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Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the *VMI* Case

BY MICHAEL FROST*

Despite an apparently inexhaustible interest in systematic analysis of judicial opinions, legal scholars usually overlook the most comprehensive, adaptable, and practical analysis of legal discourse ever devised: the classical art of rhetoric. Beginning with Aristotle's *Rhetoric* and culminating with Cicero's *De Oratore* and Quintilian's *Institutio Oratoria*, Greek and Roman rhetoricians analyzed and described rhetorical techniques that enabled ordinary Greek and Roman citizens to make successful legal arguments without the help of lawyers or legal training.

Regrettably, most lawyers and legal scholars are unfamiliar with classical rhetoric, which is unfortunate because Greco-Roman analysis of legal reasoning, methodology, and strategy is the foundation and source for most modern theories on the topic. Classical rhetoric offers detailed and practical advice on how to devise and present legal arguments and is especially useful to anyone interested in connections between the law and other academic disciplines.

Although classical rhetoric has been largely neglected by legal scholars, it has become increasingly important in the past twenty years in other academic disciplines. Scholars in departments of English, Composition, Speech, and, of course, Rhetoric are returning to Greco-Roman sources for both inspiration and instruction in discourse analysis. In the past few years, dozens of books and articles have been written on the connections between modern and classical rhetorical principles.¹

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¹ Recent scholarship on the connections between modern and classical rhetorical principles includes: *A SYNOPTIC HISTORY OF CLASSICAL RHETORIC* (James J. Murphy ed., 1983); *A SHORT HISTORY OF WRITING INSTRUCTION* (James J. Murphy ed., 1990); *LEARNING FROM THE HISTORIES OF RHETORIC* (Theresa Enos ed., 1993);

None of them, however, focuses exclusively on legal rhetoric and most barely mention the topic. Even so, a few legal scholars, judges, and lawyers have recently begun to correct this omission. They recognize the value of classical rhetoric and occasionally rely on it to clarify or illustrate their points. They also recognize that, with some adaptations for modern taste and modern legal practice, the rhetorical principles created by Aristotle, Cicero, and Quintilian are as applicable today as they were 2500 years ago. Moreover, the classical approaches provide what most modern approaches lack: a clear, experience-based theoretical framework for analyzing and creating legal arguments.

Although modern legal scholars rarely devote much attention to how classical rhetoric applies to modern judicial discourse, one exception is Chaim Perelman, a widely respected, law-trained Belgian philosopher. His *The Idea of Justice and the Problem of Argument* ("The Idea of Justice"),² analyzes judicial uses of legal precedent in order to illuminate connections between classical and modern methods of legal argument. Perelman's *The Idea of Justice*, and his *The New Rhetoric: A Treatise on Argument*³ emphasize, in ways that are reminiscent of the classical techniques of legal argument, modes of "nonformal logic which [can] 'induce or increase the mind's adherence to theses presented for its assent.'"⁴

In addition to Perelman, other legal scholars, lawyers, and judges have begun using classical rhetorical principles to analyze legal discourse. For example, Robert F. Hanley recommends that lawyers take into account the classical concepts of *ethos* (an advocate's credibility) and *pathos* (the emotional aspects of a legal argument) when planning courtroom argumentative strategies.⁵ In his treatise on legal logic, Judge Ruggero Aldisert applies the classical rhetorical concept of enthymetic proofs to modern legal arguments.⁶ Judge Richard Posner's treatise on law and literature

BRIAN VICKERS, IN DEFENSE OF RHETORIC (1988); KATHLEEN E. WELCH, THE CONTEMPORARY RECEPTION OF CLASSICAL RHETORIC: APPROPRIATIONS OF ANCIENT DISCOURSE (1990); RICHARD MCKEON, RHETORIC: ESSAYS IN INVENTION AND DISCOVERY (1987).

² CHAIM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (John Petrie trans., 1963).

³ CHAIM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENT (John Wilkinson & Purcell Weaver trans., 1969).

⁴ EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 629 (2d ed. 1971).

⁵ See Robert F. Hanley, *Brush Up Your Aristotle*, 12 LITIG. 39 (1986).

⁶ An *enthymeme* is a syllogism in which the major premise is only probable, CORBETT, *supra* note 4, at 73; or a syllogism in which one term is omitted, RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING

contains a section on judicial "style as persuasion" where he notes that "[i]t is an open question whether the style of judicial opinions is better studied from the standpoint of linguistics and *rhetoric* or from that of literary criticism"⁷ Professors Anthony G. Amsterdam and Randy Hertz's analysis of the rhetorical structure of closing arguments includes quotations from Aristotle, Cicero and Quintilian.⁸

Most of these commentators are interested in how classical rhetorical principles help discover or explain the internal logic and persuasive value of legal discourse. Understandably, given their limited purposes, these commentators rarely call much attention to the larger context from which these classical principles were drawn. That is, they apply the classical principles without referring to the overall classical system, in part because they do not need to. As experienced lawyers and judges, they can rely on their own experience for much of the information and advice contained in the classical sources.

Even so, their analyses could certainly benefit from a greater familiarity with the comprehensive, coherent, and experience-tested classical system, which offers detailed advice for handling a legal case from the initial issue and fact determinations to the final courtroom techniques and strategies. Rhetoric has always been an educational tool geared to meet the practical demands of the legal profession. For 2500 years, it has survived and adapted to those demands and can certainly still do so.

Some of these adaptations have already been noted in a series of articles that analyze the connections between classical rhetoric and modern practice.⁹ Set in the larger context of the entire classical rhetorical system,

54 (1989).

⁷ RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 270-71 (1988) (emphasis added). In addition, Posner observes:

[a]s used by Aristotle and his successors, "rhetoric" ran the gamut of persuasive devices in communication, excluding formal logic. It thus embraced not only style but much of reasoning. Since the Middle Ages the word has come more and more to mean just the eloquent or effective use of language, and that is the approximate sense in which I shall use the word "style." The broader signification of "rhetoric" has its adherents, though.

Id.

⁸ Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 60 (1992).

⁹ Michael Frost, *Brief Rhetoric—A Note on Classical and Modern Theories of Forensic Discourse*, 38 KAN. L. REV. 411 (1990) [hereinafter Frost, *Brief Rhetoric*]; Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994) [hereinafter Frost, *Ethos, Pathos & Legal Audience*]; Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 LEGAL WRITING: J. LEGAL WRITING

the aforementioned articles examine modern applications of the classical topics of invention or discovery,¹⁰ factual analysis, argumentative strategies, legal reasoning, organizational patterns, audience analysis, stylistic conventions, and lawyer credibility. While these articles provide a starting point for an understanding of how classical rhetoric can benefit modern legal scholars, they are only a beginning. What is also needed is a demonstration of how the classical approach deepens our understanding of the rhetorical forces at play in judicial opinions.

In modern parlance, “rhetoric” is usually a pejorative term, frequently associated with politicians, preachers, and other public figures. Rhetoric may be defined as “[l]anguage that is elaborate, pretentious, insincere, or intellectually vacuous.”¹¹ In this sense, “rhetoric” is a term of opprobrium reserved for those whose opinions are unpopular or controversial. This pejorative use of the term is frequently invoked by those who disagree with the written opinions of Justice Antonin Scalia.¹²

Those who approve of his opinions use a different definition. For them, rhetoric is “[s]kill in using language effectively and persuasively.”¹³ Classical rhetoricians focused most of their attention on this second view of rhetoric, but they too were acutely aware that over-elaborate, pretentious, and insincere language impairs the quality of any legal argument.

Most discussions of Justice Scalia’s rhetoric are prompted by his dissenting opinions because that is where his use of patently “rhetorical” language is most noticeable. A recent sampling of his quotable language appears in his dissent in *PGA Tour, Inc. v. Martin*,¹⁴ where he criticizes the

INST. 113 (1996) [hereinafter Frost, *Greco-Roman Analysis of Metaphoric Reasoning*]; Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 ST. JOHN’S L. REV. 107 (1992) [hereinafter Frost, *Greco-Roman Legal Analysis*].

¹⁰ See generally Richard J. Schoeck, *The Practical Tradition of Classical Rhetoric*, in RHETORIC AND PRAXIS: THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRACTICAL REASONING 28 n.3 (Jean Dietz Moss ed., 1986) (“It is a token of the lastingness of the symbiotic relation between law and rhetoric that in most Anglo-American jurisdictions *discovery* has meant . . . that early stage in the examination of evidence by parties to action at law, or their attorneys . . .”).

¹¹ AMERICAN HERITAGE DICTIONARY 1494 (4th ed. 2000).

¹² Alex Kozinski, *My Pizza with Nino*, 12 CARDOZO L. REV. 1583, 1586 (1991) (“Scalia’s dissents have been labelled ‘verbal hand grenades’ and rightfully so. They are explosive. And, like hand grenades, they throw shrapnel at anyone near the blast without attention to who they are—or how they might vote in the next case.”).

¹³ AMERICAN HERITAGE DICTIONARY, *supra* note 11.

¹⁴ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting).

Court's decision to allow disabled golfer Casey Martin to use a golf cart during professional tournaments. In that dissent, he contemptuously refers to the Court's creation of "federal-Platonic golf"¹⁵ and to its "*Kafkaesque* determination,"¹⁶ its "*Alice in Wonderland* determination,"¹⁷ and its "*Animal Farm* determination."¹⁸ This is the type of language that attracts public attention.

Justice Scalia's skill as a rhetorician consists of more than his ability to find and employ a quotable phrase. To demonstrate the important part rhetoric frequently plays in modern judicial opinions and why it is useful to analyze judicial opinions from a classical perspective, the following analysis examines Justice Scalia's dissent in the case of *United States v. Virginia*.¹⁹

In the course of his dissent in *United States v. Virginia*,²⁰ Justice Antonin Scalia criticizes the Court's opinion in language that makes his authorial voice the most distinctive on the U.S. Supreme Court. As he attacks the majority's decision to require, on equal protection grounds, the previously all-male Virginia Military Institute ("VMI") to admit qualified women,²¹ he accuses the majority of being "illiberal,"²² "counter-majoritarian,"²³ and "self-righteous."²⁴ He asserts that the majority's equal protection jurisprudence is random,²⁵ that the Court "load[s] the dice"²⁶ or plays "Supreme Court peek-a-boo"²⁷ with the standards of review it applies, that it engages in "politics-smuggled-into-law"²⁸ and "do-it-yourself . . . factfinding,"²⁹ that it re-writes the U.S. Constitution with "custom-built 'tests,'"³⁰ and "ad-hocery,"³¹ and that it employs "fanciful description[s]"³²

¹⁵ *Id.* at 701.

