Antonin Scalia’s Philosophy of Legal Interpretation

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Antonin Scalia’s Philosophy of Interpretation: From Textualism to Deferentialism
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The opening sentence in Justice Scalia’s brilliantly provocative “Common Law Courts in a Civil Law System” announces his attempt “to explain the currently neglected state of *the science of construing legal texts.*”¹ The use of the word ‘science’, with its air of precision and objectivity, contrasts with his description of the role played by the common law in the education provided by American law schools.

The overwhelming majority of courses taught in the first year, and surely the ones that have the most profound effect, teach the substance, and the methodology of the common law...To understand what an effect that must have, you must appreciate that the common law is not really *common law,* except insofar as judges can be regarded as common. That is to say it is not “customary law,” but is rather law developed by the judges.²

This comment is followed by the qualification that in the infancy of Anglo-Saxon law judges may have been expositors of common social practices, but by the fourteenth century “any equivalence between custom and common law had [with some exceptions] ceased to exist, except in the sense that the doctrine of *stare decisis* rendered prior judicial decisions ‘custom’.”³ Since common-law judges were, essentially, legislators, it is no wonder that law professors, legal scholars, and in general those educated in law schools are so enamored with judicial legislation.

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king – devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges.⁴

² P. 4, *my emphasis.*
³ P. 4.
⁴ P. 7.
This is the stage Scalia sets. Before giving arguments, he sets up a contrast. On one side, we have the neglected science of interpreting legal texts – presumably vital to a country with a constitution that vests all legislative power in the Congress and none in the judiciary, and to the fifty states whose constitutions do the same. On the other side, we have a legal culture dominated by institutions that neglect this vital science, because they reject the conception of law that our founding documents put in place. Although the message isn’t explicitly stated, Scalia’s language and imagery bring it home. Sober and respectable science -- needed to ensure fidelity to democratically ratified constitutions, and to laws enacted by elected legislatures -- versus the passion of callow youth and their misguided mentors, who thrill at the prospect of playing king.

Scalia’s rhetoric – with its echo of 1776 – isn’t a trick to avoid giving arguments; they will come. It is the work of a master of political persuasion preparing the ground for intellectual battle. Although his ideal judge is more of a textual scientist than a political campaigner, he knew he couldn’t confine himself to expounding the principles of objective, scientific judging. He had to persuade the legal culture, first to allow, and then to demand, it.

His thesis was that American judges should be textualists. Although he didn’t attempt a rigorous definition of textualism, he took it to be clear enough what he meant. Think of a text of a statute or a constitutional provision as an ordered sequence of sentences, a linguistic object, like a novel. The statute or provision – the law – is the content of the lawmakers’ use of that linguistic object. It is what they asserted or stipulated in adopting the text, which, in turn, is (or is determined by) the meaning of the text at the time of enactment. The job of the judge is to discern
that meaning and apply it to cases—not to alter it to reach desirable political, or even broadly legal, results.

That, very roughly, is Scalia’s doctrine of the judicial interpretation of legal texts. He had two main reasons for adopting it. First, he believed that textualism is enshrined in the Constitution itself, and hence that judicial departures from it are pieces of judicial legislation that violate Article 1, section 1: “All legislative powers herein granted shall be vested in the Congress of the United States.” (State constitutions contain similar provisions.) If he is right, then American judges who willfully legislate from the bench violate their legal duty. Second, Scalia believes that robust separation of legislative, executive, and judicial power in American democracy to be normatively superior to variants that would enhance the power of the judiciary at the expense of the other two branches.

Just as Scalia’s conception of textualism is informally sketched rather than precisely defined, so his arguments for it are suggested rather than rigorously stated. To evaluate them, we need to articulate them more fully.

**From Original Meaning to Original Asserted Content**

Scalia’s textualism explicitly identifies the law enacted by adopting a legal text with its *original linguistic meaning* at the time of enactment. In practice, he implicitly identifies the law with *what the original lawmakers asserted* in adopting the text. Since linguistic meaning and assertive content are different, we need to clear up the confusion.

First consider assertion. *What a speaker uses a sentence S to assert* in a given context is, roughly, *what a reasonable hearer or reader who knows the linguistic meaning of S, and is aware of all relevant intersubjectively available features of the*
context of utterance, would rationally take the speaker's use of S to be intended to commit the speaker to. Typically all parties know the meanings of the sentences used, the general purpose of the communication, and the relevant facts about what previously has been asserted or agreed upon. Because of this, what is asserted can often be identified with what the speaker means and the hearers take the speaker to mean by the use of the sentence on that occasion. How is what a sentence S means related to what a speaker means by a use of S? Ordinarily, when S means that so-and-so, speakers mean that so-and-so by uses of S. In many cases the converse is also true; when speakers ordinarily mean that so-and-so by uses of S, often S itself means that so-and-so. But this isn’t always so because the context in which S is used can play a role in determining what one means by a use of it on a given occasion.

Some sentences, like ‘I am finished’ and ‘the army was nearby’ are grammatically complete but interpretively incomplete.

