover, he restricts his investigation to certain types of figures of speech, those that he classes as "tropes," including metaphor, metonymies and personification. In this sense, the title of the book is a bit misleading, as it concerns more than metaphor in judicial opinions. Of course, "Tropes and Reason in Judicial Opinions" does not make an accessible or interesting book title.

Unfortunately, Bosmajian creates a serious problem for his reader by postponing definition of his central concepts of metaphor, metonymy and personification until about three-fourths of the way through the book.⁷ Here, Bosmajian collects several observations by other scholars. For example, to distinguish metaphor and metonymy, he quotes J. David Sapir:

Metaphor states an equivalence between terms taken from separate semantic domains: George the Lion might be an expression applied to a football player, for instance. Metonymy replaces or juxtaposes contiguous terms that occupy a distinct and separate place within what is considered a single semantic or perceptual domain. Homer will often be used instead of the *Iliad* ("You will read in Homer. . ."), where agent replaces act; or the phrase "deep in his cups," where "cups" as container stands for the sherry or wine that is contained.⁸

Quoting Kenneth Burke, Bosmajian states "The basic 'strategy' in

7. My preferred definition of metaphor appears supra note 3.

8. J. David Sapir, ed., *The Social Use of Metaphor* 4 (1977), quoted in Bosmajian at 145.

metonymy is this: to convey some incorporeal or intangible state in terms of the corporeal or tangible, e.g., to speak of 'the heart' rather than 'the emotions.'"⁹

We are told that metaphor and metonymy have different functions. Bosmajian quotes George Lakoff and Mark Johnson:

Metaphor is principally a way of conceiving of one thing in terms of another, and its primary function is understanding. Metonymy, on the other hand, has primarily a referential function, that is, it allows us to use one entity to *stand for* another. But metonymy is not merely a referential device. It also serves the function of providing understanding.¹⁰

Bosmajian turns to Hugh Blair, an eighteenth-century Scottish professor of rhetoric, to define personification as "when we introduce inanimate objects acting like those that have life."¹¹

If you find these definitions somewhat confusing, I am not surprised. The problem with the belated assortment of definitions Bosmajian offers is that we are subjected to the general scholarly confusion about the definition of metaphor and other tropes. As Wayne Booth has noted, "[m]etaphor has by now been defined in so many ways that there is no human expression, whether in language or any other medium, that would not be metaphoric in *someone's* definition."¹² While we might not expect Bosmajian to provide the definitive definition of metaphor, it would have helped if, early in the book, he had shaped his own definitions for the tropes he discusses. Bosmajian provides us with no sure common ground on which to evaluate his characterizations of metaphors and other tropes in the First Amendment cases. Bosmajian aimed at keeping his book "free of legalese and academese, making the book accessible to the educated layperson." He did keep the book relatively free of clear definition, but this undermines his objective of accessibility. It is a sad comment that experts in communication, not only Bosmajian but also those scholars he quotes, have such a difficult time helping even an educated and interested audience understand the basic terms of their discipline.

For a sophisticated¹³ or undaunted reader, Bosmajian has col-

9. Kenneth Burke, *A Grammar of Motives and Rhetoric of Motives* 506 (1962), quoted in Bosmajian at 144.

10. George Lakoff and Mark Johnson, *Metaphors We Live By* 36 (1980) (emphasis in original), quoted in Bosmajian at 145.

11. Hugh Blair, 1 *Lectures on Rhetoric and Belles Lettres* 327 (1965), quoted in Bosmajian at 167.

12. Wayne C. Booth, *Metaphor as Rhetoric: The Problem of Evaluation*, in Sheldon Sacks, ed., *On Metaphor* 48 (U. of Chi. Press, 1979) (emphasis in original).

13. In ancient Greece, the sophists were some of the first teachers and writers on the

lected a rich body of material for analysis. In his introductory three chapters, Bosmajian addresses the function of the judicial opinion and the function of style—specifically the tropes of metaphor, metonymy and personification—in the judicial opinion. His final six chapters focus on specific figures of speech in the First Amendment context. He examines the metaphors of “the marketplace of ideas,” a “wall of separation” between church and state, “chilling effect,” “captive audience” and “fires” of speech that lead to a “conflagration.” He looks at the application of the trope of metonymy in his chapter entitled “‘Shedding’ Rights at the ‘Schoolhouse Gate’ and Other Judicial Metonymies.” He also considers the use of personification, including the most familiar personification of law—“the ‘lady of Justice,’ Themis, who is blindfolded, with a scale in one hand and a sword in the other, the former conveying balanced judgment, the latter authority and protection.” In each of these chapters, Bosmajian discusses the history of the particular trope, provides examples of its use in various judicial decisions, demonstrates its impact on subsequent opinions and discusses whether the particular trope is appropriate and effective.

