Meaning, Institutional Speech Acts, and the Extraction of Determinable Legal Content
(To be presented at the Georgetown Originalism Boot Camp Seminar 2022)

Language is both our most powerful cognitive tool and our most basic social institution, without which neither law, government, nor science would be possible. Because it is so central to nearly everything we do, its familiarity tempts us to overestimate how much we understand about the way it functions in different domains. I will explain (i) how to extract legal content from linguistic acts of lawmakers in the United States, and (ii) how this content is sometimes modified by legal interpretation, when law is applied to particular cases. Although (i-ii) are grounded in facts about ordinary communicative uses of language users, there are key differences between the institutional contexts of legal uses and the communicative contexts of individual uses. These must be understood if originalist legal theories for systems like ours are to be maintained.

Background

First a word about private vs. public uses of language. Although spoken natural languages are inherently social, some uses of language are private. We use language in private thought to represent things as being various ways -- in proving theorems, drawing conclusions, planning actions, and the like. What, essentially, is thought? It is the way we cognitively relate to the world -- how we perceive, believe, or imagine it to be, as well as how we hope it will be, or remember it to have been. Individual thoughts are cognitive act or state types in which an agent represents some thing, or things, as being one way or another. When the things are as they are represented to be, the thoughts are *true* or *veridical*.

Thoughts come in different types. Compare one's thought that 16 squared = 256 with one's visual experience of a living room with furniture, books, pictures on walls, a laptop and a window, all taken in at a glance. The mathematical thought is true because it represents the number designated by "16 squared" as bearing the *identity* relation to the number designated by "256". Since the former is identical with the latter, *the proposition that 16 squared = 256 is true.* "Proposition" is the word for this type of thought, while truth is *the species of accuracy* by which we evaluate propositions. The visual experience of the living room also represents things as being certain ways. But we don't call that experience true when the representation is accurate; we call it *veridical*.

This terminological difference is grounded in the type and richness of representational content in the two cases. The visual experience is like a picture, it is *worth a thousand words*. It represents many things as being many ways (with varying degrees of precision). The same could be said of an accurate map, or of a map-like mental representation one vividly imagines. Our accuracy evaluations of them are often graded and holistic. Propositions, which are single pieces of information, or misinformation, are different. Except for special cases, they are determinately true, or false.

Propositions are often cognitive contents of uses of sentences. The simplest propositions represent single things or pluralities as being certain ways, resulting in individually sufficient and disjunctively necessary conditions for their truth or falsity. Because some sentence formation rules may reapply to their own and each other's outputs, there is no upper bound on the complexity of propositions expressed by sentences. This vast expressive power enables language users to think a staggering array of thoughts they would not otherwise be able to entertain.

This result about individual language users is directly tied to the social artifacts, sentences, they employ. In most familiar cases, S is a grammatically complete sentence, one aspect of the meaning of which is or determines a complete proposition that is true or false. To understand S, accept it, and believe it to be true counts as believing the proposition that linguists call S's *semantic content*. This proposition is compositionally determined by the semantic contents of the words or phrases of S and the semantic import of the grammatical relations they bear to each other. Because language is *compositional* in roughly this sense there is no intrinsic upper bound to the length or complexity of meaningful English sentences. Compositionality is also involved in explaining how competent speakers are capable of instantly interpreting complex sentences they have never previously encountered.

This aspect of S's meaning, namely its semantic content, is a function of the semantic contents of its parts and how they are related. Many of these semantic contents -- e.g. of names like 'Columbus" and common nouns like 'water', 'lead', 'tin', 'obsidian', 'wildebeest', and 'sycamore' are socially, rather than individually, determined. In order to successfully use the name 'Columbus' to refer to the same man as others do -- and, so to be counted as having thoughts about that man -- one doesn't have to be able to accurately and informatively describe him. It is enough to have picked up the name from others who stand in a social-historical chain of reference-transmitting uses of the name tracing back to Columbus. The same is true of common nouns functioning as names of properties the presence of which explain observed characteristics of items to which the words are commonly applied. Thus, the *semantic contents* of these names and nouns are often minimal -- either an object (person/place/thing) contributed by a name or a property contributed by a common noun to what is asserted by uses of sentences containing the name or noun in different contexts.

This point is illustrated by the following (a,b) pairs, both of which are widely regarded to be true by semanticists and philosophers of language.

1a. Necessarily Hesperus is Hesperus
 b. Necessarily Hesperus is Phosphorus

2a. Necessarily water is water
 b. Necessarily water is H_2O

The necessity operator in these examples operates on the *semantic content* of the following sentence, making the whole sentence true if and only if that content is a proposition that would be true no matter which possible state the world were in. To get this result, the semantic content of a proper name must be its referent (the planet Venus in (1)), and the semantic content of a common noun (e.g. 'water' or 'H_2O' in (2)) must be the substance it designates. Given this plus the compositionality of semantic content, we take all clauses that differ only in the substitution of coreferential proper names or natural kind terms to have identical semantic contents, even though there are many linguistic environments in which substitution of such expressions changes what is asserted, or what beliefs are reported. This suggests that there is more to meaning than semantic content.[1]

[1] See Kripke (1980), *Naming and Necessity,* Harvard University Press and chapters 2-5 of Soames (2015), *Rethinking Language, Mind, and Meaning,* Princeton University Press.

This suggestion is supported by the observation that there is more to understanding names (e.g., 'Hesperus', 'Phosphorus') and natural kind terms, (e.g., 'water', 'H_2O') than simply being able to use them to designate their conventional referents. There are also presuppositions that those who understand the terms expect their audience to share - e.g., about the visibility of the referents of 'Hesperus' and 'Phosphorus' in the *evening* vs. the *morning*, about the potability of instances of the substance designated by 'water', its necessity for life and its presence in lakes and rivers, and about the fact that 'H_2O' designates a chemical compound. These presuppositions are typically taken by speakers and hearers to be necessary conditions for understanding the terms, in the sense required for normal, effortless communication. Since speakers and hearers are presumed to understand the words in their linguistic exchange, they expect normal uses of a term to commit one to believing that its referent satisfies the presupposed conditions. Because this is assumed without being made explicit, speakers routinely leave important parts of what they assert unuttered. If, as seems undeniable, asserted content arises from semantic contents plus shared presuppositions associated with *understanding*, then a robust distinction between semantic content and *asserted content* will be needed to understand normal uses of language.