1. I am finished.
2. The army was nearby

When they are used, the needed completion can be provided by the non-linguistic situation of use (e.g., the activity that the speaker of (1) has been engaged in), by the larger discourse in which it occurs (e.g. the location that has been described in the larger story of which (2) is a part), or by the presuppositions of speaker/hearers in the context in which a sentence is used. Since there are indefinitely many possible completions of these utterances, this is not a matter of linguistic ambiguity, which arises from multiple linguistic conventions governing particular expressions.

Next consider possessive noun phrases of the form NP’s N. Interpreting them requires identifying the possession relation R that holds between the referent of the
possessor NP and the individual designated by \( NP \)'s \( N \). There are two main sub cases. In the first, the linguistic meaning of \( N \) provides a default choice \( R \), nothing in the context of use overrides the choice, and \( R \) is part of the assertion made by an utterance of the sentence containing the noun phrase. In the second case, either the default choice is contextually overridden in favor of a different relation \( R^* \), or there is no default choice to begin with, and the asserted possession relation is largely independent of the meaning of \( N \).

In the first sub case the default possession relation \( R \) is extracted from the noun \( N \), which is itself relational. For example, the default designation of ‘Tom’s teacher’ is someone who bears the teaching relation \( R \) to Tom; the default designation of ‘Tom’s student’ is one who bears the converse of that relation to Tom. Similar remarks apply to ‘Tom’s mother’, ‘Tom’s boss’, ‘Tom’s leg’, and ‘Tom’s birthplace’. For a case in which the default choice is overridden, imagine that two journalists, Tom and Bill, have each been assigned to interview a student from a local school. When this is presupposed, one can use ‘Tom’s student’ to refer to the student interviewed by Tom, and ‘Bill’s student’ to refer to the one interviewed by Bill. What is asserted in these cases isn’t fully determined by the linguistic meanings of the sentences that are used.

The lesson extends to uses of possessive noun phrases involving non-relational nouns, like ‘car’ and ‘book’, to which a potential possessor may bear many different relations. ‘Tom’s car’ can be used to designate a car he owns, drives, is riding in, or has bet on in the Indianapolis 500; ‘Pam’s book’ may be used to designate a book she wrote, plans to write, is reading, owns, or has requested from the library. As before, this isn’t ambiguity; it’s nonspecificity. The meaning of \( NP \)'s \( N \) requires it to
designate something to which N applies that stands in R to what NP designates. But the meaning doesn’t determine the choice R. Hence, linguistic meanings of sentences containing possessive noun phrases aren’t what they are used to assert.

Sometimes linguistic fine points such as these are relevant to the interpretation of legal texts. One of the best known examples is provided by an error in Justice Scalia’s otherwise brilliant dissent in Smith v. United States concerning what the Congress said or asserted in adopting the following clause in a statute.5

“Whoever … uses or carries a firearm [in the course of committing a crime of violence or drug trafficking], shall, in addition to the punishment provided for such [a] crime . . . be sentenced to imprisonment for five years,”6

The question “Does an attempt to trade a gun for drugs constitute a use of a firearm in a drug trafficking crime in the sense covered by the law?” Scalia thought not.

In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning…To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, “Do you use a cane?,” he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, i.e., as a weapon. To be sure, “one can use a firearm in a number of ways,”…including as an article of exchange…but that is not the ordinary meaning of ‘using’ the one or the other.7

The Court asserts that the “significant flaw” in this argument is that “to say that the ordinary meaning of ‘uses a firearm’ includes using a firearm as a weapon” is quite different from saying that the ordinary meaning “also excludes any other use.” The two are indeed different – but it is precisely the latter that I assert to be true. The ordinary meaning of “uses a firearm” does not include using it as an article of commerce. I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered “no” to a prosecutor’s inquiry whether he had ever “used a firearm,” even though he had once sold his grandfather’s Enfield rifle to a collector.8

Here Scalia correctly identifies what question is asked by his agent who says “Do you use a cane?” and what is asserted when his other agent answers “No” to the

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7 Id. at 242 (emphasis added).
8 Id. at 242, n.1 (emphasis added).
prosecutor’s question “Have you ever used a firearm?”. Applying the lesson to the Smith case, we get the result that in adopting the text “Whoever...uses or carries a firearm [in the course of committing a crime of violence or drug trafficking], shall, in addition to the punishment provided for such [a] crime...be sentenced [an additional penalty].”

Scalia’s point was, I believe, correct: Congress asserted that the use of a firearm as a weapon (or carrying it for that purpose) is subject to additional punishment. Regrettably, he misstated his conclusion, stating that the ordinary meaning of “anyone who uses a firearm” pertains only to the uses of a firearm as a weapon.

The majority correctly pointed out that this was false:

When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning...Surely petitioner’s treatment of his [gun] can be described as “use” [of the firearm] within the everyday meaning of that term. Petitioner “used” his [gun] in an attempt to obtain drugs by offering to trade it for cocaine.

