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Everything Old is New Again: An Essay Review of Anthony G. Amsterdam & Jerome Bruner, Minding the Law

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Book Review

Everything Old Is New Again: An Essay Review of Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (Harv. U. Press 2000)

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Introduction

In the first chapter of their excellent book, *Minding the Law,* Anthony Amsterdam and Jerome Bruner provide an *Invitation to a Journey* to make "the already familiar strange again."[1] In the course of piloting our voyage, they tackle a number of United States Supreme Court cases from a set of perspectives both numbingly familiar and strikingly different from that to which lawyers are accustomed. The words the authors use and the things they examine are familiar, so familiar in fact that they have receded into the background and become just part of what we do. As they put it, "when our ways of conceiving of things become routine, they disappear from consciousness and we cease to know *that* we are thinking in a certain way or *why* we are doing so."[2] In order to crack open this shell of sameness, they take a fresh look at four fundamental aspects of legal

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1. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 1 (2000) [hereinafter MINDING THE LAW].

2. *Id.*

decision making: categorization, narrative, rhetoric, and the culture in which they occur.[3]

Amsterdam, a lawyer and law professor, and Bruner, a cultural psychologist, structured the book by discussing and critiquing certain aspects of a topic in one chapter followed by applying and illustrating those ideas at work in Supreme Court cases in the next. Thus the second chapter, *On Categories,* is an interesting exposition on the problem of categorization (When is something within the group and when is it not? What determines relevance?) and the third chapter, *Categorizing at the Supreme Court*, examines two Supreme Court cases, *Missouri v. Jenkins*[4] and *Michael H. v. Gerald D.*[5] The next pair of chapters are *On Narrative* and *Narratives at Court,* followed by *On Rhetorics* and *The Rhetoric of Death.* The last pair are *On the Dialectic of Culture* and *Race, the Court, and America's Dialectic.*

The book concludes as it begins, with a rich overview of the trip in *Reflections on a Voyage.* The voyage metaphor is apt as each pair of chapters seems to be a port of call with the first of the pair being a map to a strange and interesting place, and the second being the actual exploration of the city with the map in hand. It turns out that the cities are actually familiar to us, but the new map and guidebook make them fresh again. As a vacation to another land can make you see your own country anew, reading this book can refresh your understanding of your own daily work.

Part of the pleasure of reading this book is that the authors invite skepticism. The authors believe what they wrote, but through regular shifts to meta-level commentary,[6] they sometimes explicitly and more often implicitly invite the reader to disagree, to read the same thing differently, to shift emphasis, to think.

While providing rich and interesting substance, the book is in no small part about method and it provokes the reader into

3. *See id.* at 2-3.

4. 515 U.S. 70 (1995).

5. 491 U.S. 110 (1989).

6. *E.g.*, MINDING THE LAW, *supra* note 1, at 10 (discussing their own biases and the inability to explore all or even a significant fraction of the alternative "*might have*" categorizations which the Court *might have* adopted in place of the one they argue it did).

using that method. It is so provocative, in fact, that I have adopted some of the voice and style of the book (e.g., having a clearly present speaker throughout), and have chosen to review the book by applying, in very truncated and simplified form, each of the book's four main concepts, i.e., categorization, narrative, rhetoric, and cultural dialectic. I decided to proceed in this way not only to contribute something perhaps to the discussion of these four concepts, but also because it seems to me to be the best way to bring alive for the reader what Amsterdam and Bruner are really about, i.e., refreshing our vision. The illustrations they chose were not haphazard and are not incidental to their point; I am sure they wanted to critique the cases they critiqued substantively and methodologically. But they have done that. I want to show that their approaches can be applied effectively to at least a few other cases and, by extension, more broadly to other cases and laws. And I want to show this by actually doing it; the book is also about learning by doing, about applying the methods taught.[7]

When categorization masks the decisive factors

On Categories is a rich and wide-ranging exposition about the nature, use, sources, and hazards of categories. After a brief discussion of the inevitability of categorizing, the authors start us out with a working definition. I quote not only the definition, but also some of the discourse surrounding it in order to capture some of the tenor of the book:

> What do we mean by *categories* anyway? . . .
>
> Let's concoct one of those bare but useful definitions that are designed not to settle matters but to open them to closer inspection. Here is one such:
>
> > A category is a set of things or creatures or events or actions (or whatever) treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other.
>
> We'll unpack some of these terms very soon. But before we do that–and to help us on the way–we need to have a quick look at

7. *See id.* at 290.

> the question of what our categories do for us, what functions they serve.[8]

The authors articulate six rules about categories:

(1) categories are made, not found;[9]

(2) categorizing is an act of meaning making;[10]

(3) categories imply a world that contains them;[11]

(4) categories serve particular functions;[12]

(5) categories become entrenched in practice;[13] and

(6) categories are never final.[14]

Of these, I find the first and last to be the most direct challenges to the way lawyers and judges typically work. Categories are not externally real, eternal, and immutable. They are human creations, temporary, and changeable. No two things are identical. In reality, nothing is other than what it is without any labels, categories, or names applied to limit or define it. But, for a variety of reasons, including nature and mental shorthand, humans categorize things.

Generally this drive to categorize is unobjectionable, even necessary and appropriate. But at times the categories can control us in ways that are either invisible or that at least mask what is really happening. Placing a case in one category or another is more properly a conclusion than an explanation. The better answer to the question "Is this set of circumstances a battery?" is one which focuses on the conduct and the definition of a battery, rather than one which simply concludes that "this is a battery." For most cases one need not examine in depth what a battery is, but there are cases where the limits of the received category of battery must be reexamined and possibly redefined, e.g., whether a reflexive retaliation is sufficiently intended to constitute "intent" within the meaning of battery.

The authors trace the categorizing moves made by Chief Justice Rehnquist in the *Jenkins* case to show "*that* a catego-

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8. *Id.* at 20. Please note the meta-discourse and the obvious presence of the authors in the text.

9. *Id.* at 27.

10. *Id.* at 28.

11. MINDING THE LAW, *supra* note 1, at 29.

12. *Id.* at 32.

13. *Id.* at 36.

14. *Id.* at 37.

rizing move is being made, *how* the move is accomplished, and *what function* it serves in the larger movement of the opinion."[15] A central issue in *Jenkins* was the distinction between interdistrict and intradistrict remedies for school segregation.[16] In *Jenkins* the district court which had oversight of the Kansas City, Missouri School District had sought to make the city's schools attractive to suburban white students by requiring a substantial investment of money in capital improvements and human resources. Better schools, it was hoped, would motivate suburban parents to choose to send their children to the magnet schools in the city.[17] This action was deemed by Rehnquist to be a prohibited interdistrict remedy because the districts from which the non-minority students were to be drawn were not under the jurisdiction of the district court.[18] The categorization problem with Rehnquist's decision is that the lower court's remedy required action only by the school district before the court.[19] The other districts would be affected, if at all, only by students being attracted to the subject jurisdiction.[20] The order was made to induce interdistrict movement, not mandate it.[21] The authors show how Rehnquist's opinion reaches the result that categorizes the remedy as an offending interdistrict one through specious categorizing moves.[22]

As Amsterdam and Bruner demonstrate, categorizing affects decision making in ways subtle and unsubtle. The words and concepts we choose affect the way we analyze and discuss things.[23] If we choose one set of categories, then the analysis will proceed along certain lines. Choosing another set will result in a different analysis and may well result in a different conclusion. Examining the use of categories and the ideas behind the selection of categories can illuminate the decision-

15. *Id.* at 61.

16. *See* 515 U.S. at 92-102. Constitutional law surrounding aspects of education is a recurrent theme in this essay.

17. *Id.* at 75-77.

18. *Id.* at 92.

19. MINDING THE LAW, *supra* note 1, at 61-63.

20. *Id.* at 65, 68.

21. *Id.* at 64-65.

22. *Id.* at 55-77.

23. *See also* Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect,* 65 U. COLO. L. REV. 519, 526 (1994) (discussing the framing of analysis through the words and approaches chosen to discuss a problem).

making process and can, perhaps, help advocates better understand how to use categories instrumentally, particularly with respect to one particular audience, the Justices of the Supreme Court.

One case that illustrates the interpretive power of categories and how the selection of categories frames the analysis is a religious freedom case, *Rosenberger v. Rector & Visitors of the University of Virginia*.[24] The Court has at times, as one of the Justices did in *Rosenberger*, explicitly recognized the limits of categorizing. As stated by Justice O'Connor in her concurring opinion, "the [*Everson*] decision reflected the need to rely on careful judgment–not simple categories–when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict."[25]

The *Rosenberger* case illustrates both the power of and the limits of the use of such categorizing. The majority opinion written by Justice Kennedy initially categorizes the case as one of free speech.[26] In doing so, the test for whether a state could fund a student organization's newspaper which "primarily promote[s] or manifest[s] a particular belief in or about a deity or an ultimate reality" became one of state regulation of the content of the speech that would require a compelling state interest to overcome.[27] One question for the majority was whether the Establishment Clause constituted an interest compelling enough to permit or even prohibit the university from supporting the religious speech.[28] The majority held that it was not.[29] In doing so, the majority relied on its versions of neutrality and equality of access[30] plus its concern that a contrary ruling would involve the state too deeply in reviewing the content and viewpoints of the student works.[31] It stated that such an "eventuality raises the specter of governmental censorship, [sic] to ensure

24. 515 U.S. 819 (1995).
25. *Id.* at 849.
26. *See id.* at 828-37.
27. *Id.* at 836.
28. *See id.* at 837.
29. 515 U.S. at 842-43.
30. *See id.* at 839, 842.
31. *See id.* at 845-46.

that all student writings and publications meet some baseline standard of secular orthodoxy."[32]

While there are many categories at work here, e.g., neutrality, equality of access, establishment of religion, censorship, free speech, the proper role of a university as a place for free exchange of ideas, and so on, the overriding ones to Justice Kennedy and the majority were free speech and neutrality. These two principles framed their entire approach to the issue. These categories are neither irrelevant nor inappropriate, but they are not the only ones which provide a way in which to view the case. But for reasons that are not fully explained, and perhaps not fully explainable, the majority found categorizing the case as a free speech and neutrality case more persuasive than the alternatives.

