Abstract
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Justice Scalia and Rhetorical Constructions of Precedent

Within the context provided by the guiding theme of an upcoming symposium, *Justice Scalia enacts his vision of the rule of law through his rhetorical framing*, this paper will draw on two rhetorical concepts. The first is the suggestion that if there is a primary area of difference in the rhetoric of different categories of speakers and writers, the difference emanates from invention, the rhetorical location for the generation of creative thought. For example, when they encounter a particular situation, neoliberal, feminist, and critical rhetoricians "may imagine different hypotheses and find different theories worthy of consideration."[1]

The second concept builds on Bernadette Meyler's formulation of the ways in which precedent may function as a rhetorical trope. The proposition that two cases are alike "has the inevitable effect of declaring that the meaning of the immediate case is one thing and not another." Rather than focusing on the role of precedent in the outcome of decisions, Meyler suggests an analysis of "the rhetorical effect of the deployment and arrangement of precedents within judicial opinions."[2]

The paper will apply insights from these perspectives to the majority opinion written by Justice Scalia in *Employment Div. Dep't of Human Resources v. Smith,* 494 U.S. 872 (1990), where the Court held that the free exercise clause did not prohibit the application of Oregon drug laws to the religiously motivated, ceremonial ingestion of peyote. In *Smith*, Justice Scalia cited *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) for the proposition that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs" without mentioning that *Gobitis* had been overruled within a few years by Justice Jackson's opinion for the Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).[3]

Justice Scalia regularly expressed his disdain for other justices' reliance on the dicta of the Court's prior opinions. For example, immediately before a sentence-by-sentence examination of opinions cited by other justices, Justice Scalia wrote: "It is to those [opinions] that we now turn--begrudgingly, since we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

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[1] Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 Texas L. Rev. 109, 210 (1991).

[2] Bernadette Meyler, The Rhetoric of Precedent (electronic copy available at http://ssrn.com/abstract=2763085). Meyler's discussion is based on "distant reading."

[3] Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1124 (1990) ("Relying on Gobitis without mentioning Barnette is like relying on Plessy v. Ferguson without mentioning Brown v. Board of Education.").

The paper will suggest that Justice Scalia's use of Justice Frankfurter's words from the short-lived majority opinion in *Gobitis* is different from the more conventional construction of precedent by "dissect[ing] the sentences" of prior opinions. Instead, this example of Justice Scalia's construction of a rule of law represents a particular kind of rhetorical invention with unique rhetorical effects and significance.