Of course, Smith’s action can be so described, and, of course, the text employs “uses a firearm” with its ordinary meaning. The linguistic meaning of the English phrase “uses an N” is silent about how N is used. So, when “uses a firearm” occurs in a sentence, the assertion must be completed, either by adding a qualifying phrase—e.g., “as a weapon,” or “as an item of barter,” or by extracting the needed content from the shared presuppositions of the language users in the context of use – in this case Congress and its audience, which includes public officials plus reasonable, informed members of the public. Like the agents in Scalia’s hypothetical examples, Congress should be, and would have been, seen by most of its audience as relying on

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10 508 U.S. at 242, n.1.
11 Id. at 228 (emphasis added).
obvious presuppositions in the communicative context. The job of the Court was to infer *what Congress asserted* from the ordinary but semantically unspecific linguistic meaning of the language it used plus the context of use.

The needed revision of textualism, as stated above, identifies the content of a legal text with what the lawmakers asserted or stipulated in adopting it. This revision is not a retreat from originalism; it is an adjustment that brings Scalia’s flawed articulation of textualism into line with current thinking about language. As illustrated earlier, it is now commonplace in linguistics and the philosophy of language to distinguish the meaning of a sentence from what is asserted or stipulated by ordinary uses of the sentence in particular contexts. Although the two sometimes coincide, often they don’t. In every legal case in which they don’t, originalism demands fidelity, not to original linguistic meaning, but to what was originally asserted or stipulated.

The friendliness of this amendment is illustrated by the many passages in Scalia (1997) in which he describes the law to which judicial interpreters must be faithful as that which, in adopting the text, they *said* or *promulgated*, as opposed to *what they really meant or intended*. For example, in describing the widely accepted rule, of which he approves, “that when the text of a statute is clear, that is the end of the matter,” he asks, rhetorically, “Why should that be so, if what the legislature *intended*, rather than what it *said*, is the object of our inquiry.” To this he adds:

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It is simply incompatible with democratic government, or indeed with any fair government, to have the meaning of the law [i.e. the legal content of a text] determined by what the lawgiver [really] meant [or intended], rather than by what the lawgiver promulgated [i.e. stipulated or asserted].

**What does Originalism Tell Us about Applying the Law in Hard Cases?**

When what the lawmakers asserted or stipulated is clear, the duty of judges is to apply it to the facts of a case -- deducing the outcome from antecedent legal content plus the facts. In easy cases a single outcome is deducible. Sometimes, however, no determinate outcome is deducible because the law is vague, and so neither determinately applies nor determinately fails to apply to the facts of the case. Judges are then called on to *precisify* vague legal contents to reach determinate results. In other situations, the contents of relevant laws plus new facts presented by the case determine inconsistent verdicts. These cases, like those involving vagueness, also require judges to modify existing content. How should this be done? Scalia's originalism doesn't authorize judges to select among possible rectifications of antecedent content the one that brings the law most closely into line with *their own normative conceptions* of what the law ought to be. Still, *some principle*, other than fidelity to antecedent content is needed to determine what judges are to aim at.

Since judicial rectification changes the law, it is, in effect, legislative. Since Scalia believes that only the legislature is constitutionally authorized to legislate, he must ground *judicial rectification* in some form of deference to the legislature. Unfortunately, he has little to say about this. Not only does he fail to tell us how judicial rectification should proceed, he seems to deny the possibility of grounding it in two likely sources: the intent of the legislature (as revealed by opinions of the chief authors of the legislation and the relevant legislative history) and the objective

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15 Ibid., p. 17.
purpose of the law (rationally inferable in some other way). Although his discussion identifies problems to be avoided in attributing legislative intent or purpose, his arguments don’t, I think, show them to be insurmountable. Since judges must sometimes precisify vague legal contents, and resolve legal inconsistencies, when applying old laws to new facts, originalist judges must either find a deferential way of doing so, or cease being originalists.

**Subjective Legislative Intent vs. Objective Legislative Intent**

Scalia’s critique of judicial attempts to use *legislative intent* as a deciding factor separates subjective intent--by which he seems to mean an aggregate of intentions of the individual lawmakers--from (idealized) objective intent rationally inferable from the content of the law and its place in the larger body of law. Although he is critical of both, his critiques are different.

Speaking first of intent in general he says:

You will find it frequently said in judicial opinions of my court and others that the judge’s objective in interpreting a statute is to give effect to “the intent of the legislature.” This principle...does not square with some of the (few) generally accepted concrete rules of statutory construction. One is the rule that when the text of a statute is clear, that is the end of the matter. Why should this be so, if what the legislature *intended*, rather than what it said, is the object of our inquiry?  

The expected answer to the rhetorical question is, “It shouldn’t be so; the judge’s objective in interpreting a statute is *not* to give effect to the intent of the legislature, it is to determine what the legislature asserted in adopting the text.” This answer is correct as far as it goes, but it doesn’t address what the judge’s objective should be when the asserted content must be rectified because of vagueness or inconsistency.

Perhaps sensing this, Scalia immediately turns to inconsistency.