Speech Acts in Ordinary Communication

Every speech act involves taking a stance toward the content expressed by a use of a sentence. To ***state*** or ***assert*** *that S* is to commit oneself to the asserted content of one's use of S being true; to ***confirm*** *that S* is a special case of asserting in which the content has been the subject of previous interest or inquiry. To ***order*** someone to act in a certain way is to direct that person to make it true that he or she performs the action; ***to promise*** to do something is to commit oneself, often by *asserting* that one promises, to making it true that one does it. Stipulation is similar. For a proper authority to ***stipulate*** that *the speed limit on a certain road is to be 35 mph* is for the authority to assert that the limit is to be 35 mph and for that very speech act to be the, or a, crucial component in making it true that is 35 mph.[2]

In each case, one can perform the relevant speech act--stating/asserting, confirming, ordering, promising, or stipulating--without using the words *state, assert, confirm, order, promise,* or *stipulate* -- and, indeed, without describing oneself as stating/asserting, confirming, ordering, promising, or stipulating anything. Nevertheless, one *can* perform the relevant speech acts by describing oneself as performing them. For any of the sentences in (3), an agent who uses it in appropriate circumstances to describe him or herself as performing the speech act *makes it true* that he or she has performed it.

3a. I hereby state/assert that so-and so is such and such
 b. I hereby confirm that so-and-so is such and such
 c. I hereby stipulate that henceforth so-and-so is to be such and such
 d. I order you to do X
 e. I promise you that I will do X

In these cases, saying you are doing so-and-so is (in certain contexts) counts as doing so-and-so. Although this is a characteristic of many speech acts, uttering the relevant words is neither necessary

[2] The earliest, though still one of the best, short introductions to speech acts, is J.L Austin's "Performative Utterances" in Austin (1970), *Philosophical Papers,* Oxford University Press . For later, more systematic developments see Austin (1962), *How To Do Things With Words,* Harvard University Press, John Searle (1969), *Speech Acts,* Cambridge University Press(1969), and K. Bach and R. Harnish (1979), *Linguistic Communication and Speech Acts,* M.I.T. Press.

nor sufficient for being a speech act. It isn't **sufficient** because merely uttering words doesn't count as a speech ac**t**, even though to **say** you are uttering words makes it true that you ***are*** uttering words. It isn't **necessary** for being a speech act since to publicly call X a hateful name is to insult X (whether or not X takes offence), even though there is no linguistic convention of using words "I insult you" to insult someone.

Speech acts are uses of words that count as acts with substantial social significance. For an official authorized to conduct marriage ceremonies to say "I now pronounce you husband and wife" is to confer the social and legal status of marriage on a couple. For appropriate agents, addressees and acts A, to say "I promise you that I will do A" is to generate a defeasible moral obligation to do A. For an appropriately placed authority, to say, " I name this ship "The Dauntless" is to give it a legal name, and for a person to publicly say "I apologize " counts as apologizing, whether or not the speaker is sincere.

The most important speech acts in understanding, interpreting, and applying the law are *asserting, guaranteeing,* and *promising*. Article I of the Constitution *asserts* that the Congress of the United States shall consist of a Senate and a House of Representatives. The First Amendment *guarantees* that no federal law shall abridge the freedom of speech or of the press. The Fifth Amendment *promises* that no one shall be deprived of life, liberty, or property without due process of law. Because they are speech acts, *asserting*, *guaranteeing*, and *promising* are governed by social norms.

Assertion is the most general of these acts. Although its primary function in ordinary life is to share information, private propositional contents known or believed by the speaker never determine what is asserted. Anything purely private is, by definition, excluded. *What A uses a sentence to assert in a context is what a reasonable and attentive hearer who understands the sentence uttered, and is aware of the intersubjectively available features of the communicative context,* ***would rationally take A to be intending to say***. Because it is possible for speaker/hearers to misjudge these factors, the asserted content of one's remark sometimes diverges from what one intends to assert and/or from what the one's audience takes to be asserted. Nevertheless, in many of these cases something is asserted. Because assertion is a move in a social language game that places obligations on those who perform it, the content of an assertive use of language is determined, in part, by its social function.

The same is true of promising. To *promise* to do A is to promise *someone* that one will do A, which typically gives the person or persons a moral claim right obliging one to do A. Assuming that we have moral obligations to others, but not to ourselves, promising is an inherently social act. I can't genuinely *promise* myself anything. Nor can I *guarantee* to myself *that so and so is such-and-such*, though I can give *you* my guarantee that it is, when I am in a position to know, or to bring it about, *that so-and so is such-and-such*. Assertion is similar. I can say to myself, alone, in my room, "I will go to the gym tomorrow," but in so doing I'm not *asserting* anything. To assert that one will go to the gym is, roughly, to give one's personal guarantee that one will go, which one can't do without an audience.

Asserting, guaranteeing, and promising are governed by social rules because they are social acts the function of which is to provide those one addresses with reasons for thinking, feeling, and acting in certain ways. Because such thoughts, feelings, and actions may be highly consequential, the contents that attentive and rational hearers *justifiably* assign to one's remarks are the contents for which one is held responsible. They are the propositions asserted, guaranteed to be true, or promised to be made true. Thus, what one commits oneself to in assertively uttering a sentence is what one gives a reasonable,

attentive and informed audience the strongest grounds for taking one to be so committed. This lesson extends beyond individual speakers to plural or institutional language users, making it the reality behind the *public* part of public meaning originalism. The real public entities that originalists attempt to capture are assertive contents of lawmakers' uses of legal texts. Two major contributors to those contents -- semantic contents of words, phrases, and sentences, and presupposed information associated with them -- are types of linguistic meaning, in the sense of shared cognitive content associated with expressions arising from established linguistic conventions. But they are not the sole contributors to assertive content.[3]

There are, of course, other senses of the words 'mean' and 'meaning'. Suppose we ask *"What did X mean by that remark?"* Typically we want to know what proposition X primarily intended to assert and convey, whether or not X succeeded. Sometimes it is the proposition that X did assert, even if though that wasn't obvious to us. At other times it is a proposition X intended to assert, but failed to do so because X misspoke. *"I know that I stated that Plotinus was the greatest philosopher, but I meant that Plato was."* This is a kind of *speaker meaning* that differs from asserted content. Another sense of "speaker meaning" is not really a sense of meaning or assertion at all. If asked by an incredulous critic, "*What did you mean by saying "Theory T is clearly incorrect?,"* I might respond, "*I meant that it wrongly predicts that something travels faster than light."* Here, my response states the **reason** supporting my previous assertion, not its content.

The Continuity of Singular and Plural Speech and Its Legal Significance

Constitutional provisions are written texts passed by congressional super majorities, and ratified by designated majorities in a super majority of states. They *delegate* specified powers to certain institutions, they *state* that certain offices are to be filled in certain ways by individuals of certain sorts, they *guarantee* that certain rights will not be abridged, and they *promise* that certain procedures shall be followed. These are speech acts that institutional actor perform by adopting certain texts. Similar speech acts are performed by Congress and the President when a law is passed by adopting a written text. To understand a constitutional provision or a federal law is to know what it asserts, guarantees, or promises, which presupposes that pluralities of language users can perform many of the most important speech acts that individuals perform. How, one wonders, can that be?

