God’s Justice, Scalia’s Rhetoric, and Interpretive Politics

During the fall Presidential campaign and in recent Senate confirmation hearings, controversies over law and politics have once again made the headlines. “Judge Gorsuch may act like a neutral, calm judge, but his record and his career clearly show that he harbors a right-wing, pro-corporate, special interest agenda,” said Senate Minority Leader Charles E. Schumer last month prior to the confirmation of the latest appointee to the Supreme Court.¹ The intersection of legal hermeneutics and ideological interpretation plays an especially significant role in these ongoing partisan debates both within specialist academic conversations and in the popular imagination beyond the academy. For example, in the 2009 confirmation hearings of Justice Sonia Sotomayor, we witnessed a lengthy public examination of how personal experience and political prejudices might impinge on judicial impartiality. Republican Senator John Cornyn summarized his concerns, stating “The test is really what kind of Justice will you be if confirmed to the Supreme Court of the United States? Will you be one that adheres to a written Constitution and written laws and respect the right of the people to make their laws [through] their elected representatives, or will you pursue some other agenda? Personal, political, ideological, that is something other than enforcing the law?”²
One of the judges mentioned in these hearings in support of a Sotomayor opinion on the Second Amendment was Judge Richard Posner of the Seventh Circuit Court. The mention of Judge Posner is somewhat ironic in these circumstances. Here we have a political conservative who published a book the year before, How Judges Think, which argued for a legal pragmatism that calls into question the very possibility of separating interpretation and politics. The book includes a chapter called “The Supreme Court is a Political Court.” The assertion of the title is not a criticism of the court, but rather a descriptive claim about the unavoidability of politically-influenced interpretive work in legal decisions. Posner writes, “Ideology, in the sense of moral and political values that transcend the merely personal or partisan, is not an illegitimate, but an inescapable, feature of legal judgment, especially in the case of appellate courts, above all the Supreme Court.” Political ideology necessarily comes into play in difficult cases in which there are “open areas,” areas of hermeneutic indeterminacy because of inadequate guidelines from foundational texts and previously decided cases, and, Posner points out, it is precisely these difficult cases that make it to the Supreme Court.

With this view of interpretive practice, Posner necessarily disagrees with Justice Antonin Scalia’s originalist legalism, the latter’s assertion that the rule of law is and should be a law of
rules, a viewpoint that Scalia believes will ensure that he does not “indulge” his “political or policy preferences” in interpreting the law and judging cases.\(^5\) In my paper I will first discuss Justice Scalia’s interpretive practice based on his theory of textual originalism and examine its rhetorical and ideological characteristics. Then I will discuss the way that the formal aspects of his rhetoric often function as significant extensions of the legal substance of his arguments.

**Scalia, Law, and Religion**

Justice Scalia began a 2002 essay, “God’s Justice and Ours,” with the following disclaimer:

Before proceeding to discuss the morality of capital punishment, I want to make clear that my views on the subject have nothing to do with how I vote in capital cases that come before the Supreme Court. That statement would not be true if I subscribed to the conventional fallacy that the Constitution is a "living document"—that is, a text that means from age to age whatever the society (or perhaps the Court) thinks it ought to mean.\(^6\)

Scalia’s rejection of the Constitution as a “living document” depends on his acceptance of the hermeneutic theory of originalism, which holds that the Constitution “means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted.” As an adherent of
originalism, Scalia believes that the text means what it originally meant when ratified. For example, he holds that at the time of its adoption, no one thought the Eighth Amendment abolished capital punishment, and therefore he rejects any attempt by a court today to impose a contemporary abolitionist morality on the Constitution and ignore the amendment’s original meaning.

But this is not the end of the matter for Scalia. He writes, “[W]hile my views on the morality of the death penalty have nothing to do with how I vote as a judge, they have a lot to do with whether I can or should be a judge at all. . . . [T]he choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases.” That is, in Scalia’s view, originalism forbids him from treating the Constitution as a living document and imposing his personal religious beliefs on the text, but those same religious beliefs would be directly relevant to a decision about whether he should continue as a judge who is legally bound to enforce capital punishment.

For Scalia, the relevant distinction here is between a hermeneutic legal question and a personal ethical one. To address the latter, Scalia quotes Paul’s letter to the Romans 13:1-5, which reads in part: “[T]he powers that be are ordained of God. . . . [a ruler] is the minister of God, a revenger to execute wrath
upon him that doeth evil.” Scalia interprets the “core of [Paul’s] message” to be “that government--however you want to limit that concept--derives its moral authority from God. It is the 'minister of God' with powers to 'revenge,' to 'execute wrath,' including even wrath by the sword (which is unmistakably a reference to the death penalty).” Thus, Scalia uses Paul to answer his ethical question about whether to remain a judge who imposes capital punishment, but this ethical question, he argues, is completely irrelevant to the hermeneutic issue of how a judge should interpret the Constitution in the first place.