The dissent[33] took a different approach. In his dissent, Justice Souter categorized the issue as a separationist problem because the state was clearly supporting religion by paying for the publication.[34] As stated by Justice Souter, "The principle against direct funding with public money is patently violated by the contested use of today's student activity fee."[35] Justice Souter himself highlights the role of categorization of the activities of the student organization in the majority opinion (though Justice Souter does not use the same categorization vocabulary as Amsterdam and Bruner):

> Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? The answer must be in part that the Court fails to confront the evidence set out in the preceding section.[36] Throughout its opinion, the Court refers uninformatively to Wide Awake's "Christian viewpoint," *ante,* at 826, or its "religious perspective," *ante,* at 831-832, and in distinguishing funding of Wide Awake from the funding of a church, the Court maintains that "[Wide Awake] is not a religious institution, at least in the

32. *Id.* at 844.

33. *Id.* at 863.

34. 515 U.S. at 864-65, 868.

35. *Id.* at 873 (Souter, J., dissenting).

36. In that section Justice Souter provided detailed information demonstrating that the publication in question was not merely one expressing a Christian viewpoint, but rather was one explicitly evangelical and proselytizing. *See id.* at 865-69.

> usual sense." *ante,* at 844; [footnote omitted], see also *ante,* at 825-826. The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus Christ, or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.[37]

Here we can see Justice Souter highlighting that the categorization of this student group matters and informs the analysis of the Court. It is a religious organization and an evangelical one at that.[38] It is not merely a club with a Christian viewpoint.[39] To Souter and the three dissenters who joined him, the *Rosenberger* case was about direct government funding of religious proselytization.[40] That was the right category for them.

Justice Souter then sought to determine whether other principles would override the establishment violation.[41] He found neutrality to be lacking in force to overcome the clear violation.[42] Indeed, he found that the majority's application of the law relating to neutrality to be flawed even though the principle was stated mostly correctly.[43] Justice Souter examined the Court's religious neutrality decisions in greater detail than had the majority and wrote:

> Evenhandedness as one element of a permissibly attenuated benefit is, of course, a far cry from evenhandedness as a sufficient condition of constitutionality for direct financial support of religious proselytization, and our cases have unsurprisingly repudiated any such attempt to cut the Establishment Clause down to a mere prohibition against unequal direct aid.[44]

Justice Souter concluded:

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37. *Id.* at 876-77.
38. *See id.* at 877.
39. 515 U.S. at 876-77.
40. *Id.* at 882.
41. *Id.* at 877-78.
42. *Id.*
43. *Id.* at 877.
44. 515 U.S. at 882 (citation omitted).

> Since conformity with the marginal or limiting principle of evenhandedness is insufficient of itself to demonstrate the constitutionality of providing a government benefit that reaches religion, the Court must identify some further element in the funding scheme that does demonstrate its permissibility. For one reason or another, the Court's chosen element appears to be the fact that under the University's Guidelines, funds are sent to the printer chosen by Wide Awake, rather than to Wide Awake itself.[45]

Here again we see a categorization: to the majority direct payment to Wide Awake is different from direct payment of its bills.[46]

Though much, much more could be said about categorization and the role of categories in the *Rosenberger* opinions (and indeed in religious freedom cases generally), the last word goes to Justice O'Connor:

> When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging–sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.[47]

Stories make the world

Amsterdam and Bruner boldly start their discourse *On Narrative* with the statement: "Law lives on narrative, for reasons both banal and deep. For one, the law is awash in storytelling."[48] The statements of facts, the stories told by witnesses, clients, and attorneys, and no less certainly, by judges, are all narratives.[49] But the authors are after something deeper, something about how the legal narrative is persuasive to the extent it best describes "*what happened* or *how the world works*."[50] Stories do not just recite what happened; rather "in some profound, often puzzling way, stories *construct* the facts that

45. *Id.* at 886.
46. *See id.* at 842-44, 850.
47. *Id.* at 847 (citation omitted).
48. MINDING THE LAW, *supra* note 1, at 110 (footnote omitted).
49. *See id.*
50. *Id.* at 111.

comprise them. For this reason, much of human reality and its 'facts' are not merely recounted by narrative but *constituted* by it."[51]

Furthermore, the very rules of the law, the rights, duties, and principles comprising the law, "are grounded in what our culture designates as *mattering*. And what does or doesn't matter to a culture can be traced back through the culture's stories, its genres, to its enduring myths."[52] The authors continue: "Narrative is the carrier of those myths and, at the same time, our means for recognizing that a present situation needs telling in a way linked to this myth or that one."[53]

The authors create an "Austere Definition" of narrative to be used to look for stories.[54] They note that this "bare-bones definition" acts "both as a guide and a set of cautions."[55]

> A narrative can purport to be either fiction or a real account of events; it does not have to specify which. It needs a cast of *human-like characters*, beings capable of *willing their own actions, forming intentions, holding beliefs, having feelings*. It also needs a *plot* with a beginning, a middle, and an end, in which particular characters are involved in particular events. The unfolding of the plot requires (implicitly or explicitly):
>
> (1) an initial *steady state* grounded in the legitimate ordinariness of things
>
> (2) that gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,
>
> (3) in turn evoking *efforts* at redress or transformation, which succeed or fail,
>
> (4) so that the old steady state is *restored* or a new (*transformed*) steady state is created,
>
> (5) and the story concludes by drawing the then-and-there of the tale that has been told into the here-and-now of the tell-

51. *Id.* As fans of *Star Trek* know, there is an episode in *The Next Generation* in which an entire race communicates solely through metaphor. Its entire language consists of truncated narratives and shorthand allusions to stories that illustrate the emotion or meaning sought to be conveyed. In their culture, all communication, and indeed their entire world-view, is literally built on narrative. *Star Trek: The Next Generation: Darmok* (Fox television broadcast, Sept. 31, 1991) (Stardate 45047.2).

52. *Id.* at 111.

53. MINDING THE LAW, *supra* note 1, at 112.

54. *Id.* at 113-14.

55. *Id.* at 113.

> ing through some *coda*–say, for example, Aesop's characteristic *moral of the story*.[56]

The authors then wander into theories about narrative and their motive force.[57] One of the theories that is particularly apt for the law treats narratives as a way "to *model* characteristic plights" of communities.[58] The narratives "represent both the culture's ordinary legitimacies and possible threats to them."[59]

The best part of the narrative chapter, and, in my judgment, of the book, is the section entitled "The Narrative Forge."[60] In this section the authors cogently explain why the elements of the "Austere Definition" matter.[61] Narratives legitimate events by making sense of them and by tying them to what is or to what is believed to be.[62] Narratives transcend and nonetheless are critically dependent upon time.[63] In part they are used to bring the past into the present and to tie the events of the story to our lives and to our culture.[64] The authors also comment on "the nature of Trouble,"[65] on the need for stories to have an end (*telos*),[66] on the importance of addressing the "fate of protagonists,"[67] and on the connective nature of narratives, i.e., on how they categorize and delineate plights–how one story always is something like another.[68]

The authors conclude the chapter by tying narrative to law.[69] Narratives function to establish and reinforce the images of how the world works, and of what is right and what is wrong. They help maintain continuity over time. And narratives provide an accessible means for explaining the need for and the propriety of change; the stories we tell legitimate the changes

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56. *Id.* at 113-14.
57. *See id.* at 114-20.
58. MINDING THE LAW, *supra* note 1, at 117.
59. *Id.*
60. *Id.* at 120-34.
61. *See id.*
62. *Id.* at 121-24.
63. *See* MINDING THE LAW, *supra* note 1, at 124-27.
64. *See id.*
65. *Id.* at 129-31.
66. *Id.* at 127-29.
67. *Id.* at 131-32.
68. MINDING THE LAW, *supra* note 1, at 132-34.
69. *See id.* at 139-42.

we make.[70] For example, the story of King George's maltreatment of the colonies legitimated the Declaration of Independence. Narrative connects with law deeply on this point because "[l]aw is one of society's means for maintaining continuity in value judgments across time and changing conditions."[71] The scale of narratives, their very specificity and human scale, make

> it *humanly* possible to relate the Grand and Timeless Principles [like equality and due process] of a *corpus juris* to the current particularities of the cases we adjudicate or arbitrate or negotiate. . . . "Humanly" possible, because it is through narrative that we provide humanly, culturally comprehensible justifications for our principled decisions and opinions.[72]

After developing these concepts, Amsterdam and Bruner use these concepts of narrative to examine two cases: *Prigg v. Pennsylvania*,[73] the fugitive slave decision authored by Justice Story, and *Freeman v. Pitts*,[74] the decision holding that federal courts should not supervise school districts when segregation is the result of demographics not attributable to state action.[75] Recognizing that the story does not start with *Prigg* in 1842, nor leap from it 150 years to *Freeman*, but equally recognizing that no story has a predetermined time when it starts, the authors choose to give a brief chronology of key events beginning with the adoption of the United States Constitution in 1788, and continuing through the ratification of the Fourteenth Amendment in 1868 and the decision in *Brown v. Board of Education*[76] in 1954.[77] Amsterdam and Bruner are intentionally and transparently and appropriately using the same narrative devices they are examining. They are telling the story of two cases, not merely clinically analyzing and describing them. The way the authors induce the reader to notice the authors' use of

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70. *See id.*

71. *Id.* at 140.