Individuals who use language to assert, guarantee, or promise *that so-and-so* have a certain content in mind which they *intend* to be recognized by their audience, along with their commitment to the truth of that content. Can we say the same for pluralities? Do they have intentions at all, let alone these intentions? We do speak of groups, institutions, and lawmaking bodies as *asking questions, investigating problems, drawing conclusions, making statements,* and *issuing directives*. Surely, there is some genuine substance to this talk. We routinely treat plural agents and institutions as if they were rational agents capable of pursuing desired ends and performing linguistically mediated speech acts. This requires applying some socio-psychological predicates to plural of institutional agents. When we do that, it is important to remember that the sense in which plural agents perform speech acts may have its own peculiarities. The sense in which lawmaking pluralities assert or stipulate certain things may differ in some respects from the sense in which individuals assert or stipulate things. In fact, I think they do.

[3] For some further factors, see chapters 3-5 of Soames (2015).

Plural Speech Acts and the Law

Consider lawmakers collectively adopting a text. What they assert is *what* a reasonable, informed audience that understands the text's linguistic meaning (including legal meanings of certain words and phrases), the relevant publicly available facts and aspects of the lawmaking history, and the body of existing law into which the new law is expected to fit *would rationally take the lawmakers to intend to assert or stipulate*. Often legislative acts have multiple audiences, including law enforcement officials, judges, lawyers, and businessmen, as well as the general public. Thus, the content of a law will sometimes include matters of detail to which only some specialized audiences are sensitive, along with other broader matters. It isn't necessary that the various institutional addressees, or the populace, possess detailed knowledge of the contents of all laws relevant to them, though it is necessary that they have recourse to legal experts who can advise them. It is also not required that all, or sometimes any, members of a legislative body have complete knowledge of all aspects of the assertive content of the sometimes complicated bills they have adopted on the basis of their individually partial, but collectively overlapping, understanding. It is required that the assertive content be rationally derivable from the meaning of the text plus the full context and the public record.

To understand such a derivation, it is important first to note how things go when individuals assert things. In these cases, a speaker X using a sentence S typically has two intentions. One is to assert and communicate X's privately cognized proposition p, thereby vouching for its truth. The other is to assert *the proposition q most justifiably derivable from X's use of S,* thereby vouching for it. To ensure proper communication, *S is chosen so that p and q coincide***.** Often they do. Sometimes, however, the intentions come apart because the private proposition p isn't rationally derivable from the speaker's performance, but q is. Then it is, q, not p, that the speaker is held responsible for having asserted.

Next imagine ninety-nine lawmakers voting on a text, with which each privately associates an interpretive proposition p. *When the text gets fifty votes, it is associated with fifty intentions to guarantee the truth of whatever proposition q is most justifiably derivable from public facts about the meaning of the text, legislative history, and the body of law into which the bill is expected to fit.* That proposition thereby becomes law, even if it differs from some, many, or even all of the private propositions p associated with the text by the fifty supporters, because some or all of them are ignorant of the difference between q and their private p's, or because they think the difference doesn't matter.[4] This is what it means for collective legislative assertive intentions **not** to be aggregates of private assertive intentions.

If you don't recognize this, but instead search for those propositions (if any) accepted by *most of the lawmakers*, what you come up with is apt to be minimal and irrelevant. It is apt to be minimal because sufficiently detailed evidence of the independent views of individual lawmakers (over and above their vote) will often be fragmentary or unavailable, making the identification of commonly shared private propositions hard to come by. It is apt to be irrelevant because some content you do

[4] Larry Alexander has posed an interesting puzzle like this in "Multimember Legislative Bodies and Intended Meaning" forthcoming in the *Journal of Contemporary Legal Issues.* His case involves a bill on which 1/3 of the lawmakers voted *no* and 2/3's voted *yes* -- despite the fact that half the supporters mistakenly believed that a single linguistically ambiguous word was used in the text with a meaning that the full text couldn't coherently bear without rendering the law a nullity. Had they not been mistaken, they would have voted against the bill, which would have failed. The question posed by Alexander is how the judge should rule when a private party brings a key matter involving the proper interpretation of the crucial word to court. My answer, appearing in the same issue, is based on the above principles.

come up with will, by virtue of being invisible in the specific lawmaking context, be incapable of contributing to the public legal content communicated by passage of the provision. Thus, it's not surprising that the practice of trying to extract legal content from contemporary or historical records providing evidence of individual lawmaking intentions leads one to underestimate the complex content of contentious law -- often to the detriment of a proper understanding of legal milestones, like the Fourteenth Amendment to the U.S. Constitution.

By contrast, when I plug John Harrison's work on the Fourteenth Amendment into the plural speech act model, I treat Congress as a rational agent using the *privileges or immunities* clause to guarantee colorblind civil rights created by state law that enables citizens to live normal, self-sufficient lives.[5] When I add Mike McConnell's work on efforts of congressional supporters to *enforce* the Amendment, and on attempts of Southern states *to appear to comply with it* in order to gain readmission to the Union, I find evidence that the original asserted content of the Amendment was understood *not to permit segregation in important domains of public life.*[6] Because public education was then in its infancy, segregated public education may or may not have been such a domain in 1868. But it's clear that within a few decades it became one, thereby triggering colorblind rights in public education with the same status as the rights listed in the 1866 Civil Rights Act, which the Amendment was intended to constitutionalize. I can't help thinking that had this been understood and accepted generations ago, our 14th Amendment jurisprudence would have been much better than it has been.[7]

Applying the Speech Act Model Plus What We Know about Language to Legal Interpretation

We begin with simple grammatically complete but semantically incomplete sentences.

4a. I was finished.
b. I was ready.
c. I was nearby.

When these sentences are used, the needed completion can be provided by aspects of the context of utterance -- the activity the speaker of (4a) was engaged in, the activity the speaker of (4b) was prepared for, or a location near where the speaker of (4c) was. Completions can also be provided by activities and locations mentioned in larger discourses of which utterances of (4a,b,c) are parts, or by shared presuppositions of speaker/hearers. Since there is no end to the possible completions of these utterances, this *isn't* a matter of *linguistic ambiguity*, which arises from multiple pre-existing linguistic conventions governing particular words or phrases. It is simply one way in which linguistic meanings can be underspecified, and so require open-ended contextual completion. Sentences containing bare numerical quantifiers – e.g. *two children, three dogs, four bicycles* -- are similar. Depending on the context quantifier, *N F's,* can be interpreted as *at least N Fs*, *exactly N Fs,* or *at most N Fs.* As before, this is *not* ambiguity; it is under specificity.[8]

Another example of *under specificity* due to *semantic incompleteness* involves the verb "use." To use something, is to use it to do something. When we say "Fred used a hammer," we typically have in

[5] John Harrison, "Reconstructing the Privileges of Immunities Clause," 101 Yale L,J., 1385 (1992).

[6] Michael W. McConnell, "Originalism and the Desegregation Decisions," 81 Virginia Law Review 947 (1995).

[7] See section 10 of Soames (2020), "Originalism and Legitimacy," 18, *Georgetown Journal of Law and Public Policy*, 241.