¹⁶ *Id.* at 705 (emphasis added).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* (emphasis added).

¹⁹ *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

²⁰ *Id.*

²¹ *Id.* at 531-34.

²² *Id.* at 567.

²³ *Id.*

²⁴ *Id.* at 601.

²⁵ *Id.* at 567.

²⁶ *Id.* at 568.

²⁷ *Id.* at 574.

²⁸ *Id.* at 569.

²⁹ *Id.* at 589 n.5.

³⁰ *Id.* at 570.

³¹ *Id.* at 600.

³² *Id.* at 571.

of its own decisions. Language like this has gained Justice Scalia a well-deserved reputation for being a caustic and frequently sarcastic stylist.³³

Much of his reputation arises from the language he uses when he is the sole dissenter. When he writes for the majority, his language is more formal and less controversial. In large part the language differences between Justice Scalia's dissents and his majority opinions arise from the fact that majority opinions are "corporate" or collaborative writing, that is, writing-by-committee. Although the assigned Justice has considerable stylistic latitude in organizing and writing the opinion, the other Justices make both substantive and stylistic contributions.³⁴ The effect of these contributions is usually to dilute the personal writing style of the official author and to produce an opinion with no distinctive authorial voice. Moreover, most judges strive for an objective writing style that subordinates their personal voice to ensure that the opinion appears as impartial as possible.³⁵

³³ See Kozinski, *supra* note 12, at 1586; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1383 (1995) ("Regular dissenters such as Justice Scalia are particularly prone to *stylish stabs*." (emphasis added)). See also Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 28-29 nn.129, 131 (2000) (asserting that "Scalia's dissent in Dickerson III is . . . hyperbolic" and that "its assertion of intellectual superiority is offensive").

³⁴ See generally JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 186 (3d ed. 1993) ("In writing an opinion, the writing judge is involved in a joint venture. The end product is not his opinion alone but rather that of all the members of the panel who form the majority. . . . Like the trial court decision, it is written by one judge. However, suggested revisions are made by the other participating judges and the *opinion is a shared effort*." (emphasis added)); BERNARD E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 83 (1977) ("In cases of exceptionally fine work, the responsive notes [of other judges] may be very enthusiastic. On the other hand, a Justice may disagree with major details of an opinion, and the result may be considerable revision or sharpening as the opinion goes through draft after draft to accommodate all of the suggestions. The writing judge may make extensive concessions either to keep his majority or to get as close to unanimity as possible." (quoting JOHN P. FRANK, THE MARBLE PALACE 119 (1958))); Wald, *supra* note 33, at 1377 ("[M]ost judges will compromise their preferred rationale and rhetoric to gain a full concurrence from other members of the panel. In an appellate court composed of strong-minded men and women of different political and personal philosophies, consensus is a formidable constraint on what an opinion writer says and *how she says it*. Her best lines are often left on the cutting room floor." (emphasis added)).

³⁵ Judge Joyce George, former judge of the Ohio Court of Appeals, stresses the need for objectivity. See GEORGE, *supra* note 34, at 422 ("The individual technique used by the writer to express the decision made, as well as the reasons for the

Dissents are a different matter. As a rule, dissenters are unhappy. After all, they have not persuaded their colleagues to their point of view.³⁶ They are unhappy about the majority's ruling, unhappy about its rationale, unhappy about its reading of the facts, treatment of the record, or understanding of the law. Consequently, they dissent. In their unhappiness, they use their dissents for sometimes questionable purposes and do so in the face of widespread skepticism about the usefulness or advisability of dissents generally.

As Bernard E. Witkin observes in his *Manual on Appellate Court Opinions*,³⁷ "[t]he proponents and opponents of dissenting opinions are about evenly divided in number and in vehemence of their opinions on the subject."³⁸ Professor Witkin quotes numerous judges who offer two primary justifications for writing a dissent: they preserve legal principles for use at a later time, and they may prompt a court, on reflection, to correct its errors.³⁹

In her *Judicial Opinion Writing Handbook*,⁴⁰ Judge Joyce George, formerly of the Ohio Court of Appeals, maintains that "[a] dissent should be aimed at serving the law by raising unanswered issues and theories that more appropriately control the particular case. They may be used to guide a future court by suggesting the evolution of legal principles necessary to meet changed social conditions and concepts."⁴¹ She cautions that a dissent, "depending upon its tone . . . may give the appearance of the existence of dissension among the members of the bench."⁴²

As a rule, then, dissenters want to demonstrate that the majority was wrong to rule as it did. Frequently, they use the dissent to continue a debate on controversial topics or to test new (or old) ideas in the court of public opinion. Sometimes the dissent is intended to spur legislative action.⁴³

decision, should be *neutral, detached, objective, and impersonal.*" (emphasis added)).

³⁶ Judge Patricia Wald, former Chief Judge of the U.S. Court of Appeals (D.C. Cir.), makes this point that "[a] dissenter is admitting she has not been able to convince her colleagues . . ." Wald, *supra* note 33, at 1412.

³⁷ WITKIN, *supra* note 34.

³⁸ *Id.* at 225.

³⁹ *Id.* at 226-27.

⁴⁰ GEORGE, *supra* note 34.

⁴¹ *Id.* at 224.

⁴² *Id.*

⁴³ Wald, *supra* note 33, at 1412 ("A dissent speaks to the rest of the court, to courts in other places, to higher courts, to Congress, to future generations; it brings no hope of present reward or vindication." (emphasis added)).

Judges who think writing dissents is a bad idea give a number of reasons, such as fostering resentment in the losing party, encouraging unnecessary appeals, and introducing uncertainty into the judicial process.⁴⁴

Some judges, Justice Scalia among them, use their dissents to publicly rebuke their colleagues or to provide a parade of horrors that will inevitably flow from the ruling. Occasionally, a dissent functions as a sort of therapeutic venting for the unhappy judge.⁴⁵ In that sort of dissent:

He [the dissenting judge] sometimes may indulge in sarcasm and far-fetched logic, unreasonable constructions and interpretations . . . In some few cases personalities enter into it. . . . He wants to make his view stand out in bold relief, and by undue emphasis, unreasonable criticism, unfair interpretation, and a failure to follow the record he affords by his dissent much that makes good reading in the press, all to the harm of the court as a whole.⁴⁶

Judge George echoes these sentiments when she insists that “[t]he dissenter should not personally attack the majority. The reasons compelling the dissent should be expressed clearly without intemperance, insinuations, or allegations of incompetence.”⁴⁷

No matter what their purpose, dissenting judges—especially rhetorically sophisticated judges like Scalia—have a stylistic latitude that collaborative writers do not. Unalloyed by the substantive and stylistic contributions of other judges, the personal authorial voice of the dissenting judge emerges, undiluted by the voices of collaborators.⁴⁸ Frequently this allows the judge’s personality, or at least his or her judicial *persona*, to become much more visible and this in turn affects how the dissent is read.⁴⁹

⁴⁴ WITKIN, *supra* note 34, at 226 (“My own view, however, is that most dissents do much more harm than good. They foster resentment on the part of the losing party, they encourage groundless appeals and they introduce an element of uncertainty where certainty should if possible prevail.”) (quoting Judge John J. Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 13 (1950)).

⁴⁵ See generally GEORGE, *supra* note 34, at 223 (“The dissenter should not attack the majority. The reasons compelling the dissent should be expressed clearly without intemperance, insinuations, or allegations of incompetence.”).

⁴⁶ WITKIN, *supra* note 34, at 226-27 (quoting Herbert B. Gregory, *Shorter Judicial Opinions*, 34 VA. L. REV. 362, 366 (1948)).

⁴⁷ GEORGE, *supra* note 34, at 223.

⁴⁸ Wald, *supra* note 33, at 1413 (“A dissent is liberating. No other judge need agree or even be consulted. Exuberant (or excess) prose is unconstrained.”).

⁴⁹ Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1436 (1995) (“A [judicial] writing has an implied author (a “voice” in a sense that goes beyond signature) as well as an actual author. The

Not only does this judicial *persona* become visible, it is also transformed in character. In one sense, the dissenting judge becomes an advocate as well as a judge. Despite repeated admonitions not to, judges sometimes become advocates. "A judge is not an advocate in robes. The judge may not extend his judicial activities so as to become, in effect, either an assisting prosecutor, an assisting defense attorney or a thirteenth juror. Nor should the judge's individual biases, values or morals be imposed upon others."⁵⁰

Unlike typical advocates, however, the dissenter is not addressing a court (or at least not his or her own court). The dissenter has already lost that battle. Instead, dissenting judges aim their arguments at other audiences.⁵¹ In the hope of influencing them and prompting them to action, dissenting judges write for other courts, and for legislative bodies, legal commentators, the media, and the general public. As judicial advocates, dissenting judges furnish these audiences with arguments, authorities, and, presumably, a rhetorical vocabulary for re-addressing the issues.

The success of these judicial advocates depends, of course, on the merits of their substantive arguments. Most commentators who review Scalia's dissents correctly focus on the substantive merits of his reasoning. After all, if he is illogical, misuses authorities, misreads the record, or otherwise compromises the integrity of his analysis, then his colleagues on the Court rightly rejected his point of view. But Justice Scalia is highly intelligent, resourceful, and experienced. Even his critics concede these attributes; however, successful arguments depend on more than substantive merit. They also depend on the advocate's credibility and the emotions he or she invokes, both of which are substantially affected by the advocate's writing style.

While the affective or emotive aspects of Scalia's opinions have received considerable attention, this attention usually focuses on revealing or objectionable word choices or phrases—that is, his diction.⁵² Even while

implied author is the author whose *character* and *values* we infer from the writing itself, as distinct from the character and values that we might infer from a personal acquaintanceship with the author or from a good biography of him." (emphasis added) (footnote omitted)).

⁵⁰ See GEORGE, *supra* note 34, at 421. See also WITKIN, *supra* note 34, at 233 ("Some commentators have therefore cautioned against taking the position of an *advocate* in an attack on the majority opinion or its authors." (emphasis added)).

⁵¹ See Wald, *supra* note 33, at 1412 ("A dissent speaks to the rest of the court, to courts in other places, to higher courts, to Congress, to future generations . . .").