72. *Id.* at 141.

73. 41 U.S. 539, 16 Pet. 539, 10 L. Ed. 1060 (1842).

74. 503 U.S. 467 (1992).

75. *Id.* at 489.

76. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding "separate but equal" unconstitutional); *see also* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (mandating that school districts desegregate with "all deliberate speed").

77. *See* MINDING THE LAW, *supra* note 1, at 141.

what they are talking about in what they talk about and in the way they talk about it is one of the clever artifices they employed that works.

In the *Prigg* opinion Justice Story uses a common narrative device: preambulary information setting the stage with respect to theme, time, place, and characters.[78] Story makes clear that the case is about "a conflict between two governmental entities, both well-intended and cooperative, who can't get their act together without help from the organs of the Union established by the Constitution."[79] It is not about slavery nor fugitive slaves nor abduction; it is about harmonious relations among the states.[80]

The relevant timeframe begins with the adoption of the Constitution, the "steady state" which must be upheld.[81] From this accurate description by Amsterdam and Bruner, we see immediately that the steady state being challenged by the Trouble (disagreements between states about treatment of escaped slaves) is the constitutional compromise to create and preserve the Union.[82] The story is not about slavery or freedom; it is about avoiding doom.[83] It is about acting to preserve the challenged state of things.[84]

Amsterdam and Bruner then draw analogies to the ancient plots of the stories of Caesar and of Helen of Troy – seeing in them, as in *Prigg*, titanic struggles brought on by challenges to the status quo which must be met.[85] In *Prigg* the challenge is met, temporarily, by affirming the primacy of the Union and federal law over state law.[86] But *Prigg* merely delays confronting the underlying great challenge by merely two decades when it resurfaces in the form of the Civil War. And as things have turned out, the challenge, the problem of white dominance of blacks in the United States, is still with us, as the authors

78. *See id.* at 148-49.
79. *Id.*
80. *Id.*
81. *See id.* at 149.
82. MINDING THE LAW, *supra* note 1, at 149.
83. *See id.*
84. *See id.*
85. *See id.* at 154-59.
86. *Id.* at 145-46.

demonstrate in their examination of the narrative aspects of *Freeman*.[87]

I have chosen another race case, *Batson v. Kentucky*,[88] to illustrate the modernity of that self-same challenge and to demonstrate the potential persuasive power of narrative. Unlike both *Prigg* and *Freeman*, which ruled against the challenge and in favor of the pre-existing "steady state," *Batson,* like *Brown,* illustrates the "steady state-Trouble-new equilibrium" legitimating function of narrative.[89] *Batson* is the 1986 Supreme Court decision written by Justice Powell which held that prosecutors could not use peremptory challenges to exclude jurors solely on account of race.[90] Although this case seems to involve a straightforward application of constitutional principles and thus seems to be more of a logic-in-the-law, rule-application sort of case, it is laden with narrative qualities, explicit and implicit.

First, there are the obvious narrative aspects, such as the facts relating to the underlying alleged crimes of second degree burglary and receiving stolen goods,[91] but this is not what the Supreme Court case is about. Then, there is the narrative of the prosecutor using all four of his "peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected."[92] Already the narrative has begun to move from the simple story of crime and accountability to one laden with the historical narrative of race relations in the United States, but this aspect of the narrative is still mostly unremarkable.

The story shifts gears dramatically when:

> Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veiremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws.[93]

87. *See* MINDING THE LAW, *supra* note 1, at 144-64.
88. 476 U.S. 79 (1986).
89. *See generally* MINDING THE LAW, *supra* note 1, at 113-14.
90. 476 U.S. at 84-89.
91. *See id.* at 82.
92. *Id.* at 83.
93. *Id.*

These events bring to the narrative items of great societal moment: liberty, constitutional rights, equality, trial by a jury of one's peers. *Batson* thus becomes a story not only of a defendant, not only about accountability for transgressions; it becomes a story of race relations, of equality, of people excluded from performing a civic right and duty; a story of exclusion from sitting in judgment of one's peers. The critical narrative is not about the defendant per se; it is about the people denied the right to be on the jury.

The Court quickly moves into the story, its story, America's story, of African-Americans sitting on juries. The shift in story line is clear in Justice Powell's opinion when he writes:

> More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.[94]

The time of this story starts with the sought-for steady state of equality (at least with respect to the exercise of the civil right to a fair and impartial jury of one's peers). It starts not with the original constitutional compromise, as did Justice Story's opinion in *Prigg*, but rather with the Civil War Amendments which rewrote the Constitution in favor of equality. The context is not that of prosecutorial prerogatives, long held, but that of race relations. The starting point is not slavery, but equality.

The story is not only about the defendant, or even about just the defendant and the prosecutor; it is also about the juror. Justice Powell writes:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. *See Thiel v. Southern Pacific Co.,* 328 U.S. 217, 223-224 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.* at 227 (Frankfurter, J., dissenting). As

94. *Id.* at 85.

> long ago as *Strauder,* therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.[95]

Let us assume a storyteller's role for a minute, and make up a story about two of the excluded jurors and see what effect that has on the impression of the case.[96] A hypothetical narrative version: The *Batson* case is about African Americans who wanted to serve on a jury. For them it was not the onerous obligation many people today take it to be; rather, it was an cherished, long-denied right. Let us suppose that among the four excluded were two elderly black men who got dressed in their Sunday best, who made the trip to the court, who sat through voir dire, who were not excluded for cause, and who thought they would get to perform this once-unattainable civic duty. But then they are kept off the jury solely because they are black. The most important human story is not that of the defendant or of the prosecutor or even of the Constitution. It is instead the story of two living, breathing, proud men who had seen dramatic changes in civil rights in their lives, but who were then denied something they had earned solely because of their race. This is a compelling story of injustice, of an ongoing plight, of a Trouble that needs to be addressed.

In contrast, the briefs and oral arguments of counsel are very typical, law-oriented briefs almost devoid of any narrative or connection to the human scale. They are, in fact, almost exclusively about the abstractions. Justice Powell is the one who uses legal narrative to connect the small-scale, human story to the grand themes:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to

95. 476 U.S. at 87 (citations omitted).

96. A version of this story was told by Justice Kennedy when he spoke at Howard University School of Law in the early 1990s. Kennedy attributed the story to a conversation he had with Justice Thurgood Marshall and said that the story helped him (Kennedy) see the case in a new light.

> that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."[97]

Thus in *Batson* we see the elements of the "Austere Definition" of narrative played out.[98] There is a cast of human and human-like characters (human institutions like juries and courts), the characters have their own intentions, make choices, act on beliefs, and have feelings. The excluded jurors were hurt by the exclusion because of their race. The plot has a steady state–Powell makes it an ideal one of equality, but one could just as easily point to the real conditions as the challenged steady state. There is Trouble (exclusion of jurors because of race) followed by recourse to the courts in an effort to solve the problem leading to either a restored ideal state (Powell's approach) or a transformed actual state (looking at the here and now as the "steady state").

But what about the last element of plot, the "coda"? The coda ties the narrative to the here and now, to what is actually happening. It connects the story to the reader and to current time. Powell's coda is typical of Supreme Court decisions; he briefly recalls the procedural posture and then remands the case to the lower court with instructions on how to proceed:

> In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.[99]

Justice Powell does not include an Aesopian moral, but he does conclude and tie the entire narrative of the opinion to something real and concrete and current, i.e., what is to be done next on this case.

Perhaps Justice Marshall's concurrence provides a more satisfactory coda:

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97. 476 U.S. at 87-88 (citations omitted).

98. *See generally* MINDING THE LAW, *supra* note 1, at 113-14.

99. 476 U.S. at 100 (citations omitted).