[8] Scott Soames (2008] 2009), "Drawing the Line Between Meaning and Implicature -- and Relating both to Assertion," originally published in *Nous 42: 529-54;* reprinted in Soames, *Philosophical Essays,* vol 1.

mind the purpose for which he used it. When that purpose isn't known to our audience we say more, e.g., "Fred used a hammer to break the window." When the purpose is obvious – e.g., to pound a nail – we often leave it implicit, knowing our audience will understand. In unusual cases we might say, having found a hammer on the premises, "I know Fred used a hammer for some purpose, but I don't know what." This is just one possible completion among many of the incomplete linguistic meaning of "Fred used a hammer." The linguistic meaning is silent about purpose because it lacks a purpose-clause in the same way that the meaning of "I am finished" is silent about what was finished and "I am ready" is silent about the anticipated action.

These linguistic niceties can be legally significant. A case in point is Justice Scalia's dissent in *Smith v. United States* concerning what the Congress *said or asserted* in saying:

> *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 crime…be sentenced to imprisonment for five years*.[9]

The question at issue was "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.
>
> 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.*[10]

Here, Scalia correctly identifies *what question is asked* by the agent who uses the words "Do you use a cane?" and *what is asserted* when his other agent answers "No" to the 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... etc.," Congress asserted that the *use of a firearm as a weapon* (or carrying it for that purpose) is subject to further punishment. Regrettably, Scalia misstated his conclusion, claiming that the *ordinary meaning* of "anyone who uses a firearm" only covers uses of a firearm as a weapon.

The court majority pounced on this mistake, saying:

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[9] 18 U.S.C. § 924(c)(1) (2006).

[10] Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (emphasis added)

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.[11]

Of course, Smith's action *can be so described*, and, of course, the text employs "uses a firearm" with its ordinary linguistic meaning. The linguistic meaning of the English phrase "uses an N" is *silent* about the purpose for which N is used. So, when "uses a firearm" occurs in a sentence, the assertion must be *completed*, either by adding a phrase (e.g., "as a weapon," "as an item of barter," "for any purpose whatsoever") or by extracting the needed content from the shared presuppositions of the language users (in this case Congress and its audience). Like the agents in Scalia's hypothetical examples, Congress may well have relied on obvious contextual presuppositions. Had the Court understood this, Scalia may have had a better shot at achieving his result.

A different, but related, kind of under specification concerns sentences containing ordinary *quantifiers* – e.g., phrases of the form *every/any/some/no so-and-so.* The linguistic meanings of these phrases determine their use in talking about so-and-so's, but the contributions they make to what is asserted by uses of sentences containing them may be further restricted by the clearly discernable point, or purpose, of a speaker's remark. For example, parents whose children are holding a sleepover in the basement might utter (5a,b,c.) to make the italicized assertions, which don't concern all people, or even all in the house, but merely the children downstairs.

5a. Everyone is asleep.	*Everyone downstairs is asleep.*
5b. Someone is lying on the floor.	*Someone downstairs is lying on the floor.*
5c. No one wants to get up before 9.	*No one downstairs wants to get up before 9.*

Similarly, a football coach wishing to keep the opposing team from learning his strategy for the big game might use (6)

6. No one may, without my permission, speak to any reporter.

to tell his players that no team member may, without his permission, speak to any reporter *about the upcoming game.* This doesn't restrict team members running for positions in student government from speaking to reporters about their candidacies.

With this in mind, consider the compact clause of Article 1 section 10 of the U.S. Constitution: *"[N]o State shall, without the Consent of Congress…enter into any Agreement or Compact with another State, or with a foreign Power"* What does this assert? As always, one can't be sure without looking closely at the historical record from 1787 to 1791, but the place to begin is with the purpose of Section 10, which is to ensure that states don't take steps that preempt or diminish federal authority on matters within its purview. With this in mind, the place to begin is, I believe, with a default interpretation in which the text is taken to assert that n*o state shall, without the consent of Congress, enter into any agreement or compact with another state (or with a foreign power) that diminishes federal supremacy or undermines the structure of this Constitution.* This does, of course, raise the question of what *federal supremacy* or *undermining the structure of the Constitution* amounts to –

[11] Id. at 228.

which is a theoretical matter to be pursued, in part, by research into the perceived purpose of the clause at the time of adoption. Nevertheless, the virtue of this understanding of the original assertive content of the clause is that it makes clear that it did not forbid any and all agreements between states (and foreign powers). If this approach is correct, it could raise important questions for the current drive to secure the commitments of a group of states with majority of electoral votes to form a compact pledging to cast all their votes for the winner of the national popular vote in any presidential election.

Next consider possessives *NP's N.* Interpreting them requires identifying "the possession relation" *R* that holds between the referent of the possessor NP and the item designated by *NP's N*. There are two 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, 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 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 to Tom; the default designation of "Tom's student" is one who bears the converse of that relation to him. Similar remarks apply to "Tom's mother'," "Tom's boss," 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 Tom *interviewed*, and "Bill's student" to refer to the one Bill *interviewed*. 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 possessives involving non-relational nouns, like "car" and "book," to which a 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 is non-specificity. The meaning of *NP's N* requires it to designate something to which N applies that stands in some relation 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.[12]

For a legal example of this type, consider cases in which one party is promised *attorney's fees.* What is promised? Is it payment of fees to an attorney for his or her services, or does it cover those plus fees the attorney requires to pay expert witnesses? Since the linguistic meaning of the phrase "attorney's fees" is incomplete, meaning alone doesn't settle the question; for that one must look to the special features of the context in which it is used.

Temporal modification is also often incomplete, and so non-specific.

7a. *The philosopher, David Lewis*, is dead.
b. *The deceased philosopher, David Lewis,* was a Princeton professor.

[12] Chapter 7 of Soames (2010), *Philosophy of Language,* Princeton: Princeton University Press.

"Dead" and "deceased" apply to someone x at time t only if x existed before t, but no longer does. Conversely, "philosopher" applies to x at t only if x does philosophy at t, which requires existing at t; the same is true of "Princeton professor." Next consider the phrases *the philosopher David Lewis,* and *the deceased philosopher*. Since these descriptive phrases contain no expressions designating a time, they are "tenseless." They pick their referent from a domain including individuals who once existed, but no longer do.

Under these assumptions, the propositions asserted by uses of (7a,b) arise from their linguistic meanings by contextually inserting *temporal designators into the semantic contents* of the descriptive phrases. Taking the form of the copula to represent time or tense, we may represent their semantic contents of (7a,b) in the following way.

S7a. [the x: x be a philosopher & x be David Lewis] x ***is*** dead
S7b. [the x: x be a deceased philosopher & x be David Lewis] x ***was*** a Princeton professor.

Although the descriptive phrases are semantically tenseless, we can see what needs to be added to get sensible assertive contents for these sentences. Utterances of (7a,b) assert the contents indicated by (A7a) and (A7b).

A7a. [the x: x ***was*** a philosopher & x was David Lewis] x ***is*** dead
A7b. [the x: x ***is*** a deceased philosopher & x *is* David Lewis] x ***was*** a Princeton professor.