⁵² One recent exception to this general approach appears in Fajans & Falk, *supra* note 33. The authors analyze the rhetoric of the Court's opinion as well as some of Justice Scalia's dissent.

decrying his aggressive tone and vocabulary as unnecessarily personal and sometimes cruel, commentators still devote most of their analysis to the substantive merits of his arguments and insufficiently analyze several important rhetorical forces at play when Justice Scalia, the Advocate, writes his dissents. These other rhetorical cross-currents are best examined in light of analytical techniques first formulated over 2000 years ago.

I. GRECO-ROMAN RHETORIC

Rhetorical analysis of legal discourse dates to the time of Aristotle, whose *Rhetoric*⁵³ is the most famous and most influential, if not the earliest⁵⁴ or most complete,⁵⁵ description of forensic rhetorical technique. In its Aristotelian sense, rhetoric is the “faculty [power] of discovering in the particular case what are the available means of persuasion.”⁵⁶ Aristotle’s *Rhetoric* was the model for Roman rhetoricians like Cicero⁵⁷ and Quintilian,⁵⁸ who expanded on Aristotle’s work to create the most comprehensive analysis of legal discourse in existence.

Basing their work on close observation of successful advocates, Aristotle and the others examined, in exhaustive detail, all the methods that

⁵³ ARISTOTLE, *THE RHETORIC OF ARISTOTLE* (Lane Cooper trans., 1932).

⁵⁴ Corax of Syracuse is generally credited with inventing rhetoric in the fifth century B.C. None of Corax’s handbooks on rhetoric have survived, although “[t]here are references in Plato, Aristotle, Cicero, and Quintilian to the part that Corax . . . played in formulating rhetorical theory. . . .” CORBETT, *supra* note 4, at 595. See also GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 8 (1980). Kennedy also observes that “Corax and Tisias . . . are traditionally described as ‘inventors’ of rhetoric.” *Id.*

⁵⁵ The most comprehensive treatment is that of Marcus Fabius Quintilian whose *Institutio Oratoria* covers the topic in four volumes, which are subdivided into twelve books. See Roland Gregory Austin & Michael Winterbottom, *Quintilian (Marcus Fabius Quintilianus)*, in *THE OXFORD CLASSICAL DICTIONARY* 1290 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996).

⁵⁶ ARISTOTLE, *supra* note 53, at 7.

⁵⁷ Marcus Tullius Cicero (circa 106-45 B.C.) was a Roman statesman, lawyer, and teacher whose major works on rhetoric include *De Oratore* and *Brutus*. See John Hedley Simon & Dirk Obbink, *Marcus Tullius Cicero*, in *THE OXFORD CLASSICAL DICTIONARY* 1558-64 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996).

⁵⁸ Marcus Fabius Quintilian (circa 35-95 A.D.) was a Roman teacher of public speaking and rhetoric whose major work on rhetoric is *Institutio Oratoria*. See Austin & Michael, *supra* note 55, at 1290.

experienced advocates used to create and present their arguments.⁵⁹ In doing so, they emphasized practical, experience-based methodologies for achieving rhetorical success. Most of them divided the practice of rhetoric into five parts: invention (discovery of available arguments),⁶⁰ arrangement (organization of those arguments),⁶¹ style (presentation of those arguments), memory, and delivery. Most of their attention is focused on style.⁶² They connected style, as well as the other aspects of rhetoric, to three modes of persuasion: arguments based on logic (*logos*), arguments based on emotion (*pathos*), and arguments based on the advocate's character or credibility (*ethos*).⁶³

According to classical rhetoricians, successful advocacy depends on a careful mix of all three modes, each complementing the others. In their view, the logical integrity of an argument will be seriously damaged if advocates lack credibility or fail to control the emotional cross-currents of their case. Good advocates employ all three modes simultaneously.

Analysis of Justice Scalia's dissent in *United States v. Virginia*⁶⁴ using Greco-Roman techniques reveals that he is a sophisticated, but frequently heavy-handed, rhetorician. He uses the time-honored rhetorical devices of metaphor, simile, antithesis, irony, hyperbole, and rhetorical questions in

⁵⁹ For a more complete discussion of the history and development of classical rhetoric as it applies to modern legal discourse see Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613 (1999).

⁶⁰ For further discussion of this topic as it applies to modern legal discourse see Frost, *Greco-Roman Legal Analysis*, *supra* note 9.

⁶¹ Extensive coverage of organization as a rhetorical strategy appears in Michael Frost, *Brief Rhetoric*, *supra* note 9.

⁶² 3 QUINTILIAN, INSTITUTIO ORATORIA 185 (H.E. Butler trans., 1996) ("Therefore it is on this [style] that teachers of rhetoric concentrate their attention, since it cannot possibly be acquired without the assistance of the rules of art: it is this which is the *chief object of our study*, the goal of all our exercises and all our efforts at imitation, and it is to this that we devote the energies of a lifetime; it is this that makes one orator surpass his rivals, this that makes one style of speaking preferable to another." (emphasis added)).

⁶³ Classical rhetoricians created these divisions for purposes of analysis and discussion, but did not consider *logos*, *pathos*, and *ethos* as completely separable from one another. Each part is connected to and helps define the others. ARISTOTLE, *supra* note 53, at 8. For an extended discussion of the part *ethos* plays in modern legal discourse see Frost, *Ethos, Pathos & Legal Audience*, *supra* note 9. See also 1 QUINTILIAN, *supra* note 62, at 397 ("There are . . . three aims which the orator must always have in view; he must instruct, move and charm his hearers.").

⁶⁴ *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

ways that damage, rather than enhance, his arguments. In the course of his dissent, he uses these devices and others explicitly to disdain his colleagues and the Court's review procedures. Moreover, he undermines his own arguments by adopting a disagreeable and frequently peevish judicial persona who appears alternately indifferent or hostile to the important emotional cross-currents moving through the case.

II. *UNITED STATES V. VIRGINIA*

A. *The Majority Opinion*

The target of Justice Scalia's dissent is the majority opinion, which addressed two questions. First, the majority assessed whether "Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—[denies] women 'capable of all the individual activities required of VMI cadets,' the equal protection of the laws guaranteed by the Fourteenth Amendment."⁶⁵ Second, it examined "if VMI's 'unique' situation—as Virginia's sole single-sex public institution of higher education—offends the Constitution's equal protection principle, what is the remedial requirement?"⁶⁶

Relying on its previous decisions in *J.E.B. v. Alabama ex rel. T.B.*⁶⁷ and *Mississippi University for Women v. Hogan*,⁶⁸ the Court required "[p]arties who seek to defend gender-based government action [to] demonstrate an 'exceedingly persuasive justification' for that action."⁶⁹ This justification must show "that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"⁷⁰ While noting that inherent differences between the sexes may justify sex classifications in some cases,⁷¹ the Court added that "such classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women."⁷²

⁶⁵ *Id.* at 530 (citation omitted).

⁶⁶ *Id.* at 530-31 (citation omitted).

⁶⁷ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

⁶⁸ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

⁶⁹ *Virginia*, 518 U.S. at 531 (emphasis added).

⁷⁰ *Id.* at 533.

⁷¹ *Id.* at 532.

⁷² *Id.* at 534 (citation omitted).

The Court rejected both of Virginia's justifications for a male-only admission policy at VMI. Virginia had asserted: (1) that "'single-sex education provides important educational benefits'" and "contributes to 'diversity of educational approaches,'" and (2) that "'the unique VMI method of character development and leadership training,' the school's adversative approach, would have to be modified were VMI to admit women."⁷³ Its examination of VMI's past and recent history⁷⁴ convinced the Court that VMI was not created or maintained to promote "diversifying . . . educational opportunities within the Commonwealth."⁷⁵

As for Virginia's second argument "that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women,"⁷⁶ the Court noted that similar rationales have been offered in the past to deny women educational opportunities in law,⁷⁷ medicine,⁷⁸ law enforcement,⁷⁹ and federal military academies.⁸⁰ The Court concluded that some women are as able as men to meet the challenge of VMI's "adversative" educational method, and that VMI's goal of producing "'citizen-soldier[s]'"⁸¹ is "great enough to accommodate women."⁸²

The Court also rejected Virginia's remedial plan, finding that Virginia "chose not to eliminate, but to leave untouched, VMI's exclusionary policy"⁸³ and, instead, "proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities,"⁸⁴ thereby failing to meet its obligation to "'eliminate [so far as possible] the discriminatory effects of the past'" and to "'bar like discrimination in the future.'"⁸⁵ At great length, the Court criticized Virginia's proposal to establish Virginia Women's Institute for Leadership ("VWIL"), a four year, state-sponsored undergraduate program located at Mary Baldwin College, a private liberal arts school for women.⁸⁶ It found that "VWIL's student body, faculty,

⁷³ *Id.* at 535.

⁷⁴ *Id.* at 536-38.

⁷⁵ *Id.* at 535.

⁷⁶ *Id.* at 540.

⁷⁷ *Id.* at 543-44.

⁷⁸ *Id.* at 544.

⁷⁹ *Id.*

⁸⁰ *Id.* at 544-45.

⁸¹ *Id.* at 545.

⁸² *Id.*

⁸³ *Id.* at 547.

⁸⁴ *Id.*

⁸⁵ *Id.* (citation omitted).

⁸⁶ *Id.* at 526-27.

course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network."⁸⁷ The Court concluded that "Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade,"⁸⁸ and that "the Commonwealth has shown no 'exceedingly persuasive justification' for withholding from women qualified for the experience premier training of the kind VMI affords."⁸⁹

B. Justice Scalia's Dissent

Justice Scalia's dissent claims that there are numerous flaws in the Court's decision.⁹⁰ According to Justice Scalia, the Court mistakenly removed decisions regarding the educational process from the democratic process, "inscrib[ed]" them into the U.S. Constitution,⁹¹ and rejected a "'long tradition of open, widespread, and unchallenged use [of male-only admissions to VMI] that dates back to the beginning of the Republic.'⁹² He further claimed that it "contradict[ed]"⁹³ and abandoned the previously employed intermediate scrutiny standard in sex-classification cases,⁹⁴ and applied instead an "amorphous 'exceedingly persuasive justification' "⁹⁵ standard that "amounts to (at least) strict scrutiny."⁹⁶

In advocating Virginia's argument that a male-only VMI supports the state's interest in promoting educational diversity, Justice Scalia notes that the record contains a "'substantial body of contemporary scholarship and research [that] supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated.'⁹⁷ He adds that VMI, like all other self-interested and autonomous colleges in Virginia, unavoidably contributes to the diversity of educational opportunities in the state.⁹⁸

⁸⁷ *Id.* at 551.