> I join Justice Powell's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available.[100]

Now my epilogue. The problem still exists. A defendant in the District of Columbia was tried four times, all four times leading to hung juries.[101] In each trial the prosecutor used his peremptory challenges to strike potential black jurors while the defense attorney used his to strike white jurors.[102] Prosecutors struck 21 blacks and 3 whites in the last two trials.[103] In the last two trials defense attorneys struck 3 blacks and 19 whites.[104] As reported by journalist Neely Tucker, *Batson v. Kentucky*'s "lofty promise of fair play in the jury box has been steadily undermined by prosecutors, defense attorneys and judges, a growing number of reports and other evidence suggest."[105]

One other aspect Amsterdam and Bruner emphasize is a tie between great literature and the stories of the law.[106] Though I think they may push the point a bit, I do think that the idea of fictional or nonfictional narratives informing decision making is a solid one. A lesson from *MacBeth* is too often forgotten – we teach what we do. By killing the king, MacBeth taught regicide

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100. *Id.* at 102 (quoting Commonwealth v. Martin, 336 A.2d 290, 295 (1975) (Nix, J., dissenting), *quoted in* McCray v. New York, 461 U.S. 961, 965 n.2 (1983) (Marshall, J., dissenting from denial of certiorari)).

101. Neely Tucker, *In Moore's Trials, Excluded Jurors Fit Racial Pattern,* WASH. POST, Apr. 2, 2001, at A1, *available at* http://www.washingtonpost.com/wp-dyn/articles/A23745-2001Apr1.html.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at A6; *see also* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective,* 64 U. CHI. L. REV. 809 (1997); David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis,* 3 U. PA. J. CONST. L. 3 (2001).

106. MINDING THE LAW, *supra* note 1, at 131-34, 139-42.

to MacDuff. Do we not teach killing by the death penalty? Do not vicious politics and personal attacks teach the same? Does not permitting state actors to discriminate on the basis of race in jury selection teach racial discrimination?

That's just rhetoric

The *On Rhetorics* chapter is the most arcane of the book. Ironically, the very chapter that is about techniques of communication, or if you will, about what the book is about, is the most jargon-laden and least accessible. There is some good stuff here, but it is unnecessarily hard work to get through it. Aside from the too-cute-by-half use of the plural "rhetorics" instead of simply "rhetoric,"[107] we encounter arcana such as the "three dimensions of any linguistic utterance: the *locutionary* dimension, the *illocutionary* dimension, and the *perlocutionary* dimension,"[108] and the "Gricean Maxims" for "implicature."[109] Even as we seem to be shifting to what should be more accessible terrain in the section entitled "Rhetorical Devices for Managing Contestability," we run smack into "ontological," "concretizing," "epistemological," "anaphora," and more.[110] Although the points made around these words are interesting and the authors, when they leave behind the terms themselves and focus on the ideas they stand for, generally get interesting again, they seem more to want to engage theory-focused linguists than practical rhetors; more scholars than practitioners and judges. The forced use of these terms is in stark contrast to the breezy, informal tone adopted throughout most of the book (complete with the use of contractions, informal constructions, and annoyingly excessive use of italics).

But on to substance. The authors "take 'rhetorics,' the plural, to denote the various linguistic processes by which a speaker can create, address, avoid, or shape issues that the speaker wishes or is called upon to contest, or that the speaker suspects (at some level of awareness) may become contested."[111]

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107. *See id.* at 165.
108. *Id.* at 167.
109. *Id.* at 170-71. The maxims are so-named for their author Paul Grice. *Id.*
110. *Id.* at 177, 181.
111. MINDING THE LAW, *supra* note 1, at 165 (footnote omitted).

Let's pause a moment to unpack this somewhat. Rhetoric is (rhetorics are?) about addressing contested or contestable ideas or positions or things. It is (they are?) not about the settled world. Of course, in the law almost nothing is really settled or uncontestable (a point the authors make explicitly later in the chapter),[112] so this part of the definition does not much limit the applicability of rhetoric in the law. So the meaningful part of the definition relates to "linguistic processes" used to communicate about (or avoid communicating about) issues.[113] The modifier "linguistic" must mean only that the authors are focusing on the language aspects of communication, and not, for example, on cultural aspects and non-linguistic (non-verbal) cues such as body language.[114]

But what of "processes"? "Processes" includes techniques such as repetition ("anaphora") and concreteness, context, suggested meaning, agreed-upon rules of engagement, and more. "Processes" is a vague, unsatisfying word here, but it is nonetheless the right word because it focuses the reader away from rhetoric as a thing, or set of things, and toward understanding rhetoric as, well, process.

The case chosen by the authors to illustrate their ideas, *McCleskey v. Kemp*,[115] is interesting. The author of the five-person majority opinion upholding the death penalty against a challenge that it was administered discriminatorily was Justice Powell.[116] Powell later changed his mind:

> Yet barely four years later, when Justice Powell was interviewed by his biographer after his retirement from the Court and was asked "whether he would change his vote in any case," he replied: "Yes, *McCleskey v. Kemp*." Powell explained that he had come to think that capital punishment should be abolished because it could not be regularly and fairly administered. This change of heart did not mean that Powell was retrospectively persuaded by McCleskey's "argument from statistics," but it did

112. *Id.* at 173.

113. *Id.* at 165-67.

114. The authors do in fact address some of these aspects quite explicitly later in the chapter, particularly with respect to the importance of context in understanding communication. *See id.* at 168-69.

115. 481 U.S. 279 (1987).

116. *Id.* at 313, 321-22.

mean that he was no longer able to accept his own grounds for rejecting McCleskey's argument.[117]

Amsterdam and Bruner ask the question of just how Powell could have been persuaded one way and then changed his mind a few years later, and their answer is rhetoric, or in their version, rhetorics.[118] They take pains to point out Powell's explanation of the importance of discretion and traditional case-by-case sensitivity of death penalty cases.[119] They unconvincingly seek to show internal inconsistencies and they seem to assert, in effect, that Powell's understanding became clouded by the words.[120]

But I believe that the role rhetoric played in the decision is actually more subtle. Of course Powell understood the equal protection argument. Of course he read the dissenter's views. Of course he agonized over the decision. In the end he went with the idea that death penalty cases are too individuated, and should be so, to use statistical analyses to impugn them. Powell found persuasive the idea that bounded discretion with individuated weighing was the better approach. But why would he so decide? What tipped the scales in favor of the death penalty and individuated application (with biased results), and against a group-based claim of equal protection? I find it hard to credit an argument that he was persuaded by something formal as opposed to substantive in this case.

The rhetoric of individualism, the assumption of fairness, the idea and the expression of the idea of individual responsibility and individual assessment were rhetorical keys that tapped into deeply held values,[121] and those values themselves coupled with intuitive judgments concerning how best to further them are, it seems to me, what persuaded Powell. It was not the rhetoric itself (as defined by Amsterdam and Bruner) that persuaded him, but rather the substantive values in the context of

117. MINDING THE LAW, *supra* note 1, at 194 (footnotes omitted).

118. *See id.* at 202-03.

119. *See id.* at 203.

120. *See id.* at 204.

121. I discuss this aspect of persuasion, i.e., the centrality of connecting your argument to the values of the audience, in the context of Aristotle's *Rhetoric* and *Brown v. Board of Education* in Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection,* 8 SCRIBES (forthcoming Spring 2002) (manuscript on file with Pace Law Review).

his beliefs about how the world worked or could be made to work. Later, when Powell became convinced that the world did not work that way and could not be made to work that way, he changed his mind.

The point is subtle, perhaps too subtle. It is difficult, if not functionally impossible, in decisions like this one to separate the power of the means of persuasion (rhetoric) from the substance of the ideas being served by those means. And this is the weakness of the authors' analysis. In the end I think the rhetoric which appealed to deep cultural myths and values coupled with the judicial system's assumptions of individuated justice overbore the cold, generalized group-based statistics. In a matter of life and death, Powell was understandably reluctant to go with numbers instead of with tempered human judgment. As a concept, this seems sound and in many instances it may be the right approach. But in some settings, at least in practice, as the death penalty statistics continue to demonstrate, reality deviates substantially from theory.

Even though I think the authors may have overstretched their point on the power of rhetorical choices to affect results at the highest levels, rhetoric does matter. The way things are explained and developed can have an impact, especially in close cases. Even if at the end of the day the case is decided on substantive considerations of policy and principle, the correct means to connect the case to those policies and principles, and to the values of the audience must be considered.[122] That is, rhetoric matters.

The underlying substantive problem of individuated treatment versus group-based remedies and classifications is a vexatious one. As urged by Dr. Martin Luther King, we want people judged by the content of their character, not by the color of their skin. We want people assessed on merit, not on birthright attributes. And yet we see, aided by those self-same hard, cold statistics, that there are huge gaps among groups within our society. And here is a rhetorical disconnect: we act in terms of groups as well as autonomously; we think in terms of groups as well as individually; we belong to groups. We are members of groups by virtue of where we live, what income we have, family

122. *Id.*

size, age, and other non-choice related attributes. But the Supreme Court (and others) have continued either to ignore or to disregard this group aspect of justice and its importance in evaluating cases.[123]

The rhetorical sleight of hand of the Court in ignoring the reality of the importance of groups and membership in groups is the same as Justice Powell's rhetorical miscue in *McCleskey*, and can lead to the same sort of disconnect between the Court's decision and the way things are. That is, by emphasizing the individual above all else, the Court buys into and defines the myth that above all else individual merit not only *should* matter most, but that it actually *does*.[124] The group aspect of personhood is discounted formally and institutionally. This is a formal approach with substantive effects. This rhetorical twist can mask the fact that individuals are part of groups and that the social or group aspect helps define who they are; it is part of their individual merit. This individual-centric approach also assumes that merit can be decontextualized and assessed in some universal way unrelated to groups, resources, connections, opportunities, and the like. I do not accuse the Court of subterfuge here. I do not think that it is consciously trying to maintain white supremacy under the guise of individualism. I do not think that it is always being disingenuous in its adoption of this sort of rhetoric. To the contrary, I think many of the Justices actually believe it.