Bosmajian’s approach illustrates the problems of attempting to analyze and evaluate legal rhetoric. How do you measure the significance of a metaphor? More generally, how should you judge the merits of legal discourse?

Bosmajian tends to weigh the significance of a metaphor by the number of times it is quoted by subsequent judicial opinions.¹⁴ He puts forward his conclusion, for example, that the “marketplace of ideas” is a significant judicial metaphor, and then proceeds to put all of his data before us, repeating some examples several times within a chapter, and then again in other chapters.¹⁵ The chief

subject of rhetoric. See George A. Kennedy, *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times* (U. of N.C. Press, 1980). Plato, a particularly accomplished rhetorician himself, began the smear campaign against the sophists, their techniques and their philosophy in the *Gorgias*.

14. A similar methodology is employed by scholars who purport to measure the impact of law reviews by the number of times they are cited. See e.g., Janet M. Gumm, ed., *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 Chi.-Kent L. Rev. 509 (1990); Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 Cal. L. Rev. 1540 (1985). The methodology is not completely worthless, since it suggests which journals are more likely to be read than others, but it is extremely limited in explaining either why a particular journal is read frequently or why a particular article may be significant. See Max Stier, Kelly M. Klaus, Dan L. Bagatell and Jeffrey J. Rachlinski, *Law Review Usage and Suggestions For Improvement: A Survey of Attorneys, Professors, and Judges*, 44 Stan. L. Rev. 1467, 1474-75 (1992).

15. An example of Professor Bosmajian’s approach:

When in 1988 the Supreme Court unanimously decided for *Hustler* magazine and against Jerry Falwell, who had sued the magazine to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress, [then] Justice Rehnquist, delivering the opinion of the Court, relied on the “marketplace of ideas”

problem with this approach is that the critic becomes merely a cataloguer, collecting and labelling specimens. A secondary problem with this approach is that Bosmajian's examples tend to exhaust and numb the reader rather than to highlight the metaphor. However, one advantage of this method is that it starkly reveals how poor judges are at creating fresh metaphors, and how easily they are trapped by stale metaphors.¹⁶

Bosmajian does not explain clearly how he thinks we should evaluate judicial rhetoric. His explicit standard is this: "Are the tropes useful in creating clearer perceptions, or do they confuse and mislead?" But this approach comes close to adopting Locke's standard—language should be a conduit of the truth rather than a device to obfuscate the truth. At another point, however, Bosmajian seems to recognize that this is a false dilemma, for he states "[t]hrough metaphors, whether political, economic, judicial, or everyday expression, we define and redefine our 'realities' and our 'truths.'" While reading Bosmajian's book, one longs to see him engage in less taxonomy and more analysis and reflection, exploring the full function of the metaphor and other tropes in creating our "realities" and "truths" about the First Amendment.

Bosmajian quotes with approval the philosopher Monroe Beardsley: "Because of its very complexity, its multiplicity of meaning, a metaphor is hard to control—to keep from saying things you don't want to say, along with the things you do want to say."¹⁷ While "unintended" meanings can be problematic from a logician's point of view, they can be very important to a critic of legal language such as Bosmajian, because they can reveal how a metaphor has functioned to shape our perspectives, sometimes more clearly and candidly than "intended" meanings.

To explore intended and unintended meanings sounds very nice in theory, but how do you do it? Bosmajian is at his best when he shows us some of his techniques. His primary method is etymological—explicating the historical roots of words.

His use of this approach is particularly effective in analyzing the "captive audience" metaphor as applied to the First Amendment rights of public school students. In *Tinker v. Des Moines In-*

three times, the personification "breathing space" for First Amendment freedoms three times, and the metaphoric "chilling effect" once, along with "fighting words" and several other tropes. The judiciary's heavy reliance on this type of nonliteral language demonstrates that tropes are an integral part of the opinions of the courts. (footnote omitted).