But is it really? At the very least we must note how interpretive work, both legal and scriptural, permeates both Scalia’s theoretical prologue and his ethical and ultimately theological deliberation. In the theoretical prologue, he argues for originalism in general and then applies it specifically to the Eighth Amendment (holding that capital punishment is constitutional). Scalia separates this hermeneutic theory and interpretive application from his personal ethics and his religious beliefs. Only then does he quote and interpret Paul, which leads him to say that the judge should respect established law and support capital punishment: God has ordained that his governmental ministers be followed even in the execution of “wrath by the sword,” which Scalia interprets as “unmistakably a reference to the death penalty.”
But this also isn’t the end of the matter. Scalia turns for further guidance on the ethical issue to his religious beliefs, specifically the teachings of the Roman Catholic Church. Here he runs into problem: a recent church encyclical, Evangelium Vitae, and the latest version of the new Catholic catechism declare, under Scalia’s interpretation, that “the death penalty can only be imposed to protect rather than avenge, and that since it is (in most modern societies) not necessary for the former purpose, it is wrong.” Thus, it would appear that, if Justice Scalia is to follow Church authorities, he should resign from the Supreme Court. Instead, he turns his interpretive focus more intensely on the religious documents that contradict his moral belief in capital punishment.

He notes that traditional Catholic dogma does not support the Church’s new teaching. “Unlike such other hard Catholic doctrines as the prohibition of birth control and of abortion, this is not a moral position that the Church has always--or indeed ever before--maintained. . . . The current predominance of opposition to the death penalty is the legacy of Napoleon, Hegel, and Freud rather than St. Paul and St. Augustine.” Then Scalia turns to the new teaching itself and the issue of its binding authority. He reports: “I am . . . happy to learn from the canonical experts I have consulted that the position set forth in Evangelium Vitae and in the latest version of the Catholic
catechism does not purport to be binding teaching—that is, it need not be accepted by practicing Catholics, though they must give it thoughtful and respectful consideration. . . . So I have given this new position thoughtful and careful consideration—and I disagree. That is not to say I favor the death penalty (I am judicially and judiciously neutral on that point); it is only to say that I do not find the death penalty immoral. I am happy to have reached that conclusion, because I like my job, and would rather not resign."

If, as Judge Posner suggests, ideology is “a political orientation . . . a body of more or less coherent bedrock beliefs about social, economic, and political questions,” can we not say that Justice Scalia’s interpretation of these legal and religious texts is ideological? He has the “bedrock belief” in the morality of capital punishment and his interpretation of both legal and religious texts are ideological extensions of that belief, at least in those places where others might reasonably see some ambiguity or indeterminacy, a rhetorical “open area” that could be filled by alternative interpretive arguments.

In his NY Times blog, Stanley Fish agreed with certain aspects of Justice Scalia’s hermeneutics of originalism, but he distinguishes his own intentionalist version from Scalia’s textualist one. More to my point, Fish argues that whatever the hermeneutics, such general theories dictate no specific
interpretive consequences. When Fish claims that “theoretical accounts do no interpretive work,” he seems to mean either that interpreters do the work not theories (a mere truism); or that theories can’t rule over interpretive practice and have no necessary practical consequences in specific interpretations (a valid anti-foundationalist claim); or that theories have no influence on interpretive practice at all. I think this last exaggeration is what Fish often means. I call it an exaggeration--and a misleading one--because even if theories do not have necessary, logical consequences, some theories do have contingent, rhetorical and ultimately political consequences.  

For example, a rhetorical hermeneutic theory might be able heuristically to suggest places in a judges network of interconnected interpretations where rhetorical pressure could be applied to change another part of the network and thus have political effects. Perhaps arguing with Justice Scalia over the meaning of a verse from Paul could someday change his view of the meaning of the Eighth Amendment. However, this would be rhetorical hermeneutic work outside of the genre of court opinion as it is currently understood and practiced. More practically relevant is the fact that when some member of a lawyer’s audience (say, the Supreme Court) is known to hold a specific theory of Constitutional interpretation, that lawyer will likely appeal to that theory. For example, if a member of the Supreme Court holds
an originalist theory, the lawyer will likely cite evidence about
the relevant statute’s original meaning. As Justice Scalia noted,
today, unlike when he first joined the Supreme Court, it is not
assumed that the judges and their law clerks would do the
historical research into “what the text was thought to mean when
the people adopted it”; rather, “[r]arely does counsel fritter
away two out of nine votes by failing to address what Justice
Thomas and I consider dispositive. Originalism is in the game,
even if it does not always prevail.” In this way, theory can have
practical consequences, contingent rhetorical consequences.

Let me now turn to some of the ways the substance and form of
Scalia’s rhetoric interact in the practice and theory of what
might be called his own rhetorical hermeneutics, his specific
combination of interpretation and rhetoric, his making sense the
law through the way he uses language.