Let's take a close look at some of the rhetorical devices employed by Justice Scalia in *Alexander v. Sandoval*.[125] Justice Scalia starts the decision out with an extremely narrow crafting of the issue: "This case presents the question whether private

123. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (holding individuated intention to discriminate is required for a private cause of action under Title VI of the Civil Rights Act of 1964 and therefore the group-based analysis underlying disparate impact theories of the case does not give rise to a private cause of action).

124. The Court is not alone in this individuated approach to solving group-based problems. For example, California Proposition 209 eliminated race from consideration for admission to California state universities as of August 28, 1997. CAL. CONST. art. I, § 31 (2001); *see also* Martin D. Carcieri, *The Wages of Taking Bakke Seriously: The Untenable Denial of the Primacy of the Individual*, 67 TENN. L. REV. 949 (2000); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241 (2000).

125. 532 U.S. 275.

individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964."[126] The issue, he says, is not whether the disparate impact regulations are lawful, nor is it whether someone other than a private individual could sue.[127] Justice Scalia is setting up the issue to be very narrow for two distinct reasons. First, by seeming to narrow the issue, he patches into the predilection of a number of the Justices to reduce access to the federal courts without directly addressing either the substantive aspects of the case or the effects of reducing access to the federal courts. Second, by defining the issue narrowly now, Scalia seeks to give himself latitude to make sweeping statements which are "mere" dicta later. The exposition to come is sweeping in two respects: (1) it is sweeping in its breadth; and (2) it sweeps out alternative, contesting readings of the law.

Section 601 of Title VI requires that government benefits not be denied on the basis of race, color, or national origin.[128] Section 602 of Title VI permits departments of the United States government to promulgate regulations to effectuate the elimination of discrimination on the basis of race, color, or national origin.[129] Pursuant to this authority, the Department of Justice ("DOJ") promulgated a regulation that required all grantees to abide by the non-discrimination provisions of the law, and which encompassed the disparate impact theory of liability for violating the statute.[130] The DOJ challenged Alabama's constitutional requirement of English-only as discriminating against non-English speakers on the basis of national origin.[131] The district court agreed[132] and the Eleventh Circuit affirmed.[133]

Justice Scalia takes pains to note:

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126. *Id.* at 278.

127. *Id.* at 279.

128. As stated by Justice Scalia, "Section 601 of that Title provides that no person shall, 'on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity' covered by Title VI. 42 U.S.C. §2000d." *Id.* at 278.

129. 42 U.S.C. § 2000d-1 (1994).

130. 28 C.F.R. § 42.104(b)(2) (2001).

131. 523 U.S. at 278-79.

132. Sandoval v. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala. 1998).

133. Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999).

> We do not inquire here whether the DOJ regulation was authorized by § 602, or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin. The petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation.[134]

Justice Scalia then starts his legal analysis by noting as follows:

> Although Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands. For purposes of the present case, however, it is clear from our decisions, from Congress's amendments of Title VI, and from the parties' concessions that three aspects of Title VI must be taken as given.[135]

Let us pause here for a moment. There are three aspects that "must be taken as given."[136] Justice Scalia is not saying that these "givens" are right. Indeed, he is setting up to say just the opposite with respect to the most critical substantive point. Note also the rhetorical device of stringing together the Court's decisions, Congress's amendments, and parties' concessions without parceling them out among the three "givens."[137] The use of "however" and the limiting "for purposes of the present case" further signal to the suspicious reader that something is afoot; to a busy reader, these things may seem ordinary.[138] Scalia is using rhetorical devices to signal where he is going, but doing so in a way that seems unobjectionable. It is only a bit later that one sees the disingenuousness of his craft.

Scalia goes on to state that Title VI does provide a private cause of action under § 601.[139] The question for him is whether this § 601 right extends to regulations promulgated under § 602 which, by its terms, grants government agencies the power to enforce the provisions of § 601 by appropriate regulations.[140] There would seem to be no reason whatsoever to separate the

134. 532 U.S. at 279 (citation omitted).
135. *Id.* at 279.
136. *Id.*
137. *See id.* at 279-80.
138. *Id.*
139. 532 U.S. at 279.
140. *Id.* at 288-91.

sections like this or to impugn regulations like this, except that, as will become clear, Scalia does not like group-based remedies.

Then Justice Scalia, in the face of a dissent which disagrees with him on exactly this point, states that "it is similarly beyond dispute–and no party disagrees–that § 601 prohibits only intentional discrimination."[141] Note the careful rhetorical device here of noting that "no *party* disagrees."[142] This slyly calls to mind the problem of advisory opinions and that the litigation is about the parties, thereby seeking to delegitimize, through this simple rhetorical aside, the dissent's contrary reading of the law and of its panning of the *Bakke*[143] decision.

Scalia then makes a carefully worded concession that "we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."[144] Note the slipping in of "are permissible under § 601."[145] This sets up the idea that the regulations are in conflict with the statute, thereby inviting the next case to challenge the regulations head on. The "even though" clause is completely unnecessary for the narrow issue Scalia claimed to have been deciding.[146] Scalia continues by directly questioning the legality of the disparate impact theory for Title VI actions, but does not hold it illegal because of the procedural posture of the case, i.e., the parties did not raise the issue.[147]

Having thus set up, unnecessarily, these three things, Scalia proceeds to show that under his tortured and selective reading of precedent, § 601 reaches only intentional discrimination (a decision not necessary to reach the narrow issue).[148] This leads him to conclude: "It is clear now that the disparate-impact regulations do not simply apply § 601–since they indeed forbid conduct that § 601 permits–and therefore clear that the private right of action to enforce § 601 does not include a pri-

141. *Id.* at 280.
142. *Id.* (emphasis added).
143. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
144. 532 U.S. at 281.
145. *Id.*
146. *See id.*
147. *See id.* at 281-82.
148. *See id.* at 281.

vate right to enforce these regulations."[149] Scalia distinguishes, for purposes of the grant of a private cause of action, regulations that merely "apply" the statute and those that somehow go beyond it.[150] This is presented as virtually as a given, not as a decision. But why is it clear? What is the causal link? There is none. And it directly conflicts with the third "given" above, i.e., that the Court must take as a given that the regulations are lawful under § 602.

Scalia presents as unalterably correct the Court's current approach to implied causes of action that no implied cause of action arises when a right is created.[151] Instead of taking an approach that recognizes "that 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute,"[152] which, in a purely disparaging rhetorical flourish, Scalia labels as part of an *ancien regime*, long since abandoned,[153] Scalia requires Congress to have explicitly granted a private cause of action, not just a private right.[154] This he does even though the so-called "*ancien regime*" was in place when the statute was enacted and Congress had no reason to foresee that the Court would so dramatically change its interpretive approach. The rhetorical device of using the disparaging term "*ancien regime*" is gratuitous, intended to make the other way of approaching Congressionally-created rights as somehow discredited, effete, and foreign.

This analysis could be extended, but enough has been brought to the fore to show the use of rhetorical devices to serve the argument. Scalia is not relying only on rhetoric, but he is clearly using rhetorical devices to make his point and to disparage alternative views.

For a contrasting use of rhetoric, I will touch briefly on the dissent, which also uses rhetorical devices to persuade. I will begin by quoting in full the first full paragraph of the dissent. Notice how the entire frame of reference is shifted from Scalia's

149. 532 U.S. at 285.

150. *Id.*

151. *See id.* at 291 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979)).

152. *Id.* at 287 (quoting J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

153. *See id.*

154. *See* 532 U.S. at 285.

seeming narrowness and his antipathy to group-based civil rights to recognition of the necessity for it. Notice too how rhetorical devices play a part in supporting this view.

> In 1964, as part of a groundbreaking and comprehensive civil rights Act, Congress prohibited recipients of federal funds from discriminating on the basis of race, ethnicity, or national origin. Pursuant to powers expressly delegated by that Act, the federal agencies and departments responsible for awarding and administering federal contracts immediately adopted regulations prohibiting federal contractees from adopting policies that have the "effect" of discriminating on those bases. At the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law. Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI' s implementing regulations.[155]

Justice Stevens is placing the dispute in the broader context of working toward social justice through civil rights legislation.[156] The legislation was intended to be transformative ("ground-breaking and comprehensive") and should be treated as such.[157] Stevens notes that the regulations were promulgated "[p]ursuant to powers expressly delegated" by Congress.[158] That is what § 602 does. The emphasis on express delegation is a rhetorical choice. Stevens also semantically ties together the idea of implied remedies with protecting "individual rights granted by valid federal law."[159] This uses Scalia's own individual-focused rhetoric against him.