The linguistic meanings of these descriptions lack temporal specifications, which must be contextually added before one has an assertion candidate. Although speaker-hearers can choose which specification to supply, the meanings of 'dead' and 'deceased' dictate the sensible choices.

In other cases, different choices are made in different contexts. Suppose, for example, that (8)

8. *The owner of the Harrison St. house* is temporarily away on business.

is uttered shortly after the house has burned down. Presumably what is asserted is that the person who, *in the past*, owned the Harrison St. house is temporarily away. In other contexts, what is asserted is that the person who *presently* owns the house is away. Thus, even though its semantic content, S8 is temporally nonspecific, the sentence can be used to assert either proposition (A8a) or proposition (A8b). (Soames 2009a)

S8. [the x: x own the house on Harrison St.] temporarily x is away on business.
A8a. [the x: x *owned* the house on Harrison St.] temporarily x is away on business
A8b. [the x: x *owns* the house on Harrison St.] temporarily x is away on business

Tenseless descriptive phrases also occur in legal contexts. Two prominent examples in the free speech clause of the First Amendment to the U.S. Constitution: "Congress shall make no law…abridging *the freedom of speech,* or [*the freedom*] *of the press."* This statement promises that the government will never *abridge* the freedom of speech and the freedom of the press. To understand the promise you must know that you can't abridge something that isn't already a reality. To abridge *War and Peace* is to truncate the original. So, to abridge the freedom of speech and of the press is to limit, restrict, truncate, or otherwise diminish the freedom to speak, write, communicate, and publish. The

freedom to do these things when? The natural answer is, "*At the time the Constitution was adopted*."[13] If that is right, what can't be abridged is the kinds of freedom to speak, publish, and communicate that existed to do these things then. Thus, the default interpretation of the original asserted content of this fragment of the First Amendment should be roughly as follows:

> *Congress shall not abridge (restrict, truncate diminish*) *freedoms of the kinds enjoyed in America at the time (1788) to speak, write, communicate, publish, and disseminate information and opinion.*

Although this asserted content protects many communicative activities today, including some that didn't exist when the Constitution was adopted, it is indeterminate regarding other activities not envisioned then. Thus we are faced with two questions: "Which new forms of communicative activity are *freedoms of the kinds originally protected*?" and "Which new forms of regulation are *of the kinds originally proscribed*?" When these questions are determinately answerable, the original content of the First Amendment requires no fine tuning. But sometimes the answers to these questions are not determinate because crucial new facts fall within the penumbra of vagueness of the Amendment's content. In these cases, judicial precisification is required.

Because the concepts expressed by many of our words are vague at the margins, the need for judicial precisification is commonplace. Since precisification modifies content, it changes the law, and so is legislative in nature. Since originalists believe that fidelity to the Constitution doesn't authorize judges to legislate, they must ground judicial precisifications in some form of deference to original lawmakers. I take originalism to require judges to make *a minimum change in existing legal content (needed to reach a verdict) that fulfills the purpose or rationale of the original lawmakers*.[14] To do this judges must identify what problems the lawmakers were trying to solve and the chief reasons, publicly offered, to justify the law's adoption. (More on this later.)

The framers and ratifiers of the free speech clause were, I think, (mostly) trying to protect the free and rational exchange of ideas 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 they judged such communication to be a right of free citizens and a necessary feature of a self-governing republic. Since our form of constitutional government requires citizens to be free to bring forward important propositions to be rationally and non-violently considered, fidelity to the Constitution requires adherence to this guiding purpose when precisifying the content of the clause to apply to new, and previously unforeseen circumstances.

Linguistic Meaning, Context, and Asserted Content

In What Language and in What Sense Public?

[13] Although this is the natural answer, it is not the only conceivable answer. If a specific set of aspirational freedoms to speak and write (beyond those existing at the time) were presupposed by the framers and ratifiers, those freedoms could provide the baseline which I believe is more naturally provided by the then existing freedoms.

[14] See "What Vagueness and Inconsistency Tell us about Interpretation," "Toward a Theory of Interpretation, and "Deferentialism," reprinted in Soames, *Analytic Philosophy in America,* Princeton: Princeton University Press, 2014.

In identifying legal content with original assertive content, I have specified the sense in which that content is necessarily public and I have illustrated how it is generated from the linguistic meaning of a text plus intersubjectively salient information in the lawmaking context. The resulting picture has strong similarities with the general framework of *original public meaning in context* espoused by prominent originalists like Randy Barnett and Larry Solum, who have done so much to develop modern originalism. Both their perspective and mine take original linguistic meaning plus the context of language use into account. However, more needs to be said about how context and meaning are combined to provide content. For this, we need the analysis of assertion I sketched above.

In constitutional interpretation, the natural question to begin with when asking about linguistic meaning is *Meaning in what language?* The natural first answer is *Late 18th century American English* for the text of the original constitution, and *Mid 19th century American English* for post-Civil-War Amendments. Next, one wonders *Were the constitutional provisions written in ordinary language* or in *specialized legal language*? Here, one is pulled in both directions.

On the one hand, much of the language of constitutional provisions was ordinary and widely understood. Because they were constitutional provisions, their authors intended to speak not only to broad publics at their time, but also to succeeding generations. However, the aim of speaking to a broad public is not incompatible with relying on legal expertise, available to the public, to guide and deepen its understanding of the Constitution. Thus, it's not surprising that there is quite a bit of legal language in the Constitution.

This duality is reflected in the Preamble itself.

> *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure Domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.*

The ringing language was intended to inspire *the people.* To this end, the preamble fictionally represents the Constitution as being written by them, suggesting, once it had been ratified, that the people themselves had, in effect, become its actual authors. Not only was that intended to be understood, it was, within a short time, successfully understood. Nevertheless, preambles were themselves legal constructions with familiar legal purposes. Just as a Last Will and Testament has a preamble invoking the authority of the deceased, *I, Joseph Buck, being of sound mind...* --despite being written by a legal expert using technical language -- so the Constitution has a lot of legal language plus implicit or explicit reference to cannons of legal interpretation. The question isn't whether the Constitution was written in ordinary or legal language. It contains both. The question is what the various mixtures of each in constitutional provisions contributed to what those provisions were used to assert.[15]

The Constitution itself was debated, drafted, and written largely by lawyers, many of whom spent their adult lives making, enforcing, administrating, and interpreting laws -- all against a background of pre-existing common and statutory law in England, the colonies, and the early years of the United

[15] See section III.D.2 of John O. McGinnis and Michael B. Rappaport "The Constitution and the Language of the Law," *William and Mary Law Review* 59:1321, 2017, for a discussion of legal interpretive rules governing preambles commonly understood at the founding. Thanks also to McGinnis and Rappaport for their personal communication.