**Scalia’s Rhetorical Hermeneutics**

What is the relation between Justice Scalia’s interpretive
theory and his rhetorical practice? What, for example, is the
relation between the hermeneutic substance of his legal opinions
and its rhetorical expression? This way of putting the question
relies on a common distinction: content versus form, substance
versus accidentals, what is said versus how it is said. What is
the relationship between the two? The answer to this question
depends on the specific text and historical context being
discussed. In some cases, it is easy to separate the content and form of a discourse, but at other times it seems that these binaries tend to collapse into each other either through identification of the opposed terms or by one aspect motivating the other.

Justice Scalia’s opinions often illustrate this collapse, as when interpretive substance motivates rhetorical form or when one aspect becomes the other (figuration becomes argument). That is, the rhetoric of Scalia’s opinions, especially his “colorful dissents,” exhibit a continuity between content and form, between what is said and how it is said insofar as certain stylistic choices reinforce or even embody the interpretive arguments. Furthermore, this claim about the rhetoric of Scalia’s interpretations (his applied practice) can also be made about his theoretical defenses of his originalist hermeneutics (his abstract theory).

So far, I seem to be making a distinction between an interpretive argument and its rhetorical embellishment, a distinction that I’m suggesting can in some instances be minimized or collapsed. Before turning to a couple concrete examples, I want to dwell for a moment on the definition of rhetoric I’m using. Most generally, one might simply equate rhetoric with language-use. A general definition of rhetoric is the use of language in a context to have effects. The two main effects are effects on
audiences and effects on language itself. The first kind we often call persuasion and the second figuration. I sometimes employ this broad definition with my students to encompass as many general definitions of rhetoric as possible. But a narrower, more contentious definition of rhetoric is: rhetoric is the ethical and political effectivity of trope, argument, and narrative in culture. I think this narrower definition works especially well for understanding the relation between hermeneutic substance and rhetorical form, persuasion and figuration, in Scalia’s opinions and their reception within the legal field and in the larger public sphere.

Again, form and substance, rhetoric and interpretation, cannot be easily separated. Often Scalia’s substantive interpretive arguments motivate or extend his formal rhetorical tropes and vice versa. Moreover, his assumed narratives of past and present jurisprudential conflict often contextualize and prompt his polemical opinions. That is, Scalia’s rhetoric of sarcasm and exaggeration is not superfluous ornamentation but substantive enhancement of his arguments.

This observation applies to his originalist textualism both in practice and in theory. In the interpretive practice of his court opinions, especially his dissents, Justice Scalia doesn’t just disagree with his colleagues on the bench, his rhetoric registers shock or disgust, tropologically marking the depth of
his rejection of their opinions. A string of rhetorical examples from just one Scalia dissent in *Atkins v. Virginia* (2002) illustrates: “[T]he Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of . . . members of the so-called ‘world community,’ and respondents to opinion polls.” “[T]he arrogance of this assumption of power takes one’s breath away.” “To invoke alien laws when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.”

This close relation between Scalia’s polemical rhetoric and interpretive arguments in his juridical practice can also be seen in his philosophy of law. In theoretical moments of hermeneutic reflection, Scalia’s opinions disparage those who support a “living Constitution” that changes with the times as opposed to the stable Constitution of original meaning. Using the metaphor of a “living Constitution” allows Scalia ironically to support the notion of a “dead Constitution,” a Constitution that is paradoxically alive precisely because its meaning is dead and buried once and for all in the past and only needs to be carefully excavated and preserved again and again in the present and future.

**Conclusion**

A review of the *The Originalist*, a 2015 drama based on the life of Justice Scalia, declared that its main character is “arguably among the most polarizing jurists of his stature in
American history, and inarguably the most combative justice currently on the court.”¹¹ In demonstrating how this is so, the play has the character Scalia reference the two intertwined issues I have examined in this paper. “I’m not an ideologue. I’m an originalist,” he says at one point; and later he notes concerning one of his opinions, “I used rhetorical exaggeration to make a legal point.” We might say that both the popular and the professional legacies of Justice Scalia thus include a particular version of rhetorical hermeneutics: a distinctive combination of originalist interpretive argument, its rhetorical incarnation, and their theoretical articulation. Viewed as a form of interpretive politics, the Scalia brand of jurisprudence often makes it as difficult to distinguish his ideological commitments from his hermeneutic performance as it does to separate his interpretive arguments from their rhetorical embodiments.

¹ “Senate battle over Supreme Court nominee Neil Gorsuch has been relatively mild, but that’s about to change.” http://www.latimes.com/politics/la-na-pol-gorsuch-senate-battle-20170318-story.html
³ Ibid. p. 68.
⁶ Antonin Scalia, “God’s Justice and Ours,” First Things (May 2002)
⁷ Posner, How Judges Think 94.