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16 Ibid. p. 16.
Another [generally accepted] rule of construction is that ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws.\(^{17}\)

The passage deals only with inconsistencies arising from “ambiguity.” When the text contains an expression governed by several linguistic conventions generating multiple meanings, resolution of the ambiguity is needed to determine what the legislature asserted. Since allowing \textit{what the legislature meant or intended to say} to play this role doesn’t directly threaten the identification of the content of a law with \textit{what was said} in enacting it, Scalia doesn’t contest it. Still, granting legislative intent even this limited role may provide his opponents with an entering wedge. If legislative intent can help decide which of two different things \textit{the legislature said or asserted} by adopting an ambiguous text, why shouldn’t \textit{what the legislature intended the law to do} help us do other things too, such as precisifying vagueness or resolving inconsistencies?

To investigate this possibility we must examine Scalia’s distinction between subjective and objective intent.

We simply assume, for the purpose of our search for “intent,” that the enacting legislature was aware of all those other laws [which, together with the new law might generate inconsistencies]. Well, of course that is a fiction...The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of “objectified” intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the \textit{corpus juris}. “[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, \textit{the meaning which the subject is authorized to understand the legislature intended}.” And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.\(^{18}\)

\(^{17}\) Ibid., p. 16
\(^{18}\) Ibid. pp. 17.
Scalia doesn’t here consider whether legislative intent might aid in precisifying vague original content or eliminating inconsistencies created over time. But he does identify a potentially useful notion of objectified intent -- something rationally inferable from the legislature’s action – that is distinct from “subjective intent,” which he dismisses. In an age in which major pieces of legislation routinely contain thousands of pages of text written by small armies of staffers, typically no member of the legislature is familiar with the whole text, and many haven’t seen any of it. To imagine that one could ask each member what he or she intended by the text, and, by aggregating, converge on a meaningful result is, as Scalia rightly suggests, absurd.

The originalist implications of his conclusion are challenging. If the intent of the legislature isn’t an aggregate of intentions of individual legislators, then surely its goals, beliefs, and assertions aren’t aggregated sums of any cognitive attitudes of individual legislators. Yet, the originalist maintains, the legislature, like other collective bodies, does assert or stipulate that so-and-so. It also sometimes asks or investigates whether such-and-such is so, and, after gathering evidence, it sometimes concludes that it is. If, like other collective bodies, it can assert, stipulate, ask, and conclude, then surely it must also believe some things and intend others. An originalist bent on discovering what the legislature said or stipulated is in no position to reject all claims about what the legislature believed or intended.

Perhaps the originalist can appeal to the “objectified” intent of which Scalia speaks. In cases in which identifying original intent is needed to determine what was said or stipulated in a sense that goes beyond mere linguistic meaning of the words on the page, Scalia himself does so. But he doesn’t explicitly acknowledge doing so for any other reason.
I acknowledge an interpretive doctrine of what the old writers call *lapsus linguae* (slip of tongue), and what our modern cases call “scrivener’s error,” where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. For example, a statute may say “defendant” when only “criminal defendant” (i.e. not “civil defendant”) makes sense. The objective import of the statute is clear enough, and I think it not contrary to sound principles of interpretation, in such extreme cases, to give the totality of context preference over a single word.”\(^{19}\)

Earlier I mentioned Scalia’s use of objective intent to resolve linguistic ambiguity. This passage extends the use of objective legislative intent to the correction of scrivener’s errors. Two threads tie these uses together. The first is the interpreter’s ability to identify, based on the text as a whole, what the legislature intended to say or assert. The second is that the resulting disambiguation or correction is, in both cases, taken to settle what the legislature did, in fact, originally say or assert, despite inartfully doing so (which is how ordinary slips of tongue are often understood). It is crucial that Scalia doesn’t use such intent-based disambiguation or correction to substitute what the legislature intended to say for what they actually did say. This lack of conflict between original intent and original assertion allows him to acknowledge legislative intent as sometimes real and interpretively useful.

But then, one wonders, why shouldn’t legislative intent be more broadly useful?

Scalia (1997a) offers two reasons, one theoretical and one practical, for distrusting judicial appeals to intent. The theoretical reason is that the law is what the legislature asserts it to be, not what they intended to assert. The practical reason is that substituting what judges surmise the legislature must, or should have, intended to say, for what it did say, invites judicial subversion of American democracy.

Government by unexpressed intent is...tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me to be the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws

\(^{19}\) Ibid., 20-21.
not of men. Men may intend what they will; but it is only the laws they enact that bind us.\textsuperscript{20}

When you are told to decide, not on the basis of what the legislature said, but on the basis of what it \textit{meant}, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person \textit{should} have meant; and that will surely bring you to the conclusion that the law means what you think it \textit{ought} to mean.\textsuperscript{21}

Though laudable, these sentiments deprive originalists of resources when rectifications of original asserted contents are needed to precisify vague content that neither determinately applies nor determinately fails to apply to new facts.\textsuperscript{22} In these cases, the goal is to supplement, not supplant, original content to reach a verdict that comports with original intent. Although the cases can be constitutional or statutory, the need is most pronounced in constitutional cases.