But the differences are greater than the similarities. Where Scalia spoke of a cramped reading of Congressional intent,[160] Stevens speaks of the "coherent implementation" of a

155. 532 U.S. at 293-94 (Steven, J., dissenting) (citation omitted).
156. *See id.*
157. *Id.* at 293.
158. *Id.* at 293-94.
159. *Id.* at 294.
160. *See, e.g.*, 532 U.S. at 288-89.

whole statutory scheme.[161] This is a different view of the Court and of justice. Stevens returns to this theme a number of times, speaking of the "integrated remedial scheme"[162] and of the legislation as an "inspired model for attacking the often-intractable problem of racial and ethnic discrimination."[163] The rhetoric is different, as is the vision of the one nation for which it stands.

Ultimately, the dispute breaks, in part, along the group wrongs/individual rights divide. As Stevens makes explicit, the Civil Rights Act of 1964 is transformative, and is intended to allow appropriate and mutable and flexible responses to changing "complex social realities."[164] The disparate impact theory anathematized by Scalia and the majority is a group-based approach. The disparate impact theory focuses on institutional problems and institutional remedies. It understands that injustice can result from things other than intentional wrongdoing and that injustice should be redressed. This fundamental dispute is not stated this way by the majority. Instead, rhetorical devices, including appeals to other aspects of the law, and inappropriately selective slicing and dicing of prior opinions, are used to cover this antipathy with a patina of seeming reason. But it is reason cut off from the world reason is supposed to serve.

The rhetoric about individualized assessment which persuaded Justice Powell in the death penalty case and Justice Scalia in the Title VI case is persuasive because it taps into the rich vein of American rugged individualism, and because it resonates with the deep American cultural mythology of decontextualized assessment of and advancement on the basis of individual merit. This rhetoric persuades because of our canonical belief in individualism both as it is and in its ideal type. The depth of this sense can be gauged by the fact that the not-quite-so-deeply ingrained value of equality in fact, in treatment, in opportunity does not prevail against it even in cases of life and death. And, if the *Sandoval* case is any indication of things to come, these values will no longer prevail even in lesser cases of access to the courts to redress discriminative effects. We see

161. *Id.* at 294.
162. *Id.* at 304.
163. *Id.* at 306.
164. *Id.* at 307.

group problems and group injustice. But we act to solve group problems not on the basis of "groupness" and classifications based on those groups, but on the basis of an exaggerated preferencing of deified individuated merit.[165]

In civil rights cases, the rhetoric of the singular me, I, you, he, she has more power to the current Court than that of the plural we, us, they. Serious problems of social justice and public welfare are generally assessed, and oftentimes best assessed, on the basis of groups. But under current Supreme Court jurisprudence, remedies are limited to individuals. *Bakke* reigns, not *Brown*.

This disconnect between group assessment and individual remedies is in part a rhetorical one. Regardless of how inapt individuated approaches to addressing the problems may actually be, the rhetoric of the individual is more persuasive. The Court's treatment of the problem of race in capital punishment, of the problem of race in admission to college, and of the disparate impact theory and private causes of action based on it under Title VI are three examples of the rhetoric of the individual trumping the reality of group inequality.

Amsterdam and Bruner have given us a useful lens through which to examine this problem. Rhetoric is not everything, but examining decisions from that perspective can help us notice things that might otherwise pass unremarked.

Culture as is; culture as envisioned

Amsterdam and Bruner entitled chapter eight *On the Dialectic of Culture*.[166] This chapter is the best and most interesting complete chapter of the book.[167] When reading it, and then when applying it, it is important to keep in mind the purpose of the authors: they are trying to develop some new approaches to examining and understanding the familiar, some new ways of looking at things. They are not trying to develop a full theory of culture or its processes. Rather, they are developing a provoca-

165. *See* Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573 (2000) (illustrating the use of group identity for purposes of increasing diversity, especially in academic and employment settings).

166. MINDING THE LAW, *supra* note 1, at 217.

167. I consider the best section of a chapter to be from the chapter *On Narrative*. *See supra* text accompanying notes 50-58.

tive, interesting approach which to them, and to me, rings true, or true enough to be of use.

After tracing two anthropological approaches to culture, which they label the "social-institutionalists" and the "interpretive-constructivists,"[168] the authors propose that we look at cultures as being "in their very nature . . . marked by *contests for control over conceptions of reality.*"[169] As they explain it:

> In any culture, there are both canonical versions of *how things really are and should be* and countervailing visions about *what is alternatively possible.* What is alternatively possible comprises both what seems desirable or beguiling, and what seems disastrous and horrifying. The statutes and conventions and authorities and orthodoxies of a culture are always in a dialectical relationship with contrarian myths, dissenting fictions, and (most important of all) the restless powers of the human imagination. . . . The dialectic between the canonical and the imagined is not only inherent in human culture, but gives culture its dynamism and, in some unfathomable way, its unpredictability–its freedom.[170]

Cultures, then, exist both as they are here and now and as they might be. As ultimately summarized by the authors, "culture is constituted by the dialectic between and within a society's institutional systems and noetic space."[171] This "noetic space" is the phrase they coined to describe the bundle of characteristics comprising a culture's "distinctive imaginative space, teeming with the alternatives to the actual."[172]

The next task in the book is to take this idea of a dialectical culture and use it to examine some legal issue. The issue the authors chose is race.[173] The cases they examine are *Plessy, Brown*, and the paired cases of *Freeman v. Pitts* and *Missouri v. Jenkins*.[174] They examine them this time "not in their historical or doctrinal contexts but as single frames snipped from the hundred-year reel."[175] After taking the snapshots, they lay them

168. MINDING THE LAW, *supra* note 1, at 219.
169. *Id.* at 231.
170. *Id.* at 231-32.
171. *Id.* at 246.
172. *Id.* at 237.
173. MINDING THE LAW, *supra* note 1, at 246-81.
174. *See id.*
175. *Id.* at 247.

out side by side and look for similarities and differences among them.[176] In essence, they are looking for marks of institutional conservatism and of ventures into "noetic space."[177]

Here is what they find, as summarized in their final chapter:

> It often happens that law provides the most vivid arena in which the dialectic of culture expresses itself. In the preceding chapter we saw such an instance–a series of Supreme Court decisions dealing with issues of racial equality throughout the past century. The wrongness of *de jure* segregation perpetuated by *Plessy v. Ferguson* becomes the Trouble to be addressed by the narrative spun in *Brown v. Board of Education* a half-century later. But by the time we reach *Freeman v. Pitts* and *Missouri v. Jenkins,* another half-century on, the Trouble has become the wrongnesses created by *Brown*–schools torn from the control of their local communities, good old American freedom of opportunity denied in the name of "affirmative action," and so forth. The legal expression of this dialectic is framed in the familiar terminology of the Equal Protection Clause of the Fourteenth Amendment, but its motive power is outside the law, expressive of a deeper struggle within American culture between what has come to be called the American Creed and what we have called the American Caution, each with its categorical constructs, stories, and rhetorics.[178]

The "motive power is outside the law."[179] The power behind what persuades the Court to decide one way or another comes from culture, from values, from a struggle between things as they are and things as they may be envisioned to be. And there are many competing visions of what may or should be, and there are many competing versions or stories of things as they are.[180]

This idea of a cultural dialectical tension between things as they are and things as they might be provides an interesting perspective from which to examine another weighty theme in

176. *See id.* at 246-81.

177. *See generally id.* at 237-39.

178. MINDING THE LAW, *supra* note 1, at 284.

179. *Id.*

180. The tie between the cultural dialectic and rhetoric is direct: it is the task of rhetoric to assemble the most persuasive argument possible to lead to the future envisioned by the advocate and valued by the audience. *See* JAMAR, *supra* note 121.

American society–religion and public education. I will briefly consider the problem of evolution versus creationism in public schools and then move on to vouchers.

One of the long-term cultural tensions in the United States relates to teaching either evolution or creationism in public schools to the exclusion of the other. A century ago William Jennings Bryan embarked on a crusade to save *The Bible* from Darwin.[181] That wave of the creationism crusade crested in 1925 in the *Scopes* trial.[182]

Tennessee had enacted a law that made it illegal for teachers "to teach any theory that denies the story of the divine creation of man as taught in *The Bible*, and to teach instead that man has descended from a lower order of animals."[183] Scopes was a teacher in Dayton, Tennessee who taught evolution to his class and was therefore charged with violating the statute.[184] Two national champions appeared on the stage to fight this case: Clarence Darrow for evolution, Scopes, and individual constitutional rights, and Williams Jennings Bryan for creationism, fundamentalism, the State of Tennessee, and majoritarianism.[185] Scopes was convicted but his conviction was overturned on the technical grounds that the jury, not the court, should have set the punishment.[186] The Tennessee Supreme Court then dismissed the case rather than remand it.[187] The Tennessee Supreme Court, not incidentally, upheld the statute against constitutional challenge.[188]

Despite Scopes having been convicted and the constitutionality of the statute upheld, in the national press and popular imagination, Darrow and evolution had carried the day. The seeming victory for evolution and vanquishment of fundamen-

181. EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION 39 (1997).

182. Scopes v. State, 289 S.W. 363 (Tenn. 1927). The trial later became the source of a McCarthyism-inspired play, *Inherit the Wind*, by Jerome Lawrence and Robert E. Lee in 1955. LARSON, *supra* note 181, at 239-40.

183. 289 S.W. at 363 n.1 (quoting the Tennessee Anti-Evolution Act of 1925, ch. 27 (repealed 1967)).

184. *Id.* at 363.

185. *See* LARSON, *supra* note 181.