⁸⁸ *Id.* at 555.

⁸⁹ *Id.* at 555-56.

⁹⁰ *Id.* at 566 (Scalia, J., dissenting).

⁹¹ *Id.* at 567.

⁹² *Id.* at 568 (citation omitted).

⁹³ *Id.* at 572.

⁹⁴ *Id.* at 574.

⁹⁵ *Id.* at 573.

⁹⁶ *Id.* at 579.

⁹⁷ *Id.* at 576 (citation omitted).

⁹⁸ *Id.* at 584.

As for Virginia's argument that admitting women to VMI would fundamentally alter its "adversative" training method, Justice Scalia criticizes the Court for rejecting ample evidence supporting that view.⁹⁹ He concludes his criticism of the majority opinion by asserting that Virginia's proposed remedy—establishment of VWIL, a four year, state-sponsored undergraduate program located at Mary Baldwin College—would adequately solve the problem.¹⁰⁰ He also criticizes the concurring opinion, by Justice Rehnquist, for rejecting Virginia's diversity rationale,¹⁰¹ asserting that VMI's "adversative" educational method serves an important governmental objective,¹⁰² and for claiming that Virginia did not react quickly enough to Supreme Court jurisprudence respecting single-sex public educational institutions.¹⁰³

Having criticized the reasoning of both the majority and the concurrence, Scalia devotes the last few pages of his dissent to predicting the consequences of the majority decision. He is convinced that the decision "ensures that single-sex public education is functionally dead,"¹⁰⁴ because no single-sex *public* institution will be able to provide the Court's "'exceedingly persuasive justification.'"¹⁰⁵ Not only that, but "[t]he potential of today's decision for widespread disruption of existing institutions lies in its application to *private* single-sex education."¹⁰⁶ He concludes by suggesting that the Court's decision was unprincipled in ignoring its own precedents and in self-righteously imposing "its own favored social and economic dispositions nationwide."¹⁰⁷

While the foregoing summary of the logical grounds (or *logos*) of Justice Scalia's dissent identifies his main arguments, it falls far short of capturing the tone and spirit of that dissent. Scalia's main arguments are hardly novel—judicial encroachment on democratic processes, failure to honor traditional practices, inexplicable and unclear shifts in the standard of review, and refusal to properly weigh the evidentiary record; all are commonplace criticisms frequently levied by Court critics. What are novel, or at least distinctive, are the rhetorical strategies that Justice Scalia employs to make his points. Examination of those strategies, using the

⁹⁹ *Id.* at 585.

¹⁰⁰ *Id.* at 590-91.

¹⁰¹ *Id.* at 592-93.

¹⁰² *Id.* at 593-94.

¹⁰³ *Id.* at 594-95.

¹⁰⁴ *Id.* at 596.

¹⁰⁵ *Id.* at 597.

¹⁰⁶ *Id.* at 598.

¹⁰⁷ *Id.* at 601.

Greco-Roman approach to analyzing legal discourse, clarifies the rhetorical impact of Scalia's stylistic choices.

III. EMOTION AND ARGUMENT

Even a casual examination of Justice Scalia's dissent reveals that he feels passionately about the case. His opening lines excoriate the Court for a multitude of errors. Scalia's decision to begin in this highly emotional fashion is a well-established rhetorical practice approved of by Aristotle, Cicero, and Quintilian, who were acutely conscious of organizational strategies in argument. They divided legal arguments into five parts: introduction (*exordium*), statement of the case (*narratio*), argument summary (*partitio*), proof of the case (*confirmatio*) and conclusion (*peroratio*).¹⁰⁸ Each part had a specific rhetorical function to fulfill.

A. *Exordium*

Aristotle stated that the purpose of the *exordium*, or introduction, is to make the "audience receptive."¹⁰⁹ He and the other rhetoricians knew that logic alone is not enough. Good advocates must also ensure that their audiences are emotionally engaged and they must do so at the beginning of their arguments. Cicero, for example, stressed that it is "essential that [the *exordium*] should have the power of being able to exert . . . influence in stirring the minds of audience . . . [because it has] a very great effect in persuading and arousing emotion. . . ."¹¹⁰ Like Cicero, Quintilian thought the *exordium* exercised a "valuable influence in winning the judge [or audience] to regard us with favor."¹¹¹

The ringing cadences of Scalia's opening paragraph are certainly an attempt to create a sense of outrage in his audience:

¹⁰⁸ For a detailed discussion of the topic of arrangement in legal discourse see Frost, *Brief Rhetoric*, *supra* note 9, at 411.

¹⁰⁹ ARISTOTLE, *supra* note 53, at 223-24.

¹¹⁰ 3 CICERO, DE ORATORE 435 (H. Rackham trans., 2001). *See also id.* at 325 ("[M]en decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward *emotion*, than by reality, or authority, or any legal standard, or judicial precedent, or statute.").

¹¹¹ 2 QUINTILIAN, *supra* note 62, at 19. *See also* 3 QUINTILIAN, *supra* note 62, at 181 ("while emotional appeals are concerned with moving the audience and, although they may be employed throughout the case, are *most effective at the beginning and end.*" (emphasis added)).

Today the Court *shuts down* an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it *rejects* (contrary to our established practice) *the factual findings . . . sweeps aside the precedents* of this Court, and *ignores the history* of our people. *As to facts*: It explicitly rejects the finding that there exist “gender-based developmental differences” supporting Virginia’s restriction of the “adversative” method to only a men’s institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution’s character. *As to precedent*: It drastically revises our established standards for reviewing sex-based classifications. And *as to history*: It counts for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.¹¹²

With this introduction, Justice Scalia announces his main substantive themes in language designed to touch readers emotionally. Couching his position in absolute terms, he asserts that the Court’s decision will “shut down”¹¹³ a venerable institution, that it “rejects”¹¹⁴ findings, “sweeps aside”¹¹⁵ precedents, and “counts for nothing”¹¹⁶ the long traditions of men’s military colleges. These particular verb choices suggest that Justice Scalia is writing as an emotionally invested advocate—not as an objective, disinterested Justice of the U.S. Supreme Court. The magnitude of Justice Scalia’s emotional investment in this case becomes very clear when this opening paragraph is compared with openings in those dissents not geared toward generating an emotional response.¹¹⁷

¹¹² *Virginia*, 518 U.S. at 566 (Scalia, J., dissenting) (emphasis added).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ For examples of Justice Scalia’s dissents that employ low-key, non-emotional opening paragraphs, see *Ornelas v. United States*, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting) (a standard of review case); and *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 885-86 (1997) (Scalia, J., dissenting) (a products liability case). *But see Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (an Equal Protection case) (Justice Scalia opens his dissent with “The Court has mistaken a Kulturkampf for a fit of spite”); and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 156-57 (1994) (Scalia, J., dissenting) (an Equal Protection case) (where Justice Scalia opens with “Today’s opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and

Not only does this opening paragraph help set the emotional tone of the dissent, it also concisely summarizes Scalia's main reasons for dissenting. This, too, is a time-honored practice that Greco-Roman rhetoricians called *partitio*.

B. *Partitio*

The purpose of the *partitio*, according to anonymous author of the *Ad C. Herennium*, is to "set . . . forth, briefly and completely, the points we intend to discuss."¹¹⁸ More than that, however, the *partitio* is designed, according to Quintilian:

[To add] to the lucidity and grace of our speech. For it not only makes our arguments clearer by isolating the points from the crowd in which they would otherwise be lost and placing them before the eyes of the judge [or audience], but relieves his attention by assigning a definite limit to certain parts of our speech, just as our fatigue upon a journey is relieved by reading the distances on the milestones which we pass.¹¹⁹

That is, although good advocates must keep the audience's needs in mind at every stage of their argument, they must be especially mindful of how they begin. An audience's emotional receptivity to an argument is affected in part by the advocate's word choice, but it is also affected by the complexity and duration of the argument.

A properly constructed *partitio* reassures the audience that the forthcoming arguments will be easy to understand and of a manageable length. Scalia's opening paragraph meets the classical criteria of making the magnitude of the task clear from the outset and attempting favorably to dispose the audience to the forthcoming arguments by identifying three main lines of argument—arguments based on facts, arguments based on precedent, and arguments based on history.¹²⁰

C. *Parallel Structure*

In his *exordium*, Scalia employs still another classical rhetorical strategy—parallel construction. Consciously or not, he uses a stylistic

how sternly we disapprove the male chauvinist attitudes of our predecessors.").

¹¹⁸ 1 AD C. HERENNIIUM 31 (Harry Caplan trans., 1989).

¹¹⁹ 2 QUINTILIAN, *supra* note 62, at 149.

¹²⁰ See *Virginia*, 518 U.S. at 566 (Scalia, J., dissenting).

device that Greco-Roman rhetoricians regarded as closely associated with forensic discourse. Parallelism, or *similitudo*, is a general term that describes both parallelism and antithesis.¹²¹ Parallelism, like other rhetorical methods, makes arguments *felt* as well as understood. The purpose of parallelism is "to attract the attention of the audience and . . . not allow it to flag, rousing it from time to time."¹²² For classical rhetoricians, sentence-level stylistic devices are never a merely ornamental feature of argument. Instead, they are deliberately chosen to clarify or vivify an argument. On this point, Quintilian makes a number of very specific recommendations. He suggests that for maximum effect "a number of clauses may begin with the same word for the sake of force and emphasis," or that they "may end with the same words."¹²³

In keeping with classical practice, Scalia's main arguments are set out in a series of parallel "as to" phrases: "[a]s to facts,"¹²⁴ "[a]s to precedent,"¹²⁵ and "as to history."¹²⁶ His substantive points are that the Court rejected well-documented evidence ("facts"),¹²⁷ revised well-established standards of review ("precedent"),¹²⁸ and ignored time-honored traditions ("history").¹²⁹ The conjunctive "as to" phrases achieve their emotional force by accretion, each one adding to Justice Scalia's indictment of the majority opinion. The parallel phrases help him sustain his emotional momentum. They have the additional virtue of acting as coherence devices that unify his argument and make it more comprehensible.¹³⁰

As the preceding analysis shows, Justice Scalia's sophisticated organizational strategies, coupled with emotion-inducing word choices and

¹²¹ See MARSH H. MCCALL, JR., ANCIENT RHETORICAL THEORIES OF SIMILE AND COMPARISON 67 (1969). See also WINIFRED B. HORNER, RHETORIC IN THE CLASSICAL TRADITION 312 (1988) (Parallelism expresses similar or related ideas in similar grammatical construction.).