\textbf{The Need for Intent-Based, Gap-Closing Constitutional Interpretation}

Originalists recognize that constitutional cases pose special difficulties. The point is touched on lightly in Scalia (1997a).

There is plenty of room for disagreement as to what original meaning was, and \textit{even more so as to how that original meaning applies...to new and unforeseen phenomena}. How, for example, does the First Amendment guarantee of “the freedom of speech” apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air television? In such new fields, the Court must follow the trajectory of the First Amendment.”\textsuperscript{23}

Scalia identifies two loci of controversy – (i) the originally stipulated content of the First Amendment guarantee of freedom of speech (and of the press), and (ii) the application of that content to new and previously unforeseeable technologies. This suggests that the latter controversy might persist even if the former is resolved.

\begin{flushleft}
\textsuperscript{20} Ibid., p. 17
\textsuperscript{21} Ibid. p 18.
\textsuperscript{22} The same is true of cases in which new facts generate inconsistencies between multiple original contents.
\textsuperscript{23} Ibid., p. 45, my emphasis.
\end{flushleft}
This possibility will be realized if the originally stipulated content of the First Amendment is vague, and so neither determinately applies, nor determinately fails to apply, to some new technologies deployed in certain new circumstances. Since, in this eventuality, a decision might still be needed, Scalia’s originalism needs a principle, which he never states, to govern the search for acceptable outcomes.

The point is illustrated by his concurring opinion in *Citizens United v. Federal Election Commission*, 2010. At issue was the 2002 McCain-Finegold campaign finance law prohibiting corporations and unions from funding “electioneering communication” advocating defeat of a candidate for federal office 60 days before a general election or 30 days before a primary. The law was used to stop the non-profit corporation, Citizens United, from airing *Hillary: The Movie* within 30 days of a Democratic Presidential primary in 2008. The Supreme Court decided 5-4 in favor of Citizens United that the ban violated the First Amendment free-speech guarantee.

Scalia’s concurring opinion addressed the question, *Whose freedom of speech is guaranteed – only individuals and newspapers, or groups of individuals, including those that are legally incorporated?* Noting that the speech of religious, educational, literary, social, and political groups organized under general incorporation statutes was unregulated at the time of the founding, he argued that to withhold the guarantee from their speech would be to *abridge* the freedom of speech that then existed. His evidence supports the thesis that the common understanding of the assertion -- that *Congress shall make no law abridging the freedom of speech, or of the press* -- made in adopting the First Amendment was roughly the following:

*Originally Asserted Content:* Congress shall not abridge – i.e. truncate or diminish – *freedoms of the kind* currently enjoyed by individuals, groups, or organizations of individuals *to speak or communicate* (e.g., in pamphlets, letters, newspapers, and books).
Although this originalist result is satisfying, it raises a further issue that many originalists have found more troubling. How, if the original content of the First-Amendment guarantee is as austere as I have made it out to be, do originalists like Scalia reach the robust results they often do in First Amendment cases? In *Citizens* the route is easy to see.

Note the italicized parts of the final paragraph in Scalia’s opinion.

The Amendment is written in terms of “speech,” not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is “speech” covered by the First Amendment. No one says otherwise. *A documentary film critical of a potential Presidential candidate is core political speech,* and its nature as such does not change simply because it was funded by a corporation.\(^{24}\)

The question was: “Would banning *a movie* critical of a presidential candidate count as *abridging* the freedoms of the kind enjoyed at the founding to speak and communicate?”

To answer it, Scalia had to precisify the vague notion *the kinds of freedom to speak or communicate* enjoyed at the founding. This wasn’t a matter of deciding what the original asserted content was; it was a matter of deciding how to extend it to new circumstances. Scalia’s description of the movie as *core political speech* (or, I suppose, communication), reflects his conception of how the content of the First Amendment had already been extended long before the case was heard.

Is that extension justified, and if so, how? The originalist answer must be that it correctly identifies a critical component of *what the framers and ratifiers of the First Amendment were trying to achieve* – namely, to protect free speech and communication by individuals, groups and organizations about matters of public or political importance.

The writings of these men, and much of the public discourse at the time, indicate that

\(^{24}\) 588 U.S. 310, 2010, *my emphasis.*
they judged free speech and communication on matters of public or political importance to be a right of free citizens, a necessary feature of a self-governing republic, and something on which they and other supporters of the Constitution had depended in trying to secure its passage.

**Was Scalia a First-Amendment Originalist?**

If the rationales for Scalia’s other opinions regarding the First Amendment guarantee of free speech and a free press were this clear, we would have an easier time reconciling his stated originalist principles of interpretation with the body of his free-speech jurisprudence. Some of his opinions are, like *Citizens United*, originalist. Others appear not to be.

One borderline case that I nevertheless believe to be genuinely originalist is Scalia’s dissent from the decision in *Hill v Colorado* (2000) upholding a law restricting the attempts of opponents of abortion to dissuade individual women from going through with their plans to have abortions.