16. Notice how difficult it is to refrain from resorting to metaphor even in discussing metaphor.

17. Monroe Beardsley, *Thinking Straight* 245 (2d ed. 1950), quoted in Bosmajian at 38.

dependent Community School Dist.,¹⁸ which held that public school officials violated the First Amendment by disciplining students for wearing black armbands to protest the war in Vietnam, Justice Fortas stated: "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."¹⁹ Bosmajian contrasts Justice Fortas's view with that of former Chief Justice Warren Burger and of Chief Justice Rehnquist. In *Bethel School Dist. No. 403 v. Fraser*,²⁰ which held that a school board's action in disciplining a student for a sexually suggestive speech nominating a classmate for a student government office did not violate the First Amendment, Chief Justice Burger quoted two historians as saying that public education " 'must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' "²¹ Justice Rehnquist, in his dissenting opinion in *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*,²² held a similar view: "The idea that such students have a right to access, *in the school*, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education."²³

By using an etymological approach, Bosmajian reveals another dimension to Chief Justice Burger and Justice Rehnquist's position. Professor Bosmajian exposes "inculcative education" as an oxymoron—a contradiction in terms. He states:

There is an anomaly in the Court's asserting that students are not "closed-circuit recipients" and then telling us that the schools have an inculcative function. *Inculcation*, unlike *education*, implies that students are closed-circuit recipients. The word *inculcate* is derived from the Latin *inculcare*, which means literally "to stamp in with the heel, tread in, cram in, press in, impress upon (the mind)." It is not coincidental [sic] that the first uses of the word *inculcate* dealt with religious matters related to faith and not inquiry, to doctrine and not diversity, to orthodoxy and not freedom.

In contrast, *educate* means literally "to lead out, to elicit, to draw out," the word *educate* being derived from *e-ducare*. To

18. 393 U.S. 503 (1969).

19. *Id.* at 511.

20. 478 U.S. 675 (1986).

21. *Id.* at 681, quoting C. Beard and M. Beard, *New Basic History of the United States* 228 (1968).

22. 457 U.S. 853 (1982).

23. *Id.* at 914 (emphasis in original).

educe, unlike *inculcate*, means to arrive at something through reasoning. Inculcating students runs counter to the Court's position in *Tinker* that students are not "closed-circuit recipients of only that which the State chooses to communicate." (emphasis in original).

Although etymological analysis is often intrinsically interesting to students of language, and revealing of the Justices' pedagogical bias in the school cases, a perceptive critic cannot proceed by it alone, and Bosmajian relies on it almost exclusively. The etymological approach is limited to revealing a shift from the historical roots of a word to its present use. In the school cases, for example, the shift suggests that Chief Justice Burger and Justice Rehnquist have very definite opinions about how children should be taught, opinions that shape the Justices' view of the First Amendment in a very different way than Justice Fortas viewed it in *Tinker*.²⁴ An etymological analysis provides this evidence even though the Justices did not make their pedagogical and philosophical biases explicit.

However, an etymological approach does not help the critic go beyond this—to explore the present meaning or to explain why the shift from the historical roots occurred. Indeed, one can make a similar criticism of textualist judges who use etymology to justify meaning that is allegedly plain.²⁵ Etymology can be used to make it seem as if individual words have a particular, fixed, or natural meaning, which the reader is supposed to accept and which always supports the writer's point of view. While resort to etymology provides interesting historical background that may be relevant to the present interpretation of a constitutional or statutory provision, it alone does little to justify that present interpretation.²⁶

Bosmajian's analysis is also limited by its excessive focus on one type or category of figurative speech. In focusing on tropes, Professor Bosmajian explicitly excludes from his discussion an anal-

24. *Bethel* and *Tinker* represent two polar opposite views of the function of education: assimilation to the dominant culture (*Bethel*) and exposure to a multiplicity of ideas, thus enabling the individual to select the "best" (*Tinker*). The oxymoron "inculcative education" reflects a preference for a particular foundational paradigm of the First Amendment. See Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. Rev. 103, 143-148 (1992).

25. See Dennis R. Klinck, *The Word of the Law: Approaches to Legal Discourse* 336-37 (Carleton U. Press, 1992) (criticizing etymological approach using Canadian and English cases).

26. Moreover, if you are going to use an etymological approach, you have to do it correctly. For example, in attempting to argue for a plain-meaning interpretation of the confrontation clause, Justice Scalia got the etymology of "confrontation" completely wrong in *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). See Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 Minn. L. Rev. 623, 637-38 (1992).

ysis of a different category of figures, "schemes, (such as antithesis, asyndeton, anaphora, antimetabole)," arguing that while these techniques may contribute to persuasive effect, "they do not have the impact on meaning or conceptualization that tropes do." This is a highly debatable point, and Bosmajian does not defend it.