¹²² 3 QUINTILIAN, *supra* note 62, at 461.

¹²³ *Id.* at 463.

¹²⁴ *Virginia*, 518 U.S. at 566 (Scalia, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 1 AD C. HERENNIUM, *supra* note 118, at 381, 383 ("A Comparison [can] be used for vividness, and be set forth in the form of a detailed parallel . . . This Comparison, by embellishing both terms, bringing into relation by a method of parallel description . . . set[s] the subject vividly before the eyes of all. Moreover the Comparison is presented in the form of a detailed parallel because, once the similitude has been set up, all like elements are related.").

sentence structures, place his opening paragraph firmly within the classical tradition of *exordia*. His opening paragraph not only provides readers with a clear picture of the forthcoming substantive arguments, but also sets the emotional tone for those arguments.

In order to appreciate fully the emotion-inducing rhetorical force of Justice Scalia's opening paragraph, it should be contrasted with the comparatively colorless opening paragraph of the majority opinion. Justice Ginsburg begins her opinion with three simple declarative sentences, none of them particularly memorable: "Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree."¹³¹ For reasons discussed earlier,¹³² Justice Ginsburg's opening contains none of the rhetorical flourishes or distinction of Scalia's opening. It is simply a business-like statement of the Court's decision.

D. Peroration

As significant as the opening *exordia* are in classical theory, classical rhetoricians thought the conclusion, or *peroratio*, was even more important for controlling emotional responses to the argument. For Aristotle, the conclusion should "put the audience into the right state of emotion" and should "make the audience feel the right emotions—pity, indignation, anger, hatred, envy, emulation, antagonism."¹³³ Quintilian agreed and observed that, "[t]he peroration is the most important part of forensic pleading, and in the main consists of appeals to the emotions."¹³⁴ He too emphasized that "[t]he peroration provides freer opportunities for exciting the passions of jealousy, hatred or anger."¹³⁵ Quintilian recommended that the opening *exordium* and the closing *peroratio* be carefully coordinated:

[I]n our opening any preliminary appeal to the compassion of the judge [or audience] must be made sparingly and with restraint, while in the peroration we may give full rein to our emotions, place fictitious speeches

¹³¹ *Virginia*, 518 U.S. at 519.

¹³² See GEORGE, *supra* note 34, at 422 (decisions should be written in a "neutral, detached, objective, and impersonal" fashion).

¹³³ ARISTOTLE, *supra* note 53, at 240.

¹³⁴ 2 QUINTILIAN, *supra* note 62, at 417.

¹³⁵ *Id.* at 391.

in the mouths of our characters, *call the dead to life*, and produce the wife or children of the accused in court, practices which are less usual in *exordia*.¹³⁶

Justice Scalia's concluding paragraphs emphasize his argument that the Court is ignoring history, and fit the pattern recommended by Quintilian and others. Even more so than in his opening paragraphs, Justice Scalia's closing paragraphs are transparently emotional. He does not quite "call the dead to life,"¹³⁷ but he does claim that VMI's "attachment to such old-fashioned concepts as manly 'honor'"¹³⁸ has made it a target for those who want to abolish public single-sex education. To illustrate what will be lost by that abolition, he quotes amply from VMI's "The Code of a Gentleman":

Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman.¹³⁹

Scalia then quotes the Code's list of gentlemanly virtues, many of which concern proper deportment toward "ladies." Gentlemen, for example, do not gossip about their girlfriends, they do not visit ladies when they are drunk, call out to them in the street, discuss their "merits or demerits," or "lay a finger" on them.¹⁴⁰ Invoking as he does the image of a knight errant or religious crusader, Scalia's purpose is obviously to play on readers' emotions and to create in them a sense of indignation over the pending "destruction"¹⁴¹ of an institution that encourages "manly honor."¹⁴²

¹³⁶ *Id.* at 21 (first emphasis added).

¹³⁷ *Id.*

¹³⁸ *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting).

¹³⁹ *Id.* at 602.

¹⁴⁰ *Id.* at 602-03.

¹⁴¹ *Id.* at 603. Justice Scalia relies on the emotion-laden figure of the knight errant in another dissent as well. In *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (an Equal Protection case), Scalia maintains that "[w]hen the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."

¹⁴² *Virginia*, 518 U.S. at 603 (Scalia, J., dissenting). Rhetorically speaking, Justice Ginsburg's majority opinion attempts a bit more in the *peroratio* than it did in its opening. It makes an emotional appeal based on an ever-evolving sense of constitutional rights. The majority opinion closes as follows:

Justice Scalia has obviously relied on emotion to strengthen the persuasive value of the opening and closing paragraphs of his dissent. Deliberately or instinctively, he closely adheres to classical advocacy principles which stress the importance of employing all modes of persuasion. While from a rhetorical perspective, Scalia's *exordium* and *peroration* are critical parts of the dissent, they are but two of the many emotion-inducing rhetorical devices he uses to reinforce his logical points. Moreover, they exploit rhetorical strategies that depend on the overall structure of the argument, that is, the rhetorical canon of arrangement or placement of arguments. Notably, classical rhetoricians regarded sentence-level rhetorical style as much more important than arrangement in persuasive value.

E. Style

Classical rhetoricians spent far more time on discussions of rhetorical style than on any other topic.¹⁴³ Aristotle emphasized that "it is not enough

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI's story continued as our comprehension of "We the People" expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

Id. at 557 (citations and footnotes omitted).

Even this example is tame when compared with Justice Scalia's command of the forceful climatic paragraph. In the recent case of *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting), he concludes his dissent, from the majority opinion allowing disabled golfer Casey Martin to use a golf cart during tournaments, with the following paragraph,

Complaints about this case are not "properly directed to Congress." They are properly directed to this Court's *Kafkaesque* determination that professional sports organizations, and the fields they rent for their exhibitions, are "places of public accommodation" to the competing athletes, and the athletes themselves "customers" of the organization that pays them; its *Alice in Wonderland* determination that there are such things as judicially determinable "essential" and "nonessential" rules of a made-up game; and its *Animal Farm* determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability (or at least no one's lack of ability so pronounced that it amounts to a disability) will be a handicap. The year was 2001, and "everybody was finally equal."

Id. (citations omitted) (emphasis added).

¹⁴³ 3 QUINTILIAN, *supra* note 62, at 185 ("Therefore it is on this [style] that teachers of rhetoric concentrate their attention, since it cannot possibly be acquired

to know *what* to say—one must also know *how* to say it.”¹⁴⁴ Quintilian insisted that “oratory in which there is no *guile* fights by sheer weight and impetus alone.”¹⁴⁵ By “guile,” Quintilian meant an advocate’s use of all available stylistic resources. He also observed that “although it may seem that proof is *infinitesimally* affected by the *figures* employed, none the less [sic] those same *figures* lend credibility to our arguments and *steal their way secretly* into the minds of the judges.”¹⁴⁶ As the following analysis demonstrates, no single rhetorical figure or device accounts for the rhetorical impact of Justice Scalia’s dissent. Instead, these devices have a cumulative effect and into the audience’s mind and affect their response to the substantive arguments.

F. *Metaphors and Similes*

From a classical perspective, one of the most important of these stylistic devices was the well-chosen metaphor.¹⁴⁷ Recognizing that all language is inherently figurative, classical rhetoricians considered metaphors,¹⁴⁸ similes, and other figurative devices as both figures of thought and figures of speech.¹⁴⁹ Regarding metaphors, Aristotle observed

without the assistance of the rules of art: it is this which is the chief object of our study, the goal of all our exercises and all our efforts at imitation, and it is to this that we devote the energies of a lifetime; it is this that makes one orator surpass his rivals, this that makes one style of speaking preferable to another.”)

¹⁴⁴ ARISTOTLE, *supra* note 53, at 182.

¹⁴⁵ 3 QUINTILIAN, *supra* note 62, at 359 (emphasis added).

¹⁴⁶ *Id.* (first and last emphases added).

¹⁴⁷ For a fuller discussion of metaphors in legal argument see Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, *supra* note 9.

¹⁴⁸ Numerous modern definitions of metaphor exist ranging from Robert Frost’s definition that a metaphor is “saying one thing and meaning another,” JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* 57 (1973), to that of the *PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS* 490 (Alex Preminger ed. 1965), which defines metaphor as:

A condensed verbal relation in which an idea, image, or symbol may, by the presence of one or more other ideas, images, or symbols, be enhanced in vividness, complexity, or breadth of implication.

. . . The metaphorical relation has been variously described as comparison, contrast, analogy, similarity, juxtaposition, identity, tension, collision [and] fusion

For a comprehensive study of metaphors in U.S. Supreme Court opinions, see HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* (1992).

¹⁴⁹ Metaphors function in the same way as examples do in inductive proofs. See ARISTOTLE, *supra* note 53, at 147-49; 1 CICERO, *DE INVENTIONE* 89, 91 (H.M. Hubbell trans., 1949); and 2 QUINTILIAN, *supra* note 62, at 275-76.

that “we may start from the principle that we all take a *natural pleasure* in learning easily; so, since words stand for things, those words are most *pleasing* that give us *fresh knowledge* Accordingly, it is *metaphor* that is in the highest degree *instructive* and *pleasing*.”¹⁵⁰ Both Cicero and Quintilian also recognized that metaphors, and to a lesser degree similes, emotionally engage readers even while instructing them.¹⁵¹

In his dissent, Justice Scalia carefully uses metaphors, similes, and other rhetorical devices to make his points. For example, when rejecting the Court’s conclusion that, as an autonomous university, it was impossible for VMI to contribute to Virginia’s state-wide diversity goals, Scalia observes, “[i]f it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not exist.”¹⁵² As for the demand in Justice Rehnquist’s concurrence for more evidence that VMI contributes to state-wide educational diversity, Scalia says that demand “is rather like making crucial to the lawfulness of the United States Army record ‘evidence’ that its purpose is to do battle.”¹⁵³ In choosing both a soccer metaphor and an Army simile to make his points, Scalia reinforces his arguments regarding the “diversity contributions” of VMI’s all-male environment with rhetorical figures that convey a vigorous, martial flavor.¹⁵⁴

These rhetorical figures also reflect the condescending, mocking tone that Scalia uses elsewhere in his dissent. He uses other figures to accuse the Court of cheating (“load[ing] the dice”),¹⁵⁵ child’s play (“Supreme Court peek-a-boo”),¹⁵⁶ amateurism (“do-it-yourself . . . factfinding”),¹⁵⁷ bait and

¹⁵⁰ ARISTOTLE, *supra* note 53, at 206 (emphasis added).