States. Because of this, it includes quite a bit of legal language, the import of which could not have been expected to be fully grasped by the public at large. As contemporary scholars have shown, it was further assumed at the founding that constitutional provisions would be interpreted in accord with legal standards at the time they were adopted. One far-reaching recent contention is that, at its conception, the Constitution was understood to be an *agency instrument*, analogous -- in the words of Justice James Iredell of the first U.S. Supreme Court -- to "a great power of attorney" in which specific powers are delegated by *we the people,* in whom the powers originate, to officers of specific branches of the government, who are to act as our agents, observing all conditions and limitations set forth in the document.[16]

This contention raises questions about the ability of Congresses in recent decades to delegate substantial portions of legislative authority to administrative agencies -- like the EPA, the EEOC, the Office of Civil Rights of the Dept. of Education, and many more. Proponents of one leading point of view argue that these questions may authoritatively be addressed by appealing to the legal norms governing agency instruments at the founding, which, they argue, did not permit those to whom authority had been delegated to sub delegate that authority to other parties, without express permission by the principals.[17] Since the Constitution contains no such provision permitting sub delegation, the consequences of this interpretation are potentially far reaching. The point of raising this question is not to take sides in this debate. It is to emphasize that the resolution of the question will require us to go well beyond the ordinary linguistic meanings of the text of particular constitutional provisions in 1789. For originalists, the resolution must depend on what the framers of the Constitution presupposed and what was publicly available to potential ratifiers and members of the public who wanted to understand the document. Such presuppositions are always relevant to *original asserted content* and *original rationale* for that content. Even when the presuppositions involve specialized legal norms known only to a comparative few, they are capable of contributing to important constitutional content.

The same can be said for substantive legal terms of art like *due process of law* and *privileges or immunities,* which play key roles in the Fourteenth Amendment. These were never widely understood terms of public language. Nor were they precisely defined legal terms. But they were neither empty, nor mere invitations to fill in the gaps with original expected applications of most framers and ratifiers. Like the contributions of all words or phrases to the asserted contents of sentences and long texts, the contributions of *due process* and *privileges or immunities* to the content of section 1 of the Fourteenth Amendment is a content derivable by an idealized rational, attentive and informed hearer who was aware of the relevant legal history of those terms, and of their role in the debates both in the Congress that passed the amendment and in the ratifying conventions. That evidence would include the understanding of *privileges* and *immunities* in the comity clause, the 1823 Bushrod Washington decision involving the clause, the intention of the Congress of 1866 to constitutionalize the Civil Rights Act of that year, and the congressional understanding of *privileges or immunities* as a virtual paraphrase of *civil rights,* as opposed to the then contemporary understanding of *social rights* and *political rights*.

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[16] The citation of Iredell's remarks occurs on page 148 of *The Debates in the Several State Conventions on the Adoption of the Federal Constitution,* edited by Johnathan Elliot, second edition, 1901.

[17] See chapter 20 of Philip Hamburger *Is Administrative Law Unlawful* (University of Chicago Press) 2014; Gary Lawson, "The Return of the King: The Unsavory Origins of Administrative Law," 93 Tex. Law Review. 1521m 2015; also Gary Lawson and Guy Seidman, *A Grand Power of Attorney,* (Kansas University Press) 2017.

The Determinacy of Constitutional Content

I have already illustrated the need to distinguish original asserted content from linguistic meaning in understanding the original content of the language of the First Amendment, and the Compact Clause. In what follows, I will give a few more examples. As before, my intention is not to argue for specific results, which always requires detailed legal and historical analysis, but illustrate how proper understandings of meaning, context, assertion, and assertive intent bear on interpretation. At most, my remarks illustrate a general approach in what I hope are plausible ways.

Consider the Establishment and Free Exercise Clauses of the First Amendment. *Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof*. Because of the highly general and unspecific meaning of *respecting*, the purely linguistic content of the establishment clause is both vague and minimal. In determining what this clause was used to assert one must appeal to presupposed common knowledge that different states had designated different Christian denominations as official state churches, as well as to what one takes to be the original intended purpose of the clause, which, it is plausible to suppose, includes the assurance that *Congress will pass no law, interfering with those churches, or making any sect, or church, the official religion of the country*.

The asserted content of the *free-exercise clause* is trickier. Looking directly at the text, it seems to say that *Congress will pass no law prohibiting the practice of this, that, or the other religion*. But how was *prohibiting the practice of a religion* understood? Surely, the idea was not that *no practice of any religion (now or in the future) could ever be prohibited*. Equally surely, the idea was, at least in part, that *acts not already legally forbidden independently of religion would not be forbidden because they are required by some religion*. Indeed that was pretty much the interpretation given by the Supreme Court in *Oregon Employment Division v. Smith,* 1990, which until very recently was standing legal precedent. Precedent or not, however, the interpretation of the free-exercise clause as guaranteeing nothing more than non-discrimination *against* religion is puzzling. Surely non-discrimination against what were perceived to be all natural liberties was the norm. Why then, among the countless natural liberties, were freedom of speech, of the press, and of the practice of religion singled out for special protection in the First Amendment?

The concurring decision of Justice Samuel Alito in *Fulton v. Philadelphia,* 2021, provides an intriguing possible answer illustrating an important fact about the role of context in identifying original asserted content. Here is how Professor John McGinnis (Northwestern University Law) puts it in a recent popular article.

> Alito invokes the legal context to support his reading of the Free Exercise Clause...[H]e relies on clauses that protect religious exercise in state constitutions at the time of the federal constitution. He notes that these clauses frequently had the proviso that religious exercise would not be protected if it disturbed "*the civil peace*" or a similar formulation. Alito's point here is that there would be little reason to include such provisos if the clause protected only against laws that discriminate against religion.[18]

McGinnis is right to highlight the importance of Alito's reading of the free exercise clause as guaranteeing more than non-discrimination against religiously sanctioned behavior. Existing state

[18] John O. McGinnis, "The *Fulton* Opinion and the Originalist Future of Religious Freedom" *Law and Liberty* blog, June 24, 2021, https://lawliberty.org/the-emfulton-em-opinion-and-the-originalist-future-of-religious-freedom/

constitutions did point in this direction, but not, it appears, with a single voice. For example, the constitution of Delaware included the provision that Christians. "ought . . . to enjoy equal Rights and Privileges in this State, unless, under Colour of Religion, any Man disturb *the Peace, Happiness or Safety of Society."* This suggests that, at best, whatever constitutional exemptions or allowances apply to religious practices must be limited to those that don't diminish a wide range of social goods. To the extent that this goes beyond the guarantee of non-discrimination against the religious, it might establish a rebuttable presumption of accommodating individuals following the dictates of the religious conscience, when, but only when, the resulting social costs are not substantial.[19]