For example, using Bosmajian's most common standard of evaluation, frequency of citation, Justice Holmes's classic antithesis, "[t]he life of the law has not been logic: it has been experience,"²⁷ probably has been quoted more frequently than any of the metaphors that Bosmajian identifies.²⁸ The value of this antithesis is more, however, than the fact that it made a good "sound bite." By pitting the term "logic" against the more inclusive term "experience," Justice Holmes helped to shape a jurisprudential landscape. In Justice Holmes's antithesis, "logic" means formal logic, such as the syllogism. But "experience" may include both formal logic and "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men."²⁹ The notion of "experience" as a source of law foreshadowed the movement to legal realism and to its successors, such as critical legal studies, feminism and pragmatism. Indeed, the scheme of antithesis has a "conceptual" function. It parallels and reinforces the adversarial structure—plaintiff versus defendant, guilty versus not guilty, liable versus not liable. This form can contribute to our tendency to view "truth" in a legal context as one of two choices, and direct our energy toward choosing one of two alternatives instead of searching for a third alternative, a fourth alternative and onward. In this sense, the scheme of antithesis is just as important to conceptualization as the tropes of metaphor, metonymy or personification.

Criticism that focuses on just one type of figure leaves out a good bit of the story. Sometimes there is good reason to focus on one metaphor to address a larger story.³⁰ But when one attempts a broader project, such as Bosmajian's, a critic might be more helpful in analyzing the variety of figures that judges use, how the figures contribute individually to the message, and how they interact with

27. Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little, Brown & Co., 1881).

28. Richard Posner attempted to measure Benjamin Cardozo's reputation using a similar standard of frequency of citation. Richard A. Posner, *Cardozo: A Study in Reputation* 72-79 (U. of Chi. Press, 1990). And, as with the law review citation studies, *supra* note 14, Judge Posner has been criticized for using this rough quantitative measure to draw qualitative conclusions about reputation. See Book Note, *The Judge's Path to Greatness*, 104 Harv. L. Rev. 788, 792 (1991) (reviewing Richard A. Posner, *Cardozo: A Study in Reputation* (1990)).

29. Holmes, *The Common Law* at 1 (cited in note 27).

30. See, e.g., Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988).

one another. For example, is the scheme of antithesis reinforced by metaphors of confrontation or personification? Does the speaker portray abstract entities going "head to head"? Moreover, a critic might go beyond figures of speech to explore how the figures work within the overall structure and form of the text. Is a text, containing several antitheses and metaphors of confrontation, divided into two contrasting sections, sending and reaffirming the message that the truth is only one of two choices? There are many tools and techniques that a critic may use, including a growing body of social science study into how we use metaphor, other figures of speech and linguistic forms.³¹ These studies cannot replace a sensitive critic in arguing about the meaning of a piece of judicial rhetoric, but they provide additional material for the critic's argument.

Bosmajian has made a sound contribution to the ongoing discussion about the role of language in legal discourse. His book does reveal several methodological problems with which all critics of legal discourse must contend. These problems provide additional opportunities for investigation and argument. They are not reasons for rejecting Bosmajian's central message: Law is language-based. As judges, academics, legislators, and lawyers—even tax lawyers—we should watch our language.

NATURAL LAW THEORY: CONTEMPORARY ESSAYS.
Edited by Robert P. George.¹ New York: Clarendon Press,
Oxford. 1992. Pp. 371. \$39.95.

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I

A little over a decade ago, John Ely explained that natural law is, for purposes of constitutional adjudication at least, "uselessly vague." This defect is also, Ely suggested, the source of natural law's persistent appeal: "The advantage, one gathers, is that you can invoke natural law to support anything you want. The disadvan-

31. Although we still have a great deal to learn. See Calvin Morrill and Peter C. Facciola, *The Power of Language in Adjudication and Mediation: Institutional Contexts as Predictors of Social Evaluation*, 17 *Law & Social Inquiry* 191 (1992); Richard D. Rieke and Randall K. Stutman, *Communication in Legal Advocacy* 210-11, 216-18 (U. of S. Carolina Press, 1990) (collecting research and applying it to closing arguments).

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