Colorado’s statute makes it a criminal act knowingly to approach within 8 feet of another person on the public way or sidewalk area within 100 feet of the entrance door of a health care facility for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content-based. A speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other’s consent. Whether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—depends entirely on what he intends to say when he gets there. I have no doubt that this regulation would be deemed content-based *in an instant* if the case before us involved antiwar protesters, or union members seeking to “educate” the public about the reasons for their strike. “[I]t is,” we would say, “the content of the speech that determines whether it is within or without the statute’s blunt prohibition,” *Carey v. Brown* (1980). But the jurisprudence of this Court has a way of changing when abortion is involved.25

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This scathing first paragraph of section 1 of the dissent sets the tone of the dissent as a whole, which is meant to be a biting political indictment of the Court and the authorities in Colorado, as well as an exemplar, though not a dispassionate one, of the “science of interpreting legal texts.” Scalia insists, with considerable plausibility, that the state’s insistence and the majority’s agreement that the statute is content neutral are incorrect and hypocritical.

What is less clearly argued is the correctness of the apparent common assumption of both Scalia and his antagonists, based on precedent, that if the statute isn’t content neutral, then it violates the First-Amendment guarantee of free speech. Perhaps it does, but how exactly? Does it violate the original assertive content, or original intent, of the First Amendment? A statute regulating organized attempts, in restricted and well-defined environments in which women are seeking medical treatment, to dissuade them from doing something legal that one believes to be immoral, isn’t, on its face, a law restricting core political speech on a matter of public importance. Originalist grounds for Scalia’s dissent might be forthcoming if it could be shown that in the United States prior to the founding (i) there were organized attempts to confront and persuade others not to engage in legal but putatively immoral activity which (ii) were, in fact, never regulated in a comparable manner. But Scalia makes no such case.

The case he actually makes in the final section of his dissent is quite different, as well as being both powerful and arguably originalist.

[T]he public spaces outside of health care facilities [have] become, by necessity and by virtue of this Court’s decisions, a forum of last resort for those who oppose abortion. The possibility of limiting abortion by legislative means–even abortion of a live-and-kicking child that is almost entirely out of the womb–has been rendered impossible by our decisions from Roe v. Wade, 410 U.S. 113 (1973), to Stenberg v. Carhart...For those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice. And as a general matter, the most effective place, if not the only place, where that persuasion
can occur, is outside the entrances to abortion facilities. By upholding these restrictions on speech in this place the Court ratifies the State’s attempt to make even that task an impossible one.

Those whose concern is for the physical safety and security of clinic patients, workers, and doctors should take no comfort from today’s decision. Individuals or groups intent on bullying or frightening women out of an abortion, or doctors out of performing that procedure, will not be deterred by Colorado’s statute; bullhorns and screaming from eight feet away will serve their purposes well. But those who would accomplish their moral and religious objectives by peaceful and civil means, by trying to persuade individual women of the rightness of their cause, will be deterred; and that is not a good thing in a democracy. This Court once recognized, as the Framers surely did, that the freedom to speak and persuade is inseparable from, and antecedent to, the survival of self-government…

The present case rejects over breadth challenges to a pro-abortion law that regulates speech, on grounds that have no support in our prior jurisprudence a...Stenberg applies over breadth analysis to an antiabortion law that has nothing to do with speech, even though until eight years ago over breadth was unquestionably the exclusive preserve of the First Amendment...

As I have suggested throughout this opinion, today’s decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively pro-abortion novelties announced by the Court in recent years. Today’s distortions, however, are particularly blatant...“Uninhibited, robust, and wide open” debate is replaced by the power of the state to protect an unheard-of “right to be let alone” on the public streets. I dissent.26

The originalist case that emerges is that direct, oral speech and conversation aimed at persuading women entering or leaving abortion clinics not to have abortions is core political speech on a festering issue of public importance, and, for that reason, falls under the original intended content of the First Amendment. Because the Colorado law prohibits this speech, it is overbroad, and should (in part) be invalidated. The unusual form of speech – conversation and counseling outside medical facilities – doesn’t deprive it of protection. On the contrary, because, in a string of wrongly decided cases, the Court removed the contentious issue of abortion from the give and take of normal democratic processes, it left opponents few avenues for changing the legal situation imposed on them. To deny them even this venue to make their case to their fellow citizens would be to allow wrongly decided Fifth Amendment “due process” cases to weaken the free-

26 Ibid.
speech guarantee of the First Amendment.²⁷

Despite the originalist case that can be made for some of Scalia’s First-Amendment jurisprudence concerning free speech, in my opinion, it is not, as a whole, consistently originalist. In the cases that follow, he found deviations from content or viewpoint neutrality in laws regulating speech (or communication) to be unconstitutional, even though it was difficult to justify taking the particular form of speech (or communication) in question to be core political speech (or communication) – and there were no controlling precedents extending protection to it. This expansionist tendency is illustrated in *Texas v Johnson* (1989) and *R.A.V. v City of Saint Paul* (1992). In the former he joined the majority in ruling that burning the American flag was constitutionally protected. In the latter, he invalidated a city ordinance prohibiting burning crosses, swastikas, and other symbols known to arouse “anger, alarm, or resentment…on the basis of race, color, creed, religion, or gender.” Writing for the Court, he ruled that although the prohibited symbolic conduct might (as the Minnesota Supreme Court had held) be a species of unprotected “fighting words,” and so not protected free speech, the government may not selectively ban some fighting words – in particular those based on race, religion, or gender – while permitting others.