186. 289 S.W. at 367.

187. *Id.*

188. *Id.*

talists[189] (or so it seemed to a "right-minded" educated elite) also resulted in the development of a strong, oftentimes invisible undercurrent of religious fundamentalism or at least religious conservatism.[190] The wave of public anti-evolution sentiment having crashed into the shore in *Scopes* ebbed, though not without some lingering force. Although most of the 15 states that had anti-evolution laws pending before *Scopes* was decided dropped them, two states, Arkansas and Mississippi, did pass them. Ultimately, in *Epperson v. Arkansas*, the Supreme Court held unconstitutional the 1928 Arkansas anti-evolution law which had been in force for 40 years.[191]

Epperson is instructive on many levels. One could analyze it using the other approaches developed by Amsterdam and Bruner–categories, narrative, or rhetoric–and find much of interest. But I have placed it here, in the cultural dialectic section, because the contrast between *Epperson* in 1968 on the one hand, and *Rosenberger*[192] in 1995 and the voucher cases in 1998 and 2001[193] on the other hand, parallels, in the field of religious freedom, the change traced by Amsterdam and Bruner from *Brown's* optimism and recognition of groups in evaluating justice to *Freeman* with its unwillingness to countenance group remedies in the field of race.

Justice Fortas starts the core section of the *Epperson* opinion with a sweeping vision:

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189. It is far beyond the scope of this article to explore the meanings of "fundamentalism." Aspects of it are explored in LARSON, *supra* note 181, at 32-37, 231-38. It often included creationism (with concomitant anti-evolutionism), though there were theistic evolutionists among the early fundamentalists. *Id.* at 33. One version of it developed by theologians at the Presbyterian seminary in Princeton led "their denomination to adopt a five-point declaration of essential doctrines that became central tenets of fundamentalism: the absolute accuracy and divine inspiration of scripture, the virgin birth of Christ, salvation solely through Christ's sacrifice, the bodily resurrection of Christ and his followers, and the authenticity of biblical miracles." *Id.*

190. LARSON, *supra* note 181, at 247-66.

191. 393 U.S. 97, 101 (1968).

192. *See supra* text accompanying notes 24-47.

193. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied,* 525 U.S. 997 (1998); Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted,* 122 S. Ct. 23 (2001). These cases are discussed below at *infra* text accompanying notes 201-09.

> The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom.
>
> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[194]

Justice Fortas further recognized the special status of local control of schools when he wrote:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." As this Court said in *Keyishian v. Board of Regents,* the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[195]

And later: "The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[196]

Quickly tracing the cultural dialectic involved here, we see a cultural status quo in which the "old-time religion" had, by 1925, been largely displaced in the popular imagination and in fact by the "new" ideas of Darwinism. The alternative vision of a fundamentalist Christian country had not died, but it had receded from view. By 1968 the separation of church from state

194. 393 U.S. at 103-04 (footnote omitted).
195. *Id.* at 104-05 (footnote and citations omitted).
196. *Id.* at 107.

and the entrenchment of the scientific theory of evolution had become so strong that *Epperson* seems inevitable. The Trouble was no longer an upstart scientific vision of culture, but rather the Trouble had become the infringing of academic freedom and the establishing of a particular religious view of the origin of humankind. The Trouble presented itself through enforcement of an old law adopted during a time when the canonical version was quite different from what it had become in 1968.

The Court responded by reaffirming the then-pervasive national norms as against the challenge of different state and local norms.[197] The individual rights of a teacher to teach biology and evolution trumped the majoritarian impulses of the voters of Arkansas to ban evolution in favor of creationism. The community's values of tolerance of difference and of the official equal treatment of various religious ideas coupled with the idea of individual freedom from state religious indoctrination carried the day. To the extent groups were involved, the Court was simply making space for them all without acting to benefit or encourage any of them. Unlike in the race area, there was no need for, and indeed, no rhetoric of group-based remedies. It was enough for the government to get out of the way and to stay out of the business of religious indoctrination.

But, as was the case with *Brown*, the *Epperson* vision did not last. The *Epperson* principles are still recited and still matter, but as happened to *Brown*'s principles, they have been much watered down. Some 50 years after *Scopes*, and just a dozen years after *Epperson*, the fundamentalist undercurrent surfaced on the national scene when the so-called Moral Majority and President Reagan led the charge against the erstwhile amoral left. The shift from a liberal, secular state to a more conservative, more religiously-infused state is visible all around us. The question is whether this cultural shift is reflected in the actions of the Court.

It is. In a series of cases culminating in *Rosenberger*, the Court permitted increasing involvement of the state in religion, including, in *Rosenberger*, requiring the state to fund a fundamentalist, evangelical student group on a state university cam-

197. *See id.* This upholding of the national norms against a state challenge calls to mind Justice Story's opinion in *Prigg*, 41 U.S. 539, 16 Pet. 539, 10 L. Ed. 1060.

pus just as any other student group would get funded.[198] The ideas of neutrality and of the evenhandedness form of equality seemed to be trumping the idea of separation of church and state. One can perhaps detect a pendulum swing here with the *Epperson* case representing the far point of the swing toward getting the state out of religion and *Rosenberger* representing a point on the swing back toward state-supported religion. I am sure the pendulum will not swing that far, but that appears to be its current direction.

It seems as though the Court had become uncomfortable with what appeared to some to be the state being not neutral toward religion, but rather being antithetical toward it. Actions like banning school-sponsored prayer were seen not as insuring state neutrality, but as denigrating and degrading religion. Non-action or action to keep the state separate from religion is seen by some as being against religion. This appears to be the cultural current on which the Court is drifting in the area of religion in public schools.

As the Court used the rhetoric of *Brown* and the Equal Protection Clause in *Freeman* and *Jenkins*, so the Court uses the rhetoric of equality, neutrality, separation, and non-establishment in *Rosenberger*, but the motive force is different than it was in *Epperson*. The cultural vision is different; the cultural values are different; the decisions are different. The vision of a polyglot, multi-ethnic, multi-religion, liberal state has perceptibly shifted toward that vision declared by Ronald Reagan that we are a Christian country. The Trouble now is asserted to be that the secular state is hostile to religion. The challenge for the Court is to respond to the Trouble properly. And, under the thesis of Amsterdam and Bruner, the Court will be affected by the culture currents on which it floats as it attempts to do so.

As was the case in racial desegregation of the schools, one playing field for this cultural contest between the liberal, inclusive state and the religiously-infused state is public education. The continuing strength of the conservative cultural current as it erodes the wall of separation can be seen in a number of

198. These developments have been summarized capably by others and will not be repeated here. *See* Simmons-Harris v. Zelman, 234 F.3d at 951-57; Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence,* 75 IND. L.J. 167, 171-179 (2000).

events including, in particular, actions of the Kansas State School Board and the various school voucher programs under which tax dollars support religiously-affiliated schools.

The 1999 action of the Kansas State School Board dropping the teaching of evolution shows the impulse by some to return to a pre-*Scopes* world.[199] This action was overturned immediately after the next election of new, moderate board members who had pledged to undo that sorry decision.[200] Both the co-opting of the school board by religious conservatives and their displacement by moderates show the cultural currents at work.

We can see in Kansas another episode in the ongoing story of the institutional stability of religion confronted by the Trouble of evolution and secular authority. This particular episode involving public education has a subplot in which the problem is compounded by themes of local versus national control, of public education serving the good of the community, and of freedom of inquiry with particular emphasis on a subset of it, i.e., academic freedom.

A second illustration of the strength of this religious cultural current can be seen in the school voucher movement championed by religious conservatives including President George W. Bush. In 1998, the Supreme Court let stand a Wisconsin program that allows voucher payments to support sectarian private schools.[201] In 2001, the Court granted certiorari in a case in which the Sixth Circuit struck down a voucher program in Ohio.[202]

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199. *See The Kansas State School Board Throws Out Evolutionary Science, at* http://www.atheistalliance.org/aaw/kansas_school_board.htm (last visited Sept. 19, 2001); Kate Beem, *Evolution vs. Biblical Creation: The Conflict Continues*, KANSAS CITY STAR, April 11, 1999, http://www.kcstar.com/item/pages/home.pat,local/30dae5e2.411,.html; Kate Beem, *Focus Is on State Science Standards*, KANSAS CITY STAR, June 9, 1999, http://www.kcstar.com/ projects/kboe/ev6.htm; *see also* NATIONAL SCIENCE BOARD STATEMENT ON ACTION OF THE KANSAS BOARD OF EDUCATION ON EVOLUTION, NSB 99-149 (August 20, 1999), *available at* http://www.nsf.gov/nsb/documents/1999/nsb99149/nsb99149.htm; NATIONAL ACADEMY OF SCIENCES, *Science and Creationism: A View from the National Academy of Sciences* (National Academy Press, 2d ed. 1999), *available at* http://books.nap.edu/html/creationism/index.html (last visited Oct. 10, 2001).

200. *See* John Milburn, *Evolution Returned to Kansas School Standards,* KANSAS CITY STAR (February 14, 2001), *available at* http://www.kcstar.com/item/pages/home.pat,local/37752184.214,.html.

201. 525 U.S. 997.

202. 2001 U.S. LEXIS 5351.