¹⁵¹ 3 CICERO, DE ORATORE, *supra* note 110, at 125 (Readers respond favorably to metaphors because their “thoughts are led to something else and yet without going astray, which is a very great pleasure.” (emphasis added)); 3 QUINTILIAN, *supra* note 62, at 213 (“rhetorical ornament[s] contribute not a little to the furtherance of our case For when our audience find[s] it a *pleasure* to listen, their attention and their readiness to believe what they hear are both alike increased” (emphasis added)).

¹⁵² *United States v. Virginia*, 518 U.S. 515, 584 (1996) (Scalia, J., dissenting).

¹⁵³ *Id.* at 593.

¹⁵⁴ *Id.* Justice Scalia employs muscular metaphors in other dissents as well. In *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (an Establishment Clause case), he accuses the majority of destroying a long-standing tradition of nonsectarian prayer at graduation ceremonies with, “[a]s its instrument of destruction, the bulldozer of its social engineering, [with which] the Court invents a boundless, and boundlessly manipulable, test of psychological coercion.”

¹⁵⁵ *Virginia*, 518 U.S. at 568 (Scalia, J., dissenting).

¹⁵⁶ *Id.* at 574.

¹⁵⁷ *Id.* at 589 n.5.

switch tactics (“ad-hocery”),¹⁵⁸ and criminal activity (“politics-smuggled-into-law”).¹⁵⁹ Although these and other rhetorical figures contribute somewhat to Justice Scalia’s logical points, their most important contributions arise from their capacity for subtly keeping readers emotionally invested in the arguments. Each figure makes an incremental, almost unnoticeable, addition to the emotional climate of Justice Scalia’s arguments.

G. Parallelism

Metaphors and similes are among the most noticeable rhetorical devices in Justice Scalia’s dissent, but other less noticeable devices also make important contributions. Parallelism, for instance, which played an important part in the *exordium*, frequently appears when Justice Scalia wants to increase the emotional force of his argument.

He uses it to emphasize that the Court contradicted its own precedents when it concluded that Virginia has not provided an “exceedingly persuasive justification” for VMI’s male-only admission standard.¹⁶⁰ Relying on a series of parallel predicate phrases, he says that the Court’s conclusion “can only be achieved . . . if there are *some* women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands.”¹⁶¹ Each of these phrases isolates a substantive point for separate consideration while simultaneously increasing the oratorical impact of the sentence.

Elsewhere, he asserts that by tailoring its educational objectives to meet the Court’s requirements, VMI will always be vulnerable to an Equal Protection violation:

[I]f it restricts to men even one means by which it pursues that objective—*no matter how few* women are interested in pursuing the objective by that means, *no matter how much* the single-sex program will have to be changed if both sexes are admitted, and *no matter how beneficial* that program has theretofore been to its participants.¹⁶²

The parallel “no matter how” phrases punctuate and gradually increase the emotional force of the sentence even as they itemize Justice Scalia’s

¹⁵⁸ *Id.* at 600.

¹⁵⁹ *Id.* at 569.

¹⁶⁰ *Id.* at 572.

¹⁶¹ *Id.* at 572.

¹⁶² *Id.* at 587 (emphasis added).

substantive points. In this way, he relies on the phrasal cadences produced by parallelism to intensify and provide coherence to his arguments.

H. *Antithesis*

As was pointed out earlier, classical rhetoricians saw strong connections between parallelism and another syntactical device, antithesis. Aristotle was especially fond of antithesis as a method for making arguments felt, as well as understood, stating that:

When the style is . . . *antithetical*, in each of the two members . . . an opposite is balanced by an opposite . . . 'By nature citizens, by law bereft of their city' . . . This kind of style is *pleasing*, because things are best known by opposition, and are all the better known when the opposites are put side by side; and is *pleasing* also because of its resemblance to logic—for the method of refutation . . . is the juxtaposition of contrary conclusions.¹⁶³

Aristotle, like other Greco-Roman rhetoricians, thought that juxtaposing contrasting ideas brought them into sharper relief, thereby making them more comprehensible.¹⁶⁴

Not only that, antithesis brings with it an aesthetic pleasure that redounds to the credit of the advocate. Aristotle also valued antithesis for its concision, "the more concise and antithetical the saying, the better it pleases, for the reason that, by the contrast, one learns the more, and, by the conciseness, learns with the greater speed."¹⁶⁵

At critical junctures in his dissent, Scalia employs antithesis, often in parallel form, for rhetorical effect. As he begins his criticism of Justice Rehnquist's concurrence, Scalia uses antithesis to assert that it (the concurrence) "finds VMI unconstitutional on a basis that is *more moderate* than the Court's but only at the expense of being even *more implausible*."¹⁶⁶ With parallel phrases, Scalia grudgingly concedes that the concurrence is "more moderate"¹⁶⁷ than the majority opinion, but then quickly qualifies

¹⁶³ ARISTOTLE, *supra* note 53, at 204-05 (emphasis added).

¹⁶⁴ See, e.g., CICERO, TOPICA 413, 415 (H.M. Hubbell trans., 1949); 3 QUINTILIAN, *supra* note 62, at 325, 439, 441; 1 AD C. HERENNIUM, *supra* note 118, at 381, 383.

¹⁶⁵ ARISTOTLE, *supra* note 53, at 214.

¹⁶⁶ *Virginia*, 518 U.S. at 592 (Scalia, J., dissenting) (emphasis added).

¹⁶⁷ *Id.*

that point by claiming it is "more implausible."¹⁶⁸ With one phrase he offers a compliment, with the other he withdraws it.

Elsewhere, he uses antithesis to repeat his argument that the Court applies the Equal Protection standards inconsistently: "The only hope for state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today. That is a substantial hope, I am *happy* and *ashamed* to say."¹⁶⁹ That is, he is happy that the Court will not apply the legal principles, but ashamed at the Court's inconsistency. The antithetical elements in both these examples sharply juxtapose Scalia's substantive points with the concision and wit that classical rhetoricians considered persuasive.

I. *Rhetorical Questions*

One of Justice Scalia's favorite figurative devices is the rhetorical question. Here, too, he employs a device that attracted considerable attention from classical rhetoricians who recommended it highly. Like other figurative devices, rhetorical questions "serve to increase the force and cogency of proof."¹⁷⁰ Quintilian subdivides rhetorical questions into several categories: those that emphasize a point, those that criticize a person, those that embarrass others, those that reflect indignation, and those that express wonder.¹⁷¹ In other words, rhetorical questions are emotional arguments, not disinterested inquiries, and are intended to stir both emotion and thought. More than half of Quintilian's list is devoted to emotion-inducing questions that "embarrass," "reflect indignation," and "express wonder."¹⁷²

Justice Scalia also plays on the audience's emotions as he intersperses rhetorical questions of various kinds throughout his dissent. He criticizes the Court for failing to see that VMI's "mission" of "learning, leadership, and patriotism" resembles the "mission" of all Virginia's colleges.¹⁷³ In doing so, he asks "[w]hich of them (other colleges) would the Old Dominion continue to fund if they did *not* aim to create individuals 'imbued with love of learning, etc.,' right down to being ready 'to defend their country in time of national peril'?"¹⁷⁴ He also uses a rhetorical question to criticize Justice Rehnquist's concurrence for failing to see that VMI's

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 600 (emphasis added).

¹⁷⁰ 3 QUINTILIAN, *supra* note 62, at 377.

¹⁷¹ *Id.* at 379, 381.

¹⁷² *Id.*

¹⁷³ *Virginia*, 518 U.S. at 587 (Scalia, J., dissenting).

¹⁷⁴ *Id.*

“mission” is related to Virginia’s diversity goals: “What other purpose *would* the Commonwealth have?”¹⁷⁵

Near the end of his dissent, Justice Scalia uses a pair of rhetorical questions to emphasize the Court’s inconsistent application of legal principles: “After all, did not the Court today abandon the principles of law it has applied in our earlier sex-classification cases? And does not the Court positively invite private colleges to rely upon our ad-hocery by assuring them this [case] is ‘unique’?”¹⁷⁶ Justice Scalia’s “ad-hocery” coinage, while calling attention to itself, also expresses his indignation at the Court’s failure to follow its own legal principles. As with the other rhetorical devices he employs, Justice Scalia uses rhetorical questions to deepen the emotional impact of his logical points.

By linking as he does the emotional resonances of the case with the logical cross-currents of his arguments, Justice Scalia demonstrates his sophistication as a stylist and his skill an advocate. As the forgoing analysis shows, Justice Scalia uses a variety of rhetorical techniques to attract and maintain the attention of his readers and to engage their emotions. To tap into his audience’s emotions, he does not rely primarily on the emotion-generating words and phrases that opened this essay. Instead, he uses less noticeable, but classically endorsed, rhetorical ploys.

That is, he carefully controls the emotional content of his opening and closing paragraphs to create a sympathetic climate for his arguments and to conclude in a memorable fashion. He carefully calibrates the emotional force of metaphors and similes and places them at critical junctures. Further, he adds still more emotional impact to his arguments by interspersing sentence-level devices such as parallelism, antithesis, and rhetorical questions throughout his dissent. By turns, he provokes anger, outrage, dismay, indignation, shame, and, finally, regret, and does so in ways that were recognized and recommended by classical rhetoricians from Aristotle to Quintilian. Like any good advocate, Justice Scalia deliberately stirs these emotions in his audience with the hope they will be more receptive to his legal arguments. In the main, he succeeds, at least on the level of recognizing and exploiting the emotional content of the case.

IV. ETHOS AND ARGUMENT

Scalia is less successful, however, in maintaining the proper *ethos*. For classical rhetoricians, *ethos* was as important as *logos* or *pathos* in successful advocacy. Aristotle insisted that:

¹⁷⁵ *Id.* at 592.

¹⁷⁶ *Id.* at 600.