As a matter of public policy, there is something to be said for both decisions. But their relation to the original assertive content of the First Amendment, and even to its original intent of protecting core political speech or communication, is tenuous. For one thing, the regulated behavior was not speech but a special form of expressive conduct. For another, the political message it was intended to communicate – that the United States of America, in the first case, or African Americans, in the second, are hateful and

not deserving of respect – would have been constitutionally protected had it been stated in words, without the air of menace and attempt to incite or provoke carried by the conduct. For these reasons, I doubt that the conduct determinately falls under the original assertive content of the First Amendment, and I suspect that it falls determinately outside that content. If so, then the original assertive content of the free-speech clause doesn’t require precisification, and the speech is unprotected.

Others may disagree, at least to the extent of arguing that the conduct doesn’t fall determinately inside or determinately outside the original asserted content, in which case an originalist judge must appeal to original intent to precisify the content in order to reach verdicts. Still, it is doubtful that this would allow Scalia to reach his result. Was it central to what the framers and ratifiers of the First Amendment were trying to achieve that the symbolic conduct exhibited in these two cases be unregulated? Although democratic self-government does require that citizens be free to place items on the public agenda by stating propositions they believe to be true, no matter what the ideological content of those propositions, it does not require, and is not advanced by, intimidating and provocative expressive behavior that inhibits rational debate. Thus, I doubt that Scalia’s decisions in these cases can be justified by his originalist philosophy of interpretation – even when that philosophy is amended, as it must be, by allowing a judge to appeal to original intent to precisify vague original content when doing so is needed to reach verdicts.

This doesn’t preclude a pragmatic justification of his decisions, which may have appealed to him. One may argue that a bright line of content neutrality, governing even what would otherwise be unprotected speech or communication, is needed as a barrier against erring judges who may be inclined to privilege certain contents and prohibit others in speech that clearly is constitutionally protected. This putative justification is, for
good or ill, moral and political rather than originalist. If originalism is, as Scalia and I believe it to be, inherent in the Constitution itself, then for judges to decide a case on this basis is, implicitly, to violate their legal duty by usurping legal authority they don’t have. Whether or not doing so may sometimes be morally or politically justified is another matter. The legal authority of judges, like all office holders, is limited. Hence, circumstances can arise in which the morally best thing for a judge to do exceeds the judge’s legal authority. Suppose – for the sake of argument – that some of Justice Scalia’s rulings were politically and morally correct, despite lacking originalist justification. This wouldn’t show that his constitutional duties weren’t originalist. Nor would it show that the originalist conception of the role judges in America isn’t normatively superior to competing conceptions. For that one would have to demonstrate that those conceptions would, on the whole, generate normatively superior results, which Scalia would surely dispute.  

His opinion in Brown v Entertainment Merchants Association (2011) extends his exquisite sensitivity to apparent violations of content neutrality to another new form of expressive content. The issue in Brown concerned an attempt by the state of California to restrict violent video games for minors. Writing for the majority, Scalia says:

Video games qualify for First Amendment protection. Like protected books, plays, and movies, they communicate ideas through familiar literary devices and features distinctive to the medium...The most basic principle—that government lacks the power to restrict expression because of its message, ideas, subject matter, or content...is subject to a few limited exceptions for historically unprotected speech, such as obscenity, incitement, and fighting words. But a legislature cannot create new categories of unprotected speech simply by weighing the value of a particular category against its social costs and then punishing it if it fails the test...[T]he State wishes to create a wholly new category of content-based regulation that is permissible only for

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28 The normative superiority of deferentialism, which is my own version of originalism, is discussed in the final section of Soames (2013), at pp. 336-341 of its reprinting in Soames (2014).
speech directed at children. That is unprecedented and mistaken. This country has no tradition of specially restricting children’s access to depictions of violence.29

Here Scalia extends to video games the status of protected speech on the same grounds that apply books, plays, and movies. He does so despite the fact that, like unprotected, obscene pornography, and regulated, sexually explicit public activity (which he believed could be restricted in the name of morality and social order), violent video games don’t contribute propositions to rational discussions of public and political issues. In justifying this extension, he maintains that the country has no tradition of restricting children’s access to depictions of violence. Why, one wonders, is this relevant? Perhaps because if there is no tradition of such restrictions, then there were no such restrictions at the founding, in which case to add one would be to abridge a freedom enjoyed then. But the case for this conclusion is weak, since no similar form of expressive or symbolic conduct existed then to be enjoyed. In addition, the propositional content of the games, to the extent they have any such coherent content, falls far outside the original intent to protect core political speech. Thus, this free-speech decision, like those in Texas v Johnson and R.A.V. v City of Saint Paul isn’t strictly originalist. Pending the discovery of heretofore unarticulated originalist justifications, they should be disavowed by originalists.