In upholding the Milwaukee voucher scheme, the Wisconsin Supreme Court synthesized the following rule from United States Supreme Court decisions. According to the Wisconsin Supreme Court, the United States Supreme Court

> has established the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.[203]

According to the Wisconsin court, "The amended MPCP [Milwaukee Parental Choice Program] is precisely such a program. Applying to the amended MPCP the criteria the Court has developed from *Everson* to *Agostini*, we conclude that the program does not have the primary effect of advancing religion."[204] By laundering the money through a parent's signature, the state gives money directly to religious schools that teach religion as an integral part of the daily education of the students. Here we see the cultural dialectic at play. On the one hand are arrayed values of parental control over the education of children, and of individual choice and freedom. On the other hand are arrayed values of keeping the state out of the business of supporting religion, and not taking funds from some taxpayers to support religious indoctrination with which they may vehemently disagree. The dodge of "indirectness" and intervening choice by individuals seems to be enough of a wall of separation now.[205] The Trouble is no longer the religious freedom problem of *Epperson* (and other religion-in-the-schools cases), but one of ineffective education. Thus vouchers become not a tool to support religion, but a tool to improve education and to advance freedom of choice.[206]

In contrast to denying certiorari when a state court upheld a local voucher program which benefited religiously-affiliated

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203. 578 N.W.2d at 617.

204. *Id.*

205. For an unmatched critique of the fallacy of treating the interposed parent as avoiding the problem, see Underkuffler, *supra* note 198.

206. Examining from a rhetorical perspective just who is making use of the rhetoric of "freedom of choice" in this context versus in the abortion context would be interesting but is beyond the scope of this article.

schools, the Court granted certiorari when a federal court held a similar voucher program unconstitutional as a violation of the Establishment Clause.[207] The Sixth Circuit recognized the problem explicitly when it wrote:

> We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us.
>
> The courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another. The design or specifics of *a program intended to remedy the problem of failing schools and to rectify educational inequality* must be reserved to the states and the school boards within them, with one caveat: the proposed program may not run afoul of the freedoms guaranteed to all citizens in the Constitution. In other words, the determinations of states and school boards cannot infringe upon the necessary separation between church and state. We therefore consider the program presented before us under the controlling precedents of the United States Supreme Court and this Court to determine whether such infringement has occurred.[208]

The italicized language makes clear that the Trouble has to do with education, not with religion. The problem for the court was that the solution proposed, i.e., vouchers which could be used in religious schools, directly implicates the Establishment Clause since the state would be financially supporting the religious schools in a very direct way. The court does not explicitly use the need for educational reform to transform the Establishment Clause. Indeed, it relied upon established methods of legal reasoning to address the Trouble by affirming the status quo principles of non-establishment. As stated by the court:

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207. 2001 U.S. LEXIS 5321.

208. 234 F.3d at 951 (emphasis added).

> We recognize the importance of this case and the precedential value it espouses. Equally as important, we are aware of the critical nature of questions of educational policy, and the need to establish successful schools and academic programs for children. We find, however, that even more important is the need to uphold the Constitution of the United States and, in this case, to override the State of Ohio's statutory scheme where it constitutes an impermissible infringement under the Establishment Clause of the First Amendment.[209]

Although the Sixth Circuit upheld the status quo against the challenge of an alternative vision of society and education and the role of the state in religious matters, the Supreme Court has granted certiorari. Based on the Court's denial of certiorari in the Milwaukee case coupled with the trend toward allowing greater state financial support for religious education, and coupled further with the continuing shift of the government toward religious conservatism, I would predict that the Court will overturn the Sixth Circuit decision. The Court is riding a different cultural current.

As in the transformation in the area of racial equality from *Brown* in 1954, with its willingness to tackle group-based issues and transform society, to *Freeman v. Pitts* in 1992,[210] with its cramped focus on the loss of local control over schools and hostility towards affirmative action in the field of religious freedom, the Court has moved from sweeping national policies of separation built on ideas of individual and group freedom to local, individual choice based on a shift in the categorization of the problem. The Trouble is not religious freedom; it is quality education. And that, together with the shifting cultural currents, makes the difference. Vouchers are acceptable not because the need for quality education trumps religious freedom, but because a conservative religious undercurrent has surfaced and is flooding the law. The motive force is only in part the desire for better education–that need has been around a long time, during most of which, conservatives, including religious conservatives, fought national involvement in education. The motive force which shifts the balance lies elsewhere, in religion

209. *Id.* at 962-63.

210. 503 U.S. 467 (1992).

and in the desire to use taxpayer moneys to fund it. That is a cultural vision different from that of two decades ago.

The freedom of religion and establishment issues range far beyond creationism and vouchers. Until the 1950s prayer opened many public school days. Release time programs sent students to church mid-week (it was "Wednesday School" in my town). But then the secular impulse became ascendant. Now the secular schools have, to some, became the new Trouble: amorality and immorality is traced by some to a putative chasing of religion out of the schools. There are now regular attempts to put evangelical Christianity back into the core curriculum of schools. The legal scene is infused with this dialectical struggle between the secular and the sectarian.

But this difference in religious philosophy is not merely a two-sided cultural war; it is not merely a dialectical struggle. The religious cultural scene has become more complicated with multiculturalism which includes many more variants of religion than a mere few strands of Christianity. Religions in the United States today range from Islam to Judaism to innumerable variants of Christianity to Hinduism to Buddhism and various local religious traditions imported with immigrants.[211] In such a polyglot setting, the establishment of religion becomes even more problematic. Will the faith-based social service initiative of President George W. Bush really result in the granting of funds in the new partnership with faith-based institutions to the Nation of Islam? To Catholic groups? To Seventh Day Adventists? To New Age spiritualists? To Buddhist or Hindu social service programs? Or is the model just certain sets of Christian groups purveying the "right" religious message?

Viewing legal struggles through the cultural dialectic lens etched by Amsterdam and Bruner can result in seeing the power struggles and the cultural aspects of deciding hard cases more clearly. Using this lens should allow scholars and practitioners to more finely craft their arguments to meet the values of their audiences, especially the Supreme Court. Recognizing cultural shifts and their effect on the Court is not new;

211. *See, e.g., WWW Hmong Homepage, at* http://www.hmongnet.org/ (last modified Sept. 25, 2001); *Gary Yia Lee-Ph.D.: A Hmong Anthropologist,* http://www.atrax.net.au/userdir/yeulee/ahtmpages/Culture.htm (last modified November 7, 2001).

Roosevelt's New Deal Court remains proof enough of that. But the particular way of working culture into the equation is fresh.

Vision Refreshed

In the concluding chapter, *Reflections on a Voyage*, the authors include some observations about legal education and the applicability of their ideas to it. As they put it, "[b]ecoming a lawyer is learning what is involved in lawyer*ing*. And that requires more than simply knowing the doctrinal rules."[212] And just as becoming a lawyer requires more than learning disembodied doctrine (it also requires practice), learning to use the analytic tools they have developed requires more than learning about them; it requires using them. It requires "some performative side to learning about such things–either in a clinical setting or through simulation or in some theater-like activity."[213] Learning these skills, like other lawyering skills, requires doing, not just learning about them. I have applied this principle in this essay–after I described some of the core ideas and summarized how the authors illustrated them, I applied them in new settings.

One of the settings I examined relates to religion and the relationship of government to it, particularly with respect to education. Our country was founded in part on a narrative of a myth of religious freedom. Our country has grown up with a generalized separation of church from state. The nature of the religious freedom, and the nature and extent of involvement and separation has ebbed and flowed over time in step with cultural currents. Through it all, the rhetoric of individual freedom, separation of church and state, non-establishment of religion, equal treatment of the religious and non-religious and the religious of various types continues. The same rhetorical labels for certain principles seem to hang around, but the actual manifestation and content of those principles shift even as the words stay the same.

Bruner and Amsterdam seek to refresh our vision of four fundamental aspects of legal decision making: "categorizing, telling stories, framing communications rhetorically, and being

212. MINDING THE LAW, *supra* note 1, at 289.
213. *Id.* at 290 (footnotes omitted).

of one's culture."[214] As a parent on a walk with a child gets to see things anew through the child's eyes, so too a lawyer reading this book gets to experience anew some too-familiar trails and to see anew the path and trees and sights. In our transformation from a novice layperson to an expert lawyer, we learned the habits of the legal mind of categorizing by recognized legal categories, of narration in expected legal forms, of the importance of rhetorical choices including selecting the right words and means of persuasion, and of the importance of attending to the cultural milieu of which law is an integral part. This book exposes these habits of mind. It seeks to accomplish part of what Buddhist monk Thich Hnat Hanh describes as right mindfulness, i.e., recognizing your habits of mind and, where appropriate, breaking or changing them.[215] This is part of the Buddhist idea of enlightenment.[216] Amsterdam and Bruner may not lead us to enlightenment through this excellent book, but it is, for the legal mind, enlightening. It exposes our habits of mind and helps us see what has become commonplace. By opening closed doors, Amsterdam and Bruner have contributed much to the discussion of law.

214. *Id.* at 282.

215. THICH NHAT HANH, THE HEART OF THE BUDDHA'S TEACHING: TRANSFORMING SUFFERING INTO PEACE, JOY, AND LIBERATION 64-83 (1998).

216. *Id.* at 125, 214-20.