[T]he speaker must not merely see to it that his [argument] . . . shall be convincing and persuasive, but he must . . . *give the right impression of himself* This is true above all in deliberative speaking . . . ; for in conducting to persuasion it is highly important that the speaker should *evince a certain character*, and that the judges should conceive him to be disposed towards them in a certain way¹⁷⁷

Advocates can create a good impression, according to Aristotle, by several means: “[T]here are three things that gain our belief, namely, intelligence, character, and *good will*.”¹⁷⁸ Aristotle also pointed out the necessity of connecting the emotional content of arguments (*pathos*) with *ethos*: “[Y]ou may use each and all of these means [of emotional arguments] . . . with a view to making your audience receptive, and *withal give an impression of yourself as a good and just man, for good character always commands more attention*.”¹⁷⁹

Like Aristotle, Cicero was convinced that an advocate’s *ethos* played a critical part in the success of his arguments. While Cicero agrees with Aristotle that projecting intelligence and good character are important, he focuses on other qualities as well:

[A]ttributes useful in an advocate are a *mild tone, a countenance expressive of modesty, gentle language* It is very helpful to display the tokens of *good-nature, kindness, calmness, loyalty* and a *disposition that is pleasing* . . . and all the qualities belonging to men who are upright, unassuming and *not given to haste, stubbornness, strife or harshness*¹⁸⁰

Cicero repeatedly insists that a low-key approach, demonstrating the advocate’s good nature, calmness, and loyalty are crucial to successful advocacy. Elsewhere, he connects these personal attributes to rhetorical style by observing that “by means of particular types of *thought* and *diction*, and the employment besides of a delivery that is unruffled and

¹⁷⁷ ARISTOTLE, *supra* note 53, at 91 (emphasis added).

¹⁷⁸ *Id.* at 92 (emphasis added).

¹⁷⁹ *Id.* at 223-24 (emphasis added). For modern recognition of this point, see Frost, *Ethos, Pathos & Legal Audience*, *supra* note 9, at 104-07; Posner, *supra* note 49, at 1436 n.33 (“The creation of the implied author corresponds to the *ethical appeal in classical rhetoric*—that is, to the devices by which a speaker tries to convince his audience that he is the kind of person who is worthy of belief.” (emphasis added)).

¹⁸⁰ 3 CICERO, DE ORATORE, *supra* note 110, at 327, 329 (emphasis added).

eloquent of *good-nature*, the speaker . . . [is] made to appear upright, well-bred and virtuous.”¹⁸¹

Like Aristotle, Quintilian sees a close connection between *pathos* and *ethos*. In some senses, “*pathos* and *ethos* are sometimes of the same nature. . . .”¹⁸² He adds that “sometimes however they differ, a distinction which is important for the peroration, since *ethos* is *generally employed to calm the storm* aroused by *pathos*.”¹⁸³ Quintilian also insists that advocates avoid “the impression that [they] are abusive, malignant, proud or *slanderous toward any individual or body of men*, especially such as cannot be hurt without exciting the disapproval of the judge [or audience].”¹⁸⁴

Above all, Quintilian regarded rhetoric as the art of a good man speaking:

Finally *ethos* in all its forms requires the speaker to be a man of good character and courtesy. For it is most important that he should himself possess or be thought to possess those virtues for the possession of which it is his duty, if possible, to commend his client as well, while the excellence of his own character will make his pleading all the more convincing and will be of the utmost service to the cases which he undertakes.¹⁸⁵

As these quotations illustrate, classical rhetoricians had a highly developed sense of how an advocate’s character and demeanor affect an audience’s response to arguments. Intelligence is important, of course, but other characteristics are more important. All of them agree that an advocate must demonstrate good will, modesty, calmness, and loyalty, in part because these attributes help calm the emotional turmoil created by the *pathos* of the case.

To create the proper *ethos*, they recommend that advocates use gentle language, and adopt a mild tone. Finally, to avoid exciting the disapproval

¹⁸¹ *Id.* at 329 (emphasis added). As one of the most famous and successful advocates of his day, however, Cicero was well aware that it is sometimes necessary to address audiences “in quite another way, [which] excites and urges the feelings of the tribunal towards hatred or love, ill-will or well-wishing, fear or hope, desire or aversion.” *Id.* at 331. That is, depending on the audience, advocates may need to abandon the low-key approach in favor of a more aggressive, confrontational stance.

¹⁸² 2 QUINTILIAN, *supra* note 62, at 423.

¹⁸³ *Id.* (second emphasis added).

¹⁸⁴ *Id.* at 11 (emphasis added).

¹⁸⁵ *Id.* at 427.

of their audiences, advocates must not be abusive, malignant, or slanderous. This advice regarding civility is echoed in VMI's "The Code of the Gentleman," which insists that a gentleman "[d]oes not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity *in public*."¹⁸⁶ Justice Scalia professedly admires the Code, but seems to have forgotten this particular admonition while writing his dissent. Although his dissents are obviously a very "public" forum, he nevertheless exhibits anger, ardor, and hilarity, thereby departing not only from the Greco-Roman standard, but also from "The Code of the Gentleman."

Because Justice Scalia miscalculates the negative impact of several different rhetorical devices, the *ethos* he projects in his dissent frequently falls short of the classical ideal. His word choices are questionable, his claims are hyperbolic, and his irony is mean-spirited. Of the three, his word choices are the easiest to detect. They are also Scalia's stylistic feature that attracts the most critical attention.¹⁸⁷

A. *Word Choice*

According to classical rhetoricians, word choices, like other aspects of rhetoric, reveal the true character of the advocate. Rhetoricians admired a simple style and were skeptical of any stylistic mannerism that called attention to itself. Aristotle says that "[n]aturalness is persuasive, artifice is just the reverse. People *grow suspicious of an artificial speaker*, and think he has designs upon them."¹⁸⁸ Quintilian observed that:

[T]hose words are best which are least far-fetched and give the impression of simplicity and reality. For those words which are obviously the result of *careful search* and *even seem to parade their self-conscious art*, fail to attain the grace at which they aim and *lose all appearance of sincerity*¹⁸⁹

Several of Justice Scalia's words and phrases obviously fall in the category of "artificial." Among the more noticeable ones are: "ad-hocery,"¹⁹⁰ "do-it-yourself . . . factfinding,"¹⁹¹ and "Supreme Court peek-a-

¹⁸⁶ *United States v. Virginia*, 518 U.S. 515, 602 (1996) (Scalia, J., dissenting) (emphasis added).

¹⁸⁷ See, e.g., Fajans & Falk, *supra* note 33.

¹⁸⁸ ARISTOTLE, *supra* note 53, at 186 (emphasis added).

¹⁸⁹ 3 QUINTILIAN, *supra* note 62, at 189 (emphasis added).

¹⁹⁰ *Virginia*, 518 U.S. at 600 (Scalia, J., dissenting).

¹⁹¹ *Id.* at 589 n.5.

boo.”¹⁹² These, and other words and phrases, are obviously the self-conscious result of careful search and, according to both Aristotle and Quintilian, make audiences suspicious of their author’s sincerity.

While Scalia’s word choices do call attention to themselves, they probably do the least damage to Scalia’s *ethos*. Because they are so obviously biased, readers are forearmed against their impact. Even so, because they are so slangy and colloquial, they seem to reflect a contempt for the Court’s deliberative processes.

Justice Scalia also employs this slangy vocabulary elsewhere. When criticizing the Court’s lack of clear standards of review he asserts, “[w]e have no established criterion for ‘intermediate scrutiny’ either, but essentially apply it when it seems like a good idea to *load the dice*.”¹⁹³ He uses this vocabulary when claiming the Court offers false hope regarding its future sex classification cases, stating that “the Court creates the illusion that government officials . . . will have a *clear shot* at justifying some sort of single-sex public education.”¹⁹⁴ Like the aforementioned patently “artificial” words and phrases, these colloquialisms call as much attention to themselves as they do to Scalia’s arguments and for that reason are rhetorically suspect.¹⁹⁵

In sum, Scalia’s conversational, slangy diction level lacks the “propriety” befitting the dignity of the court. Any lawyer who used such language in a brief or in oral argument would undoubtedly alienate his audience, in part because it appears to be gratuitous and unprofessional.

Justice Scalia is far too skilled a rhetorician to rely solely on such heavy-handed word choices. He also uses subtle word choices that are likely to escape the audience’s notice. For example, he repeatedly uses the verb “enshrine” to subtly criticize the Court on several different fronts. First, he claims the Court “*enshrines* the notion that no substantial educational value is to be served by an all-men’s military academy.”¹⁹⁶

¹⁹² *Id.* at 574.

¹⁹³ *Id.* at 568 (emphasis added).

¹⁹⁴ *Id.* at 596 (emphasis added).

¹⁹⁵ Justice Scalia’s fondness for “artificial” coinages and slangy phrasings is evident in other dissents. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting) (“In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with *nary a mention* that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies” (emphasis added)). Elsewhere in this dissent, Scalia asserts that the majority opinion is based on a “psycho-journey” which results in a “psycho-coercion” test. *Id.* at 643-44.

¹⁹⁶ *Virginia*, 518 U.S. at 567 (emphasis added).

Then, he faults the Court for its mistaken assumption that VMI's 1839 educational policy "had been *enshrined and remained enshrined* . . . pronouncing that the institution's purpose is to keep women in their place."¹⁹⁷ Worst of all, he asserts, "[t]he enemies of single-sex education have won; . . . their view of the world is *enshrined* in the Constitution."¹⁹⁸ Playing on the religious connotations of the word, Scalia subtly emphasizes his fear that the wrong ideas have been "enshrined" and does so in a way that focuses on the ideas, not on the advocate. Had Scalia relied more heavily on subtleties of this sort in his word choices, he would have attracted fewer suspicions of judicial partisanship and would have preserved the proper judicial *ethos*.¹⁹⁹

B. Hyperbole

Justice Scalia also compromises his judicial *ethos* with his noticeable penchant for hyperbole. Although his substantive concerns may be justified, he overstates them in ways that make audiences suspicious. Aristotle cautiously approved of the use of hyperbole to add liveliness to arguments but, he noted, "[h]yperboles are characteristic of youngsters; they betray *vehemence*. And so they are used, above all, by men in an *angry passion*."²⁰⁰ Quintilian too finds that hyperbole is useful, but also includes it in among the "causes of the decline of oratory."²⁰¹ He says that misuse of hyperbole arises from a failure to observe a sense of proportion, "[w]e must therefore be all the more careful to consider how far we may go in exaggerating facts which our audience may refuse to believe."²⁰²

Justice Scalia employs hyperbole at several critical junctures in his dissent, the most important being his opening paragraph.²⁰³ In that

¹⁹⁷ *Id.* at 581 (second emphasis added).