**Deferentialist Originalism**

Three changes are needed to extract a defensible originalist philosophy of interpretation from Scalia’s articulation of textualism plus the bulk of his judicial opinions. First, the legal content of a statute or constitutional provision must not be identified with the original linguistic meaning of the text used to adopt it; instead it should be identified with what lawmakers or ratifiers originally used it to assert or

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29 564 U.S. 786 (2011)
stipulate. This originally asserted content is what a reasonable person who understood the linguistic meanings of the words in the text, the publically available facts, the history of the lawmaking context, and the background of existing law into which the law is expected to fit would take to have been asserted or stipulated in adopting the text. This change departs very little from Scalia’s own thinking. Although it conflicts with his official formulations in Scalia (1997), it fits both the examples used there to support his theory and most of his own judicial practice.

Second, cases in which it is necessary to judicially rectify originally asserted content must be recognized. The initial duty of a judge is to ascertain the original asserted content of a legal provision and then to reach the verdict determined by that content. But this isn’t always possible. When the content is vague, no determinate verdict may be determined; when the content is inconsistent with surrounding law plus facts presented by a particular case, inconsistent verdicts may be determined. In these cases, the judge must modify existing legal content by deferring to the original intent (rationale) of the lawmakers, as Scalia himself implicitly did in *Citizens United* and *Hill v Colorado*. All that was needed to make this acceptable to originalists was an explicit articulation of a deferentialist way of doing so. Although Scalia himself didn’t provide that, he could have done so without sacrificing anything essential to his textualism.

Third, in cases of judicial rectification the duty of the judge is to articulate a minimal change in existing content that maximizes the original intent (or rationale) of the law. The intent (rationale) to which the judge appeals is not, as Scalia rightly observed, an aggregated sum of private understandings of individual lawmakers, or of the causally efficacious factors that motivated them. Instead, it is rationally
inferable content derived from viewing original asserted content in light of the main publically offered and understood reasons for it. This use of intent (rationale) is an emendation of Scalia’s explicit textualism, which is otherwise notable for dismissing attempts to substitute original intent for original asserted content. However, as I have stressed, when what is at stake isn’t substitution, but the need to extend and precisify vague original content to apply it to unanticipated facts, Scalia, like virtually every other jurist, was quite willing to (implicitly) traffic in original intent.

**Defending Deferential Originalism**

The question of whether this version of originalism, which arises naturally out of Scalia’s version, is correct, or justified, can be taken in two ways. One way queries whether deferentialist originalism correctly describes the legal duties of judges in the United States today. The other asks whether it is normatively superior to other equally well-worked out conceptions of what the legal duties of judges ought to be in this place at this time. The questions are independent. One’s answer to either question doesn’t necessarily dictate one’s answer to the other. Since I have sketched my answers elsewhere, I will not repeat them here.

First, the question of what the legal duties of judges are is, at bottom, a question of what the whole body politic recognizes to be the basis of the legal authority of judges. Since that basis has been, and remains, the written Constitution, virtually every prominent Supreme Court decision – including those with strongly anti-

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originalist elements – has been clothed in originalist reasoning.\textsuperscript{32} This, more than anything else, provided the fuel that fired Scalia’s powerful rhetoric, rendering it influential far and wide. Yes, there have been prominent cases, some widely accepted, the contents of which have strayed significantly from any proper originalism. But many of the decisions in those cases remain vulnerable to Scalia-style attacks because the originalist understanding of the role of the judiciary remains deeply embedded in the American psyche. No one, I suspect, knew this better than Scalia himself.

Second, bad precedents are still precedents. Respect for precedent is itself originalist. Because of the constitutional authority of the Supreme Court, which originalism must recognize, all precedents, including the dubious or erroneous, qualify as the law of the land, and so deserve a degree of deference, even though they can be, and sometimes are, overturned by revisiting the Constitution itself.\textsuperscript{33} Even when not overturned, they can be limited or isolated. Originalism doesn’t demand perfection.\textsuperscript{34} Any workable theory must accommodate changes in constitutional law that come about through precedent, or established practice or both. Scalia knew this.

Third, the normative question of what the role of the judiciary should be at this time and place is intimately tied to one’s conception of the American project and its future. During his adult life, Scalia witnessed the consolidation of government power, the expansion of the administrative state, the decline of federalism, the hardening of our class structure, and the rise of a credentialed, self-perpetuating,

\textsuperscript{33}See Baude for discussion.
\textsuperscript{34}See Soames (2017b) section 5.
cognitive elite whose claim to expertise, real or imagined, separated them from ordinary citizens, and provided them with privilege and influence across American society. He didn’t welcome these changes because he saw them as threats to democracy and representative government. The man behind his passionate opinions knew in his bones that, when it comes to the big decisions about our individual and collective lives, there is no such thing as expertise possessed by an elite governing class. There are only choices to be made in accord with our deepest values in light of all the information we can gather. These are, he all but screamed, best made by the people and their elected representatives, not by nine unelected justices or by armies of unaccountable federal bureaucrats. He believed what was once axiomatic, that in America the people rule. In this, as in so much, it is hard not to agree with him.