The important point here is not the final resolution of these matters, but what they tell us about how the speech act model applies to constitutional interpretation. In interpreting the First Amendment to the Federal Constitution we consult related clauses of state constitutions because the latter were part of the legal context for understanding the former. Because the authors and ratifiers of the free exercise clause had generally made their careers in the law and recognized that the clause would be implemented by similar legal actors, they would naturally have been familiar with provisions of state constitutions protecting religious liberty. *If* it was commonly presupposed that those legal protections included a rebuttable presumption of accommodating religious practice when doing so did not impose significant social costs -- a point that today must be established by historical scholarship -- then including that presumption in the asserted content of the clause is justified. Remember, the content of a text adopted by a lawmaking body is what an idealized rational agent, presumed to know all relevant public facts would take the lawmakers to have asserted. It is (roughly) *what a knowledgeable hearer who understands the text's linguistic meaning, publicly available facts, relevant lawmaking history, and the background of existing law (*which here includes the provisions of state constitutions) *into which the new law* (the free-exercise clause) *will fit would be justified in taking the lawmakers to commit to.*

The clause of the Eighth Amendment prohibiting *cruel and unusual punishments* also illuminates the relationship between the linguistic meaning of constitutional text and the original content of that text. What, I suspect, the clause was used to assert is *that no one will be subjected to punishments that are* both disproportionately *severe in relation to the seriousness of the offense* (i.e. cruel) *and without sanction in recent tradition and legal practice* (i.e. unusual). Nothing is said about the scales by which either crimes or punishments are ranked for severity. Of course, common knowledge about these matters existed in 1788, along with even greater knowledge about *usual* (i.e. sanctioned in recent legal history) vs. *unusual* punishments for different crimes. Because of this, citizens could confidently predict how the Amendment would be applied then. Because capital punishment was not *unusual*, there was then no ground for thinking that it was *cruel and unusual*, or would be so judged anytime soon. Nevertheless, the asserted content of the Amendment is silent about these well-founded expectations. It does not say that punishments *widely considered* cruel (i.e., unduly severe) and unusual (i.e., without sanction in recent legal practice) won't be inflicted. It does not say this now, and it didn't say that when adopted; it never said it. Hence, when judges and justices apply that original content today to controversial issues, like capital punishment, fidelity to the Constitution calls upon them to make two judgements -- a moral judgement about whether capital punishment is too severe in relation

[19] For opposing views of two leading originalist scholars, see Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion." 103 *Harvard Law Review* 1409 (1990), and Philip Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective." 60 *George Washington Law Review.*915 (1992).

to the crime of which someone has been convicted, and a legal judgment about whether capital punishment has been sanctioned in recent tradition and legal practice in relevant jurisdictions.

There is a further point to notice about the words 'cruel' and 'unusual'. The former was, I should think, used with the same sense it has in ordinary English today -- *excessively severe in relation to an offence.*(Mere differences over the centuries of what counts as cruel are **not** differences in meaning.) The latter was, I believe, used as a legal term of art with a richer content than that provided by its ordinary meaning, *rarely occurring.* To say that something is an *unusual punishment* in this relevant legal sense is not to say that it is *one that has not often been inflicted* (in relevant jurisdictions and periods). It is to say that it is a punishment *has not been legally authorized or sanctioned* (in relevant jurisdictions or periods*).*[20] To establish this claim about the asserted content of the constitutional use of 'cruel and unusual', one must look not just at ordinary texts of the 1780s and 90s, but at the legal history of the term in England and America in the decades before the Constitution was adopted.

I have one more example illustrating how taking originally asserted contents of constitutional provisions (supplemented by original intended purpose or rationale) to be their constitutional contents results in a more determinate Constitution than that provided by any purely linguistic or intent-based approach. The example derives from a paper, "Offices, Officers, and the Constitution" by Seth Barrett Tillman and Josh Blackman.[21] Their problem is to interpret the clauses of the Constitution containing phrases including "Office...under the United States" and "officers of the United States" as well as clauses in which "officer" or "office" occur unmodified. It turns out that this is no easy job and that the interpretation one adopts has legal consequences.

For my purposes, their method is more important than their conclusion (which I find plausible). They look for the most coherent, internally consistent, assignment of content that best fits both early Constitutional history and the Framers' overall constitutional design. This closely parallels what we do in ordinary speech situations in which what a speaker has said at various parts of a discourse is unclear. We search for the best rational construction of the remarks, because we know that the content asserted is what a rational hearer in possession of all relevant facts about the context would take the speaker to be committed to.

It is striking that the same approach works for Tillman and Blackman's problem, despite the fact that not only were the authors of the Constitution -- the framers and ratifiers -- massively plural, it is probable that no significant sub set of them, and perhaps no single person, internalized any one interpretation sufficient to unpack the contents of all its clauses containing "officers" and "offices." No matter. What those plural authors *asserted* was the coherent content best supported by -- and derivable (by an ideal addressee) from -- all relevant public facts about its drafting, passage by Congress, and ratification by the states. That is the constitutional content we are looking for. *No comparable claims can, I believe, be made for constitutional content as original linguistic meaning -- whether ordinary, or that of any familiar legal terms -- or for any account of content as specific psychological intentions of the authors and ratifiers.*

[20] See John Stinneford, "The Original Meaning of 'Unusual'. The Eighth Amendment as a Bar to Cruel Innovation. 102, Nw. U. L. Rev. 1739 (2008).

[21] Draft delivered at the Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference at the Center for the Study of Constitutional Originalism at the University of San Diego Law School, Feb. 21-22, 2020.

What To Do When Original Asserted Content Runs Out

Up to now I have emphasized the richness of original assertive content, including constitutional content. However, there is no denying that unanticipated circumstances sometimes require adjustments of pre-existing legal contents when old law confronts them. Has the passage of so many years taken us beyond anything that can be accommodated by the speech act model? I think not. To see why, we need to think a little about how we typically reason when we act under the verbal direction of others.

Consider an example in which A's wife says, "*Please pick up a large, inexpensive hat for me at the shop. I want to keep the sun off my face*." This request is vague, because it isn't precise what counts as *large* or *inexpensive*. At the shop, A finds no hat that is clearly large and none that is clearly inexpensive. Knowing the purpose of his wife's request, A selects one that will keep the sun off her face reasonably well, without costing more than any that would do equally well. Although A can't claim to have done *exactly* what his wife asked, he has minimized the degree to which he failed to do so, while fulfilling her purpose to the extent possible. When he reports back, she is pleased. This is analogous to the situation faced by the judge when asked to apply legal provision the pre-existing legal content of which is vague about a crucial, previously unanticipated fact to which the provision must now be applied.

Next imagine that A's wife says, "*I am dying for a soda. Please bring me the largest bottle of soda in the fridge*." At the fridge, A sees two bottles of soda identical in size. Since the request presupposed there would a bottle of soda larger than any other, the request was *inconsistent with the relevant facts,* making it impossible for A to do *exactly* what was asked. Nevertheless, he has no trouble. Noticing that one bottle is open, causing the soda to lose its fizz, A brings the other, thereby fulfilling the purpose of the request, while minimizing the degree to which he failed to do what was literally requested.