¹⁹⁸ *Id.* at 597 (emphasis added).

¹⁹⁹ In response to this last assertion, my colleague, and constitutional law scholar, Professor James Kushner, observed, "Perhaps, but there is always the possibility that he is so wrong substantively that his prose hardly loses anything—indeed, it endears him to some and amuses others."

²⁰⁰ ARISTOTLE, *supra* note 53, at 216 (emphasis added).

²⁰¹ 3 QUINTILIAN, *supra* note 62, at 345.

²⁰² *Id.* at 343.

²⁰³ Scalia writes:

Today the Court *shuts down* an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings . . . , *sweeps aside the precedents*

paragraph, he exaggerates the impact the Court's decision will have, and the processes whereby it reached that decision.²⁰⁴ Justice Scalia's claims notwithstanding, the Court's decision did not shut down VMI, it did not reject all the lower courts' findings, nor did it sweep aside its precedents or ignore history.

Instead, the Court simply reached a result with which Scalia disagreed. While Scalia's hyperbole in the *exordium* (introduction) may be a rhetorically justifiable attempt to engage the interest and emotions of the audience, his use of it elsewhere in the dissent is less defensible. There, his exaggerations seem to reflect the "vehemence" and "anger" that Aristotle and others found damaging to an advocate's *ethos*.²⁰⁵ For example, at various points in his dissent, Scalia accuses the Court of feeling "free to evaluate everything under the sun by applying one of three tests,"²⁰⁶ of varying its standard of review "whenever [it] feel[s] like it,"²⁰⁷ and of "destroy[ing] VMI."²⁰⁸ Of these three examples, the first two are the most damaging to Scalia's *ethos*. With them, he impugns the very Court processes he and the other justices are sworn to uphold and, in doing so, violates the classical admonition that advocates avoid being "abusive" or "slandrous toward any . . . body of men. . . ."²⁰⁹ To suggest that his colleagues are unprincipled, instead of just mistaken, exceeds the bounds of judicial propriety and good taste.

C. Irony

From the standpoint of *ethos*, the most corrosive rhetorical device Scalia employs is irony. In a variety of ways, he uses irony as a sort of

of the Court, and *ignores the history* of our people. *As to facts*: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. *As to precedent*: It drastically revises our established standards for reviewing sex-based classifications. And, *as to history*: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Virginia, 518 U.S. at 566 (Scalia, J., dissenting) (emphasis added).

²⁰⁴ *Id.*

²⁰⁵ ARISTOTLE, *supra* note 53, at 216.

²⁰⁶ *Virginia*, 518 U.S. at 567 (Scalia, J., dissenting).

²⁰⁷ *Id.* at 568.

²⁰⁸ *Id.* at 599.

²⁰⁹ 2 QUINTILIAN, *supra* note 62, at 11.

running commentary throughout his dissent in ways that display not just his disagreement with the Court's result, but also his apparent contempt for the Court as an institution and the reasoning and motives of his colleagues.

Classical rhetoricians admired irony as a rhetorical device primarily because of its ability to engage the audience's interest. They thought that by inviting audiences to "understand something which is the opposite of what is actually said,"²¹⁰ advocates require them to be more than passive participants. However, as Aristotle pointed out, irony frequently "implies contempt" for its target.²¹¹ Moreover, while Aristotle observed that irony "befit[s] a gentleman,"²¹² he adds that, to be most effective, "[t]he jests of the ironical man are at his *own* expense," not at the expense of others.²¹³

Quintilian distinguished several different types of irony based on the advocate's pretenses: pretending to be lost in wonder at the wisdom of others, pretending to own faults they do not have, pretending to concede to opponents qualities they do not have, etc.²¹⁴ Justice Scalia employs these and other types of irony, but does so in a fashion that is so sarcastic that it compromises his *ethos* and thereby damages his arguments.

Not all of Justice Scalia's irony has the harsh tone that adversely affects his *ethos*. For example, he justifies his dissent by observing that "[s]ince it is entirely clear that the Constitution of the United States—the *old one*—takes no sides in this educational debate, I dissent."²¹⁵ Elsewhere, he feigns confusion about how to answer his own rhetorical question concerning why Virginia should be blamed for treating VMI just as it does other public schools by stating "[t]his is a *great puzzlement*."²¹⁶ He also subtly mocks the Court's perceptions of "VMI [as] a uniquely prestigious all-male institution, *conceived in chauvinism*, etc., etc."²¹⁷ Tempered in tone and quietly witty, these ironical asides would have little damaging effect on Scalia's *ethos* were it not for the fact they are coupled with harsher, more intemperate sallies in which his irony becomes sarcastic.

²¹⁰ 3 QUINTILIAN, *supra* note 62, at 401.

²¹¹ ARISTOTLE, *supra* note 53, at 98.

²¹² *Id.* at 240.

²¹³ *Id.* (emphasis added).

²¹⁴ 3 QUINTILIAN, *supra* note 62, at 401, 403.

²¹⁵ *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (emphasis added).

²¹⁶ *Id.* at 595 (emphasis added).

²¹⁷ *Id.* at 600 (emphasis added).

When accusing the Court of misleadingly describing its previous sex-classification cases,²¹⁸ Scalia's sarcasm is patent:

The *wonderful thing* about these statements is that they are *not actually false*—just as it would not be *actually false* to say that “our cases have thus far reserved the ‘beyond a reasonable doubt’ standard of proof for criminal cases,” or that “we have not equated tort actions, for all purposes to criminal prosecutions.”²¹⁹

Elsewhere, he is equally sarcastic when he criticizes the Court's dismissal of the District Court's evidentiary findings by observing, “[h]ow remarkable to criticize the District Court on the ground that *its findings rest on the evidence*.”²²⁰ Shortly thereafter, he adds that the Court's misguided dismissal of the District Court findings “makes evident that the parties to this [case] *could have saved themselves a great deal of time, trouble, and expense by omitting a trial*.”²²¹ As he concludes his dissent, Scalia repeats his accusation that the “self-righteous Supreme Court” has created an unworkable standard of review while “acting on its Members' personal view of what would make a ‘more perfect Union,’ (a criterion *only slightly more restrictive than a ‘more perfect world’*).”²²²

The sarcastic tone of these criticisms is magnified when it is coupled with the milder ironical comments. As Justice Scalia's ironical commentary periodically interrupts his substantive criticisms, the tone of the dissent becomes increasingly sarcastic. This sarcasm, more than any other rhetorical device he employs (except perhaps the name-calling), damages Justice Scalia's *ethos*, and with it, the persuasive impact of his arguments.

Instead of projecting a positive *ethos* by evincing loyalty (to the Court as an institution), calmness (in making his points), good will (to his

²¹⁸ *Id.* at 574 (“‘The Court has,’ it says, ‘*thus far reserved most stringent judicial scrutiny for classifications based on race or national origin . . .*,’ and it describes . . . earlier cases as having done no more than decline to ‘*equat[e] gender classifications, for all purposes, to classifications based on race or national origin*’.” (citations omitted)). *Id.* at 574.

²¹⁹ *Id.* (emphasis added).

²²⁰ *Id.* at 585 (emphasis added).

²²¹ *Id.* (emphasis added).

²²² *Id.* at 601 (emphasis added) (citations omitted). *Cf.* Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (an Establishment Clause case) (“Another *happy aspect* of the case is that it is *only a jurisprudential disaster* and not a practical one.” (emphasis added)).

opponents), and a seemingly modesty, Justice Scalia has created a negative *ethos* comprised of disloyalty (to the Court as an institution), pride (in his own reasoning), intemperance (in his language), and abuse (of his colleagues). In doing so, he ignores or misuses one of the most potent rhetorical tools available to an advocate—his credibility, or *ethos*.

V. CONCLUSION

In his discussion of “style” in judicial opinions, Judge Posner of the Seventh Circuit offers several definitions of style, including the following: “‘style’ is what is left out by paraphrase.”²²³ He adds that:

Some judicial opinions—those written by the masters—would lose something, and maybe a lot, in being *paraphrased*. But their essential meaning would not be lost. Even the best, the most distinctive, the most eloquent judicial opinion could be rewritten in a very different style and yet convey enough of the meaning of the original to be considered a close substitute for it.²²⁴

Because Judge Posner focuses primarily on the *logos*, or logic, of an opinion, his point regarding paraphrase is an insightful, but incomplete, definition of rhetorical style. “Style” in the Greco-Roman sense encompasses more than what is paraphrasable. As Judge Posner observes elsewhere, style also “establish[es] a mood and perhaps a sense of the writer’s personality.”²²⁵

Justice Scalia’s arguments are certainly paraphrasable, as the summary earlier in this Article shows.²²⁶ But a paraphrase cannot duplicate the emotional force of Justice Scalia’s arguments, or the “sense of the writer’s personality” that pervades them. For that reason a paraphrase, no matter how complete or exact, is potentially misleading because it eliminates Justice Scalia’s “style.” Both the emotional force (*pathos*) and the “writer’s personality” (*ethos*) are as important as logic (*logos*) in making Justice Scalia’s arguments successful. To convince those who have not already made up their minds regarding VMI’s male-only admission policy, Justice Scalia must engage their emotions and convince them that he is, in

²²³ Posner, *supra* note 49, at 1422.

²²⁴ *Id.* at 1423 (emphasis added) (footnote omitted).

²²⁵ *Id.* at 1422.

²²⁶ See *supra* Part II.B.

Quintilian's phrase, "'a good man, skilled in speaking.'"²²⁷ Unfortunately for his arguments, Justice Scalia's dissent only partly succeeds as an example of effective advocacy. While he does succeed in arousing readers' emotions, he consistently squanders his emotional capital with gratuitous attacks that compromise his credibility.

While this conclusion regarding Justice Scalia's effectiveness is certainly debatable, the 2500 year-old analytical technique whereby it was reached is not. Moreover, given its exhaustive attention to rhetorical detail, this technique can be profitably applied to almost all legal discourse. As the history of legal analysis demonstrates, insights into legal discourse sometimes come from unexpected and nontraditional sources, usually bringing with them a deeper understanding of how that discourse succeeds or fails. Analyzing modern legal discourse using the tools created by Greco-Roman rhetoricians can add invaluable perspectives not only on judicial opinions, but on all forms of legal discourse.

²²⁷ 4 QUINTILIAN, *supra* note 62, at 355.