Finally, consider a slight variation on the previous case in which the fridge contains only a large open bottle of soda that has lost its fizz plus two smaller, unopened bottles, one larger than the other. Knowing his wife can't stand flat soda, A realizes that *doing what was literally asked would defeat his wife's purpose*. So, he brings her the larger of the unopened bottles, fulfilling her purpose to the maximum degree possible, consistent with minimizing the degree to which he fails to do what was asked.

These examples illustrate how words guide action in ordinary life. When we follow the verbal directions of others, we calculate the asserted content of their words and the purpose of their assertion, which place limits on what we do. In my examples, *A discharges his obligations imposed by his wife's request, despite either being unable to do what was literally asked because the request is vague, or because its content is inconsistent with key facts, or because the cost of doing what was asked would make it self-defeating*. In each case, A minimizes the degree to which his action deviates from the content of his wife's request while fulfilling, to the greatest feasible degree, her intended purpose.

Extending the model to cover adjudication, we might offer originalist rules for simple interpretation (SI) and deferential rectification (DR).

SI In applying law to facts of a case, the legal duty of a judge is to reach the verdict determined by the pre-existing asserted content, unless (a) that content is vague and so *doesn't*, when combined

with the facts of the case, determine a definite verdict, or (b) the content, surrounding law, and facts of the case determine *inconsistent* verdicts, or (c) the contents plus new facts of a kind that could not reasonably have been taken into account by the original lawmakers *transparently contradict crucial elements of the law's rationale*, which is the publicly stated purpose advanced by its supporters.

DR In cases of type (a,b), a judge is authorized to *make new law* by *articulating a minimum change in the content of existing law that fulfills the law's original rationale to the maximal feasible degree.* In cases of type (c), a judge is authorized to *make new law* by *articulating a minimal change in the content of existing law that neither substantially expands or radically restricts its intended application* and *is sufficient to avoid subversion of the law's original rationale*.

DR limits judicial lawmaking by requiring judicial legislation to be maximally deferential to original lawmakers. Imagine the following idealized procedure. One formulates possible changes in the pre-existing legal content which are consistent with the originally stated public purpose of the law, in the sense of not undermining it and, perhaps, advancing it. One then ranks those that require the least change in pre-existing legal content, and selects one from among those that are minimal in this respect. What to do when there are ties, how one determines the fine points of original public rationale, and how one ranks degrees of difference from original asserted content are open questions that can't be resolved algorithmically. In practice this will allow some room for judicial discretion. Still, if the method is followed in good faith, it forces discretion to be grounded to a substantial degree in the goals of *original lawmakers*, rather than opening up everything to the moral or political values of *contemporary judges*.

This originalist extension of the speech act model to legal interpretation identifies the purpose or rationale of a law or constitutional provision, not with the aggregate of causally efficacious factors that motivated individual legislators to pass it, but rather with the chief reasons, publicly offered, to justify its adoption. The Affordable Health Care Act of 2010 offers a good illustration.[22] Among the motivators for individual members of Congress were political payoffs in the form of special benefits for their states or districts, political contributions from groups favoring, and companies profiting from, the act, the desire to advance the fortunes of their party and the agenda of their president, plus an ideological commitment to expanding government control over the economy and introducing a more socialistic system of medicine. But none of these were part of the rationale of the legislation in the sense relevant to SI and DR. Its rationale was (i) to expand health insurance among the previously uninsured without jeopardizing existing plans with which the already insured were satisfied, (ii) to reduce the amount the nation spends on health care without sacrificing quality, (iii) to reduce the cost of health insurance and health care for most citizens, especially the poor, who would be subsidized, (iv) to equalize access to health care while preserving free choice of health care providers, and (v) to make health insurance and health care more reliably available by loosening their close connection with employment. Similar statements can, I think, be made about many constitutional provisions. Thus, although originally asserted contents aren't the same as original rationale or intended purpose, they are rationally identified by the same sorts of derivations from public evidence by idealized agents.

So understood SI and DR provide one way of tying what is often called *construction* to strictly original legal content. Although the distinction construction and interpretation is an attempt to get at

[22] Patient Protection and Affordable Care Act, Pu.\b. L. No. 111-148, 124 Stat. 119 (2010).

something real, it is contested and not easy make out There are many social, political, economic, and technological facts that weren't anticipated at the founding, during Reconstruction, or even in the early twentieth century, which render the application of some constitutional provisions to contemporary circumstances potentially problematic. Because of this, it is natural for originalists to think that later *legal constructions* of earlier constitutional provisions must, at a minimum, be **consistent** with their original asserted contents. However, originalists should, I think, aim at something stronger. The approach naturally arising from my suggested principles SI and DR suggest that the only allowable deviations from original asserted contents are those that sustain original intended purpose while being maximally close to original asserted content.

Think back about the freedom of speech and of the press clauses of the First Amendment. Earlier, I characterized their asserted content as follows.

> *Congress shall not abridge (restrict, truncate diminish) freedoms* ***of the kinds*** *enjoyed in America at the time (1788) to speak, write, communicate, publish, and disseminate information and opinion.*

Since it is vague *what kinds of freedom* to communicate, publish, etc. were then enjoyed, it is indeterminate how it applies to some contemporary communicative activities not envisioned then. When addressing such vagueness it is natural to consult the original intended purpose of the clauses, to the extent that it can be identified. I suggested it may have been *to protect the free and rational exchange of ideas by individuals, groups and organizations about matters of public or political importance.* Since the form of government authorized by the Constitution requires citizens to be free to put forward propositions to be rationally and non-violently considered, it would seem that fidelity to the Constitution may require adherence to this guiding purpose.

With this in mind, I draw your attention to two cases -- *Texas v Johnson* (1989) and *R.A.V. v City of Saint Paul* (1992) -- decided by the Supreme Court. In the former Antonin Scalia, writing for the majority, argued 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,"* ruling that although the prohibited symbolic conduct might be a species of unprotected "fighting words," and so not be protected free speech, the government may *not* selectively ban some fighting words – in particular those based on race, religion, or gender – while permitting others.

Although both decisions are, I think, consistent with the vague asserted content of the First Amendment given above, it's not clear that they are consistent with the original intended purpose of the Amendment. First, the regulated behavior was not speech but expressive conduct. Second, the political message -- that the United States, in one case, or African Americans and Jews, in the other, are hateful and not deserving of respect – *may have been legitimately protected had it been stated in words, without the air of menace and the attempt to intimidate or provoke carried by the conduct*. Surely, however, the nature of the conduct adds something to the discursive message! Might the addition render the conduct unprotected? It is plausible that democratic self-government requires that citizens be free to place propositions they believe to be true on the public agenda, regardless of ideological content. But democratic self-government doesn't require, and isn't advanced by, intimidating, deliberately insulting and provocative behavior that inhibits rational debate.

I am not here raising normative questions about the wisdom or folly of protecting such behavior. I am asking about how the asserted contents and intended purposes of legal provisions interact in deciding constitutional questions. Although contents and purposes are different, each seems to play a role in originalist interpretation. If they do, then genuine "originalist construction zones" may be considerably smaller than they are sometimes taken to be.